The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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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

Prosecutors can appeal too

Whenever I win a trial, I take it as a given there will be an appeal.

By Alex Hunn
Assistant District Attorney in Brown County

Writing response briefs to these appeals makes up the overwhelming majority of appellate work prosecutors do. Even so, every prosecutor should know the situations in which the State is entitled to file an appeal of its own. I had one after a suppression hearing last year, and I managed to have the suppression reversed by filing a State's appeal.[1] That case, styled *State of Texas v. Brandon Nicholas Martinez*, showcases how to pursue such an appeal and the potential upside of taking the time to do so.

The case

The case itself is a common one: Brandon Martinez was detained by Brownwood Police Officer Rodriguez for failure to signal a turn within 100 feet. The two talked for about seven minutes before Officer Rodriguez called for a drug dog, and then the officer made all the ordinary traffic-stop inquiries. All the while, Martinez talked about his prior encounters with law enforcement. The dog arrived 38 minutes later and alerted to narcotics, and a search discovered THC wax in the vehicle.

Martinez is a frequent flyer in our office, and we indicted him for state-jail possession of THC. His defense attorney filed a suppression motion, and we had an ordinary suppression hearing in which he argued that the stop was unduly prolonged without reasonable suspicion or probable cause. Officer Rodriguez's testimony made up most of the evidence. Ultimately the trial court sided with the defendant and suppressed all the physical evidence in the vehicle, which was a deathblow to the case.

Lucky for me, a suppression issue is one of several orders the Code of Criminal Procedure specifically designates as appealable by the State.[2] When the trial court issues one of those orders, prosecutors need to move quickly. While a defendant can wait to appeal until after the final verdict, the State must file notice of appeal within 20 days of the appealable order or waive the issue.[3] I did just that, and the case was set for briefing in the 11th Court of Appeals.

Making a good record

Before diving into the appeal, it's important to discuss what the State can do during the hearing to make it easier on the appellate attorneys. If you're in a small office like mine, you may well be your own appellate attorney!

Continued on page 13

Mike Hinton Memorial Scholarship Fund

At its September meeting, the Foundation Board of Trustees developed the process for distributing funds for the Mike Hinton Memorial Scholarship.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

The fund is in memory of legendary Harris County prosecutor **Mike "Machine Gun" Hinton** (he was known for talking fast) and will offer scholarships for the 2022 Annual Criminal and Civil Law Conference to be held in Corpus Christi. The purpose of the scholarships is to assist those who cannot otherwise attend without this support.

In January, you will have access to the application form, which must be completed and returned at the end of April. Decisions on the applications will be made by the end of May so that those who are awarded the scholarship can make their plans to attend the Annual Conference. We are all very grateful to those who contributed to this effort, and we are looking forward to even more attendees at the Annual as a result of their generosity.

Ken Magidson

I am pleased to announce that **Ken Magidson** has been selected to serve as the next President of the Texas District and County Attorneys Foundation. Ken, a former DA in Harris County and U.S. Attorney for the Southern District of Texas, has been a great supporter of the profession of prosecution and TDCAA for decades. Many will recall that during his tenure as Harris County DA, he helped the Foundation secure long-term funding for our Advanced Trial Advocacy Course. Ken had the vision to invest in prosecutor trial skills so we could live up to the Foundation mantra, "So the State is Always Ready." We're thrilled to have him on board for 2022! ❇

Recent gifts to the Foundation*

Richard Alpert
Skip Cornelius
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Tony Fidelie
David Finney
Gretchen Flader
Lilli Hensley
John Hubert
Bruce Isaacks
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Karen Morris *in honor of Tom & Evalyn Morris*
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* gifts received between August 7 and October 1, 2021

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Table of Contents

The 2021 Annual Conference in review

We did it! After a stormy year, the sun shone on our Annual Criminal and Civil Law Conference.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Nearly 900 attendees and speakers enjoyed three days of top-notch live training in Galveston. I also believe that people liked reconnecting with others in the profession, and the happiness on folks' faces showed. I want to thank our training team of **Brian Klas, LaToya Scott**, and **Andie Peters** for putting together this robust training and the receptions—the ice sculpture with the TDCAA logo at the Thursday night dinner was a great touch! I also want to thank a few Training Committee members for helping us with registration and for running the various tracks on Thursday. We could not have done it without **Tanisha Manning**, ADA in Harris County, **Zack Wavrusa**, ACDA in Rusk County, and **Xochitl Vandiver-Gaskin** and **Clay Hearrell**, ACDAs in Galveston County. Thanks for pitching in!

Legendary Annual Conference shirts

It is fun to see how many members take the TDCAA Annual Conference T-shirt so seriously. We have many folks with quite a collection. But the unicorn of TDCAA Annual shirts has to be the one we sold 20 years ago in 2001. At that time we had a tradition that the TDCAA President got to design the shirt. In a real break from tradition, then-President **David Weeks** (former CDA in Walker County) went Hawaiian. I can't say that design was a huge success, and we ended up donating quite a few shirts to the Austin Goodwill upon our return. (For years after that Annual, we would see that shirt on various homeless people around town.) It even spelled the beginning of the end of our practice of the President designing the Annual shirts.

But it was a favorite of a select few folks, and for the past 20 years, we'd see those Hawaiian shirts here and there at our Annual Conferences. I am happy to report that at this Annual, the 20th anniversary of David Weeks's Hawaiian shirt debut, three attendees broke out the underappreciated classic: (left to right) David himself; **Bob Scheske**, former County Attorney in Gonzales County, and **Randall Sims**, DA in Armstrong and Potter Counties.

Bar proposal to amend TDRPC 3.09

On October 6, the State Bar Committee on Disciplinary Rules and Referenda considered a proposal by St. Mary's School of Law Professor **Vincent Johnson** to amend Rule 3.09 to include a number of additional duties related to conviction review proposed by the American Bar Association's Model Rule 3.8. You can read that model rule at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.

The proposal is to add Subsection (g) of the model rule, which would create an ethical duty for a prosecutor, when learning of credible and material evidence casting doubt on a conviction, to disclose it to the defendant, investigate it, and take appropriate action to "remedy the conviction." To date, this model rule has rarely been adopted in other states, and states that have addressed it have narrowed it quite a bit.

The committee voted to begin the process of proposing this rule change, so if you want to offer input, time may be short. If you have questions or concerns, call me at 512/474-2436.

The future of TDCAA's online training

I have been proud of the work that the TDCAA staff has done to create quality online training during the pandemic. Now that we are plenty busy returning to our regularly scheduled live training, what will become of our online courses?

Great news! Our grantor agency, the Court of Criminal Appeals, has approved our request for additional personnel so that we can continue to offer online as well as live training. In the very near future, you will see online courses on Child Protective Services work, criminal prosecutions of defendants with mental health issues, and trial advocacy. We are very excited about using online training to enhance and enrich the live training you rely on.

Mandatory *Brady* training, 2022 edition

Speaking of online training: In 2022, prosecutors who took the mandatory *Brady* training TDCAA offered several years ago will be due for a refresher course. We again intend to produce a *Brady* course and offer it online for free, and we will be developing it in the coming months. Stay tuned.

Federal student loan forgiveness

We have tried to keep you informed about the student loan forgiveness program that in theory applies to prosecutors and other people in public service. I say "in theory" because we have heard that the government has made it very difficult to obtain the forgiveness once someone qualifies.

That might be changing. If you have tried to navigate that program, it appears that the new administration is attempting to get it back on track. Read about it at www.wsj.com/articles/student-debt-relief-to-include-more-public-sector-workers-11633514400, and keep us informed if you have success.

Correction

In the September–October issue of this journal, our As The Judges Saw It column included an error concerning *Ex parte Gomez*. It incorrectly stated that *Gomez* should be helpful when a magistrate, including a justice of the peace in a smaller county, has set a bail the trial judge believes is too low.

Jerry Phillips, an ADA in the 112th Judicial District Attorney's Office, recognized that the application of *Ex parte Gomez* to felonies filed in justice courts is not as straightforward as with cases where appointed magistrates have set bail. Under *Ex parte Clear*,[1] a district judge could not use *Gomez* to increase the bail of a defendant who was originally charged by complaint in a justice court unless an indictment had been issued. If a prosecutor is unhappy with the bail assessed by a JP in a felony case, his or her options are to:

1) ask the JP to increase bail;
2) get an indictment, which would vest the district court with jurisdiction to adjust bail under Art. 17.09; or
3) file an affidavit in the district court seeking increased bail under Code of Criminal Procedure Art. 16.16.

We wanted to clear that up—and to thank Jerry for a great catch!

Annual Business Meeting

Our association will hold its annual business meeting in conjunction with the Elected Prosecutor Conference on Wednesday, December 1, at 5:00 p.m. at the Hilton Dallas Rockwall Lakefront Hotel. At this meeting, the membership will consider a leadership slate of candidates for President, President-Elect, Secretary–Treasurer, District Attorney at Large, and Assistant Prosecutor at Large. In addition, we will hold regional meetings for the purpose of elected directors for Regions 3, 5, 6, and 8. If you have any questions about the meeting or the elections, please call me at 512/474-2436. ❇

Endnote

[1] 573 S.W.2d 224 (Tex. Crim. App. 1978).

I have been proud of the work that the TDCAA staff has done to create quality online training during the pandemic. Now that we are plenty busy returning to our regularly scheduled live training, what will become of our online courses?

Rodriguez v. State, confession and avoidance equivocation, and Han Solo

In the 1977 film *Star Wars*, the character of Greedo is holding a blaster and "has the drop" on the hero (or perhaps antihero) Han Solo in a futuristic Old West cantina.

By Britt Houston Lindsey
Chief Appellate Prosecutor in the Criminal District Attorney's Office in Taylor County

Greedo is preparing to take him to the galactic gangster Jabba the Hut, but Han shoots him first, which causes such a commotion that the band very briefly stops playing. In later versions of the film, director George Lucas alters the scene to show Greedo firing at Han first (and missing) in an effort to give Han greater justification for acting in self-defense. Fans of the original movie were outraged at what they saw as the storyteller's equivocation with the story.

Thanks to *Rodriguez v. State*,[1] handed down September 15, we now know that, at least in Texas, a certain amount of equivocation in a claim of self-defense is legally acceptable.

Background

The underlying case involved a charge of murder for the shooting and killing of Richard Sells in the Cowboys Stadium parking lot after a football game. The defendant, Marvin Rodriguez, was tailgating with his two brothers and several other men, including the victim, Sells. A fight broke out between one of the brothers and two other men, and it escalated into a chaotic brawl, during which Rodriguez shot and killed Sells.

The State put on several witnesses, including Sells's fiancé and two other tailgaters, who testified that Sells had been trying to break up the fight, that Rodriguez was not struck or injured, and that they did not see Sells strike anyone. The defense presented testimony from Rodriguez's brother that he was sucker-punched and knocked unconscious, and when he came to, he was being viciously strangled, punched, and kicked by multiple assailants, one of whom was on his back. He testified that he called for his brothers and that he heard a gunshot, after which the attack on him subsided and the weight on his back lifted.

Rodriguez testified too, saying that he saw his brother being attacked; Rodriguez attempted to intervene with his fists but was knocked down twice. He retrieved a gun from his brother's vehicle out of fear that his brother would be severely injured and because he was unable to defend him unarmed. He denied the intent to kill anyone, saying that he got the gun to scare away attackers. He testified that when he returned to the scrum, Sells was kneeling on his brother's back and punching him. When he put Sells in a headlock and placed the gun at his neck, Sells jerked away and someone yanked on his arm, at which point the gun fired, mortally wounding Sells. Rodriguez testified that he never intended to fire the gun and that he was "shocked" when it went off. He agreed on cross-examination that the only way that the gun could have gone off is if his finger had been on the trigger, but he testified on redirect that his "instinctual reaction would be to pull back" and that he instinctively "gripped" the gun "tightly."

At the charge conference, Rodriguez requested jury instructions on the defenses of necessity, self-defense, and defense of a third person. The trial court denied all requested instructions, and Rodriguez was found guilty of murder and sentenced to 20 years in prison.

The court of appeals

Rodriguez appealed to the Fort Worth Court of Appeals alleging nine points of error, chief among them the denial of his requested jury instruc-

tions. The main barrier to his argument was that those instructions are "confession and avoidance" defenses, and prior caselaw required a defendant to admit (the "confession") to each element of the offense (including the requisite mental state), which then allows him to assert the justification to excuse the otherwise criminal conduct (the "avoidance").[2] The Fort Worth Court noted at the outset that Rodriguez did not admit the culpable mental state for murder and had at trial repeatedly insisted that the shooting was unintentional and an accident.

However, Rodriguez asserted that a line of older cases stemming from *Martinez v. State*[3] had held that a defendant may be entitled to a self-defense instruction even when he contends that a shooting is unintentional, so long as he admits to the underlying actions that constitute the commission of the offense. In *Martinez*, the defendant testified that the gun went off several times after his mother-in-law grabbed his arm, and that he could not remove his finger from the trigger because her finger was "right on top" of his own. The trial court denied a self-defense instruction (and the court of appeals affirmed) because the defendant did not admit to the offense: Instead, he denied an intent to kill the victim and claimed that his mother-in-law "caused" the victim's death. The Court of Criminal Appeals reversed, finding the defendant had sufficiently admitted to the commission of the offense: He admitted to pulling out the gun, firing it into the air, and having his finger on the trigger when the fatal shot was fired. Significantly, the Court held that while the defendant "specifically denied intending to kill [the victim], this alone does not preclude an instruction on self-defense."[4]

The Fort Worth Court wasn't convinced, in part because it questioned whether *Martinez* was still good law. Even assuming it was, the court distinguished its facts from those in Rodriguez's case, finding that "unlike [in] *Martinez*, [the] appellant refused to take ownership of the lethal act." According to the court, Rodriguez differed from Mr. Martinez in that he never admitted "firing" the gun or "having his finger on the trigger when the fatal shot was fired"; rather, he carefully avoided that admission, stating instead that when his arm was pulled on, "the pistol just—it went off," leaving him in shock and confusion because he "didn't understand why the pistol went off." Because of what the court called a "conspicuous gap" in Rodriguez's admission concerning what actually caused the gunshot, he failed to substantially admit the charged offense and was not entitled to any of his requested defensive instructions.

As the CCA saw it

But that's not As the Judges Saw It on the Court of Criminal Appeals. Rodriguez petitioned the high court on the issue of the denied defensive instructions, and the Court granted his petition. The Tarrant County Criminal District Attorney's Office filed a responsive brief on the merits, arguing that the facts of the case more closely resembled those of *Ex parte Nailor*.[5] The State Prosecuting Attorney also filed a brief as amicus curiae arguing that *Martinez* should be disavowed and that Rodriguez's testimony describing an accidental killing entitled him to nothing more than a lesser-included manslaughter instruction.

The Court of Criminal Appeals found that the failure to give the instructions was error. Judge Keel wrote for the Court, joined by Presiding Judge Keller and Judges Hervey, Richardson, Newell, Slaughter, and McClure (Judges Yeary and Walker concurred without written opinion). Judge Keel's opinion settled the question straight out of the gate that *Martinez* still stands as good law and also held that Rodriguez's equivocation about the commission of the charged conduct satisfied the doctrine of confession and avoidance.

Judge Keel's opinion noted the traditional "confession and avoidance" formulation is that the defendant must "admit to all elements of the offense," but the opinion also noted that formulation has been "rephrased and even seemingly undermined."[6] Judge Keel noted that other cases had treated *Martinez* as an anomaly, and that one in particular, *Juarez v. State*,[7] went so far as to call it an instance when the Court had ignored the general rules of confession and avoidance to allow a defendant to claim it when he had asserted accident at trial. Judge Keel reconciled those two opinions by noting the holding they have in common: that the defendant's denial of a culpable mental state or assertion of an accident doesn't automatically foreclose a justification defense, so long as the culpable mental state may be implied by his testimony. She reasons that if the rule were otherwise, refusing the defensive instruction would violate the trial court's duty to

The Court of Criminal Appeals found that the failure to give the instructions was error. Judge Keel's opinion settled the question straight out of the gate that Martinez *still stands as good law and also held that Rodriguez's equivocation about the commission of the charged conduct satisfied the doctrine of confession and avoidance.*

view the evidence in the light most favorable to the requested instruction—the court would have to accept as true the defendant's express denial of intent and ignore his admissions of having injured or killed the victim in response to the victim's aggression. When the evidence conflicts, the instruction should be given, even if the source of that conflict is the defendant's own equivocation.

And equivocate the defendant did. The District Attorney's Office argued that Rodriguez negated the act by testifying that the shooting was involuntary and negated the culpable mental state by testifying that he did not intend to shoot Sells.[8] However, Judge Keel noted, the evidence on those points conflicted; even Rodriguez's own testimony conflicted. Judge Keel observed an accidental or unintentional movement may be voluntary, and a rational jury could have reasoned the shooting was voluntary from Rodriguez's concession that his finger must have been on the trigger, and his testimony that he gripped the gun tightly "as an instinctual reaction" to being grabbed, supported an inference that he fired the gun voluntarily. His intent to kill may be inferred from the same testimony that would support a finding of intent in a legal sufficiency argument: He admitted that he pointed a gun and shot it at someone at close range,[9] and he admitted to the use of a deadly weapon.[10] As Judge Keel put it, "If such testimony will support a conviction, then it also satisfies the confession-and-avoidance requirement."

Judge Keel observed that an accidental or unintentional movement may be voluntary, and a rational jury could have reasoned the shooting was voluntary from Rodriguez's concession that his finger must have been on the trigger, and his testimony that he gripped the gun tightly "as an instinctual reaction" to being grabbed, supported an inference that he fired the gun voluntarily.

The Court also found the *Ex parte Nailor* case cited by the DA inapposite. In *Nailor*, a defendant who denied assaulting a victim was not entitled to a self-defense instruction because he failed to satisfy confession and avoidance, but the defendant in that case testified that the victim essentially injured herself when he raised his hands to passively defend himself from a brass eagle she had raised over her head; he accidentally knocked it from her hands, causing it to fall on her face.

Because the Court found the failure to give the instructions was error, it reversed and remanded *Rodriguez* to the court of appeals for a harm analysis under *Almanza v. State*.[11]

One other note

There's reason to believe this harm analysis could be changing. On September 29, 2021, the Court of Criminal Appeals released its opinion in *Phi Van Do v. State*.[12] A bombshell was tucked away in Judge Newell's concurrence, which was joined by Judges Hervey, Richardson, and McClure. In discussing how treating a .15 alcohol concentration provision as a DWI enhancement would result in future defendants' punishment elections waiving a claim under *Apprendi v. New Jersey*,[13] Judge Newell said that another case was "poorly reasoned and unworkable" and was the root cause of many problems in evaluating jury charge error on appeal: *Almanza v. State*. A four-judge concurrence is pretty close to a majority on this topic, so if you're reading this article and you're familiar with *Almanza* harm analysis at all, do yourself a favor and go read Judge Newell's concurrence in *Do* right now.

The takeaway

Back to *Rodriguez*: What does it mean to me, the hard-working, front-line prosecutor? I'm so glad you asked. If you're like me, you've been confused by some of the seemingly contradictory opinions regarding when a defendant has or hasn't satisfied the "confession and avoidance" requirement when claiming self-defense; Judge Keel's opinion here does all parties a favor and clarifies the broader questions to at least some degree. How *Rodriguez* applies to the case currently in front of you may be clear as mud, but it might help to think of the "confession and avoidance" doctrine as a very low bar. Unless a defendant's disclaimer of assault very closely tracks the facts in *Nailor*, it's best not to fight a claim of confession and avoidance in a close case.

A good rule of thumb is to remember that self-defense, defense of a third person, and necessity defenses are not treated as legal sufficiency questions but are rather viewed in the light most favorable to the defendant. An instruction will be warranted when some evidence from any source supports the claim, whether strong or weak, unimpeached or contradicted, and without regard to credibility.[14] *Rodriguez* makes clear that remains the rule even when a defendant himself equivocates in his testimony. The bottom line is when a defendant is talking out of both sides of his mouth and trying to have it both ways on self-defense, don't argue his equivocation to the judge at the charge conference—argue it to the jury in closing argument. ❇

Legislative award winner

State Representative Ann Johnson (D-Houston) was recognized at the 2021 Annual Conference with TDCAA's Freshman Legislator of the Year Award in recognition of her outstanding work during the 87th Regular Session. In addition to putting her experience as a former prosecutor to good use on the House Criminal Jurisprudence Committee, Rep. Johnson passed several criminal justice-related bills, including a measure authorizing the stacking of punishments for certain serious felony crimes. Presenting the award to Rep. Johnson (right) was TDCAA's Director of Governmental Relations, Shannon Edmonds (left).

Endnotes

[1] No. PD-1130-19, 2021 Tex. Crim. App. LEXIS 786, 2021 WL 4186684, _S.W.3d_ (Tex. Crim. App. Sep. 15, 2021).

[2] See e.g. *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

[3] 775 S.W.2d 645 (Tex. Crim. App. 1989).

[4] *Id*. at 647.

[5] 149 S.W.3d 125 (Tex. Crim. App. 2004)

[6] *Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017) ("admitting to the conduct does not necessarily mean admitting to every element of the offense").

[7] 308 S.W.3d 398, 401-02 (Tex. Crim. App. 2010).

[8] As Judge Keel points out, these are separate questions. See *Rogers v. State*, 105 S.W.3d 630, 638-39 (Tex. Crim. App. 2003) (comparing "voluntary" under Tex. Penal Code §6.01 versus "nonvolitional"); *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (holding that voluntariness is an issue separate from mental state).

[9] *Ex parte Thompson*, 179 S.W.3d 549, 556 n.18 (Tex. Crim. App. 2005) ("pointing a loaded gun at someone and shooting it toward that person at close range demonstrates an intent to kill").

[10] *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996) ("the jury may infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon").

[11] 686 S.W.2d 157 (Tex. Crim. App. 1985).

[12] No. PD-0556-20, _S.W.3d_ (Tex. Crim. App. Sep. 29, 2021).

[13] 530 U.S. 466, 120 S. Ct. 2348 (2000).

[14] *Gamino*, 537 S.W.3d at 510 (citing *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016)).

Award winners from our Annual Criminal & Civil Law Conference

At this year's Annual, our membership honored a number of people who have contributed greatly to the profession.

TOP PHOTO **State Bar Criminal Justice Section Prosecutor of the Year:** Kenda Culpepper, CDA in Rockwall. Kenda led our association through a rough year when COVID-19 shut down trials and courthouses. Her hallmark was the creation of regional elected meetings throughout the pandemic, which turned out to be invaluable as we all worked through issues at the courthouse. Kenda threw herself into the thankless task of standing up for prosecutors in all sorts of "stakeholder" meetings about how we navigate these uncharted waters, and her cool head and steady hand served you well. She is pictured (on the right) with Jack Roady, CDA in Galveston County and President-Elect of the TDCAA Board.

MIDDLE AND BOTTOM PHOTOS **Lone Star Prosecutor Award**: Mike Laird, ACDA in Jefferson County, and Retha Cable, ADA in Kleberg and Kenedy Counties (both pictured on the left with Julie Renken, DA in Washington County and DA Representative on the TDCAA Board, on the right). This award is dedicated to honoring people in our profession who contribute mightily to justice in their communities, but who may not always get the recognition they richly deserve. Mike and Retha are two prosecutors who have stood out in their courthouses with their energy and dedication to justice. Their nominations for this award was met with a loud "Oh yeah!" from their communities, and we couldn't be prouder!

TOP PHOTO **Oscar Sherrell Award:** Jerry Varney, ACDA in Dallas County. TDCAA presents the Oscar Sherrell Award each year to a member who provides exceptional service to the association and its members. Jerry has chaired TDCAA's Diversity, Recruitment, & Retention (DRR) Committee since 2019 and was an outstanding speaker at multiple trainings in 2020–21. Under Jerry's leadership, the DRR Committee hosted multiple Zoom events for members to discuss diversity and inclusion among prosecutor staffs and produced a video encouraging high school, college, and law students to consider prosecution as a career. He is pictured on the right with Diane Beckham, TDCAA Senior Staff Counsel.

MIDDLE PHOTO **Gerald Summerford Civil Practitioner of the Year:** Russ Roden, ACDA in Dallas County (pictured [left] with John Dodson [right], County Attorney in Uvalde County and TDCAA President). Russ has been a huge contributor to the civil practitioners in our association. He has served on the Civil Committee and is currently its chair. He is a frequent presenter on a number of topics and has distinguished himself in our recurring trainings for newly elected prosecutors in the gnarly topic of dealing with commissioner's courts.

BOTTOM PHOTO **C. Chris Marshall Award:** Sunni Mitchell, ADA in Fort Bend County (pictured [right] with Brian Klas [left], TDCAA Training Director). Sunni has been one of our top-rated speakers for many years and is an enthusiastic contributor to our ongoing training efforts. She has also been strong contributor to and longtime member of our Diversity, Recruitment, & Retention Committee.

Congratulations to all of these winners! ❇

A roundup of notable quotables

"I love being a rural prosecutor specifically because people have access to me and I have access to them. These are the people my kids are playing sports with, it's their parents. It's people I'm gonna see at the grocery store. So for me, I think it's really important that a prosecutor or any kind of leader be connected to the people that they represent."

—Staley Heatly, 46th Judicial District Attorney, in a documentary on family violence, *Beyond Conviction*. https://video.kera.org/video/beyond-conviction-e9j5bg/

Have a quote to share? Send it to the editor at Sarah.Halverson@tdcaa.com. Everyone who contributes a quote will receive a TDCAA ball cap.

"It was about three sessions in and we were talking about property being destroyed and showing dominance that way, and once I realized that was me, it changed my way of thinking. Maybe I am an abuser. … Maybe I don't want to be that angry guy anymore."

—Anthony Loya, Vernon resident and participant in a Batterers Intervention and Prevention Program (BIPP), in a documentary on family violence, *Beyond Conviction*. https://video.kera.org/video/beyond-conviction-e9j5bg/

"We can tell, 'Hey, they're at Dollywood.' We'll hear people say 'hold on' and 'here we go.' We've actually heard, 'Keep your hands and feet inside the ride at all times.'"

—Todd Spence, 911 dispatch director in Sevier County, Tennessee, in an article about smartphones and smartwatches accidentally calling emergency services while their owners are on rides at local amusement parks. Spence blames "emergency SOS" functions on iPhones and Apple Watches, which call 911 when the side power button is pressed rapidly five times, and the Life360 app, which can mistake the speed and volatility of the rides as vehicle crashes and then alerts 911. https://www.kvue.com/article/news/investigations/roller-coasters-are-causing-smart-devices-to-accidentally-call-sevier-county-911/51-3d6a1fb0-9876-407b-8afd-04da51e91ce7

"Dear young prosecutors, Re-direct of a witness is not mandatory. Sincerely, Everyone else in the courtroom."

—Murray Newman, Houston defense attorney and former prosecutor, on Twitter (@murraynewman)

"It is a really confusing mess, and everybody is scratching their head really, of which of these are legal and which of them are not legal. Delta 8 THC derived from hemp is kind of this gray area. It may be legal, but Delta 8 derived from marijuana would be still illegal. I can't tell you the difference, nor can anyone else."

—Peter Stout, president and CEO of Houston Forensic Science Center, in a Houston Chronicle article on Delta 8 marijuana. https://www.chron.com/news/houston-texas/article/delta-8-legal-texas-marijuana-hemp-laws-16542705.php

Prosecutors can appeal too (cont'd from front cover)

At the hearing, the trial judge is likely to make a lot of assumptions about the circumstances of the case and focus on the issue he believes to be most salient. If you lost a good stop like I did, that means the trial court focused on the wrong facts and the wrong issues to ultimately reach the wrong decision, basing it on the framework the defense attorney laid out.

It can be useful at the hearing, and it is especially helpful on appeal, to broaden the scope of the evidence. Wherever evidence is lacking, the appeals court will backfill those gaps by making extremely generous inferences in favor of the trial court's ultimate ruling, including the inference that the trial court disbelieved the officer's testimony.[4] Appellate courts will never reverse a trial court for failing to consider evidence that was not presented.

What evidence is particularly salient? Objective evidence that establishes relevant facts is invaluable because it narrows the issue and supports the testimony of the officer, whom the trial court is entitled to disbelieve. In *Martinez*, I presented evidence of body camera recordings, dash camera recordings, and the call sheet detailing the exact time the stop began, the time the drug dog was called, and the time that dog arrived. These records made many important facts indisputable, such as how long the initial investigation took, how long the canine unit took to arrive, and everything the defendant and Officer Rodriguez said.

By presenting overwhelming evidence of what was said, what was done, and when, prosecutors can narrow the issue to a matter of law rather than a factual dispute. While the trial court can rely on deference to findings of fact, conclusions of law are reviewed *de novo*,[5] and *de novo* review means the State gets to run the whole thing back from the beginning.

Findings of fact and conclusions of law

The first thing prosecutors should do after filing timely notice of appeal is to ask the judge for findings of fact and conclusions of law, which we are entitled to receive.[6] Absent these, the reviewing court will presume the findings and conclusions most consistent with the ultimate decision, giving the trial court the benefit of the doubt that it applied the correct legal analysis. Asking for written findings of fact and conclusions of law will commit the trial court to its actual reasoning and provide the State with a roadmap of how to attack its decision.

The trial court is entitled to write its own findings from scratch, but as with any order, it will likely ask for proposed findings from the victorious party and adopt those with few edits. In *Martinez*, that is exactly what happened: The trial court instructed the defense attorney to submit a proposed order and adopted it with no changes. The final order contained some exceptional holdings, such as:

> "The time proximity between the end of the traffic investigation and the arrival of the canine was a *per se* unreasonable and illegal detention under the Fourth Amendment to the United States Constitution." (emphasis mine)

> "There were no separate articulable facts supporting reasonable suspicion or probable cause of any other crime apart from the traffic infraction to allow the detention to continue after the conclusion of the traffic investigation."

The former references a *per se* standard that has been squarely rejected,[7] and the latter presented me with the easy objective of finding a single articulable fact supporting reasonable suspicion.

I'll further note that two conclusions of law, including the second conclusion quoted above, were listed as findings of fact. It pays to read critically and point out these incorrect categorizations—the 11th Court agreed with my suggestion and sorted them over to conclusions of law, subjecting them to *de novo* review.[8]

The findings of fact and conclusions of law in *Martinez* weren't unusual. When prompted to write the story of their victory, defense attorneys may be inclined to write their win into big, unequivocal conclusions of law. The findings of fact are likely to be perfunctory and leave plenty of wiggle room for the State to write up an argument. What's highly unlikely is that they will be drafted to mirror the caselaw perfectly and award the defendant a narrow victory on a perfectly curated set of facts. Read them closely.

Writing the brief

Once the State has filed notice and identified issues on appeal, the next step is to write the brief. Unlike the usual response briefs we file to defend convictions, a brief on a State's appeal is a direct attack on the trial court's ruling. Resist the temptation to reproduce all the arguments from the initial hearing; instead, zero in on the specific conclusions of law the trial court got wrong and hammer them directly. If the trial court erred on multiple conclusions, as it did in *Martinez*, address each individual issue that could independently support a reversal so the reviewing court has several options for how to award the State a victory.

When I say "directly," I mean it. In my first point of error, the subheading quoted the trial court's findings of fact verbatim: *"The trial court erred in holding that 'there were no separate articulable facts supporting reasonable suspicion or probable cause of any other crime apart from the traffic infraction.'"* Framing the issue as such sets the bar at identifying any single articulable fact in the record which *does* support reasonable suspicion.

If the trial court erred on multiple conclusions, as it did in Martinez, *address each individual issue that could independently support a reversal so the reviewing court has several options for how to award the State a victory.*

Don't settle for just one, though. While it pays to be direct in identifying the error, it also pays to pile on as much evidence as we can to contradict the trial court's finding. In my case, I cited the following:

1) The officer was aware that Martinez had a history with narcotics.

2) Martinez had pulled up to a gas pump with his tank on the wrong side of the vehicle.

3) Martinez exited the vehicle immediately and closed the door behind him.

4) Martinez immediately changed the subject of the stop to discuss a prior arrest.

5) Martinez was not the registered owner of the vehicle he was driving and could not explain the discrepancy.

6) When asked to roll down his windows, Martinez refused, claiming that doing so would prompt the officer to call a drug dog.

For every point, be sure to cite to another court that *did* consider the evidence as supporting reasonable suspicion, and wherever possible provide precise timestamps in any video evidence admitted. And of course, remind the appellate court that while it defers to the trial court as to what the facts were, its determination as to whether those facts were enough to support reasonable suspicion (or probable cause) must be made *de novo*.[9]

My second point of error involved a glaring misstatement of the law, wherein the trial court held there was a *per se* standard for the permissible amount of time to wait on a drug-sniffing dog. The U.S. Supreme Court has "expressly rejected the suggestion that [it] adopt a hard-and-fast time limit for a permissible *Terry* stop."[10] When confronted with a conclusion of law so obviously opposed to the caselaw, be direct: Place binding caselaw front and center. While paraphrasing frequently makes for better writing, in this particular circumstance, a direct quote like the one above says it better than anything else a prosecutor could write.

When delay has been raised as the basis for suppression, after identifying the relevant law, the next step should be to dig for similar cases applying the standard. In *Martinez*, the canine unit took 38 minutes to arrive. To show that this delay was reasonable, I cited a plethora of other appellate court holdings endorsing similar lengths of time, ranging from 40 to 90 minutes. This is one of the rare occasions where a string-cite can be highly persuasive—remind the appellate court that its sister courts have sided with the State's position time and time again.

The appellate court's decision

A year after filing my brief, I was surprised this September with an opinion from the 11th Court containing the words "reverse and remand"—frightening words for any prosecutor. This time, however, those words meant a win for the State and a lot of cheers and high-fives in my office.

In a rare published opinion, the 11th Court in *Martinez* provides a helpful application of current traffic-stop law. In its holding, the Court reiterated that determinations about whether a particular set of facts comprise reasonable suspicion are reviewed *de novo*.[11] Not directly stated is another useful detail: Those facts which were explicitly supported by uncontroverted testimony or video, and not resolved to the contrary in the findings of fact, were weighed by the appellate court in making the reasonable suspicion determination.[12] This rationale from the Court further emphasizes that we as prosecutors have much to gain from admitting plentiful evidence at suppression hearings, even if we know the trial court is unlikely to take the time to review every video

from beginning to end. The timestamps we note for important video details in the brief will make it easier on the reviewing court; in *Martinez*, one of the timestamps I provided even made it into the opinion.

This specific opinion is only one more on a growing pile of affirmations that there is no specific time limit to wait on a canine unit. Unlike most of those cases that a Westlaw search will find, however, the 11th Court in this case was willing to create binding authority for the proposition that 38 minutes is, in fact, not necessarily too long a wait.

In addition to further discussing the generally accepted legal standard for calling in canine units for traffic stops, the 11th Court added another useful tidbit for rural prosecutors: The Court acknowledged that smaller and more rural law enforcement agencies face additional difficulty in using specialized resources, such as canine units.[13] Those resources may need to be shared between departments and travel between jurisdictions, causing reasonable delay. Beyond that direct justification, this acknowledgment suggests that in handling these suppression issues, it can be helpful to think outside the box to explain why law enforcement was delayed. I suspect our officers will frequently have good reasons, and those reasons will make for stronger arguments in suppression hearings to come.

Beyond the useful holdings, favorable rulings on State's appeals also remind trial courts that ruling against the State isn't an easy way out of making tough decisions—that siding with the defense on contentious issues won't necessarily prevent an appeal. That reminder may encourage a judge to double-check the law before sinking a case at the next suppression hearing.

Conclusion

As prosecutors, we rarely think about appealing bad orders. For something like a suppression order that can blow up an entire case, however, the State's appeal is a tool every prosecutor should be aware is in our arsenal. Next time you find yourself fuming at a trial judge for getting it all wrong on a suppression issue, I hope you'll remind the judge that the State can appeal too. ❇

Endnotes

[1] *State v. Martinez*, No. 11-20-00144-CR, 2021 WL 3919778 (Tex. App.–Eastland 2021, no pet. as of 9-16-2021).

[2] Tex. Code Crim. Proc. Art. 44.01.

[3] *Id*.

[4] See, e.g., *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

[5] *Lerma v. State*, 543 S.W.3d 184, 190 (Tex. Crim. App. 2018).

[6] The trial court is required to provide findings of fact and conclusions of law upon request. *State. v. Cullen*, 195 S.W.3d 696, 698 (Tex. Crim. App. 2006).

[7] *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

[8] *Martinez*, at *4.

[9] *Derichsweiler v. State*, 348 S.W.3d 906, 913 (Tex. Crim. App. 2011).

[10] *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

[11] *Martinez* at *4.

[12] *Martinez* at *5.

[13] *Martinez* at *9 (citing *Parker v. State*, 182 S.W.3d 923, 924 (Tex. Crim. App. 2006).

The Court acknowledged that smaller and more rural law enforcement agencies face additional difficulty in using specialized resources, such as canine units. Those resources may need to be shared between departments and travel between jurisdictions, causing reasonable delay.

Venue in juvenile law cases

Venue in adult criminal cases is straightforward: An alleged crime happened in Lubbock County, Texas, so venue is proper in Lubbock County, and the Lubbock County Criminal District Attorney's Office is the proper prosecuting authority.

By Hank Wilkins
Assistant Criminal District Attorney in Bexar County

Another jurisdiction, such as Bexar County and the Bexar County District Attorney's Office, would have no interest in the case, nor any argument for venue, barring exceptional circumstances.

Venue in juvenile criminal cases can also be straightforward, with proper venue occurring simply where the alleged crime occurred. However, due to the unique nature of juvenile jurisprudence, venue is not always as clear-cut as in adult cases. In certain situations, Bexar County *is* a proper venue for juvenile criminal cases that occurred in Lubbock County.

Exceptions

Texas Family Code §51.06 is the governing law for venue in juvenile cases. This statute restricts venue in juvenile proceedings to two possible locations:

1) the county in which the alleged conduct occurred or

2) under certain circumstances, the county in which the child resides at the time the petition is filed.[1]

The circumstances for trying a juvenile case in the youth's county of residence are:

1) the child was under probation supervision at the time the alleged delinquent conduct occurred;

2) it cannot be determined in which county the delinquent conduct occurred; or

3) the county in which the child resides agrees to accept the case for prosecution, in writing, prior to the case being sent to the county of residence for prosecution.[2]

There is a dearth of caselaw in this area, likely because venue is seldom challenged in juvenile law cases, but that doesn't mean a healthy discussion of such issues would not be a worthy endeavor, so we press onward.

The child was under probation supervision

If a child was already under probation supervision when he committed another offense, the case could be heard in the county where such supervision existed, in the name of judicial efficiency. As the late Robert Dawson pointed out in *Texas Juvenile Law*,[3] because the juvenile is already on supervision, the effect of the new charge is likely to trigger a Motion to Modify Supervision. It is more judicially expedient to bring the new charge in the county in which the juvenile is already under supervision rather than initiating new proceedings in the other county.

It's unclear where the offense occurred

If it cannot be determined in which county the delinquent conduct occurred, "such as an offense committed near a county line or against a very young child, the petition can be filed in the county of the respondent's residence."[4] Offenses against young children are commonplace in the juvenile justice system,[5] and often it is difficult for them to tell authorities where they were victimized due to their age and ongoing intellectual development. This provision allows the juvenile

offender's county of residence to prosecute the case in such situations.

When the county of residence agrees in writing

This provision allows juvenile cases to be filed in the county of the juvenile's residence *if* the county of residence agrees to accept the case for prosecution, in writing, ahead of time. As a practical matter and in the name of judicial efficiency, the acceptance of the case in writing could be served by the accepting county filing a Petition Alleging Delinquent Conduct.

To illustrate how this works in practice, we can revisit the Lubbock County versus Bexar County example. Say a high school band from Bexar County takes a trip to Lubbock County. While there, one juvenile student sexually assaults another. There is no outcry until the band returns home to Bexar County. In this situation, it may be more judicially efficient to prosecute the crime in the perpetrator's county of residence (Bexar) because all or most of the parties reside there, rather than the county where the crime occurred (Lubbock). The Bexar County Criminal District Attorney's Office could accept the case for prosecution in writing, and Bexar County would be a proper venue to prosecute the case, even though the crime occurred in Lubbock.

Conclusion

Proper venue in juvenile cases in Texas is limited to two places: the county in which the delinquent conduct occurred or the county of residence of the juvenile, but the latter is allowed only in three circumstances: when the juvenile is already under supervision in his county of residence; when the county where the delinquent conduct occurred cannot be determined; or when the county of residence accepts the case for prosecution.[6]

The goal of this quirk of the Texas Family Code is judicial efficiency. Practically, it prevents juveniles from travelling outside their county of residence to face criminal charges in limited circumstances. Criminal law practitioners would be well-served to be familiar with this provision of the Texas Family Code when practicing in Texas juvenile courts. ❇

Endnotes

[1] *In re D.J.M.*, 2013 WL 5936627 (2013 WL 5936627 at *3 (Tex. App.–Austin, Oct. 28, 2013).

[2] Tex. Family Code §51.06.

[3] Dawson, Robert O. *Texas Juvenile Law*, 9th Edition, at 155.

[4] Dawson at 155.

[5] www.ojp.gov/pdffiles1/ojjdp/201628.pdf.

[6] Tex. Family Code §51.06.

The goal of this quirk of the Texas Family Code is judicial efficiency.

Getting back to trials

I practice in Ector County, which is located in West Texas. If I had to describe the residents of West Texas, it would probably be to say that they are polar opposite of the residents of Austin.

By Scott Turner
Senior Trial Attorney, District Attorney's Office in Ector County

Specifically, they were among the last people to acknowledge COVID-19 was a real thing. They were among the last ones to start wearing masks or even socially distance. When Governor Greg Abbott mandated the shutdowns, they were also among the last ones to actually do it. Conversely, when Governor Abbott ended the shutdowns and stopped requiring masks, West Texans were among the first ones to re-open and end the limits on entry into businesses. There are several residents today who refuse to get vaccinated or even believe there is such a need because COVID-19 is no worse than the flu.

At least some of these beliefs are shared by those who make decisions regarding the criminal justice system in our area, which is why ours was one of the last jurisdictions to stop having jury trials at the beginning of the pandemic and one of the first to resume trials now that things have opened back up.

Ector County has four district courts that handle primarily criminal felony cases, one with a primarily family law docket, three county courts, and four justice of the peace courts. For the purposes of this article, I am going to focus on the district courts that handle criminal felony cases. Pursuant to Texas Supreme Court guidance, these courts began to have jury trials in May 2021 and are currently still doing so. Before trials began again, there were many concerns about what a trial should look like or even if trials could be conducted safely. There were discussions about whether jurors would show up when they were summoned and whether the courts could properly socially distance the jurors who did show. Would there be any Confrontation Clause issues if jurors or witnesses wore masks? Finally, what would we do with jurors during deliberations, and could our jury rooms accommodate social distancing?

A civil commitment trial

The first case we tried after the shutdown was the civil commitment of a sex offender—this was in October 2020, long before most offices went back to trying cases. We had to address how to socially distance a jury panel of 200-plus people, and our first attempt was to do jury selection at an outdoor location. The court reached an agreement with people at the Ector County Coliseum, and the qualification of the jury panel was conducted there. Before they even arrived at the venue, prospective jurors were sent a COVID-19 questionnaire that asked a series of questions to determine if they had COVID symptoms or had been exposed to anyone who was infected. When jurors arrived at the coliseum, they were masked, lined up, and socially distanced with a series of barricades. Their temperatures were taken, and people were asked again if they had experienced any COVID-related symptoms in the recent past.

After jurors entered the building, they were seated in chairs that were socially distanced. Because of the size of the room and the distance between all court participants, we used a microphone with each prospective juror during the qualification process. The court coordinator, also masked, walked from one juror to another and held the microphone up to their mouths so

they could respond to questions. After each witness was finished answering, the foam microphone cover was replaced. There were additional conditions on how many jurors could be in the bathroom at any given time or could congregate in the hall during breaks.

From that larger group, a jury panel was selected, and that panel was taken to the largest courtroom available for voir dire. During voir dire, the jurors were socially distanced and masked throughout the courtroom. When jurors were asked questions, they were allowed to pull the masks down so that the parties could hear their answers. The court also had plexiglass shields installed between the bar and the gallery, around the witness stand, and around the jury box. It should be noted that the defense did object to the proceedings taking place during the COVID-19 pandemic; I should also note that this was not a criminal proceeding, and there were some differences in the requirements to conduct civil versus criminal proceedings during that time.

In this case, sufficient jurors were qualified, and a panel was selected. The case was tried, and jurors deliberated in a much larger meeting room, rather than the small deliberation room, that would ordinarily hold more than 100 people. In the end, the defendant was civilly committed, and there were no complaints from jurors. While it seemed to work for this particular trial, I don't know if it would have been sustainable over a normal trial schedule. I also don't think that this process would have been feasible for a trial involving a lesser offense.

Changes since then

After the civil commitment trial concluded, the court attempted to conduct a criminal trial, as the defendant had been in custody for some time. However, the defendant tested positive for COVID the Friday before the trial was to commence.

It was then determined, after court officials spoke with doctors at the Department of Health & Human Services, that defendants in custody should be quarantined 10 days prior to a jury trial. After speaking with officials in the jail, though, we determined that the quarantine requirement was not economically feasible for the jail. Based upon this representation by the jail officials, the Court suspended all criminal jury trials until May 2021.

When trials began again in May 2021, we focused on the most serious cases with defendants in custody. We also had smaller dockets with fewer defendants in the courtrooms at any given time. The intent was to give those defendants in custody their day in court while considering the safety of the parties, jurors, and witnesses. We have had about 25 jury trials since May. This number is, of course, fewer than we would ordinarily have had, but it is certainly more than we did last year. This time, instead of conducting jury qualifications at the Coliseum, the court qualified jurors in the courthouse but did so in multiple shifts, which allowed for socially distancing them. Initially the plexiglass barriers remained, but they were later taken down because jurors told the judges that they had problems seeing evidence that was published through the glass.

Now, when jurors arrive, they are not allowed to wear their masks in voir dire, but the court does provide clear face shields to anyone who requests one. Finally, jurors are back to deliberating in their ordinary jury room. Surprisingly enough, the citizens who come for jury duty seem to be completely fine with these precautions. Fewer people arrive in masks and even fewer request a clear face shield. Finally, with regard to prospective juror participation, there have been a few trial weeks where a lack of prospective jurors was an issue, but it was not clear whether COVID was the reason, as opposed to general aversion to jury service. It is clear, at least in Ector County, jury trials will continue, as long as the citizens and court feel comfortable with the current set of safety protocols. ❇

The court then attempted to conduct a criminal trial, as the defendant had been in custody for some time. However, the defendant tested positive for COVID the Friday before the trial was to commence.

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