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

Setting the record straight

Recent media reports and a study by the Northern California Innocence Project claim that prosecutorial misconduct is rampant in Texas, so a TDCAA subcommittee tackled the "evidence" to see if all the brouhaha is justified. Here's what we found.

By William Lee Hon
Criminal District Attorney in Polk County

In September 2012, the TDCAA Board of Directors released a first-of-its-kind report produced by the TDCAA Training Subcommittee on Emerging Issues. A link to that full report (and all of the supporting documents) can be found on the front page of the TDCAA website at www.tdcaa.com. This is a must-read document for every member of a prosecutor's office.

This association, through its many committees, addresses the legal issues of the day with training and support tailored for a prosecutor's office. I think this member-driven effort has been very effective. But we have all seen the dark clouds on the horizon as issues surrounding exonerations, eyewitness identification, forensic science, and allegations of widespread prosecutor misconduct continue to swirl. In December 2011, the TDCAA board decided it was time to thoroughly examine these issues, with an eye toward improving our profession. It was the view of the board that, acting through TDCAA, we could enhance the quality of criminal justice in Texas.

On the same day the subcommittee held its second meeting, the Northern California Innocence Project released a list of 91 cases of alleged prosecutorial misconduct in Texas, contending that the State Bar failed to discipline the prosecutors responsible for said misconduct. Although most research up until this point indicated that misidentification and faulty science were at the heart of the vast majority of exonerations, this Innocence Project apparently decided to go in a new direction. TDCAA's subcommittee thought it was important to look very carefully at the Innocence Project's list of cases to see if the claims of widespread prosecutorial misconduct had merit.

I suspect that the results of this careful study of the Innocence Project's list will not surprise you. Its claims were so overblown that the subcommittee believed that all members of our association, as well as representatives of other Texas criminal justice entities, should have a detailed rebuttal of those unfounded claims.

Notwithstanding the overstat-

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TDCAF Summer Social

We enjoyed catching up with our members, sponsors, and friends in central Texas at the Texas District and County Attorneys Foundation's first Summer Social at the Speakeasy Bar in Austin on August 1. We would like to thank all of our sponsors:

By Jennifer Vitera
TDCAF Development Director in Austin

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The Foundation will be hosting social gatherings across the state throughout the year; we will keep you posted on one near you in the future.

How is the Foundation helping this year?

With $12,500 in support from the Foundation, TDCAA hosted a three-day seminar in San Antonio targeting the unique role of prosecutors' office personnel in combatting domestic violence. We are still looking for corporate and foundation partners from across the state to support the Domestic Violence Training Initiative in the future, so please contact Jennifer Vitera at vitera@tdcaa.com if you know of any possible sponsors.

In addition, IBC Bank (through TDCAF) donated funds to pay for John Kwasnoski to speak and his *Little Red Book* to be distributed to all attendees at the Advanced Trial Advocacy Course in Waco. Thank you, IBC Bank, for your generosity!

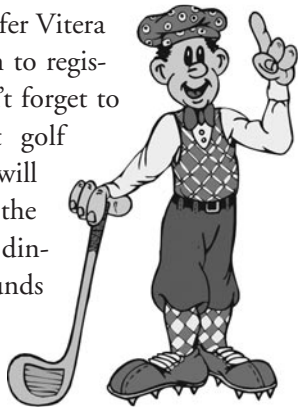
At the Annual

As you know, the TDCAA Annual Criminal & Civil Law Update will take place on September 19–21 in South Padre Island. We wanted to let you know about the exciting Foundation events planned during the three-day seminar.

The 4th Annual Golf Tournament tees off at 8:00 a.m. on Wednesday, and that night at 6:00 p.m., the Foundation will host the opening reception at the Pearl (formerly the Sheraton Hotel). Also, don't forget to stop by the Foundation booth Wednesday and Thursday to bid on silent auction items.

More golf tourney details

There is still time to register and sponsor! The Foundation Golf Tournament will take place Wednesday, September 19 at the South Padre Island Golf Club at 8:00 a.m. Please contact Jennifer Vitera at vitera@tdcaa.com to register or sponsor. Don't forget to wear your craziest golf outfit—the winner will be acknowledged at the opening reception dinner that night. Funds raised through the golf tournament will support the 2012 Annual Campaign.



Thanks to these sponsors of our golf tournament:

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The Texas District and County Attorneys Association (TDCAA), in cooperation with the Texas Department of Transportation (TxDOT), Anheuser-Busch Companies, Inc., and the Texas District and County Attorneys Foundation (TDCAF), is proud to offer the 2012 DWI Summit, Guarding Texas Roadways. Thank you to SmartStart, a supporter of this year's event.

We are asking members to please help the foundation identify corporations and individuals who might be interested in supporting this popular training event. Please contact Jennifer Vitera at vitera@tdcaa.com if there is someone in your area we can send more information to.

2012 Annual Campaign

We would like to thank you, our TDCAA members, the TDCAA Board of Directors, TDCAF Board of Trustees, and TDCAF Advisory Committee for six successful years of leadership and support! Please help us celebrate this year by making a contribution to the 2012 Annual Campaign; visit www.tdcaf.org for details. ❇

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Why do we prosecutors do what we do?

Last week I had an opportunity to speak to a group of high school students attending Criminal Justice Camp at Sam Houston State University in Huntsville. The students were hearing presentations from law enforcement and criminal justice professionals from a variety of agencies and disciplines. I, of course, had the privilege of discussing with them what a career as a prosecuting attorney might entail.

By William Lee Hon
Criminal District Attorney in Polk County

If I haven't mentioned it in an earlier column, I'll just note that I received my bachelor's degree in Criminology and Corrections from Sam Houston State University way back in 1987. It's always fun for me to go back to the George Beto Criminal Justice Center on campus and remember back to what it was like in undergraduate school. That was a fun time in my life. I actually didn't go to Sam Houston with the intention of majoring in criminal justice. In fact, I began as an agriculture major but, not unlike many college students, I wasn't entirely sure that was the career that I truly wanted to pursue. In the summer after my first year of college, I took a course named Introduction to the Criminal Justice System that was taught by the late Dr. Billy Bramlett. I learned about different components of the criminal justice system, different theories of crime and punishment, general defenses to criminal responsibility, and different types of culpable mental states. To say I was hooked would be an understatement. I came back for the second part of that introductory class during the second summer session and decided after that to change my major. The rest, as they say, is history.

I mention this because some members of the media have very publically begun to question the motives of prosecuting attorneys. In some corners, we have been portrayed as "power-hungry" lawyers with a "God complex" who are solely motivated by a desire to win the cases we prosecute at all costs. I'm not sure about other prosecuting attorneys and can only speak for myself; however, I can honestly say that my own personal motivation for being a professional prosecutor stems from a genuine fascination with and interest in better understanding why people do bad things, a desire to correct bad behavior if possible, and wanting to reduce the incidence of people doing bad things to themselves and others. I think this actually relates all the way back to my undergraduate experience and interest in the criminological theories and concepts I learned at Sam Houston. Yes, I was one of the rare individuals who actually stumbled into a major and got it right.

So what is it about crime in society that makes our jobs so interesting? Aside from the fact that the stuff we deal with on a daily basis has a tendency to also wind up on the six o'clock news or in the daily police report in our local newspapers, crime and punishment have captured the public attention and imagination going all the way back to the Book of Genesis in the Bible and the story of Cain and Abel. For me personally, I remember reading *Blood and Money* by Thomas Thompson when I was still in high school. For those of you who've never read that book, you need to get your hands on it. *Blood and Money* is the story of the suspicious 1969 death of Houston socialite Joan Robinson Hill and the 1972 murder of her husband, Houston plastic surgeon John Hill. (You can Google "Joan Robinson Hill" and read all about it on the Internet.) A movie about the case starring Farrah Fawcett was made a number of years ago. To this day, that case remains one of the most sensational real-life crime dramas in the history of Houston, and the book is a real page-turner. My point in mentioning it is that the public eats that sort of thing up. It's the stuff of made-for-TV movies. People have an almost morbid fascination with criminal behavior. Don't believe me? As I type this column we are now in our third week of intensive media coverage of the movie theater shootings in Aurora, Colorado. As prosecuting attorneys, that is our life.

Although I hope that none of us ever have to deal with a mass murder of that magnitude, we do, on a not-infrequent basis, get to see the absolute worst aspects of human behavior. We get to see things that your average accountant, dentist, and civil lawyer can relate to based only upon what they see or read in the media. We get all the details. That's

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why when we go to civic clubs, cocktail parties, and other social gatherings people want to hear our "war stories." When I finished my presentation at Sam Houston last week and invited questions from the students, one of their first requests was, "Tell us about the most memorable case you've ever prosecuted." (My response, of course, involved a fairly lengthy discussion of the never-ending saga of Johnny Paul Penry.) You've all had questions asked of you like that, I bet.

Sure, I'm "just a lawyer," but I've been to major crime scenes. I've been to autopsies. I've seen the gruesome photographs (all of them, not just the ones that the judge allows into evidence). I've received daily briefings on the progress of major criminal investigations in my county. At the end of the day, I get to walk into a court of law and present that information through witnesses and exhibits to a jury comprised of 12 citizens of Polk County to obtain justice in a criminal case. How many of your law school classmates are able to describe their jobs in that fashion? I get to see a side of humanity that only other prosecutors and criminal justice practitioners can understand and appreciate.

I'm sure there are plenty of other professions where you have to build a wall between your job and your personal life, but I'm not sure there are many other jobs where people in your personal life have such an interest and fascination with what you keep behind that professional wall. It does bother me a little at times that there is this whole part of my life that my family and non-criminal justice friends can never truly understand—but that's the nature of what we do. The side of humanity we see on a daily basis impacts our lives in other ways too. It causes us to be more careful about how we live our lives. It causes us to be sometimes overprotective of our kids. It causes us to stay out of certain neighborhoods and be more cognizant of crime rates in areas where we might consider living. These are just a few of the collateral consequences of the career path we have chosen.

It's been 27 years now since I took that first Introduction to the Criminal Justice System class at Sam Houston State. Little did I know or realize at the time how fully immersed I would become into the "business" of people doing bad things. With that said, there's hardly a day that goes by that I don't think about or wonder why some person that I'm prosecuting made the choices that he or she made. It's still fascinating. As a prosecutor who still loves the courtroom, I think it's nearly as important to be able to show why someone committed a crime as it is to prove beyond a reasonable doubt that the defendant on trial actually committed the crime. I think jurors want to know and understand why something bad happened as best they can.

I'm not sure it's possible to understand or explain this public fascination with criminal behavior. But as a criminal prosecutor, I know that I'm uniquely positioned and fortunate to be in a profession that remains genuinely interesting to me every day. It's not a power thing or an ego thing for me. It just stems from something deep within that I find challenging in terms of trying to understand why people do the things they do. Perhaps I could have been a forensic psychologist and had an equally rewarding and interesting career, but I doubt it. In my position as a prosecutor for the State of Texas, I get to see our criminal justice system from every conceivable angle. I don't think I'd trade that for anything in the world. ❇

News Worthy

E-books are here!

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

Is there an epidemic of prosecutorial misconduct in this country?

This is one of the questions the TDCAA Training Subcommittee on Emerging Issues faced in the last nine months. On the first page of this edition of *The Texas Prosecutor*, you can read about the work of a committee appointed in December 2011 by **Lee Hon**, TDCAA's President and the Criminal District Attorney in Polk County, to examine important issues in Texas criminal jurisprudence and report back to the full TDCAA Board and membership with recommendations for how we as a profession and association can best address them. The subcommittee examined exonerations, forensic science, eyewitness identification, and allegations of widespread prosecutorial misconduct, studying cases, interviewing people, reviewing scholarly treatises, and spending hours upon hours developing findings and recommendations.

By Rob Kepple
TDCAA Executive Director in Austin

I want to take a moment to thank the members of the committee for their hard work (they are listed in the box at right). They took their work quite seriously, and as a result the association has clear guidance on how we can continue to serve you for the benefit of the profession.

In the report entitled "Setting the Record Straight," the subcommittee examined claims made in March by the Northern California Innocence Project that there exists in Texas widespread prosecutorial misconduct that has gone unaddressed. It was not the subcommittee's original intention to devote significant time to such a response, but in light of the barrage of recent allegations and a few headline-making cases, it was certainly an important exercise. If you'd like the short answer to the question posed above by someone intimately involved with the work of the Innocence Project, you can go to the report itself, which is on the front page of the TDCAA website at www.tdcaa.com. You probably won't be surprised by the results of the subcommittee's work in this regard.

Perception or reality?

We all know that changes in our Penal Code and Code of Criminal Procedure can have a real impact over time on the conduct of the citizens that it governs. Just take a look at the law passed two sessions ago dubbed "Lillian's Law." This legislation amended Health and Safety Code §822.005 to create a new felony offense for negligently failing to secure a dog if that dog, as a result of its owner's negligent conduct, escapes and causes serious bodily injury or death. That statute has now been used successfully a number of times and has recently been held constitutional by the Court of Criminal Appeals in *Watson v. State*, PD-0287-11 (Tex. Crim. App. June 27, 2012). Over time the teeth in this statute will, we hope, encourage more and more citizens to properly secure their animals, and as a result we will see a decline in dog attacks. A legislative success story to be sure.

But it appears the legislature can also make changes that affect perception just as much as reality. You will all recall that three sessions ago the Legislature enacted a bill purporting to create the "castle doctrine" in Texas. Now, as a prosecutor you know that Texas has had the castle

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Training Subcommittee on Emerging Issues
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Edward "Chip" Wilkinson, Assistant Criminal District Attorney in Tarrant County

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doctrine in place for, oh, let's say a century or so—we can't recall an instance where someone who was justifiably protecting a home or family was indicted and prosecuted for defending the homestead. But perception being what it is, once the legislature passed the new law, folks rightfully assumed that something had changed in that regard.

Enter George Zimmerman and Trayvon Martin. The media pounced on the story out of Florida where an unarmed teen (Martin) was shot and killed by a man (Zimmerman) who felt threatened, and all sorts of articles are printed talking about how the Castle Doctrine statutes passed around the country have meant more shootings. Just take a look at an article published in the *Houston Chronicle*, www.chron.com/news/houston-texas/article/Killings-deemed-justified-are-on-the-rise-in-Texas-3676412.php, purporting to link an increase in justifiable homicides to the 2007 law. If you read closely, however, you will probably come to the conclusion that the cases cited in the article are ones that would not have resulted in criminal charges, castle doctrine or no castle doctrine.

You, as a prosecutor, know that the changes made in 2007 have made it more difficult to prosecute murder cases, but you also know that those changes really didn't expand defenses for those homicides that, prior to 2007, were considered justifiable.

Thus, I have come to believe that criminal justice legislation can have an impact in two ways: reality and perception. About two-thirds of Texas criminal laws belong to prosecutors—the practical, useful, and reality-based rules that you can use to do your job and thus over time impact crime. One-third of our criminal codes, however, can more properly be viewed as belonging to the state's policymakers. These are the laws that may not actually be that useful or practical for those enforcing them, but they make a statement or set a tone that the state leaders feel is appropriate. And that is fair enough, as long as their one-third does not negatively impact the ability to do our jobs.

So, has the castle doctrine law passed in 2007 damaged your ability to get justice in those homicide cases that merit prosecution? That would be my chief concern as a prosecutor. If not, then the debate will continue to play out on national television, but it may not have much impact on our business at the courthouse.

Only 100 more years to go!

About 10 years ago we invited **Victor Vieth**, the now-director of the National Child Protection Training Center, to speak at an Elected Prosecutor Conference. The title of his topic seemed a little far-fetched—"Ending Child Abuse in 120 Years"—but Victor is an absolutely inspirational speaker who had people thinking that just maybe the subject of his speech was possible.

Victor has a vision for how, through training and policy, we could get a grip on child abuse. And prosecutors were ready to hear his ideas, given how the number of child abuse cases had exploded onto criminal dockets across the country. His theory is that it would take three generations, and each generation has a role to play. (You can read his 2004 paper on the subject at www.ndaa.org/pdf/unto_third_generation.pdf.) Victor ended his talk, as he did his paper, with an inspirational story of a Civil War era Minnesota regiment sent onto the field at Gettysburg, knowing that they could not win the battle themselves but that their selfless charge would provide an opportunity for victory for the soldiers who followed.

It was with this speech still in my mind that I read a *New York Times* article on the TDCAA twitter feed, "Researchers See Decline in Child Sexual Abuse Rate." (Find it here: www.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html?_r=1.) Researchers are quick to hedge, saying that the precise reasons for the decline are not clear and that most crime, not just child abuse, has gone down over the last 20 years, but they believe that greater public awareness, stepped-up prevention efforts, better training and education, specialized policing, the presence of child advocacy centers, the coordinated response to abuse, and prosecution of offenders should get credit—all things that Victor argued were fundamental to success in the future.

By my clock a lot of the training, prevention, coordination, and prosecution efforts started in earnest in the early 1990s, so I am thinking we have about 100 years to go before Victor's dream is realized. If he is right, and I am willing to believe he is, y'all are going to be remembered as the heroes who went into the breach knowing that your efforts today would be rewarded by the ultimate victory of those who follow.

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Preventing the firebird's resurrection

One online source tells us that a "phoenix is a legendary bird that according to one account lived 500 years, burned itself to ashes on a pyre, and rose alive from the ashes to live another period."[1] If we are not careful, cases can live the life of a phoenix too.

By John Stride
TDCAA Senior Appellate Attorney

Lesser-included offenses continue to attract more attention than many topics before the Court of Criminal Appeals. This term the court continued the trend by righting a wrong and clarifying an unknown in *Bowen* and *Hicks* respectively.[2] The two opinions further justice, but underlying both is a lurking specter that could appear patently to prevent their application. Beware your trial strategy.

In 1999, Judge Mansfield, joined by Judges Meyers, Price, and Johnson, authored *Collier*, which stood for the proposition that an appellate court finding the evidence insufficient to support the charged offense could not reform the conviction to a lesser-included offense (LIO) unless either the LIO had been 1) requested by the parties or 2) included in the jury charge.[3] Absent one of these two actions, the wholly undeserving defendant, with notice by way of the charged offense of any LIOs and unequivocally guilty of an LIO, would obtain the windfall of an acquittal.[4] This opinion haunted us for far too long—and *Bowen* corrected this gross injustice.

Hicks, on the other hand, came about because of a conflict between two intermediate courts on whether reckless aggravated assault was an LIO of intentional or knowing aggravated assault.[5] In that case, the unanimous court, in an opinion written by Judge Cochran, held that reckless aggravated assault is a LIO of intentional or knowing aggravated assault, so the matter is now settled.

But if all we take away from these two opinions is that the law of LIOs has been relaxed so we can 1) now always rely on an LIO to salvage a conviction overturned on sufficiency grounds and 2) freely submit a jury instruction on recklessness for the first time in the jury charge, we are in peril of losing convictions and undoing all the good work that has been put into securing these important rulings. *Bowen* not only warns us in its particular context that the type of trial strategy recognized in *Collier* probably still won't past muster, but it also signals on a broader scale that evidence of gamesmanship will likely serve to limit the application of *Hicks*. At trial, the State must play fair.[6]

The birth of *Collier*

A jury convicted John Henry Collier of serious bodily injury to a child. On appeal the Third Court of Appeals held that, although the evidence was sufficient to support a conviction for bodily injury to a child, it was insufficient to support a conviction for serious bodily injury. Relying on its own precedent, the intermediate court determined that it could not reform the judgment to the LIO because the jury had not been instructed on the LIO.[7]

Taking up the issue raised by the State Prosecuting Attorney—whether the court of appeals had authority to reform the judgment—as one of first impression, the Court of Criminal Appeals followed the Supreme Court of Wisconsin's lead in affirming the intermediate court. The court's rationale, also adopted, was that to permit the State to obtain an LIO when one had not been requested or submitted gave the State "all the benefits and none of the risks of its trial strategy, while the accused would have all the risks and none of the protections." It was seen as unfair gamesmanship to allow the State to engage in a trial strategy of securing a conviction for a greater offense with weak evidence and, when reversed on appeal for insufficient evidence, to be able to obtain a conviction on an unrequested or uncharged LIO. In other words, the State should not be rewarded for "going for broke."

Judge Keasler concurred but reached the same result by an independent route: He relied on the Rules of Appellate Procedure and cases interpreting them that limited an appellate court to rendering a judgment that the trial court should have rendered. This law informed, he opined, that a trial court could render judgment only under the instructions given to the jury so, if a single offense was submitted to a jury, the trial court could convict or acquit of that offense alone. Then Judge Keller dissented, joined by

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Executive Director's Report (cont'd)

For more information about the National Child Protection Training Center, go to www.ncptc.org.

TDCAA online training

Many of you have taken advantage of our first web-based training offering, a one-hour course on *Brady*. (If you haven't, check it out here: www.tdcaa.com/training/mcle-video.) We really enjoyed doing the program and have had very positive reviews about the content and delivery. TDCAA's own **Erik Nielsen** and **W. Clay Abbott** did the heavy lifting on the project, and their work laid the foundation for more offerings in the future. The TDCAA Training Committee will be continuing to develop our web-based training, so stay tuned!

Buck Files on tour

I want to take a moment to thank **Buck Files**, current State Bar President and criminal defense attorney in Tyler, for helping us develop our first web-based program. Buck really went out of the way to connect us with the State Bar's resources for the program, and we could not have done this without him.


Lauren Owens

And speaking of going out of the way, you may be seeing Buck soon at your courthouse. Buck, as State Bar President, has decided the best way to spread the word about the Bar's good works is in person. So he has launched a tour of Texas courthouses that, by the end of it, will probably include yours. Be sure to say hello and thank him for his efforts in including prosecutors in the Bar activities and services.

Congratulations, Manda!

In July, our Meeting Planner, **Manda Helmick**, married Bradley Herzing in Wisconsin. Congratulations to you both! Please note that she now goes by **Manda Herzing**, and her email address has changed too: It's manda.herzing@tdcaa.com.


Bradley & Manda Herzing

Welcome to Lauren Owens

Next time you call TDCAA for some legal assistance, you may have the good fortune of talking with our new Research Attorney, **Lauren Owens**, who started working in August. Lauren, a graduate of the University of Texas and Notre Dame Law School, actually began her legal career as an Assistant Criminal District Attorney in Tyler before she relocated to Austin. Welcome, Lauren! ❇

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Presiding Judge McCormick and Judges Holland and Womack.

Four months later, the court denied the State's motion for rehearing.[8] Judge Johnson concurred, explaining what the plurality decision meant; Judge McCormick, joined by Judge Keller, issued a strong dissent. Later, in *Haynes*, the court held that Judge Keasler's opinion in *Collier* was the majority holding (the narrowest ground on which the plurality agreed).[9]

The death of *Collier*

After other attempts to torpedo *Collier*, the briefing of the State Prosecuting Attorney's office in *Bowen* scored a direct hit. On the death of Deborah Bowen's father, a family trust was created and, a few years later, Bowen became a co-trustee. When the trust terminated, instead of distributing the considerable balance between her and her deceased brother's three children, Bowen kept the small fortune for herself. At her trial for misapplication of fiduciary property of the value of $200,000 or more, the trial court submitted no LIOs, and the parties requested none. The jury convicted. But the Eleventh Court of Appeals, finding the evidence insufficient for purposes of the value—because the single beneficiary alleged in the indictment was entitled to only one-sixth of the money (about $100,000)—reversed and acquitted.

On petition to the Court of Criminal Appeals, two of the original *Collier* judges realigned themselves. Judge Meyers writing for the majority—joined by now Presiding Judge Keller, and Judges Womack, John-

son, Cochran, and Alcala—expressly overruled *Collier*. But Judge Price, dissenting, stuck to his original position and was accompanied by Judges Keasler and Hervey.

So what swung Judges Meyers and Johnson?

The majority's review of the appellate landscape post-*Collier* revealed that the risk of gamesmanship identified in *Collier* as the rationale for the holding had not been realized in many of the subsequent cases. Simply, *Collier*'s progeny did not indicate that either the State or the defense had elected not to request an LIO as a matter of gamesmanship.[10] Thus, *Collier* did not fulfill its stated purpose and, worse, actually produced an "unjust" result.

(In contrast, the court had recently decided *Tolbert*,[11] where the defense had clearly gone for broke at trial, the defendant was convicted, and on appeal the defendant argued that the trial court should have *sua sponte* instructed the jury on an LIO. The court, not buying into the gamesmanship, held that the defense could not get relief from the consequences of its own strategy.)

Evidence of improper gamesmanship—attempting to obtain an unfair advantage—then has become a touchstone for determining the propriety of submitting LIOs. Such gamesmanship has been an issue in other areas too, for example, goading the defense into a mistrial so that the State can obtain a second bite at trial.[12] The Court of Criminal Appeals is not tolerant of such practices. Indeed, in *Bowen* it apparently retained a safety barrier—a hurdle that the State should not be able to jump if it engaged in gamesmanship. The majority specifically observed that there was "no indication that either party overreached" and the failure to request an LIO was simply "a mistake as to the applicable law" and "not the result of gamesmanship." These are not the noises of a poltergeist but rather fair warning. We should assume that the court will not reform a judgment to the State's benefit if the record reflects that the State adopted an "all or nothing" strategy with the charged offense.

Given the background of *Collier* and these observations in *Bowen*, we should be under no misapprehension that the court will grant an acquittal, rather than a reformation to an LIO, if it identifies evidence of gamesmanship. This places the State on the same level as the defense in *Tolbert*. Thus, at trial, prosecutors must evaluate and implement our strategy carefully: We don't want a guilty defendant to walk away scot-free because the State overplayed its hand.

We should not forget *Collier*'s ashes

As trial strategy has become increasingly relevant to the LIO inquiry, we are wise to consider its application in *Hicks*—even though this is something the court did not address in its opinion.[13] (Even an oracle addresses only the question presented.) A single case of improper gamesmanship could tilt the LIO playing field again.

In *Hicks* the Court of Criminal Appeals held that reckless aggravated assault can be the LIO of intentional or knowing aggravated assault. This makes sense: The LIO of a greater offense can be the greater offense's LIO.[14] Plenty of prior decisions from our high court confirm the same thing in other contexts.

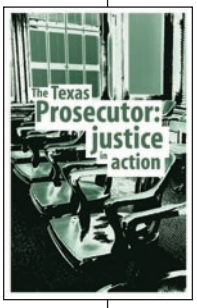
But we should reflect before taking *Hicks* at face value alone. Buried in the Code of Criminal Procedure is a provision that seems to thrive on being more than a little troublesome. As most recognize all too well, art. 21.15 requires that, when alleging recklessness as a culpable mental state, the charging instrument "must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness" (the same requirement adheres to criminal negligence too). Often, though, because appellate decisions have shown that this pleading requirement can be a trap for prosecutors who plead too little, the culpable mental state of recklessness is not alleged.[15]

It may or may not have been because of this additional pleading requirement for recklessness that the indictment in *Hicks* did not allege the culpable mental state. Anyway, relying on the evidence presented, the trial court gave an instruction on the lesser offense for the first time in the jury charge—seemingly *sua sponte*. But the Court of Criminal Appeals' opinion contains not even a hint of art. 21.15. What's more, the language of the court's charge in *Hicks* does not appear to "allege, with reasonable certainty, the act or acts relied upon to constitute recklessness." At least, it provides no more notice of the acts relied than the allegation of the greater offense, i.e., "unlawfully, recklessly cause bodily injury to [the victim] by using a deadly weapon, namely a firearm."

Continued on page 12

Prosecutor booklets available for members

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



Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at 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@tdcaa.com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❇

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Does this mean that by the expedient of delaying a recklessness allegation until the charge is prepared, the State can perform an end-run around art. 21.15 (Must Allege Acts of Recklessness or Criminal Negligence)? If so, the State could duck its duty to provide adequate notice. I suggest not even taking the risk that our conduct could be perceived so. If an appellate court detects even a whiff that the State had employed such a trial strategy, we can expect it to reverse and acquit. And such gamesmanship doesn't just hurt your case and credibility—at least in the current hyper-vigilant atmosphere, where prosecutors' conduct is under intense scrutiny—it also serves to taint all prosecutors and erodes faith in the criminal justice system.

To conclude, a court's identification of a devious trial strategy on the State's part in seeking an LIO will likely prevent reformation to an LIO on appeal and could bar submission of an LIO of recklessness at trial. We don't need that precedent. Let not an undesired phoenix rise from *Collier*'s ashes. ❇

Endnotes

1 See http://www.merriam-webster.com/dictionary/phoenix.

2 *Hicks v. State*, No. PD-0495-11, 2012 Tex. Crim. App. LEXIS 865 (Tex. Crim. App. June 27, 2012); *Bowen v. State*, No. PD-1607-10, 2012 Tex. Crim. App. LEXIS 817 (Tex. Crim. App. June 20, 2012).

3 *Collier v. State*, 999 S.W.2d 779 (Tex. Crim. App. 1999).

4 Incongruously, the same limitation on reforming a judgment to an LIO did not apply where there was no jury charge—in bench trials.

5 My gratitude to Professor George Dix, George R. Killam, Jr. Chair of Criminal Law at the University of Texas, Austin, for alerting me to the fact that *Hicks* does not address art. 21.15 and potentially cracks the door to improper gamesmanship.

6 The "primary duty" of prosecutors "is not to convict but to see that justice is done." Tex. Code Crim. Proc. art. 2.01.

7 The CCA questioned the lower court's reliance on precedent. The authority had actually been overruled.

8 See *Collier*, 999 S.W.2d at 779.

9 See *Haynes v. State*, 273 S.W.3d 183 (Tex. Crim. App. 2008).

10 *Bowen* involved a theft-type offense where, although the State proved the "essential elements" of misapplication of fiduciary property offense, it failed to prove the "aggravating element" of the value of the property misapplied. Whether this factor affords the basis for a principled distinction in other offenses without a similar aggravating element remains to be seen. Two cases discussed by the majority, *Lawrence* and *Haynes*, also involved crimes with "aggravating elements" beyond those required for a crime with mere "essential elements." See *Haynes*, 273 S.W.3d at 183 (family violence assault); *Lawrence v. State*, 106 S.W.3d 141 (Tex. App.—Amarillo 2003, no pet.) (bodily injury to a person over 65 years of age).

11 See *Tolbert v. State*, 306 S.W.3d 776 (Tex. Crim. App. 2010).

12 See, e.g., *Ex parte Masonheimer*, 220 S.W.3d 494 (Tex, Crim. App. 2007) (repeated *Brady* violations resulted in double-jeopardy bar against third trial).

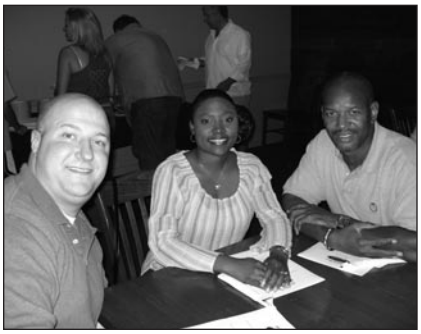
13 Presumably, the issue of gamesmanship was not briefed in the case.

14 See Tex. Code Crim. Proc. art. 37.09 (Lesser Included Offense).

15 Article 21.15 not only addresses charging instruments. As its opening language reveals, it also applies "[w]henever recklessness or criminal negligence enter into or is a part of element of any offense." As the language of the article carries on to expressly address charging instruments, this preliminary language, if it means anything at all, must address something else. Could this language be interpreted to include LIO instructions on recklessness (and criminal negligence) not included in a charging instrument but submitted in a jury charge?

Photos from our Digital Evidence Seminar

Photos from our Prosecutor Trial Skills Course



John Stride, TDCAA Senior Appellate Attorney (and gentleman farmer)

The first in an ongoing (we hope) series of profiles of TDCAA members and their out-of-the-ordinary hobbies and passions. Know someone who qualifies? Email the editor at sarah.wolf@tdcaa.com, and we may feature that person.

Hum, pronk, kush, snoot!

So why would anyone have a camelid? Over two decades, we tried beef cattle, but they tore down the fences, and boer goats, but they had serious parasite issues. And both ate enormous quantities, could be noisy, and left dung wherever the feeling overtook them. Llamas and alpacas don't test the fences, cope with the parasites, don't each much, and are simply serene.

Besides, working with camelids requires learning a different vocabulary. And even if languages are not one of your strengths, you can soon pick up the lingo. "Camelids" include camels, llamas, alpacas, guanacos, and vicunas; "crias" are their young; "coffee beans" are their by-product (considerately deposited in communal heaps); they "hum" to communicate, "kush" when they lay with their feet tucked beneath them, "squeal" when alarmed or fighting, "spit" when very upset, "snoot" when expelling air at both ends simultaneously, and "pronk" when having fun by bouncing stiff-legged.

Alpacas (short, roundish, and with straight ears, pictured at bottom right) produce fine fiber that is sheared annually and relished by spinners. Llamas (taller, longer, and with banana ears, pictured at top right) produce great fiber too but can be trained for packing, hunting, and carting. They can even serve as guard animals to sheep and goats. Both alpacas and llamas can participate as therapy and companion animals. Some *homo sapiens* eat them.

On our small patch of land, we have raised llamas for over a decade and currently run 15 llamas and nine alpacas. We breed, medicate, and shear them ourselves. Three Great Pyrenees stay out in the pastures, four Border Collies roam, and two Jack Russells entertain from the house yard. When we retire, each one of the menagerie plans to join us in the Colorado Rockies. ❇

—By John Stride

Continued from the front cover

Setting the record straight (cont'd)

ed claims of misconduct detailed in the report, the subcommittee members believe that any prosecutor misconduct is unacceptable and should be addressed. The subcommittee took a serious look at the issue of prosecutor conduct in the context of the most troubling cases on the list. They researched cases, interviewed various people involved in criminal justice, and studied legal treatises. In those few cases of concern, it appears that inadequate disclosure of exculpatory evidence, often exacerbated by a closed-file office policy, played a central role. In many instances of inadequate disclosure, the evidence remained in the hands of law enforcement and was unknown to the prosecutor.

Importantly, the subcommittee recognized that there is emerging research into the concept of cognitive bias (or "tunnel vision") which may play a role in prosecutor decision-making. This potential bias deserves further attention. Finally, the subcommittee recognized that times have changed: Prosecution as a profession has advanced significantly since the passage of the Professional Prosecutor Act in 1979. It would be a mistake to judge the state of today's prosecutor offices on cases tried three decades ago.

What emerged from the subcommittee's work was a unique document that squarely addresses the overblown allegations of the Innocence Project but also makes serious recommendations for the TDCAA board, committees, and staff to follow in developing additional programs, training, and resources for the benefit of our profession. Because issues and cases concerning exonerations will likely continue to be a topic of interest, the TDCAA board believed it was important to publish the report and make sure that every person working in a prosecutor's office takes the time to read it. I invite you to do so.

I am proud of our profession, and I believe that what each of you do on a daily basis makes a difference in the lives of all Texans. We have a duty to be the best we can be at our jobs, and the association is going to work its hardest to help you in that effort. ❇

Fighting crimes against elders

Elder exploitation cases can take many twists and turns, but Dallas County prosecutors are specially equipped to see them through. Here's how they won justice for an elderly theft victim suffering from dementia.

"Someone broke into my house and turned my oven on." "There is a man sitting on top of the telephone pole watching me."

These were some of the 50-plus complaints that Ruth Barrett made to the Dallas Police Department in 2005 and 2006. These service calls were the start of authorities looking into the lonely life of the elderly Barrett. Their investigation revealed an isolated woman struggling with dementia that led to her victimization by a trusted individual—themes that are all too common when dealing with elder exploitation.

By Donna Strittmatter and Amy Croft
Assistant Criminal District Attorneys in Dallas County

Our background

The Dallas County Criminal District Attorney's Office has had a designated elder exploitation prosecutor since 2007. This position has given our office the ability to learn how to best investigate and prosecute cases involving the financial exploitation of elderly victims, which are extremely challenging and time-consuming because of complex legal documents and issues. There are also difficulties in dealing with elderly victims in a criminal case: Sometimes a victim is able to testify at trial, and other times he or she cannot. In those cases, all is not always lost. Under the right circumstances, enough evidence may exist to prove the case even when the victim is unable to testify—it is often a matter of knowing where to look for the right evidence.

We hope this article, which details a particular case of an all-too-common crime, is helpful for other prosecutors investigating offenses against elders.

A criminal tenant

Ruth Barrett was a single 76-year-old living in East Dallas. She had never married, had no children, and was estranged from her family. Her pride and joy were the two side-by-side duplexes that she owned in Dallas. Ruth had worked hard to purchase the properties, and the retired secretary was enjoying the fruits of her labor, hoping to live off the rental income in her golden years. She even had plans for the duplexes after her death; she proudly told everyone she knew that she wanted to leave her duplexes for the benefit of sick children.

Unfortunately, Norman Lehr entered the picture and soon jeopardized her dreams. In 2001 Lehr became a tenant in one of the three units that Ruth leased out (she lived in one too). Though he did not have a criminal history, Lehr displayed a very controlling nature over time and eventually became her power of attorney, exercising influence over every aspect of Ruth's life.

This undue control culminated on June 2, 2006, when Lehr had Ruth deed all of her properties to him at a time when she was suffering from a serious onset of dementia. That transaction resulted in the Dallas County District Attorney's Office bringing an indictment for theft over $200,000 against Lehr.

At the jury trial we alleged that Ruth's consent was ineffective because at the time that she deeded her property to Lehr, Ruth had diminished capacity. The theft statute states that consent is ineffective if it is given by a person who, by reason of advanced age, is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property. The fact that the transaction occurred was not in question in our case, so we knew the main issue at trial would be whether Ruth had diminished capacity and whether Lehr knew it. Most of our evidence went toward proving that element.

Suffering from dementia

Ruth had chosen to live a quiet and rather isolated life. Unlike many other elderly victims that we had worked with in the past, she didn't have a

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network of family or many friends. Because of her diminished capacity, we knew that Ruth would be unable to testify at trial and that the jury would never see or hear from our victim. At first we wondered how we would be able to tell Ruth's story without her or people close to her to tell it on her behalf. As it turned out, we were able to find plenty of evidence to make our case that Ruth did indeed have diminished capacity and that Norman Lehr knew it.

The defense wanted to subpoena Ruth as a witness at trial. We believe Lehr felt he could influence what she would say on the stand if he could just be in the same room with her. Prior to the trial, the judge found that she was not competent to testify and instructed both sides not to bring up her absence during the trial. During voir dire, we pointed out crimes where the victim might not be able to testify, such as murder cases. We also discussed the fact that witnesses must be competent to testify. We felt like this prepared the jurors before the testimony ever began that they would not hear from Ruth during the trial.

APS records

One of the first things that we did was subpoena the Adult Protective Services (APS) records involving Ruth. APS requires a subpoena to release records to law enforcement, and very similar to Child Protective Services (CPS) records, they are a wealth of information. Interestingly, APS records can be searched by either the name of the victim, which APS refers to as the "client," or by the name of the defendant, or in APS lingo, the "alleged perpetrator." Searching by the perpetrator's name can be helpful to determine whether he has had any other complaints involving abuse, neglect, or exploitation regarding this victim or any others.

The APS records led us to information regarding Ruth's finances. She had banked at a local credit union for years, so we started there. We hoped that someone at the bank would remember something relating to this case. Several of the credit union's employees did remember the situation and painted a picture of Ruth's mental decline during the time period in question, as well as the relationship between Ruth and Norman Lehr. Once meticulous about balancing her checkbook and keeping her finances in order, the employees began to notice that sometime in early 2005 Ruth had begun bouncing checks and having trouble filling out her checks. The employees also testified that during that period, Lehr began to regularly accompany Ruth to the bank, that she seemed confused, that Lehr would tell her what to say, and that she was very submissive to him.

Several of the employees recalled a specific instance sometime before the June 2 theft during which Lehr had gone out of town and Ruth had actually removed him from her account. (We are still unsure why she did so.) When Lehr came back to Dallas and learned from bank personnel that he was no longer on the account, he was furious. He made a call on his cell phone, apparently to Ruth, during which he was yelling, cursing, and slamming things around. He left in his car and returned to the bank 10 minutes later, this time with Ruth. She was very subservient to Lehr and meekly told the bank tellers that removing him from the account had been a mistake. The employees also testified that sometime after that incident, Lehr obtained a power of attorney (POA) from Ruth and from that point forward he relied on the POA to conduct business at the bank without her presence.

Another source of helpful information in the APS records was the name of the property management company that Ruth had used for years to collect rent, find tenants, and conduct maintenance on her duplexes. This company was run by a married couple who had grown fairly close to Ruth over time and had noticed that she had begun to have problems balancing her checkbook and paying bills. The property managers even ended up taking Ruth to see her doctor about it. In their testimony at trial, they described Ruth as having had a drastic mental decline over a very short time in the spring of 2005. They also expressed their concern about Lehr's involvement with Ruth when he used the POA she had given him to take over the management of the duplexes.

Another name listed in the APS records turned out to be extremely relevant to our case. A real estate developer had approached Ruth during the time period in question about buying her property. He reported that within only moments he knew that things weren't right with Ruth mentally. He chose to forego doing business with her and instead made a report to APS regarding her vulnerability and his concern that she could very easily be taken advantage of by anyone who might come along. We argued that if this stranger to Ruth

could see her mental deficits, especially relating to her duplexes, then Lehr certainly would have known of Ruth's diminished capacity at the time that he stole those very properties from her.

Medical history

Fortunately for our case, Ruth had been seeing a doctor regularly for her dementia for at least a year prior to the theft, probably in part because of her property managers' urging. The doctor's medical records and testimony were key in establishing that she did in fact have diminished capacity. She was taking medication for the dementia, which was ultimately diagnosed as Alzheimer's-type dementia. Starting in June 2005, Ruth's treating physician noted a steady decline in her cognitive abilities at each and every doctor's visit.

The medical records revealed another helpful piece of evidence. They noted that prior to the offense date, Norman Lehr was accompanying Ruth on these visits and that the doctor was sharing his diagnosis with Lehr (due to the power of attorney). Some of the records even contained statements that Lehr made to the doctor regarding his observations of Ruth's declining mental capabilities. This was great evidence to prove Lehr knew she had diminished capacity.

Police service calls

The form of dementia that Ruth suffered from caused delusions, which were clearly the basis for a number of police service calls she made in 2005 and 2006. As part of

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A proactive approach in Bexar County

John Warner (not his real name) couldn't believe his ears, listening to the speaker at his monthly neighborhood association meeting. Joanne Woodruff, a prosecutor with the Bexar County Criminal District Attorney's Office assigned to the Elder Fraud Unit, was describing various types of fraud perpetrated against elderly citizens. Just that day he had discovered that over the last month his 86-year-old mother had paid $34,000 to several men to paint her home. That might be acceptable if she lived in a huge house, but her small, aging, west-side home was only worth $35,000 according to the Bexar County property tax records.

By Cyndi Jahn
Victim Assistance Coordinator in Bexar County and VAC Board Chair

When the presentation was over, John approached Joanne and told her his story, and she immediately got him in touch with law enforcement. Their investigation showed how the group had taken advantage of Mrs. Mabel Warner (also not her real name). Mrs. Warner's youngest son, Mark, cared for her, and he suffered from kidney problems and had to attend dialysis several times a week. The perpetrators always waited to visit Mrs. Warner whenever she was home alone, telling her that "she hadn't paid them that week" or that she "owed them the next installment on her bill." Mrs. Warner had no idea that she was being lied to and swindled out of her life's savings.

The investigation was solid; Joanne and her team moved forward with prosecution against the four men involved and not only sent them to prison (the ringleader was sentenced to eight years), but also was able to obtain the $34,000 in restitution and return it to Mrs. Warner. If John Warner had not had the opportunity to hear that presentation about elder fraud, he may have waited too long to call police, and both the money and men would be gone—or he may have written it off as a horrible mistake by his mother.

Being proactive

Prevention is not something that a prosecutor's office usually handles. The nature of our duties is generally reactive: The crime has already been committed when we get involved. But Bexar County Criminal District Attorney Susan Reed likes to think outside the box.

Reed has been proactive in several ways within the office. In 2004 she created the Elder Fraud Unit to not only prosecute financial crimes against the elderly, but also to provide outreach to the community to prevent this crime from occurring.

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our investigation and in preparation for trial, we made a timeline of the 50-plus calls to Ruth's address and identified a particular officer who had been out to her home on many of those occasions.

Officer Amie Brewer of the Dallas Police Department was able to provide valuable information that related to Ruth's mental status and Lehr's involvement with her. On one of her many visits, Officer Brewer was stopped by the mail carrier who preferred not to get involved but was concerned that Lehr was exploiting Ruth. The mail carrier ended up testifying for the State in the trial about his opinion regarding Ruth's diminished capacity and the fact that Lehr knew about it. (You would be surprised to learn how much your mailman might know about you!)

The timeline of service calls also revealed one extremely helpful piece of evidence. On the afternoon of June 2, 2006, the very day that Ruth deeded the properties to Lehr, Dallas police were called out to Ruth's home where they found her screaming in the alleyway behind her house, completely delusional. One theme that the defense used in its cross-examination of the State's witnesses was that everyone, even those with Alzheimer's and dementia, have "good" and "bad" days mentally. We were able to argue that the evidence was clear that on June 2, 2006, Ruth Barrett was not having a "good" day.

The Dallas police officer also referred her concerns about Ruth to the Dallas Police Department's Crisis Intervention Division, and a social worker was assigned to her case. The social worker was instrumental in having Ruth's situation with Lehr brought to light by making a referral that Ruth might need a guardianship to the Dallas County Statutory Probate Court.

The guardianship proceedings

A guardianship is a legal process designed to protect incapacitated persons. The Texas Probate Code defines an incapacitated person as one who, because of physical or mental condition, is substantially unable to provide food, clothing, or shelter for herself, to care for her own physical health, or to manage her own financial affairs. A guardian is a person or entity (such as a state agency or nonprofit) appointed by the court to make decisions on behalf of the incapacitated person, or the "ward." A "guardian of the person" is appointed by the court to take care of the ward's physical well-being, and a "guardian of the estate" is appointed to manage the ward's property and finances.

Because a guardianship removes certain rights and privileges from the ward, it is not a process that the court takes lightly. The court is always inclined to find a less restrictive alternative if possible. Many times, though, a less restrictive alternative does not exist and the court will appoint a guardian of the person, a guardian of the estate, or both.

In our case, the Dallas PD Crisis Intervention Division made a referral to the Dallas County Probate Court. An investigator was assigned, and she made the recommendation to the probate court that Ruth was in need of a guardianship. In August 2006, only two months after the theft, the probate court granted a guardianship for Ruth. A nonprofit senior advocacy group was appointed as the guardian of Ruth's person, and an attorney was appointed as the guardian of Ruth's estate. The guardianship proceeding provided us with a number of credible witnesses, including the probate court investigator, lawyers, and doctors, all of whom had interacted with Ruth in the months after the offense and were able to testify as experts in their fields and give opinions about Ruth's diminished capacity.

Once the guardianship process was underway, the probate court required Ruth to undergo a full examination by a geriatric psychologist, as is standard practice in guardianship proceedings. His examination of Ruth occurred two months after the theft and provided further evidence of her mental vulnerabilities. The doctor testified how Ruth's dementia negatively affected her ability to process information, make decisions, and have insight. He also explained how the cognitive deficits that Ruth had were a "slow-moving train" going in one direction: toward a worsening mental state. He extrapolated that the symptoms that Ruth exhibited during his August 2006 evaluation would most certainly have been present on June 2, 2006.

The probate court investigator and the attorney acting as guardian of Ruth's estate also testified that guardianship proceedings can be contested by any concerned citizen who is able to provide evidence that the guardianship is not necessary and that guardianships are very often contested. However, Lehr had not

contested the necessity of the guardianship in Ruth's case, which we argued was proof that he knew of Ruth's diminished capacity. We also argued that Lehr wasn't as close of a friend to Ruth as he might like others to think, because after the court found her to be incapacitated, he did not volunteer to become the guardian of her person or her estate. Instead he left her to become a ward of the state, with the court having to appoint a guardian of her person because she had no one to do it for her.

Defense strategy

The defense strategy at trial was two-fold. One was to illustrate Lehr as the only person in the world who was helping poor Ruth and that Lehr had her deed the property to him to "protect" it for her. With that defense, the defense was conceding that Ruth had some deficits—but on the other hand, they also argued that Ruth knew what she was doing and wanted Lehr to have the property. One of their witnesses to this fact was the notary who notarized the deed. She turned out to be a friend of the defendant.

We rebutted the "protection" defense by arguing that the defendant kept all the rental income that he had received once the property was in his name and that he could have easily deeded the property back into safe hands once Ruth had a court-appointed guardian, but Lehr had chosen not to. Some protector! In fact, during trial is when Lehr thought it would be a good time to deed the property back to Ruth. The defense attorney tendered a deed to

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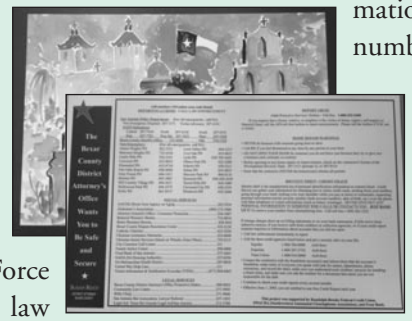
A proactive approach in Bexar County (cont'd)

The unit includes a prosecutor, victim assistant, and investigator. They generally maintain 200 open cases at any given time, and over just the last two years we have returned approximately $250,000 to 150 elderly victims.

Prosecutor Joanne Woodruff, who wholeheartedly admits that her job is "the best prosecution job in the office," is primarily tasked with providing this outreach to the community. Joanne believes that this aspect of her job is as important as prosecuting the perpetrators of elder fraud. She spends many hours speaking with various community and professional groups, such as physicians and home health care management organizations; senior/community groups; bankers; law enforcement; service clubs such as Rotary, Lions, and Kiwanis; and neighborhood associations.



Joanne speaks to an average of 1,700 individuals a year and also belongs to several local groups such as the Bexar County Elder Fraud Task Force (made up of law enforcement, the banking community, probate court, Adult Protective Services, and the DA's Office). They are able to staff specific cases to determine the particular needs for each independent victim.

When speaking to groups, one of the most important pieces of information Joanne provides is the medically documented fact that that the loss of executive function (the ability to handle financial affairs) is one of the first signs of senility or dementia in an older person. The inability to handle money occurs before someone may notice that an elderly family member is getting forgetful or is no longer able to physically care for herself. Because of Joanne's outreach, two of our local banks have made upgrades to the security software controls on their elderly clients' accounts to help prevent fraud.

Whenever Joanne speaks directly to a group of senior citizens and family members, she always leaves them with something special that they can keep as a reminder of how to be safe from elder fraud and identity theft. It is a laminated placemat with a beautiful watercolor painting of the Missions of San Antonio by Brother Cletus on the front and helpful prevention information and telephone numbers on the back (see images of the front and back, at left). Many of our local senior centers use these everyday when serving meals to the elderly.

The combination of outreach and prosecution is a successful one that is making a difference to the elderly citizens of Bexar County. Don't be afraid to think outside the box and develop new preventive programs through outreach to your local community. The investment is well worth it! ❇

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Ruth's guardian while he was on the witness stand. Thankfully, the jury did not fall for this ploy. The guardian took the deed, filed it, and we had Ruth's property returned to her before we even rested. Not a result that we can guarantee to ever happen again!

Verdict

The jury returned a guilty verdict and sentenced the defendant to five years in prison. We were very pleased with this outcome. Prior to the existence of an elder exploitation prosecutor in our office, this case would probably not have been prosecuted at all. It has been our experience that police departments do not have the time and expertise to investigate these types of cases; in fact, our office was the sole law enforcement entity that handled Ruth's case, which was made possible because of the elder exploitation prosecutor position and the relationships that our office has built with the elder abuse professionals in our community, such as APS and the investigators and staff at the probate courts, who have helped train us on elder issues. As you can see, many entities may become involved when handling an elder victim in need, so collaboration is key.

Ruth now lives in assisted living and her guardian is able to use her rental income to assure a comfortable lifestyle for her. The one time we met Ruth, we saw that she had severe mental deficits, but with tears in her eyes she told us of her desire to leave her property to sick children. Sometimes the best thank-yous come from victims who have no idea that you had the privilege of seeking justice on their behalf. ❇

The mother of all demonstrative evidence

Life-size cutouts help secure a life-sized sentence.

By Lisa Callaghan and Jim Hudson
Assistant Criminal District Attorneys in Tarrant County

Paper dolls are usually considered kid stuff, but in one recent criminal trial, they helped secure a life sentence for a drug dealer who shot it out with Tarrant County narcotics officers.

By filling the courtroom with life-sized, cardboard cutouts of eight undercover officers involved in the early-morning raid on Korey Michael Gautreaux's home, we easily overcame the defendant's claim that he thought he was firing at robbers in self-defense. In the process, we proved to the jury he was the "poster boy" for a maximum sentence.

Due to the danger involved with busting armed drug dealers who don't want to be arrested, narcotics officers train extensively for the safe execution of search warrants. They spend a great deal of time learning how to properly organize a warrant execution so that officers can quickly enter a house and detain its occupants without risking harm to themselves or the people they find.

Any narcotics officer will tell you they worry about the worst case scenario: an armed drug dealer who decides to shoot it out rather than submit to the officers' authority during a search warrant. For the officers of the Tarrant County Narcotics Unit, Kory Michael Gautreaux turned out to be their worst nightmare.

The take-down

In 2010, Gautreaux was living in a nice neighborhood in Arlington. He had a big house, nice cars, and a young son living with him. Unbeknownst to his neighbors, however, Gautreaux was also a drug dealer who was moving large quantities of methamphetamine to finance his leisurely life style. Gautreaux had been arrested and charged with possession of methamphetamine, alprazolam, and hydrocodone in December 2005 in Arlington. While out on bond, he was arrested for possession of methamphetamine in Shreveport, Louisiana, and was placed on felony probation.

So when Tarrant County Narcotics Unit (TCNU) officers received a tip in March 2010 that he was dealing large quantities of methamphetamine, Gautreaux had a lot to lose.

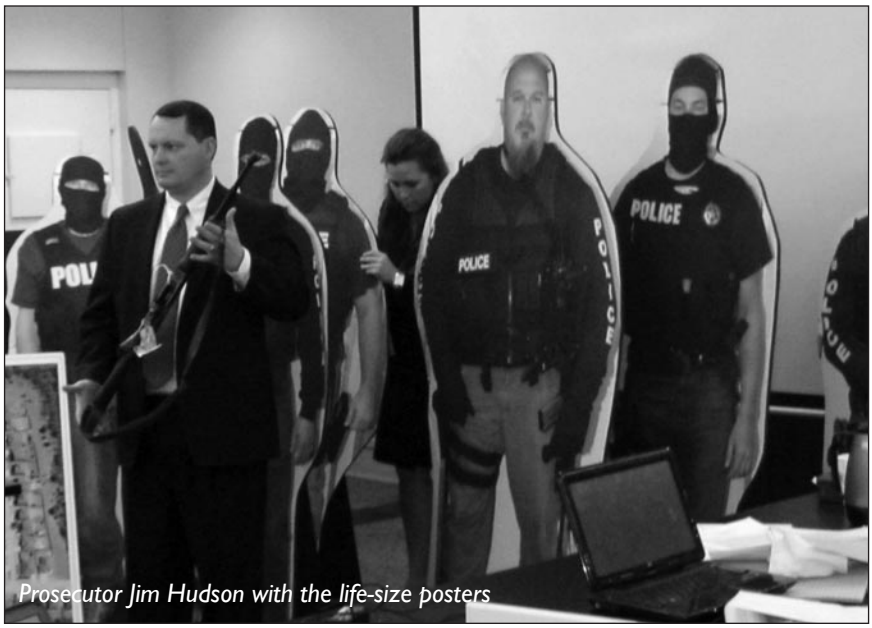
After the TCNU officers developed information that Gautreaux had a large amount of meth in his house on Eden Green Drive, they presented a "no knock" search warrant for Gautreaux's residence to a local magistrate in the early morning hours of April 1, 2010. Once the search warrant was signed, the officers immediately began preparing to execute it.

After a quick pre-raid briefing in

a nearby parking lot, the officers quietly approached the house on Eden Green Drive. TCNU Investigator Scott Ho was in charge of the investigation and gave each officer specific responsibilities. They were either part of the perimeter team, which was responsible for securing the outside boundaries of the house, or they were part of the entry team, which was to make initial entry to secure the house and occupants.

The entry team was organized into a "stack": a pre-determined order of entry into the house after the door is forced open. That morning, TCNU Investigator Darrin Yarborough was the designated "breacher" and, once everyone was in position, he slammed the battering ram repeatedly against the front door of Gautreaux's house, causing a racket that seemed to shake the house. The rest of the stack of officers quickly entered the house. TCNU Investigator Ho entered first, followed by TCNU Investigators Jonas Ceja, Tom Bulger, Bryan Laurie, Robert LaPenna, Sgt. James Hailey, and Yarborough. As they swept through the two-story house, all of the officers announced loudly that they were police officers there to execute a search warrant.

According to the entry plan, Laurie was supposed to help secure the upstairs rooms after making entry; however, Laurie never made it up the staircase. As he entered the house, Laurie caught a glimpse of someone peeking out from behind a refrigerator in the kitchen. The kitchen lights were on and Gautreaux was watching the officers. Laurie abandoned his assignment to address the threat of an unsecured occupant in the kitchen. When Laurie confronted Gautreaux in the kitchen, he saw he was holding a pistol. Laurie quickly identified himself as a peace officer and ordered Gautreaux at gunpoint to put down his gun.



Prosecutor Jim Hudson with the life-size posters

Prosecutor Lisa Callaghan (and police friend) in court

Gautreaux hesitantly bent down as if to set his gun on the floor while squinting at Laurie's tactical vest and its "POLICE" lettering. At that point, Laurie decided to take cover behind a pillar to the left of the kitchen bar. Meanwhile, Sgt. Hailey converged on the kitchen area to assist him. Suddenly, Gautreaux stood back up and fired. At the same time, he turned and ran into the laundry room behind him. The officers instantly returned fire at Gautreaux, who fired at officers two more times from the laundry room before disappearing.

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What the officers did not know at that moment was that Gautreaux had fled through the laundry room with his girlfriend (who had been out of sight from the officers) and into the garage. He then pressed the opener button and waited for the door to rise.

Outside, the perimeter team saw the garage door opening and took their positions. TCNU Investigator Andrea Davis was nearest to the garage door and could hear Gautreaux telling his girlfriend, "Come on, let's go!" Davis had already drawn her firearm after hearing shooting inside the house seconds before. When the garage door was about halfway up, she saw Gautreaux duck under the door and come out with a gun in his hand. Davis pointed her firearm at him and announced she was a police officer.

When Gautreaux turned towards Davis and pointed his gun at her, she fired, hitting Gautreaux in the leg. He went down in the driveway with an entry gunshot wound to the left outer leg and an exit wound in the inside of his thigh. Officers from the perimeter team quickly administered life-saving first-aid to stop Gautreaux from bleeding to death while they waited on an ambulance to arrive. Gautreaux's girlfriend was found hiding in the garage and was quickly detained by the officers.

Gautreaux was taken to John Peter Smith (JPS) Hospital in Fort Worth, where he underwent surgery to repair the bullet damage to his femoral artery in his leg. He remained under guard at JPS until he recovered enough to be transferred to the Tarrant County Jail. The Arlington Police Department thoroughly investigated the shooting incident and charged Gautreaux with aggravated assault on a public servant. (Though we could've charged the defendant with attempted capital murder, we opted for agg assault because it has the same range of punishment but is easier to prove.) Additionally, after the shooting, TCNU officers fully executed the search warrant at the residence, where they found numerous pistols, rifles, and shotguns, as well as 869 grams of methamphetamine and 2,133 grams of gamma hydroxybutyric acid acid (GHB) in the house. Gautreaux was also charged with drug offenses.

The entire throng of posters in storage before trial

The trial

Gautreaux remained in custody until his jury trial, which started on October 31, 2011, in the 297th District Court of Tarrant County. Judge David Cleveland, a visiting judge from Mineral Wells who was standing in for Judge Everett Young, presided. Three defense attorneys (Pia Rodriguez, Richard Kline, and Robert Cady) represented Gautreaux, while three of us (Lisa Callaghan, Jim Hudson, and Anna Summersett of the Tarrant County District Attorney's Office), represented the State.

It was apparent to us from the beginning that Gautreaux's most probable defense was going to be self-defense. We thought Gautreaux might argue that he had the right to protect himself, his girlfriend, and his home from intruders and was therefore justified in shooting at the officers. (Indeed, during his opening statement, Kline indicated that Gautreaux had been robbed in January 2010 and believed the people entering his home that morning were robbers.)

A large part of our strategy was figuring out how to address this slippery defense. As we all know, Texans take the sanctity of the home very seriously. Many subscribe to the belief that people have a great deal of discretion in the defense of their own homes. If the defense made a solid argument that Gautreaux was rea-

sonable in believing he was being robbed at the moment of the shooting, the jury might go along with it.

We decided our first course of action was to impress on the jury how obvious it should have been to Gautreaux that the individuals entering the home were in fact police officers, not robbers. The Penal Code provides that a defendant is presumed to know someone is a public servant if he wears a distinctive uniform or badge indicating his employment. Our first thought was to use a mannequin, dressed in typical police raid gear, as demonstrative evidence of how officers physically appear during a warrant execution.

However, as we began our case preparations, we discovered that the Arlington Police Department's crime scene officers had carefully documented the shooting scene with photographs. All of the officers involved in the shooting had been individually photographed shortly after the incident, wearing their tactical gear. Looking at these dramatic photographs, we realized that we already had the ideal evidence to refute Gautreaux's claims. To maximize the effect of the photos, we did not think that the usual 8x10 color print would suffice. We wanted to put the jury in Gautreaux's shoes so that they could see what information he had in front of him when he chose to shoot it out with the TCNU officers.

Life-size posters

To this end, we needed help. Enter Rhona Wedderien, our office's trial technology specialist. We handed off our idea to Rhona, and she ran with it. After showing her our photos and describing our goals, she asked us to get each of the officers' height measurements, and she arranged to have each officer's photo enlarged to the officer's actual height. She located 8-foot-tall pieces of foam board and found a way to have each officer's image cropped down to the silhouette of the officer's body. She then had the cutout posters fitted with simple cardboard props to make them stand up independently.

The result, frankly, was breathtaking. The life-size posters all depicted the officers in their tactical vests with "POLICE" marked on them in large, white letters. Most of their badges were visually obvious. Several officers also had the word "POLICE" down the arms of their shirts. The physical height of the posters was extremely intimidating.

The life-size images of the officers, in all of their tactical gear glory, took up quite a bit of space. We stored them in prosecutor Jim Hudson's office for several days prior to the start of the trial. He found it difficult to even get to his desk (let alone the shock of walking into a room full of officers in raid gear everyday). In the following days, the posters became local celebrities in the office. A lot of people stopped by to see them and, in some cases, have their picture taken with them.

During the trial, as the officers testified, we had each "announce" his or her identity in court in the same bellowing manner as they did in the defendant's house that morning. We then had each officer authenticate his or her poster and position it the same distance from the jury box that the officer had been from Gautreaux during the shoot-out.

There were a multitude of questions from the defense challenging the level of light in the house, suggesting that Gautreaux could not see the officers clearly. However, the life-size posters in the courtroom made it clear at every turn how ridiculous that argument was. The posters took up most of the free space in the courtroom and demonstrated that, even in the lowest lighting, they would have been visible. We made a point of dimming the lights in the courtroom during our PowerPoint slideshows to make sure the jury could see the posters in less-than-ideal lighting.

After a two-hour deliberation, the jury agreed with our position and found Gautreaux guilty of aggravated assault on a public servant and possession of a controlled substance over 400 grams with intent to deliver. We spent another day in the punishment phase of the trial proving up Gautreaux's criminal history and his 2005 pending drug cases. Jurors deliberated for another hour before returning a verdict of life on the aggravated assault case and 75 years with a $25,000 fine on the possession case.

We would like to thank the Tarrant County Narcotics Taskforce and the Arlington Police Department for the job they do in the most difficult of circumstances. Also, a special thanks to our trial technology specialist, Rhona Wedderien. It was a job well done and a case worth *posting* about.

And, if you're wondering about the posters, the narcotics officers kept them as souvenirs at the conclusion of the trial. ❇

A primer on objec-

How to make them correctly and make them count

At first glance, the subject of objections seems relatively uncomplicated: The defense attorney does something wrong or quirky and the prosecutor objects to set things straight. Or the State does something that defense counsel disapproves of, he objects in protest, and we defend or amend our actions accordingly. While responding to a defense attorney's objections can be tedious—especially in the middle of a smooth-flowing examination of a witness—making our own objections seems easy and maybe even fun. After all, objections and their aftermath often form the most dramatic parts of courtroom scenes in the movies for a reason: They are exciting!

By Melissa Hervey
Assistant District Attorney in Harris County

As simple as objections may appear to be, if not done correctly they can become very troublesome, possibly resulting in the reversal of a hard-fought conviction. Here's a primer on how to properly make objections.

The purpose of objections

Appellate courts require proper objections for two general reasons: first, to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it, and second, to afford opposing counsel an opportunity to remove the objection or supply other evidence. Stated more broadly, objections promote the prevention and correction of errors.[1]

Aside from keeping the case on track, a proper objection is also essential to preserving error for appeal.[2] While defendants initiate most direct appeals and writs, the State has the right to appeal in select circumstances.[3] Because the points of error presented in a State's appeal must correlate to the objections the State raised at trial or in a suppression hearing,[4] prosecutors must know when to object and how to do so properly.

There are also circumstances where the State's failure to make a needed objection may have dire consequences. A prime example of this is during the charge conference. The general rule is that a defendant is not entitled to defensive instructions in the jury charge if he fails to properly request them[5] (by providing his proposed instruction to the court in writing, or by dictating it into the record).[6] However, the defendant is absolutely entitled to certain jury instructions when the issues are raised by the evidence, even if neither the State nor the defense requests that the instructions be included (e.g., voluntariness of the defendant's statements,[7] corroboration of a jail-house informant's testimony,[8] corroboration of accomplice-witness testimony,[9] etc.). If the trial court fails to include an applicable, necessary instruction in the jury charge on its own, appellate courts will declare the omission to be error and will then review the mistake for "egregious harm" if the defense did not request the instruction.[10] Though reviewing courts may not always find that a defendant suffered egregious harm in such a situation, if a court does so in your case, it will be reversed and remanded for a new trial[11]—requiring the State to repeat all of the work and time already devoted.

Proper objections

So what is a proper objection? To appropriately object and preserve the contention for appellate review, the record must show that: "1) the complaint was made to the trial court by a request, objection, or motion that was timely and sufficiently specific to make the trial court aware of the grounds of complaint, and 2) the trial court ruled adversely (or refused to rule, despite [further] objection)."[12] For an objection to be considered timely, it should be made, if possible, before the contested evidence is actually admitted.[13] If that is not possible, the objection must be made as soon as the objectionable nature of the evidence becomes apparent to the complaining party.[14]

Though there are no particular "magic words" to make a proper objection,[15] a valid objection must be specific enough to notify the trial court of the nature of the complaint

and must be "sufficiently clear to provide the trial judge and opposing counsel an opportunity to address, and, if necessary, correct the purported error."[16] "References to a rule, statute, or specific case help to clarify an objection that might otherwise be obscure, but an objection is not defective merely because it does not cite a rule, statute, or specific case."[17] However, a "general or imprecise objection may be sufficient to preserve error for appeal, but only if the legal basis for the objection is *obvious* to the court and to opposing counsel."[18]

Then, even after a timely and specific objection is made initially, the work is not over. The complaining party must renew his objection each time the challenged evidence is offered or addressed or obtain a running objection from the trial court on that basis; failure to do so will result in waiver of the issue on appeal.[19] Typically, a timely request for a running objection will preserve error "as long as it does not encompass too broad a subject matter during too broad a time or over different witnesses."[20] Though a running objection covering one particular subject matter—but extended over several witnesses—preserved error in at least one case,[21] the safest course of action is to re-urge or renew objections to contested evidence with each subsequent witness that introduces it.[22] While a renewed objection to challenged evidence must be made each time that evidence is offered, if the judge hears and overrules an objection to evidence out of the presence of the jury, that objection does not have to be repeated or re-ruled-upon in front of the jury—when the evidence is actually presented—to preserve error on the issue.[23]

Improper objections

Courts of appeals generally adopt a flexible stance when determining whether a particular objection is proper and sufficiently specific; however, courts have invalidated a number of particular objections over the years, including:

- "invading the province of the jury"[24] or "asking the witness to testify regarding an ultimate issue"[25];
- "bolstering"[26];
- "lack of foundation" or "improper predicate has been laid"[27];
- "prejudicial"[28];
- "recognizing one witness as a qualified expert would essentially make all employees in the same organization qualified experts on the same matters"[29];
- "that exhibit is not accurate";[30] and
- "improper argument."[31]

If the trial court sustains an objection and excludes certain evidence, to demonstrate that the court's failure to admit the evidence was error and preserve the complaint for appellate review, the objecting party must either perfect an offer of proof or a bill of exceptions, or establish that the substance of the excluded evidence was apparent from the context within which the evidence was presented.[32] An offer of proof may be in the form of a question-and-answer dialogue between the proponent of the evidence and the witness, or it may be an informal bill of exceptions that contains a concise statement or summary of what the proponent believes the evidence would have shown.[33]

However, as with objections, an offer of proof or bill of exceptions that is so generalized or vague that it fails to inform the trial court and any reviewing court of what the excluded evidence would have consisted of is inadequate to preserve error.[34]

An offer of proof may be deficient because the defense attorney "failed to provide the trial judge with a concise statement regarding the content of the testimony he proposed to elicit from the witness" regarding that issue.[35] Accordingly, although an offer of proof or bill of exceptions need not recite verbatim the proposed (but excluded) testimony, it must at least reasonably summarize what such evidence would establish.[36]

Prosecutors should also be careful not to mistake raising an issue through a pretrial motion *in limine* for a proper, error-preserving objection. True motions *in limine* are administrative instruments whose "fundamental purpose … is to obtain an order requiring an initial offer of objectionable evidence outside the jury's presence"[37]—not to obtain an immediate and final ruling on the admissibility of the evidence.[38] However, even if a trial court does make a ruling on a matter raised in a motion *in limine*, that decision is merely preliminary because the court generally cannot effectively evaluate the contested evidence in context before it is actually introduced.[39] Further, because a trial judge is free to reconsider his initial ruling on a motion *in limine* throughout the course of the trial, a "motion *in limine* … normally preserves nothing for appellate review,"

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regardless of whether it was granted or denied.[40] To preserve error regarding the subject of a motion *in limine*, the complaining party must object (and re-object as necessary) when the issue is raised or when the evidence is offered in trial.[41] Thus, while motions *in limine* can be an important tool to help address troublesome matters outside the jury's presence (e.g., requiring the judge to evaluate whether the defense attorney may impeach a State's witness with a questionably admissible prior conviction before the damaging information reaches the jury's ears), they must not be relied upon as an appropriate substitute for timely and specific trial objections.

Anticipate objections

In practice, as prosecutors prepare for trial we will probably be able to anticipate many objections that a defense attorney might raise to oppose State's evidence. For example, in prosecuting a defendant for aggravated robbery where the State will want to prove identity by admitting evidence of previous aggravated robberies the defendant has committed with a substantially similar *modus operandi*, prosecutors should anticipate and prepare for the defense attorney's probable objection to any such evidence on the basis of Texas Rules of Evidence 404(b) and 403.[42] Additionally, in preparations, try to identify areas of the case where the State might have to object as the facts unfold. For instance, in an assault case, the prosecutor should expect and prepare to ward off the defense attorney's likely attack on the complainant's credibility or character, which could arrive in various forms, such as impeachment with evidence of the witness's prior inconsistent statement,[43] bias or interest,[44] criminal conviction,[45] or untruthful character.[46]

Knowing the applicable rules of evidence and procedure associated with all of the issues identified ahead of trial is certainly a prosecutor's best weapon in the war of making and responding to objections. By anticipating any potential problems with a case at an early stage, we have time to think through and formulate the timely and specific objections or responses that might be made in trial. Because trying to perform more than a cursory Lexis or Westlaw search in the middle of trial or a contested hearing can be very difficult and vexing, early detection of trouble spots will also enable prosecutors ample time to research the issues to find any cases that support the State's position and will ease the trial judge's concerns about error and reversal.

Conclusion

While objections are often not as simple as they may seem, they can still be a fun and rewarding part of the trial experience for everyone involved (yes, even for appellate prosecutors) when done properly. In summary, making timely and specific objections will make courts very glad. Best of luck and happy trials! ❇

Endnotes

1 *Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002) (quoting *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977)).

2 *Tucker v. State*, 990 S.W.2d 261, 262 (Tex. Crim. App. 1999); see Tex. R. App. P. 33.1.

3 See Tex. Code Crim. Proc. art. 44.01(a)–(c).

4 In a defendant's appeal following a trial court's ruling to deny the defendant's motion to suppress evidence, the trial court's decision will be upheld if it is supported by any applicable theory of law, even if that theory was not advanced by the State in the motion to suppress. See *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); see also *Martinez v. State*, 91 S.W.3d 331, 335-36 (Tex. Crim. App. 2002) (stating that Texas Rule of Appellate Procedure 33.1 and Texas Rule of Evidence 103 are "judge-protecting rules" which emphasize "party responsibility"—meaning that "the party complaining on appeal (whether it be the State or the defendant) about a trial court's admission, exclusion, or suppression of evidence 'must, at the earliest opportunity, have done everything necessary to bring the judge's attention to the evidence rule [or statute] in question and its precise and proper application to the evidence in question.'" (quoting Stephen Goode, et al., *Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal,* §103.2 at 14 (2d ed. 1993)) (parenthetical in original)).

5 See *Oursbourn v. State*, 259 S.W.3d 159, 179 (Tex. Crim. App. 2008); *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007) ("The trial judge has an absolute sua sponte duty to prepare a jury charge that accurately sets out the law applicable to the specific offense charged. But it does not inevitably follow that he has a similar sua sponte duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues. These are issues that frequently depend upon trial strategy and tactics"); *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App.1998) (trial court has no affirmative duty to instruct the jury on unrequested defensive issues).

6 Tex. Code Crim. Proc. art. 36.14.

7 See Tex. Code Crim. Proc. art. 38.22, §6; *Oursbourn*, 259 S.W.3d at 180.

8 See Tex. Code Crim. Proc. art. 38.075; *Brooks v. State*, 357 S.W.3d 777, 781 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

9 See Tex. Code Crim. Proc. art. 38.14; *Freeman v. State*, 352 S.W.3d 77, 81-82 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

10 *Oursbourn*, 259 S.W.3d at 182.

11 See, e.g. *Freeman*, 352 S.W.3d at 82-87.

12 *Tucker v. State*, 990 S.W.2d 261, 262 (Tex. Crim. App. 1999) (parenthetical in original); see Tex. R. App. P. 33.1.

13 *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); *McMillon v. State*, 940 S.W.2d 767, 769 (Tex. App.—Houston [14th Dist.] 1997,

pet. ref'd).

14 *Id.*; see *Casey v. State*, 349 S.W.3d 825, 834 (Tex. App.—El Paso 2011, pet. ref'd) (the defendant's objection that a female employee of the district attorney's office was seated next to the 12-year-old victim of sexual abuse during the victim's testimony was untimely because the objection was made several minutes into the victim's testimony).

15 *Ford v. State*, 305 S.W.3d 530, 533 (Tex. Crim. App. 2009); see *Rivas v. State*, 275 S.W.3d 880, 887 (Tex. Crim. App. 2009).

16 *Ford*, 305 S.W.3d at 533 (citing *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005)).

17 *Id.*; see *Rivas*, 275 S.W.3d at 887.

18 *Buchanan v. State*, 207 S.W.3d 772, 775 (Tex. Crim. App. 2006) (emphasis in original). When the legal basis for the objection is not obvious from the context, "then reviewing courts should not hesitate to hold that appellate complaints arising from the event have been lost." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).

19 *Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003); see, e.g., *Lane v. State*, 151 S.W.3d 188, 192–93 (Tex. Crim. App. 2004).

20 *Smith v. State*, 316 S.W.3d 688, 698 (Tex. App.—Fort Worth 2010, pet. ref'd); see *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985) (rejecting the defendant's contention that his running objection preserved error when six witnesses testified between when the running objection was originally made and when the challenged evidence was reintroduced), overruled on other grounds by *Hernandez v. State*, 757 S.W.2d 744, 751-52 n. 15 (Tex. Crim. App. 1988); *White v. State*, 784 S.W.2d 453, 461 (Tex. App.—Tyler 1989, pet. ref'd) (holding that a defendant's running objection preserved error with regard to the witness then testifying, but did not extend over the testimony of several subsequent witnesses).

21 See *Ford v. State*, 919 S.W.2d 107, 113-14 (Tex. Crim. App. 1996) (running objection to "any and all impact evidence").

22 See *Sattiewhite v. State*, 786 S.W.2d 271, 283 n. 4 (Tex. Crim. App. 1989); *Goodman*, 701 S.W.2d at 863.

23 *Ethington*, 819 S.W.2d at 858.

24 *Contreras v. State*, No. 12-10-00045-CR, 2011 WL 3273966 at *4 (Tex. App.—Tyler July 29, 2011, pet. ref'd) (mem. op., not designated for publication) (citing *Ortiz v. State*, 834 S.W.2d 343, 348 (Tex. Crim. App.1992)); see *Peters v. State*, 31 S.W.3d 704, 712 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (citing Tex. R. Evid. 704 and *Ortiz*, 834 S.W.2d at 348).

25 See Tex. R. Evid. 704; *Ruiz-Angeles v. State*, 351 S.W.3d 489, 499 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

26 "Bolstering" consists of "any evidence the *sole* purpose of which is to convince the fact-finder that a particular witness or source of evidence is worthy of credit, without substantially contributing 'to make the existence of [a] fact that is of consequence to the determination of the action more or less probable that it would be without the evidence.'" *Cohn v. State*, 849 S.W.2d 817, 821 (Tex. Crim. App. 1993) (citing Tex. R. Evid. 401). Various courts of appeals have held that a general objection to bolstering is not valid because it does not sufficiently inform the trial court of the nature of the objection. See *In re J.G.*, 195 S.W.3d 161, 183 (Tex. App.—San Antonio 2006, no pet.); *Montoya v. State*, 43 S.W.3d 568, 573 (Tex. App.—Waco 2001, no pet.).

27 See *Bird v. State*, 692 S.W.2d 65, 70 (Tex. Crim. App. 1985); *Harris v. State*, 565 S.W.2d 66, 68-70 (Tex. Crim. App. 1978). To properly object on this basis, "Counsel must inform the court just how the predicate is deficient." *Bird*, 692 S.W.2d at 70; *Young v. State*, 183 S.W.3d 699, 704-05 (Tex. App.—Tyler 2005, pet. ref'd); *Hernandez v. State*, 53 S.W.3d 742, 745 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd).

28 *Schwarzer v. State*, No. 02-02-00192-CR, 2008 WL 2404231 (Tex. App.—Fort Worth June 12, 2008, no pet.) (not designated for publication) (internal citation to Tex. R. Evid. 403 omitted).

29 See *Brucia v. State*, Nos. 05-11-00866-CR, 05-11-01312-CR, 2012 WL 2926203 at *5-6 (Tex. App.—Dallas July 19, 2012, no pet. h.).

30 See *Cochran v. State*, No. 05-98-01232-CR, 1999 WL 675438 at *1 (Tex. App.—Dallas Sept. 1, 1999, no pet.) (mem. op., not designated for publication). Though the court in *Cochran* did not explain why such an objection was invalid, it is likely that the argument was too vague or general to alert the trial court and the State as to the defendant's basis for complaint, which could have been that the State had not properly authenticated the videotape, that the State had missed some portion of the predicate to admit the evidence, etc.

31 *Miles v. State*, 312 S.W.3d 909, 911 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd); see *Hougham v. State*, 659 S.W.2d 410, 414 (Tex. Crim. App. 1983).

32 Tex. R. Evid. 103; see *Guidry v. State*, 9 S.W.3d 133, 153 (Tex. Crim. App. 1999).

33 See *Love v. State*, 861 S.W.2d 899, 901 (Tex. Crim. App. 1993) ("An informal bill will suffice as an offer of proof when it includes a concise statement of counsel's belief of what the testimony would show"); *Bundy v. State*, 280 S.W.3d 425, 428-29 (Tex. App.—Fort Worth 2009, pet. ref'd) ("Error may be preserved by an offer of proof in question and answer form or in the form of a concise statement by counsel" which "must include a summary of the proposed testimony").

34 See *Love*, 861 S.W.2d at 901; *Bundy*, 280 S.W.3d at 429.

35 *Love*, 861 S.W.2d at 901.

36 See *Love*, 861 S.W.2d at 901; *Duke v. State*, 365 S.W.3d 722, 725-26 (Tex. App.—Texarkana 2012, no pet. h.) ("If an offer of proof is made in the form of a concise statement, the concise statement must include a reasonably specific summary of the proposed testimony")

37 *Delane v. State*, No. 01-10-00698-CR, 2012 WL 340234 at *12 (Tex. App.—Houston [1st Dist.] Feb. 2, 2012, pet. ref'd); see *Norman v. State*, 523 S.W.2d 669, 671 (Tex. Crim. App. 1975) ("The purpose of a motion *in limine* is to prevent particular matters from coming before the jury").

38 *Rawlings v. State*, 874 S.W.2d 740, 743 (Tex. App.—Fort Worth 1994, no pet.)

39 *Norman*, 523 S.W.2d at 671; *Rawlings*, 874 S.W.2d at 743.

40 *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008); see *Griggs v. State*, 213 S.W.3d 923, 926 n. 1 (Tex. Crim. App. 2007).

41 See *Fuller*, 253 S.W.3d at 232.

42 See *Crockett v. State*, No. 01-10-00467-CR, 2011 WL 4925980 (Tex. App.—Houston [1st Dist.] Oct. 13, 2011, pet. ref'd) (mem. op., not designated for publication); see also Tex. R. Evid. 404(b).

43 See Tex. R. Evid. 613(a).

44 See Tex. R. Evid. 613(b).

45 See Tex. R. Evid. 609.

46 See Tex. R. Evid. 608.

CJIS made simple

A discussion of the Computerized Criminal History side of the Texas Criminal Justice Information System

If only it were easy to explain CJIS to criminal justice workers. The concept is simple, but sometimes the implementation is not. That's why for the last several decades, Texas has been trying to figure out how to accurately report individuals' criminal history and collect crime statistics that are uniformly reported across the state. Progress has been made in small baby steps and with legislative "encouragement," but progress is indeed being made. Wouldn't it be nice, in 2020, to be able to run a computerized criminal history with the assurance that the information is both correct *and* complete?[1]

By Jana K. McCown
Assistant District Attorney in Williamson County

The Texas Criminal Justice Information System (CJIS) has two major components, the Computerized Criminal History System (CCH) and the Corrections Tracking System (CTS). The CTS is managed by the Department of Criminal Justice (TDCJ) and will not be examined here.[2] This article is limited in scope to a discussion of the Computerized Criminal History side of CJIS.

If you remember, beginning in the mid to late '80s, prosecutors were just beginning to have personal-sized computers available in the office. It was a far cry from today where you can find a computer in just about every office. In 1989, Chapter 60 of the Texas Code of Criminal Procedure established the requirements for criminal history reporting to the Texas Department of Public Safety (DPS).[3] The Computerized Criminal History System (CCH) was defined as the "data base containing arrest, disposition, and other criminal history maintained by the Department of Public Safety."[4] This is where the printout in a case file showing the arrest, charging, and conviction data for a defendant most likely comes from. Like any database, however, the accuracy of the information in that report depends upon the data input by arresting agencies, prosecutors, and clerks. Combined with the fact that electronic reporting was pretty much nonexistent before 1995 and that dispositions were often handwritten or done by typewriters and mailed to DPS, it's not too surprising that early criminal histories are often a little vague and frequently incomplete.

In retrospect, it appears that the original challenge was to find a way to track an arrest and find out what happened after the arrest. The solution, still in place today, was to assign an incident number for the arrest and a state identification number (SID) for the person arrested. The Incident Tracking Number (TRN) and Incident Tracking Number Suffix (TRS) are the numbers used to link a charged offense from arrest through disposition. If you are not one of the people responsible for reporting to CJIS in your office, it's likely that you have never heard of or thought about how these numbers are used. The TRN is the number assigned to the arrest, and the TRS numbers are used for the individual and sometimes multiple offenses that can be charged during an arrest.

The other number that you have probably heard about but might not know what it means is the offense code. Offense codes are eight-digit numbers (currently) that are assigned to specific criminal offenses. DPS is responsible for maintaining and assigning the offense codes, and a new set of codes is released after every legislative session with some additional updates and changed codes released in between. Offense codes can be helpful in identifying the number of cases with a specific crime involved if you have a computer software program that can pull data using an offense code. It is important, however, that the folks in the local jail or law enforcement agency entering arrest data as well as all others involved in data entry for prosecutors and clerks have a solid,

working knowledge of which codes should be used for a specific offense. Some offenses have several different options depending upon either the degree of the offense, the mental state required, or both. When the incorrect code is used, it is more difficult to accurately determine what happened in a specific case. Many times the only way to be completely certain is to obtain copies of the actual charging instruments and court documents from the county where the offense occurred. DPS doesn't make it any easier by changing codes for the same offense every so often.

The good news

In the early '90s, the federal government provided funds to improve the system through a couple of initiatives. The Criminal Justice Policy Council was mandated by the governor and legislature to plan for improvements and implement the Texas Criminal History Improvement Program (TCHIP) and received grant funds to help with its implementation. Two of the major improvements in the '90s were the introduction of the Live Scan electronic fingerprint identification and reporting systems and the beginnings of electronic reporting to DPS of prosecutor and court disposition records. The latter project was known as the Electronic Disposition Reporting Project (EDR) and was funded by the Criminal Justice Division (CJD) of the governor's office through additional federal grants.[5]

By 2002, however, the Criminal Justice Policy Counsel estimated that only about 60 percent of the dispositions in local courts were present in CCH.[6] Clearly, there was room for improvement. Although the Department of Public Safety was given the mandate to collect the data and maintain these systems, the agency had no ability to discipline anyone for non-compliance. Thus, in 2009 the 81st Legislature began to encourage counties with a reporting disposition percentage under 90 percent to work towards improving those percentages. Article 60.10 of the Code of Criminal Procedure required those counties to create Data Reporting Improvement Plans, which have now been added to the DPS website. These plans required the participating counties to create a local data advisory board and begin a review of their data reporting processes with the goal of increasing reporting. Art. 60.10(g) sunsets the entire article—and the requirement for these boards—as of Sept. 1, 2013, but nothing prohibits these boards from remaining in place to continue to monitor progress in the years to come.

It wasn't until the Governor's Office Criminal Justice Division (CJD) took a step in December 2011 that real progress has been made. CJD issued a memo and sent it to all CJD "grant recipients of future funds." With a single sentence the incentive to report changed significantly and results have been astounding. Here's the sentence:

> Effective September 1, 2012, each county must comply with Chapter 60 reporting requirements in order for the county or any political subdivision within that county to be eligible for grants under CJD's Justice Assistance Grant (JAG) program.

This possible loss of a funding source accomplished what years of encouragement apparently could not. In January 2012, only 55 out of 254 counties in Texas were at an overall percentage for disposition reporting of 90 percent or more for the five-year period of 2006–2010. As a direct result of the CJD memo and with the assistance of CJD and DPS, on August 1, 2012, there were 229 counties that had reached an overall percentage of 90 percent or better for the years 2006 through 2010. In other words, 90 percent of Texas counties are at 90 percent or better!

Where do we go from here?

We keep on working to insure accurate and complete reporting to DPS of our criminal history records. For prosecutors' offices that means reporting charging decisions *on every case*. It also means that county officials must work together to make sure employees have the proper training and knowledge to comply with these requirements. And lest you think about resting, there was one more thing in "the memo."

> Effective September 1, 2013, *any entity, public or private,* in a county that does not report at 90 percent or above will be ineligible to receive grants from any state or federal fund sources managed by CJD. (emphasis added by this author)

If you work in one of the 25 counties still not in compliance, don't despair. Your CJIS representative can help with training and answers about your problem cases. There may even still be some grant funding left to help your county attain compliance.

Why should you care about whether a defendant's criminal history is reported properly? This is really

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more of a rhetorical question. We all know the frustration of not being able to look at the CCH and tell what happened to that previous felony arrest. We have all seen the DWI suspects who missed out on a mandatory blood draw because the law enforcement officer did not know that this suspect had two previous DWI convictions. So many enhancements are dependent upon our ability to find out the defendant's previous history: felon in possession of a firearm, misdemeanors that become felonies because of previous convictions, automatic life for certain sex offenders with previous convictions, and the list goes on.

At the rate technology is improving, it won't be long before a complete criminal history, DNA profile, fingerprint, and bank account numbers can all be found in one database, downloadable to your SIM card, iPad, flash drive, and implantable chip (for those of us who lose things) and scanned onto a driver's license for law enforcement use. But until then, keep taking those baby steps! ❇

Endnotes

1 "Maybe if … we think and wish and hope and pray it might come true," "Wouldn't It Be Nice?" The Beach Boys, *Pet Sounds*, Capitol Records, 1966.

2 *A Brief Guide to the Texas Computerized Criminal History System (CCH)*, Texas Department of Public Safety, August 2003.

3 Added by Acts 1989, 71st Leg., ch. 785, §6.01, eff. Sept. 1, 1989.

4 Tex. Code Crim. Proc. Art. 60.01(3). For years I thought that CCH stood for "complete criminal history."

5 Overview of Texas Criminal History Improvement Program, Criminal Justice Police Counsel, Tony Fabelo, Ph.D., Executive Director, report from January 2001.

6 *A Brief Guide to the Texas Computerized Criminal*

Advanced expunction law

Several months after big changes to the expunction statute, prosecutors are finding themselves with some tricky cases. Here are the answers to some burning questions.

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

Although the expunction statute is not long, it is complex. The statute attempts to create a broadly applicable set of rules that balance the competing interests of a wrongly arrested person wanting to get a fresh start without the stigma of a criminal history, the State's need to preserve records for future use, and the public's right to information. The result is a labyrinth of "if-then" scenarios that challenge the most determined flow-charter. Every time I speak or write on expunctions, there inevitably follow at least a few questions that lead to breaking out pen, paper, and statute to sketch out exactly how an expunction should or should not be granted, or even more often, how an agency complies with an expunction in a particular circumstance.

This article is an attempt to answer a few of the unusual situations that have come up around the state regarding expunctions and somehow always manage to find their way to my in-box. Some facts have been changed to protect the innocent, the guilty, or the confused, but these are all based on real questions that have been faced by those of us struggling to deal with the expunction statute. I hope they provide some guidance to those faced with the same situation—or at least a bit of relief that other people are confronting the same weird problems you are!

Can I object to a discretionary expunction someone else agreed to?

The No. 1 question since discretionary expunctions were created in 2011 has been who can agree to them and who can object to them. A discretionary expunction is where a prosecutor recommends an expunction at any time before the person is tried for the offense, regardless of whether the person would otherwise meet the requirements for an expunction.[1] If more than one prosecutor is authorized to prosecute the case—for example, a theft where

property is stolen in one county and moved to another[2]—then either prosecutor could recommend the expunction. So long as a prosecutor recommends it, the judge may grant the expunction.

But this is a *may grant* expunction, not a *shall grant* like the rest of the expunction statute. Discretionary expunctions are discretionary on the part of the judge as well as the prosecutor. And the same procedural rules regarding notice to agencies and holding a hearing still apply.[3] Thus, another prosecutor's office or any other agency affected by the expunction must receive notice and could object at the hearing to the expunction. It would then be in the judge's discretion to grant the expunction or not.

How does it work if there are multiple charges out of the same arrest?

It is not at all uncommon to have more than one charge result from the same arrest. Perhaps a person is arrested for driving while intoxicated, but he also has marijuana in the car. Ultimately the possession of marijuana is dismissed or reduced to a Class C deferred, but the defendant is convicted of driving while intoxicated. Can he get an expunction of just the marijuana charge?

The short answer to this one is "it depends." There is currently a circuit split on this issue, and the Texas Supreme Court has not weighed in on the question.[4] The First District Court of Appeals in Houston has long held that an expunction order may carve individual offenses out of an arrest and expunge only the ones that meet the expunction requirements,[5] but this seems to go against the expunction statute's focus on the records of "the arrest" rather than "the offense."[6] More recently, the Austin and Waco Courts of Appeals have re-focused on this arrest requirement and held that the *entire* arrest must be able to be expunged to qualify for an expunction.[7] The Austin and Waco approach appears to be a more accurate reflection of the statute, and it is much more practical given the difficulties in expunging one offense when it is intermingled with the rest of the file.

If your jurisdiction allows partial expunction of an arrest, then the records and files associated with *both* offenses should be assembled after the expunction is granted. Any references to the expunged offense must be deleted or redacted from the files of the non-expunged offense. If all records are in a single file, then references to only the expunged offense would be deleted or redacted and the rest of the file would stay the same. A note should be placed in the file explaining that portions of the file were redacted pursuant to an expunction order so that future prosecutors handling the case will know why parts of the file have been redacted.

Can a finding of not guilty by reason of insanity be expunged?

Generally acquittals can be expunged, but does the same rule apply if a defendant was found not guilty by reason of insanity under Chapter 46C? That will depend on the date of the offense. The current insanity defense provides that a NGRI finding is *not* considered an acquittal for the purposes of Chapter 55;[8] thus, a person acquitted under this statute will not be eligible for an expunction.

But Chapter 46C was adopted in 2005 and is applicable only to offenses committed after September 1 of that year.[9] The prior version of the statute simply provided that a person found not guilty by reason of insanity "shall stand acquitted of the offense charged."[10] Thus, a person who committed an offense before September 1, 2005, and was found not guilty by reason of insanity can obtain an expunction as an acquittal.

Can a pretrial diversion be expunged?

Pretrial diversions are becoming more common as prosecutors look for new ways to resolve cases. But can someone completing a pretrial diversion get an expunction?

In the past, a person receiving a pretrial diversion could eventually obtain an expunction as a dismissal, but she would have to wait out the statute of limitations before becoming eligible. In 2009, however, the legislature amended the statute to allow a person an immediate expunction upon completing "a pretrial intervention program authorized under §76.011, Government Code."[11] If your pretrial diversion program qualifies under §76.011—which is the statute authorizing probation departments to supervise pretrial diversion participants and assess fees upon them—the defendant can obtain an expunction as soon as she completes the program.[12]

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Can a case be expunged if the petitioner received judicial clemency after serving probation?

Section 20 of Article 42.12 allows a person who received community supervision to have the verdict set aside and be released from "all penalties and disabilities" of the case.[13] Does receiving judicial clemency under this section mean he can also get an expunction?

No, a person who receives judicial clemency is not eligible for an expunction. A person who received judicial clemency still served community supervision, which bars an expunction, and the order releasing him from "all penalties and disabilities" does not alter that.[14] It is also evident from the judicial clemency statute itself that it was not intended to allow an expunction. Section 20 specifically provides for records of the case to be maintained so that it can be used if the defendant is convicted of another offense or applies for a child-care license.[15]

Can the right to expunction be waived?

A defense attorney is asking for a pretrial diversion for his client, a reduction to a Class C deferred, or a dismissal of some charges for a plea to others. You are otherwise agreeable to the plea, but it would make him eligible for an expunction and you do not think that is warranted in this case. Is there anything you can do?

A defendant may waive his right to an expunction. The right to expunction is purely a statutory privilege, not a constitutional right,[16] and a defendant has the right to waive any right secured to him by law.[17] Therefore, as long as the waiver is done knowingly and voluntarily, a defendant may waive his right to an expunction.[18] This is a good option to give a defendant the benefit of the dismissal or deferred but preserve information the prosecutor believes may be important at a later date, such as a finding of family violence in a Class C assault.

What if I didn't find out about the expunction until after it's been granted?

There may be all sorts of wonderful objections you could raise about a particular expunction, but sometimes unfortunately the first you hear about it is after the order has already been granted. Is there anything you can do? Even if you are outside the usual 30-day limit for filing a notice of appeal, you may still be able to appeal the case as a restricted appeal. Because expunctions are civil, you can file a restricted appeal so long as you file the notice of appeal within six months of the judgment.[19] Only a party who did *not* participate at trial may file a restricted appeal.[20] This type of appeal was formerly called a writ of error.[21]

The one restriction to this type of appeal is that error must be apparent on the face of the record.[22] This includes all papers filed in the case and the reporter's record of any hearing.[23] That means that if no answer was filed or hearing held, then the petition for expunction itself must show that the petitioner was not entitled to an expunction to prevail. But remember that one requirement of expunction is notice to all parties. If the record reflects that the order was granted less than 30 days after the petition was filed or if the court records do not show service to the agencies, then the expunction may be reversed on that ground.[24]

Can a witness testify about her experiences with a case even after an expunction?

A person is charged with assault, but the case is dismissed and ultimately expunged. Later, the same person is charged with another assault against the same victim. In her testimony, the victim mentions that the defendant also assaulted her once before, the expunged case. Is this proper?

The victim's testimony is *not* a violation of the expunction statute (though it may, of course, be inadmissible for various other reasons). An expunction order covers only the records and files of government agencies;[25] it does not cover private entities, and it does not erase a person's memory. A witness may testify about a matter that was expunged so long as she is doing it solely from her own memory or private records.[26] A witness could, for example, testify about what she observed, what she wrote in her own notes, or even from records of a non-governmental agency such as a hospital, therapist, or newspaper. Even a police officer could testify from his memory of past encounters with a defendant. But the witness may *not* refresh his recollection by referring to any records and files of a government

agency such as a police report. (Of course, all of these records should have been destroyed pursuant to the expunction order, so they would not be around for people to refresh their recollections from in the first place.)

If someone is acquitted and gets an expunction, how can I prosecute the *right* defendant if all my records are gone?

The case goes to trial. The defendant is acquitted and promptly obtains an expunction. Except the State has identified "the real killer" and wants to prosecute that person for the crime. How are you going to do that when most of the records of the case are now subject to the expunction order for the first defendant?

There is an exception in the expunction statute for just this situation. Under Article 55.02, §4, the court may order an exception in certain circumstances, including following an acquittal where the records and files are necessary for the investigation and prosecution of another person for the same offense.[27] This exception allows the police and prosecutors to keep their records, while all the other agencies expunge theirs.

Another time a §4 exception might be used includes if the records and files are necessary for prosecution of any person for another offense.[28] Unlike the acquittal exception, this includes prosecuting the expunction petitioner himself. This would be useful if the person is acquitted on the underlying case but a bail jumping or escape case is still pending. The records of the original case would be necessary to prosecute the second one. Also, this applies to civil cases as well as criminal, so a person pursuing a civil wrongful death case could seek to have records retained even if the criminal murder charge is dismissed. The most useful function of this exception is when misconduct arises out of the trial itself: jury tampering, perjury, bribery, or misconduct by the judge or attorneys.

Can non-acquittal expunctions also get a §4 exception?

What if the petitioner got his expunction because his case was dismissed or the statute of limitations ran? Can he still get a §4 exception?

Yes, but the right is more limited. There are two non-acquittal §4 exceptions. First, if a person receives an expunction but is subject to conviction of another offense arising out of the same transaction, his records can also be limited under §4.[29] Under this section, the State must prove that the statute of limitations has not yet run on another offense out of the same transaction *and* that there is "reasonable cause" the person will be prosecuted for the other offense.

Second, the §4 exception is mandatory if the petitioner received an expunction under the waiting period section.[30] This is the section that allows a person to get an expunction before the statute of limitations has run.[31] If the exception were not required, then a petitioner would be able to prevent the State from being able to file a case even within the statute of limitations in a case by ensuring all records and files are destroyed with a waiting period expunction. Thus, the trial court *must* include the exception for a waiting period expunction. The only exception to this exception is if the waiting period expunction was granted under Subsection (d), which allows expunction if the prosecutor certifies the records and files are not needed for the investigation or prosecution of any criminal case.

I'm trying a case with a §4 exception. Now what?

Unfortunately, the statute itself gives little guidance for what happens *after* a §4 exception has been granted. The statute simply provides that the police and prosecutor "may retain" the records and files subject to the expunction order.[32] But confusingly, exceptions for a person subject to prosecution for another offense out of the same transaction are still bound by Articles 55.03 and 55.04, which prohibit the release, dissemination, or use of expunged records. The prosecutor and police would be allowed to "retain" the records but prohibited from "using" them. It is not clear exactly how a prosecutor would be able to pursue a case with this type of exception.

Fortunately, exceptions for acquittals and waiting period expunctions are *not* subject to Articles 55.03 and 55.04.[33] This would seem to suggest that the police and prosecutor can treat these records as if there were no expunction order at all. It would still be wise to limit the use of any records that identify the person who received the expunction. Obviously the current defendant

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would need to be able to receive information about the previous acquittal, but documents introduced into evidence should be redacted of the expunged person's identity whenever possible. Also, the other agencies would still be prohibited from releasing any records on the expunged person. This could result in the current defendant being unable to obtain a transcript of the prior trial or documents from the clerk, which may result in a due process claim. The State should take care to ensure these necessary documents are preserved in *its* file and made available to the defense if necessary.

Someone asked me for an identity theft expunction, but the offense was in another county. Should I send this person to that other county to file a petition?

Other than being called expunctions and being located in Chapter 55, identity theft expunctions have very little in common with other kinds of expunctions. They have their own requirements for qualifying and applying for an expunction. Two differences are where the petition is filed and by whom. Ordinary expunctions are filed in the county where either the arrest or the offense occurred,[34] but identity theft expunctions are concerned with a person who was *not* arrested but whose identifying information was falsely used in another's arrest.[35] An identity theft victim has no connection to the arrest itself, and it may have occurred a long distance from where the petitioner lives, making it a burden for the person to apply for an expunction there. So an identity theft expunction is filed in the county where the petitioner lives.[36]

Also, an identity theft petitioner does not actually file for the expunction himself. He submits an application to the prosecutor responsible for felonies in the county where he resides.[37] After the prosecutor has verified to her satisfaction that the petitioner was not the person arrested (usually by comparing fingerprints), then the prosecutor must file the expunction petition on the petitioner's behalf.[38]

What if I have questions you haven't covered?

I hope that this article has been helpful in providing answers to some of the more unusual expunction questions. I know there are many more questions out there, so please feel free to email me at awesterfeld @co.collin.tx.us. ❇

Endnotes

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

2 Tex. Code Crim. Proc. art. 13.08(a).

3 Tex. Code Crim. Proc. art. 55.02, §2.

4 Remember, expunctions are civil cases. Their appeals ultimately go to the Texas Supreme Court, not the Court of Criminal Appeals.

5 *Ex parte E.E.H.*, 869 S.W.2d 496, 498 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

6 Tex. Code Crim. Proc. art. 55.01(a) ("a person … is entitled to have all records and files relating to the arrest expunged").

7 *Travis County Dist. Atty. v. M.M.*, 354 S.W.3d 920, 928 (Tex. App.—Austin 2011, no pet.); *Ex parte M.R.L.*, No. 10-11-00275-CV, 2012 WL 7633139, at *3 (Tex. App.—Waco Mar. 7, 2012, pet. filed) (not designated for publication).

8 Tex. Code Crim. Proc. art. 46C.155(b).

9 Act of June 17, 2005, 79th Leg., R.S., ch. 831, §5.

10 Tex. Code Crim. Proc. art. 46.03(d) (Vernon's 2005).

11 Act of June 19, 2009, 81st Leg., R.S., ch. 840, §5.

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

13 Tex. Code Crim. Proc. art. 42.12, §20(a).

14 *Tex. Dept. of Public Safety v. J.H.J.*, 274 S.W.3d 803, 808-809 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

15 Tex. Code Crim. Proc. art. 42.12, §20(a)(1) & (2).

16 *Heine v. Tex. Dept. of Public Safety*, 92 S.W.3d 642, 648 (Tex. App.—Austin 2002, pet. denied).

17 Tex. Code Crim. Proc. art. 1.14(a).

18 *In re Expunction of Jones*, 311 S.W.3d 502, 505 (Tex. App.—El Paso 2009, no pet.).

19 Tex. R. App. P. 26.1(c).

20 Tex. R. App. P. 30.

21 Id.

22 *Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *Tex. Dept. Public Safety v. Jacobs*, 250 S.W.3d 209, 210 (Tex. App.—Dallas 2008, no pet.).

23 *Id.*

24 Tex. Code Crim. Proc. art. 55.02, §2(c); *Tex. Dept. of Public Safety v. Arbelo*, 170 S.W.3d 734, 735-36 (Tex. App.—Amarillo 2005, no pet.).

25 Tex. Code Crim. Proc. arts. 55.01, 55.03.

26 *Bustamante v. Bexar County Sheriff's Civil Service Com'n*, 27 S.W.3d 50, 53-54 (Tex. App.—San Antonio 2000, pet. denied).

27 Tex. Code Crim. Proc. art. 55.02, §4(a-2)(1).

28 Tex. Code Crim. Proc. art. 55.02, §4(a-2)(2).

29 Tex. Code Crim. Proc. art. 55.02, §4(a).

An update on the pursuit of fugitives who flee into Mexico

While some new procedures are now required, the Mexican government has never been more willing to help capture and return fugitives hiding in their country back to the U.S. for prosecution.

By Roberto J. Ramos
Director, Foreign Prosecution Unit, 34th Judicial District of Texas in El Paso

When their 4-year-old son joined them in bed, Jesus Terrazas told his wife that he was going to sleep in their daughter's room. Their daughter was 13 years old at the time. Recently, Terrazas's wife had suspected that he was using drugs so, when he left his bed that night she thought he might be going to his daughter's room to take drugs. She followed him into her daughter's bedroom and turned on the light: She saw Terrazas standing next to the bed in his boxer shorts. Their daughter was lying on the bed, crying, with her legs facing her father. His wife then saw that Terrazas had an erection. Furious at what she saw, the police were immediately called and Terrazas was arrested. The investigation quickly revealed that this was not the first time Terrazas had abused his daughter. He was appointed a lawyer, and he rejected a plea offer. He was scheduled to go to trial on April 27, 2007. On that date Terrazas failed to appear in court, and family members feared that he had fled to Mexico. Thus began the hunt and pursuit of Jesus Terrazas in Mexico.

Introduction

In El Paso, the international bridges to Mexico are literally blocks away from some neighborhoods, and the belief that freedom is just beyond those borders is too great a temptation for many criminals. Recently the suspect in a triple homicide, who had fled from El Paso to Mexico after the killings, walked across the bridge from Ciudad Juarez, Mexico, and turned himself in to startled U.S. Custom officers less than a week after the crime.

This conscientious act, however, is extremely rare. More commonly fugitives have to be rigorously pursued deep into Mexico. To track down those fugitives, the El Paso

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

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

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

33 Id.

34 Tex. Code Crim. Proc. art. 55.02, §2(a).

35 Tex. Code Crim. Proc. art. 55.01(d).

36 Tex. Code Crim. Proc. art. 55.02, §2a(a).

37 Id.

38 Tex. Code Crim. Proc. art. 55.02, §2a(c).

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County District Attorney, Jaime Esparza, created the Foreign Prosecution Unit. In the eight years of its existence, the unit has established close working ties with the Department of Justice (DOJ), Office of International Affairs (OIA), U.S. Marshals Service, and Federal Bureau of Investigation (FBI); it has also established a solid working relationship with Mexican prosecutors in the various PGR (the Mexican equivalent of the Attorney General) offices throughout the country and in Mexico City, and with the Mexican Consulate's Office in El Paso. The good news is that any DA's office can also look to any of these agencies for help in locating, arresting, and extraditing fugitives who are hiding in Mexico.

Extradition treaty with Mexico

In May 1978, the United States signed an extradition treaty with Mexico, which went into effect on January 25, 1980.[1] The treaty's appendix lists the extraditable offenses; in addition, Article 2 of the treaty states that willful crimes that fall within any of the clauses of the crimes listed in the appendix are also extraditable. An intentional crime punishable by at least one year in jail may also be extraditable.

Article 3 of the treaty sets out the evidence required to successfully obtain an extradition. This article states that the extradition shall be granted only if the evidence is sufficient, according to the laws of the requested party, for committing the defendant to trial. It has been my experience, however, that the case must be fairly strong. Even though many weak cases have been successfully tried, for extradition purposes, a weak case may not pass the scrutiny of the Department of Justice. The treaty also sets out the required documents, and those can be found in Article 10. Article 10 also sets out extradition procedures.

In short, the treaty is composed of 23 Articles and an Appendix and should be read carefully before an extradition is pursued. Since the treaty's inception, Mexico has been an excellent partner in the pursuit of fugitives hiding within its borders.

First things first

To pursue an extradition from Mexico, one must first have an address for the fugitive in Mexico. This may seem like an odd requirement, but the U.S. Marshals Service or the FBI can assist in this matter. Both agencies have offices in Mexico City, and both are well-connected and have ample sources in Mexico that can yield an address for the fugitive. Also, the Procuraduria General de la Republica of Mexico (abbreviated PGR; this is the attorney general's office) can help. The PGR has five offices in the U.S., any one of which can be contacted for assistance. People there are always willing to help.

Once an address for the fugitive is obtained, the first step is to request a Provisional Arrest Warrant (PAW). This is a warrant issued by the Mexican authorities pursuant to the treaty. A state warrant from Texas or any other state in the U.S. is not valid in Mexico.

Provisional arrest warrant

To request a PAW, the Department of Justice requires a certified copy of a capias, certified copy of the indictment, and draft of the extradition package. This last requirement, the draft of the extradition package, previously was not required in seeking a provisional arrest warrant. But these days, DOJ likes to have a draft of the extradition package to expedite the process.

DOJ will review all of the affidavits and documents submitted in the package; therefore, the draft must contain all of the necessary affidavits (unsigned—more on why later), and all the other required documents and evidence. DOJ will review the package carefully, and once it is satisfied that there is enough evidence to move forward, officials there will request the PAW.

Armed with a PAW, the Mexican Federal Police will arrest the fugitive in Mexico. Once this occurs, the clock begins to run on the requirement that the formal extradition package be delivered to the Mexican authorities within 60 days of the fugitive's arrest, or the fugitive will be released.

Extradition package

Every extradition package is likely to look different. Much will depend on the type of case, the facts of the case, the witnesses involved, and other details. Nevertheless, every extradition package will contain some basic documents and generally will be assembled as follows:

1) Prosecutor's affidavit (an explanation of the laws and statement of the case)
2) Exhibit A: Certified Copy of the

Indictment
3) Exhibit B: Certified Copy of the Arrest Warrant
4) Exhibit C: Relevant Statutes
5) Exhibit D: Affidavit of Case Agent (a detailed accounting of the investigation)
- Attachment 1: Photo of Defendant
- Attachment 2: Fingerprints of Defendant
- Attachment 3: Medical Records or Autopsy Reports

6) Exhibit E: Declaration of Witnesses
- Attachment 1: Witness Statement
- Attachment 2: Photo of Defendant

When I put my first extradition package together in 2005, I gathered the witness statements and police supplements from the original police file, and we had those documents certified at the police department. Along with the other basic documents listed above, that was essentially our extradition package. That was the extradition of Richard Flores, a man who murdered his common-law wife. Flores's extradition moved quickly and seamlessly through the diplomatic channels of both the United States and Mexico. In fact, Flores was back within six months after the extradition was requested.

Things have changed. Today, DOJ is requiring "new" witness declarations (affidavits). The witness statements taken by police that may already exist in a file may not be enough for purposes of an extradition from Mexico. As a result, investigators must now contact witnesses during the preparation of the extradition package and have them ready to come in to sign a new affidavit. Also, at least one of the declarations must be from a witness who can identify the defendant through an attached photo as the perpetrator of the crime. Once the folks at DOJ have a copy of the draft, they will thoroughly review all of the affidavits. They may make suggestions on the wording of one of the affidavits or have questions about the case that must be addressed in the overall package. The affidavits should not be signed until after everything is approved by DOJ. A prosecutor's affidavit and the case agent affidavit are signed in front of a district judge. Witness declarations are generally signed in front of a notary. According to the DOJ timeline, the agency prefers to have all properly executed extradition documents within 42 days of the arrest date of the fugitive. Currently DOJ is requiring two original packages and six copies.

Translating the package

The entire extradition package must be translated into Spanish for the prosecutors, judges, authorities, and defense attorneys. Be assured that each Mexican official will carefully scrutinize every document in the package; therefore, the importance of the quality of the translation cannot be over-emphasized—the extradition package must be handed over to a professional translator. (DOJ can have the package translated but that is likely to cost twice as much as shopping around for your own translator.)

The extradition process

The decision on whether to extradite a fugitive back to the United States is made by the Secreteria de Relaciones Exteriores (SRE). The SRE will seek an advisory opinion from a federal judge on whether the extradition should be granted. If the judge finds some reason why the extradition should be denied, the SRE can address those concerns and still grant the extradition. On the other hand, if the SRE grants the extradition, the defendant can challenge that decision by filing an *amparo*.

The *amparo* operates much like a habeas corpus proceeding in our laws. In Mexico, an *amparo* can be used to challenge practically every aspect of the legal proceedings against an individual. For example, an *amparo* can challenge the propriety of an arrest warrant, search warrant, or even the charges against a person. Once a case reaches the trial stage, an *amparo* can challenge a judge's decisions during the course of the trial. If an *amparo* is filed during a trial, the proceedings are stayed until the issues raised in the amparo are resolved. Those issues will be addressed and resolved by an *amparo* court, that is, a court separate and apart from the court presiding over the case in chief.

Likewise, if the decision to grant an extradition is challenged by an *amparo*, the extradition is stayed until the *amparo* is resolved. If the *amparo* court finds merit in the issues raised by the *amparo*, the SRE can cure the issues or possibly appeal the decision to a higher court. A fugitive will not be extradited if there are any unresolved amparos pending

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in court. In fact, one of the last things that INTERPOL does before handing the fugitive over to U.S. authorities is to make sure no *amparos* are pending.

The arrest and extradition of Terrazas

A provisional warrant was issued for Jesus Terrazas on February 26, 2009. Unlike other cases we have worked on, his arrest was rather uneventful. With the assistance of the U.S. Marshals Service, Terrazes was located in Choahuila, Mexico. He was arrested on November 12, 2010, and he was extradited on April 8, 2011. Terrazas was tried in June 2012. The prosecutors, Lisa Clausen and Holly Rodriguez, did an excellent job. He was found guilty and sentenced to 60 years in prison. The U.S. Marshals Service and FBI have always helped to show flight in an extradition case that goes to trial; one of the case agents from the U.S. Marshals Service testified at the trial.

A final word on extraditions

It is important to contact DOJ to discuss the latest instructions and requirements on extraditions. For example, on drug cases, DOJ has begun to require at least one civilian witness, which can be difficult if a drug bust did not involve a civilian. Also, in the last two post-conviction extradition cases we did (extradition to serve out a sentence), rather than request the PAW after approving the draft of the extradition package, DOJ asked that we submit the formal package, and then DOJ requested the PAW.

Alternatives to an extradition

Deportations

A deportation is the fastest way to get a fugitive back from Mexico. The fugitive cannot be a Mexican citizen, however, because Mexico will not deport one of its citizens. Also, when a deportation occurs, there are no political strings attached. For example, to get a capital murder suspect *extradited*, assurances have to be given to Mexico that the death penalty will not be applied to the case. This is not necessary in a deportation. Another benefit might be getting around the specialty rule, which states that a fugitive can be tried only for the offense for which he was extradited. There are exceptions, but basically the rule is not a concern in a deportation.

Once the Mexican authorities decide (more often than not, they are convinced through on-the-fly negotiations with U.S. agents working the case) to deport someone, it can take between two and six hours before the paperwork is complete. Once that occurs, U.S. law enforcement officers want no further delays in getting their hands on the suspect. This is where our city's proximity to the border can be an asset—no flight arrangements have to be made. In two recent murder cases the deportation out of Ciudad Juarez culminated with Mexican authorities taking the suspects to one of the international bridges in downtown El Paso and literally turning him loose on their side of the bridge while U.S. law enforcement officers waited anxiously a few yards away on the U.S. side.

Article 4 prosecutions

Under Article 4 of the Federal Mexican Penal Code, Mexico will arrest and prosecute a fugitive for crimes committed outside its border if the perpetrator or victim is a Mexican citizen and if the subject is found in Mexico. This can be a very useful alternative to an extradition when the witnesses are all in Mexico, where perhaps there is a Mexican statute that might improve the probability of conviction, or, as I have seen, when the witnesses no longer want to go through the ordeal of a trial.

Conclusion

We share a lengthy border with Mexico, a border that is still perceived by criminals as the gateway to freedom. Because of the hard work of many federal and local agencies on both sides of the border, that notion is now an illusion.

Whether by extradition, deportation, or an Article 4 p39rosecution, justice demands that fugitives be held accountable for their crimes even if the trail to their capture leads into Mexico. The tools and the means for their arrest and extradition are already in place and should not be overlooked. ❇

Endnote

1 The treaty is available online at http://sitemaker.umich.edu/drwcasebook/files/u.s.__mexico_extradition_treaty.pdf.

Victim allocution statements

Different from Victim Impact Statements, these opportunities for certain victims to address the defendant are limited in scope but powerful in word. Here's a primer on when they're appropriate.

By Deanna Belknap
Assistant County Attorney in Hood County

I currently have a victim of two violation-of-protective-order cases with the same defendant. There's a long history between the victim and defendant and thankfully, she is actually done with her violent man. Early on in her cases, when we thought he was going to plead, she told me she wanted to make an oral statement in court after he pled. As a misdemeanor prosecutor, I am pretty familiar with Victim Impact Statements (VISes) under Article 56.03 of the Code of Criminal Procedure, but in the four years I've been prosecuting misdemeanors, I've never actually had a victim tell me she wanted a chance to come to court and say something. (Usually I'm trying to convince victims of family violence to come to court!) So when she told me this, I intelligently said something like, "Uh, really? Wow! Really? OK—let me look into it."

I had to first get it into my head that the right to speak she was talking about wasn't the same as her testimony in the punishment hearing. She wasn't talking about testifying in a question-answer form as to all the bad things the defendant had ever done to her; rather, she was talking about giving him a piece of her mind. So I pulled out TDCAA's *Victim Assistance Manual* and started reading about victim allocution, a.k.a. the victim's right to speak after punishment.[1]

Article 42.03(1)(b) of the Texas Code of Criminal Procedure is the guiding statute, specifying to which victims this right applies and what they can talk about. After reading up on the subject, I was sad to tell my victim that the statute didn't apply to her because she technically didn't qualify as a "victim" for this purpose. Article 42.03 states in part that "the court shall permit a victim, close relative of a deceased victim, or guardian of a victim, as defined by Article 56.01 of this code, to appear in person to present to the court and to the defendant a statement of the person's views about the offense, the defendant, and the effect of the offense on the victim." Article 56.01 defines a victim as a "person who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child; elderly individual; disabled individual; or [a person] who has suffered personal injury or death as a result of the criminal conduct of another." Well, I had a victim of two violations of a protective order, and although she has suffered personal injury at the hands of this defendant, it wasn't related to the cases I was prosecuting. So I directed her back to the victim impact statement.

Even though my victim in these violation-of-protective-order cases is not allowed to give an allocution statement, I did some further reading on the subject in anticipation that maybe in the future I will have a victim who qualifies and I can be ready with a truly intelligent response. Let's briefly look at the difference between the victim impact statement and the victim allocution statement.

Victim Impact Statement

- Article 56.03, Tex. Code Crim. Proc.
- Written statement
- Provided to prosecutor and judge
- Contains information about the impact of the offense on the victim with respect to physical, psychological, and financial injuries
- Court must consider after defendant is convicted or pleads guilty or no contest and before imposing sentence
- Defendant has right to notice and may rebut or cross-examine the information in the statement

Victim Allocution Statement

- Article 42.03, Tex. Code Crim. Proc.
- Oral statement
- Made to judge and defendant

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- Includes victim's personal views on the offense, the defendant, and the effect the offense has had on the victim
- Made after sentence is pronounced
- Typically includes very personal testimonies from the victim and family members regarding the pain and suffering the defendant has caused them
- Forum for family members to talk about the victim, her accomplishments, and her lost hopes and dreams
- Forum for victims and family members to condemn or forgive the defendant
- Defendant has no right to respond

Texas caselaw gives us minimal guidance on victim allocution statements. In *Johnson v. State*, the issue addressed by the court is the timing of the statement.[2] The court found that the meaning of Article 46.03 is pretty clear: Victim allocution statements can be made only after sentencing is pronounced; therefore, a judge can't go back and alter sentencing based on what he's heard as an unsworn, un-cross-examined victim allocution statement.[3] The judge in *Johnson* did just that by adding jail time to a probation sentence that was already pronounced after hearing the victim's allocution statement. The Court of Criminal Appeals said that was unacceptable, reversed, and remanded.

In *State v. Aguilera*, the judge actually *reduced* time from the defendant's sentence after hearing the victim allocution statement.[4] The State appealed on the issue of plenary power, and the appellate court reversed the trial court, remanding the cause for reinstatement of the sentence. However, the Court of Criminal Appeals reversed the appellate court and reinstated the reduced sentence. The court noted that the State raised only the plenary power argument, not that the modification was based on an improper consideration of the victim allocution statement and therefore could not address the allocution issue. (That argument likely could have changed the outcome of the case.) The dissent in *State v. Aguilera* felt it worth addressing the fact that the judge changed the sentence after hearing the allocution statement and discussed the legislative intent of the statute.[5] The dissent also recognized that the original legislative bill permitted victim allocution statements to be made *before* pronouncement of a defendant's sentence, but during the committee hearings concerns arose that victim statements could influence judges and alter punishments, so the bill was amended to allow victim allocution statements only after the court pronounces the sentence.

Of course there are critics out there who argue that the victim allocution statement should be abolished as it is a "superfluous" process wherein victims cannot conduct themselves in a "dignified manner," creating a "frontier justice" atmosphere in which victims are allowed to "lash out" at defendants, and defendants' families must "seek outlets for their frustration."[6] But supporters argue the obvious, that this process allows victims of violent crimes the choice on whether to partake in the process and provides a forum where they, not the defendant, become the focus of the crime.[7] This option, in turn, allows for psychological healing and the ability to regain control over something that has drastically and negatively altered their lives.

I am sure other prosecutors have heard many victim allocution statements. I myself witnessed one that I will never forget. I was observing an attempted murder trial in our county's district court because I had helped with the protective order for these particular victims and felt invested in the outcome of the trial. The father tried to shoot his wife, son, and daughter while they were driving, and the 14-year-old son gave a victim allocution statement. His demeanor was more than dignified, and he exhibited more wisdom and grace than most adults I know are capable of. A number of observers fought back the tears as this young man, who was no longer a child, told his father he'd never understand him but he'd always love him. ❇

Endnotes

1 Some refer to the victim's right to speak after sentencing as "elocution." Perhaps this is an effort to not confuse the victim's right to speak with a defendant's right to speak at sentencing under Art. 42.07, commonly referred to as a defendant's right to allocution. However, caselaw, legal articles, and the index in the TDCAA *Criminal Laws of Texas* manual refer to it as "allocution," and that is how I will refer to it in this article.

2 *Johnson v. State*, 286 S.W.3d 346 (Tex. Crim. App. 2009).

3 *Id.* at 349-350.

4 *State v. Aguilera,* 165 S.W.3d 695, 696 (Tex. Crim. App. 2005).

5 *Id.* at 706.

6 Nicholson, Keith D., "Would you like some salt with that wound?", 26 St. Mary's L.J. 1103, 1995.

7 Morton, Nikki, "Cleaning salt from the victim's wound," 7 Tex. Wesleyan L. Rev. 89, Fall 2000.

Medical records or alphabet soup?

A clip-and-save guide for deciphering jargon and abbreviations from medical records

In preparing for trial, have you ever sat down with mountains of medical and EMS records and dreaded deciphering not only the handwriting but the medical terminology in them?

By K. Sunshine Stanek
Assistant District Attorney, and
Kim Elliott
Investigator, both in Lubbock County

In getting ready for a recent murder trial we did not fully appreciate the wealth of information contained in the records until we sat down with the paramedics who were first on scene.

The facts, in short, were as follows: After stabbing three people, the defendant was transported by EMS for a visible injury to his hand and complaints of a head injury. In a subsequent statement to detectives, the defendant said he did not remember anything after arriving at the victim's house to watch a football game. The first thing he said he remembered was waking up in the hospital. However, the EMS patient assessment report told a much different story.

The defendant told medics he was acting in self defense and his "CC" was pain in his head and hands. He indicated that the only "MOI" he remembered was a blow to his head with a baseball bat. During transport, Medics saw no "S&S" of a head injury, but they documented "superficial lacs" in the webbing of his "rt" hand with minimal bleeding. This injury, we found out later, was caused by the murder weapon slipping while the defendant stabbed his victims.

In addition, the EMS records reflected "No LOC, PERL, and CAOX3"—that is, that he had not lost consciousness, his pupils were equal and reactive to light, and he was conscious, alert, and oriented to 1) person, 2) time, and 3) place. These observations, as explained by the paramedics, quite obviously contradicted the defendant's claim of a head injury.

Not only were we able to use the medical records in our case to prove the elements of the crime, but we were also successfully able to discredit the defendant's story of what had happened at the scene. He testified at trial and was flustered to no end when confronted with the records. Even after sitting through the testimony of the paramedics, he was unable to conform his version of events to reflect what was contained in the paramedics' report. The defense argued self-defense, but ultimately the jury convicted him of capital murder.

In Lubbock County, we have the luxury of an investigator on staff, Kim Elliott, who is also a certified EMT. But without her and/or our local paramedics explaining their occupational jargon, we would be at a loss trying to decipher medical records in preparation for trial—hospital records are instrumental in the successful prosecution of many types of cases. (Remember to obtain not only your defendant and victim's hospital records, but their EMS records as well, if applicable.)

Kim put together the cheat sheet on page 44 to assist other investigators and prosecutors in understanding common medical terms and their abbreviations on medical records. It is useful in an initial review of the records, but do follow up with those who wrote the reports for further and contextual explanation, as this is not a comprehensive list of abbreviations but rather those we have seen most frequently. In addition, the following websites are also helpful and were used in compiling the attached information:

- www.emory.edu/EEMS/MedicalTerms.html
- www.upstate.edu/hospital/patients/glossary.php
- www.medterms.com/script/main/art.asp?articlekey=9210
- www.jointemsprotocols.com/Approved-Medical-EMS-Abbreviations. ❇

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Common medical abbreviations

AMA—against medical advice
BLS—basic life support
BM—bowel movement
CAOX3—conscious, alert, oriented to person, place, and time (no decreased level of consciousness)
cc—cubic centimeters
CC—chief complaint
c/o—complaint of
CPAP—continuous positive airway pressure
DA—drug abuse
D/C—discontinue
DCAP-BTLS—deformities, contusions, punctures/penetrations, burns, tenderness, lacerations, swelling
DOB—date of birth
DX—diagnosis
ENT—ear, nose, and throat
FX—fracture
GSW—gunshot wound
H/A—headache
HEENT—head, ears, eyes, nose, throat
I & D—incision and drainage
IV—intravenous. The delivery of fluids and/or medication into the blood stream via a needle inserted into a vein
LOC—loss of consciousness or level of consciousness
MVA—motor vehicle accident
MOI—mechanism of injury; manner in which injuries occur; actions or objects that cause trauma injury to a patient
N&V—nausea and vomiting
PERL—pupils equal and reactive to light
R/O—rule out
ROM—range of motion
Rt—right
Rx—prescription, treatment, or therapy
s̄—without (sine)
S&S—signs and symptoms
SL—sublingual (under the tongue)
SOB—shortness of breath
Stat—immediately (statim)
Sx—symptoms
T—temperature
TPR—temperature, pulse, respirations
TX—treatment
VS—vital signs
WNL—within normal limits
yo—year old

Common medical terminology

Anterior—front
Antiemetic—medication to control vomiting
Caudad—toward the feet, opposite of cranial
Crackles—low-pitched bubbling sounds produced by fluid in the lower airways; often described as either fine or coarse
Cranial—toward the head
Cyanosis—slightly bluish, grayish, slate-like, or dark purple discoloration of the skin caused by a deficiency of oxygen and excess of carbon dioxide in the blood
Diaphoretic—sweating
Distal—the most distant of two or more things; opposite of proximal
Dorsal—the back
Emesis—vomit
Febrile—denoting or relating to fever
Glasgow Coma Scale—standardized rating system used to evaluate the degree of consciousness impairment based on eye opening, motor response, and verbal response; points are scored
Hyper—above or high
Hypo—below or low
Inferior—below; opposite of superior
Intubation—the insertion of a tube into a hollow organ such as the trachea (to get air to the lungs)
Lac—laceration
Lateral—typically refers to the outer side of a body part; opposite of medial
Medial—towards the middle
Narcan—(naloxone) reverses the effects of other narcotic medicines; may be used to treat narcotic drug overdose
Patent airway—an open, unblocked airway
Perfusion—state of adequate supply of oxygen and nutrients to the tissues; ability of the circulatory system to distribute blood containing nutrients and oxygen to the tissues
Pertinent negative—absence of a sign or symptom that helps substantiate or identify a patient's condition
Pertinent positive—presence of a sign or symptom that helps substantiate or identify a patient's condition
Posterior—behind
Prone—lying face down
Proximal—toward the beginning, the nearer of two or more items; opposite of distal
Rales—a crackling or bubbling sound in the lungs
Shock—failure of the circulatory system to perfuse tissues
Stridor—abnormal, high-pitched, musical sound caused by an obstruction in the trachea or larynx, usually heard during inspiration
Subcutaneous—under the skin
Superior—above; opposite of inferior
Superficial—on the surface or shallow, as opposed to deep
Supine—lying on the back, face up
Tachycardia—condition in which the heart contracts at a rate greater than 100 beats per minute
Tracheostomy (also referred to as tracheotomy)—an incision made in the neck to allow the passage of air directly into the trachea to reach the lungs
Ventral—the front
Void—urinate

A corporate criminal

An anonymous letter to the Tarrant County Criminal District Attorney's Office prompted a far-reaching investigation that resulted in criminal charges and a conviction against a corporation.

In the fall of 2006, the Tarrant County Criminal District Attorney's Office received an anonymous letter asking officials to look into why so many houses in a suburban subdivision were in foreclosure, vacant, or for sale.

By Melody McDonald Lanier
Public Information Officer at the Tarrant County Criminal District Attorney's Office

"For the past two years, several builders have constructed new homes in Twin Creeks and either allowed them to go to foreclosure or sold them to non-resident buyers," the letter stated. "While builders having new properties foreclosed and investors buying real estate is not particularly unusual, this situation seems exceptional. About a quarter of the homes in the subdivision (approximately 25 out of 100) may be touched by various parts of this situation."

The letter landed on the desk of Assistant Criminal District Attorney David Lobingier, who is assigned to the Economic Crimes Unit and, at the time, was in charge of reviewing citizens' complaints.

"I hadn't ever received such a letter before," Lobingier said. "I asked an investigator to get the tax rolls and get a survey and figure out if there is anything to it."

As it turned out, that anonymous letter was like a pulled thread that slowly unravels a garment. It helped uncover a complex, $13 million mortgage-fraud ring and led to the arrests of 20 people, including a rare indictment and conviction of a corporation.

"As the cases evolved, it kept growing and growing, and we uncovered another defendant at every turn," Lobingier said.

Tsunami of mortgage fraud

At the time the District Attorney's Office received the letter, the Economic Crimes Unit was already covered up in mortgage fraud cases. "We were hit with a tsunami of mortgage fraud," recalls Criminal District Attorney Joe Shannon, who was then chief of the Economic Crimes Unit.

In late 2007, the DA's Office hired Brad Wheeler, a retired Senior Supervisory Resident Agent with the FBI who oversaw the Fort Worth office and led a white-collar crime squad, to help handle the mounting caseload. The so-called "Twin Creeks" case was the first one Wheeler picked up.

"I looked at it and nothing was passing the smell test for me," Wheeler said. "The more I looked, the more convinced I was that there was something to it. I really started working the case hard."

Wheeler traced property records, scrutinized documents, and followed the money. His investigation revealed that false information from "straw buyers" was being used to buy homes at inflated prices so a group of people could pocket the illicit proceeds. One woman, Chekeelah Phelps, seemed to be the linchpin of the operation.

"She was the mortgage broker in all of the deals," Wheeler said. "She was the common thread. She was the one who connected the dots."

And while Phelps may have been in the middle of it all, everyone—from the builder and appraiser on down—was on the take. "There were dirty appraisers, dirty borrowers, dirty closers, and dirty developers," Wheeler said. "If the deal doesn't close, then nobody makes money. They all had a dog in the fight. They all wanted it to work because if it worked, everyone left the table with a wad of cash in their pocket."

At the top of the pyramid was Jerry Jordan, a prominent real estate developer who ran Sierra Developers, Inc. and its sister company, Genesis Homes of Texas, LP. Jordan, like other developers in a down economy, was sitting on newly built houses that wouldn't sell. He hooked up with Phelps, who lined up straw buyers to purchase his houses. The prices

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of the houses, meanwhile, were inflated to offset kickbacks.

"The straw buyers never had any intention of living in the homes," Wheeler said. "Phelps would get the buyers, for a fee, to lend their credit and name. It would get the house out of Jordan's company's name and then he was off the hook. He still got the same amount of money from the sale because they got phony appraisals and inflated the price of the home."

For example, if Sierra had a house on the market for $300,000, the company would inflate the price to $360,000 and represent in the closing documents that it was to cover the cost of a renovation or mechanics lien. The additional $60,000 would then be split among the participants in the scheme. The house would end up in foreclosure. In one instance, a hairdresser bought two houses for about $500,000 each on the same day and no one raised an eyebrow.

"It was just blatant," Lobingier said. "It was like daytime armed robbery without a mask."

A novel idea

In January 2010, after an intensive three-year investigation, the grand jury began returning indictments against some of the players in the scheme. When confronted with the evidence, many confessed and started talking.

"We approached at the bottom with all of the straw buyers," Lobingier said. "They had less culpability. They couldn't have made it happen without the broker and the title company. We wanted to get pleas from these people, and then we moved up the food chain to the next level."

Most straw-buyers struck deals and received five to 10 years' probation and a $10,000 fine in exchange for guilty pleas and cooperation. The principals in the scheme received an additional 180 days in the county jail.

One woman, a former title closer, was sentenced to six years in prison, which is being served concurrently with a 78-month federal sentence she received for mortgage fraud. Phelps, for her part, has pleaded guilty to engaging in organized crime and money laundering and awaits sentencing.

Jordan of Sierra Developers, meanwhile, passed away in 2010 before charges could be brought against him individually. But Lobingier had a novel idea, a way to still make his company pay. "I thought, 'They shouldn't benefit from all of this illegal activity. Let's try and indict this corporation.'"

Wheeler liked the idea. "It was a way to ensure that all the time we spent on that aspect of the investigation wasn't in vain," he said. "The least we could do is try and recover some funds."

Dirty deeds don't come cheap

Over the years, Lobingier had contemplated indicting corporations, but the facts never bore it out. "I've investigated doing it before but didn't pursue it because the evidence was too weak or there were questions about their true culpability," he said. "It is not a common tool that is utilized because you seldom have high managerial people committing crimes on behalf of the corporation. Usually they are committing crimes to benefit themselves."

This case was different. "If you have a corporation that is solvent, you can make them account for their crimes in a financial way, which is really the only way to hurt them," Lobingier said.

Lobingier dug in, relying on several provisions to guide his way: Chapter 7 of the Penal Code (§§7.21, 7.22, et. seq.) specifically addresses corporate defendants. Section 12.51 deals with authorized punishments for corporations and associations. Chapter 17A in the Code of Criminal Procedure sets out the rules for charging corporations and how to process them.

On Dec. 15, 2011, a Tarrant County grand jury indicted Sierra Developers, Inc. on one charge of making a materially false statement in writing to obtain property or credit over $200,000. The panel also indicted Genesis Homes of Texas, LP, on a charge of making a materially false statement in writing to obtain property or credit over $200,000.

The accusations were that Jordan used the companies to help generate more than $600,000 in fraudulent loans for the sale of two homes worth far less in the Twin Creeks subdivision. The fraudulent loans were handled through companies Phelps operated.

Under §12.51 of the Penal Code, the indicted companies were facing a huge fine—double the amount of the loss—if they went to trial and were found guilty. (Jail time

is not an option in cases in which a corporation is the defendant.) "If you're talking about a $600,000 loss, that's $1.2 million," Lobingier said. "It could have been over a million dollars if they tried it."

The surviving management of the entities decided not to roll the dice. In July, both sides reached a plea bargain agreement and Sierra Developers, Inc. pled no contest in exchange for a $50,000 fine and the State dismissing the charge against Genesis. As part of the plea bargain, Sierra had to pay the $50,000 upfront. The goal, Lobingier said, was to recoup some of the money for the taxpayers of Tarrant County.

"We had really been unable to get restitution because most of the mortgage companies involved in the scam were now defunct and scattered all over the United States," Lobingier said. "We focused on getting a substantial fine that would go into the general fund and back to the taxpayers of Tarrant County."

On the day of the plea, the defense attorney representing Sierra brought a $50,000 check to the courthouse, along with a financial statement showing this amount was the corporation's net worth. "We, in essence, forced the shareholders to give up their remaining equity in the company," Lobingier said.

Thinking outside the box

Currently, 19 defendants have been convicted for their roles in the scheme and one—Chekeelah Phelps—awaits sentencing. The investigation continues and more arrests are expected.

The elaborate scam was based on greed. The promise of easy money snared people who would otherwise be honest citizens. And if not for the anonymous letter, they might have gotten away with it.

"What that letter did was enable us to get a jump on it and figure out who the title companies and lenders were," Wheeler said. "Most of the mortgage companies, by the time we started working on the case, were out of business. These cases are extremely paper-intensive and go slowly. Some find it to be boring. But when you get the string to pull, sometimes it will unravel rather quickly."

To be sure, the case is not one that the Economic Crimes Unit will soon forget. Not only was it labor intensive and unique, but Lobingier and Wheeler tried something they had not done before.

Lobingier encourages other law enforcement agencies to think outside the box and go after a corporation if the facts support it.

"Don't hesitate to pull that arrow out of your quiver and use it," he said. ❇

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

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

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

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

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

Spousal privilege and common law marriage

Sometimes defendants will claim common-law marriage so that their girlfriends don't have to testify against them. Here's how to determine who's hitched, who's not, and whether spousal privileges apply.

By Cody Henson
Assistant District Attorney in Williamson County

It is often said that absence makes the heart grow fonder. A brief read through some steamy jail mail and one might come to the conclusion that this saying was coined by a dejected lover cooling his heels in the local county lockup. It never ceases to amaze me how the possibility of a long prison sentence tends to be the best couples' counseling that taxpayer money can buy. It is even more true that a brief discussion with a knowledgeable cellmate can lead a dejected lover to suddenly realize, much to everyone's surprise, that he is bound within the matrimonial chains of a common-law marriage and his "spouse" cannot testify against him. She now holds the keys to his jail cell. Queue the invocation of the spousal privilege!

While preparing for trial on an aggravated robbery case, my trial partner, Stacey Mathews, and I had the difficult task of defending against just such a claim of spousal privilege based upon the allegation of an informal marriage. Our case was based in large part upon the testimony of the defendant's girlfriend who was now claiming to be the defendant's wife and who planned on invoking the spousal privilege at trial. If the court determined that a marriage existed, we would lose the girlfriend's testimony and several pieces of jail mail, which contained numerous stunning admissions of guilt.

This article will provide a brief overview of the law, detail our efforts in disassembling what we believed to be a sham marriage, and, we hope, provide the reader with some basic tools to assist in combatting any future unfounded claims of spousal privilege.

Spousal privileges

Spousal privilege plays an important role in preserving the sanctity of marriage and cultivating free communication between spouses, and when legally established, should be vigorously protected. However, it is equally important to protect the institution of marriage and assure that it is not used as a pawn in an attempt to thwart the criminal justice system. "Marriage is more than a contract, it is a status in which stability and permanence are vital, and this is particularly true when dealing with common-law marriages."[1]

Rule 504 of the Texas Rules of Evidence details the "Husband-Wife Privileges." Contrary to popular belief there are actually two separate forms of spousal privilege.[2] The first privilege addresses confidential communications made during marriage[3] while the second privilege is testimonial and provides the spouse of an accused with a privilege not to be called as a witness for the State.[4] Spousal privileges extend to valid informal marriages.[5] "Once a common law marriage has been established it is generally given the same legal significance as a ceremonial marriage."[6] However, both privileges require the existence of a valid marriage.

Confidential communications

It is important to distinguish the confidential communications privilege from the testimonial privilege. Rule 504(a) states that "[a] person, whether or not a party, or the guardian or representative of an

incompetent or deceased person, has a privilege during marriage and afterwards to refuse to disclose and to prevent another from disclosing a confidential communication made to the person's spouse while they were married."[7] Communications are confidential if they are made privately by any person to the person's spouse and not intended for disclosure to any other person.[8] "Statements between husband and wife which are overheard by a third person do not come within the privilege,"[9] meaning that communications that are witnessed by a third person lose their confidential character. "The confidential communication privilege may be claimed by the person or the person's guardian or representative, or by the spouse on the person's behalf. The authority of the spouse to do so is presumed."[10]

However, as with all privileges, there are some exceptions to the rule.[11] For the purposes of this article I will focus on two of them. The privilege may not be invoked if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.[12] Additionally, the privilege does not apply in a proceeding in which the party is accused of conduct that is a crime against the person of the spouse, any minor child, or any member of the household of either spouse or in a prosecution for bigamy.[13]

Testimonial privilege

The testimonial privilege, in certain situations, allows one spouse to refuse to testify against another.[14] This privilege is applicable only in a criminal case[15] and is "personal to the witness-spouse; the defendant-spouse may not invoke it on his or her behalf or override its assertion by the witness-spouse."[16] In other words, the defendant may not invoke this privilege and therefore prevent his otherwise willing spouse from providing testimony against him.[17] This is distinguished from the confidential communication privilege where either spouse may invoke the privilege.[18] The testimonial privilege does not extend to a proceeding in which the party is accused of conduct that is a crime against the person of the spouse, any minor child, or any member of the household of either spouse or in a prosecution for bigamy or to matters that occurred prior to the marriage.[19]

Our story

On October 5, 2011, a masked robber walked into a local gas station in Taylor, pointed a gun at the clerk, and demanded money. The clerk recognized the masked intruder and immediately began shouting, "I know you, I know you!" As a frequent patron of the gas station—and recognizing that his master disguise had failed—the robber immediately fled the store and returned to his apartment, which was a whopping three blocks away. Upon returning home, the defendant shared important details of the incident with his girlfriend and prepared for his impending arrest. The defendant was arrested the next day and charged with aggravated robbery.

The defendant spent several months in the county jail while the State and his able defense counsel attempted to reach a resolution on the case. Unfortunately, negotiations faltered and the case was eventually set for a jury trial. When the case was filed with our office we immediately began to monitor the defendant's jail mail, phone calls, and jail visitations. During this time the defendant and his girlfriend began to communicate both verbally and by mail, and we discovered a letter the defendant had written to one of his children, which stated in part:

> I wanna [sic] tell you for myself why I'm in here and not with you, first of all what lead up to me makin [sic] the decision I made was we were finna [sic] loose [sic] our apartment and I didn't want that to happen to you or your mom or your unborn sister because I love ya'll [sic]. Secondly I ran into a [store] and pulled out a gun and said give me your money but the guy at the store said I know you so I ran out. I had good intensions [sic] but wrong actions. …

This letter preceded several others addressed to his girlfriend in which he alluded to his involvement in the armed robbery and made similar admissions. In preparation for trial we began to interview witnesses and one day found ourselves meeting with whom we considered to be the defendant's girlfriend. She appeared to be very cooperative, indicated that she would be truthful if called to testify, never referred to the defendant as her husband, and most certainly did not give the impression that there was any form of marriage between the two. As the case progressed toward trial the jail mail conversations began to center on the need to invoke spousal privilege to prevent damaging testimony during trial. Eventually it was disclosed to the State that an informal marriage existed and the "wife" would invoke

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the spousal privilege if called to testify during trial.

Disassembling a sham marriage

I have often been told that hindsight is 20/20. I sat and pondered how I had been so naïve to have missed such an obvious evidentiary problem. Eventually my frustration turned to motivation, and my trial partner and I set out to disassemble what we believed to be a sham marriage. Our case relied in large part on introducing the girlfriend's testimony and, through her, presenting several pieces of jail mail in which the defendant admitted to committing the offense. If the defendant was able to establish the existence of an informal marriage, not only would we lose the girlfriend's testimony, but we also risked losing the jail mail admissions, as they could conceivably be classified as confidential communications made during the marriage.

Our first step was to determine how courts have defined "common law marriage." Common law marriage is codified in the Texas Family Code, which outlines three required elements: 1) the man and woman agreed to be married, and after the agreement 2) they lived together in Texas as husband and wife, and 3) represented to others in Texas that they were married.[20]

Whether an informal marriage existed was a question of fact, and as the defendant was the party attempting to establish the existence of an informal marriage, the defense bore the burden of proving the above elements by a preponderance of the evidence.[21] Rule 104(a) of the Texas Rules of Evidence notes that "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court." "When the existence of an informal marriage must be addressed as a preliminary issue, the trial court is the sole fact-finder and in that capacity may believe or disbelieve all or any part of any witness's testimony."[22] Courts have traditionally applied "close scrutiny to claims of spousal privilege based on an informal marriage relationship."[23] We now knew these issues would be determined at a pretrial hearing where the court would determine whether an informal marriage existed and if so, whether the spousal privilege applied.

Agreement to be married

The first element of an informal marriage requires that the parties have some agreement to be married.[24] If we were able to demonstrate that the parties never actually agreed to be married, we could negate the first element required of an informal marriage. In researching this element we determined that an agreement to be married requires a showing that the parties "intended to have a present, immediate, and permanent marital relationship and that they did in fact agree to be husband and wife."[25] The parties could prove this element by direct or circumstantial evidence and the testimony of only one of the parties "constitutes some direct evidence that the parties agreed to be married."[26] We soon realized that there were only two people who knew if this agreement had been reached and we were not likely to locate any physical evidence to contradict this claim. Thus, we focused our energy in other areas and moved on to the second element.

Cohabitation

In establishing the existence of an informal marriage, the second element of Texas Family Code §2.401(a)(2) requires that the parties live together in Texas as husband and wife. We were aware the defendant and his girlfriend were living together in an apartment on the date on which the convenience store was robbed. A subpoena was issued for the apartment lease and our investigator personally served it on the apartment manager. A review of the lease indicated that the parties moved into the apartment approximately seven months prior to the robbery. We interviewed a friend of the girlfriend and the defendant's previous employer who both told us the couple had a somewhat rocky relationship that began approximately two years earlier.

A few months after the birth of their first child, the defendant moved to Taylor from Houston for a short time and then returned to Houston. He eventually returned to Taylor and the two lived with a friend and eventually moved into an apartment on their own. However, we learned the defendant would frequently leave, sometimes for extended periods. In speaking with the local police department we discovered that the girlfriend had filed a missing persons report during one such episode. However, despite evidence the couple had a somewhat rocky relationship with intermittent

breaks, we were aware that "cohabitation need not be continuous for a couple to enter into a common-law marriage."[27] Still not having located our smoking gun, we determined to focus our efforts on the third and final element.

Presenting to others

The third element required to establish an informal marriage requires the parties to hold themselves out to others as husband and wife.[28] "The cohabitation must be professedly as husband and wife, and public, so that, by their conduct towards each other, they may be known as husband and wife."[29] This element requires that the parties consistently hold themselves out as husband and wife and likewise "occasional introductions as husband and wife are not sufficient to establish the element of holding out."[30]

The defendant's girlfriend had never represented to us that she was the defendant's wife and in fact indicated she considered him to be her "baby's daddy." Finally, we had something to work with. We knew from prior discussions that the girlfriend was a student at a local college and was receiving state welfare benefits. We immediately issued subpoenas for her college application, financial aid applications, and any documentation relating to her application for state assistance. We obtained the apartment lease and copies of any prior offense reports that related to the parties and all magistration and booking records from the defendant's prior arrests. We were attempting to determine whether the parties "had a reputation in the community for being married"[31] and whether they had "consistently conducted themselves as husband and wife in the public eye or that the community viewed them as married."[32]

The first item of evidence, the apartment lease, appeared to have been filled out by the parties and indicated that they were married. We spoke with the apartment manager who informed us that, during her interactions with the couple, they held themselves out as husband and wife. However, the application and attached documents were inconsistent. At one point the girlfriend used her maiden name and at other points adopted the defendant's last name. We disclosed this information to defense counsel and provided him with a copy of the lease.

Continuing our search, we reviewed a prior offense report from June 2010 in which the defendant was charged with assaulting the same girlfriend. The responding officer authored a report in which he listed the defendant as the "common law husband." However, in reviewing the written statement provided by the girlfriend she clearly referred to the defendant as "her boyfriend." It appeared that the officer had made the same assumption the defendant was now asking the court to make. Additionally, almost a year later in May 2011, when the defendant was finally arrested on the charge, he indicated on his booking information that he was "single."

We located another offense report from when the girlfriend had reported the defendant as a missing person. The initial report taken by the officer again referred to the defendant as the "common law husband." However, after we obtained the recorded 9-1-1 call, it was clear the girlfriend called to "report her boyfriend missing" and at no time referred to him as her common law husband. This officer had unfortunately made the same assumption as the first officer.

Determined to demonstrate this was a marriage of convenience, we continued to review the physical evidence. We were able to obtain a copy of the girlfriend's college application, which was executed approximately two months prior to the robbery. On this handwritten application she noted she was both "single" and "single and pregnant." This document was filled out using her maiden name and contained her signature. Additionally, the electronic documents that were used to determine her eligibility for student loans reflected her marital status to be "single" and contained a similar date.

Spurred on by our recent discovery, we continued to gather documents that would demonstrate that an informal marriage did not exist and was simply a ruse to prevent the State from obtaining valuable testimony. The next set of documents we obtained was from the Texas Health and Human Services Commission and related to the girlfriend's application for state-funded welfare benefits. We discovered an application containing her signature that was executed approximately three months prior to the robbery in which she indicated she was single and the defendant was single, and which specifically listed the defendant as her "boyfriend." Additionally, we located an application for state welfare benefits executed 12 days

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after the robbery in which the girlfriend indicated she was single. These documents strongly contradicted the claim that the couple had entered into an informal marriage.

Although we had accumulated a substantial amount of evidence, we continued to delve through piles of jail mail in search of additional information to support our position. While the couple often assumed the defendant's last name in their salutations and referred to each other as husband and wife, they were inconsistent and often went from describing their desire to be married in the future to describing how happy they currently were as a married couple. However, one piece of mail summed up the State's position. The letter was written from the defendant to the girlfriend and ended with the following closure: "Your soon-to-be husband."

Despite this discovery, we felt as if we needed a representative of the community who could testify to whether the defendant held his girlfriend out to be his wife. We were aware that "… standing alone, occasional references to each other as 'husband' and 'wife' and the like are insufficient to establish an informal marriage."[33] The final element of an informal marriage requires both parties to have represented themselves as a married couple.[34] We were able to locate the defendant's previous employer who informed us the defendant worked on and off for him for approximately one year. During this time period he interacted closely with the defendant and specifically noted that the defendant never referred to his girlfriend as his wife. In fact, he noted the defendant consistently held her out to be his girlfriend or "baby mama" but never his wife.

We were done. We had exhausted significant resources in an effort to demonstrate that the alleged marriage was a sham and a last-ditch effort to prevent incriminating testimony from entering into trial. Our final task was to marshal all of the evidence and present it to the court during a pretrial hearing.

The hearing

In preparation for the pretrial hearing we found ourselves facing an ethical dilemma. As the party wishing to establish the existence of the privilege, the defendant bore the burden to prove the elements of an informal marriage by a preponderance of the evidence. If the defendant did not wish to testify, he would likely be required to elicit the girlfriend's testimony. Bringing forth such testimony subjected the girlfriend to the possibility of self-incrimination and/or perjury. The evidence we had collected strongly contradicted the claim that she and the defendant were married, and the evidence would establish she had executed government documents and applied for financial assistance as a "single" applicant.

Understanding our ethical obligations—and in an attempt to avoid any appearance of impropriety—we determined that the best course of action was to request that the court appoint her an independent attorney to advise her of her rights. At the State's request the court appointed an attorney to represent the girlfriend and the case was reset.

After meeting with the girlfriend, her attorney requested that the State grant her use immunity in exchange for her truthful testimony. We prepared a use immunity agreement and requested the court execute the document. The girlfriend had now been immunized and the road was cleared for a final hearing to determine whether an informal marriage existed.

Throughout this process we had kept the accused robber's defense attorney appraised of the documentation we were recovering and prior to the hearing allowed him to review all of the documents. As the defense bore the burden, counsel began the hearing by calling the girlfriend. She admitted that no legal marriage existed. She testified that "in her heart she felt she was married" but she understood that she was not legally married. On cross-examination, she authenticated the documents we had collected and they were admitted into evidence.

To establish that the couple had not consistently held themselves out as husband and wife, through cross-examination of the girlfriend, we demonstrated that the couple's two children were never given the defendant's last name. In fact, one child was born while the defendant was incarcerated on this charge and still bore the girlfriend's maiden name. Additionally, the girlfriend admitted she filed her taxes as single, requested student aid as a single adult, and filed for state welfare benefits as a single adult. She admitted that the couple was inconsistent in holding themselves out as husband and wife. The State's position was bolstered by the admission of the 9-1-1 call where she reported her "boyfriend" missing and testimony supporting these facts. As our last witness we called

the defendant's former employer who was able to provide the court with a clear view as to how the defendant saw the couple's relationship. The employer testified the defendant never held his girlfriend out as his wife and consistently referred to her as his "girlfriend."

The defense put forth a valiant effort in attempting to show that an informal marriage existed and that the witness had simply changed her testimony when faced with the possibility of criminal sanctions. The girlfriend's mother testified that she considered the defendant to be her daughter's husband and that the defendant and her daughter held themselves out to others as husband and wife. However, the court was not swayed by this position and later ruled that there was no marriage.

It had been our firm belief that the alleged marriage was one of convenience that was ordained for the purpose of thwarting the prosecution. However, after listening to the girlfriend's testimony, I decided that the truth lay somewhere in the middle. Perhaps she did feel in her heart that she and the defendant were married. Perhaps she did have every intention of marrying the defendant at some point in the future. Unfortunately for the defendant, the law does not reward intentions of the heart with a marriage license.

The spousal privilege is not designed to protect those persons "who are not legally married, nor parties who are unmarried, but who live together and recognize each other as husband and wife."[35] "Merely living together with a person of the opposite sex and having intimate relations with that person do not establish, without more, the relationship of husband and wife."[36] As the *Tompkins* court so eloquently stated, "a secret common law marriage" does not constitute common law marriage in Texas.[37] ❇

Endnotes

1 *Tompkins v. State,* 774 S.W.2d 195, 209 (Tex. Crim. App. 1987) (quoting *Welch v. State*, 207 S.W.2d 627 (Tex. Cr. App. 1948)).

2 T.R.Evid. 504.

3 T.R.Evid. 504(a).

4 T.R.Evid. 504(b).

5 See *Reece v. State*, 772 S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1989, no pet.); see also *Tompkins*,774 S.W.2d at 207.

6 *Weaver v. State*, 855 S.W.2d 116, 120 (Tex. App.—Houston [14th Dist.] 1993, no pet.).

7 T.R.Evid. 504(a)(2).

8 T.R.Evid. 504(a)(1).

9 *Bear v. State*, 612 S.W.2d 931, 932 (Tex. Crim. App. 1981).

10 T.R.Evid. 504(a)(3).

11 T.R.Evid. 504(a)(4).

12 T.R.Evid. 504(a)(4)(A).

13 T.R.Evid. 504(a)(4)(C).

14 T.R.Evid. 504(b).

15 T.R.Evid. 504(b).

16 *Gibbons v. State*, 794 S.W.2d 887, 893 (Tex. App.—Tyler 1990, no pet.); see also T.R.Evid. 504(b)(3).

17 *Id.*

18 T.R.Evid. 504(a)(3).

19 T.R.Evid. 504(b)(4)(A)&(B).

20 Tex. Fam. Code §2.401(a)(2).

21 *Small, et. al. v. McMaster*, 352 S.W.3d 280, 282 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

22 *Kennedy v. State*, No. 2-07-008-CR, 2008 Tex. App. LEXIS 4607 at *8 (Tex. App.—Fort Worth June 19, 2008, pet. ref'd) (not for pub.).

23 *Reece*, 772 S.W.2d at 200.

24 Tex. Fam. Code §2.401(a)(2).

25 *Small*, 352 S.W.3d at 283 (citing *Eris v. Phares*, 39 S.W.3d 708, 714 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)).

26 *Id.*

27 *Id.* at 284.

28 Tex. Fam. Code §2.401(a)(2).

29 *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124, 1130 (Tex. 1913).

30 *Flores v. Flores*, 847 S.W.2d 648, 652 (Tex. App.—Waco 1993, writ denied).

31 *Small*, 352 S.W.3d at 286.

32 *Small*, 352 S.W.3d at 286 (citing *Danna v. Danna*, No. 05-05-11472-CV, 2006 Tex. App. LEXIS 2368 at *4 (Tex. App.—Dallas March 29, 2006, no pet.)).

33 *Id.*

34 *Small*, 352 S.W.3d at 285.

35 *Tompkins*, 774 S.W.2d at 209 (quoting *Johnson v. State*, 122 Tex. Crim 224, 54 S.W.2d 140, 141 (1932)).

36 *Id.*

37 *Id.* at 209.

A Pyrrhic victory in *Williams v. Illinois*

"Another such victory and I come back to Epirus alone." This is what King Pyrrhus of Epirus reportedly told one of his soldiers after defeating the Roman army at Heraclea.[1] This exchange has since given rise to the term "pyrrhic victory" because King Pyrrhus's army had won, but had also suffered irreplaceable losses while doing so.

By David C. Newell
Assistant District Attorney in Harris County

The U.S. Supreme Court's decision in *Williams v. Illinois* is a perfectly modern—though less violent—example of just such a victory. In *Williams*, the court upheld the admissibility of a DNA expert's opinion that was based upon a DNA profile generated by a non-testifying forensic analyst over a Confrontation Clause objection.[2] However, Justice Alito, the author of what prosecutors hoped would be a majority opinion, failed to cobble together a coalition of five justices that agreed upon a rationale that supported the court's ruling. Worse, five judges on the court disagreed with the primary rationale for admissibility. What this leaves the bench and bar is a very confusing and weak opinion of questionable legal vitality. I hope that this article's attempt to see what the judges saw can help tease out a few guiding principles to assist prosecutors going forward.

The facts are these

In 2000, a young woman in Chicago was abducted while she was walking home from work. The perpetrator forced the woman, L.J., into his car and raped her. Then he robbed her of her money and personal items before pushing her out into the street. L.J. ran home and reported the attack to her mother, who called the police. An ambulance took L.J. to the hospital to treat her wounds and perform a sexual-assault examination. A Chicago police detective collected the vaginal swabs and submitted them under seal to the Illinois State Police (ISP) lab. The ISP lab conducted a chemical test to confirm the presence of semen on the vaginal swabs before sending them to Cellmark Diagnostics Laboratory for DNA testing. Cellmark sent back a report containing a male DNA profile produced from semen taken from those swabs.

A forensic specialist at the ISP lab conducted a computer search to see if the Cellmark profile matched any of the entries in the state DNA database. The computer showed a match to a profile from a sample of Sandy Williams's blood that had been taken when he was arrested on unrelated charges. Police conducted a lineup featuring Williams, and L.J. identified him as her assailant. The State indicted Williams for aggravated criminal sexual assault, aggravated kidnapping, and aggravated robbery. Williams chose to be tried before a state judge rather than a jury.[3]

At the bench trial, the State called an expert to testify to Williams's DNA profile generated from the sample of Williams' blood and another expert to confirm the presence of semen on the vaginal swab. The State also called Sandra Lambatos, an expert in forensic biology and forensic DNA analysis. She explained the process of generating DNA profiles and how they could be matched to an individual based upon the individual's unique genetic code. The person who had performed this task at Cellmark, however, did not testify, though Lambatos stated it was a common practice within the scientific community for one DNA expert to rely upon a report from another.

When the State tried to question whether there was a computer match between "the male DNA profile found in the semen from the vaginal swabs of [L.J.]" and the "male DNA profile that had been identified," Williams objected. The State explained that it was not trying to get into what the other lab did; rather, the State claimed it was simply asking about the testing Lambatos had done based upon the information she had received from Cellmark. The trial court allowed the question, and Lambatos answered that there was a match between the two profiles. Lambatos then testified that, based on her own comparison of the two DNA profiles, that Williams could not be excluded as a possible source of the semen identified on the vaginal swabs.[4]

The Cellmark report itself was never admitted or shown to the trial court. Lambatos did not quote or read from the report. She did not identify it as the source of any of any opinions that she expressed. She

acknowledged that she had not observed or conducted any of the testing on the vaginal swabs. She also agreed that degradation of the sample was possible, but she strongly doubted it because there were no signs of degradation in the data making up the DNA profile.

The State argued that Williams's Confrontation Clause rights were not violated because he had the opportunity to cross-examine the expert who had testified that there was a match between the DNA profiles produced by the ISP and Cellmark. The State invoked Rule 703 of the Illinois Rule of Evidence, which is consistent with Rule 703 of the Texas Rules of Evidence, to argue that an expert can base her opinion on otherwise inadmissible evidence. The trial court agreed, stating he would not exclude Lambatos' testimony, which was "based upon her own independent testing of the data received from [Cellmark]." Notably, the question asked and answered was whether the known profile matched the profile generated from the sample collected from the vaginal swab. However, the trial court seemed to regard the question as merely the comparison of the two profiles without any assertion of fact that Cellmark had generated its profile from the sample sent from the ISP.

Before deciding whether Lambatos' testimony violated the Confrontation Clause, Justice Alito conveniently summarized the court's two previous cases dealing with scientific reports after *Crawford v. Washington*. First, he noted the court had held in *Melendez-Diaz v. Massachusetts* that the admission of certificates of analysis that were created for the sole purpose of providing evidence against a defendant violated the Confrontation Clause.[5] Second, he noted that the court had held in *Bullcoming v. New Mexico* that a scientific report could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation.[6] Moreover, he added that the court had rejected the use of a "surrogate" expert to testify about the lab results when that expert had not performed or observed the actual analysis. And finally, Justice Alito quoted Justice Sotomayor's concurring opinion from *Bullcoming* to explain that the court had not previously addressed the question of whether an expert witness was asked for an independent opinion about underlying testimonial reports that were not themselves admitted into evidence. But now, according to Justice Alito, that question was squarely before the court.

Is DNA a witness for the truth?

Justice Alito first justified the admission of Lambatos' opinion that the known DNA profile of the defendant matched the DNA profile taken from the semen recovered from the vaginal swab by explaining that the opinion was not offered for the truth of the matter asserted. Joined by Chief Justice Roberts and Justices Breyer and Kennedy, Justice Alito explained that experts have long been allowed to voice an opinion based on facts without first-hand knowledge of those facts. Moreover, experts were permitted to answer hypothetical questions that included un-established facts under the common-law, a practice incorporated into the modern rules of evidence. According to Justice Alito, Lambatos merely agreed with the premise of the prosecutor's question that the Cellmark DNA profile actually came from the sample submitted to them by the police; she was not making an assertion that that was true.

Five judges on the court disagreed with this argument. The four dissenters, led by Justice Kagan, felt that Lambatos had testified to the substance of the report in her opinion and had not given any indication that she was answering a hypothetical. But more problematically, Justice Thomas, who agreed with the result, wrote a concurring opinion rejecting this theory of admissibility as well. As Justice Thomas explained, the value of Lambatos' testimony depended upon the truth of the assumptions in the question. However, everyone seemed to agree that there would be no Confrontation Clause issue had the prosecutor simply asked if the two profiles matched rather than including the "assumption" in the question that the DNA profile from Cellmark came from the sample submitted to them by the police. Thus, the plurality found the testimony to be purely opinion testimony and therefore admissible under the Confrontation Clause, while five judges regarded the testimony as primarily fact testimony, the latter of which raised a right of confrontation under the Sixth Amendment.[7]

Texas courts of appeals have apparently already drawn this distinction. For example, in *Hamilton v.*

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State, the San Antonio Court of Appeals held that a DNA expert who testified to a lab analyst's findings violated the Confrontation Clause.[8] Of course, in that case it appears the testifying DNA expert actually told the jury the results of the non-testifying expert's DNA analysis. So, unlike the situation in *Williams* where there was some dispute as to whether the DNA expert had actually asserted a fact by agreeing to the prosecution's question, the situation presented in *Hamilton* appeared more clear-cut. But the *Hamilton* court also held that the testifying DNA expert's opinion based upon the DNA profile was not testimonial because it was based on data generated by scientific instruments operated by other scientists.[9]

While the dissent in *Williams* did not go so far as to suggest the Cellmark DNA profile was not testimonial because it was computer-generated data, Justice Kagan did observe, "There was nothing wrong with Lambatos's testifying that two DNA profiles—the one shown in the Cellmark report and the one derived from Williams's blood—matched each other; that was a straightforward application of Lambatos's expertise."[10] So, there seems to be some suggestion that the Supreme Court would uphold the admission of straight expert opinion testimony even if it was based on testimonial assertions or information generated by a non-testifying expert; the problem in *Williams* was the DNA expert mingling factual assertions (about things that only the non-testifying expert could know) into her opinion testimony.[11]

The 4-1-4 split

Justice Alito also suggested a second, independent basis for the admission of the testimony. According to Justice Alito, the DNA report from the non-testifying expert was non-testimonial because it was not prepared to accuse Williams or to create evidence for use at trial. Relying upon the "primary purpose test" announced in *Michigan v. Bryant*, Justice Alito explained that the DNA profile in this case was generated to help locate a criminal still at large. But in reaching this conclusion, the plurality grafts a new component onto the test, namely that testimonial statements have accused an identified defendant. Unlike the situations in *Melendez-Diaz* and *Bullcoming* where the defendant was known and the statements were designed to support guilt, here the primary purpose of sending the sample to Cellmark was to catch a dangerous rapist who was still at large, not obtain evidence for use against Williams who was not in custody or a suspect. According to Justice Breyer's concurring opinion, it will be unlikely for a particular researcher to behave dishonestly if the researcher has no defendant-related motive.

As you might expect, five judges rejected this rationale as well. Justice Kagan, writing for the dissent, noted archly, "Where that test comes from is anyone's guess." She acknowledged that the court had previously evaluated whether a statement was testimonial by asking if the statement was made for the primary purpose of establishing "past events potentially relevant to later criminal prosecution," but further noted that none of those cases required a showing that the statement must be meant to accuse a previously identified individual. Justice Thomas (remember, he concurred with the result that the testimony did not violate the Confrontation Clause) also rejected this new test, explaining that not only was there no support for it, but also that the record did not even support the new test because there was no ongoing emergency.

So what's the rationale? If there is any agreement among the five judges who voted to uphold the admission of the testimony, it is in the bare assertion that the non-testifying expert's report was non-testimonial.[12] Justice Thomas wrote a separate concurring opinion upholding the admission of the testimony because it was non-testimonial, but for a different reason than the one posited by Judge Alito's concurrence. According to Justice Thomas, Cellmark's report was not a statement by a "witness" within the meaning of the Confrontation Clause because it lacked the solemnity of an affidavit or a deposition. The un-introduced report was not a sworn or certified declaration of fact. This position is consistent with Justice Thomas's previous concurring opinion in *Melendez-Diaz* where he opined that the certificate of laboratory analysis was the functional equivalent of an affidavit. I suppose one could argue that the testimony in *Williams* was admissible because unlike *Bullcoming*, the State never offered the report nor had another expert read the results of another expert's analysis. Therefore, the argument would go, the expert's opinion including a recitation of facts observed by another expert was non-testimonial. How-

ever, given that there appears to be very little overlap between the rationale proposed by the plurality opinion and Justice Thomas's concurring opinion (that no one joined), it is hard to see this opinion as any sort of retreat from *Bullcoming*.

Conclusion

This case is a mess. At first glance, the dissent's snarky take-down of the plurality opinion benefits from its readability. But Justice Kagan's opinion hides the fact that it moves the goal-posts from *Bullcoming*. As the plurality noted at the outset, this opinion considered a question unanswered by *Bullcoming* and it quotes Justice Sotomayor (who joined the dissent in *Williams*) to back it up. Yet the constant refrain from the dissent was that this case was, in fact, already decided by *Bullcoming*. In the end, Justice Breyer's lone concurring opinion may sum it up best when he says that neither the plurality nor the dissent answers the issue in this case adequately.

So where does that leave prosecutors? As noted above in the discussion of Texas law, probably the same place they were before *Williams* was decided. The best solution is still retesting, if possible, and calling an expert with direct knowledge of that testing. And, as Texas courts have already noted, having an expert testify as to an independent opinion without relating the substance of information provided by a non-testifying expert should be permissible. But as *Williams* reveals, the slightest hint of a factual assertion from a non-testifying witness may run afoul of the Confrontation Clause even when that assertion could be characterized as merely an expert's opinion.

And while Justice Alito struggled mightily to uphold the introduction of the testimony in this case, he revealed that there is not a stable majority on the court that can agree on a coherent rationale to limit the categorical approach to the Confrontation Clause first announced in *Crawford v. Washington*. He also announced a new test for analyzing whether a statement is testimonial that is confusing and unlikely to enjoy any longevity. So while Judge Alito may have won this battle, he nevertheless appears to be losing the war. ❇

Endnotes

1 Plutarch, *Life of Pyrrhus*, 21:8. Notably, Plutarch was later reclassified as a dwarf historian.

2 *Williams v. Illinois*, 132 S.Ct. 2221 (June 18, 2012).

3 Justice Alito seems to put a lot of stock in this aspect of the case under a theory that the trial court, as the trier-of-fact, would have properly understood the testimony in a way that the jury would not have. This seems suspiciously similar to the line of harm-analysis cases that held that trial courts presumably disregarded incompetent evidence. See e.g. *Tolbert v. State*, 743 S.W.2d 631 (Tex. Crim. App. 1988). Unfortunately, the Court of Criminal Appeals has since abandoned that presumption. *Gipson v. State*, 844 S.W.2d 738 (Tex. Crim. App. 1992). It seems unlikely that the Court of Criminal Appeals will find this distinction in Justice Alito's plurality opinion persuasive.

4 She also said that the probability of the profile's appearing in the general population was "1 in 8.7 quadrillion black, 1 in 390 quadrillion white, or 1 in 109 quadrillion Hispanic unrelated individuals." But the fact that she said the two profiles matched is all that really mattered for the purpose of the Confrontation Clause analysis.

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

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

7 Notably, Justice Alito went so far as to suggest that this might have been a violation of the Confrontation Clause had the case been a jury trial rather than a bench trial because a trial judge would understand that the prosecution was merely asking a streamlined hypothetical question while a jury might not. As discussed above, this distinction is unlikely to be persuasive in Texas.

8 *Hamilton v. State*, 300 S.W.3d 14 (Tex. App.—San Antonio 2009, pet. ref'd.)

9 Other courts of appeals have reached the same conclusion that an expert opinion relying upon scientific data generated by a non-testifying expert does not violate the Confrontation Clause. See e.g. *McWilliams v. State*, 367 S.W.3d 817 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.); *Dreyer v. State*, 2011 WL 193494 (Tex. App.—Beaumont Jan. 19, 2011, no pet.) (not designated for publication); *Oliver v. State*, 2010 WL 3307391 (Tex. App.—Houston [14th Dist.] Aug. 24, 2010, no pet.) (not designated for publication); But see *Pollard v. State*, 2012 WL 1986530 (Tex. App.—Waco May 30, 2012, no pet. h.) (holding that expert's opinion testimony mixing his independent opinion with assertions of fact from a non-testifying DNA expert violated the Confrontation Clause).

10 The Dallas Court of Appeals rejected the reasoning of *Hamilton* and held that both a drug analysis report performed by a non-testifying expert and a testifying expert's opinion based upon the data in that report violated *Bullcoming*. *Soto v. State*, 2011 WL 6188598 (Tex. App.—Dallas 2012, pet. dism'd) (not designated for publication). Assuming the dissent in *Williams* maintains its position that pure opinion testimony based upon otherwise testimonial statements does not violate the Confrontation Clause, that portion of *Soto* would seem to be erroneous going forward. Of course, it's not a published opinion so it lacks precedential value, but since when has that ever stopped anyone?

11 And for those of you concerned about autopsies, *Williams* appears to be consistent with the Austin Court of Appeals opinion in *Wood v. State*, 299 S.W.3d 200 (Tex. App.—Austin 2010, pet. ref'd.). There, the court held the autopsy report by a non-testifying medical examiner was testimonial, but the testifying medical examiner could give his own independent opinion on the nature and causes of a victim's injuries and death based in part upon a review of the autopsy report.

12 By way of analogy, this is kind of like what happened in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) where three judges rejected factual sufficiency on one rationale and two others rejected it for another.

Hoping to close the revolving door

Travis County operates a docket dedicated to defendants with mental health issues, which (in its three years of operation) has opened up jail beds, cleared up other dockets, and saved the county money. Here's how it works.

By Krystal Muller
Paralegal in the Travis County District Attorney's Office

Jails and prisons are rapidly becoming America's largest system of mental health care providers. People with mental health concerns, substance abuse, homelessness, and other issues often find themselves wrapped up in the revolving door of the criminal justice system. Because our jails are not specifically designed to treat these issues, inmates' mental health can decompensate while in custody. Decompensation and the added requirements of addressing mental illness within a criminal justice setting slow down the adjudication process and as a result, mentally ill inmates spend more time incarcerated than the average inmate. Once adjudicated, there is a lack of resources for this population, and many times a gap exists between these minimal resources and connecting an individual to services.

Our goal at the Travis County District Attorney's Office in forming a Mental Health Unit was not to excuse these actions, but rather to reduce recidivism by alleviating the cause of these actions. Our dispositions are tailored to provide medication, housing, treatment, and counseling. Everyone's needs are different and unique, but many of these needs can be addressed through services that already exist in our community. While there may not always be enough services to go around, we have to try to connect the dots where and when we can.

Planning for the Mental Health Unit began in 2008 after newly elected District Attorney Rosemary Lehmberg took office. Lehmberg quickly appointed then-assistant district attorney Karen Sage (now a Travis County district judge) to create this unit from the ground up. Staffed with a paralegal and a legal secretary, Sage set to work. Planning began, and in less than 30 days a docket was formed. Lehmberg, a believer in therapeutic justice, quickly recognized that there is a fine balance between treating the cause of criminal behavior and keeping our community safe. Because we were still learning as we went along, we started our docket with only lower-level drug and property cases of defendants who were still in jail—no violent offenses and no cases involving victims. Our caseload was relatively small in the beginning and we held docket weekly.

Over the last three years our docket has grown significantly. When Sage was elected to the bench, ADA Michelle Hallee volunteered to lead our unit. With a special-needs son and previous work with the juvenile mental health cases, Michelle brings a unique mixture of personal and professional experience that helps make our docket a success. Building off Sage's solid foundation, Michelle has expanded the docket to include other offenses. The only requirements for a case to be set on our docket are that the defendant has been diagnosed with one of the top four Axis I diagnoses and that there is a causal connection between that diagnosis and the defendant's criminal behavior. Those diagnoses are: schizophrenia, schizoaffective disorder, bipolar disorder, or major depressive disorder (MDD). Because of the broad spectrum of MDD, this particular diagnosis also requires a Global Assessment of Functioning (GAF) score of 50 or less. A GAF score indicates how well someone is functioning in daily life on a scale of 0 to 100.

Cases are set on our biweekly docket in one of two ways. First, cases that would normally be automatically set on the magistrate's docket by Court Administration (defendants who are still in jail and charged with lower-level drug or property offenses) are set directly on our docket if the defendant is psych-coded in the jail. This psych coding can happen at any time, but in a majority of cases it happens during the routine screening that every inmate completes within 24 hours of booking. Secondly, any party can refer any case to our docket. Our referral form requires the approving signatures of both the

assigned ADA and the district court judge, which then allows these cases to be screened for our docket. This screening process involves confirming a qualifying diagnosis, gathering input from any victims, and reviewing the defendant's criminal history. There are no barriers that automatically bar a defendant's case from being set on our docket. While it proves very difficult to work with someone with a parole hold or an INS detainer, every defendant is screened on a case-by-case basis. Criminal histories are reviewed to give us a better sense of the defendant's pattern of behavior. Many times we are able to line up a defendant's noncompliance with his treatment and his arrest history. We want to feel confident that given the right help, criminal behavior will decrease or stop. We do not want to accept cases involving criminals who are trying to play the "mental health card" in an attempt to receive a lesser punishment.

Court days start with a roundtable staffing attended by a handful of key players. Besides the ADA, defense attorney, and me (I'm a paralegal), the team also consists of the jail's service coordinator, a representative from our local MHMR, and a senior probation officer assigned to the mental health caseload. The group is able to share information and get a clear picture of who every defendant is, what treatment he has received in the past and may currently be receiving, or if he is resistant to treatment. We know where he is living, if he has been on probation before, or if he followed up with treatment while on his own. We take a non-adversarial approach to every case and collaborate to customize dispositions that can help fill in the gaps.

There are no "common dispositions" on our docket. Dispositions on our cases range from a term of probation supervised on the mental health caseload to a "desktop deferral" monitoring defendants on bond. If a defendant is active in his own treatment in the community but had a recent slip-up, we can still offer time under Penal Code §12.44(a) (reduction of felony to misdemeanor) and coordinate transportation from the jail directly to a service appointment at our local MHMR.

Repeat offenders are common on our docket. While empathetic to the needs of our defendants, we hold them responsible for the terms of their treatment. As our judge always tells the defendants, "You have a mental illness and that's not your fault, but it is your responsibility to listen to your doctors, follow through, and treat it accordingly for the safety of yourself and others." We will continue to work with someone who is willing to work with us. There are times, however, when a defendant refuses to acknowledge his illness or is unwilling to treat it. In those cases, we have to keep the public safe and therefore recommend incarceration.

While our main objective is to help the mentally ill population within the criminal justice system while continuing to keep the community safe, we also have other, more quantifiable, objectives. We aim to lower the number of days this population stays incarcerated in the Travis County Jail. On average, the costs of jailing a mental health inmate are nearly double the costs of jailing an inmate without mental health needs. By streamlining the adjudication process on these cases, we can save Travis County hundreds of thousands of dollars every year. To quantify this goal, we needed to keep a lot of data on our docket. Through a detailed spreadsheet, we are able to provide quarterly reports on every aspect of it: from demographic information, to dispositions, to the average number of days spent in jail, all broken down by offense. This data has proven to be a valuable resource in every conversation we have about acquiring more resources.

As I write this article, three years after starting the docket, my spreadsheet has over 2,500 cases listed. Last fiscal year I reported statistics on 535 cases and at the rate we are going, I believe that we could handle over 800 cases on our docket this year. When we started this docket in April 2009, an inmate with mental health issues spent an average of 109 days in jail. During fiscal year 2011, defendants on our docket spent an average of 50 days in jail. With roughly 500 mental health inmates incarcerated at any given time, the opportunity to open up jail beds, clear up other dockets, and save county money is fantastic. These potential cost savings can serve as great motivation any time we—or any prosecutor's office—needs to approach the county commissioners and taxpayers to ask for more resources.

We have come so far in the last three years, and while we believe in the work we are doing, there is room to do more. Our next goal is to work toward a true diversionary mental health court, rather than a mental

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health docket. A diversionary court would allow us to serve the same population while they receive services in the community rather than while incarcerated. A defendant's successful completion of the court's program could also result in a dismissal, which alleviates the collateral consequences of a criminal conviction in regards to housing and other benefits that this population so often needs.

During the evolution of our Mental Health Unit, we leaned on and learned from our peers in other counties, community agencies, and non-profit service providers. We hope that our learning curve can smooth the path of others wanting to create or develop mental health dockets or courts in their jurisdictions.