

◆ FREE DWI training ◆

# Worst Case Scenario: Impaired Driving Crashes from Crash to Courtroom

Texas District and County Attorneys Association (TDCAA)  
in cooperation with the Texas Department of Transportation

There is no worse place to investigate a homicide than in the middle of a busy road in the middle of the night. Yet Texas has thousands of such crime scenes every year. Investigating and prosecuting these cases is no easy task. Once the scene is cleared, you can never go back and revisit it, so conducting a full investigation in the moment is key to the criminal case. This course is a survey of common investigative and legal issues in impaired-driving prosecutions. Great focus is placed on the responsibilities of the first investigating officer and how his actions form the case's foundations for crash investigators, the grand jury, and the prosecutor preparing to try the case. Information on basic scene preservation, evidence preservation, scene documentation, witness interviews, crash reconstruction, blood evidence collection, and dealing with victims will all be included. This course is designed for prosecutors new to intoxication manslaughter cases and officers new to impaired-driving crash investigations—yet it is also a great review and update for officers and prosecutors well-versed in these cases.

## Today's schedule

|            |  |
|------------|--|
| 8:15 a.m.  | Registration   |
| 8:40 a.m.  | Securing the Crime Scene                                   |
| 9:40 a.m.  | Break  |
| 9:50 a.m.  | Investigating, Documenting, and Presenting the Crime Scene |
| 10:50 a.m. | Break  |
| 11:00 a.m. | Suspects as a Crime Scene                                  |
| Noon       | Lunch  |
| 1:15 p.m.  | Gathering and Presenting Blood and/or Breath Evidence      |
| 2:15 p.m.  | Break  |
| 2:25 p.m.  | Post Scene Investigations                                  |
| 3:25 p.m.  | Break  |
| 3:35 p.m.  | Punishment and Victim Issues                               |
| 4:30 p.m.  | Adjourn  |



In addition to this excellent free training, every attendee will receive two TDCAA publications: *DWI Investigation & Prosecution* and *Traffic Stops*. These books give attendees resources in many areas not covered by this seminar. Please be sure you've signed in and double-checked your Bar number or TCOLE number. The TCOLE Course number is 2070. If lunch is not provided, all afternoon times are delayed by 15 minutes.



# **Worst Case Scenario: Impaired Driving Crashes from Crash to Courtroom for police and prosecutors**

There is no worse place to investigate a homicide than in the middle of a busy road in the wee hours of the night. Yet thousands of such crime scenes occur in Texas every year when impaired drivers crash into others, causing injury or death. Investigating and prosecuting these cases is no easy task. Once the scene is cleared, you can never go back and revisit it, so conducting a full investigation in the moment is key to the criminal case. This course is a survey of common investigative and legal issues in impaired-driving prosecutions. Great focus is placed on the responsibilities of the first investigating officer and how his actions form the case's foundations for crash investigators, the grand jury, and the prosecutor preparing to try the case. Information on basic scene preservation, evidence preservation, scene documentation, witness interviews, crash reconstruction, blood evidence collection, and dealing with victims will all be included. This course is designed for prosecutors new to intoxication manslaughter cases and officers new to impaired driving crash investigations—yet it is also a great review and update for officers and prosecutors well-versed in these cases.

This course is designed for both peace officers and prosecutors to attend together. In addition to the stated objectives, each course provides an opportunity for officers and prosecutors to see an investigation or case from the other side's perspective. A common reference and vocabulary should assist both groups in greater effectiveness in the investigation and trial of DWI offenses.

## **Securing the Crime Scene (1 hour)**

Once the crash is cleared, the evidence is gone. Developing a plan to protect the roads from secondary crashes while treating the scene like any other homicide is a must. Identifying the four crime scenes in an impaired driving crash must be planned well before the crash ever happens. The four scenes include: 1) the road, 2) the vehicles, 3) the suspect, and 4) witnesses. Developing a team approach before the next crash happens is also essential to officers' ability deal with the enormous burden of the impaired driving crash scene. Finally, the prosecutor's role at the scene will be discussed.

### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Describe the need for effective crime scene processing in the impaired driving homicide.*
2. *List the four crime scenes usually present at an impaired driving crash.*
3. *Explain why teamwork is essential to this monumental task.*
4. *List both common and local team members to help secure the crime scene.*
5. *Discuss the role of the prosecutor at the crash scene.*

## **Investigating, Documenting, and Presenting the Crime Scene (1 hour)**

Officers must work a secured crime scene thoroughly. The segment begins with an exercise in identifying items that must be investigated, documented, and photographed at an impaired driving crime scene. Then a three-step photo process will be discussed and modeled. Finally, all participants will be taught and shown essential crash reconstruction evidence that must be obtained at the scene to allow for later crash reconstruction.

### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Create a list of items that must be investigated, documented, and photographed at an impaired driving crash scene.*
2. *Use a three-step photo process to document and allow effective presentation at trial of an impaired driving crime scene.*
3. *Define and identify skid marks, yaw marks, skid patches, crush, final resting places, and points of impact.*

## **Suspects as a Crime Scene (1 hour)**

Dealing with a suspect as a crime scene begins with “wheeling the driver” (proving who was operating a vehicle). It continues with observing the suspect’s use of their mental and physical faculties. It includes legally gathering physical evidence and testimonial evidence from the suspect. All of this evidence must not only be gathered, but it also must be effectively presented to a jury by the officer witness and prosecutor to a jury. Finally, the investigating officer must obtain chemical samples of breath or blood, which will be addressed in the next segment.

### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Define “operation” of a motor vehicle.*
2. *Describe the evidence necessary to corroborate an admission of operation.*
3. *Define “custodial interrogation.”*
4. *Identify common signs of the loss of the normal use of mental and physical faculties in both personal contact and SFSTs.*

## **Gathering and Presenting Blood and/or Breath Evidence (1 hour)**

An essential step in any impaired driving investigation, especially the impaired driving crash, is legally obtaining a breath or blood sample from the suspect. A four-step process (going from consent, to implied consent, to mandatory blood draws, to blood search warrants) will be explained and modeled with hypotheticals. This discussion can no longer be made without a discussion of *McNeely v. Missouri* and all the state cases following it. One area of weakness for officers and prosecutors alike is effectively presenting a suspect’s refusal to provide a breath or blood sample as evidence. This will be explored from the perspective of both gathering and presenting evidence. Finally, a couple of common defense attacks on officers and science in breath and blood evidence will be explored.

### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Describe the four-stage continuum of gathering chemical evidence.*
2. *Identify 5 key components of the implied consent and mandatory blood draw statutes.*
3. *Apply the holding of *McNeely v. Missouri* to their own investigations.*
4. *Create a plan to effectively gather and present evidence of a suspect's refusals.*

### **Post Scene Investigations (1 hour)**

Like any homicide, the impaired driving homicide investigation is not over when the suspect is arrested. This segment will focus on the officer's, investigator's, and prosecutor's roles in the post-arrest investigation. During this hour all of the potential criminal charges that can result from an impaired driving crash will be surveyed. Topics that will be covered include: next-day photos, vehicle autopsies, grand jury investigations and subpoenas, source investigations, and demonstrative exhibit creation and presentation.

#### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *List five potential charges that can stem from an impaired driving crash.*
2. *Identify key pieces of evidence that can be obtained from a Grand Jury investigation.*
3. *Create demonstrative exhibits that help place a jury at the crash scene.*

### **Punishment and Victim Issues (1 hour)**

While officers and prosecutors must focus on evidence, law, and science, victims and what they go through cannot be forgotten. Proving prior convictions and criminal conduct at trial is the beginning of gathering punishment evidence, but so is obtaining both aggravating and mitigating evidence. The consequences to victims must also be gathered and presented. Officers and prosecutors owe victims many of the same (and a few unique) obligations; these legal and non-legal obligations will be discussed. There will also be a discussion of the Victim Impact Statement for both prosecutors and police.

#### ***Learning Objectives***

*By the end of this session students will be able to:*

1. *Define the terms "mitigating" and "aggravating" as they relate to punishment evidence.*
2. *Describe the differences between prior conviction evidence and prior misconduct evidence.*
3. *Identify their own obligations to crime victims under the Texas Constitution and Code of Criminal Procedure.*
4. *Describe the Victim Impact Statement.*

# **Worst Case Scenario: Impaired Driving Crashes from Crash to Courtroom for police and prosecutors**

## **Texas District and County Attorneys Association (TDCAA) in cooperation with the Texas Department of Transportation**

- Please sign in. Officers double check your TCOLE PID, Prosecutors please check your bar number.
- Please pick up DWI Investigation and Prosecution, Traffic Stops, and a paper hand out.

CLE number for attorneys is

- **174074129** 6 hours, no ethics
- Officers will get 6 hours Course 2070

## **Securing the Crime Scene (1 Hour)**

I) Create a Response Ahead of Time

- a) Where is the worst place for a homicide scene?
- b) When is the worst time?
- c) What is happening with our most valuable evidence?
- d) In what other case do we ask our eye witnesses to “move along”?
- e) In what other homicide is the investigation finished when the bodies are removed?

II) Resist Urge and Pressure to Clear Roadway

III) Secure Your Crime Scene

IV) Team Approach

- a) Get help.
  - i) Every Officer You Can Get
  - ii) Every Agency that will Respond
- b) Create a plan with:
  - i) Fire Department
  - ii) EMS
  - iii) Hospital
  - iv) Towing Companies

## V) Prosecutors at Crash Scenes

### I) Every Impaired Crash has at least Four “Scenes”

- a) Road (Crime Scene)
- b) Cars (Crime Scene and Post Crash)
- c) Suspect (Suspect as Crime Scene and Gathering Blood)
- d) Witnesses

#### i) What to do:

- (1) Photo License Plates
- (2) Gather DLs
- (3) Interview on in car video
- (4) Always nail down potential hostile witnesses
- (5) Get Help!

#### ii) When Interviewing Witnesses

- (1) Where they were coming from?
- (2) Who they were with?
- (3) Did they see or hear something first?
- (4) Have them show you where they were when they saw it.
- (5) Take a photo from their vantage point.
- (6) The patient witness will often be the better witness.

#### e) 911 Calls

- (a) Make sure the calls are preserved
- (b) Review details if you can
- (c) Follow up with callers for interviews

## **Investigating, Documenting and Presenting the Crime Scene (1 hour)**

- I) 3 Keys to Scene Work
  - a) Photograph
    - i) Still
    - ii) Video
    - iii) Day after daylight
  - b) Mark
  - c) Document
    - i) Then document you documenting

## II) Roadway Surface

- a) Skid
- b) Post impact, what made the tires move sideways
- c) Fluid dump, where engine was ruptured
- d) Gouge marks, where frame of car hit
- e) All of these are Necessary to Determine Point of Impact

## III) Skids

- a) Straight
- b) Parallel
- c) Should end where tire rested
- d) Reference Point

## IV) Yaw Marks

- a) Curved
- b) Striations

## V) Photo & Video Traffic Signals

## VI) Important Clues Driver Was Going Wrong Way

## VII) Final Resting Position

- a) All 4 directions



- b) Make sure to get a reference in shot so we can map later
- c) Wide enough to get debris, why is officers bumper back here?

VIII) Don't let cars get moved first

IX) Details of Damage

- a) Shattered Windshield
- b) Damaged Headlight
- c) Victim's Hair
- d) More hair, some brain

X) Tire examination: Skid Patch

- a) Tire damaged due to sliding on brand new concrete

XI) Interior of Vehicle

- a) Airbags
- b) Seat settings
- c) Mirror and wheel settings
- d) Blood or damage to internal components
- e) Final Resting Point of Bodies

XII) Indicators of Seatbelt Usage

XIII) Document the Documenting

XIV) Other things of note.

- a) Fabric Fusion Mark
- b) Check Shoes and Brake Pedals

XV) A crime about motion should be captured in motion.

- a) Walk the scene with a video camera.
- b) Use the camera on your vehicle.
- c) Use your body camera

XVI) Finally, Secure the Vehicles

XVII) Victims of Homicides and Potential Homicides Need an Autopsy.

### **Suspects as a Crime Scene (1 hour)**

I) Lines of Defense in These Cases

- a) Not driving.
- b) Driving but not intoxicated at the time.
- c) Driving, Intoxicated at the time, but intoxication did not cause the crash.

II) Proving Operation: Wheeling the Driver

- a) If you did not observe driving this (not intoxication) is the defense.
- b) How?
  - i) Witnesses
  - ii) Circumstantial Physical Evidence
  - iii) DNA
  - iv) Surveillance Video

- v) Admissions (must be corroborated)
- c) Proving Operation: Witnesses
- d) Proving Operation: Physical Evidence & DNA
- e) Proving Operation: Surveillance Video
- f) Proving Operation: Admissions
  - i) Interview early and be nice
  - ii) Are you ok? What happened?
  - iii) Let them explain.
  - iv) The story on the side of the road is never as good as the story at trial.

### III) Gathering Testimonial Evidence – Post Arrest

- a) Turn Camera Around and leave it on!
- b) They have the right to remain silent but not the ability.
- c) Let them call someone while you hold their cell phone from the back of the patrol car and record it. Get the phone password too.
- d) How they are acting will be a big factor in their punishment.

### IV) Gathering Physical Evidence from Suspect

- a) Photo Injuries
  - i) Seatbelt bruises
  - ii) Head trauma
  - iii) Wrists, ankles
- b) Car Keys!
- c) Cell Phones
  - i) Seize it as a Search Incident to arrest
  - ii) Turn it off
  - iii) Get warrant
  - iv) How do you get the password?

V) Gathering Evidence of Mental Impairment

- a) Reaction to Crash
- b) Reaction and Response to Questions
- c) Divided Attention During Questioning
- d) SFSTs
- e) The More You Ask the More You Learn
- f) Mental impairment evidence is huge for drugged driving cases.

VI) Gathering Evidence of Physical Impairment

- a) HGN
  - i) Do it
  - ii) Every time
- b) SFSTs
  - i) If Refused Demonstrate them all
  - ii) Get them moving on camera
- c) Non-standardized tests
- d) Signing Documents
  - i) If you can't drive a pen, you can't drive a car.

**Gathering and Presenting Blood and/or Breath Evidence (1 Hour)**

I) Blood Test Considerations

- a) Legal basis for the search
- b) Search executed reasonably and/or in compliance with the Transportation Code
- c) Chain of custody and storage conditions before getting to the lab
- d) Chain of custody and storage conditions once at the lab
- e) How does the lab test the blood

## II) Legal Avenues to Get Blood

- a) Consent
  - i) 4<sup>th</sup> Amendment Consent
  - ii) Implied consent
- b) Exigent Circumstances
- c) Search Warrant

## III) 4<sup>th</sup> Amendment Consent

- a) Before being placed under arrest for a DWI offense
- b) This refusal cannot be used against them in court
- c) State must prove consent was voluntary by clear and convincing evidence
  - i) Record oral consent
  - ii) Written consent
- d) What if they are too intoxicated to consent?

## IV) TC 724.011 Implied Consent Breath or Blood

- a) Arrested for DWI
- b) Requested to Submit with DIC 24
- c) This refusal can be admissible against them
- d) State must prove consent was voluntary by clear and convincing evidence
  - i) Record oral consent
  - ii) Written consent
- e) What if they are too intoxicated to consent?
- f) What if they are unconscious?

## V) TC 724.012 Mandatory Blood Draws after arrest for DWI

- a) These are situations where it is mandatory for you to get blood.
- b) Situations you must get a warrant if they refuse:
  - i) Individual Died

- ii) Will Die
- iii) SBI (not driver)
- iv) Bodily Injury and transported to hospital or other medical facility for medical treatment (not driver)
- v) DWI W/ Child Passenger
- vi) Officer has reliable evidence from credible source
  - (1) One prior Intox MS (a felony DWI), Intox Asslt, DWI w/ Child
  - (2) Two prior DWI or BWI (anywhere, ever)

#### VI) Exigent Circumstances

- a) Missouri v. McNeely
  - i) The natural dissipation of alcohol does not create per se exigent circumstances in all DWI cases.
  - ii) This case focused only on alcohol
- b) Birchfield v. North Dakota
  - i) Breath Tests are searches incident to arrest on a DWI
  - ii) Blood Tests are not.
- c) Mitchell v. Wisconsin
  - i) General Rule
    - (1) When police have PC to believe a person has committed DWI and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the 4<sup>th</sup> Amendment.
  - ii) The exception

(1) We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

iii) Plurality Opinion

VII) Get a Warrant of Die Trying

- a) Show what you did, not why you didn't.
- b) Be prepared to say how long it takes to get warrants when you did.
- c) Document, document, document
- d) Elimination of alcohol plus.
  - i) Drug usage?
  - ii) Medical Treatment?
  - iii) Surgery?

VIII) TC 724.017. Blood Specimen

- a) Grants immunity from civil and administrative liability for:
  - i) the person who takes blood at the request/order of an officer under Ch. 724 or pursuant to a search warrant
  - ii) That person's employer
  - iii) The facility at which that person draws blood

IX) Blood Search Warrants

- a) Magistrate must be an attorney
- b) Probable Cause of DWI
  - i) Operate
  - ii) Motor Vehicle
  - iii) Public Place

iv) While Intoxicated

- c) Describe your suspect (it is the person to be searched)
- d) Lots of Available Forms
- e) All intoxication observations
- f) Reasons for stop
- g) How we know suspect was driving
- h) Time and date suspect was driving
- i) Whether suspect refused or not
- j) Agency that has custody of suspect

X) Art. 18.08 Power of officer executing warrant

- a) Get with your hospital(s) ahead of time
- b) In the execution of a search warrant, the officer may call to his aid any number of citizens in this county, who shall be bound to aid in the execution of the same.
- c) Just because you can, doesn't mean you should

XI) Before the blood is drawn

XII) Video the blood draw

XIII) Hospital Blood

- a) Don't rely solely on it
- b) You should get the actual vials for crime lab testing
- c) Ways to get it:
  - i) Grand Jury Subpoena – allows you to take, but need a search warrant to test
  - ii) Search Warrant – you can take and then test
- d) Small window to get – most hospitals only hold for 3 days
- e) Info to get that night at the ER:
  - i) Who drew the blood
  - ii) What time it was drawn



iii) Who gets the subpoena / warrant

XIV) REFUSALS ARE EVIDENCE

- a) Always read DIC 24.
  - i) The refusal will NOT be admissible if you don't
  - ii) But don't read it right away
  - iii) Develop your evidence first
- b) Carefully note all comments surrounding refusal.
- c) Prosecutors this is evidence, and great punishment evidence.

**Post Scene Investigations (1 Hour)**

I) Crash Reconstruction for Officers

- a) Crash Reconstructionist's opinions are only as good as the data.
- b) By data I mean on scene photos and measurements.
- c) Get a crash reconstructionist to scene if you can, if you can't you will need to take scene to them.

II) Crash Reconstruction for Prosecutors

- a) Get one, every time.
- b) Main Role is Saying What Did NOT Happen
- c) Have them help prepare your demonstrative evidence for jury.
- d) Have them ID which photos you should offer
- e) Have them help with an animation
- f) Make sure they see defense experts testify.

III) Day After Photos: The Scene & Roads

IV) Day After Photos: The Vehicles

V) Day After: Measurements / Scans

- a) Document you all documenting

VI) Surveillance Videos

VII) Bar Videos

VIII) The “Vehicle Autopsy”: Cut off the Trial Defense

IX) Recalls

X) The Charging Decision

a) Driving While Intoxicated

i) Penal Code Section 49.04– Class B/A

(1) Elements

- (a) Commits if person operates a motor vehicle
- (b) While intoxicated
- (c) In a public place

b) Driving While Intoxicated 3<sup>rd</sup>

i) Penal Code Section 49.09- 3<sup>rd</sup> Degree

(1) Elements

- (a) Commits if person operates a motor vehicle
- (b) While intoxicated
- (c) In a public place
- (d) 2 or more priors ...

c) Criminally Negligent Homicide

i) Penal Code Section 19.05 – SJF

(1) Elements

- (a) Commits if person causes the death of an individual by criminal negligence

d) Manslaughter

i) Penal Code Section 19.04 – 2<sup>nd</sup> Degree

(1) Elements

- (a) Commits if person recklessly causes the death of an individual

e) Intoxication Assault

i) Penal Code Section 49.07 – 3<sup>rd</sup> Degree

(1) Elements

- (a) Commits if person operates a motor vehicle
- (b) While intoxicated
- (c) In a public place
- (d) By reason of the intoxication causes SBI

f) Intoxication Manslaughter

i) Penal Code Section 49.08 – 2<sup>nd</sup> Degree

(1) Elements

- (a) Commits if person operates a motor vehicle
- (b) While intoxicated
- (c) In a public place
- (d) By reason of the intoxication causes DEATH
- (e) By accident or mistake

g) Aggravated Assault

i) Penal Code Section 22.02 – 2<sup>nd</sup> Degree

(1) Elements

- (a) Commits if person Intentionally, Knowingly or RECKLESSLY
- (b) Causes SBI to another or
- (c) Uses a deadly weapon during the commission

h) Felony Murder Statute

i) Penal Code Section 19.02 (b)(3) - 1<sup>st</sup> Degree

(1) Elements

- (a) Commits or attempts to commit felony
- (b) Other than manslaughter

- (c) In furtherance of the commission/attempt
  - (d) Commits/attempts to commit an act clearly dangerous to human life
  - (e) Resulting in death of an individual
- i) §550.021. Accident Involving Personal Injury or Death (HB 3668)
- i) We call it “Failure to Stop and Render Aid”
  - ii) 2013 change to law – operator of a vehicle involved in an accident that results or is reasonably likely to result in injury to or death of a person shall:
    - (1) Immediately determine whether a person is involved in the accident, and if a person is involved in the accident, whether that person requires aid
  - iii) Curry v. State – 2019 WL 5587330
    - (1) A driver does not have to stop and render aid if:
      - (a) He does not know that he was involved in an accident;
      - (b) He knows that he was involved in an accident and knows that it did not result in injury to or the death of a person; OR
      - (c) He knows that he was involved in an accident, but it was not reasonably likely that the accident would result in injury to or the death of another person.
    - (2) “Not just any accident will trigger the failure-to-stop-and-render-aid duties. The accident must have resulted in injury to or the death of another person, or it must be the type of accident that was reasonably likely to have injured or killed another person.”
    - (3) “The question is not whether the defendant knew that he was involved in some kind of accident.”
    - (4) “It is whether he made a reasonable mistake in thinking that no one involved in the accident was injured or killed or in thinking that the accident was not reasonably likely to have injured or killed another person.”

## XI) Grand Jury Investigation

- a) Grand Jury Subpoenas are used to obtain documentary evidence
  - i) Do not require probable cause
  - ii) Less obtrusive than search warrant
- b) Chance to depose defense witnesses
  - i) Passengers, recent phone calls, family
  - ii) Nail down all witnesses without sworn statements.
  - iii) That includes potential defense witnesses.
- c) Backtrack Defendant
  - i) Phone (locations and witnesses)
  - ii) Credit Card and Bank Records (purchases and locations)
  - iii) Restaurant and Bar Records and Video
    - (1) Get TABC to help
- d) All vehicle Maintenance & Repair Records
- e) Registration/Owner records
- f) ON Star/ GPS
- g) Smart Watches
- h) Gas Receipts
- i) Parking Receipts
- j) Medical Records
  - (1) Defendant and Victims
    - ii) Subpoena “all medical records.”
    - iii) Separate subpoena for the hospital lab.
    - iv) Look in nurses / doctors notes for admissions of drinking and/or driving.
    - v) There is no physician/patient privilege in a criminal investigation.
    - vi) There are exceptions for EMS records and substance abuse counseling.
- k) Insurance Agency Records

- l) Defendant and Victims
  - i) Many accidents are not reported to police.
  - ii) The suspect's insurer may have records of claims paid from prior accidents.
  - iii) If you locate any unreported accidents, follow up with the other involved drivers.
- m) Where do we learn....??
  - i) Credit card numbers
  - ii) Phone numbers
  - iii) Mechanics and repair sites
  - iv) Insurance Companies
  - v) From Inventory Search & Search Incident to Arrest

### **Punishment and Victim Issues (1 Hour)**

- I) Building a Punishment Case
  - a) Show the jury who your Defendant is.
  - b) Show what has already been done to "help" this defendant.
  - c) Get the punishment your defendant really deserves
  - d) Be a voice for the victim and the community.
- II) What Can We Use in Punishment
  - a) *EVERYTHING!!!* (CCP 37.07 Sec. 3)
    - i) All prior convictions/deferreds
    - ii) All prior juvenile adjudications
    - iii) Any other prior bad acts
      - (1) Regardless of whether they were ever reported or resulted in a court case
    - iv) Any bad acts or new criminal cases that have occurred *SINCE* your offense
      - (1) Including anything that happens right up through the trial

- b) Go Behind Judgments!!
  - i) Paper Judgments are never as powerful as live witnesses
    - (1) Prior cops
    - (2) Prior Victims
    - (3) Prior witnesses
  - ii) Often, there is bad conduct beyond the crime committed
    - (1) Cussed out police, etc...
- c) Remember the Refusal as Punishment Evidence
  - i) Character v. Reputation
- d) Prior Probations
  - i) Talk to Probation Officer
  - ii) What classes/programs did Defendant take?
  - iii) Interlock/SCRAM/Soberlink
    - (1) Get the reports
  - iv) Any Substance Abuse Issues?
    - (1) If no, that's good for you
    - (2) If yes, that's good for you
  - v) Victim Impact Panel?
    - (1) Talk to the speak. What was their story?
  - vi) Any good statements to PO?
    - (1) "learned my lesson"
    - (2) "Glad this happened"
    - (3) "I don't need treatment"
  - vii) Attitude on Probation?
    - (1) If bad, that's good for you
    - (2) If good, that's good for you

- e) The Parade
  - i) Calling witness after witness who has had their life negatively impacted by the Defendant is overwhelming.
  - ii) Even if the individual witnesses' stories are not that powerful, the cumulative effect of "the parade" can be devastating.
- f) Jail Calls
- g) Social Media
  - i) Find it ASAP, it will get taken down
  - ii) Defendants often post punishment evidence on their Facebook, Twitter, Instagram... pages
  - iii) Anything they post can and will be used against them

### III) Remember ALL Your Victims

- a) Ask your officers, EMS, and firefighters how bad it was
  - i) Did it bother them?
  - ii) Did it make them think of their families?
  - iii) Has the case stuck with them since it happened?
    - (1) Why?
- b) Show the jury ALL of the lives your Defendant has impacted

### IV) Crime Victims' Rights

- a) Texas Constitution, Article 1, Section 30(2)(c) gives the state, through its prosecuting attorney, the right to enforce the rights of crime victims.
- b) TCCP. Art. 56.04 Prosecutor shall designate a VAC
  - i) Duty of VAC: ensure victims are afforded rights and work closely with law enforcement, prosecutors, Board of Pardons and Paroles and judiciary
- c) TCCP Art. 56.02(a)(1)



- (1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;
- d) TCCP Art. 56.02(a)(1)
  - (1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;
- e) TCCP. Art. 56.02 (a)(3)(A)
  - i) The right to be informed of:
  - ii) Relevant court proceedings, including appellate proceedings
  - iii) Informed if proceedings have been changed or canceled, prior to event
- f) TCCP. Art. 56.02(1)(3)(B)
  - i) To be informed by an appellate court of the decisions of the court, after the decisions are entered but before the decisions are made public
- g) TCCP. Art. 56.02(a)(6)
  - i) The right to receive information regarding compensation to victims of crime by the Crime Victims Compensation Act
  - ii) Information about payment for a medical examination for a victim of sexual assault
  - iii) Referrals to social service agencies for additional assistance
- V) Victim Impact Statement TCCP. Art. 56.02(a)(5)
  - a) Provide information to probation conducting presentencing investigation
  - b) Impact of offense by:
  - c) Testimony
  - d) Written statement or
  - e) Any other manner prior to sentencing
  - f) TCCP. Art. 56.02(a)(14)
    - i) To be informed of the uses and purpose of a victim impact statement (VIS)

- ii) To have the VIS considered by prosecutor and judge prior to sentencing and before plea agreement is accepted; and by the Board of Pardons and Paroles before the inmate is released on parole

#### VI) Other Prosecutor Duties

- a) TCCP. Art. 56.02(a)(8)
  - i) Separate and secure waiting area
- b) TCCP. Art. 56.02(a)(9)
  - i) The right to prompt return of property
- c) TCCP. Art. 56.02(a)(10)
  - i) Prosecutor's office provide employer intervention on behalf of the victim

#### VII) Victim Issues for Police

- a) Impaired Driving Crashes are as traumatic as other violent offenses.
- b) Fear of not knowing.
- c) Be aware of your pay grade.
- d) Refer charging issues to prosecutors.
- e) Restitution.

#### VIII) Victim Issues for Prosecutors

- a) Worst Multi-victim cases
  - i) Consider a post GJ meeting with "all" victims
  - ii) E-mail groups and notice
- b) Concurrent Civil Cases
  - i) Always Brady
  - ii) Should never matter
  - iii) You represent state
- c) Right to be notified and considered v. right to control.

**IX) *No victim will ever deserve more of your effort or attention***

**Please drop evaluations off at registration table.**

**Be careful on the roads**

**Thanks for all you do.**

XV) HIPAA - Exceptions for Law Enforcement Access To Medical Records

- a) Emergency Health Care Worker Response – 45 CFR 164.512(6))
- b) Locate & Identify D & CW – 45 CFR 164.512(f)(2))
- c) Court Order or Subpoena – 45 CFR (164.512(f)(1)(ii)(A))
- d) Grand Jury Subpoena – 45 CFR (164.512(f)(1)(ii)(B))

## **Basic Crash Reconstruction Definitions**

Sources: Northwestern University Traffic Institute,  
National District Attorney's Association,  
Harris County Sheriff's Department

### **Acceleration Scuff / Mark**

A mark made to the surface when sufficient power is supplied to the driving wheels to make at least one of them spin on the road surface. These marks are difficult to distinguish from skids, but generally start out darker in color and get lighter as speed increases.

### **ACTAR**

Accrediting Commission for Traffic Accident Reconstructionists. Testing in proficiency is normally required by this agency. It is an expert-certifying agency, although it is not officially recognized by any courts as a requirement to testifying. This is the most respected group. Not many peace officers are certified by this agency. The HCSO has three people who are ACTAR certified and there are fewer than ten officers in the state who are so certified.

### **CDR**

Crash Data Recorder. A computer chip that is in all vehicles that determines if the airbag should deploy or not deploy during a collision. Many agencies are able to download this data and interpret it. HCSO can download and interpret the data. HPD recently acquired the equipment and can download it. Only a few HPD officers are trained to interpret the data. Also known as a "black box."

### **Centrifugal Force**

The force of a body in motion that tends to keep it continuing in the same direction rather than following a curved path.

### **Coefficient of Friction**

See "Drag Factor."

### **Conservation of Energy / Momentum Analysis**

Complex reconstruction. Many variables must be known or calculated. Will give speeds immediately before the impact and immediately after separation from impact. Can be used in conjunction with Crush in many cases. Better used when the impact is not a true head on or true rear end collision. A sensitivity study should be done to check the speeds.

### **Crash Investigator**

A person who has been trained to investigate crashes. These people can measure scenes, photograph the scene, document evidence, etc. They should not be interpreting data. This is a higher level of proficiency than a regular officer, but lower than a reconstructionist. Mistakenly called an "accident investigator."

**Crash Reconstructionist**

A person who has the same training as a crash investigator, but is additionally trained to interpret evidence collected. A reconstructionist can use the theories mentioned here to determine speeds.

**Crush Analysis**

Complex reconstruction. Derives from the results of staged car crashes. Needs the depth of damage to the vehicle. Using the crush measurements and a scientific formula will tell a prosecutor how much speed is needed to create that much crush damage. Better for true head on impacts or true rear end impacts.

**Drag Factor**

Road friction or coefficient of friction. Basically how “how slippery is the surface.”

**Drag Sled**

An instrument used to measure the drag factor of a surface. Basically, it is a piece of tire attached to a weight and pulled by a pull force scale. General ranges are: dry asphalt or cement .60 to .80, wet asphalt or cement .45 to .70, and ice .10 to .25. These averages should not be relied upon as the agency should do test drags if using a sled (HPD).

**EDR**

Event Data Recorder. See CDR.

**FRP**

Final Resting Point. This is where a vehicle’s motion has stopped and it has no kinetic energy.

**Gouge Mark**

A pavement scar deep enough to be easily felt with the fingers.

**Kinetic Energy**

An object’s (vehicle) motion energy. In a crash, a vehicle’s kinetic will be reduced by many factors: energy lost to road surface, energy lost due to side-slipping, vehicle damage, energy transferred to other objects, braking, etc.

**Perception Reaction Time**

The time that elapses between the point where the driver sees the danger and is able to react to it.

**POI**

Point of impact. May not be the same as point of maximum engagement.

**Scuffmark**

A tire friction mark that is made by a tire that is both rotating and slipping on a surface.

**Sensitivity Study / Analysis**

Altering the angles in a momentum analysis to verify the accuracy of the officer's interpretations. Should be done in all cases where a momentum analysis is performed.

**Skidmark**

A friction mark on a pavement made by a tire that is sliding without rotation. Generally is lighter in color at the beginning and darker towards the end as friction increases.

**Speed From Skid Marks**

Basic reconstruction. Needs measurements, drag factor, and braking efficiency. This will provide only a bare minimum speed after braking begins which will be an underestimate of speed.

**Stiffness Coefficients**

Used for crush analysis. Mathematical numbers used to describe how a vehicle's impact speed is related to the resulting damage.

**Striations**

Narrow, light, parallel stripes or streaks generally made by friction or abrasions on a surface.

**TAARS**

Texas Association of Accident Reconstruction Specialists. An agency that many officers belong to in this field. Does not require any testing to enter the agency and is not an expert certifying agency. Many HPD officers are members.

**Time-Distance Analysis**

Used to evaluate driver behavior such as perception reaction time.

**Vault Formulas**

Moderate reconstruction (angle measurements important as is center mass). Involve deriving speed from math formulas. Used to determine speeds of airborne vehicles. Must know takeoff angle, vertical and horizontal distances from center mass.

**Vericom**

A computerized method of determining drag factor. An officer should perform several test runs with a Vericom and use the average. This instrument is used by the HCSO.

**Yaw Marks**

Moderate reconstruction (yaw marks may be difficult to recognize). Yaw occurs when gravity overcomes the tire's friction to the road (sideways movement of a vehicle). Drag factor must be known. The result is the speed during the yaw and will be lower than the actual speed.

## Checklist of Photographs Needed at the Scene

- Collision Scene
  - All vehicles before being moved.
    - At all points of compass
    - Full and long range from each angle.
  - Any visible debris.
  - Any fluids or glass at place of initial contact.
  - Interiors of all vehicles
    - Blood
    - Damage
    - Open Containers
    - Locations of Personal items
    - Control Panels
  - Tires of all vehicles
    - Damage to tires
    - Scuff or abrasion to tires
    - Skids connected to tires
  - Bodies
  - Persons
    - Visible Injuries
    - Seatbelt Marks
    - Hand stamps
- Roadway
  - All skid and other tire marks
  - All traffic signs and traffic signals
    - All cycles of Traffic lights
    - Speed limit signs
      - Both Directions
      - Close up
      - Back of sign
      - Sign in context of collision site
    - Signs from all directions
  - Reference or wide angle shots of type of road
  - Long view shots in all directions
  - Any objects that impair line of vision in any direction
  - All measurement markings
- After vehicles are moved
  - Close up of all damage to vehicle
  - Overhead view of damage to vehicles
  - Interior daylight
  - Content of glove box, console
  - Establish working order of as many signals and lights as possible.
- Aerial Photos of Scene

## **FIRST RESPONDERS TO MAJOR COLLISION SITES**

- Think about route of entry into scene.
- **DO NOT DRIVE OVER EVIDENCE**, tire marks included.
- Select position for unit that gives good visibility to public and protects the scene.
- Turn headlights out, or at least to low-beam, if facing oncoming traffic.
- If you are first on-scene officer, check for injured parties.
- Initiate traffic control such as cone or flare lines.
- PROTECT all evidence points and the vehicles.
- Cover license plates with cloth or remove from vehicles.
- Check for witnesses. Secure their Driver's licenses or ID cards. (They won't leave without them).
- Separate the witnesses to avoid contamination of stories.
- Calls for other services needed at scene, however, do not call for Medical Examiner until evidence at scene is documented.
- Contact C.R.A.S.H. unit for full investigation of chargeable collisions.

## **CHECKLIST FOR RECONSTRUCTION WHILE ON-SCENE**

- Insure you do not drive over evidence.
- Walk through scene before speaking with anyone so the evidence can tell you what happened.
- While walking the scene, check for evidence that may have been overlooked before your arrival.
- Look specifically for yaw marks prior to collision site.
- If found, make certain the yaw marks are documented completely.
- Determine if alcohol or other substance is involved.
- Determine causation from information at hand.
- If applicable, get blood draw.
- Insure injured treated. (Speak to them if possible).
- Get witness information and start initial statement process.
- Make sure evidence is safe.
- Before the suspect is taken from the scene to a hospital, try to check for evidence of seatbelt injury.
- If there is a question about "wheeling" the driver, make certain the evidence is maintained (fingerprints, DNA from airbag, etc.).
- Take photographs before marking of scene if possible.
- Make certain that damage areas and all tire marks are photographed completely (Close enough to determine striations and markings).
- Photograph all tires and any skid patch or yaw mark evidence on those tires.
- Note tire pressure on tires.
- Mark, or paint, the scene to preserve.
- Photograph and check inside of all vehicles.
- Remove vehicles and bodies as soon as possible, but only when it will not compromise other evidence.



- Place holds on vehicles until time to release is determined.
- Gather data for a forensic map of the scene and make certain the “approach distance” for vehicles is included in the map.
- Determine drag factor of roadway.
- Walk the scene again, before opening the roadway to traffic.

### **FURTHER SITE INVESTIGATION**

- Return to the scene at first available time in daylight to view for missed items of evidence.
- If collision was in the rain, photograph tire marks in daylight that are now dry. (If you find they were not all mapped the night before, measure and record to add to map manually).
- Document tire marks again in daylight.
- Check for other roadway evidence.
- Photograph approach for all vehicles.

### **VEHICLE IMPOUND INVESTIGATION**

- With vehicle statistics in hand, go to the impound.
- Photograph vehicles again in daylight to document damage.
- Attempt to locate evidence that lines up collision point with other vehicles. (license plate imprints, wheel imprints, headlight bezel markings, etc.)
- Photograph above items.
- Use crush jig or total station to document the crush profiles of vehicles. (If jig is used, photograph the jig in place to use for demonstrative evidence).
- Photograph the interior of the vehicles again in daylight to show airbag deployment and facial marks on them.
- Photograph marks in windshields and windows from head strikes.
- Examine and photograph seat belt D-rings, stretch marks in seatbelts, deployed pre-tensioners, etc. Then collect and log into evidence.
- Make certain the vehicles are preserved well enough to protect airbag DNA, if needed.
- Vehicle weights if not accomplished at original site.

### **RECONSTRUCTION IN OFFICE**

- Develop or print photographs of evidence to use during examination and reconstruction.
- Complete forensic map of scene.
- Make certain to save the point list and raw data to validate the forensic map.

- Contact Medical Examiners office about autopsy, either attend or get information and photographs.
- Obtain recalls for each involved vehicle.
- Obtain crush co-efficients for vehicles.
- Write any warrants or court orders needed for search of vehicle to gain Airbag deployment information, DNA testing of airbags, etc.
- Serve warrants as soon as practical to get evidence secured.
- Obtain mechanical examination of suspect vehicle by qualified mechanic.
- Complete preliminary calculations using Momentum and Energy solutions.
- Compare calculations from each discipline for validity.
- Compare calculations to Airbag Control Module data.
- Contact Prosecutor to discuss case facts.
- Finalize calculations, ranging values for cross check.
- Compile case book.

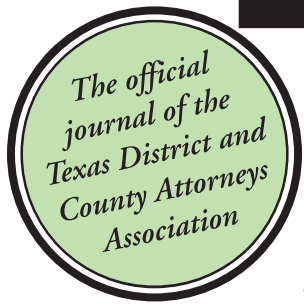
At this point, until such time as a trial date is set there will be no more work unless directed by Prosecutor. Keep vehicles safe in impound until told to release them by the Prosecutor's office.

## **Exercise Worksheet**

- **Team up and make a list of all the photos you would need to take here**
- **Pick a spokesperson and be ready to report**

## **Exercise Worksheet**

- **Group back up**
- **Make a list of punishment evidence officers gather**
- **Make a list of punishment evidence prosecutors gather.**
- **Pick a spokesperson to report back.**



# 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*

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## The devastation of driving while drugged

Even with a doctor’s prescription and legitimate medical need, often people should not be driving with drugs in their systems. How to investigate and prosecute a case of driving while intoxicated (on prescription drugs).

On Sunday, September 20, 2015, at about 12:45 p.m., Roland Sedlmeier, his wife Mendy, and their two kids, Harley, age 6, and Sofie, 4, were driving home from church on State Highway 105 in Conroe.

A few minutes later, a 911 call came in to Montgomery County dispatch. The caller described a gray sedan that was almost hitting other vehicles and driving off the road. The sedan’s driver was Ronald Cooper, who was also heading home from church on Highway 105. A Conroe Police Department (CPD) officer, hearing the call, raced down Highway 105 in an attempt to stop Cooper, but the officer could not get there in time. Cooper’s sedan careened into the Sedlmeiers’ small car—a crash witnessed by several other drivers, including the 911 caller—and Roland, Mendy, Harley, and Sofie were killed instantly.

Tyler Dunman, a co-author of this article, had just gotten home from church himself when the phone rang. The Conroe Police sergeant in charge of investigating fatal crashes told him about a bad crash on Highway 105 where several were dead. In Montgomery County, we have a Vehicular Crimes Callout Team where prosecutors are on-call on a rotating basis to respond to scenes of crashes when there is potential for criminal charges to be filed. We believe this team is very important because we are able to actively assist law enforcement in real time with evidence collection; prosecutors can



**By Andrew James and Tyler Dunman**  
*Assistant District Attorneys in Montgomery County*

also see the crime scene with their own eyes. Overall, it gives us better connection to the case and a perspective that you can’t get from photos or videos of the scene. Because it was a Sunday afternoon, Tyler, then the supervisor of the team, decided to give the on-call prosecutors a rest and handle this one himself.

He arrived about 35 minutes after the crash to a fairly chaotic scene. He was briefed by CPD officers and began to think about all that needed to be done. He learned that the entire Sedlmeier family had been killed and that the “at fault” driver was being treated by Emergency Medical Services (EMS) for what appeared to be impairment from prescription medication. He knew immediately this was not going to be an ordinary crash investigation. He called Andrew James, an experienced vehicular crimes prosecutor and co-author of this article, to the scene to help out. Andrew and Tyler had been on many crash scenes, but nothing could prepare them for this one. An entire family smashed together in such a way that none of them were easily identi-

*Continued on page 23*

# The devastation of driving while drugged (cont'd from the front cover)

fiable, including two little kids. It was horrific and shocking to even the most experienced first responders on scene that day.

In looking at the crash evidence and talking with witnesses, we learned that Cooper was driving in the same direction as the Sedlmeier family when he left his lane and clipped the back end of the family's compact sedan. This caused the Sedlmeiers' car to skid into the oncoming lanes, where they were hit head-on by a young man driving a Jeep Wrangler. This young man and his passenger had also just left church and were headed to a local restaurant to have lunch with his family. His Jeep struck the Sedlmeiers' car broadside and caused significant damage, while the two men in the Jeep walked away with only minor injuries.

Although the crash was fairly involved, the two of us began to focus our attention on Ronald Cooper. At the time, he was a 67-year-old man driving alone in his car, the same vehicle that had been reported for reckless driving by 911 callers and other witnesses. The initial witnesses and law enforcement officials noticed fairly quickly that something seemed "off" with him. Some of the witnesses characterized it as a "likely medical condition," such as diabetes or low blood pressure, while others said he just seemed to be "dazed" from the crash. Some on-site witnesses told law enforcement that they did not smell any alcohol so they knew that he "wasn't drunk," but other witnesses and officers described Cooper as having slurred speech, slowed reactions, and unsteady balance, as well as being confused. One of the more experienced CPD officers believed that Cooper's signs of impairment were probably from prescription medication. Another CPD officer on scene discovered several prescription pill bottles in the center console of Cooper's car. The prescriptions were recently filled, and the bottles for Valium and oxycodone still had pills inside.<sup>1</sup> A crime scene investigator collected the pills as evidence.

At this point, we decided to call a Drug Recognition Expert (DRE) to the scene to do the initial follow-up and intoxication investigation with Cooper. Cooper was still being evaluated by EMS, and one of the paramedics stepped out of the ambulance to talk with us. She believed that Cooper was impaired, and he had admitted to taking Valium and oxycodone that morning. She

also said that he appeared to have substantial medical history, although all his vitals and other signs were checking out just fine. We learned that he had not suffered any injuries in the crash and that his blood pressure and blood sugar were both within normal range.

Soon thereafter, DRE Michael Dean arrived. We decided that it would be best for this investigator to interview Cooper and determine the extent and likely cause of his impairment. Cooper had previously been read his Miranda warnings by one of the patrol officers before getting into the ambulance. He had also been read the DIC-24 and had consented to a blood sample. This initial blood sample was taken in the back of the ambulance by one of the paramedics, who was also a registered nurse.

Following the DRE's initial interview and collection of the blood sample, paramedics consulted with law enforcement and decided that Cooper should be transported to the emergency room to be checked out, a decision we highly encouraged. Because of Cooper's age, the fact that he had admitted to taking multiple prescription medications, and the numerous "medical conditions" and "prior injuries" he had mentioned to the paramedics, we just knew that in any future prosecution, his defense would attempt to raise those issues as causes of the crash. It was important that Cooper be seen by a medical doctor to rule out any of those factors from playing a role in this case. And frankly, as seekers of the truth, we wanted to make sure there was in fact no medical event that could have contributed to this crash.

Cooper was transported to the ER and seen by a medical doctor and nursing staff. Other than noting impairment from the prescription drug use, they found nothing wrong with him. At the ER, the DRE also conducted his full evaluation, including taking a second blood sample. The DRE determined that Cooper was intoxicated on a narcotic analgesic. Following the medical screening at the emergency room and the DRE evaluation, Cooper was arrested and charged with four counts of intoxication manslaughter for the Sedlmeier family and two counts of aggravated assault with a deadly weapon for the injuries to

the two young men in the Jeep. Our investigation into this crash was well underway.

### **Cooper's medical history**

Understandably, the crash garnered a lot of attention from local news outlets, and Ronald Cooper's wife and daughter-in-law both spoke to various news organizations the evening after the crash and in the days following. They claimed that Mr. Cooper's conduct had to be the result of his health issues, which include diabetes and a blood clot on his brain.<sup>2</sup> We knew that we needed to talk with both women to investigate the details of Mr. Cooper's ailments and injuries and obtain whatever information we could from them.

In our crash investigations, it is normal practice for our Vehicular Crimes Team to rely heavily on the grand jury to obtain records and interview witnesses to lock down testimony and gain insightful information for the investigation. Several of Cooper's family members were interviewed at grand jury. From their testimony, we learned generally about Cooper's numerous prior crashes, his hospitalizations, his medical history, his previous doctors, his family's concern about letting him drive and letting people ride in the car with him, and all of the prescription medications he was taking (in addition to the ones that he admitted to and which were found in his car after the crash). One of the drugs is called Gabapentin, which is an anti-epileptic medication that affects the body's chemicals and nerves that are involved in the cause of seizures and some types of pain. His family expressed concerns that Gabapentin was the primary cause of any impairment they had seen in him before the crash. Having never heard of Gabapentin, we did some research into it and found that it also causes central nervous system (CNS) depression. We reached out to our usual lab<sup>3</sup> to find out if it could test for Gabapentin and were told that it couldn't but that the National Medical Service Labs in Pennsylvania could conduct the testing we needed. Our office uses NMS occasionally for blood testing, as it is often the only lab in the country that will test for certain substances. There can be significant costs associated with independent testing at private labs like NMS, but given the serious nature of this case, we felt it was necessary and well worth it to spend the additional funds. A few weeks later, we received a report showing that

Gabapentin was in Cooper's blood in a low, therapeutic amount.

Next, we zeroed in on Cooper's medical history and other prescription drug use. We subpoenaed his medical records from those hospitals that Cooper admitted to visiting in the last couple of years, as well as the hospital he visited on the day of the crash. To expedite things, we had an investigator serve those subpoenas at the hospital and pick them up once they were ready. Based on the information obtained in these records, we discovered additional hospital stays and identified Cooper's primary care and pain management doctors. We then subpoenaed records from these doctors and the records about Cooper's prescriptions.

We also ran Cooper through the statewide prescription drug database and found all the other (numerous) doctors that he had visited, along with the prescription history from each visit. That finding led to additional grand jury subpoenas and follow-ups with other pharmacies in the area. As these records came in, we put together a fairly extensive timeline and spreadsheet that included a number of other crashes that Cooper had been involved in, as well as several hospital visits going back as far as 2001. Again, anticipating that his attorney would surely use Cooper's medical history and health issues as defenses in the trial, we studied all of these records in great detail and became very well-versed in Cooper's medical conditions, their causes, their treatments, and the drugs he was taking. This process took lots of time and organization, as the records accumulated into thousands of pages.

Generally, these records obtained through the grand jury were a goldmine of information. To better understand them, Tyler reached out to the director of our county-wide EMS service, a medical doctor who had some involvement in the case. We arranged for several meetings to review the medical records together so that Tyler could better understand what the medical conditions were and the best practices for treating them, including what prescription drugs we would expect to see. Tyler found these meetings to be very informative. With this doctor's help, he understood what we needed to prepare for and what would likely be an issue at trial.

Also during this time, Tyler pulled Cooper's medical records from his time in jail. (He spent about a year in jail before trial, where he was treated by a doctor for his basic medical needs.)

These records were incredibly valuable. We discovered that Cooper was able to function perfectly for an entire year in jail without taking any type of controlled substance for alleged pain from prior injuries. He went an entire year in the jail never once requesting pain medication and often describing his overall condition as “very good.” We felt his medical progress and abilities to function without pain medication would be an important point during the trial (and it was). We were confident that if the defense decided to open Pandora’s Box of prior medical conditions as either causes of the crash or as mitigation, we were prepared to defend such claims. We subpoenaed many of Cooper’s doctors for trial and were ready to truthfully explain his medical history and the fact that none of it was the cause of (or even relevant to) this particular crash. We probably knew Cooper’s medical history and prescription drug use better than he did!

### **Jury selection**

During voir dire, in addition to the typical intoxication manslaughter topics, our biggest hurdles to overcome involved:

- 1) misperceptions surrounding “legally prescribed” prescription drug use, intoxication, and driving;
- 2) how drugs affect the body,
- 3) lack of per se limits; and
- 4) signs of impairment being attributed to prior injury and age.

In all honesty, this was the first case we had seen in some time that involved a defendant who was taking prescription medication based on a valid prescription for what appeared to be legitimate medical conditions. Of course, we have had our share of drug-related DWI cases, and a number of those involved prescription drugs as the intoxicant. But most of the time, DWI offenders are taking prescription drugs without a valid prescription and for the “high” effect rather than for any legitimate medical purpose. In Cooper’s case, we had to overcome the public’s perception that a person cannot commit DWI (or any other crime) if he has a legitimate medical condition, goes to a legitimate doctor, is prescribed a drug, takes the drug as prescribed, and then drives. If you ask around, many laypeople assume that if someone has a valid prescription from a doctor and he takes the drug as prescribed, that person can safely operate a motor vehicle. Although laypeople might not perceive the consequences up-front, usually once we remind them about the

warnings on the pill bottles against operating machinery and driving and then discuss the effects of certain drugs on the body and mind, they come around to understanding that such practice could be criminal. We addressed these issues head-on in voir dire.

We began with the definition of intoxication manslaughter and what it means to be intoxicated generally. We turned the conversation to drugs and of course, no one was surprised to learn that drugs (of any caliber) can cause intoxication. Before we jumped too far into the details of prescription drug use, Tyler wanted to test the waters with a general question so to start off, he asked something like, “Do you believe that a person could be legally intoxicated on prescription medication even if taking it as prescribed by their doctor?” He went person by person gauging gut reactions to this question. This helped with identifying those who might need more persuasion (or evidence) as to this element in the case. We then carefully transitioned the conversation to prescription medication and asked whether certain prescription medications might cause someone to be intoxicated. This question led to follow-up questions about types of prescription medications that might be an issue and experiences some people on the panel had had with taking certain medications. This conversation led to responses running the gamut from those who had never taken these types of drugs to those who were taking them right then for medical issues. Panelists also talked about the effects of these drugs and why medications have warnings on their labels.

Most of the conversation led to the group educating itself and coming to grips with the ramifications of taking these types of drugs while driving. To address this issue, we asked a series of basic questions so the panel would consider a number of scenarios, such as “whether it is legal to take prescription medication and drive,” as compared to “driving while intoxicated on prescription medication.” We ended the discussion with explaining Texas Penal Code §49.10, which states that “the fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense.” It was a good ending point, as it reaffirmed the discussion and the logical conclusion in prescription drug cases.

The voir dire process on per se limits on



drugs and potential medical conditions that could affect an intoxication investigation were no different from in any other DWI case. It is important for the jury panel to know and understand why we do not have per se limits for drugs like we do for alcohol. In our voir dire, we found a nurse on the panel who spoke about the basics on prescription drug use and how these drugs affect the body and most importantly, how they vary with half-lives, etc. This could lead to a complicated discussion if prosecutors are not careful, but it is important that the panel understand the differences in our procedures and abilities between alcohol and drugs. The panel must also understand that medical conditions and other injuries might affect an officer's ability to test for intoxication. In this voir dire, we discussed field sobriety tests, how they are used, and what would happen if someone was unable to complete them because of a medical condition (i.e., what other ways an officer might check for intoxication). Included in this discussion were questions about how police officers could exclude certain medical conditions, such as diabetes or high blood pressure, from indicating impairment (for example, consulting with medical professionals during a DWI investigation). Of course, getting the panel to understand the totality of the circumstances is an important part of jury selection in a case like Cooper's, and overall, this voir dire was more educational than most we might do in an intoxication manslaughter case. But educating the jury and dispelling related myths are very important.

### **Proving intoxication**

We knew that to prove Cooper was intoxicated and that his intoxication caused a crash that killed four people, we needed to explain to the jury the medical reasons a doctor would prescribe oxycodone, Valium, and Gabapentin to a patient, how these drugs affect the human body, and that those effects impaired Cooper's ability to safely operate a car.

It was paramount to proving our case to connect the side effects of the drugs in Cooper's system with his driving, appearance, and actions at the time of the crash and during the investigation. About a month before trial, we sat down with our DRE and our toxicology expert, Dr. Sarah Kerrigan.<sup>4</sup> When we first retained Dr. Kerrigan, we provided her with several important items from the case file: the police report, EMS

records, DRE evaluation report and video, videos of the EMS and officers interviewing Cooper at the scene, toxicology reports, and Cooper's prescription records. We prepared for this first meeting by reviewing the DRE evaluation and police report to familiarize ourselves what officers, first responders, and civilians witnessed at the crash scene.

We discussed our concerns and what we thought would be potential issues at trial. A person intoxicated on prescription drugs can often look nothing like the stereotypical drunk, and Cooper was no exception. On the various videos of his interactions with EMS and officers, the evidence of Cooper's intoxication often appeared subtly. When Cooper was engaged in conversation, he would generally respond appropriately and maintain his focus; however, when he was not being engaged, he had trouble keeping his eyes open and displayed one of the classic indicators of narcotic analgesic impairment, being "on the nod" (that is, the semi-sleep state that narcotics users experience while on the drug).

We also discussed some of the evidence that our toxicology expert believed to be inconsistent between the DRE evaluation and toxicology reports. The amount of oxycodone in Cooper's blood was above the therapeutic range, the amount of Valium and its active metabolite was around the middle of the therapeutic range, and the amount of Gabapentin was in the low end of the therapeutic range. Our toxicology expert would have expected Cooper to display horizontal gaze nystagmus (HGN) because of the Valium, a CNS depressant, but neither our current DRE nor the DRE officer who interviewed and administered tests to Cooper at the scene saw HGN in his eyes. Our toxicology expert explained that although Cooper did not have HGN, that did not mean that the Valium and its metabolite were not contributing to his intoxication.

The fact that our DRE did not see HGN would also allow us to respond to the confirmation bias argument that defense attorneys often make against DREs. Defense attorneys often argue that DREs claim to observe clinical indicators of impairment consistent with the type of substance the arresting officer tells them the suspect admitted to taking. But though our DRE was told that Cooper admitted to taking Valium and oxycodone and he would have expected to see HGN, he didn't actually observe nystagmus, and he documented only what he observed.

We ended our first meeting with a plan to

meet again in another week; Andrew would prepare direct examination questions for both the DRE and our toxicology expert, our DRE would review his materials, and the toxicology expert would delve into the scientific studies and literature on oxycodone and Valium, peak concentrations and dosages, and how they affect driving. The three of us met once more, and after that Andrew met with the DRE and tox expert separately (to review the videos of the DRE's evaluation of Cooper and to finalize the questions that we would ask her and what her answers would be, respectively). Our tox expert also provided me with several studies to use during cross-examination of the defense expert.

### **The trial**

Everyone who interacted with Cooper immediately after the crash, from civilian witnesses to first responding officers and paramedics, noted that his speech was slurred, his reactions were slow, his balance was unsteady, his pupils were constricted, his thought disorganized, and that he was "on the nod." We knew that narcotic analgesics and CNS depressants typically cause all of these signs, and we decided to highlight this intoxication evidence throughout the trial by calling all of the witnesses who made these observations.

The civilians and most of the officers couldn't say whether Cooper's behavior and appearance was due to intoxication on prescription drugs or whether it was caused by a medical condition. The paramedics, the ER staff, and the DRE, however, could make that distinction. We felt that it would help the jury understand that Cooper's impairment was due to drug intoxication by walking them through the same analysis that we did on the day of the crash and eliminating medical impairment as a possibility.

We started by calling a close friend of the Sedlmeiers who saw them leaving church that morning and who could tell us what the typical Sunday was like for the family. We then went straight into the good Samaritans who called 911 and followed Cooper for more than 5 miles trying to get him off the road, the first two responding officers, paramedics, the DRE who interviewed Cooper and administered SFSTs right after the crash, and emergency-room personnel. At this point the jury had heard from numerous people who believed Cooper was intoxicated and that his impairment was not caused by any sort of injury, ailment, or illness.

We then called analysts from SWIFS and NMS who tested Cooper's blood. We asked only about the testing process and the results of the testing and did not ask the analysts to interpret their findings or get into detail about how those drugs affect the human body. We wanted all the interpretation testimony to come from our toxicology expert, Dr. Kerrigan, so there would be only one consistent line of testimony for the jury to consider.

Next up was our DRE, who went through the details of his evaluation. His testimony combined what jurors had already heard regarding the physical manifestations of the drugs in Cooper's system (from civilians, other officers, and medical personnel) with the known drugs in his system. Jurors had already heard, "I observed slurred speech, unsteady balance, constricted pupils, and the nod," as well as that Cooper had oxycodone, Valium and its active metabolite, and Gabapentin in his system. The DRE could then say that oxycodone is a narcotic analgesic and that such drugs cause constricted pupils and being "on the nod." The DRE could do the same thing for the other drugs, explaining their effects on the body.

We followed the DRE with our toxicology expert, who built on and reinforced the DRE's testimony. Dr. Kerrigan gave meaning to the amounts of each drug in the defendant's system and explained that although Cooper had likely developed some tolerance to these drugs after taking them for years, he wouldn't have been showing impairment if he had a tolerance to the drug amounts in his system. She also explained the additive effect that narcotic analgesics and CNS depressants often have when taken together and that even though two of the three drugs in his system were in the therapeutic range, their combined effect was impairing.

At this point in the trial we transitioned from putting on evidence to prove intoxication to proving that Cooper's intoxication caused the crash. We did so by explaining how these three drugs can and do impair someone's ability to safely operate a car. The jury heard about common driving mistakes made by people intoxicated on Valium and oxycodone, such as an inability to maintain a single lane or overcorrecting, the same things Cooper was doing that caused the crash. We also wanted to show the jury the aftermath of how these drugs impair driving by calling the medical examiner to testify as to the horrific injuries sustained by each member of

the Sedlmeier family. We followed the medical examiner by calling crash reconstruction officers to explain how the crash happened, and we ended our case by putting one of the Sedlmeiers' family members on the stand to identify their bodies from the autopsy photos.

### **Countering the defense**

Starting at the crash scene on that Sunday afternoon, we anticipated that the defense would try to attribute Cooper's behavior to a medical or age-related explanation. It was the only plausible defense available to them. They could attempt to minimize and provide innocent explanations for the observations that the witnesses made of Cooper's person, but they would have a difficult time explaining away his driving.

The defense initially provided us with notice of eight potential defense experts, including some of the more well-known names in the industry, and we provided it to our toxicology expert. We learned which one of these experts the defense actually had lined up to testify, and with that information our toxicology expert determined the avenue of attack that defense expert would pursue: that Cooper had developed a tolerance to the oxycodone and Valium because he had been taking them both for years and, therefore, those drugs did not cause impairment—the crash had to be caused by either medical or age-related issues. We also expected that the defense would talk about the various drugs in isolation and avoid discussing any additive effects. We were confident that several factors—our work early on in the investigation, Cooper having been evaluated by EMS and ER staff the day of the crash, and our obtaining so many of Cooper's medical records—would pay dividends at trial by allowing us to disprove the defense claims. We were right.

### **Conclusion**

Ronald Cooper was convicted of intoxication manslaughter for each of the four deaths in this case and was also found guilty of two counts of aggravated assault. The defense elected to have the judge assess punishment, and Cooper was sentenced to 20 years in prison on each count (the maximum). The judge stacked the sentences for a total of 80 years.

This case highlights the dangers with drug impaired drivers, especially those who take legally prescribed medication and drive, thinking they are all good. Like it or not, prosecutors can-

not approach one of these cases like we would an alcohol intoxication case or even an illegal drug intoxication case. They are different, and juries will see them as different until we spend time educating them through voir dire, researching the defendant's medical history and reasons for taking the drugs, shoring up State's experts, and addressing anticipated defenses head-on and up-front. But all of that work is worth it. The Sedlmeiers' deaths were not the result of an accident. Ronald Cooper drove while intoxicated, and his intoxication killed them. Justice requires that we take up these challenges for the victims, and it is well worth the fight in any prescription drug intoxication man-slaughter case. i

### **Endnotes**

<sup>1</sup> The discovery of these pills led to an entirely separate criminal investigation into the doctor who prescribed them. By happenstance, a police officer on scene recognized the doctor's name on the pill bottles and knew that the Drug Enforcement Administration (DEA) had been investigating him for operating a "pill mill" in our county. I reached out to the DEA and discovered that authorities there had been waiting for two years for the U.S. Attorney's Office to move forward on the case. Our office decided that the safety of the public required immediate action, so the next day (two days after this crash), we ran a search warrant on the doctor's office and shut it down. The doctor and others were subsequently charged with various counts of insurance fraud and prescription fraud. Those cases are still pending.

<sup>2</sup> [www.houstonchronicle.com/neighborhood/woodlands/news/article/Wife-of-retiree-charged-in-deadly-crash-says-he-6520435.php](http://www.houstonchronicle.com/neighborhood/woodlands/news/article/Wife-of-retiree-charged-in-deadly-crash-says-he-6520435.php) and [www.desertsun.com/story/news/2015/09/20/four-dead-in-major-accident-on-highway-105-in-conroe/72523854/](http://www.desertsun.com/story/news/2015/09/20/four-dead-in-major-accident-on-highway-105-in-conroe/72523854/).

<sup>3</sup> We sent Cooper's blood samples to the Southwestern Institute of Forensic Sciences (SWIFS) in Dallas for testing. Our office often uses SWIFS to test blood on fatality crashes where substances other than alcohol are suspected because the turnaround time is much faster than the DPS lab.

<sup>4</sup> Although we were able to hire an independent forensic toxicologist for this case, the forensic toxicologist who performed the analysis would have been otherwise capable of assisting in pretrial planning and in testifying in the trial.