PRESIDENT’S MESSAGE

ASSOCIATION ACTIVITIES

Legal Notes

*Todd Jermstad*

Do Sex Offender Residency Restriction Laws Increase Public Safety

*Kelli D. Stevens-Martin*

Changing a Life… Regardless of the Program Title

*Jim Stott*

NEWS FROM THE FIELD
Happy New Year TPA! I hope that each of you enjoyed a merry Christmas and a safe New Year’s Eve. Furthermore, it is my wish that 2013 proves to be a blessed and prosperous year for all of my friends and colleagues, as well as for our noble profession. Now that the celebration is over, the kids have gone back to school, and the work week resumes to lasting five days, it is time to get back to work and continue proving that probation in Texas is the best sentencing option for most offenders.

By the time that you read this message, the 84th Texas Legislative Session will be underway. Undoubtedly state agencies will be vying for position in an effort to secure scarce operational funds. Probation is no different. However, I believe that we have a leg up on many other agencies. For several years now your hard work and commitment has served to prove that our profession can accomplish great things, and we can do so while continuously facing funding shortages. We are making our communities safer by focusing on evidenced based practices and a dedication to help those with whom we work succeed.

As we have grown accustomed to hearing, legislators will once again struggle to create a balanced budget with extremely lean resources. However, please be assured that the Texas Probation Association, through its leadership, legislative committees, and lobbying team, have been and will continue to work diligently to secure the future of probation. The adult legislative committee will continue to argue against an overreaching ignition interlock bill that would greatly increase our workload with no additional funding. The health insurance issue will also continue to be a focus for this committee. The juvenile legislative committee will fight to ensure that the Texas Juvenile Justice Department created in the last legislative session, will live up to its mandate to focus its efforts and resources to the front end of the juvenile justice system, or probation. The next few months will be very interesting to say the least. I encourage all members to be cognizant of the legislative alerts periodically sent out by our lobbying team, GovBiz Partners, led by Representative Ray Allen. These alerts will notify you of any necessary action, such as calling your legislators about a bill. It is critical that each of us take an active role in communicating with our state senators and representatives. The education that we provide them about the importance of our work to the corrections system will often times be the only education about the subject that they will receive.

Finally, please make plans to attend the TPA Annual Conference to be held at the Sheraton in Austin on March 24 – 27, 2013. The conference planning committee for this conference, led by Michael Hartman of the Caldwell, Comal, and Hays CSCD and Samara Henderson of the Williamson County Juvenile Probation Department, has done an outstanding job of putting together what will prove to be a very informative and educational agenda. As always, there will also be plenty of social activities for networking. Additionally, this is the first conference in which TPA is expanding into providing Motivational Interviewing (MI) training in cooperation with the Motivation Interviewing Network of Trainers. There are still a couple of slots left for this basic MI session. Interested participants must e-mail Kathleen Gilbert at the Correctional Management Institute of Texas to get put on the waiting list.

Again, Happy New Year, and I hope to see each and every one of you in Austin. Let’s make this the best TPA conference ever.

Toby Ross
TPA President
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**INSTRUCTIONS FOR CONTRIBUTORS**

*Texas Probation*, the journal of the Texas Probation Association, publishes articles, reports, book reviews, poems and prose, editorials, commentaries, obituaries, and news items of interest to community corrections professionals. *Texas Probation* is published quarterly, in January, April, July, and October. Unless previously discussed with the editor, submissions should be received no later than the 15th day of the month preceding the publication month.

Submissions for publication consideration should be typed on 8½ by 11 inch paper, double-spaced, with at least one inch margins. Manuscripts exceeding one page in length must be submitted on a computer diskette, or by e-mail, in either MS Word or WordPerfect format. Persons submitting articles, commentaries, or book reviews should enclose a brief biographical sketch or resume and a photograph for possible inclusion. Specific questions concerning this procedure should be directed to DeeAnn Collins at (817) 556-6110 ext. 308.

All submissions and/or other correspondence regarding *Texas Probation* should be sent to the following:

DeeAnn Collins, Chairperson
TPA Publications Committee
Johnson County CSCD
102 South Main St.
Cleburne, TX 76033
E-mail: deeann@johnsoncountytx.org

The Correctional Management Institute of Texas at Sam Houston State University serves as the Secretariat for the Texas Probation Association. *Texas Probation* is published by Sam Houston Press & Copy Center.
CANDIDATES FOR OFFICE

Association members will have the opportunity to vote on candidates for five positions on the Board of Directors prior to and during the 2013 Annual Conference. The vacancies are for President, Vice-President, Adult Discipline, Juvenile Discipline, and an At-Large Position. The following is a biographical sketch of each candidate.

Ed Cockrell
President

Ed Cockrell, Juvenile Casework Manager of the Jefferson County Juvenile Probation Department, is a graduate of Stephen F. Austin High School in Port Arthur and Lamar University in Beaumont, where he earned a Bachelor’s degree in Criminal Justice in December 1989.

In January 1990, Cockrell gained employment with the Jefferson County Juvenile Detention Center as a Detention Officer. Eight months later he was re-assigned as a Juvenile Probation Officer. In February 1992 he was promoted to Assistant Detention Supervisor, and after a short time, he was promoted to Casework Supervisor over the satellite office in Port Arthur. He also supervised the Special Needs Diversionary Program and served as the department’s Data Coordinator. In March 2005, Cockrell was promoted to Detention Superintendent and a little over a year later was promoted to the position of Juvenile Casework Manager over Probation and Detention Services. He served as the Casework Manager for five years. On October 1, 2011, Cockrell was named the new Chief Juvenile Probation Officer for Jefferson County.

Cockrell is an active member of the Texas Probation Association. He was an integral part of the Conference Planning Committee that organized the 2002 Annual Conference in Beaumont. He served as the co-chair of the Conference Planning Committee for the 2010 Annual Conference in Beaumont. He served two consecutive terms on the TPA Board of Directors, and he served as co-chair of the Exhibitors Committee for many years. He is currently serving as the Vice-President. In April 2009, he received the TPA Roy Williams, Sr. Award for outstanding work as a committee chairperson. In April 2010, he received the TPA President’s Award for his unselfish and dedicated service to the Texas Probation Association.

Caroline Rickaway
Vice-President

Caroline Rickaway is a graduate of Sam Houston State University. She started her career in community corrections in 1980 when she was appointed as a Brazoria County Adult Probation Officer. She was promoted to Assistant Director in 1988 and has been the Director of the Brazoria County Community Supervision and Corrections Department since 2004, a position she currently holds.

Rickaway is the Region 2 Representative to the Texas Probation Advisory Committee. She has long-standing memberships in the Texas Probation Association, the American Probation and Parole Association (APPA), the Texas Corrections Association (TCA), and the National Association for Probation Executives. She is a member of the TPA Legislative Committee and is currently the Association’s Affiliate Representative to the APPA. Rickaway currently serves as the Region 12 Representative to the APPA Board of Directors, and she is the co-chair of the APPA Judiciary Committee. Rickaway is also the Vice-Chair of the Board of Trustees for the Gulf Coast Center MHMR Authority of Brazoria and Galveston Counties.

Rickaway has won several awards, including the Association’s Brian J. Kelly Award for Adult Administrators in 2007, TCA’s Outstanding Adult Corrections Administrator Award in 2008, and APPA’s Member of the Year Award in 2011.

Arnold Patrick
Adult Discipline

Arnold Patrick is a graduate of Southwest Texas State University where he earned a Bachelor of Science degree in Criminal Justice. He has been a member of TPA for over twelve years and has fourteen years of experience in the probation field. He also has another ten years of experience in the behavioral science fields. Patrick has held the position of Director of Research, Planning and Development with the Tarrant County CSCD, Assistant Director of the Concho Valley CSCD, and he was the Treatment Alternative to Incarceration Program Administrator for TDCJ-CIAD. He is a member of Fiscal Issues, Legislative and Insurance Committees for the field. Patrick is currently the Director of the Hidalgo County CSCD and serves on the Association’s Board of Directors.
Iris Lewis  
Juvenile Discipline

Iris Lewis has served in the area of the juvenile justice field for over 12 years. She is currently employed with the Harris County Juvenile Probation Department, where she serves as an Administrator in the Field Services Division. Lewis oversees the community supervision of sex offender and mental health programs. Additional supervision experiences include the management of community supervision programs, such as the girls program and Project 17, and supervision of the Psychiatric Stabilization Unit (PSU) and Brief Structural Intervention Unit (BSIU) in a post-adjudicated facility. Prior to becoming a supervisor, Lewis worked as a specialized Juvenile Probation Officer for a mental health program and residential aftercare program. She provided intensive supervision to youth with identified mental health issues and youth released from post-adjudicated facilities.

Lewis’ educational background includes a B.S. in Psychology, M.S. in Psychology, and M.S. in Administration of Justice and Security. Lewis has the ultimate goal to obtain a doctoral degree in the area of psychology for infinite knowledge in working with youth with special needs.

Lewis has been involved with various committees and programs for service and personal growth. She serves on the Intellectual Developmental Disabilities Planning Advisory Council of Mental Health Mental Retardation Authority, member of the American Psychological Association, and co-chair of the Membership Committee of the Texas Probation Association. Lewis also has extensive experience in the area of training. Training skills were displayed as a Resource Training Officer for the Harris County Juvenile Probation Department for nine years, where she has trained juvenile justice professionals in topics such as professionalism, juvenile law, legal liabilities, cultural diversity, HIPAA, and workplace violence. Lewis is currently a training associate of Mel Brown Associates. She is accustomed to being in positions of responsibility and professional development.

While Lewis’ professional life is important, the most significant role in her life is being a mother and wife. She has been married for nine years and has two wonderful and rambunctious young boys (4 and 6 years old). Her personal interests include reading and shopping (of course).

Lewis’ experience and dedication to the field makes her an excellent candidate for the Juvenile Discipline position for the Association’s Board of Directors.

Randy Turner  
Juvenile Discipline

Randy Turner earned his Bachelor of Science degree from Howard Payne University and a Master of Arts degree from San Houston State University. He has dedicated his service to the youth and adults of Texas, Colorado, and Oklahoma since 1974. He was employed with the Texas Youth Commission for nine years, during which time he served in several different positions in which he progressively assumed greater responsibilities. Turner has been the Program Coordinator for the Dallas County Juvenile Services; the Program Coordinator for a youth center with the Tarrant County Juvenile Services; the Administrator of Institutional Services for Dallas County Juvenile Services; the Director of Career Services and Director of Emergency Shelter for the Lena Pope Home in Fort Worth; held a number of positions with the Rebound program in Denver, Colorado; Vice-President for Mel Brown and Associates in Conroe; the Director of the Oklahoma County Juvenile Bureau in Oklahoma City, Oklahoma; the Assistant Director of the Tarrant County Juvenile Services; and he is currently the Director/Chief Probation Officer of Tarrant County Juvenile Services.

Turner has served in various leadership/committee roles in several professional organizations, including the Texas Correctional Association, Colorado Juvenile Council, Juvenile Justice Association of Texas, and American Correctional Association. He has served as a Commissioner for the Oklahoma Commission on Children and Youth representing the Juvenile Bureaus in the State of Oklahoma. Turner was an adjunct professor at the University of Texas at Dallas in the Fall of 1990 and the University of Central Oklahoma in the Summer of 2003. He is currently a member of the National Association of Probation Executives, American Probation and Parole Association, and Texas Probation Association.

Lisa Tomlinson  
At-Large Position

Lisa Tomlinson is a graduate of Southeastern Oklahoma State University, where she earned her Bachelor’s degree in Criminal Justice in 1988. She began her career in 1988 in Grayson County as a Juvenile Probation Officer. She served in that capacity for five years before becoming the Deputy Director of the Juvenile Detention facility. In that position, she was responsible for the day-to-day operations of the Juvenile Detention facility. She served in that position for seven years before accepting the position of Chief Juvenile Probation Officer in Johnson County in May of 2000. In 2004, she accepted the additional position as the Chief Juvenile Probation Officer for Somervell County.

Tomlinson was awarded the Association’s Amador R. Rodriguez Award in 2012.
AWARDS AND RESOLUTIONS COMMITTEE

The Awards and Resolutions Committee is currently seeking nominations for a number of awards to be presented at the Annual Conference in March 2013. The nomination deadline is January 31, 2013, so hurry to nominate a deserving candidate. For award descriptions or additional information, you may contact Chairperson Jason Murphy at mmurphy@johnsoncountytx.org or (817) 556-6110 ext. 325. The Awards Nomination Form can be found near the end of this publication. If you are interested in becoming a member of the Awards and Resolutions Committee, please contact Jason Murphy.

TPA WEBSITE

The Association’s Technology Committee continues to work closely with the website designer to keep the website updated with new and informative information. The website is www.txprobation.com; take a moment to browse the website.

The Technology Committee and Membership Committee joined forces to make it easier for new members to join the Association and for current members to renew their membership on-line. This can be done through the website by clicking on the “Become a Member” and following the prompts.

TPA – PAC

The Political Action Committee continues to seek donations that will be used to promote the Association’s causes during the next Legislative session. If you are interested in making a donation to the PAC, you can do so by mailing a check or money order payable to TPA – PAC to:

Ron Zajac, Co-Chair
Political Action Committee
108 North Hills Circle
Franklin, Texas 77856

For more information on the PAC, you may contact Ron Zajac or John McGuire at (979) 361-4410.

UPCOMING CONFERENCES

Austin will be the site of the next conference and the first Motivational Interviewing sessions will be offered during this conference. As mentioned in the October 2012 issue of Texas Probation, the Board of Directors approved the addition of Motivational Interviewing tracks that will continue to be offered at each conference. There will be a beginning Motivational Interviewing session during the 2013 Annual Conference; beginning and advanced sessions during the 2013 Legislative Conference; and beginning, advanced, and booster sessions during the 2014 Annual Conference and each conference thereafter. The Board looks forward to seeing everyone at one of the upcoming conferences.

NEW MEMBERS WELCOMED

Forty-four community corrections professionals joined the Association between September 1st and November 30th, 2012. Please take a moment to welcome each of these new members to the Association.

New Associate members from the East Texas Treatment Center include: Jennifer Brown, Michelle Daley, Alicia Dovel, Deborah Fields, Clyde Graves, Larry Harkless, Pamela Kelley, David Koemer, Kathy Mosely, Vernon Pittman, Temeka Royster, Teresa Sherman, and Leonard Ward. Christopher Steele joined under the recently created Student Membership category. Professional Members include: Thomas Escamilla, Comal County CSCD; Anthony Henderson and James Olalekan, Galveston County CSCD; Albert Sanchez, Gillespie County CSCD; Joshua Rogers, Grayson County CSCD; Nicolaus Taulai, Guadalupe County CSCD; Kristen Defee, Jessica Diaz, Valerie Espinoza, Guadalupe Facundo, Peggylou Leal, and Anthony Uballle, Guadalupe County JPD; Margaret Perez, Hidalgo County CSCD; Kirbie Humble, Jasper County CSCD; Travis Dykes and Will Hurley, Matagorda County CSCD; Courtney Lawrence, Midland County CSCD; Debbie Buck, Rachael Darling, Michelle Espy, Candace Fyfe, Kiamesha Hatcher, Ashley Marineau, Kelli Martin, and Carley Shelton, Tarrant County CSCD; Joy Hall and Jennifer Lacefield, Tarrant County JPD; Kendra Kevil and Steve Rivas, Terry County JPD; and Elaine Minton, Walker County CSCD.
This column of “Legal Notes” examines an unusual array of issues affecting community supervision. These issues include a consideration of the constitutional rights against self-incrimination and effective assistance of counsel. This column also discusses the extent to which defense counsel in a state proceeding must understand federal law, i.e., immigration law in order to adequately represent his/her client. In addition this column examines certain recurring issues discussed in previous columns of “Legal Notes” such as the viability of the doctrine of collateral estoppel, whether a defendant is entitled to an expunction, and enforcing an order of restitution. These and other issues are found in this “Legal Notes” column.

**Conducting a Presentence Investigation Report – Does Interviewing the Defendant Constitute a Violation of the Person’s Fifth and Sixth Amendment Constitutional Rights?**

Even though I have been researching probation law for over two decades now, there are still legal questions involving basic procedures for which I still have not found a definitive answer. One is the extent to which a person being interviewed for a sentence investigation report (PSI), has the right to: a) refuse to be interviewed; b) be warned that statements made could be used against the individual; and 3) have the person’s defense counsel notified that a community supervision officer intends to interview the defendant. I have always assumed that the person retains his or her Fifth Amendment right to refuse to be interviewed and not be forced to make self-incriminating statements. However I have also assumed that no warnings, much less Miranda warnings, had to be given to the person prior to the interview and that the person’s defense counsel did not have to be notified that an officer planned to interview the attorney’s client as part of the preparation of a PSI report.

Now a recent court decision sheds some light concerning the extent to which an interview of a defendant for the purpose of conducting a PSI report may entail the person’s Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. In Reyes v. State, 361 S. W. 3d 222 (Tex. App. – Fort Worth, 2012) the defendant entered a plea of guilty to two separate counts of aggravated assault with a deadly weapon against a family member. The trial judge accepted the pleas of guilt, set the case for a punishment trial and ordered that a PSI report be prepared. A community supervision officer, without notifying the defendant’s attorney, visited the defendant in jail, and without administering any type of warning, questioned the defendant about the two offenses. At the punishment hearing the defendant testified that he did not intend to kill his spouse. However the State, in cross-examining the defendant and based on the PSI report, noted that the defendant had told the community supervision officer preparing the report that he did indeed intend to kill his wife. At the conclusion of the punishment hearing the trial judge sentenced the defendant to fifty and twenty years in prison.

The defendant appealed his conviction to the Fort Worth Court of Appeals. The defendant contended that his Fifth Amendment right against self-incrimination and his Sixth Amendment right to counsel had been violated when the community supervision officer interviewed him for the PSI report without the benefit of his counsel being present and without informing him of his Miranda rights. One obstacle facing the defendant on his appeal was the fact that no objection had been made to the trial court’s consideration of the PSI report at the punishment hearing. Instead the defendant had filed a motion for new trial asserting the same points that the defendant raised on appeal. Nevertheless the defendant contended that his failure to object at the time the PSI report was considered at the punishment hearing was not waived because the “nature of the State’s infractions in this case implicated ‘fundamental’ errors that required no objection at trial.”

The appellate court noted that as a general rule, to preserve a complaint on appeal, a party must have presented to the trial court a timely request, objection, or motion that stated the specific grounds for the desired ruling if they were not apparent from the context of the request, objection, or motion. See Tex. R. App. P. 33.1 (a) (1); see also, Layton v. State, 280 S. W. 3d 235 (Tex. Cr. App. – 2009).

Thus the Court stated that in the absence of a proper procedural perfection of error, the only type of errors that could be raised for the first time on appeal were complaints that the trial court disregarded an absolute or systemic requirement or that the defendant was denied a waivable-only right that he did not waive. See Bessey v. State, 239 S. W. 3d 809 (Tex. Cr. App. – 2007).
The appellate court determined that since the Texas Court of Criminal Appeals had never held that the rights the defendant was now complaining of were systemic or absolute and given the fact that the defendant could have either filed a pre-trial motion to suppress evidence and have it heard and ruled upon before trial or have objected to the admission of the evidence at the time it was offered at trial, the rights that the defendant complained of were not systemic or absolute rights. The Court further concluded that the points of error raised on appeal were not “waivable-only” rights and that since the defendant had failed to object to the consideration of the PSI report at the time of the punishment hearing, the issues complained of on appellate were forfeited and could not be raised on appeal.

This case does not resolve the issues I had previously identified, i.e., whether a defendant had a right to: a) refuse to be interviewed; b) be warned that statements made could be used against the individual; and 3) have the person’s defense counsel notified that a community supervision officer intended to interview the defendant. The appellate court in *Reyes* did note that the federal system and one holding in the State’s intermediate appellate system had addressed these issues by determining that the defendant did not retain the rights he asserted in the preparation of a PSI report. Nevertheless the opinion in *Reyes* focused on whether the points of errors raised on appeal had been forfeited. It would be interesting to read an appellate decision that addresses the substantive issues raised in the *Reyes* decision. However until the Texas Court of Criminal Appeals finally rules on this matter, I continue to opine that a defendant probably can invoke his right against self-incrimination and not participate in the preparation of the PSI report, does not have to be administered a *Miranda* warning prior to being interviewed, and an officer does not have to notify his defense counsel that he will be interviewed as part of the preparation of the PSI report.

**Collateral Consequences of a Plea of Guilt – A Defense Attorney Now Needs to Know Immigration Law**

In a recent decision, an appellate court examined whether a plea of guilt entered by a non-citizen was involuntarily made because her defense attorney failed to inform her that a conviction would subject her to a deportation proceeding if she left the country and attempted to re-enter the United States. In *Ex parte Tanklevskaya*, 361 S. W. 3d 86 (Tex. App. – Houston [1st Dist.], 2011), the defendant, a Ukrainian citizen who was a legal permanent resident of the United States, pleaded guilty to the Class B misdemeanor offense of possession of less than two ounces of marijuana. Prior to the plea she informed her defense counsel that she intended to visit Germany to see her father. While her defense counsel told her of the general immigration consequences of a guilty plea, he did not inform her that a guilty plea rendered her presumptively inadmissible to the United States upon her return from traveling abroad or that she could not obtain a waiver from this inadmissibility requirement.

Federal immigration law clearly states that an alien convicted of violating any state law relating to controlled substances is inadmissible upon a return to this country. See 8 U.S.C. Section 1182(a)(2)(A)(i)(II) (2008). Nevertheless federal law also provides that the Attorney General can waive application of this inadmissibility provision if the alien is convicted of “a single offense of simple possession of 30 grams or less of marijuana.” See 8 U.S.C. Section 1182(h)(2008). Unfortunately for this defendant, the judgment stated that she was convicted of possession of less than two ounces of marijuana. Since the judgment did not specify the actual number of grams of marijuana that she possessed, she could not come under this waiver. Thus when she returned from her trip to Germany, she was detained by immigration officials, her permanent residence card was confiscated, and she was allowed to return to Houston pending removal proceedings.

The defendant subsequently filed an application for writ of habeas corpus, alleging that her plea counsel provided ineffective assistance when he failed to specifically inform her that a guilty plea would render her presumptively inadmissible upon leaving and attempting to reenter the United States. The trial court denied her habeas corpus relief and she appealed this decision to the First Court of Appeals in Houston. The appellate court noted that the outcome of its decision largely hinged on its understanding of a recent United States Supreme Court decision in *Padilla v. Kentucky*, 130 U.S. 1473 (2010). In the *Padilla* case the Supreme Court held that defense counsel “must inform her client whether his plea carries a risk of deportation” to satisfy the requirements of the Sixth Amendment. The Court further clarified that when the relevant immigration law was “not succinct and straightforward,” defense counsel needed only to “advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences;” however, when the deportation consequences were “truly clear,” counsel had an “equally clear” duty to give correct advice.

The Court noted that an applicant seeking habeas corpus relief based upon ineffective assistance of counsel had to demonstrate, by a preponderance of the evidence: 1) that her counsel’s representation “fell below an objective standard of reasonableness” and 2) that there was a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668 (1984). In this case the applicant testified at the habeas hearing that had she known that she would be inadmissible upon her return to the country, she “would not have accepted the plea as she did” and would have probably decided to go to trial.

The appellate court examined the first prong of the *Strickland* standard in light of the Supreme Court’s holding in *Padilla*. The Court concluded that because the inadmissibility consequences were truly clear in this case plea counsel had a duty to inform applicant of the specific consequences of her guilty plea. The Court further stated that because counsel, who knew that the applicant had an out-of-country trip planned, only informed her of the general “possible” immigration consequences, and did not inform her that her inadmissibility and subsequent removal was “virtually certain” and “presumptively mandatory,” the Court held that counsel’s performance was deficient under the first prong of *Strickland*.

In regards to the second *Strickland* prong, the appellate court stated that in order to establish prejudice in the context of an involuntary guilty plea resulting from the ineffective assistance of counsel, the applicant had to demonstrate that there was a reasonable probability that, but for her plea counsel’s deficient representation, she would not have pleaded guilty, but would
instead have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52 (1985). Moreover the Court noted that the Texas Court of Criminal Appeals had stated that, to demonstrate prejudice in this situation, the defendant had to show a reasonable probability that, absent counsel’s errors, “a particular proceeding would have occurred,” but she need not show that she would have received a “more favorable disposition” had she gone to trial. See Johnson v. State, 169 S. W. 3d 223, (Tex. Cr. App. – 2005).

Based on the testimony at the habeas corpus hearing the Court concluded that the applicant had met her burden of demonstrating that, but for her plea counsel’s deficient and incomplete advice regarding the immigration consequences of a guilty plea, an issue of vital importance to the applicant, she would not have pleaded guilty. As such the First Court of Appeals granted her habeas corpus relief.

**Yes, a Defendant Can Waive His/Her Right to Seek an Expunction**

In a recent decision an appellate court examined the extent to which a defendant in a pretrial diversion program could waive his right to seek an expunction of his criminal record. In In the Matter of the Expunction of R.B., ___ S. W. 3d ___ (Tex. App. – El Paso, 2012) delivered on January 11, 2012, the petitioner, arrest on a theft charge, had agreed to be placed in a pre-trial diversion program. As part of the placement, the petitioner signed a voluntary waiver of the right of expunction. The petitioner successful completed the diversion program and his misdemeanor charge was dismissed. Subsequently he filed a petition for expunction that was granted by the trial court. The El Paso County District Attorney then appealed the decision of the trial court before the El Paso Court of Appeals.

The petitioner argued on appeal that at the time that he waived his right of expunction, the expunction statute did not allow for the expunction of records for a defendant who had successfully completed a pretrial diversion program. However the petitioner further contended that in 2009 the Legislature amended Article 55.01, Code of Criminal Procedure, to expressly permit a person to obtain an expunction where the trial court found that the indictment or information had been dismissed or quashed because the person had completed a pretrial intervention program authorized under Section 76.011 of the Government Code. Thus while the defendant conceded that he could validly waive his right to expunction based on the statute existing at the time he entered the agreement, he contended that he could not validly waive a future statutory right to seek an expunction based on the successful completion of a pretrial diversion program.

The appellate court noted that Article 55.01, supra, had undergone numerous amendments since its introduction in 1977. Moreover the Court acknowledged that at the time the petitioner signed the pretrial intervention agreement, Article 55.01 (a) (2) did not expressly address whether he could obtain an expunction of his misdemeanor theft records because his case had been dismissed following a successful completion of a pretrial diversion program. Nevertheless the Court did not concur with the petitioner’s contention that prior to the legislative changes made in 2009, a person in a pretrial diversion program was ineligible to seek an expunction. Instead the Court stated that while older versions of Article 55.01 did not expressly authorize an expunction on the ground that the petitioner had successfully completed a pretrial diversion program, neither did the statute prohibit it. Thus having found that the petitioner had waived a right that he otherwise possessed at the time of his agreement, the appellate court held that the trial court erred by refusing to apply the petitioner’s waiver to his petition for expunction.

**Failure to Pay Restitution – Who Carries the Burden of Proof?**

In 2007 the Legislature changed the law to shift the burden of proof in revocation hearings from the defendant to the State where it is alleged that certain fees were not paid. H.B. 312 amended Article 42.12, Section 21 (c), Code of Criminal Procedure, to provide that in a revocation hearing at which it is alleged only that the defendant violated the conditions of community supervision by failing to pay compensation paid to appointed counsel, community supervision fees, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not pay as ordered by the judge. Moreover this bill deleted all mention in Article 42.12, Section 21 (c), supra, of alleging failure to pay restitution and which party carried the burden of proving failure to pay or inability to pay. Now, while the procedure for conducting a revocation proceeding for the alleged failure to pay restitution fees is still governed under Article 42.12, Section 21 (c), supra, the factors for determining whether the defendant should be legally held accountable for the failure pay restitution is established under Article 42.037, Code of Criminal Procedure.

Hence under Article 42.037, Section (h), supra, if a defendant is placed on community supervision, the court must order the payment of restitution as a condition of community supervision. In addition, this section states that a court may revoke the person’s community supervision if the defendant fails to comply with the order. Moreover this section provides that in determining whether to revoke community supervision, the court must consider:

1. the defendant’s employment status;
2. the defendant’s current and future earning ability;
3. the defendant’s current and future financial resources;
4. the willfulness of the defendant’s failure to pay;
5. any other special circumstances that may affect the defendant’s ability to pay; and
6. the victim’s financial resources or ability to pay expenses incurred by the victim as a result of the offense.

At the time that H.B. 312 was enacted into law I noted that while Article 42.037, Section (h), supra, did not specify which party bears the burden of proof when it is alleged that the defendant failed to pay restitution and what that level of proof might be, I assumed that the State carried the burden to establish or negate the above listed six factors by a preponderance of the evidence. This assumption may be incorrect in light of a recent holding by an intermediate appellate court.

In Bryant v. State, 355 S. W. 3d 926 (Tex. App. – Eastland, 2011), the defendant had originally been placed on deferred adjudication community supervision for ten years in two cases after pleading to the offense of misapplication of trust funds. One of the con-
tions imposed in the cases was that the defendant pay restitution in the amount of $197,663.64. The defendant made an effort to comply with this condition. The defendant paid $33,904.75 in restitution but as he reached the end of his term of community supervision, he still owed $163,758.89. As such the State filed motions to adjudicate guilt in both his cases.

At the hearing the defendant testified that a prior motion to adjudicate had been dismissed after he had agreed to make a minimum monthly payment of $300 as opposed to the original amount of almost $2,000 per month. He further testified that he had judgments against him in a total amount exceeding $400,000 and that he had had to declare bankruptcy. The defendant, who was 77 years of age, testified that at the time of the hearing, his only income was $2,700 per month, which included social security for him and his wife and a part-time job for his wife. He further testified that his bills totaled $2,100 but that he faithfully paid $300 every month on his restitution. Although the trial court found that he had violated the conditions of community supervision by failing to discharge his restitution obligation, the court adjudicated him guilty but placed him on “regular” community supervision for an additional seven years.

The defendant appealed the decision of the trial court. The defendant argued on appeal that the State carried the burden of proof of his ability to pay, that the State had failed to do so, and that the decision to adjudicate his guilt deprived him of his liberty due to poverty. The Eastland Court of Appeals rejected the defendant’s contention that the State had the burden to show his ability to pay. Nevertheless the Court further held that the trial court was required to consider the factors listed in Article 42.037, Section (h), supra, as they existed at the time the defendant was ordered to pay restitution before revoking (sic) his community supervision based upon the failure to pay restitution. As such the Court held that the trial court abused its discretion in revoking (sic) the defendant’s community supervision without giving consideration to the factors that, pursuant to Article 42.037 (h), it had to consider. Hence the case was remanded for further proceedings consistent with this opinion.

**Waiver of Right to a Jury – When Does it Apply to Both the Guilt/Innocence and Punishment Phase of a Trial?**

In a recent court decision, I came across an issue that I had never seen a court address but to which I had always assumed that I know the answer. In *Delatorre v. State*, 358 S. W. 3d 280 (Tex. App. – Houston [1st Dist.], 2011), the defendant, pursuant to a plea bargain agreement, was granted deferred adjudication community supervision for a term of two years after having entered a plea of guilty to the offense of felony theft. At the time of his plea the defendant executed a waiver of his right to a jury trial. The waiver read: “I waive and give up my right to a jury in this case . . . .” The State subsequently filed a motion to proceed to an adjudication of guilt. At the adjudication hearing the defendant plead “true” to certain alleged violations and the trial court adjudicated his guilt. The trial court then proceeded to the punishment phase of the hearing and after hearing evidence, sentenced the defendant to sixteen months in a state jail felony facility.

The defendant argued on appeal before the First Court of Appeals in Houston that he was entitled to a jury trial on punish-
sex offenders. The State also argued that because a polygraph examination could be a condition of community supervision, it was only logical to require a defendant to show no deception during a test and that, otherwise, polygraph exams would lose much of their benefit.

The Eastland Court of Appeals noted the paradox in this case — while courts routinely require sex offenders on community supervision to take and pass polygraphs, the test results are inadmissible. Moreover the Court observed that the ban on polygraph evidence is comprehensive. See Tennard v. State, 802 S. W. 2d 678 (Tex. Cr. App. – 1990). It applies even if the State and the defendant agree and stipulate to use the results of a polygraph at trial and the Court even maintained that it applies to revocation proceedings. See Nethery v. State, 692 S. W. 2d 686 (Tex. Cr. App. – 1985); see also, Nesbit v. State, 227 S. W. 3d 64 (Tex. Cr. App. – 2007). Consequently the appellate court held that the trial court abused its discretion by considering evidence of the defendant’s failed polygraph exams when determining whether to revoke his community supervision.

Now the Texas Court of Criminal Appeals has weighed in on this matter. In Leonard v. State, ___ S. W. 3d ___ (Tex. Cr. App. – 2012), delivered on March 7, 2012, the Court granted the State’s Application for Petition for Discretionary Review to determine whether the appellate court erred in concluding that, in adjudication proceedings, a sex offender treatment provider was not permitted to testify to the results of polygraph examinations conducted as part of sex offender treatment, which were a condition of community supervision, and were admitted as a “fact or data” to support his expert’s opinion as to why the defendant had been terminated from the mandated sex offender treatment program. The State argued on appeal that evidence regarding failed polygraph exams was admissible for two reasons: first, as a basis of the expert’s opinion that the defendant should be discharged from the sex offender treatment program as a risk and danger to the community; and second, because it was a condition of the defendant’s community supervision that he show “no deception” on the polygraph exams. The State contended that if the results of polygraph testing were inadmissible, the condition would be a nullity.

The Court of Criminal Appeals noted that when a defendant is placed on community supervision, Article 42.12, Section 11 (a), Code of Criminal Procedure, allows a judge to “impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.” Moreover the Court observed that for sex offenders, section 11(i) specified that the conditions of community supervision could include supervision according to the offense-specific standards of practice adopted by the Council on Sex Offender Treatment, which included the use of polygraph exams. In addition, the Court stated that the polygraphs taken by the defendant in this case were used only for treatment purposes.

The Court further noted that it had not directly considered whether polygraph results were admissible in a community supervision revocation hearing. Nevertheless the Court noted that a revocation hearing was an administrative proceeding; did not involve findings of guilt, but rather was a forum to determine whether the defendant had broken the contract he made with the Court, i.e., had violated one of the conditions with which he had agreed to comply. Moreover the Court stated that most of the problems that the Court had identified in previous holdings regarding the use of polygraphs in criminal proceedings were not present in community supervision revocation hearings.

Furthermore the Court stated that the Texas Rules of Evidence Rule 703 allows experts to rely on inadmissible evidence in forming an opinion and Rule 705 provides that an expert may disclose on direct examination or be required to disclose on cross-examination, the underlying facts or data that formed the basis of his opinion. The Court also recognized that generally inadmissible facts or data can be used by an expert in forming an opinion as long as the facts or data are of a type reasonably relied upon by other experts in the field. Hence since polygraph examinations were reasonably relied upon by experts in sex offender psychotherapy and in a community supervision revocation hearing, there was no jury, the Court concluded that polygraph results could be admissible as the basis for an expert opinion under Rule 703 and 705 (a). As such the Texas Court of Criminal Appeals reversed the decision of the intermediate appellate court.

**Fifth Amendment Right Against Self-Incrimination – Is Not Applicable to Offenses Barred from Prosecution by Double Jeopardy**

In another court decision discussed in a previous “Legal Notes” column, I examined an opinion by the Fort Worth Court of Appeals regarding whether a defendant placed on community supervision with certain sex offender conditions imposed could assert a Fifth Amendment right against self-incrimination regarding certain questions posed in a polygraph examination. In Ex parte Dangelo, 339 S. W. 3d 143 (Tex. App. – Fort Worth, 2010) the defendant was charged with four sex-related felony offenses involving a child younger than fourteen. Nevertheless the defendant pleaded guilty to the offense of injury to a child and was granted deferred adjudication community supervision. Although the original conditions of community supervision did not require the defendant to participate in sex offender treatment, the trial court later amended the conditions to require the defendant to submit to a sex offender evaluation, complete psychological sex offender counseling, and submit to and show no deception on any polygraph.

The defendant’s attorney informed the sex offender treatment provider that his client did not intend to answer any questions that might incriminate him. The defendant later reported to a polygrapher but refused to answer the following questions:

1. “Since you have been on probation have you had [sic] violated any of the conditions?”
2. “Since you have been on probation, have you had sexual contact with any persons younger than 17?”
3. “Since you have been on probation, have you tried to isolate any child for sex purposes?” and
4. “Since you have been on probation, have you intentionally committed any sexual crimes?”

The defendant also filed several applications for writ of habeas corpus, alleging that the trial court’s conditions violated his right against compelled self-incrimination.

The Fort Worth Court of Appeals found that the first question asked only about community supervision violations, not about
independent criminal activity, and the defendant therefore did not have a Fifth Amendment right to not answer the questions. As to the second and fourth questions, the Court concluded that these inquiries were about independent crimes rather than mere community supervision violations and that the defendant had a Fifth Amendment right to not answer those questions. Finally in regards to the third question, the Court concluded that it exceeded asking only about a violation of the defendant’s community supervision and provided at least a link in the chain to the probationer’s responsibility for an independent offense. See “Legal Notes,” Texas Probation, Vol. XXIV, No 3, July 2010.

The defendant proceeded to file an application for petition of discretionary review before the Texas Court of Criminal Appeals. The Court granted the defendant’s application as to whether the intermediate appellate court erred: 1) when it granted immunity to the defendant to require him to answer questions put to him on the allegations in the indictment for which he refused to acknowledge guilt; and 2) when it held that the defendant could be questioned on the indictment allegations to which no plea was entered. The defendant argued on appeal that the Court of Appeals had no authority to grant him immunity to the allegations in which he had refused to acknowledge guilt and the Court of Appeals had denied him the benefits of his plea bargain because he had refused to plead to a sexual offense, consistently denying that he had ever committed such an act but that he was now facing the choice of either admitting to a crime he did not commit or having his probation revoked for not admitting it.

TheState responded by conceding that the Court of Appeals erred in holding that the State had made “binding concessions” that it would never prosecute the defendant based on the other allegations in the indictment. Nevertheless the State asserted that because it did not affirmatively waive, dismiss, or abandon counts one through four of the indictment before the trial court accepted the defendant’s plea of guilty to count pursuant to the plea bargain, jeopardy attached to those counts as well. Thus the State argued that once jeopardy had attached, the State was barred from prosecuting the defendant on those counts in the future and hence the defendant could be required to answer questions regarding other allegations in the indictment.

The Court noted that in a negotiated-plea proceeding, the issue is joined, and jeopardy attaches when the plea agreement is accepted by the trial court. See Ortiz v. State, 933 S. W. 2d 102 (Tex. Cr. App. – 1996). Thus the Court stated that in light of the state’s concession that double-jeopardy principles precluded it from prosecuting the defendant for the four sex-related offenses set out in counts one through four, it agreed with the Court of Appeals’ determination that the defendant “may be compelled to discuss the facts particularly related to counts one through four of his indictment” because the State could not use those facts in a future criminal prosecution. The Court held that the defendant had no Fifth Amendment right to refuse to answer legitimate questions that were a condition of his community supervision regarding those offenses and therefore affirmed the judgment of the Fort Worth Court of Appeals.

**Collateral Estoppel – It is Not Going Away**

Over the years, I have discussed the legal doctrine of collateral estoppel is several columns of “Legal Notes.” See “Legal Notes,” Texas Probation, Vol. XIX, No 4, October 2004; see also, “Legal Notes,” Texas Probation, Vol. XXIII, No 4, October 2008. This is the doctrine that holds that issues of ultimate fact that have been previously adjudicated adversely against the State through a final, valid judgment cannot be relitigated between the same parties. See Ex parte Tarver, 725 S. W. 2d 195 (Tex. Cr. App. – 1986). The effect of this doctrine even applies when a judge in one county in a revocation proceeding denies the State’s motion and the defendant is indicted in another county and the State attempts to prosecute the defendant on the same charges that formed the basis of the revocation proceeding. See Wafer v. State, 58 S. W. 3d 138 (Tex. App. – Amarillo, 2001).

Nevertheless there has been some hints from Judges on the Texas Court of Criminal Appeals questioning the application of this doctrine to probation matters. However in a recent opinion the Court of Criminal Appeals reasserted that the doctrine is applicable to probation cases. In Ex parte Doan, 369 S. W. 3d 205 (Tex. Cr. App. – 2012), the defendant had been placed on community supervision in Brazos County. The defendant was later charged with misdemeanor theft in Travis County. The Brazos County Attorney’s office filed a motion to revoke, alleging the theft charge. However at the revocation hearing, the county attorney presented no non-hearsay evidence to substantiate the theft charge and the motion was dismissed. The Travis County Attorney’s office still intended to prosecute the theft charge. Nevertheless, the defendant filed a pre-trial writ of habeas corpus seeking to bar any further prosecution of the theft offense under the doctrine of issue preclusion, i.e., collateral estoppel.

The trial judge denied the defendant relief and the defendant appealed the matter to the Austin Court of Appeals. The appellate court affirmed the ruling of the trial court and the defendant proceeded to file an appeal with the Texas Court of Criminal Appeals. The Court addressed the question concerning whether “in earlier litigation the representative of the government had authority to represent its interests in a final adjudication on the merits.” In order to answer this question the Court had to look at the procedures and issues involved in the Brazos County revocation hearing and in the Travis County criminal prosecution and ask whether the government prosecutors had the same interests and authority to litigate to a final adjudication.

The Court noted that several of its past holdings had referred to probation revocation proceedings in Texas as “administrative” in nature. See Hill v. State, 480 S. W. 2d 200 (Tex. Cr. App. – 1972); see also, Cobb v. State, 851 S. W. 2d 871 (Tex. Cr. App. – 1993). Nevertheless the Court in this case seriously questioned the characterization of probation revocation cases as “administrative.” The Court stated that a community supervision revocation proceeding in Texas bears little resemblance to an administrative hearing described in Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Court noted that in Texas, the State is represented by a prosecutor, the defendant has a right to counsel, the hearing is before the judge, formal rules of evidence apply, and there may be appeal directly to a court of appeals. The Court further observed that other than the State having a lesser burden...
of proof, there are few procedural differences between a Texas criminal trial and a Texas community supervision revocation proceeding. Thus the Court concluded that community supervision revocation proceedings are not administrative hearings; they are judicial proceedings, to be governed by the rules established to govern judicial proceedings.

The Court stated that in this case, the issues and procedures were nearly identical in the Travis County and Brazos County proceedings. The Court also noted that in both proceedings, prosecutors pled and sought to prove that the defendant committed the same act. Both were criminal judicial proceedings with nearly identical procedural rules, in which the State was represented by sworn prosecutors. The Court further observed that the Brazos County Attorney had the authority to litigate the matter to a final adjudication and the only difference between the interests of the Brazos County Attorney and the Travis County Attorney in this case was that one sought to prove theft in order to criminally punish the defendant for theft, while the other sought to prove theft in order to have the defendant’s criminal punishment from a prior case altered to his detriment. Consequently the Court of Criminal Appeals held that the appellate court erred in holding that two prosecuting authorities could not be the same party for res judicatapurposes and therefore the Court reversed the Court of Appeals’ judgment.

**Deferred Adjudication Community Supervision for State Jail Felonies – The Term Can be Extended for a Period Not to Exceed Ten Years**

Despite the fact that the sentencing laws for state jail felony offenses have been in existence since 1993, there still remains some questions regarding their application. One issue involving state jail sentencing laws concerns the length of time that (and even whether) a term of deferred adjudication community supervision for a state jail felony offense can be extended. Now the Texas Court of Criminal Appeals has resolved this issue. In Garrett v. State, ___ S. W. 3d ___ (Tex. Cr. App. – 2012), delivered on June 20, 2012, the defendant was charged with the offense of possession of less than a gram of cocaine, a state jail felony offense. Pursuant to a plea bargain agreement, she entered a plea of guilty and was placed on deferred adjudication community supervision for a term of five years. Later the trial court extended her term for an additional two years. After the original term had expired but prior to the end of the extended term the State filed a motion to adjudicate. The trial court granted the State’s motion, adjudicated her guilt and assessed punishment at eighteen months in a state jail felony facility.

The defendant appealed the decision of the trial court, arguing for the first time that the trial court lacked the authority to extend a period of deferred adjudication community supervision. The defendant contended that the only authority to extend a term of community supervision was found in Article 42.12, Section 22 (c), Code of Criminal Procedure, and this provision only expressly authorized the extension of the term of community supervision for first, second and third degree felonies and misdemeanors. Therefore the defendant reasoned that since a trial court could not validly extend the term of her community supervision, it lacked the authority to adjudicate her guilt and sentence her as a state jail felon upon a motion to adjudicate that had been filed after the expiration of the originally assessed term of community supervision.

The Dallas Court of Appeals rejected her argument by holding that the trial court did have the authority to extend the term of community supervision for a state jail felony offense. The defendant filed an application for petition for discretionary review which was granted by the Texas Court of Criminal Appeals. The Court first noted that the term “community supervision” has two meanings in the Code of Criminal Procedure: a placement by a court for a specified term during which 1) the criminal proceedings are deferred without an adjudication of guilt or 2) a sentence of imprisonment or confinement is probated and the imposition of sentence is suspended. Moreover the Court found that there are three places in Article 42.12, supra, in which the court is authorized to extend the term of community supervision: 1) Section 5 (a), which deals with deferred adjudication cases; Section 15, which deals with state jail felonies; and Section 22 (c), which authorizes extensions of the terms of community supervision.

The problem in analyzing these three provisions is that, as noted by the defendant, Section 22 (c) only applies to first, second and third degree felonies and misdemeanors. Moreover the Court noted that Section 15 only deals with persons placed on community supervision upon a conviction for a state jail felony offense. The Court stated that this section does not apply to deferred adjudication cases. Thus the question for the Court to decide was whether Section 22 (c) precluded the trial court from extending the term of community supervision for a state jail felony offense and whether Section 5 (a) did not provide the authority to the trial court to do so.

The Court noted that Article 42.12, Section 5 (a), supra, permits a trial judge to extend the period of deferred adjudication community supervision “in the manner provided by Section 22 (c).” Moreover the Court explained that the fact that Section 22 (c) expressly prescribed a maximum aggregate period of community supervision beyond which extensions could not go but expressly did so only for first, second, and third degree felonies and misdemeanors, did not necessarily mean that the Legislature did not intend for trial judges to be authorized to extend the period of state jail felony deferred adjudication community supervision too, provided they conformed with the manner of extending that community supervision as otherwise prescribed by Section 22 (c). Nevertheless the Court recognized the ambiguity of these statutory provisions. However the Court decided that the best way to resolve the ambiguity in the statutory scheme was to conclude, precisely as the Dallas Court of Appeals did, that a trial judge was authorized to extend an originally assessed period of deferred adjudication community supervision in state jail felony cases by authority of Article 42.12, Section 5 (a) and 22 (c). As such the Court affirmed the holding of the Dallas Court of Appeals.

**Conclusion**

As long as I have been researching legal issues involving community corrections, I am still astounded as to the number of legal issues that are still unresolved. Nevertheless with each passing term of the courts, certain fundamental issues are eventually
addressed and often finally resolved. This particular column is a prime example regarding certain basic issues being finally addressed by the Court. In this column the Texas Court of Criminal Appeals examined for the first time whether the term of community supervision for a state jail felon granted deferred adjudication could be extended. In addition the Court of Criminal Appeals has now reviewed the admissibility of polygraph results for sex offenders ordered to attend a sex offender treatment program. Finally an intermediate appellate court has considered (if not answered) the issue concerning the extent to which a defendant can be required to waive the Fifth Amendment right against self-incrimination and the Sixth Amendment right to effective representation of counsel in the preparation of a presentence investigation report. I have no doubt that in future columns of “Legal Notes” I will find court decisions providing me with more answers to questions I never knew before.

Endnotes

1 The Courts have consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. See Saldano v. State, 70 S. W. 3d 873 (Tex. Cr. App. – 2002).

2 The Fort Worth Court of Appeals noted that in United States v. Washington, 11 F. 3d 1510 (10th Cir. 1993), the Court held that the Fifth Amendment privilege against self-incrimination did not apply to a PSI interview; that in United States v. Woods, 907 F. 2d 1540 (5th Cir. 1990), the Court held that a defendant’s Sixth Amendment right to counsel was not violated because a routine PSI interview was not a critical stage of the criminal proceedings in which counsel’s presence or advice was necessary; and that in Trimmer v. State, 651 S. W. 2d 904 (Tex. App. – Houston [1st Dist.] 1983) the Court held that a defendant need not be admonished regarding his Fifth Amendment and Miranda rights before participating in a routine presentence interview.

3 See Minnesota v. Murphy, 465 U.S. 420 (1984) in which the Supreme Court recognized that although a person on probation could not be compelled to waive his or her Fifth Amendment right against self-incrimination, a person must expressly invoke this right or it is waived; hence the State, i.e., a probation officer, could ask an incriminating question to a probationer and the probationer, if he or she voluntarily answered the question, would hence waive any complaint that his or her Fifth Amendment right against self-incrimination had been violated.

4 As a matter of practicality, what defense attorney in any jurisdiction in this State who regularly practices criminal law does not know that as a matter of routine whenever the trial court orders that a PSI report be prepared, his or her client will be asked to be interviewed as part of the preparation of a PSI report?


6 At the time that the defendant was ordered to pay restitution in 2000, factor six did not exist and factors two and three did not include the words “current and future.” These additional factors were added in 2005 and made applicable only to an order of restitution entered on or after September 1, 2005.

7 The Eastland Court of Appeals rejected the defendant’s contention that the trial court could not constitutionally revoke his community supervision and adjudicate his guilt on the underlying offense, sentencing him to a suspended prison term and community supervision. In support of his contention, the defendant cited Bearden v. Georgia, 461 U.S. 660 (1983), in which the United States Supreme Court held that, in revocation proceedings for failure to pay a fine or restitution, if the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the trial court must consider alternative measures of punishment other than imprisonment and could not imprison that probationer absent a showing that such alternative measures are not adequate to meet the State’s interest in punishment and deterrence. Nevertheless the appellate court stated that the trial court, by suspending any imprisonment it imposed and placing the defendant on community supervision, availed itself of an alternative measure of punishment other than imprisonment such as had been discussed in Bearden, supra.

8 While a defendant does not have a constitutional right to a jury trial at the punishment phase of a trial, see Barrow v. State, 207 S. W. 3d 377 (Tex. Cr. App. – 2006), criminal defendants in Texas do have a statutory right to have a jury assess punishment. See Article 26.14, Code of Criminal Procedure.

9 See, however, my discussion of Leonard v. State, supra, earlier in this column in which the Texas Court of Criminal Appeals allowed an expert witness to testify regarding the results of a polygraph examination of a sex offender in a revocation proceeding partly because the Court had characterized probation revocation proceedings as “administrative” in nature and not criminal.

10 In Gagnon v. Scarpelli, supra, the United States Supreme Court described the due process rights under the United States Constitution that must be afforded to a probationer in a revocation proceeding. The Texas Court of Criminal Appeals noted in its holding in Ex parte Doan, supra, that while an administrative agency conducted the revocation proceeding in Gagnon v. Scarpelli, the trial courts conduct revocation proceedings in Texas.

11 While the parties on appeal used the term “collateral estoppel” and the Court’s opinion used the term “res judicata” Judge Keller in her dissent explained that in both civil and criminal cases, “res judicata” is sometimes used as a broad term to describe both claim preclusion and issue preclusion, and at other times the term is used in a more narrow sense to refer only to claim preclusion, leaving the concept of issue preclusion to be described as “collateral estoppel.”

12 The Court of Criminal Appeals consolidated this opinion with another case, Turner v. State, 101 S. W. 3d 3 (Tex. Cr. App. – 2012) but for the purpose of this discussion, I will only refer to Garrett.
DO SEX OFFENDER RESIDENCY RESTRICTION LAWS INCREASE PUBLIC SAFETY?

by
Kelli D. Stevens-Martin
Tarrant County CSCD Researcher

Sex offenders are a fascination to society for a variety of reasons, but mainly because acts committed by such individuals are so abhorrent and deviant. The media is guilty of overly sensationalizing such heinous acts to garner ratings. Politicians are guilty of using the “get tough” approach on sex offenders for campaign platforms. These factors, in combination with other variables such as highly publicized offenses against children, have to the passage of very restrictive laws for sex offenders. Some of these laws include sex offender registration and notification, mandatory outpatient treatment and annual polygraph testing for probated offenders, and residency restrictions prohibiting child sex offenders from living near “child safety zones.” Many of these statutes were passed in haste without consideration for long-term ramifications. This review summarizes common sex offender legislation, the scholarly literature addressing the utility and efficacy of sex offender residency restriction laws, the negative consequences of residency restrictions, and policy recommendations.

The cycle of moral panic aptly explains how many sex offender laws are passed. The cycle unfolds in the following way: “(a) occurrence of an emotionally charged sex crime; (b) panic erupts; (c) legislation is proposed to control predatory sex offenders; (d) because of political implications, laws are enacted against sexual predators; and (e) laws are of questionable utility and eventually fall into disuse” (Terry, 2006, p. 24). Rare instances of child abduction and murder are usually the catalysts for strict sex offender legislation. In 1994, the Jacob Wetterling Crimes Against Children Act of 1994 after a ten year old boy was abducted. Sex offender registration derived from this legislation. Several amendments would be made to this Act in the years to come. For example, Megan’s Law, the Pam Lynch Sexual Offender Tracking and Identification Act of 1996, Jacob Wetterling Improvements Act of 1997, and the Campus Sex Crimes Prevention Act of 2000 were passed (BJA, 2011). These laws created a variety of regulations such as public sex offender registries and community notification, establishment of a national sex offender database, and lifetime registration for certain sex offenders. Many states and municipalities have subsequently passed laws and ordinances restricting where sex offenders (whose victims were children) can live. Generally, these laws state offenders that perpetrated against a child cannot live near a school, daycare, park, or other area where children congregate. Furthermore, a distance requirement is included and can range anywhere from 500 feet to one mile. However, the effectiveness of such policies is questionable.

There is no doubt the public and politicians support a tough stance toward sex offenders (Mears, Mancini, Gertz & Bratton, 2008; Sample & Kadleck, 2008); however, research does not support the assertion these laws reduce recidivism (Barnes, Dukes, Tewksbury & De Troye, 2009; Mancini, Shields, Mears & Beaver 2010; Walker, 2007; Zanderbergen, Levenson & Hart, 2010; Zgoba, Levenson & McKee, 2009). The Colorado Department of Public Safety (2004) examined residency restriction in relation to recidivism and found child sex offenders that reoffended while under parole supervision did not cluster around child safety zones, but throughout the area of study. Zanderbergen et al. (2010) specifically examined the relationship between reoffending and the distance of sex offenders’ residences from schools and daycares and found no significant relationship. Offenders who lived close to child safety zones did not have a higher rate of recidivism compared to those that did not live close to these zones. In addition to the dearth of evidence to support residency restriction laws, scholars also suggest they may be counterproductive to increasing public safety (Levenson & Cotter, 2005; Minnesota Department of Corrections, 2003; Walker, 2007; Zgoba et al., 2009).

In a survey of 135 sex offenders in Florida, Levenson and Cotter (2005) discovered that offenders felt the residency restriction laws increased the offense triggers. Offenders felt socially isolated, a common trigger for relapse. Barnes et al. (2009) indicated residency restriction laws may limit access to treatment and therapy, which are crucial in reducing recidivism. Social support is critical to preventing recidivism, but residency restrictions often force offenders out of their homes and away from their support networks. They may be forced to live in more rural areas where public transportation in unavailable, thereby increasing their likelihood of failure. Or, these statutes can force offenders to live in areas of high social disorganization (Barnes et al., 2009; Tewksbury & Mustaine, 2008), leading to reoffending according to Shaw and McKay’s theory of social disorganization argument claiming residence restriction laws are beneficial because they actually restrict sex offenders from living in the most densely populated and disorganized communities. Residency restriction laws are actually counterintuitive.

Residency restriction laws ignore the fact that most victims of a sexual offense know their perpetrators on some level (BJS, 2000). Offenders who violate a child find it easier to gain access to children with whom they have some type of relationship, such as grandchild, niece or nephew, step-child, or neighbor. Because offending against a stranger would draw more attention and sex offenders want to avoid detection, child sex offenders normally...
groom and victimize children they know on some level. Moreover, recidivism rates for sex offenses are relatively low (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2004), even though most people believe the opposite. The despicable nature of sex offenses stirs negative emotions and can lead people to believe the worst about those who perpetrate such crimes. Lack of understanding about the etiology of sexual offending can lead to ineffective laws, as well as other negative consequences for both society and perpetrators.

Residency restriction laws are not only ineffective at reducing recidivism, but are also deleterious in a variety of ways. Stable housing for general offenders (Pinard & Thompson, 2006), as well as sex offenders (Arkowitz, Shale & Carabello, 2008; Levenson & Hern, 2006) is crucial to reintegration into society. These statutes often prevent sex offenders from finding affordable housing (Chajewski & Mercado, 2009; Socia, 2011; Zanderbergen et al., 2010). Residency restrictions can lead to instability, homelessness, and difficulty for law enforcement in monitoring and tracking offenders, (Levenson & Cotter, 2005; Socia, 2011; Walker, 2007; Zevitz, 2004; Zgoba et al., 2009) which is quite the opposite of what these laws set out to achieve.

Furthermore, retaliation toward offenders, increases in triggers for reoffending, and limited social opportunities are negative outcomes brought about by residency restriction laws (Barnes et al., 2009; Craun et al., 2011; Levenson & Cotter, 2005; Minnesota Department of Corrections, 2003; Walker, 2007; Zanderbergen et al., 2010; Zgoba et al., 2009). These restrictions, like other sex offender statutes, are viewed by some as symbolic rather than instrumental. According to Sample, Evans & Anderson (2010) symbolic laws help to (a) reassure the public that something is being done about the issue, thereby decreasing anxiety; (b) increase societal moral cohesion; and (c) provide an example of law for other states. In addition, other research has shown property values decrease in neighborhoods where sex offenders are clustered (Linden & Rockoff, 2008) causing more detriment to a community.

In conclusion, several noteworthy policy implications are derived from a review of the literature. Blanket residence restrictions for all sex offenders are ineffective at increasing public safety, as most offenders victimize someone they know, not strangers. And, as Zanderbergen (2010) points out, “the glaring irony of residence restrictions is that they regulate only where offenders sleep at night and not where they travel daytime hours when children are more vulnerable to sexual predation” (499). Therefore, these laws may only serve to provide society a false sense of security. Parents should be more wary of people they know, such as family members and friends who have easy access to their children, as opposed to strangers. These laws were originally designed for the most dangerous of sex offenders, those that kidnap and murder children, not a family member who commits incest. Limiting where an offender lives then does nothing to protect “potential victims.”

Residence restriction laws can actually cause more harm than good. Civil liabilities are of a concern, as offenders are not free to choose their place of residence, are limited to employment opportunities and access to services. They are forced into isolation which can be a trigger for recidivism, thereby decreasing public safety. The restrictions may also serve to create clusters of sex offenders in one area, which arguably is not ideal. It is highly unlikely that policy makers intended to create a large number of sex offenders living in one area where they may socialize with each other and reinforce their aberrant behaviors. There is a need for evidence-based sex offender legislation, because emotion, not intellect, often guides these policy decisions. It is difficult to reverse the damage of erroneous assumptions held by both society and the criminal justice system.

References


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102 S. Main Street
Cleburne, Texas 76033

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by Jim Stott
Director, Jefferson County CSCD

Faced with the possibility of a prison sentence, many people breathe a sigh of relief when they receive a sentence of probation. To the first time offender, the many fears about being locked up typically outweigh the challenges of being placed on probation. This is the perception. But does it? Contrary to popular belief, probation is not the slap on the wrist that everyone believes. It is extremely hard to convince someone to change their lifestyle. Many would choose to take their time in prison or jail over probation because of various reasons.

For many offenders, the mere fact that they were arrested for an offense was deterrent enough. These people will more than likely never cross our paths again. For many others, though, placing them into the right programs is paramount to their success. In 2013, Jefferson County Adult Probation will begin our 30th year of providing a residential program for offenders. This program is one of many we operate. We accept offenders from counties throughout Texas. This 60 bed all female facility is aptly called the Jefferson County Women’s Center. When we began this program in 1983 it was a co-ed facility. The ultimate goal was to keep people out of prison by providing them with the tools to improve their quality of life. Education, jobs, effective parenting, anger management and chemical abuse treatment are just a few of the components we provide. While the times have changed and the center has gone through many transitions over the years, I believe that deterrence is still our ultimate goal. Sometimes you have to get away from the life you are living to make clear decisions about the life you want to live. For 29 years now, we have tried to give people the tools to make the right decisions. Most of the time, they listen. Sometimes however, they don’t.

As an outsider, I would think that the biggest obstacle for most people entering the Women’s Center or any other residential program was the time away from their families. But, even the absence of family for a short time is a small price to pay for receiving the tools necessary to provide for a lifetime of making the right choices; choices that not only affect them, but their families as well. Given those tools, this will hopefully be their last venture into the criminal justice system.

Effective September of 2012, we began our transition from our classification as a “Restitution Center” to a “Court Residential Treatment Facility.” I strongly believe we have been so much more than a “Restitution Center” for years now, primarily due to a committed and dedicated staff at the facility, starting up programs when they felt a need was there. We have changed literally thousands of lives in those 30 years and hope to continue. The changing times dictate that we adopt a more treatment conscious programming model, focusing on a cognitive based curriculum and providing even more opportunities for offenders to receive those tools. We have enjoyed statewide cooperation with many departments who send their offenders to our program because it achieves results. I do not see that commitment changing, and I sincerely hope that you will remain certain that we will still have the same goals, faith and dedication to making it work.

With the right tools, most people can change the behavior that causes them to break the law. If they do change, it takes a burden off of the community to keep them locked away and makes them responsible for taking care of their own. Our hope is that they learn how to care for their families and assume responsibility for their lives. We are optimistic as we begin this transition. Please bear with us as we enter this new journey.

CALL FOR ARTICLES

Texas Probation is your journal and the Publications Committee needs your help to make it a success. We are always seeking articles and/or information to be included in the News From the Field portion of the journal. The instructions for contributions can be found on page three of this journal. In addition to sending the information to the Chairperson of the committee, you can always contact any of the members of the Publications Committee to have your article and/or information considered for publication. The committee members include: Dr. Melvin Brown, Mel Brown and Associates; Jim Stott, Jefferson County CSCD; Todd Jermstad, Bell & Lampasas Counties CSCD; Romeo Zapata, Hidalgo County Juvenile Probation Department; Lisa Tomlinson, Johnson and Somervell Counties Juvenile Probation Department; Earnest Perry, Jefferson County CSCD; Stephanie Christopher, Brazos County CSCD; Darin Deutsch, Brazos County CSCD; and Hilda Martinez and Priscilla Solis, Hidalgo County CSCD.

The field of community corrections is ever-evolving, and it is through the exchange of information that we evolve with it. Let Texas Probation be your format for exchanging information with other members of the probation field.
JOHNSON COUNTY CSCD
RECOGNIZES EXCELLENT EMPLOYEES

During the Johnson County CSCD’s annual Christmas luncheon in December, two employees were recognized for their service to the department. Shawn Smith was recognized as the Employee of the Month for November 2012. He has been employed with the CSCD since November 1999 and currently supervises a SAFPF Aftercare caseload. Smith is a valued member of the department. David Georges has only been with the department for five years, but he has proven himself to be an irreplaceable member of the department. Georges has supervised a transfer-in caseload for a few years, but recently assumed supervision of a felony caseload. He was chosen as the department’s Employee of the Month for September 2012 and the Employee of the Year.

Director Toby Ross praised both Smith and Georges for the dedication to the department and also for their desire to improve the lives of those offenders they supervise.

BRAZOS COUNTY CSCD NEWS

Brazos County CSCD held their annual Thanksgiving luncheon at the department on November 15, 2012. The department provided turkey, ham, and dressing, while the staff provided all the other fixings.” As always, it was a great time to socialize and be thankful for all their blessings. 361st District Court Judge Steve Smith and County Court at Law #2 Judge Jim Locke were in attendance as well.

The entire Brazos County CSCD staff attended the Tree of Angels Ceremony on December 4, 2012 hosted by the Brazos County District Attorney’s Office. This year marked the 10th year for the ceremony. The family and friends of victims of violent crimes were invited to bring an angel ornament to place on a special tree in memory and support of their loved ones. Brazos County CSCD Support Staff Supervisor Amber Pledger played a key role on the committee which organized the event.

The CSCD held its’ annual employee recognition awards ceremony on Friday, December 7, 2012. The award recipients were nominated by both peers and supervisors. The Employee of the Year Awards are presented to employees that embody the best in overall job proficiency and professionalism as demonstrated during 2012. The following are the award winners for each of the categories:

Lawrence Carter, CSO II – CSO I & II, Counselor, and CSOA category;
Chris Arredondo, Senior CSO I – Senior Officer category;
Rusti Henderson, Intake Technician – Administrative Technical Support category;
Vicki Van Liere, Senior CSO II – Court Liaison Officer category; and
Stephanie Christopher, Supervisor – Supervisor category

The Pat Martin David Award was awarded for outstanding direct case manager for 2012. The recipients this year were Senior CSO I Caroline Gonzalez and CSO II Kaci Yargo. The Helping Hand Award is given to the officer whose work helps offenders change their lives. The recipient this year was Senior CSO I Martha Banks. The Most Valuable Collector Award is awarded for excellence in fee collections, and CSO I Billie Kennedy was the recipient. The Good Neighbor Award is presented to the County employee who provided the most outstanding support for the department during the year. The recipient this year, from the Information Technology Department, was Desmond Harris.

The Director’s Star Awards are awards given to employees that exhibit the following:

A Star for initiative above and beyond was awarded to CSO II Bobby Baker;
A Star for contributions to operational efficiency or morale building was awarded to Support Staff Supervisor Amber Pledger;
A Star for outstanding professionalism was awarded to Senior Supervisor Marie Nutall; and
A Star for Unsung Hero is awarded to the staff member who makes substantial contributions without fanfare and was awarded to CSO II John Latson.

Finally, CSOA Daylia Welch was recognized for her 25 years of loyal service to the Brazos County CSCD. Congratulations to each of these recipients.
Join the Texas Probation Association, the only professional organization created to exclusively serve the needs of probation and community corrections practitioners.

The Texas Probation Association has four membership classifications – Professional, Associate, Alumni, and Student. Professional Membership is for full-time certified probation officers. Associate Membership is for all other categories of professionals who do not qualify for full membership, including, but not limited to, criminal justice practitioners, counselors, volunteers, treatment center personnel, and professors. Alumni Membership is for professionals who retire from the field and choose to remain active in the association. Student Membership is for persons enrolled in an institution of higher learning.

Dues paid to the Texas Probation Association are not tax deductible.

All members, whether Professional, Associate, Alumni, or Student receive a subscription to Texas Probation journal, lapel pin, decal, membership card, and registration discounts for Association conferences. All members may serve on committees. Professional and Alumni members may vote, hold office, and chair committees, while Associate members are ineligible for these three activities.

MEMBERSHIP APPLICATION
(Please Photocopy)

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Name __________________________________________ Title ___________________________

Organization ______________________________________________________

Mailing Address ______________________________________________________

City/State/Zip Code ________________________________________________

Telephone Number __________ FAX Number __________ E-Mail ________________

Referred By __________________________________________________________________

Enclose check or money order and mail to:

Texas Probation Association
Correctional Management Institute of Texas
Attn: Kathleen Gilbert
George J. Beto Criminal Justice Center
Sam Houston State University
Huntsville, Texas 77341-2296
AWARDS NOMINATION FORM
(SPECIFY ONE)

AWARDS

Charles W. Hawkes Lifetime Achievement Award
Brian J. Kelly Award (Adult Administrator)
Judge Terry L. Jacks Award (Adult Officer)
Amador R. Rodriguez (Juvenile Administrator)
Clara Pope Willoughby Award (Juvenile Officer)
Lewis “Butch” Amonette Award
Sam Houston State University Award
Roy H. Williams, Sr. Award

AWARD NOMINEE

Name __________________________________________________________ Telephone ______________________
Address/City/State/Zip __________________________________________

NOMINATOR

Name __________________________________________________________ Telephone ______________________
Address/City/State/Zip __________________________________________

REFERENCES (List names and addresses of three persons familiar with the accomplishments of the nominee)

Name __________________________________________________________ Telephone ______________________
Address/City/State/Zip __________________________________________
Name __________________________________________________________ Telephone ______________________
Address/City/State/Zip __________________________________________
Name __________________________________________________________ Telephone ______________________
Address/City/State/Zip __________________________________________

NOMINATION

I hereby nominate _______________________________________________ for the above marked award.
Signature of Nominator __________________________________________ Date ______________

A statement of not more than five typewritten pages, double spaced, describing the nominee’s impact on the profession, the Association, and the jurisdiction in which he/she resides must accompany this form. Supporting materials, such as newspaper clippings, letters of recommendation, and pamphlets, may be included but may not exceed five additional pages.

Nominations for the first six awards listed above should be sent to the following:

Jason Murphy, Chair
TPA Awards and Resolutions Committee
Johnson County CSCD
102 South Main Street
Cleburne, Texas 76033

Nominations for the Sam Houston State University Award should be sent to the following:

Texas Probation Association
Correctional Management Institute of Texas
Attn: Kathleen Gilbert
Sam Houston State University
Huntsville, Texas 77341-2296

All nominations must be received by January 31, 2013.
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