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

A new punishment hearing for a mass murderer

Dallas prosecutors recently retried a defendant whose death sentence was overturned on appeal. Here's how they tracked down witnesses and prepared for a case decided 18 years prior.

By Patrick Kirlin
Assistant Criminal District Attorney in Dallas County

In the late night hours of Saturday, August 19, 1989, Mark Robertson walked approximately three miles with a loaded Smith and Wesson revolver to "visit" Sean Hill, a friend who lived with his grandmother, Edna Brau, in an affluent part of North Dallas. When Robertson arrived at the house, Sean was fishing, kneeling at the edge of a creek that flowed through the backyard. Robertson pulled out the revolver and fired a single gunshot into the back of Sean's head, and he slumped over into the creek.

Robertson then went into Ms. Brau's home where she was asleep in front of the television. Her legs were crossed at the ankles as they rested on a coffee table in front of the couch. At close range, Robertson fired another gunshot—this time right between the eyes. He covered Edna's head with a blanket, a classic move by a murderer who intends to rummage through the victim's house after the kill. Ultimately, Robertson stole a small amount of cash, a purse and wallet, a wristwatch, and the keys and registration papers to Edna's Cadillac, which he drove from the crime scene.

Robertson tossed the purse into a dumpster and spent the next couple of hours at a topless bar. He

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Also in this issue:

TDCAF celebrates third anniversary

We would like to thank you, our members, the TDCAA Board of Directors, and the TDCAF Board of Trustees and Advisory Committee for three successful years; we look forward to the foundation's continued success in the upcoming year. The foundation is committed to educating and training Texas prosecutors and law enforcement.

By Jennifer Vitera
TDCAF Development Director in Austin

2009 Annual Campaign needs your support!

As most of you know, the foundation kicked off the 2009 "Color in the Map" Annual Campaign in April. Our goal is to raise $100,000 and have 100 percent support from every Texas county. If you have not had a chance to contribute, please remember that every dollar counts! (See the map at right to find out if your county has contributed.) You may designate your gift for training or books, contribute in honor or in memory of a loved one, or make an unrestricted donation for general operations. In the next few weeks, TDCAA regional directors will be contacting elected prosecutors in their area to ask for help in reaching our goal of 100 percent participation in this year's campaign.

Funding from individuals, foundations, corporations, and the community at large greatly increases the quality of service we are able to offer our members. I am asking you to please consider supporting the foundation by making a contribution of any size. You will find a return gift envelope in this issue of *The Texas Prosecutor* journal or you can go online www.tdcaf.org to make a quick and secure donation. The more funding we secure, the more effective TDCAA is in developing programs to ensure the safety and security of your communities.

We appreciate your support and consideration!

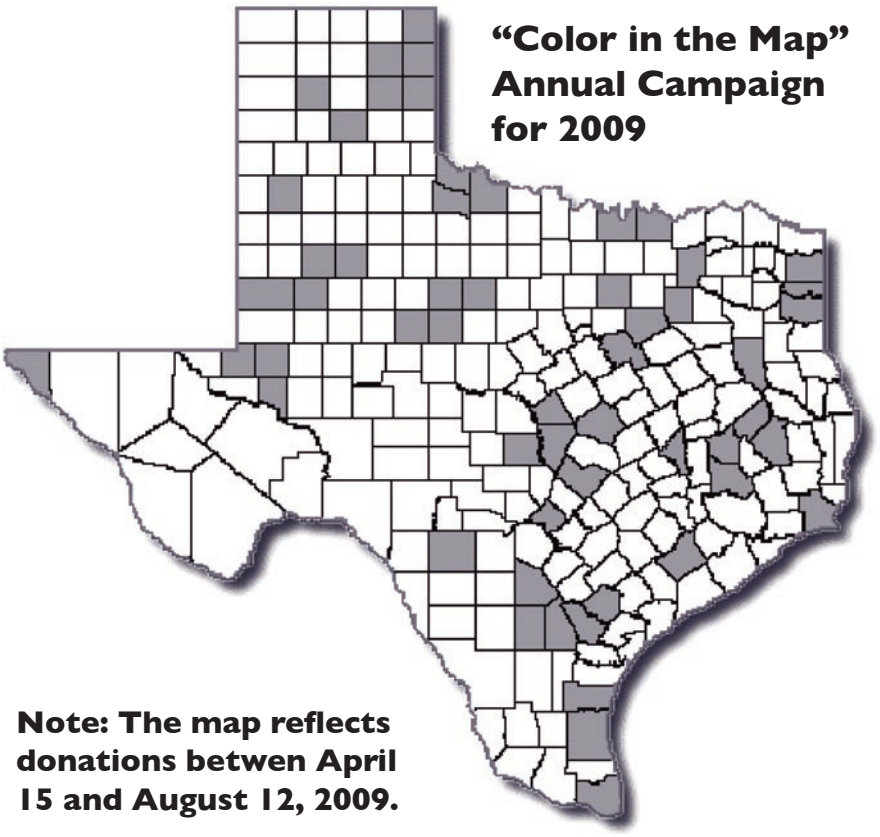
In other news

A special thanks to our Champions For Justice 2010 Planning Committee and Honorary Host Committee. This year we will honor Carol Vance, former district attorney in Harris County, and we are in the process of securing a date and location for the event in Houston. The Planning Committee held its first meeting Thursday, September 3 from 2–3 p.m. at TDCAA's office. In addition, TDCAF is seeking corporate and private sponsors to support this year's event. Please feel free to call me at 512/474-2436 with any ideas or questions you may have.

Be sure to check out our revised website, www.tdcaf.org, where you can make a donation or just learn more about the foundation. ❇

For a list of recent gifts, turn to page 23.

"Color in the Map" Annual Campaign for 2009



Note: The map reflects donations betwen April 15 and August 12, 2009.

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Fond farewell and best wishes to TDCAA's director of operations, John Brown

By Barry Macha
Criminal District Attorney in Wichita County

By the time you read this column, John Brown will have left his post after 11 years of outstanding service as TDCAA's Director of Operations. John was an unsung hero with our association who performed quality work and could always be counted on to pitch in and help with whatever needed to be done.

John grew up in Georgetown where he graduated from high school. After college (UT with a degree in German), he had been doing landscaping work when Judge Marvin Teague on the Court of Criminal Appeals hired him as his secretary. After about 10 months, Tommy Lowe, the clerk of the court, hired John to oversee the financial and computer operations in the clerk's office.

John worked for the Court of Criminal Appeals for 10 years when he was hired by TDCAA after Judge Mike McCormick, a former executive director of TDCAA, told him that TDCAA had a job opening for a director of operations that paid more than he was making at the court. Not bad for a guy who never had to write a resume or put on a suit for work!

I have asked a few of John's coworkers at TDCAA to share some of their thoughts and stories about the friend they often simply called "Brown":

W. Clay Abbott, DWI Resource Prosecutor

John Brown has been of great help to me in the proper use of adverbs. No grammatical blunder in this category goes uncommented upon. His attention to this is very helpful.

On a more serious note, John brings a huge amount of credibility to this office from our grant managers at the Court of Criminal Appeals. His work keeping us funded and out of trouble is largely unnoticed. He doubles as the technical go-to guy. John probably did not break it, but there is a very good chance he is the guy that fixed it. His work on the website is constant and very effective. Take a look at the DWI Resource page! It wouldn't be there without John's quiet and constant attention.

Diane Burch Beckham, Senior Staff Counsel

John Brown is the go-to guy for so many things at the association, from ordering and maintaining our computer and audio-visual equipment to online registration, budgeting, and acting as the go-between with countless other professionals. He is the person on staff who contacts our health insurance representative, copy repair people, website construction person, Court of Criminal Appeals grant administrators, and everyone in between. And he is the perfect person to do that. No one else on staff has as calm and patient an approach for all these things.

John Brown is the most unflappable person I've ever worked with, which makes him an invaluable member of the TDCAA team. He drives the speed limit (or, often, less than) regardless of the circumstances. He deals with emergencies—audio-visual equipment going out in the middle of a presentation—as calmly as he must deal with brushing his teeth in the morning.

Which is why it's so fun to flap him—not in emergencies, of course. My favorite story happened on the way home from somewhere in north Texas, when John Brown, Erik Nielsen and I were on our way back to Austin in the TDCAA Suburban from a legislative update presentation. Erik and I were extraordinarily punchy, but tired, after doing the presentation, which made us both more … annoying than we typically might be. Somehow, we got on the subject of people who sing at weddings (Erik and I both have), and how "The Lord's Prayer" is a particularly dangerous song to choose for a wedding because you'll either end up starting way too low, or ending way too high, depending on the key you choose to sing. To demonstrate, we began singing it—opera-style, of course—as John Brown patiently drove us home. And we sang it over, and over, and over, and over, starting in a different key each time. We must have sung the song—or parts of it—25 times, laughing like hyenas in between, before John finally threatened to throw us out the windows.

That is probably the incident that prompted John to co-opt his now-infamous phrase, "Oh death—where is thy sting? Seriously, where??"

We've attempted to get under his skin a number of times since then, but probably never so colorfully.

Gail Ferguson, Administrative Assistant

I first met John when he would come over from the Court of Criminal Appeals after work to mow the grass at 1210 Nueces (TDCAA's former headquarters). He kept us looking good then and still does.

He is the go-to guy for anything from computer problems, to seminar A/V, to moving fallen trees off cars—which has happened at least once after a harsh storm. He can always be counted on to do whatever is required for our members and our staff.

Erik Nielsen, Training Director

For training, John Brown has been our A/V guru for years. Speakers feel comfortable asking for any kind of hook-ups (DVD/VCR, computer, iPod, etc.) as long as JB is around to make sure it all runs smoothly. He also has been a steady hand with his institutional knowledge of how and why we have done and continue to do certain things. That institutional knowledge also translates to a friendly face that members like to see when visiting HQ or on the road at a seminar, and John always offers a warm smile, a wry grin, and hearty handshake. And sometimes a shrimping net.

JB also lends a hand in all kinds of different areas, including traveling for training, IT support, payroll, insurance, budgets—really everything.

Sarah Wolf, Communications Director

John Brown is the quiet voice of reason in the office: When he talks in a meeting, everybody listens. He doesn't get worked up easily; in fact, his laid-back attitude is something we all tease him about. But he is *not* laid-back about his duties as operations manager: He takes his position as financial guru very seriously, and I am continually reminded of his strong moral compass and sense of right and wrong. We all look up to him because of it, and we know that his decisions will be grounded in responsibility and practicality.

Brown works well with others, but he often has to give people answers they don't like. As the money guy, he carefully keeps track of what we spend, and sometimes he has to say "no" when a coworker asks for a new computer or another big expense. He carefully balances our needs and wants with our budget, which, as anyone in charge of a budget can attest, can be tricky.

One funny thing we all chuckle about: If someone complains about their computer crashing or the copier getting jammed, Brown's pat response is: "Turn it off, then turn it back on." It's his answer to everything broken, which is evidence of his "don't get too worked up about it" attitude. In homage to Brown, we have extended it to include other stuff: If someone's car won't start, we ask, "Did you turn it off and back on?" If someone spills coffee on her shirt, we ask, "Maybe you could turn it off and turn it back on."

John Brown has quite the flair for fashion. He owns pants in just about every color of the rainbow (including royal blue, leaf green, and brick red), and more than once he and Shannon Edmonds have come to work wearing the same houndstooth trousers, which always cracks us up.

He's also a runner who competes in local races regularly, and we have printed off photos of him in his running gear and taped them up all over the office—one is even on the phone in the kitchen. So every time one of us grabs a ringing line while heating up lunch in the microwave, we see John Brown in his athletic glory!

He's also an early bird. Sometimes he gets to work long before 7 am—which means that by 3 in the afternoon, he is dragging. We tease him endlessly about it.

So long, farewell

We will miss John Brown at TDCAA. He and his wife, Brenda, are going to Nebraska to help her brother-in-law harvest this year's crop of potatoes. After that, John is going to take a little time off before deciding what he wants to do next. He's talked of maybe becoming a surveyor (he notes that George Washington and Thomas Jefferson were surveyors), but whatever he does, he hopes that he doesn't have to draft a resume or wear a suit to work.

On behalf of our association and its members, we are grateful and thank you, John, for your friendship and dedicated service to TDCAA. Our best wishes to you and Brenda.❇

If it bleeds, it pleads

By the time you read this column, we will have finished our Legislative Update tour across Texas. The biggest hit by far has been the discussion of the new DWI laws that we introduced under the heading "If it bleeds, it pleads."

For years Texas prosecutors have labored under a 50-percent refusal rate in DWI cases. Like many of you, I cut my teeth on "no evidence" DWI cases and have an almost even win-loss record to show for it. Long ago the defense bar successfully convinced the public that the penalties for refusing to provide a breath specimen were so minimal that it was worth refusing to blow even when the law required it. And for the most part, the Texas legislature has been unwilling to enact laws that would put teeth into punishing refusals.

By Rob Kepple
TDCAA Executive Director in Austin

So hats off to Texas prosecutors who have found ways to get the evidence we have been missing. In the last couple years many of you have worked with your police departments to launch "no-refusal weekends" and other programs using search warrants to get evidence. And in this past legislative session, thanks to prosecutors' hard work, the mandatory blood-draw provisions in the Transportation Code have been significantly expanded and the Code of Criminal Procedure has been amended to expand the pool of judges who can issue a search warrant for blood. (Read more about the changes on page 8.)

Judging by the reaction of the defense bar to these recent innovations, prosecutors must be doing something right. Recent comments decrying "police-ordered blood draws" may just reveal the truth of the matter: With solid evidence legally obtained, we can prove a defendant's intoxication (or his sobriety) and see that justice is done in DWI cases. Perhaps the defense attorneys who hand out business cards at bars on how not to cooperate with police officers in DWI investigations should now include a warning about the new consequences of refusing to take a breath test.

The beginnings of journalist privilege jurisprudence

It didn't take long for battle lines to form over the newly enacted journalist privilege. As you know, on May 13, HB 670, the journalist shield law, became effective. Codified as Art. 38.11 in the Code of Criminal Procedure, the law grants journalists a privilege not to disclose confidential sources and information in some circumstances.

Many prosecutors have had long-standing relationships with their local media outlets, perhaps in recognition that there is a symbiotic relationship between the courthouse and the media. After all, reporters seek information from prosecutors and defense attorneys more often than the other way around. But those long-standing relationships may be in for a change.

In a recent case, a television reporter interviewed a defendant about a crime, and snippets of the interview were played on the nightly news. Before the shield law went into effect, that tape would end up on the prosecutor's desk in a hurry. Now, though, the TV station filed a motion to quash in response to the prosecutor's subpoena for the unpublished footage, claiming that the content of the video can be retrieved from "alternative sources" or that the prosecutor had not shown the footage was "relevant and material to the proper administration of justice."

It will be an interesting year as this new area of jurisprudence takes shape. To make sure the law develops evenly around the state, please keep in touch with us here at the association concerning any media privilege issues. A great team of prosecutors worked very hard on this issue during the session, including **Bobby Bland** (DA in Ector County), **Randall Sims** (DA in Potter County), **Cliff Herberg** (ACDA in Bexar County), **Katrina Daniels** (ACDA in Bexar County), and **John Rolater** (ACDA in Collin County). Please rely on us and this team as we work through the issues that come up in the next couple years.

Student loan forgiveness update

For law students eyeing a career in prosecution and elected prosecutors trying to hire talented new prosecutors, student loan debt remains a big issue. Back in the March-April issue I talked about the College Cost Reduction Act of 2007, which went

into effect July 1, 2009. There are two significant components to this law.

Income-based repayment, or IBR, is a way for people with large federal student loans to cap their repayments. All federal direct loans and federally guaranteed loans are covered. The reduction in monthly loan payment can be significant, as this chart illustrates:

IBR Monthly Payment Amount

Annual Income	Family Size 1	2	3	4	5	6	7
$10,000	$0	$0	$0	$0	$0	$0	$0
$15,000	$0	$0	$0	$0	$0	$0	$0
$20,000	$47	$0	$0	$0	$0	$0	$0
$25,000	$109	$39	$0	$0	$0	$0	$0
$30,000	$172	$102	$32	$0	$0	$0	$0
$35,000	$234	$164	$94	$24	$0	$0	$0
$40,000	$297	$227	$157	$87	$16	$0	$0
$45,000	$359	$289	$219	$149	$79	$9	$0
$50,000	$422	$352	$282	$212	$141	$71	$1
$55,000	$484	$414	$344	$274	$204	$134	$64
$60,000	$547	$477	$407	$337	$266	$196	$126
$65,000	$609	$539	$469	$399	$329	$259	$189
$70,000	$672	$602	$532	$462	$391	$321	$251

Under some circumstances, the IBR program will forgive some of the interest payments, but for the most part the student will still need to repay the full amount of the loan. But there is one major exception to that: 10-year public service loan forgiveness. In this program, the rubber meets the road. If the student has loans under the federal direct loan program, after 10 years of public service (working in a prosecutor's office qualifies), the balance of those loans can be forgiven. The benefit to those in public service is enormous, especially if their loan payments have been capped under the IBR program for their first 10 years of service. The combination of the IBR and the 10-year forgiveness program means that graduating law students with a keen interest in prosecution have a real shot at making the job fit their financial needs.

For more information, go to: http://studentaid.ed.gov/PORTALSWebApp/students/english/IBRPlan.jsp.

Are potential jurors qualified to serve?

Recently questions have arisen about checking the criminal histories of the venire panel before jury selection begins. It's a long-standing practice in Texas, and the rationale is pretty simple: A criminal conviction can disqualify a potential juror from service and put a subsequent conviction at risk should that juror serve.

We have recently received confirmation from the Texas Department of Public Safety that checking the criminal history of potential jurors through the Texas Law Enforcement Telecommunications System (TLETS) is permissible. The bottom line is, criminal history information is available for criminal justice purposes, and that is broadly defined as activities included in the administration of justice, such as a criminal jury trial. (See §§411.082 and 411.083 of the Government Code.)

If this issue pops up in your jurisdiction, let us know and we can supply you with more information.

The NAC survives

Through the years many of you have enjoyed the training provided by the National Advocacy Center in Columbia, South Carolina. In past years "the NAC," as it's known, has provided great training for about 75 Texas prosecutors a year, all expenses paid. In this last year the NAC has fallen on hard times and has had to cut back on its training agenda.

But I can share good news from South Carolina! The National District Attorneys Association has secured funding from Congress to keep the NAC open to prosecutors all around the country. The $1.6 million in the pipeline isn't enough to completely restore its work—the NAC is fully funded at about $4.5 million—but it is a good start. Keep an eye on www.ndaa.org for future NAC offerings.

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Hats off to the publications department!

Many of you rely on TDCAA publications to support you in your work. None are more important than the biennial Penal Code and Code of Criminal Procedure books written and edited by our senior staff counsel, **Diane Beckham**. The code books are not only outstanding and affordable, but they also arrive on your desk before most laws go into effect September 1.

The people behind the book handling operations are our Sales Manager, **Andrew Smith**, and his assistant, **Patrick McMillin**. They have done a remarkable job of shipping every pre-ordered book weeks before the September 1 deadline. (All the more remarkable that Andrew "Drew" Smith can take care of our business and still launch his musical career. Check him out at www.youtube.com/watch?v=dABIN7EH438.) Thank you, Diane, Andrew, and Patrick, for all of the extra effort you've put into this year's publications! ❇

New objections and laws concerning blood draws

While innocence projects and half the defense bar laud blood evidence and the certainty they bring to DWI cases, the other half decry blood search warrants and the certainty they bring to DWI cases. Blood evidence is just as hard to fight in an intoxication case as DNA evidence in sexual assaults. This does not mean that such cases are not strenuously defended; blood samples just change the arena from a jury trial to the suppression hearing.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Statewide, blood search warrants lead to fewer jury trials in DWI cases. (As TDCAA's Shannon Edmonds so pithily observed about blood draws in TDCAA's ongoing Legislative Updates, "If it bleeds, it pleads.") Not surprisingly, however, novel and complicated defense objections to blood search warrants are proliferating. Meanwhile, thanks to the outstanding efforts of John Bradley (DA in Williamson County), Shannon Edmonds, and a host of other prosecutors who fought the good fight in Austin during the 81st Legislative Session, a wonderful improvement in the law concerning blood draws in the most serious DWI and related cases is now in effect. These changes to the mandatory blood draw provisions of Chapter 724 of the Texas Transportation Code will allow warrantless, mandatory blood draws in felony DWI and DWI-related offenses, effective September 1. Because the new law will virtually remove the need for blood search warrants in felony cases, let's take a thorough look at the changes.

New laws

Early in the session, House Bill 747 by Representative Dan Gattis of Georgetown and Senate Bill 261 by Senator Bob Deuell of Greenville (and numerous co-sponsors) began the trip through the legislative process. While neither bill survived, Rep. Gattis added both bills' language to Senate Bill 328 by Senator John Carona of Dallas, which eventually passed.

Before September 1, 2009, an officer was required to take a blood sample without a warrant if: 1) he arrested an individual for an offense under Chapter 49 of the Penal Code (DWI and DWI-related offenses), 2) the suspect refused an implied consent sample, 3) the officer reasonably believed that a collision occurred because of impaired operation of the vehicle, and 4) the officer reasonably believed the collision caused a person other than the driver to die or suffer serious bodily injury. These requirements demanded an officer's quick and efficient evidence collection at a chaotic crime scene, often in the middle of the night and in the middle of an intersection. If the officer could not satisfy all these require-

ments, the defendant had the final say about whether the State would have the most essential piece of evidence about who was responsible for the death or serious injury of a citizen: The defendant could refuse to submit a breath sample, and the officer could not compel a blood draw. The old law's limitations were a strong factor in pushing for blood search warrants, which provided officers and prosecutors a way to let a magistrate—rather than the suspect—decide whether to procure this evidence.

As of September 1, 2009, Chapter 724 of the Texas Transportation Code requires an officer to draw blood without a warrant if:

- the subject, arrested for an offense under Penal Code Chapter 49, refuses to provide a breath sample and a person other than the suspect "has suffered bodily injury and has been transported to a hospital or other medical facility for medical treatment";
- the suspect is arrested for DWI with a child passenger under Penal Code §49.045;
- the officer credibly believes that the suspect can be charged with felony DWI due to two prior Chapter 49 DWI offenses or one prior intoxication manslaughter; or
- the officer credibly believes that the suspect committed DWI and was previously convicted of intoxication assault or DWI with a child passenger. (This offense would be enhanced to a Class A misdemeanor.)

When making a DWI arrest, the officer must request a breath or blood sample. If he has a reasonable belief that any of the above additional circumstances exist, then a blood sample *must be drawn*. It's that simple. The officer has no discretion to call an early end to the shift, nor does he need a search warrant for blood. Needless to say, this information is important to teach local peace officers soon.

Calming "concerns"

The initial media coverage of this new law was full of "concerned" criminal defense lawyers and civil rights experts "wondering about its constitutionality." Real lawyers need not worry: The U.S. Supreme Court[1] and Court of Criminal Appeals[2] have both found that DWI cases present very clear exigent circumstances allowing warrantless draws, and the implied consent statutes impose limitations, not constitutional prohibitions, on officers drawing blood. The so-called "concerns" are political and economic, not legal, academic, or practical.

Senate Bill 328 also amended §724.017 of the Transportation Code and created a solidified immunity for a person, business, or entity that assists officers in drawing blood under the old and new mandatory draw procedures. It also clarified that assistance with blood search warrants enjoys the same immunity, not only from civil liability but also from "any licensing or accrediting agency and body," because the statute prohibits juries from considering that the extraction was involuntary in determining negligence. The legislature declared caregivers immune in every possible way, so if hospitals now claim fears of liability as a reason not to comply with their legal obligations to draw blood, they do not have a leg to stand on. The hospitals' issue is one of money and a false sense of being above the law, not any legitimate concern about lawsuits or discipline.

The bill also expanded the pool of judges who can sign blood warrants for offenses under Penal Code Chapter 49 (DWI). The new controlling provision is Article 18.02(j) of the Code of Criminal Procedure, which permits "any magistrate that is an attorney licensed by the state" to issue an evidentiary search warrant for blood in a DWI case. This addition should be very helpful to many jurisdictions. Just be aware that the inclusion of subsection (j) did nothing at all to change subsection (i) of the same statute; that's the provision which very small jurisdictions without courts of record rely on to use any magistrate (whether or not she is an attorney) to sign all evidentiary search warrants. The new changes are purely expansive, not restrictive.

New objections

Here are some common objections to blood samples and how to counter them.

Using a search warrant to obtain blood violates the Constitution. Really? The Fourth Amendment prohibits unreasonable searches, yes, but drawing blood with search warrants in DWI cases has survived both federal[3] and state[4] constitutional challenges.

Using a search warrant to obtain blood is prohibited by the Transportation Code or is preempted by the code's implied consent statutes. *Beeman v. State* directly addressed both of these issues.[5] Use of search warrants under Chapter 18 of the Code of Criminal Procedure is not

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limited to felonies and is not precluded by the implied consent[6] or mandatory blood draw[7] provisions of the Transportation Code. Sometimes the objection will be made under §724.013 of the Transportation Code, which says a specimen may not be taken if the subject refuses except under the mandatory provisions. The Court of Criminal Appeals established in *Beeman* that that section does not control the general provisions governing search warrants under the Code of Criminal Procedure. That provision does impose nonconstitutional bars to evidence that could be taken without a warrant under *Schmerber v. California*.[8] Make copies of this case and carry them to any trial involving a blood search warrant.

The place the blood was drawn was not sanitary or not certified as a sanitary place. Language requiring certification of a place as sanitary was removed from the Transportation Code more than a decade ago. If defense counsel objects, claiming the location must be certified, make sure defense counsel's law library has been updated in the last 10 years.

If a blood draw was made pursuant to the Transportation Code, the place the blood was drawn must be a "sanitary place."[9] This is a fact issue, and prosecutors must introduce evidence of the fact. No specific agency or institution is responsible for determination of whether a place was sanitary, so general testimony about the space should suffice.[10] If blood was drawn after issuance of a search warrant, this requirement does not apply.[11] In search warrant cases, the predicate is reduced to whether the blood was drawn in a medically acceptable fashion.

The person who drew the blood was not qualified. The State must prove the qualifications of the person drawing blood, but again, there is no state-required certification. For nonsearch warrant cases, the Transportation Code lists several qualified professionals and then gives authority to "qualified technicians."[12] A phlebotomist is a technician trained to draw blood. If the hospital or other medical facility determines phlebotomists on staff to be qualified, then they are "qualified technicians."[13] But the qualifications of people drawing blood must be established if they are unlicensed yet qualified.[14] Again, with warrants, this specific provision does not control, but prosecutors should always establish the qualifications of the person drawing blood to verify that the evidence was obtained in a medically acceptable fashion.

An alcohol-based swab was used during the blood draw, thus skewing the test results. This certainly sounds right, but it is not. Alcohol swabs use isopropyl alcohol, not ethyl alcohol (you may know it as the stuff in beer). It is a better idea to use a nonalcohol-based swab and an even better idea to preserve it as evidence. If you have a blunder in this regard, talk to your chemist. Introduce expert testimony, not unsworn defense "folk wisdom."

The person drawing blood must identify the defendant. Silly objection. Again, this would be ideal and is exactly what the blood draw affidavit was created to accomplish,[15] but as long as the officer can identify where the sample came from, then you have a witness. With the blood draw affidavit, the officer and technician should be able to testify to proper draw procedures, and the officer should identify the subject and the technician as those people related to the sample.

Too much time passed between the blood draw and when the defendant was driving. This issue is no different in search warrants than in mandatory blood draws and breath testing. A four-and-a-half-hour delay has been found not to render the sample too remote.[16] Additionally, establish the reasons for delay; in particular, emphasize the defendant's refusal. Don't let this objection become a back-door argument that somehow the State is required to prove retrograde extrapolation. Breath and blood evidence is relevant and admissible without extrapolation;[17] this objection goes to weight, not admissibility.

The affidavit is insufficient to establish probable cause. Well, no two ways about it: Officers must articulate their probable cause that the defendant committed DWI in the affidavit. First, make sure officers write affidavits alleging only DWI, not higher-level offenses for which they may have arrested the defendant. The warrant should allege only the minimal offense necessary to obtain the warrant. The elements—called the four corners—are simple but essential: 1) operated, 2) a motor vehicle, 3) in a public place, and 4) while intoxicated. Second, "probable cause" is less than "beyond a reasonable doubt"—don't increase the standard unnecessarily. Third, the defendant's refusal to provide a breath sample is evidence (and therefore probable cause) of the defendant's intoxication.[18] Last, if the affidavits are light on detail, they will continue to be that way if you do not train

officers to do them right. Use bad affidavits as a training opportunity.

The affidavit contains conclusory statements. It is not a problem if an affidavit contains some conclusory statements, so long as the affiant provided sufficient detail so the magistrate may independently determine whether probable cause exists. If there is little detail, then the warrant should be suppressed.[19] The affidavit should contain the source of each bit of information; while some of it may be hearsay, the source of the hearsay must be identified. The officer's experience and training should be detailed; if the affiant is not the investigating officer, then the affidavit must identify the investigating officer.[20] While blood search warrants must be done quickly, they must be done sufficiently, and officers must be trained to provide this kind of detail. There is perhaps no better resource than TDCAA's *Warrants Manual For Arrest, Search & Seizure* by Tom Bridges and Ted Wilson. That publication has numerous examples, including examples of DWI blood warrants, and is for sale at www.tdcaa.com/publications.

The warrant or probable cause affidavit does not include a time reference and is stale. Staleness of the warrant is covered by statute. The warrant must be executed "without delay."[21] The officer must testify as to the reasonable steps he took to execute the warrant promptly, which may simply be an end-run extrapolation objection (if so, see the comments above). The law provides for "three whole days" to execute a warrant.[22] If the officer waited a day, you have a problem with evidence, not the search. Additionally, the warrant must have the "date and hour of its issuance,"[23] but the defendant should have to show harm to obtain suppression without it.

The affidavit to establish probable cause that the defendant's blood contains evidence of his intoxication really needs to state the time of the officer's observations and investigation. Because the magistrate needs to make an independent determination of probable cause, the four corners of the affidavit must set out the time of these observations or the magistrate can't find the blood still has relevant evidence. This exact objection failed to pass muster with Fourteenth Court of Appeals in Houston.[24] Still, make sure the warrant and affidavit forms have a clear location where the time of observation, investigation, and arrest is prominently set out. The warrant should have a place for the magistrate to date and time her signing the warrant. The fact that the magistrate put the time the warrant was signed in the warrant likely saved the day in the Houston case.[25]

The motion to suppress the blood results was granted. What now? Don't panic. You still have a refusal case, the same kind we have been trying for years. Just be sure to correct the problems with the stop, affidavit, or warrant with the officers, or I guarantee you will lose more search warrants in the future. Blood search warrants mean that many officers are performing a new and difficult investigative task—provide them with resources and training to do it properly.

Brand new defense

In the category of "no good deed goes unpunished," the innovative use of search warrants to obtain valuable blood evidence in DWI has created some unpleasant side effects. In refusal cases, the defense often attacks police investigators and the State's case by arguing that a blood search warrant could and should have been obtained. This argument is voiced as strongly and assuredly as the same attorneys voiced their constitutional "concerns" about the same investigative technique in the media moments before. And while ironic and seemingly unfair, the argument can be pretty effective. Prosecutors trying cases where blood warrants were not secured should address this argument well before their own rebuttal argument. The only effective counter must be set up on voir dire, in opening, and most importantly, during direct examination of the officer. Having the officer explain which local or individual circumstances made obtaining the search warrant impossible, or at least difficult, takes much of the sting out of this defense argument. If the real reason is lazy judges, officers, or hospitals, admitting such testimony could smart a bit, but in the long run, that pain might be a good thing.

Secondly, through the rebuttal close, redirect the jury to the real source of the lack of chemical evidence, which is the defendant's refusal—a refusal to provide evidence after this defendant was carefully and fully warned that this very jury can and should consider evidence against him. In this instance, though it greatly pains me to admit it, the defense may have a point. DWI is an offense well worth the effort of enforcing, prosecuting, and

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obtaining the best evidence to prove; the more than a thousand Texans a year who die in alcohol-related crashes[26] would probably agree.

New voir dire

Many members of the public are not fans of the blood search warrant or the mandatory blood draw. Some of the concern at trial will be the public clamor raised in the press by DWI defense attorneys misleading the public and deliberately ignoring caselaw. Due to the "experts" who are "worried" about constitutionality, it's certain that members of the jury panel will be too. Whether their opinions stem from the position that DWIs are too zealously investigated and prosecuted or the idea that a simple and common medical procedure is too invasive, many members of the public are very emphatic about their opinions. A seated juror with these strongly held positions is a nightmare for the prosecution. In cases where the State will introduce blood, and frankly, even in cases where we may not, this issue must be broached during jury selection. Don't be afraid to "poison the well"—trust me, it is already toxic, but don't fall into verbal brawls with these folks. They have the right to their opinions and prosecutors should respect those opinions; not knowing those opinions, I must stress, is the greatest risk. Jurors with a prejudice against the laws the State will rely on in court have no business on the panel. Instead of arguing, go to those jurors who understand the need for evidence and the importance of DWI enforcement and prosecution. Let them make the points the State will repeat on close.

Defending the law and the truth

Prosecutors stand for the law and the truth. This may sound a little Pollyannaish, but that's what the call "to see that justice is done"[27] requires: law and the truth. Those who defend impaired drivers and those opposed to the laws against impaired driving and their enforcement have been loud and insistent in opposition to officers obtaining the best evidence in DWI cases. They had great success using the same methods to attack breath testing and preaching a doctrine of obstruction and refusal to the guilty and innocent alike. If prosecutors do not speak up for the law and for the truth, no one will. At the local Rotary Club lunch, on radio, on TV, and in our conversations with the public, we need to be heard. There are several points every discussion of mandatory and search warrant blood draws should include:

1) empirical scientific evidence is beneficial to determine both guilt and innocence;

2) DWI is an offense that deserves effective investigation and prosecution;

3) harsh penalties for DWI have little deterrent effect if effective prosecution is not possible;

4) search warrants and mandatory draws are not necessary if suspects comply with the law (a law they received full written notice of when they obtained a driver's license); and

5) a personal freedom and right often overlooked is the one possessed by every driver to use our highways without drunk drivers' needless and selfishly created risk to their lives and property. While opponents of the law and of the truth decry "vampire cops," we must stress the benefit of evidence, knowledge, reason, and public safety, both in the courtroom and elsewhere.

Conclusions

Despite a vocal opposition, blood evidence helps the DWI prosecutor achieve her only goal in trial: getting to the truth. Blood evidence uncovers the truth of the DWI charge legally and quickly by helping convict the guilty and release the innocent. Despite the opportunity blood evidence provides the defense to perform independent analysis of the most important evidence in a DWI case, defense counsel rarely makes such a request. Blood search warrant results continue to almost unerringly support arrest decisions and provide shockingly high BAC readings—counter to the biblical axiom, we now know the truth and the truth is not setting many free. ❇

Endnotes

1 *Schmerber v. California*, 384 U.S. 757 (1966).

2 *Burhalter v. State*, 642 S.W.2d 231 (Tex. Crim. App. 1982).

3 *Schmerber v. California*, 384 U.S. 757 (1966).

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

5 *Ibid.*

6 Tex. Trans. Code §724.011.

7 Tex. Trans. Code §724.012.

8 384 U.S. 757 (1966).

9 Tex. Trans. Code §724.017(a).

10 Before the removal of the certification

requirement, this issue was addressed by *Adams v. State*, 808 S.W.2d 250 (Tex. App.—Houston [1st] 1991, no pet.). In *Adams*, periodic inspection was found to be sufficient without testimony an individualized inspection was made. Do note that the statute has changed since this case was returned.

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

12 Tex. Trans. Code §724.017(a). It lists the following: a physician, qualified technician, chemist, registered professional nurse, or licensed vocational nurse.

13 *State v. Bingham*, 921 S.W.2d 494 (Tex. App. — Waco 1996, pet ref'd).

14 *Cavazos v. State*, 969 S.W.2d 454 (Tex. App. — Corpus Christi 1998, no pet.). The qualification may be based on experience or training. See *Torres v. State*, 109 S.W.3d 602 (Tex. App.—Fort Worth 2003, no pet.).

15 Need a blood draw affidavit? See page 62 of TDCAA's *DWI Investigation & Prosecution* publication by Richard Alpert.

16 *Douthitt v. State*, 127 S.W.3d 327 (Tex. App. — Austin 2004, no pet.).

17 *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004), on remand, 169 S.W.3d 269.

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

19 *Jones v. State*, 833 S.W.2d 118 (Tex. Crim. App. 1992).

20 *Illinois v. Gates*, 462 U.S. 213 (1983).

21 Tex. Code Crim. Proc. Art. 18.06.

22 Tex. Code Crim. Proc. Art. 18.07(a)(2).

23 Tex. Code Crim. Proc. Art. 18.07(b).

24 *State v. Dugan*, No. 14 08-00905-CR (Tex. App—Houston [14th Dist.] 2009).

25 *Ibid.*

26 National Highway Traffic Safety Administration.

27 Tex. Code Crim. Proc. Art. 2.01.

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A new punishment hearing for a mass murderer (cont'd)

then went to his apartment, where he napped for a few hours. While the bodies of Edna and Sean remained undiscovered, Robertson spent his Sunday morning hanging out at the apartment pool with a friend and smoking marijuana. After the bodies were discovered that evening, he stayed a couple of days in Dallas to watch the news story unfold. Robertson then stole $700 from his roommate and drove the Cadillac to Las Vegas.

On August 29, 10 days after the double murder, a conscientious Las Vegas patrol officer ran a routine license plate check on the Cadillac as it passed by. The car came back as stolen out of Dallas and connected to a homicide there. After some strategic planning by the Las Vegas Police Department, Robertson and a male passenger were apprehended as they drove out of a casino parking lot.

According to several seasoned Las Vegas police officers, Robertson was unbelievably calm, collected, and unbothered. He wanted to know if he was on "America's Most Wanted." He casually talked to the SWAT officers about how quick and good they were with the takedown because he had had no time to reach for his gun on the back floorboard. Indeed, a search of the Cadillac revealed a wooden jewelry box with a .38 revolver inside it. Ballistics testing on the revolver later determined that it was the weapon used to murder both Edna and Sean.

Robertson readily and matter-of-factly admitted appalling details of the double murder to any Las Vegas police officer who would listen, including the part where he waited until the bubbles stopped rising from Sean's body in the creek before proceeding to his elderly victim. Dallas Police Detective Jesus Briseno flew to Las Vegas and obtained a written statement from Robertson, who again readily admitted the details of this offense. In shocking, "true crime" style, Robertson also admitted to a detective that he had robbed and killed a 7-Eleven clerk in Dallas just 10 days before committing the double murder and robbery at the Brau residence. Based on this admission, Dallas police had the .38 revolver compared with the autopsy bullet from the 19-year-old clerk, Jeffrey Saunders. The revolver that killed Jeffrey and the revolver that killed Sean and Edna were one and the same.

Before he could be brought back to Dallas to stand trial for these murders, Robertson tried unsuccessfully to escape from a Nevada jail. While awaiting trial in the Dallas County jail, Robertson set fire to a newspaper in his cell and shoved it under his door out into the walkway, creating a major disturbance and safety concern.

In February 1991, Robertson was tried for the capital murder of Edna Brau, convicted, and sentenced to death. He also pleaded guilty to murdering Sean and Jeffrey, for which he received two life sentences. But after 17 years of post-conviction litigation and six execution dates, the Court of Criminal Appeals ruled on March 12, 2008, that Robertson deserved a new punishment hearing in the capital case due to jury charge error. In short, 17 years of appeals had kept the case—and Robertson—alive long enough for him to take advantage of a change in the law. Specifically, the trial court's jury instruction regarding mitigating evidence—which had been upheld on direct and collateral review and denied certiorari review by the United States Supreme Court—was no longer constitutionally viable after 2004. That year, the Supreme Court issued its opinion in another Dallas County death penalty case, *Smith v. Texas*.[1] The Court of Criminal Appeals held that the *Smith* opinion created a new rule of law and allowed Robertson to re-assert the jury charge issue in another habeas writ, which he did, this time with success. We had to prepare for a new punishment trial.

Getting ready for trial

The victims' family anticipated this setback, as they had maintained a close relationship with our appellate team and followed the changes in law as they developed. Nevertheless, they were rightly disappointed and angry. Robertson, an inmate who wrote fluent German and had above-average intelligence, was retroactively given the benefit of a new legal rule which, at its inception, was intended to benefit the mentally challenged. No amount of legal rhetoric could justify this turn of events to the victim's family, particularly to the woman who had lost both her mother and her only child to Robertson's brutal handiwork.

The punishment charge in our case on retrial would contain the "deliberateness" special issue from 1991 law along with the "future dangerousness" special issue, but in keeping with the *Penry* rule, the charge would also contain the current statutory language of the mitigation special issue.

Never having retried a death row inmate for punishment, I had the luxury of a great team of very dedicated attorneys and investigators who pulled together on the case. We were presented with eight storage-size boxes jammed with paperwork from this prosecution, starting with the police and crime lab reports from 1991 to everything that had accumulated during the post-conviction process. Where to start?

We went through everything in those boxes to get a good feel for our case, our victims, the defendant, and what, if anything, he had done on death row for 18 years. After reading the transcript from the original trial, we determined which of those original witnesses we needed and could track down for the punishment hearing. Because we were seeking the death penalty again, we planned to put on everything the original jury had heard.

DA investigators Hoyt Hoffman and Tonia Silva set out to locate more than 40 witnesses from so many years ago. Armed sometimes with only a name, they gave their computer databases and IT skills a workout. Through their determination and persistence, all of those witnesses were located. Several are now deceased; one key witness was not in good health and could not testify. Needless to say, there was quite a bit of "former testimony" we had to read to our jury pursuant to Rule 804(b)(1).

Additionally, our investigators subpoenaed all TDCJ records, but reviewing them produced little in the way of additional punishment evidence. There were only five or six disciplinary reports from Robertson's years on death row, each of which dealt with the possession of various contraband, which we knew the defense would characterize as "minor" violations. (Our classification expert, though, showed that even things such as an altered coffee pot or copper wire are ingeniously used to create safety and security risks in prison.)

Countering defense arguments

We also knew from the previous testimony and trial records that the defense would present mitigating evidence of Robertson's terrible drug addiction at the time of the murders, as well as his father's physical and emotional abuse of his mother and siblings. This knowledge did not give us cause for concern, however, as it is all standard fare in death penalty cases. Given the lack of violent behavior for the last 18 years, we focused on the defense's theory that the TDCJ records alone showed that Robertson is not a future danger because TDCJ could and would control him if he were given a life sentence.

Our presentation and argument to counter this theory was to emphasize to the jury that death row inmates are confined to their 8x10-foot single cells for 23 hours a day and only one hour for individual recreation, leaving little opportunity for violence to others. Then, we contrasted this picture of life on death row (and we did introduce photos of the death row area and individual cells) with the much less restrictive prison life in general population, where Robertson would be housed if given a life sentence.

There was only one problem with our description of life on death row. The 23-hours-a-day-lockdown policy came into existence in 1999 when death row was moved (after an inmate escape) from the Ellis Unit to its current location at the Polunsky Unit. Robertson entered death row at the Ellis Unit in 1991, when death row inmates were still work-eligible and not on lockdown, so the defense argued that Robertson was not a future danger because he never committed a single violent act even during those eight years on the Ellis Unit. Our response to this argument was simple and fact-based: Robertson is a coward who targets only the unsuspecting and defenseless—something he would not find with inmates on death row. We may have used more colorful language, but the point is obvious.

By now, it may be apparent that the "facts alone" theme was our starting and ending point. That is, our case was going to be won or lost based on the horrendous facts of this offense and the murder of Jeffrey Saunders, the 7-Eleven clerk. Our jury selection was based in large part on whether prospective jurors could answer the special issues so as to result in a death verdict based solely on the facts of the offense. Josh Healy and Ellyce Lindberg, my trial

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NEWS-WORTHY

A new guide for CPS prosecutors

The Texas Department of Family and Protective Services (TDFPS), Office of General Counsel, is pleased to announce the upcoming release of its *Texas Practice Guide for Child Protective Services Attorneys*. The guide is designed as a quick reference tool for county and district attorneys and DFPS regional attorneys who handle Child Protective Services (CPS) cases. The format provides easy access to succinct statements of relevant law and policy, as well as best practice tips, resources, sample forms, checklists, and a trial notebook.

Look for the guide online at on the DFPS website at www.dfps.state.tx.us. The TDCAA website, www.tdcaa.com, also has a Word document summary of the guide; look for it in the Newsletter Archive under this issue. ❇

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colleagues in this case, set out to find 12 jurors who could do just that. And they did: The jury returned a death sentence in a little over three hours. Talking to the jury afterwards, it was apparent that the facts of the case were the overriding factor in their decision, along with the callousness with which Robertson described the murders to the police.

We had used this callousness to our benefit during the examination of a defense expert who testified that Robertson suffered from antisocial personality disorder. The expert could only concede on cross-examination that Robertson was a sociopath/psychopath at the time of the murders because he exhibited characteristics from each category on the Hare psychopathy checklist, including callousness.[2] We then argued that once a psychopath, always a psychopath—there is no cure, no magic pill, and no treatment. We argued that if Robertson received a life sentence and went into the much less-restrictive environment of the general prison population, coupled with his psychopathic personality and ability to manipulate and charm most people, he would definitely be a danger to the people who work with the general prison population. The key was drawing a clear distinction between life on death row and life in the general population.

It bears noting that parole has not been mentioned in this article. If given a life sentence, under the law in effect at the time of the offense, Robertson would be eligible for parole after serving 15 years which, of course, he had already served. Based upon the advice of Lisa Smith and Kim Schaefer, our incredible appellate attorneys on this trial team, we never mentioned parole during the trial or in closing argument. This advice was aimed at avoiding a claim on appeal that the 15-year eligibility requirement unfairly persuaded the jury to avoid a life sentence. As a trial attorney, it was difficult to see the defendant sitting in the courtroom, knowing that he was already eligible for parole if the jury gave him a life sentence. But during voir dire, both sides agreed that the judge alone would read the general law regarding parole, including that the jury cannot consider it for any reason, and this same instruction was included in the charge. Those were the only times that parole was ever mentioned.

Some factors, such as having multiple victims, made this case an easy one to retry for death, but other factors, such as an 18-year period of proven non-violence, made it one of the more difficult. In the end, our success can be attributed to a thorough and relentless investigative search for witnesses, tireless co-counsel who used the facts creatively, and conservative appellate advice to keep us well within the law. The jury heard the facts and applied the law to reach a just punishment, one we hope this time is carried out. ❇

Endnotes

1 534 U.S. 37 (2004) (per curiam).

2 See Robert D. Hare, Psychopathy Checklist-Revised (1991).

Strange things are afoot at the Circle K…mart?

An examination of the United States Supreme Court's decision in *Melendez-Diaz v. Massachusetts*[1]

Editor's note: Starting with this issue, we are revamping the As the Judges Saw It column. Rather than duplicate effort by writing about cases that have already been published in TDCAA's weekly case summaries emailed every Friday (sign up for these free emails at www.tdcaa.com/newsletter/subscribe.php), our writers will focus on a single case that requires in-depth analysis. While Melendez-Diaz v. Massachusetts *is clearly a significant case, its lasting impact in Texas may be in the questions it raises rather than the answers it gives.*

By David C. Newell
Assistant District Attorney
in Harris County

Boston police officers got information that Thomas Wright was dealing cocaine out of a local Kmart. A customer would call Wright while he was working at Kmart, a car would pick him up, then the car would drop him off back at his job. The police set up surveillance and witnessed a blue sedan pick Wright up and take him to make the exchange. When the sedan returned, police stopped Wright, searched him, and found cocaine. They also stopped the two men in the car, one of whom was Luis Melendez-Diaz, the defendant in this case.

Police put all three men in a police cruiser, and during the drive to the jail, they noticed the passengers fidgeting and acting nervous. After depositing all three at the jail, police searched the cruiser and found cocaine. The State charged Melendez-Diaz with distributing cocaine. At his trial, the State introduced "certificates of analysis" pursuant to a Massachusetts statute. The certificates were affidavits that showed the results of the forensic analysis performed on the seized substance. The sole purpose of these affidavits under Massachusetts law was to provide *prima facie* evidence of the composition, quality, and net weight of the analyzed substance. Melendez-Diaz objected based on *Crawford v. Washington*[2] that the Confrontation Clause required the analyst to testify in person, but the trial court overruled the objection. The U.S. Supreme Court, though, later disagreed.

An analysis requires an analyst

The United States Supreme Court held that the analyst's affidavits were testimonial statements, and the analysts were witnesses for purposes of the Sixth Amendment. Justice Scalia, writing for the five-judge majority, explained that the affidavits fell within the "core class of testimonial statements," and the Confrontation Clause guaranteed Melendez-Diaz the right to confront the witnesses who made those statements through cross-examination. Moreover, the affidavits are functionally identical to live, in-court testimony doing "precisely what a witness does on direct examination." So, the affidavits were testimonial and the analysts were witnesses; Melendez-Diaz should have been given the opportunity to cross-examine those witnesses at trial.

Scalia then went on to reject arguments that the witnesses don't need to be cross-examined. Just because they aren't "accusatory"—meaning they're not directly accusing the defendant of wrongdoing—doesn't mean they aren't testifying against him. Just because they aren't "conventional"—like the ones called in the trial of Sir Walter Raleigh to relate past events—doesn't mean the State can keep them off the stand. It doesn't matter whether the witnesses are describing contemporaneously observed facts or relating matters from the past. It doesn't matter that they did not observe the crime or any human action related to it. It doesn't matter that the statements didn't come from interrogation. It doesn't matter that the testimony is simply neutral scientific testing. What matters, according to Scalia and the majority, is that the Confrontation Clause provides a procedural guarantee of reliability by allowing the defendant an opportunity to cross-examine those witnesses against him.

Thank God for Article 38.41 and Colorado County, Texas

Melendez-Diaz does not mean, however, that the State must always call

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the analyst to introduce results of chemical analysis. Justice Scalia notes that 95 percent of convictions are obtained via guilty pleas so this decision would be implicated only in a small fraction of cases. Moreover, many states have crafted laws to allow for the admissibility of such evidence without running afoul of *Crawford* (and now *Melendez-Diaz*). States like, oh I don't know, Texas. That's right; Justice Scalia actually cites Article 38.41 of the Texas Code of Criminal Procedure as one of three examples of how to craft a notice-and-demand statute that still satisfies *Crawford*. In doing so, Scalia makes clear that the defendant always has the burden to make his *Crawford* objection so these statutes don't shift the burden of proof to a defendant. Rather, the statute regulates the time in which a defendant must make the objection by giving him notice of the State's intent to use the evidence and a deadline to demand that the actual witness be called. If he doesn't make the demand in a timely fashion, he forfeits the right to complain.

What does this have to do with Colorado County? Well, our statute—the one likely to become one of the models for the rest of the country—was the brainchild of Jay Johannes of the County and District Attorney's Office in Colorado County and drafted by Ken Sparks, the elected prosecutor. They—along with then-State Senator Teel Bivins and State Representative Debbie Riddle, the legislators who carried the bill—helped give Texas prosecutors a very practical and modest statute that has probably shielded Texas from another *Apprendi*-like storm. So if you happen to see these folks (you can identify Ken by his eponymous cap), make sure you give them a shout out of thanks.

What's all this talk about business records, then?

The foresight baked into Article 38.41 (and presumably Article 38.42 [chain of custody affidavit], which works the same way) doesn't end the discussion, however. Justice Scalia also considered the impact of *Crawford* on business records. Scalia makes clear that business records that satisfy the hearsay definition of a business record aren't necessarily immune from a Confrontation Clause objection. Judge Keasler, who concurred in *Smith v. State*[3] on the ground that business records are not testimonial under *Ohio v. Roberts*, may have to rethink his position. According to Scalia, business records kept in the normal course of business may not violate *Crawford*, but courts must look at whether the regularly conducted business activity is production of evidence for use at trial. If it's a record made with the idea that it will be used at trial, it violates the Confrontation Clause; if not, it does not.

The example Justice Scalia gave of a problematic business record was an accident report prepared by an employee of a railroad company. In a prior case, the Supreme Court had held that such records were not "business records" because they were calculated for use essentially in the courts, not in the business.[4] Conversely, Justice Scalia does note in footnote two of the opinion that medical reports created for treatment purposes would not be testimonial in this case. Perhaps it's a little too soon for a sigh of relief on that front, but it is reassuring.

So where does that leave autopsies? On the one hand you can see the argument that it is a record prepared for trial. On the other hand, it's really a diagnosis of a dead patient. Obviously, prosecutors offering an autopsy report should be ready to argue that such a report is a business record created for the use of the medical examiner's "business," not prepared solely for trial.[5] Moreover, *Melendez-Diaz* can be distinguished from the typical autopsy situation because the lab results in the case came in without a sponsoring witness to explain them, while autopsies will typically come into evidence through a sponsoring witness, namely the medical examiner. Note, however, that Scalia specifically mentions in *Melendez-Diaz* that coroner's inquests are given no special status despite the fact that they were admissible without a right of confrontation in common-law England.

The court does not touch upon what happens when the medical examiner who performed the autopsy is unavailable. Is the second, redone autopsy OK even though it was based on data collected by an un-testifying witness? The data are based on the previous ME's observations. In footnote one, Justice Scalia rejects the idea that the State must prove every link in a chain of custody, thereby leaving it up to the prosecution to decide what links are necessary. But if the State must prove a link, it must do so with live testimony. So if you draw the analogy, it may be necessary to bring in the

medical examiner to prove the underlying data if that information is important to the case.

However, under Rule 703, the second doctor can rely upon even inadmissible evidence in reaching his own opinion,[6] which could provide an avenue of admissibility for the second medical examiner's opinion even if the report itself is inadmissible. The defense may point out the language that even a business record that satisfies an evidentiary predicate may not be immune to a Confrontation Clause challenge. However, that argument loses sight of the evidence being introduced. That might work to stop the introduction of the data contained in the autopsy, but if the State is trying to introduce the second examiner's opinion, that witness is necessarily available for cross-examination, so it shouldn't violate *Crawford*.

Of course, this is all pretty far afield of the question of admissibility of unsponsored lab results, so only time will tell how big of an impact this case will have on such records. By way of reassurance, the San Antonio Court of Appeals has upheld autopsy reports over *Crawford* objections where the doctor performing the autopsy was not the one who testified.[7] Additionally, for those concerned about the same situation except with a chemist opining about tests performed by another chemist, the Texarkana Court of Appeals has held that such situations do not violate *Crawford* either.[8] Remember, these cases were decided before *Melendez-Diaz* so they may be distinguishable, but they should provide some support going forward should these situations arise.

Are jail records in trouble?

Melendez-Diaz may impact another area of Texas law, namely jail infraction records introduced at punishment. In *Smith v. State* and *Russeau v. State*, the Court of Criminal Appeals held that some portions of jail infraction records violated *Crawford*, but the court reached that decision by drawing a distinction between records that amounted to nothing but a sterile recitation of the facts and subjective narratives.[9] According to the Court of Criminal Appeals, the former do not violate *Crawford*, but the latter do. Under this theory, the Court of Criminal Appeals upheld the admission of parole revocations certificates in *Segundo v. State* because those were merely boilerplate certificates that did not contain subjective narratives on why a particular defendant violated his parole.[10] Under *Melendez-Diaz*, it's possible that this distinction could be seen as an attempt to single out a certain type of evidence for exemption from the confrontation requirement based upon its reliability. However, it's also possible that the narrative recitations in jail records could be admissible if they were not prepared in contemplation of trial. Time will certainly tell, but prosecutors seeking to introduce such records should be prepared to argue why these jail records are just like normal business records in response to a *Crawford* objection.[11]

And so it goes

Prosecutors are likely to get some new *Crawford* challenges based on *Melendez-Diaz*. Remember, though, that this case dealt only with drug lab results, and the Supreme Court pretty much endorsed the Texas statutory notice-and-demand scheme for admission of drug analysis. However, prosecutors must be prepared to respond to a *Crawford* objection to business records with some argument that the records were not prepared for the purpose of later use at trial.[12] This need may be particularly keen in situations involving autopsies or jail infraction records as current caselaw may need to be re-examined in light of *Melendez-Diaz*. Normally, I'd ask you a question to end the column, but it seems the Supreme Court has taken care of that for me. ❇

Endnotes

1 *Melendez-Diaz v. Massachusetts*, ___ S.Ct.___; 2009 WL 1789468 (June 25, 2009)(5:4).

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

3 *Smith v. State*, ___ S.W.3d ___; 2009 WL 1212500 (Tex. Crim. App. May 6, 2009)(Keasler, J. concurring).

4 *Palmer v. Hoffman*, 318 U.S. 109 (1943).

5 See e.g. *Mitchell v. State*, 191 S.W.3d 219, 221-22 (Tex. App.—San Antonio 2005, pet. ref'd.)(holding that an autopsy is admissible as a non-testimonial business record).

6 Tex. R. Evid. 703.

7 *Mitchell v. State*, 191 S.W.3d 219, 221-22 (Tex. App.—San Antonio 2005, pet. ref'd.); see also *Pierce v. State*, 234 S.W.3d 265, 269 (Tex. App.—Waco 2007, pet. ref'd); *Denoso v. State*, 156 S.W.3d 166, 182 (Tex. App.—Corpus Christi 2005, pet. ref).

8 *Blaylock v. State*, 259 S.W.3d 202, 206 (Tex. App.—Texarkana 2008, pet. ref).

9 *Smith v. State*, ___ S.W.3d ___; 2009 WL 1212500 (Tex. Crim. App. May 6, 2009); *Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005); see also *Campos v. State*, 256 S.W.3d 757, 762 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd)

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(holding that autopsy report was non-testimonial upon same "sterile recitation of the facts" theory).

10 *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008).

11 They can also take the road that Smith County took in the retrial of Russeau by calling 62 witnesses to prove up all the incidents that had merely been lost in the jail records on the first trial. *Russeau v. State*, ___ S.W.3d ___; 2009 WL 1873298 (Tex. Crim. App. July 1, 2009).

12 *De La Paz v. State*, 273 S.W.3d 671 (Tex. Crim. App. 2008) (holding that the prosecution faced with a *Crawford* objection must establish evidence is admissible under *Crawford*).

Making no-refusal holidays float

Montgomery County has taken no-refusal weekends from the streets to the water so that boaters, like drivers, must submit a breath or blood sample if suspected of intoxication.

By Warren Diepraam
Assistant District Attorney in Montgomery County

Thanks to some enterprising law enforcement officials almost a decade ago in Hereford, the use of search warrants in driving while intoxicated (DWI) cases has become an accepted part of Texas law enforcement practice. Appellate cases on the issue are becoming more common and approving of the practice. The "no-refusal holiday program," where law enforcement and prosecutors designate a holiday weekend, such as July Fourth, as a high-publicity time to seek search warrants for blood when DWI suspects refuse breath samples, has been expanded to many Texas counties, and I have spread the gospel to seven other states with more lining up to join. The legislature arguably approved of the program through recent legislation making it easier to obtain mandatory blood samples and blood search warrants. (See W. Clay Abbott's article on the subject on page 8.) Now, the Montgomery County District Attorney's Office has expanded the no-refusal program to Lake Conroe, thereby increasing the flotilla of tools available to impaired driving and boating enforcement.

Lake Conroe is one of the smaller of the Texas lakes. Addition-ally, the City of Houston has a possessory interest in the lake, and the area surrounding the water is close to that city's jurisdiction. This means that the lake is swamped with recreational weekend and holiday boaters who are not necessarily the most skilled at boating rules and safety. The one theme that echoed when Brett Ligon, the district attorney, began to focus on impaired driving and boating was that the locals refused to go on the lake during the summer weekends due to the large number of impaired boaters. The facts bore this out with several recent incidents of serious boating crashes. Furthermore, no police officer who patrolled the lake could remember a summer holiday when there was no major boating incident. This situation was tailor-made to deliver a broadside on impaired boaters through implementation of a no-refusal program.[1]

Implementating this program required some significant planning on the part of the Montgomery County District Attorney's Office. The first area of concern identified by the planning prosecutors (Frank Barnett, Brett Ligon, and myself) was the Texas Penal Code. The laws regarding boating while intoxicated (BWI) are not necessarily the same as those that cover drivers of cars. What constitutes a motor vehicle is a simple maneuver that requires little thought. However, the same does not hold true for the definition of a watercraft.[2] It's a no-brainer that a motorized boat is a watercraft, but the definition is particularly broad in that water skis, rowboats, aquaplanes, or any other vessel is a watercraft unless it is designed to be propelled only by the water current. Because the operation of a motorized boat by an impaired skipper is the most dangerous of the potential BWI conduct, we decided to limit search warrants to people suspected of operating motorized vessels. While an impaired skier is not automatically excluded for warrant consideration, we decided to allow them to be processed with more traditional approaches. Almost all the serious crashes on Lake Conroe involved impaired boaters, further justifying the focus on these individuals.

We also decided which law enforcement agencies to contact. The Texas Parks and Wildlife through Captain Ron Vanderroest and Montgomery County Constable Don Chumley were the obvious choices because they knew the ropes when it came to boating safety. Both of their agencies have a long history of law enforcement on the lake, and their input was extremely important in the process.

Field sobriety tests

One area of concern was field sobriety testing (FSTs). With boating, impaired driving facts are often absent (in contrast with DWI cases, where such facts are often part of the prosecutor's case in chief). This absence of impaired driving facts would need to be addressed through other means to justify intrusion upon boaters on the lake. The lack of ability to perform the National Highway Traffic Safety Administration's (NHTSA) standard tests is a further complicating factor in BWI cases that seriously affect the prosecution's chances of prevailing at trial.

All of the FSTs adopted by NHTSA require that the subject be tested on a flat and solid surface. This requirement is difficult on a lake or other waterway. In fact, officers involved in BWI cases prefer that the NHTSA FST battery not be performed until the subject has been on dry land for at least 15 minutes. Considering tow time to the shore and this 15-minute wait, we needed a method to solidify an officer's decision to detain. Therefore, we decided that officers would employ some of the traditional but non-standardized FSTs used before the three NHTSA FSTs (one-leg stand, horizontal gaze nystagmus, and the walk-and-turn) became the mantra of DWI enforcement. To justify a detention and quickly release those not requiring further investigation, the hand-slap, finger-touch, alphabet recitations, and penny pick-up were used as part of the testing retinue on the water. In addition to these tests, patrol officers employed portable breath testing instruments (PBTs). These devices are the bane of prosecutors in DWI cases but come in handy for BWI cases as an effective tool to minimize delays to innocent boaters. The fact is that a failed PBT may currently be admissible as an indicator of impairment at trial.[3] The standard line of questioning by defense lawyers on the use of PBTs does not hold water when countered with an informed officer advocating for the quick release of a boater. By employing these tests on the boat immediately after detecting signs of impairment, officers could develop more evidence to justify the detention and bolster the chances of succeeding in court. When onshore, the completion of the standardized battery of FSTs and the subject's refusal to provide a breath test[4] further bolstered the detention decision and seeking a search warrant.

Once on dry land and after the 15-minute observation period for FSTs had passed, the procedure was generally handled the same as on any other no-refusal weekend with the notable exception of the Houston Police Department's Breath Alcohol Testing Mobile Unit (or BAT-mobile) operated by Officers Paul Lassalle and Don Egdorf at Lake Conroe. (See photos of it on the next page.) The deployment of this vehicle has been a tremendous success in all Montgomery County DWI or BWI initiatives because the equipment has a significant deterrent effect on both DWI and BWI offenders and has resulted in a greater reduction in refusal rates as compared to nights without the BAT-mobile.[5] In fact, HPD's use of this equipment and sat-

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uration patrols by the Texas Department of Public Safety, the sheriff's department, and local police agencies ensure that impaired individuals will be captured whether on land or on water.

Once suspects are detained

As mentioned, those detained faced the standard processing. Each subject was given the opportunity to perform the FSTs, the implied consent document was read, and the refusal was obtained. Then the officer contacted the prosecutor for preparation of the warrant and presentation to the on-site or available magistrate.[6] A nurse or paramedic was at the lake patrol station to ensure that the blood evidence was quickly obtained. The blood was submitted to the relevant law enforcement agency for analysis. The Montgomery County Sheriff's Department provided a jail transport van for faster processing of the arrestees.

The blood results so far have been supportive of the need for this type of program. All of the arrestees have had a blood alcohol level above 0.08, and comments from the general public and business community are overwhelmingly positive. However, some problems developed after the first event over Memorial Day. For example, one boater complained that he was stopped twice by less than even-keeled game wardens while attempting to go from one marina to the next; also, a local business owner complained that business was slow because of the large law

Strong, visible police presence, both in the BAT-mobile (top photo and photo at right) and other officer vehicles (above) are strong deterrents during both BWI and DWI no-refusal initiatives. Pictured at top are Montgomery County Sheriff Tommy Gage, Captain Ken Ariola, and Officer Paul Lassalle of the Houston Police Department. Photos courtesy of Jamie Nash, Montgomery County News.

enforcement presence in the area.

To address the first issue, we implemented a procedure whereby all boat stops were recorded through a central dispatch center so that patrol officers would know if a boat had already been contacted by law enforcement. However, police officers should be cautious with this practice: One boat was stopped and the operator tested with a PBT. After

providing a sample of 0.04, he was released. The same boat was stopped two hours later with another operator. This time, the test result was 0.18. Note that reasonable suspicion to detain a boater is not needed because law enforcement or Coast Guard officials can conduct boating safety checks at any time and for any reason.[7]

As to the concern of the business owner, we will heavily publicize the availability of a new business in the area. DD4Hire will provide a designated skipper (or driver) for a nominal fee to those requesting the service. By promoting a designated skipper or driver, citizens can have their fun and not endanger the public.

Conclusion

The expanded use of search warrants has been a boon to prosecutors in our state and across the nation. As Texas appellate decisions begin to mount in favor of search warrants and as people become accustomed to the approach, the best evidence available in DWI cases, blood evidence, will be used more and more frequently. One statistic that is not difficult to fathom is that when the program was in operation, there were no alcohol-related boating crashes on Lake Conroe for the first time in recent memory. The nation's first no-refusal BWI weekend has been an overwhelming success, and it too should be considered state- and nationwide as an important boating safety program. ❇

Endnotes

1 See "Anatomy of a DWI 'no-refusal weekend,'" *The Texas Prosecutor,* September-October 2007, Volume 37, Number 5; and "Boating While Intoxicated," *The Texas Prosecutor,* September-October 2008, Volume 38, Number 5.

2 See Texas Penal Code §49.01 (4)

3 *Fernandez v. State*, 915 S.W.2d 572 (Tex. App.—San Antonio 1996, no pet.).

4 As with DWI no-refusal initiatives, it is strongly suggested that prosecutors and officers obtain a refusal before mentioning or seeking a search warrant.

5 According to Houston Police Department and Montgomery County Criminal District Attorney statistics, when the BAT-mobile is used on a DWI or BWI initiative, the refusal rate drops to less than 20 percent. The average refusal rate on no-refusal holidays is about 30 percent, compared to an almost 50-percent refusal rate on other nights.

6 The fill-in-the-blank warrant forms in the TDCAA book *DWI Investigation & Prosecution* by Richard Alpert were used and changed to reflect the use of a watercraft.

7 Tex. Parks and Wildlife Code §31.124(a).

TDCAF News

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Jennifer Vitera
Janice L. Warder
Noble D. Walker, Jr. ❇
(from June 1 through August 1, 2009)

Avoiding improper jury arguments

Strike hard blows but not foul ones during close.

"A prosecuting attorney is permitted in his argument to draw from the facts in evidence all inferences which are reasonable, fair, and legitimate, but he may not use jury argument to get before the jury, either directly or indirectly, evidence which is outside the record. A prosecuting attorney, though free to strike hard blows, is not at liberty to strike foul ones, either directly or indirectly."[1]

By Andrea Westerfeld
Assistant Criminal District Attorney in Collin County

Closing argument is nearly every prosecutor's favorite part of trial. It's a chance to get away from witness headaches and legal arguments and just talk about the whole of your case to the jury. But don't get carried away! Even veteran prosecutors can wind up losing a case from a mistake in closing argument, whether through a mistrial or reversal on appeal. Of course, many other types of permissible argument do not slot neatly into one of these four areas, such as explaining the relevant law or the jury charge.[3] It's more important to remember what is *not* permitted and why. This article will provide a list of the more common problem arguments and how to not get caught in the trap.

The common saying is that there are four permissible areas of jury argument:

1) summary of the evidence,

2) reasonable deductions from the evidence,

3) response to opposing counsel's argument, and

4) plea for law enforcement.[2]

Problem arguments

Arguing outside the record. This is probably the most common mistake in closing argument. During argument, you may summarize the evidence presented, make reasonable deductions from it, and talk about things that are common knowledge. But anything that cannot be traced back to evidence in front of the jury is not a proper subject for argument. Here are a few examples.

✘ "There's something very important that I cannot tell you about concerning why you should not give [the defendant] anything less than 10 years."[4] This is *improper* because it injects outside facts and invites the jury to speculate about the "very important" reason to which the prosecutor alludes.

✘ "I can't show you his arms; he's [the first co-defendant] got long sleeves on, and I don't know if you can see hers [the second co-defendant] or not—but look at the needle tracks on them."[5] This is *improper* because there was no evidence of needle marks, and any marks would not have been visible to the jury; thus, the jury was left to speculate whether the marks existed and what they meant.

✔ "What'd he do? He does this. He does this. 'I refuse. I refuse. I refuse to take the breath test. I refuse.' You know why he refuses? Because if he blows in the machine, the game is over."[6] This statement is *proper* because it is a reasonable inference that the defendant would refuse a breath test because he was intoxicated. *But* the argument would be improper if the prosecutor tried to argue the defendant would have blown a particular result because there was no evidence of a precise alcohol concentration in the record.

Expressing personal opinions. A corollary of the first rule is that prosecutors must be careful not to inject their own opinions into argument, at least where it would amount to unsworn testimony. It is fine to express opinions that are reasonable deductions from the evidence, but where your opinion is based on information not in front of the jury, whether personally vouching for a witness's credibility or discussing police or office procedures, it is improper. Here are a few examples.

✘ "I don't believe I have ever seen anybody that I thought was any more honest than she is."[7] This is *improper* because it gives the prosecutor's personal opinion of the witness's credibility, which is not based on any evidence from trial.

✔ "[N]ow who is the expert? You look. You look. You tell me, did not that boot make that print? If so [sic—not?], why not? Looks like it to me."[8] This argument is *proper* because it was based solely on the

evidence and did not imply the prosecutor had any special expertise.

Commenting on the defendant's failure to testify. We all know from our first day on the job that a prosecutor absolutely cannot comment on the defendant's failure to testify. But it's not only outright saying, "By the way, the defendant didn't testify!" that can be a problem. For example, it's fair to comment on the defense failing to produce evidence to support a theory, but if the evidence is something *only* the defendant could produce, then it's a comment on his failure to testify. Before commenting on any evidence that the defendant did not produce, make sure it's something that could have been introduced by some other evidence. This can include prior statements by the defendant that have been introduced into evidence. Here are some examples.

✘ "You've heard that now from two people. You heard no evidence to the contrary as to … the second victim. You heard no denial. That was just accepted."[9] This is *improper* because the only person who could have denied the victims' testimony was the defendant.

✔ "Questions are not evidence; they are not facts. All this about a foster home and being abused and all, all that was questions. Not one fact has been presented to you about foster homes and a bad childhood and being abused. If it was there, they can bring it to you. They told you I can bring anything—"[10] This is *proper* because it referred to witnesses who testified about the defendant's experience in foster homes. The evidence could have been introduced through the foster parents, social workers, or other sources than the defendant's testimony.

✔ "They want to say first that it's self-defense. Well, in order to have self-defense, what has to happen is someone says, 'Yeah, I committed this crime. I committed this murder. I did this and I intended to do this because I was in fear of my life.'"[11] This is *proper only* because the defendant's written statement was admitted, and the argument in context referred to it. Always be careful when using the word "I" when explaining a defense because it is often automatically considered a reference to the defendant testifying.

Commenting on the defendant's lack of remorse. This is really just a continuation of commenting on the defendant's failure to testify, but it's worth a separate mention because it's very easy to trip on. If the defendant does not testify, then prosecutors must be very careful mentioning that he did not express remorse. It is appropriate to do so only if the defendant has given pretrial statements that were admitted into evidence or if other witnesses testified about his lack of remorse. Otherwise, the only way the defendant could express remorse is by taking the stand, and prosecutors can't mention that in closing argument. A few examples include:

✘ "You have had a chance to sit here this whole trial, listen to the evidence, look at the demeanor of the witnesses on the stand. And you have had chance [sic] to look at everything. See any remorse in this courtroom other than comes from the …"[12] This argument is *improper* because the defendant did not testify and no witnesses testified to the defendant's lack of remorse.

✔ "That's the type of person you're dealing with in [the defendant]. And since that time not one feeling of remorse, not one word of sorry."[13] This is *proper* because a police officer testified that the defendant had told him, "I'm not sorry."

Nontestimonial courtroom behavior. The demeanor of a *testifying* witness, so long as it was something visible to the jury during his testimony, is relevant to the jury's determination of credibility. Therefore, a prosecutor can comment on the defendant's expressions or behavior while he was on the witness stand, but the defendant's behavior while seated at counsel table is not evidence, and commenting on it runs the risk of both arguing outside the record and commenting on the defendant's failure to testify. For instance:

✘ "You observed [the defendant's] demeanor in this courtroom and I submit to you it is a reasonable deduction that he would have reacted in some way, shown some concern. He has just sat there cold, unnerved, uncaring, just like he was like that morning [of the burglary]. That tells you a great deal about him. That has nothing to do with articulation or being able to speak or education. No, that has to do with the fact that he is guilty and he could care less this week that he is guilty and he could care less back on June 9th, 1983."[14] This is *improper*

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because the defendant's behavior was not evidence and it was not a reasonable deduction that he was guilty merely because he did not react to the victim's testimony.

✘"Now, we all heard very credible testimony from an independent witness who sat right here on the stand and told you that that man, the defendant (indicating), sitting right here now looking like he really doesn't care one way or another what happens here today—"[15] Again, this is *improper* because whether the defendant looked concerned about the outcome of the trial was not evidence of guilt.

Shifting the burden of proof. The State cannot make any argument that misstates the law. The most common way of doing so is a statement that improperly shifts the burden of proof onto the defendant. The State cannot imply, directly or indirectly, that the defendant has the burden of proof in any matter, except for affirmative defenses where the defendant *does* have the burden. As discussed above, a prosecutor *can* comment on the defendant's failure to bring witnesses or evidence to support his story, but we must be careful not to imply that such failure means the State doesn't have to prove its case.

✘"There is no gray area here. He did it, or he didn't do it. That's the only choice here. There is no gray area here. There is no notion that I believe he did it, but you didn't prove it."[16] This argument is *improper* because a jury can believe that the defendant is guilty but the State did not present proof beyond a reasonable doubt.

✔"You may hear from the defense, he was good when he was in the penitentiary. Well, let me tell you something. You don't find anything but one year's worth of information that he didn't do anything wrong, that year from '83 to '84, when he was in the penitentiary. I defy you to find a shred of documents anywhere in evidence that says he is a model prisoner. You won't find it."[17] This is *proper* because it commented only on the defendant's failure to produce witnesses or documentary evidence.

Strike at the defendant over counsel's shoulders. No matter how tempting it may be at the end of a long, hard-fought trial, be careful not to personally attack the defense attorney. The old faithful "Of course Mr. Smith says the defendant's innocent—he's paid to think that" can end up getting the State reversed. Prosecutors are allowed to respond to the defense arguments, but we must take care to respond to the argu*ment*, not the argu*er*. When the argument is made in terms of the defense counsel personally and explicitly impugns his character, it is improper. For example:

✘"The defense has attempted to get you off the main road, to divert you. They don't want you to stay on the main road because they know where that will take you. … They want you to take a side road, a series of side roads, rabbit trails, and a rabbit trail that will lead you to a dead-end. The truth is not there."[18] This was *improper* because it referred to defense counsel personally and suggested counsel wanted to divert the jury from the truth.

✘"Ladies and gentlemen, if I had done just a smidgen of what [defense counsel] said, I should not only be fired, but I should be indicted. So what she did to you was she lied. … She stood up here and lied to you."[19] This was *improper* because it dealt with matters outside the record and the prosecutor's opinion of defense counsel's honesty.

✔"There is a saying among lawyers that if you don't have the law on your side, you try the facts. If you don't have the facts, you try to argue the law. And when you have neither on your side, you argue something ridiculous."[20] This was *proper* because the prosecutor only attacked counsel's argument as ridiculous and did not impugn counsel personally.

Putting the jury in the victim's shoes. There is a fine line between asking the jury to feel sympathy for the victim and asking the jury to feel *like* the victim. Just as the victim is not permitted to testify about what punishment she would like to see, the prosecutor may not ask the jury to imagine what the victim would like or what punishment they would want if they were the victim. Here are a few examples.

✘"I think you can see from the evidence, from some of the photographs, there is a look of stark terror in the photographs seen on her face. It is fair for you to think about the feelings of the father who lost his baby daughter and it is fair for you to think about how you would feel if you lost your children in considering …"[21] This was *improper* because it was simply "a plea for abandonment of objectivity" rather than any legal basis for pun-

ishment.

✘"Place yourselves in the shoes of the victim … How would you feel? What would you want?"[22] Again, this is *improper* because it invites the jury to assess punishment based on a sense of vengeance rather than the facts and the law.

✔"In thinking about what to do with this defendant, I want you to think of the last few moments that [the victim] was alive because that is appropriate. Rosa told you that she just remembers hearing him scream. You know he was in pain. I think it is very easy in the course of a trial to hear evidence in a very antiseptic, sort of unemotional way, and for a moment before you decide what to do with this defendant, I want you to close your eyes and think of how that young man felt."[23] This was *proper* because the jury is entitled to consider the "full, unvarnished specter of the defendant's actions," and the victim's physical and mental injuries are relevant to the appropriate punishment. The prosecutor did not ask the jury to consider what punishment the victim would want but rather to consider the injury the victim suffered when deciding the appropriate punishment.

Community expectations. A plea for law enforcement is a proper area for jury argument. It can include arguing the relationship between the jury's verdict and deterrence of a specific type of crime or crime in general. It can also include the impact of the verdict on the community. But you may *not* argue that the community expects or demands any particular verdict or sentence. Such an argument is excluded both because it injects a new fact that is not part of the evidence and because it invites a verdict based on emotional grounds rather than one tailored to the particular defendant. Some examples:

✘"You have a chance right now to cut this cancer cell out of this society, and hopefully save it. It is up to you 12 people. Now, the only punishment that you can assess that would be any satisfaction at all to the people of this county would be life [imprisonment]."[24] This was *improper* because it suggests the community expects a particular result.

✔"Now, that's sad, it really is, and you should think about [the victim] when you're assessing your punishment. Let's think about her and think about the other children that live in this community that are subjected to this type of conduct by others and use your common sense." This was *proper* because it asked the jury to consider deterrence of a specific type of crime, sexual assaults against children.

Conclusion

Unfortunately, there are many ways to lose your head and lose your case during closing argument. It can be difficult in the heat of the moment to distinguish between the "hard blows" that are not simply allowed but encouraged, and the "foul blows" that must be avoided at all costs. This article is not a complete list of reversible closing arguments, but I hope it has provided a refresher on some of the more common, easy-to-make mistakes. When in doubt about whether an argument is improper, the ultimate consideration is the effect it will have on the jury. If the effect is to ask the jury to base its verdict on something not properly before it—whether facts not introduced into evidence, something the law forbids them to consider, or simply pure vengeance—then reconsider. The jury must reach the correct result under the law and the evidence, and our job in closing argument is to help them get there. ❇

Endnotes

1 *Jordan v. State*, 646 S.W.2d 946, 948 (Tex. Crim. App. 1983).

2 *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000).

3 *Hawkins v. State*, 135 S.W.3d 72, 86 (Tex. Crim. App. 2004) (Womack, J., concurring).

4 *Thompson v. State*, 89 S.W.3d 843, 850 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).

5 *Jordan v. State*, 646 S.W.2d 946, 947 (Tex. Crim. App. 1983).

6 *Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988).

7 *Menefee v. State*, 614 S.W.2d 167, 168 (Tex. Crim. App. 1981).

8 *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985).

9 *Archie v. State,* 221 S.W.3d 695, 698 (Tex. Crim. App. 2007).

10 *Patrick v. State*, 906 S.W.2d 481, 491-92 (Tex. Crim. App. 1995).

11 *Cruz v. State*, 225 S.W.3d 546, 549 (Tex. Crim. App. 2007).

12 *Caldwell v. State*, 818 S.W.2d 790, 800 (Tex. Crim. App. 1991).

13 *Howard v. State*, 153 S.W.3d 382, 385-86 (Tex. Crim. App. 2004).

14 *Good v. State*, 723 S.W.2d 734, 736 (Tex. Crim. App. 1986).

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Jury selection in 30 minutes or less

It ain't science—it's social science. Luckily, most trial lawyers are more suited to chatting up potential jurors than manning a microscope. Use that expertise to your advantage during voir dire.

By Jeff Strange
Assistant District Attorney in Fort Bend County

Before my first jury trial I was a little surprised when the judge gave me a mere 15 minutes to voir dire the jury panel. I took it in stride because I thought he was angry that I was making him try a trespassing case, but on the plus side, the limit gave me less time to do or say something stupid. The harsh reality that I learned in subsequent trials was that 15 minutes was about all the time a Harris County misdemeanor judge was going to give me, period.

If picking a jury were hard science, I would have been pretty much hosed from that point forward. (If any of us were good at science, we would have gone to medical school.) Success in jury selection relies on your interpersonal skills—your ability to stand in front of a group of people and make them like you, trust you, and share personal information with you. So relish the fact that jury selection, especially with a 15-minute time limit, is not science, and realize that a social nature gives you a head start on connecting with jurors. There are woefully few absolutes when it comes to selecting juries, but you can do a few things to maximize your time and make the selection process slightly less random.

While I encourage prosecutors to learn acceptable shortcuts, make educated guesses, and develop "gut instincts" about jurors, I am *not* advocating striking jurors for inappropriate reasons. A prosecutor who excludes jurors based on race, religion, ethnicity, or gender is behaving illegally and unethically and is just plain lazy.

Jury selection by its nature forces attorneys to assume things about jurors based on incomplete information. What your gut says, however, is no substitute for actually visiting with members of the panel and receiving information on which to base your peremptory challenges. A *Batson* hearing may ultimately require prosecutors to give the trial court race-neutral reasons justifying their peremptory challenges, and that process is less of a challenge if you have actually visited with the juror and the record justifies your decision to exclude them. A prosecutor who bases peremptory challenges solely on the jury information cards

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15 *Wead v. State*, 129 S.W.3d 126, 130 (Tex. Crim. App. 2004).

16 *Abbott v. State*, 196 S.W.3d 334, 343-44 (Tex. App.—Waco 2006, pet. ref'd).

17 *Bible v. State*, 162 S.W.3d 234, 249 (Tex. Crim. App. 2005).

18 *Mosley v. State*, 983 S.w.2d 249, 248-59 (Tex. Crim. App. 1998).

19 *Brown v. State*, 270 S.W.3d 564, 571-72 (Tex. Crim. App. 2008).

20 *Coble v. State*, 871 S.W.2d 192, 203-204 (Tex. Crim. App. 1993).

21 *Brandley v. State*, 691 S.W.2d 699, 712 (Tex. Crim. App. 1985).

22 *Williams v. State*, 732 S.W.2d 762, 765 (Tex. App.—Beaumont 1987, no pet.).

23 *Torres v. State*, 92 S.W.3d 911, 921 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd).

24 *Cortez v. State*, 683 S.W.2d 419, 420 (Tex. Crim. App. 1984).

never gets the opportunity to gauge the potential juror's attitude toward the State or the case.

As you stand before the panel, remember that voir dire is a two-way street. As the lawyers are evaluating potential jurors, veniremembers are also making their initial judgments about the attorneys' competence and fairness. Everything you do in front of the panel must be even-handed and must appear fair. Jurors require absolute confidence that you will present your case honestly and that every word that comes from your mouth is true. Any effort to slant the law or circumstances in the State's favor will be perceived as gamesmanship and could cost you the panel's trust.

As you are making assumptions about the venire's appearance, they are doing the same with you. It goes without saying that conservative clothes are appropriate, but remember the small details, such as shined shoes and a matching belt. When you stand before the jury, you want them to focus on your case and what you have to say, not your inability to match your clothes.

Prepare ahead of time

I typically use a detailed outline instead of a script to guide me through jury selection. As I prepare to cover the relevant legal topics, I consider a number of open-ended hypothetical questions to bounce around the panel to stimulate discussion. Working from an outline provides more freedom to address the specific issues raised by the panel, which I do more effectively without worrying about a script. I generally want to be loose and friendly in front of the group and create an atmosphere conducive to free discussion.

I do script my questions to challenge jurors for cause, which I discuss at more length later in this article. As jury selection is in reality juror *exclusion*, it makes sense to be able to exclude people quickly. While drafting my outline, I consider the legal topics I will discuss and formulate relevant questions to stimulate challenges for cause. Keeping in mind the necessity to make the record legally justify my challenge, I compose questions to cover each necessary element of the challenge. Remember that when challenging jurors you are no longer gathering information; you are making a detailed record as fast as possible to justify the exclusion and move on to the next topic or juror.

Adjust expectations

What may you realistically accomplish in the quarter- to half-hour the judge lets you visit with the jury? Jurors predisposed not to like you will continue not to like you; jurors with a bone to pick with the system will not be swayed by the majesty of your courtroom presence. Erase any delusions that it is possible to change a panelist's deeply held beliefs during voir dire. Jury selection is your opportunity to identify and get rid of problematic jurors, not win their hearts and minds. Do not fall into the trap of arguing with jurors in a pointless effort to change their opinions, and do not worry that what a veniremember says aloud will somehow poison the rest of the panel. When a juror confronts you with a hostile position, thank him because he is doing you a favor. A confrontational juror exposes not only his bias but also the bias of anyone who nods her head in agreement.

Scour the jurors' information cards

These cards provide minimal information about the people you have insufficient time to get to know. Do not panic. Depending on the jurisdiction, you should be provided with the juror's name, age, address, occupation and length of employment, spouse's name and occupation, the number and ages of any children, whether the juror has any prior jury experience, and involvement, if any, in prior criminal proceedings. This information should at least speed up the getting-to-know-the-panel process.

There is no magic State's juror eager to blindly follow you to Convictionland. The entire answer will never be found on the card, but you can find clues about where jurors are in their lives. I look for signs of stability and jurors who have a stake in the community. Length of time employed at the same job or married to the same person are good signs. Jurors who have invested in a house or have children attending local public schools are more likely to take to heart the quality-of-life issues that I stress during the course of a trial.

Remember that jurors do not check their self-interests and attitudes at the courthouse door when they arrive for jury service. A jury's receptiveness to a particular case depends on the extent to which the facts and desired outcome are compatible with their collective belief system. Never underestimate the

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human factor in jury selection. Not only is it not science, it's not even always logical.

You are provided with jurors' addresses, so learn as much as you possibly can about the communities and neighborhoods in which they live. I have been a prosecutor in one large jurisdiction (Harris County) and two medium ones (Cameron and Fort Bend Counties). As a Harris County prosecutor, I studied a key map, attempting to memorize zip codes to their corresponding parts of town. In Cameron and Fort Bend Counties, it is possible to know individual streets as well as neighborhoods and subdivisions. (It's amazing how some will continually reappear in offense reports.)

People tend to adopt the collective attitudes of their communities. For example, police are perceived differently in various parts of town and to some extent, so are crooks. It can be easy to stereotype people on this basis, but resist the urge. A hard-working laborer who serves on your jury may resent a quick-buck drug dealer almost as much as he resents the police. Getting to know a little bit about where jurors live tells you a little about *how* they live and what issues and challenges they bring to jury service.

Some jurisdictions allow individual jurors to donate their stipend to a local victims' assistance organization. I like people who do this both as citizens and as potential jurors. Donating $10 to the local Child Advocacy Center is no guarantee that a particular veniremember is not crazy and incapable of hanging a jury. However, the donation indicates that the juror is civic-minded, and when you're grasping at straws, that's better than a non-civic minded juror.

Watch and listen

When the panel enters the courtroom to be seated, stop what you are doing, respectfully stand, and watch everything the members of the panel do. Pay attention to how jurors interact with each other as these relationships will continue through the week, and you need people who can work together in groups. Observe what jurors carry in their hands and how they are dressed. Jurors often bring reading material, which to the observant prosecutor provides some insight to their personalities. Most panelists will bring benign reading fare such as the newspaper, paperbacks, or popular magazines. Jurors reading the *Turner Diaries* or the *Anarchist's Cookbook* probably get a big X by their name on my seating chart.

I love jurors who make the effort to get dressed up for jury service, especially if it is not their custom to dress up. We want jurors who will take their service seriously, pay attention, and follow the court's instructions. Tee shirts, flip flops, and other casual clothing signals to me a lack of concern and respect for the judicial process. Inappropriate dress is a sign of a bad attitude or poor judgment, and neither is worth taking a risk. (I told you this isn't science.)

Generally, I am looking for conformists who accept societal norms and expect others to do the same. Radical dress, hairstyles, piercings, and tattoos are signs that a person prides himself on being different and setting himself apart from the group—in other words, someone who could hang the jury. Prosecutors have the responsibility to seek out jurors capable of collective, cooperative action and give them appropriate facts on which to act. Observations about prospective jurors' social skills can be telling and should not be overlooked.

Questioning the panel

Do not go straight down the rows asking the jurors to recite. Remember in law school when your professors did that? You zoned out when you knew it was not your time to recite. Jurors will do the same thing if you let them. Bounce your questions around the room and understand that you do not need to spend the same amount of time with each juror.

It is unnecessary to visit with every member of the panel as only the first 16 or 17 have a realistic chance to serve in a misdemeanor case. As you have now had the opportunity to observe the panel and read their information cards, you have started forming basic opinions about them and their desirability as jurors. Now is the time to prioritize how your time will be spent and on whom.

With some jurors, you will feel comfortable but need to ask a couple questions to justify your confidence. On the other extreme, some jurors will just rub you the wrong way. Loop back, returning to each of these jurors when seeking challenges for cause. I will return to jurors again and again until I either change my opinion of them or make a record justifying their exclusion. Jurors seeking the easy way out of jury serv-

ice figure out what I am doing and know to say the magic words to be excluded. Good jurors also figure out the drill and know what not to say when defense counsel has them on voir dire. If more than four or five panelists appear to be challengeable, I know to question deeper in the panel.

I have been caught flat-footed a couple of times in cases where the court granted an unexpected number of challenges and left unquestioned jurors in play. Ask your judge to bring these jurors up to the bench so that both sides can ask a couple of questions. Try this even if you are sure that your judge won't go for it. The judge's disdain for hung juries usually overrides his desire to teach you a lesson.

For misdemeanor prosecutors, exercising peremptory strikes is more an exercise in rating jurors because you get just three strikes. In district court, I don't always use all 10 strikes, but in a misdemeanor case, there will almost always be three potential jurors with whom you are not comfortable. This is the time to take a deep breath and remember this is not science—but it is not life and death either. Make the most intelligent choices you can, and live with them. Do not get paralysis through overanalysis. You will usually have the opportunity to visit with the panel after the trial; use it to evaluate your decision-making and improve your jury selection at the next trial.

Narrow the focus

My first district court judge, Doug Shaver, asked me after a drug trial why I bothered to voir dire on guilt-innocence issues when my habitual criminal defendant dropped two rocks of cocaine at the arresting officer's feet. Judge Shaver advocated informing the jury that they were potentially serving on a drug case, then spending the remaining time discussing punishment, which was the whole reason the case went to trial. From then on I narrowed my focus when I selected juries.

Discuss the relevant issues to be contested in the case. Do not show the jury panel pictures of your children or tell them where you went to law school. A prepared prosecutor knows her case's facts, can anticipate defenses, and can usually get the defense attorney to tell her about the issues and defenses simply by asking. If you are trying a DWI case and the defendant was initially stopped for speeding, do not waste time discussing "wheeling" the defendant if it will not be a contested issue. The assault defendant who gave the victim a black eye in a room full of witnesses set the case for trial for a reason other than "whodunnit." Prepare to voir dire on the technicalities of self-defense.

Narrowing the focus of voir dire saves time to cover the appropriate issues in depth and properly focuses the panel's attention. Plus, it creates time to visit with more jurors individually. Do not resort to row-by-row information gathering, as jurors will simply parrot each other. Ask simple, candid questions to individual members, and prepare to bounce their responses amongst the group.

Ask open-ended questions

Jurors must be engaged, and the best way to do that is to involve them in an interesting discussion. Ask open-ended questions that encourage complete, well-reasoned responses. It is not your job to lecture jurors. Get jurors talking early in the process, then become part of the discussion. Use this process to frequently involve jurors with whom you are uncomfortable. Ask provocative, open-ended questions that require more than one-word answers. Remember: You are teaching, yes, but your main goal is gathering information. Telling jurors the law is much less effective than having them verbalize the rationale surrounding the law.

I prefer to discuss legal topics by putting them in a public policy context. Rather than simply holding a poster board in front of a panel to discuss the elements of a crime, I want to know if veniremembers believe in the law and see the value in its enforcement. I want jurors to explain how various laws solve problems and affect their communities. Give jurors tangible examples that allow them to draw pictures in their heads. For example, I will sometimes put jurors in a legislator's role and ask them to create a statute that fixes a problem. When explaining the law of parties, I become the getaway driver to my co-counsel's bank robber.

Explore the law but also explore individual jurors' reaction to it. How did the panel grasp the issues you discussed? How did you bond with the group? Use some of this time to assess the intelligence of individual jurors. Preparing the *Allen* charge is a

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bad time to find out that one of your jurors could not keep up.

Make challenges for cause

To conduct an effective and efficient voir dire, you must know why and how jurors can be challenged for cause. Article 35.16 of the Code of Criminal Procedure sets out the reasons that a juror can be challenged, but only a few scenarios occur with any frequency. Jurors may be excluded if they have a bias or prejudice for or against the defendant[1] or if they have established in their minds a conclusion about his guilt or innocence.[2] Additionally, a juror may be excluded if he has a bias or prejudice against any phase of the law upon which the State is entitled to rely.[3]

Always look for people who will raise your burden of proof, which is an automatic challenge for cause your judge should understand. Jurors may be challenged if they require more than proof beyond a reasonable doubt[4] or if they require 100-percent certainty or proof beyond all doubt.[5] Panelists may also be challenged if they require an element of proof beyond that required by law (i.e., jurors who wouldn't convict without a breath test, more than one witness, or an eyewitness).

A juror's bias or prejudice is established when a prospective juror is unwilling to consider and apply the relevant law. A bias exists when a veniremember's beliefs or opinions prevent or substantially impair his performance of duties.[6]

To justify a veniremember's exclusion, it is not enough to show the existence of a bias or prejudice. It is further necessary to develop that the juror has been shown proof beyond a reasonable doubt of every element necessary to be proven and that his bias or prejudice is an impediment to following the law. It is also necessary, before challenging a juror, to explain the law and ask if his personal views would interfere with following the law.

Let's take a fairly common example: a juror who requires a breath test before he could find anyone guilty of driving while intoxicated. It is necessary to show more than the fact that the juror will require proof of an additional fact (a breath test). The record must also clearly show that the juror first believed that the defendant drove while intoxicated (having lost the normal use) and that the juror believed all of the elements beyond a reasonable doubt.

"Mr. Juror, you indicated that you would require me to introduce evidence of a breath test before you could consider convicting someone of driving while intoxicated. Do you understand that the law does not require me to show that the defendant took a breath test? So even if I prove to you beyond a reasonable doubt that the defendant was driving while intoxicated under a different theory of intoxication, you will still require me to produce evidence of a breath test?"

A potential juror who clearly expresses bias against a phase of the law is immediately challengeable for-cause and need not be presented for rehabilitation.[7] If a juror equivocates, then both sides get the opportunity to make a record.[8] Either party may challenge a veniremember regarding a bias against any phase of the law upon which either party may rely during the trial.[9] Therefore, the State may challenge a prospective juror for his bias on an issue of law even if the bias would not harm the State.[10]

A juror may also be disqualified if a personal experience would prevent her from being fair. This challenge is also predicated on the juror believing all of the necessary elements were proven beyond a reasonable doubt, so make a complete record. The challenging party must demonstrate that the veniremember could not act fairly as a juror even when confronted with proof beyond a reasonable doubt because of a prior experience. Once this is established, the person should be discharged for cause.

Punishment is also a fertile area for challenges, as jurors must be able to follow the entire law. Jurors must accept that the minimum and maximum legal punishments are appropriate in some circumstances if the defendant is found guilty of the charge.[11] If the defendant is eligible for probation, the jury must be able to consider that too. I do not run through outlandish scenarios with the jury panel where aggravated robbers are appropriate for probation. I tell the panel that considering the full range of punishment is simply keeping an open mind and that they do not have to commit to any particular punishment during the trial. Considering the full range of punishment is exactly that: giving it consideration. Make the panel understand that they are free to accept or reject any punishment as long as they at least briefly consider the full range.

Talk with jurors post-trial

Don't ever pass up the opportunity to chat with jurors after a trial.[12] First, it is the right thing to do, as they donated several days of their lives so you could try your case. Second, what better time to figure out where you screwed up in jury selection? Remember earlier when we were discussing developing instincts —visiting with jurors post-trial, especially when you lose, will hone those instincts.

Compare their post-acquittal demeanor with the way they acted during voir dire. Were you right about who the group's leaders would be? Did jurors find compelling the same things you thought they would? Do not be judgmental or accusatory. Jurors are entitled to their opinions, and it was your job to prove the case to their satisfaction. Talk with jurors about the case's deciding factors and gauge their understanding of the law. Your success as a trial lawyer will be based greatly on what you can make jurors retain until they finish deliberations. Do not pass up the opportunity to figure out how much they held onto.

Conclusion

Given the realities of how juries are selected, it's amazing that prosecutors are as successful as we are. It is also proof to some degree that good facts make good cases. It is possible to learn enough about a panel in a half hour to make intelligent choices about who should stay on your jury. Milk every drop of meaning from the limited information you are provided. Spend more time listening and less time lecturing. And finally, know how to effectively challenge jurors for-cause.

It ain't science, but with some preparation, strategic questions, and an eye on the clock, you can bring order to voir dire, which might otherwise be a study in chaos theory. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 35.16(a)(9).

2 Tex. Code Crim. Proc. art. 35.16(a)(10).

3 Tex. Code Crim. Proc. art. 35.16(b)(3).

4 *Coleman v. State*, 881 S.W.2d 344 (Tex. Crim. App. 1994).

5 *Butler v. State*, 872 S.W.2d 222 (Tex. Crim. App. 1994).

6 *Sells v. State*, 121 S.W.3d 748 (Tex. Crim. App. 2003).

7 *Howard v. State*, 941 S.W.2d 102 (Tex. Crim. App. 1996).

8 *Felder v. State*, 848 S.W.2d 85 (Tex. Crim. App. 1992).

9 *Phillips v. State*, 701 S.W.2d 875 (Tex. Crim. App. 1985).

10 *Guerra v. State*, 771 S.W.2d 453 (Tex. Crim. App. 1988); *Caldwell v. State*, 818 S.W.2d 790 (Tex. Crim. App. 1991)

11 *Johnson v. State*, 982 S.W.2d 403 (Tex. Crim. App. 1998).

12 When talking with jurors after a trial, of course be mindful of Texas Disciplinary Rule of Profession Conduct 3.06(d), which states: "After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask any questions of or make comments to a member of the jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service."

DWI Corner

Applications for hosting DWI schools now accepted

TDCAA is now taking applications from elected prosecutors to host DWI training for the 2010 calendar year. Visit our website, www.tdcaa.com, and click on the DWI Resource button to fill out an online application. The deadline for submission is Friday, October 16, so don't delay! ❇

Travis County probation, three years later

How Travis County's probation department was completely revamped and what effect the changes have had on recidivism

In mid-2006, I wrote an article in this publication about efforts to rejuvenate the Travis County probation department. Three years later, data show that the program was successful in reducing recidivism and eliminating the need to build more prison beds (which many thought was the only answer to crowded prisons a few years ago). In fact, we're about to embark on a similar overhaul of the Bexar County system.

By Dr. Tony Fabelo
Former Director of the Texas Criminal Justice Policy Council and present Director of Research of the Justice Center of the Council of State Governments in Austin

I wrote a report this year for the legislature reviewing prison population trends;[1] in a nutshell, it says that since we adopted the "justice reinvestment" plan in 2007—and despite the challenges of managing a large expansion in residential treatment—this initiative appears to be stabilizing the growth of the Texas prison population. The increase in treatment capacity and intermediate sanction facilities has connected more probationers with services and reduced the number revoked to prison. The legislation's in-prison programs have reduced delays in parole releases, enabling the parole board to grant more supervised releases. And the infusion of resources for intermediate sanction facilities and the administrative policy changes regarding violations seem to be the main reasons for decreasing parole revocations. Texas had 77,990 parolees under direct supervision in 2008, but only 7,444 were revoked to prison, and, of these, only about 20 percent were revoked for administrative violations.[2] As documented in another Justice Center report for prison officials early this year, this change is the result of the aggressive implementation of progressive sanctions and the use of ISFs in lieu of a prison revocation.[3]

The legislative session that ended in June 2009 recognized the success of this policy and re-authorized funding for all programs adopted in 2007, leaving in place the infrastructure to support these policies. The prison population is stable and declining (and yes, the state population continues to grow and unemployment has increased during this period). Recently, state prison officials notified county officials that they no longer need to contract with counties for close to 1,800 beds due to the population decline.[4] Shutting down the county contracts will save an additional $28 million a year.

In the meantime, crime has not skyrocketed as usually suggested by opponents of these programs. In 2007, the latest full year crime figures are available, the Texas Department of Public Safety (DPS) reported a decline of 1.2 percent in the violent crime rate and a slight increase in the property crime rate of 0.9 percent.[5] At the time of this writing, there are no state crime stats from DPS for 2008, but the Federal Bureau of Investigation (FBI) has preliminary national figures for 2008 showing a decline in crime nationally. An analysis of the FBI's figures shows the number of violent and property crimes in Dallas, El Paso, Fort Worth, Houston, and San Antonio to be relatively stable.[6] For the record, crime increases can be the result of other factors that have nothing to do with the adoption of these justice reinvestment policies; difficult economic conditions, increased unemployment, cuts in local programs, and diverting youth formerly bound to the Texas Youth Commission (TYC) for the community can be contributing factors. (By the way, I had nothing to do with that last policy!)

How it all began

On a beautiful winter day in December 2006, John Bradley, District Attorney in Williamson County, and I were doing mental calisthenics outside a ballroom in an Austin hotel. While people were mingling outside drinking coffee, we were preparing to debate in front of all elected district and county attorneys whether Texas needed to build more prisons, and we were armed with our PowerPoints and ready to tear each other apart.

It was a hot topic at the time. A few months before, prison officials, in reaction to the legislative budget office's projections, proposed a major prison construction project. The

budget office estimated the need for 17,000 additional prison beds, requiring new construction by 2012 at a minimum cost of $2 billion. Prison officials had submitted a budget request to the legislature of $523 million to build prisons and an additional $184 million in "emergency" contracted capacity to rent detention space in county jails.[7]

John's argument went like this: We can't trust the state to fund diversion programs over the long term, and we can't protect the public if we just release criminals early from a sentence. History has shown that rehabilitation programs, even if created, will die from lack of ongoing support and funding. Regardless, we need to expand prison capacity because the Texas population is growing and we need to keep up with this growth; if we fall behind the capacity curve like we did in the late 1980s, policymakers will simply deal with overcrowding by approving early release of criminals. Once that happens, the real cost will come in an increased crime rate.

My argument went like this: We don't need to build more prisons. The main cause of the projected bed shortfall is not population growth but draconian cuts to probation and treatment programs (made by the legislature in 2003). The cuts created long waiting lists for substance abuse facilities, suppressed judges' ability to sentence offenders to incarceration alternatives, and encouraged the parole board to release low-risk offenders because of few prison rehabilitation programs and weaker supervision alternatives. I stated that even if we wanted to build more prisons, we could not staff them (at the time the vacancy rate for guards was 14 percent), and given the prognostications on state revenues in the future, we could not pay to operate them. (Yes, I showed a bunch of number charts in nice colors.)

The legislature took action

Less than a month after our debate, the 80th Session of the Texas Legislature convened in January 2007. Elected officials faced a major dilemma: spend a half billion dollars to build and operate new prisons to accommodate the surging number of people expected to be incarcerated or explore options to control that growth. With the sponsorship of the Pew Charitable Trusts, a national foundation starting a project to assist states in controlling prison costs while maintaining public safety, and the U.S. Department of Justice's Bureau of Justice Assistance, I assisted the legislature through my work at the Justice Center.

Working with a bipartisan group of legislative leaders headed by Senator John Whitmire and Representative Jerry Madden, we conducted a comprehensive analysis of the state's prison population. The data were used to shape policies that obviated the need to build more prisons and allowed for the reinvestment of roughly half the funds, earmarked for prison construction, for a range of strategies designed to increase public safety and reduce recidivism.

In May 2007, the Texas legislature adopted, and the governor approved, a budget that included greater treatment capacity in the prison system and expansion of diversion options in the probation and parole system. A total of 4,500 new diversion beds and 5,200 new program slots were funded.[8] At the end of the 2007 legislative session, the state budget agency projected that the justice reinvestment policies, if adopted and implemented, would stabilize the prison population. Governor Rick Perry vetoed the second year of funding contract jail capacity, noting that this money would not be necessary due to the diversion and treatment funding provided in the state budget. Subsequent projections in January 2008 and June 2008 were consistent with these projections.[9]

The final budget adopted by the legislature for the 2008–2009 biennium reflected an increase of $241 million in funding for additional probation diversion and treatment capacity. The expansion of these programs translated into a net savings of $443.9 million in the FY 2008-09 budget by reducing funding for contracted bed space and canceling funding for the construction of the new prison units originally proposed.[10]

One area of no debate

Bradley and I are still talking and are friends, and we strongly agreed during the debate on one point: Unless we implement programs and diversion effectively, we cannot sustain positive results in reducing recidivism. This is particularly important in probation. A recent report from the Pew Charitable Trusts, Center for the States, shows that 1 in 31 people in the country are under correctional control, meaning locked up, on probation, or on parole. Most are on probation (4,293,163 on probation from a total 7,328,200 popu-

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lation under correctional control). In Texas, 1 in 22 people (797,254) are on correctional control with 54 percent of those on probation and another 13 percent on parole.[11] Therefore, making community corrections more effective is critical to the success of any effort to control the prison population growth, as up to two-thirds of prison admissions are for offenders violating probation or parole.

I made my case about the need to strengthen probation a few months before our debate in an article in this journal that I titled "Rejuvenating Probation."[12] In this article I discussed the challenges that lay ahead for Texas' probation system and discussed an effort to develop a model to address these challenges. I discussed my evaluations of the Dallas and Travis Counties' probation departments and the findings that these organizations were operating under old models that emphasized the supervision of paperwork instead of people. I stated that unless we improve these organizations and how they supervise probationers, our progress in reducing the number of probation revocations by changing probationers' behavior will be limited. Austin, Dallas, Houston, San Antonio, and El Paso are among the 25 most populous metropolitan areas in the nation, and probation departments in these cities can no longer operate like they are judges' fiefdoms. I made the case that judges must oversee probation department policy, just as a corporate board does, but they must also support the department's professional independence to administer cohesive policies along evidence-based practices.

There is growing knowledge of what effective practices for supervising offenders in the community should look like. This knowledge is usually referred as "evidence-based practices" or EBP. Key to effective practices is the ability to identify, using scientific tools and well-tested interview protocols, the risk and criminal behavior patterns of those considered for community supervision (usually referred to as criminogenic characteristics). Once the population is properly identified, the conditions and strategies of supervision should be designed to match the population profile. In general, there is strong empirical evidence that the "most powerful impact on changing criminal behavior and reducing recidivism comes from paying attention to the risk, need, and responsivity principles: providing the greatest supervision and treatment to medium- and high-risk offenders, focusing on criminogenic needs, and using cognitive-behavioral and behavioral interventions."[13] There is also good evidence that the "quality of the interpersonal relationship between the probation/parole officer and the offender and the structuring skills of the officer may be as important as or even more important than specific programs in influencing behavioral change in offenders" and that "graduated sanctions (i.e., those that increase in severity based on nature and number of violations) decrease recidivism."[14]

In the marketing culture that we live in, most community corrections agencies in the nation claim to have EBP practices. However, my experience is that there is more spin than effective adoption of these practices. Although growing evidence supports that certain supervision strategies are effective in reducing recidivism in community corrections, these practices cannot be easily instituted without methodically revamping a probation agency. And this revamping cannot easily occur without judicial players modifying practices to fit a more effective supervision model. Therefore, with funding from the Texas Department of Criminal Justice (TDCJ) probation division (Community Justice Assistance Division or CJAD), and under the leadership of Dr. Geraldine Nagy, director of the Travis County Probation Department, we engaged in a two-year process to retool the Travis County probation system along these practices. The process started with an assessment of the department in 2005 and continued with a methodical plan to change key aspects of its operations in 2006 and 2007. This effort was supported by local judges, prosecutors, the defense bar, and county commissioners.

Making probation more effective

In Travis County we tested the implementation of an EBP model, and in a department that in general had a long tradition of professionalism and respect from the judges, it took three years to adjust all the nuts and bolts to have an integrated EBP model. I documented major aspects of the implementation in about a dozen reports.[15] At the end of the day we were able to:

1 **Create a central diagnosis unit.** Travis County now has a centralized diagnosis process for all felony probationers and high-risk misdemeanants staffed by specialized "diagnosticians" dedicated only to this process. The diagnosis uses sci-

entifically tested tools as opposed to the prior open-ended narrative of a PSI that could be written and interpreted in many different ways. Scientific assessment tools are a risk assessment, which identifies offenders by their propensity to be re-arrested or re-incarcerated, and a case classification tool, which determines the defendant's criminogenic factors and how to address them. Criminogenic factors have been shown to predict future criminal behavior; they include antisocial thinking, impulsive personality, substance abuse, and relations with criminally oriented peers. These factors can be addressed through well-designed treatment or intervention programs.

2 Develop a diagnosis report to the courts. Based on locally conducted research, a diagnosis matrix was created with three categories, each reflected by three colors: yellow, blue, and red. The offenders falling in the yellow portion are generally low-risk offenders with pro-social factors. Those falling in the matrix's blue section are low- to medium-risk offenders with generally pro-social factors but with skill deficits, substance abuse, and impulsive behavior. Those falling in the red are generally medium- to high-risk offenders with criminogenic and destructive behavior factors. "Off-grid" supervision adjustments are made for sex offenders, repeat DWI offenders, and repeat family violence offenders. A more detailed explanation of this system can be found in an article that Dr. Nagy and I published in the American Probation and Parole Association magazine.[16]

3 Design supervision strategies to fit diagnosis of population. There are six elements in crafting a supervision strategy: 1) expected contacts per month, 2) appropriate program utilization, 3) special conditions to support supervision requirements, 4) a sanctioning strategy for violations, 5) incentives for success, and 6) outcome accountability. These six elements were structured to fit the specific populations based on a diagnosis process as described above.

4 Design sanction strategies for violations. Following the logic above, a sanctioning grid for violations was developed to match each of the colors in the matrix. The idea is that the response to violations should support each strategy's goals, with the yellow sanctioning scheme providing low to moderate responses to administrative violations, the blue scheme providing more restrictive responses directed at supporting compliance with participation in treatment programs, and the red scheme providing swift and restrictive responses to even minor violations.

5 Strengthen the department's infrastructure. Changes in diagnosis, supervision, and sanctioning processes were backed by strengthening the department's administrative support infrastructure. Personnel training and evaluations were revamped and new process and outcome monitoring reports were created to provide the tools that management needs to support the operational model.

Results to prove it

I will let you ask your colleagues in Austin if the changes in the probation department resulted in better assessments and supervision strategies. The word I hear is that it has and recently *County*, the magazine of the Texas Association of Counties (TAC), published a feature article with positive testimonial regarding the "probation experiment,"[17] but we also have some empirical information to share.[18]

The third year of the project started in April 2008. During this phase measuring the impact of the initiative on outcomes and measuring fidelity to the model were completed. The analyses shows that Travis had the largest decline in felony revocations to prison compared to the other four largest metropolitan probation departments in Texas (Bexar, Dallas, Harris, and Tarrant Counties) from prior to the implementation of the Travis County project in 2005 to after the implementation of the TCIS project in 2008. Specifically:

- Travis County felony revocations declined by 19.6 percent while there was a 0.4 percent increase statewide;
- the Travis County revocation rate declined from 10.2 percent in 2005 to 9.0 percent in 2008, the lowest revocation rate of the largest urban probation departments;
- Travis County experienced the largest decline in felony technical revocations compared to the other four largest urban departments (a 47.7-percent decline), from 5.9 percent in 2005 to 3.4 percent in 2008, resulting in a cost avoidance of $4.8 million in state incarceration costs;
- reduced jail days associated with a reduction in offenders jailed for motions to revoke produced an estimated cost avoidance of $386,000 for county jail costs in one year; and

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- new felony absconders declined by 9 percent from 2006 to 2008. This may also be associated with better supervision practices and the creation of a new absconder caseload.

Research was also conducted to determine if re-arrests after placement on felony probation changed with the implementation of the TCIS project. The evaluation groups were developed from all offenders placed on felony probation. Those placed from January to June 2006 were considered the pre-reform group, those placed from January to April 2007 were considered the transition group, and those placed from July to October 2007 were considered the post-reform group. The last period was selected to allow enough time for a one-year follow-up. The recidivism analysis shows that the percent re-arrested in the one year after placement on probation declined from 29 percent of the pre-reform group, to 26 percent for the transition group, to 24 percent for the post-reform group. These numbers represented a decline of 17 percent compared to the pre-reform group.

Is the justice system ready for real change?

We are working on translating this experience into national documents to guide these types of reforms in other localities. In Texas, with the funding support of CJAD, we are starting the same project in Bexar County with an in-depth evaluation of the probation department and its relations to other aspects of the justice system there. This process will be completed by January 2010, at which point we will have a good idea of whether Bexar County is ready and able to adopt an EBP model. A former association president and Criminal District Attorney in Bexar County, Judge Susan Reed, is providing guidance and support in this effort. County Commissioner Tommy Adkisson is a great fan and some district court judges are already well-versed in the EBP model. Moreover, the department leadership is fully invested in the process and ready for change.

This probation department is substantially larger than the Travis County department and is driven by different judicial traditions. Therefore, we are now testing if larger departments can really be aligned along EBP in a reasonable period of reform time (three years) and if larger judicial systems can accommodate these changes. If we can do this in Bexar County, I bet then we can do it in any other place in the country.

Wish me luck. If you compare my picture in this issue to the one in the 2006 article, that will give you a clue of what happens when you invest in one of these projects! By the way, tough-as-nails John Bradley has implemented an effective diversion program for mentally ill offenders in Williamson County that has reduced the jail population and related costs and provided more humane interventions for these folks. So if we keep moving in this direction, maybe our next debate will be a love fest. I hope we will have less to debate and more praise to go around!❇

Editor's note: Mr. Bradley has a bit more to add to Mr. Fabelo's memory of the legislative process: "My memory is that Texas prosecutors seriously engaged in the legislative debates of 2005 and 2007, strongly influencing criminal justice leaders to avoid simplistic proposals to reduce prison populations by decriminalizing felony crimes to misdemeanors and expanding early release to dangerous levels. In fact, a 2005 bill by Rep. Jerry Madden, which would have released over 50,000 felons from any supervision, was vetoed by Governor Perry at the request of many Texas prosecutors. The net result of that collective effort was to influence legislators to act more cautiously and to restore the proper balance between confinement and treatment resources necessary to fulfill the promise of deterrence, punishment and rehabilitation contained in the Penal Code adopted in 1994. That balance will not continue unless we all remain vigilant. By the way, Tony Fabelo is a great Texan, by way of Cuba, and has a magnificent memory for dirty jokes."

Endnotes

1 Council of State Government Justice Center, March 2009. Assessing the Impact of the 2007 Justice Reinvestment Initiative, www.justicecenter.csg.org.

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3 Internal Report to TDCJ, Justice Center, Texas Parole System: A Case Study of Progressive Sanctions and Risk Reduction Strategies at Work, February 2009.

4 "Prison guard shortage eases; officials attribute progress to economy and pay incentives," by Mike Ward, *Austin American-Statesman*, June 27, 2009.

5 Texas Department of Public Safety, Crime in Texas, 2007.

6 Federal Bureau of Investigation, Preliminary Semiannual Uniform Crime Report, January-June 2008, Table 4, www.fbi.gov/ucr/2008prelim/downloads.htm.

7 Texas Department of Criminal Justice, Legislative Appropriations Request, Fiscal Years 2008–2009, August 2007.

8 Figure 2 as presented in Council of State Governments Justice Center, September 2007. Justice Reinvestment Texas: A Case Study, cited above.

9 Legislative Budget Board, Adult and Juvenile Correctional Population Projections, January 2008 and June 2008, www.lbb.state.tx.us/PubSafety_CrimJustice/PubSafety_CrimJustice.htm#.

10 Council of State Governments Justice Center, September 2007. Justice Reinvestment Texas: A Case Study www.justicecenter.csg.org. The savings represent the difference between the original request for appropriations by the administration and the final adopted plan and do not consider potential future savings or cost-avoidance due to the impact of the plan on the projected prison bed shortfall and reductions in recidivism.

11 The Pew Center for the States, One in 31: The Long Reach of American Corrections, Pew Charitable Trusts at www.pewtrusts.org.

12 "Rejuvenating probation," *The Texas Prosecutor*, Volume 36, Number 3, May-June 2006.

13 A upcoming publication presently under development will provide a good review of all empirical evidence behind EBP. "DRAFT: A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems". Project for the National Institute of Corrections from Collaborative Project between Center for Effective Public Policy, Pretrial Justice Institute, the Justice Management Institute and the Carey Group, 2009. Check www.cepp.com/work.htm or www.nicic.org for the final published copy later this year.

14 Ibid, footnote 13.

15 See: Travis Community Impact Supervision, www.co.travis.tx.us/community_supervision/TCIS_Initiative.asp.

16 Dr. Tony Fabelo and Dr. Geraldine Nagy, American Probation and Parole Association, Perspective Journal, Fall 2009. "Streamlining and Strengthening Assessments with Evidence-Based Practices: The Travis County Experience."

17 *County*, A Publication of the Texas County Association, Volume 21, Number 3, May-June 2009.

18 Council of State Governments, Justice Center. Travis County Community Impact Supervision Project: Analyzing Initial Outcomes May 2009.

Greetings from Iraq

Kenedy County Attorney Jaime Tijerina has been deployed with the Army Reserves since last December. He shares some photos and stories with his prosecutor peers.

By Maj. Jaime Tijerina
County Attorney in Kenedy County

When I started my first term as Kenedy County Attorney in January 2001, I never envisioned that I would spend more than a year and half away from my job serving my country in Germany and now in Iraq. Then September 11, 2001 happened and my career in the army reserves took on a whole new meaning. The slogan, "One weekend a month, two weeks a year," no longer applies.

In December 2008 I was elected to my third term while I was mobilized, a job I never really thought I would be doing after law school. I owned a home in Kenedy County and the county attorney at the time needed a little check on his authority. So I moved to my ranch and filed for the position. Thus, my career in small town politics began. Turns out either people really liked me or didn't think much of my predecessor. I won my first ever election in a landslide, a whopping 169 votes to 65. I have run unopposed ever since. (It doesn't hurt that until recently I was the only attorney in the county.) I am fortunate to have a terrific replacement in Tonnyre Thomas while I have been gone. It has taken the stress of worrying about the office completely off my shoulders. I still keep in touch with the office on a weekly basis when I can, but I stay out of the decision-making process. Tonnyre has complete authority and probably does a better job than I do! Tonnyre and my assistant, Tammy Mendez, make a terrific team. I joined the reserves in 1988 to help pay for college. I enlisted and immediately joined ROTC my first year back in school. I was commissioned in December 1991 and re-commissioned in the JAG Corps in 1998. I was working as the team director for the First Legal Support Organization (LSO) when I was first elected county attorney. It was a fairly mundane assignment. After September 11, 2001, though, the one weekend a month quickly turned into more than two weekends and countless other days preparing soldiers for deployment. I mobilized in 2004 to Germany to support the 1st Infantry Division while they deployed to Iraq. When I returned, I joined the 211th Regional Support Group (RSG) out of Corpus Christi, with the knowledge that it would be deployed in a few years. This was a deliberate choice. I knew the 211th would deploy and wanted to be a part of it.

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Above photo: Saddam Hussein's Baghdad palace. Top left: Tijerina looking for a book at Sharquat Library. Middle left: a memorial to fallen soldiers at Camp Summeral. Bottom left: Five-thousand-year-old ruins at Ashur.

While we knew we would be deployed, we did not know when or where. But one thing certain in life is that time will pass, and in June 2008 we were sent our orders to report to Ft. Hood on December 1 for a 400-day tour. Prior to arriving at Ft. Hood we were required to complete some pre-mobilization training at Fort McCoy, Wisconsin. There is nothing like weapons training in sub-freezing temperatures in preparation for the desert! We arrived at Fort Hood on time and stretched 14 days of training into 45 days—there was a lot of down time.

We left Fort Hood near the end of January 2009 and arrived at Contingency Operating Base (COB) Speicher on January 20. COB Speicher is near Tikrit, Iraq, Saddam Hussein's hometown. Our primary mission is to provide life support to the 16,000 coalition forces and civilians living on the COB; we ensure everybody has food, water, and a safe

place to live. Not a very glamorous role, but a necessary one nonetheless. My responsibility is to advise our commander and staff on a variety of legal issues, and the majority involves contract and fiscal law. Every time we spend money, and we can spend money, a legal review is required. That's how most of days are spent, buried deep in the Federal Acquisition Regulation (FAR) and various other Army Regulation, fragos (supplements to orders from Higher Headquaters), and memos, attempting to make sense of the army acquisition process and keep my acquisition officer out of jail.

In an effort to leave the COB sometimes, I volunteered to work with the Provincial Reconstruction Team, now called the Embassy Team, to rebuild libraries in our province. (I wanted to avoid being a FOBITT, someone who never leaves the COB during his tour.) Libraries were one of the institutions in Iraq that Saddam dismantled to keep the citizenry illiterate. He did a very good job destroying them. This has probably been the most rewarding part of my tour. It has enabled me to travel throughout the province and see some unbelievable things. On one trip in particular we visited 5,000-year-old Assyrian ruins at Ashur. The real reward, however, was making a difference in Iraq's future. We have completed two of eight library projects within the province that provided much-needed books and equipment, and we hope to have the other projects completed by the time we leave. However, some of the libraries are in such a state of disrepair that entire buildings will have to be constructed. Our work is complete when we finish the assessment of library and secure the funding for the project.

These trips to the libraries required all of the same precautions as regular combat patrols. We traveled in Mine Resistant Ambush Protected Vehicles (MRAPs) in full protective gear. I wish everybody could experience walking an Iraqi street in full body armor (65 pounds) in 120-degree heat. It is a humbling experience. I never thought I could consume so much water and not require a bathroom break. The only good thing about these trips was that the MRAPs air conditioning worked surprisingly well. I have a lot of respect for the soldiers who do this on a day-to-day basis.

Life on the COB is a lot like the movie Groundhog Day: Every day is the same. Speicher, thankfully, is a fairly safe place. We are 16 square miles of Air Base stuck in the middle of desert. It is difficult for anyone to try to take a shot at us. Indirect fire has reached our area only twice since I have been here, which was two times too many. Iraq is a much safer place than it used to be, but it is still a dangerous place in some areas and I don't want to minimize the sacrifice many soldiers are still making today. When we are not working, there are many activities to participate in. We have a variety of organized sports, multiple gyms, and entertainers often perform for us. Food is good and we even have steak and lobster every Sunday night. As good as it is, it is still not home.

I hope to be home by Thanksgiving, but will settle for Christmas. Hopefully, this will be my last deployment, but anything is possible. *Inshalla* (God willing) I will see you in Fort Worth for the Elected Prosecutor Conference in December.

Hurricane 51 (my call sign), out.❇

Vehicle searches, post-*Gant*

What the recent Supreme Court decision means for vehicle searches once a driver has been arrested

On April 21, 2009, the U.S. Supreme Court, in *Arizona v. Gant*,[1] revisited its long-standing vehicle search incident to arrest holding in *New York v. Belton*[2] and reversed course, holding that warrantless vehicle searches incident to arrest are not permitted *unless* 1) it's reasonable to believe that the arrestee might access the vehicle at the time of the search (apparently meaning that the arrestee is unsecured *and* within reach of the vehicle), or 2) it's reasonable to believe that the vehicle contains evidence of the offense of arrest.

By Riley Shaw
Assistant Criminal District Attorney in Tarrant County

Chimel and *Belton*

One of the limited exceptions to the Fourth Amendment's prohibition against warrantless searches and seizures was articulated in *Chimel v. California*.[3] In that case, police officers obtained an arrest warrant for the defendant for burglarizing a coin shop, went to his house, and arrested him inside. Then officers performed a non-consensual, warrantless search of the entire house. The question before the court was whether the warrantless search of the whole house could be justified as incident to the arrest.

In holding that the search's scope was unreasonable under the Fourth and Fourteenth Amendments, the Supreme Court approved of "wingspan" searches, meaning it is reasonable for an officer to search an arrestee to remove weapons or find evidence (and thereby prevent its concealment or destruction) and to search the area into which an arrestee might reach to grab a weapon or conceal or destroy evidence. There is no justification under *Chimel*, however, for routinely searching any room other than that where an arrest occurs or for looking through desk drawers or other closed areas in that room.[4]

Twelve years later, the Supreme Court, in *New York v. Belton*,[5] re-examined its holding in *Chimel* and relaxed the rules in the automobile context by allowing officers to search a vehicle passenger compartment incident to arrest without respect to officer safety or evidentiary justification. In *Belton*, a lone police officer stopped a vehicle with four men inside. The officer discovered that none of the men owned the vehicle, and he smelled burnt marijuana and saw an envelope on the floor that he believed contained marijuana. He ordered the men out of the car, placed them under arrest for possession of marijuana, patted them down, and separated them; however, he had only one pair of handcuffs, so he could not secure them all. The officer picked up the envelope and confirmed that it contained marijuana, then searched the rest of the passenger compartment; he found a jacket belonging to Belton, unzipped the pocket, and found cocaine. He seized the cocaine and drove the four men to the police station. Belton was charged with possession of the cocaine and was subsequently convicted.[6]

The U.S. Supreme Court reviewed the case and issued an opinion that revisited *Chimel* and the cases construing it, noting that the *Chimel* standard was difficult to apply in specific cases primarily because "courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant."[7] To provide clear guidance to officers in the field, the court articulated a new standard for vehicle searches, stating that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile … [and] may also examine the contents of any containers found within the passenger compartment."[8] In support of this new standard, the court noted that articles in an automobile's passenger compartment are almost inevitably within an arrestee's reach where he might grab a weapon or

evidence.[9]

Arizona v. Gant

Belton had been the law of the land for the past 28 years, but its reign ended in April when the Supreme Court, without expressly overruling *Belton*, handed down its opinion in *Arizona v. Gant*. In *Gant*, three officers were investigating a drug house. While there, they arrested two people and placed them in two patrol cars for offenses unrelated to Mr. Gant. Shortly thereafter, Gant drove up to the house, parked his car, and got out. He walked 10 or 12 feet toward one officer, at which time he was arrested for driving while his license was suspended. A third patrol car and two more officers arrived. After Gant was handcuffed and placed in the back of the third cruiser, two officers searched his car incident to arrest and located a bag of cocaine in the pocket of a jacket in the passenger compartment. Gant was charged with possession of the cocaine, convicted, and sentenced. At the motion to suppress hearing, Gant argued that *Belton* did not authorize searching his vehicle because he posed no threat to officers after he was handcuffed and in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. Gant's motion to suppress was denied, he was convicted, and the appeal worked its way to the Supreme Court.

The U.S. Supreme Court, in its review of the facts in light of the caselaw discussed above, clarified that the safety and evidentiary justifications underlying *Chimel*'s reaching-distance rule limit *Belton*'s scope. Accordingly, the majority held that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. The court further held that circumstances unique to the automobile context will justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.[10]

After applying the law to the facts, the majority held that the search in *Gant* was unreasonable under the Fourth Amendment. The differences between *Gant* and *Belton* were many: *Belton* involved a single officer and four unsecured arrestees; plus, Belton was already under arrest for marijuana that the officer had smelled and seen in the vehicle prior to searching it and finding additional drugs. On the other hand, *Gant* involved five officers and three arrestees, all of whom had been cuffed and placed in patrol cars before the search; plus, Gant was arrested for a driving offense for which police could not expect to find evidence in the passenger compartment of his car.

In rejecting other courts' broad reading of *Belton* as always allowing a vehicle search incident to arrest of a recent occupant, the *Gant* majority noted that the *Belton* holding does not change the fundamental principles established in *Chimel* regarding the basic scope of searches incident to lawful custodial arrests. The majority stated, "Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis."[11] In addition, the majority noted that, rather than providing simplicity and clarity, the broad reading of *Belton* had generated inconsistent results in its application, particularly regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene.[12]

The *Gant* opinion was a 5-1-4 decision, and the majority opinion was authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsberg. Justice Scalia also authored a concurring opinion in which he argued that when a person is arrested, he should be moved away from the vehicle, patted down for weapons, handcuffed, and secured; therefore, there should realistically be no officer safety issue with regard to the arrestee and what might be in his vehicle.

Justice Scalia expressed concern that having an "unsecured and within reaching distance" rule will encourage officers to allow the scene to remain unsecured to conduct a vehicle search.[13] As a result, Justice Scalia would limit warrantless searches to those instances where the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.[14]

The dissent was authored by Justice Alito and joined by Justices Roberts, Kennedy, and Breyer. Its crux is that there isn't sufficient justi-

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fication under the doctrine of *stare decisis* to abandon the 28-year line of caselaw that flowed out of Belton.[15] (The majority responded that "s*tare decisis* … does not compel us to follow a past decision when its rationale no longer withstands 'careful analysis.' We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice.")[16] Per the dissent, the majority's overruling of *Belton*'s bright-line rule will "cause the suppression of evidence gathered in many searches that were carried out in good-faith reliance on well-settled caselaw" and will "reintroduce the same sort of case-by-case, fact-specific decision-making that the *Belton* rule was adopted to avoid."[17] Further, the dissent argued that *Chimel*'s reaching-distance rule was to be measured at the time of arrest rather than at the time of the search; otherwise, the dissent argued, the rule would encourage officers to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer.[18] Finally, the dissent argued that part two of the new rule, which allows searches for evidence of the offense of arrest, was flawed for using a "reason to believe" standard rather than probable cause; for limiting the search to the offense of arrest; and for limiting the search to the passenger area.[19]

Issues for the future

Here are a few questions *Gant* raises that police and prosecutors should note.

1 **"Unsecured and within reaching distance":** Part one of the new rule says a search is allowed "only when the arrestee is unsecured and within reaching distance of the passenger compartment"; the opinion later states that a search is permissible "when an arrestee is within reaching distance of the passenger compartment."[20] Thus, there is at least *some* uncertainty whether the rule is "unsecured and within reaching distance" or just "within reaching distance." It appears from the opinion as a whole that the court means the arrestee has to be both unsecured *and* within reaching distance, but we'll have to wait and see how the courts interpret it.

2 **"Reasonable to believe":** Part two of the new rule uses "reasonable to believe" when referring to the existence of evidence in the vehicle. This standard is presumably something less than probable cause, but again, we'll have to watch how it unfolds in court.

3 **Searches under Belton rule:** What about officers who made searches based on *Belton prior* to the court's ruling in *Gant*? At least one federal court has already considered this issue. The Tenth Circuit, in *United States v. McCane*,[21] applied the good-faith exception to the exclusionary rule where the defendant was arrested for driving with a suspended license and the officer, after handcuffing and placing him in the back of the patrol car, searched McCane's vehicle and found a gun—illegal for the defendant, a felon, to possess. The Tenth Circuit upheld the search because it was supported by precedent and did not undermine the principle of deterrence that underlies the exclusionary rule.

Other things to remember

It is important to remember that *Gant* applies only when there has been an arrest, and it is *not* the only exception to the warrant requirement. Other exceptions available to officers in the field include:

- searches of the person incident to a lawful arrest;[22]
- searches of the passenger compartment when there is reasonable belief that a suspect who has *not* been arrested is dangerous and might access the vehicle to gain immediate control of weapons;[23]
- searches of the vehicle when there is *probable cause* to believe the vehicle contains evidence of criminal activity;[24]
- limited protective sweeps of areas of a house that an officer reasonably believes harbor a dangerous person;[25]
- inventories, which must be done according to standard policy and procedures related to protecting the vehicle and its contents;[26]
- dog sniffs outside vehicles during legitimate traffic stops, as long as they don't extend the time of the stops;[27] and
- voluntary consent searches of vehicles and containers within it.[28]

Gant does not do away with any of the above; rather, the decision modifies only *Belton*. Applying *Gant* with the other available warrant exceptions should give an officer in the field the flexibility he needs to fully investigate criminal activity, keep himself safe, and procure evidence constitutionally.

Endnotes

1 556 U.S. ___, 129 S.Ct. 1710 (2009).

2 453 U.S. 454, 460 (1981).

3 395 U.S. 752 (1969).

4 *Id.* at 762-763.

5 453 U.S. 454 (1981).

6 *Id.* at 455-456.

7 *Id.* at 460.

8 *Id.*.

9 *Id.*

10 *Gant* at 1719.

11 *Id.* at 1721.

12 *Id.* at 1720, 1721, footnotes omitted.

13 *Id.* at 1724.

14 *Id.* at 1725.

15 *Id.* at 1727.

16 *Id.* at 1722.

17 *Id.* at 1726, 1729.

18 *Id.* at 1730.

19 *Id.* at 1731.

20 *Id.* at 1714, 1723.

21 *U.S. v. McCane*, ___ F.3d ___, 2009 WL 2231658, C.A.10 (Okla.)(decided July 28, 2009)

22 See *Weeks v. United States*, 232 U.S. 383, 392 (1914).

23 See *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

24 See *United States v. Ross*, 456 U.S. 798, 820 (1982), *Carroll v. United States*, 267 U.S. 132, 153 (1925).

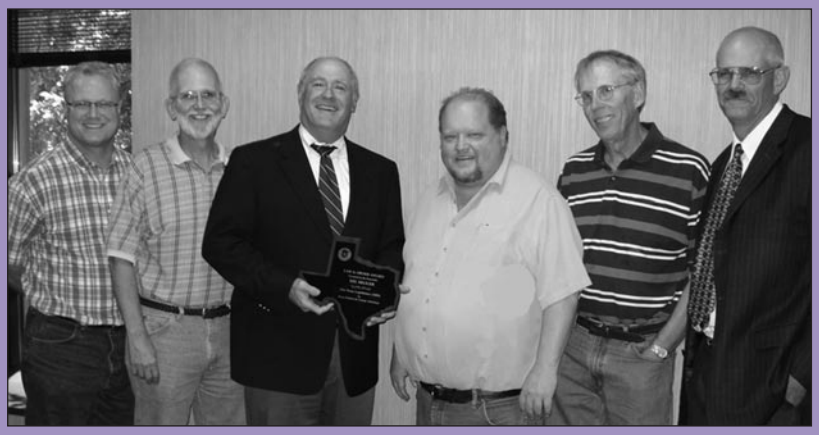
25 See *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

26 See *Colorado v. Bertine*, 479 U.S. 367, 374 (1987).

27 See *Illinois v. Caballes*, 534 U.S. 405, 407-409 (2005).

28 See *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), and *Florida v. Jimeno*, 500 U.S. 248, 249 (1991).

Law & Order Award winners



During our recent legislative updates, TDCAA presented awards to several lawmakers honoring them for their work on criminal justice and public safety issues during the 81st Legislative Session.

In the top photo, Rep. Joe Moody (D–El Paso) is holding TDCAA's Freshman of the Year Award, flanked by Jaime Esparza (El Paso DA) on the left and Shannon Edmonds, TDCAA's Director of Governmental Relations, on the right. Rep. Moody, a former El Paso assistant DA, was recognized for his work on the House Committee on Criminal Jurisprudence and his successful passage of bills targeting criminal street gangs.

In the middle photo, Rep. Allen Vaught (D–Dallas) is on the left with Craig Watkins (Dallas CDA) holding the TDCAA Law & Order Award; the award was given to Rep. Vaught in recognition of his work on the House Committee on Criminal Jurisprudence and his bills to improve DNA-related investigations.

In the bottom photo, Sen. Kel Seliger (R–Amarillo) is holding his Law & Order Award while being congratulated by (from left to right) Mark Snider (Hutchinson DA), David Green (Moore DA), David Scott (Ochiltree C&DA), John Hutchison (Hansford CA), and J.C. Adams (Cochran CA). Sen. Seliger was recognized for his service as Vice-Chairman of the Senate Committee on Criminal Justice and for his support of prosecutors in his district on a variety of issues.

The next issue of this journal will include photographs of the other award recipients from this session.

Photos from our Capital Murder Seminar

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