Criminal Justice Section

The State Bar of Texas

July 1, 2015

Judge Doug Skemp, *Chair*
Dallas County Criminal Court No. 3

As lawyers practicing in the criminal justice system, we know how important it is for each of us to adhere to the highest tenets of professionalism. The victims of criminal conduct, the persons charged with the offenses, and the citizens who we serve all rely upon us to use our best efforts to make the criminal justice system work. It is a special responsibility and privilege. It is an honor to know that Texas criminal law practitioners understand the role that all of us have in making justice for all closer to being a reality.

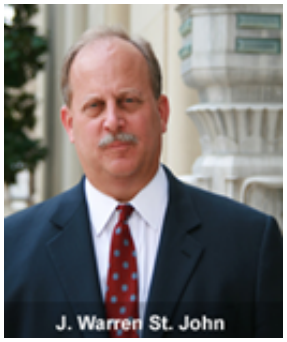
Cheryl Brown Wattley, Newsletter Editor
Professor and Director of Experiential Education
UNT Dallas College of Law

Slightly more than two years after the deaths of Chris Kyle and Chad Littlefield, a Stephenville jury found Eddie Ray Routh guilty of murder. He was sentenced to life in prison without parole. The jury rejected Routh's insanity defense.

The trial was the focus of extensive international media attention. Kyle was known as the "American Sniper." His military experiences as a sniper had been detailed in his autobiography, *American Sniper: The Autobiography of the Most Lethal Sniper in U.S. Military History*. By the time of the trial, a major movie had just been released heralding Kyle's exploits as a Navy SEAL.

For almost three weeks, that trial in the district court in Stephenville captured national attention as it became the demonstration of the American criminal justice system. Every criminal trial reflects, in some measure, the persons serving as representatives of the state, and the

advocates for the defendant. Who were the attorneys who served as the prosecutor and lead defense counsel in the Routh case?



Member Profile
J. Warren St. John
Attorney for Eddie Ray Routh, Defendant

From a family that has practiced law in Texas for more than a century, defense attorney J. Warren St. John has spent his 26-year legal career practicing criminal law. He graduated with honors from Sam Houston State University with a Bachelor of Science in Criminal Justice. After doing course work toward a Master's Degree in Public Administration at Texas Christian University, St. John pursued his law degree at South Texas College of Law. While he has tried over 60 homicides to final verdict, his practice revolves around complex state and federal criminal cases.

St. John is no stranger to high-profile cases. In 2013, he represented an Arlington bar owner convicted of plotting to kill Arlington Mayor David Cluck and attorney Tom Brandt. Ryan Walker Grant pleaded guilty to murder for hire and was sentenced to 10 years in federal prison.

Another case became the subject of an episode of the series "Snapped." In 2009, Colette Reyes shot her husband, a UTA professor. Despite diagnoses of major depression, schizophrenia, and schizoaffective disorder, Reyes's insanity defense was rejected. She was convicted and sentenced for 45 years in prison.

St. John is not a stranger to national television. He has appeared on ABC News 20/20, Nightline, The Today Show, FOX News, CNN, and Snapped. He has declined interviews with the Dr. Phil Show on three occasions and once on Good Morning America.

In light of this experience, St. John understands that special concerns arise in representing a defendant in a case that is receiving significant media attention. St. John advises: *"Initially, keep the information to the media somewhat limited because they will always twist around what they are told. Once I am in the position to share the information to the media, I want to make sure the reporter is trustworthy, so they can report accurately what I said to them. I always maintain my honesty and integrity, and hopefully they will return the same in kind."*

As a criminal defense attorney, St. John recognizes that *"it's difficult to overcome society's perception that if someone is arrested, they must be guilty of something. It is also difficult to get people to accept that mental illness really does exist and is not just a defensive theory in someone's mind.*" But prosecutors and defense attorneys have important roles to play in the criminal justice system. St. John encourages prosecutors to "*realize your job is to seek justice, not to seek convictions. Don't pander to societal pressure, stay true to your oath*." To defense attorneys, he advises "*be prepared, respectful, and honest to the court and their staff. Try to have patience with your clients; sometimes they are difficult to deal with and don't always tell the truth. Try to have fun while practicing law, although it doesn't always seem fun."*

Member Profile
M. Alan Nash
Erath County District Attorney

Raised in Erath County, District Attorney Alan Nash is the child of a school teacher and cattle trader. After graduation from Tarleton State University and Texas Tech School of Law, he returned to practice law in Stephenville. He had a general practice that included civil litigation, criminal defense, estate planning and probate, family law and transactional work for 12 years. He has been able to draw upon his trial experience, especially in criminal cases ranging from misdemeanor to capital murder (non-death penalty) cases, since his appointment as district attorney in 2012. "*Being a small jurisdiction district attorney is the best job a lawyer can have. It combines courtroom advocacy, daily work with law enforcement, office management, and local political involvement.*"

Erath County may be a small jurisdiction but earlier this year, it became a focus of massive media attention with the trial of Eddie Ray Routh. D.A. Nash is frank about the potential impact of such media attention. "*The biggest challenge of the Routh case was keeping all of us focused on trying the case in the courtroom without succumbing to the constant pressure and temptation to chat with the media. The national media is like a sly, enticing serpent persistently dangling the fruit of notoriety and whispering about how sweet just one bite would be. Early in the investigation, all of us in law enforcement bought into the principle that when the evidence is revealed in the courtroom, it should be the first time the media—and more importantly—the jury, learned the story of the murder of Chad Littlefield and Chris Kyle. For two years of investigation and pretrial, under intense pressure to counter myth and speculation, and constant temptation to tell the whole story—our team maintained discipline. No leaks, no press conferences, no television appearances. As an attorney and prosecutor, I'm proud of the integrity and discipline shown by the litigants and law enforcement in this case.*"

Pride in serving as the district attorney also leads Mr. Nash to help citizens to understand the limits and boundaries of the criminal justice system. "*When folks have been personally wronged in business transactions, employment situations, and family relationships, they often believe the wrongs should result in punishment. We do our best to explain the proper limitations on the power of the criminal justice system; however, at times people are frustrated that the only avenue for justice is the civil courts system.*"

Explaining things and talking to the people is a key piece of advice from D.A. Nash. His advice to criminal practitioners: "*Having done both criminal defense and prosecution—a common, simple solution to most frustration coming from clients and victims is to scheduled 'face-time'. Talking with a criminal defendant or a victim accomplishes a couple of things for an attorney: 1) it compels a natural procrastinator to work a file, as there is accountability with face-time; and, 2) even when the client or victim do not like what you have to tell him or her, direct communication alleviates the most common complaint made by clients and victims -- that of neglect by the attorney or prosecutor.*"

INTERESTING CASES – MAY 2015

State of Texas v. Adelfo Ramirez Cruz, (Tex. Crim. App. May 13, 2015) Reversing the Austin Court of

Appeals, the CCA held that questions about the defendant's name and phone number in a custodial interrogation could require *Miranda* warnings. While the questions were the type of questions asked during a booking procedure, in this case they were not asked in a booking procedure. Evidence at an Austin killing tracked to the defendant, a resident of Chicago. Austin police coordinated with Chicago authorities to have defendant arrested on a pending Illinois misdemeanor warrant. When he was arrested in Chicago, he was booked in by local authorities and provided his name, date of birth, phone number, and address as part of their booking form. Hours later, having flown to Chicago, an Austin police officer interrogated the defendant. Prior to giving him *Miranda* warnings, the detective asked the defendant for his name, address, phone number, and whether he had a cellphone. The detective claimed that the information was needed for immigration purposes. The defendant responded. Some of the information that he gave was false. He provided a phone number that he said was his girlfriend's cell phone. After asking these questions and getting this information, the detective gave the defendant his *Miranda* warnings. The defendant requested an attorney and the interview was terminated. The detective then went to the address that had been provided on the booking form, which was the girlfriend's home. She provided him with the cellphone. Records from the cell phone showed that it was used in Austin on the date of the murder near the murder scene.

The *Miranda* test of whether "police should know that their words or actions are reasonably likely to elicit an incriminating response" focuses upon the perception of the suspect. Questions that serve an administrative need, such as name, address, heights, weight, eye color, date of birth and current age" are an exception. Applying an objective standard, the issue is whether the posed question reasonably relates to a legitimate administrative concern. Under these facts, the questions were posed to gather evidence and were likely to lead to an incriminating response. It is the content of the question and the circumstances under which is was asked that determines whether it is administrative concern. In this case, the defendant had already been booked in; the detective did not have any administrative need for the information. Rather, the detective was specifically asking about a cellphone so that cellphone records could be obtained to establish the defendant's presence in Austin. *Miranda* warnings were required. The interview between the defendant and the Texas detective was suppressed.

Ex parte Vela, ---S.W.3d.---, (Tex. Crim. App. May 13, 2015): The CCA held that a case remanded for a new sentencing hearing removed it from the original sentencing order making it consecutive to another sentence. Following conviction by a jury of aggravated robbery and possession of heroin, the defendant was sentenced to life in prison on the aggravated robbery and 60years on the possession of heroin. The 60-year sentence was stacked, to be served consecutively to the aggravated robbery sentence. As a result of the appeal, a new sentencing hearing was ordered for the aggravated robbery sentence. At the second sentencing hearing, the judge imposed a sentence of life, but did not stack that sentence. As a result, the aggravated robbery and heroin possession cases were running concurrently.

Reviewing the analysis of sentencing statutes and stacking provisions that had been discussed in *Alsup v. State, 84 Tex. Crim. 208, 1918; Ex parte Nickerson, 892 SW2d 546 (Tex. Crim. App. 1995),* the CCA held that the remand for a new punishment hearing removed the case from the stacking order. Because the trial court did not, upon resentencing, issue another stacking order, the sentences are to be served concurrently.

In re Allen, ---S.W.3d ---, (Tex. Crim. App. May 13, 2015): In this death penalty case, the defendant had sought a pre-trial hearing to determine whether he was intellectually disabled and therefore exempt from the

death penalty. When the district court granted the motion to have such a hearing, the state sought mandamus relief from the court of appeals. The appellate court granted the mandamus relief ruling that the trial judge had exceeded his authority.

Because mandamus relief is only appropriate when the relator establishes (1) that he has no adequate remedy at law to redress his alleged harm, and (2) that what he seeks to compel is a ministerial act, not a discretionary or judicial decision, mandamus was not appropriate. The CCA held that the trial court's decision to conduct a pre-trial hearing to determine the defendant's intellectual capacity was a discretionary act.

Interestingly, the CCA made "explicit what we before expressed only tacitly: Legislation is required" for the creation of uniform procedures for intellectual-disability determinations.

Tapia v. State, *---S.W.3d---,* (Tex. Crim. App. May 13, 2015): The appellant had been placed on a 10-year deferred adjudication community supervision for aggravated assault. The same day, appellant was sentenced to a term of imprisonment. The sentences were to run concurrently. When the appellant was released from prison, he did not contact the probation office. A revocation motion was filed alleging that the appellant had failed to report, failed to provide address change, and had violated curfew. When he was arrested, the appellant admitted to using cocaine and alcohol.

During the revocation hearing, the state announced its intent to file new violations based upon appellant's admission that he had used cocaine and alcohol. Proceeding on the existing revocation motion, the trial judge denied the state's first motion for revocation but sanctioned him to 21 days in the county jail. The state then filed the second revocation motion based upon the cocaine allegations. Based upon these new violations, the court revoked appellant's probation, adjudicated him guilty and sentenced him to five years. The appellant would have satisfied the original sentence in just weeks.

Applying a due process analysis to the proceedings for appellant's revocation, the CCA rejected the appellant's argument that the revocation could not be based upon grounds known to the trial court, but not relied upon, in an earlier revocation hearing. Reversing the Thirteenth Court of Appeals, the CCA repeatedly noted that the appellant had objected to an amendment of the first revocation motion to include the cocaine and alcohol use.

Stillwell v. State, ---S.W.3d--- (Tex. App. Ft. Worth, May 28, 2015) Appellant was convicted by an 11-person jury of indecency with a child and sentenced to 12 years in prison. A jury of 12 was originally empaneled but after three days of testimony, a juror came forward to inform the court that he was having difficulty understanding the proceedings. The juror primarily spoke Spanish and was having difficulty following the proceedings because they were in English. During the exchange between the judge and the juror, the juror repeatedly said "I understand a little bit" or "I don't understand." Both the defense and state agreed that the juror did not adequately understand English and what was going on in the courtroom.

The parties disagreed as to the basis for the juror's removal. The state urged that juror be deemed disabled under Tex.Code Crim. Proc. Ann. art. 36.29(a) which would allow the trial to proceed with 11 jurors. The defense argued that because the juror was never able to serve, he was disqualified and a trial using 11 jurors could only proceed with the defendant's consent. The defendant did not consent to continuing the trial with only 11 jurors.The trial court dismissed the juror as disabled and the trial continued with 11 jurors.

The court of appeals held that the court could have allowed the juror to remain on the jury because the right to have him excluded due to his inability to understand English had been forfeited. It is always the attorneys' duty to determine that capability and fitness of the jurors during voir dire. Neither party inquired as to ability to understand the English language.

But, once the court determined that the juror should be dismissed, agreement was need to proceed with 11 jurors. Because appellant did not agree to proceed with 11 jurors, a mistrial was required. The lower court was reversed.

Richards, Jr. v. State, (Tex. App. Dallas, May 20, 2015): A DWI conviction was reversed due to an unlawful warrantless blood draw. The appellant had been stopped for speeding. The officer observed red eyes, smelled alcohol. Field sobriety tests were conducted. Appellant refused to give a blood sample. The officer elected not to pursue a warrant. Blood was drawn from appellant without his consent pursuant to section 724.012 of the Texas Transportation Code. Appellant did not consent to the draw, and the taking of his blood did not fall under another recognized exception to the warrant requirement. The warrantless, nonconsensual blood draw violated appellant's fourth amendment rights.

Ex parte Anthony Hill: (Tex. App. Dallas May 20, 2015): Relator pleaded guilty to shooting a man during a robbery and was sentenced to 45 years in prison. The victim subsequently died. Relator was indicted for capital murder. Relator filed a writ claiming that the subsequent indictment violated federal double jeopardy protections.The state appealed the trial court's grant of the motion. The court of appeals reversed, holding that double jeopardy did not bar the prosecution. Because the state could not have brought the capital murder trial at the time that it brought the aggravated assault charges, double jeopardy did not apply.

Carrasco-Flores v. State, (Tex App. El Paso, May 14, 2015): A conviction for aggravated assault was reversed due to the trial court's failure to include a self-defense charge. The appellant, a live-in boyfriend, was charged with murdering his girlfriend and assaulting her teenage son. The facts portray a very complicated, antagonistic relationship between the appellant and the son, including threats by the son to kill appellant. While the appellant's testimony did not fully establish the defense, it would have provided the jury with a basis to infer that he did not provoke the attack. The charge should have been given.

Tate v. State, (Tex. App. Ft. Worth, May 14, 2015): Following a stop for outstanding warrants, appellant was convicted of possession of methamphetamine as a result of the discovery of a syringe containing meth in a car that he was driving. Both appellant and a passenger claimed to own the car but neither could produce any documentation to support the ownership. Consequently, the car was impounded. The syringe was found during an inventory search, in an open compartment underneath the air conditioning/heating panel. Recognizing that contraband can be linked to a defendant by a variety of circumstances, the court identified 16 such links.The only link between the appellant and the syringe was the fact that he was driving and claimed to own the car in which it was found. That evidence was insufficient to support the conviction.

Yarbrough v. State, No. 07-14-00044-CR (Tex. App. Amarillo, May 13, 2015) The appellant was convicted of tampering with physical evidence when he allegedly swallowed marijuana to impair its availability as evidence. A police officer stopped the appellant's car after receiving information that appellant may have been involved in a drug transaction. The officer saw "some green leafy crumbs... on the appellant's shirt and in his lap" and arrested him for possession of marijuana. As the appellant sat in the back of the squad car, the officer observed him "playing with his mouth a little bit with his tongue" and upon inspection saw "a

green leafy substance chewed up in his mouth, in his teeth, and in the back of his throat" which the officer opined appeared to be marijuana. When asked what it was, the appellant responded that it was lettuce from a hamburger that he had just eaten. The "green leafy substance" was not preserved because the officer "didn't want to stick his hand [in the appellant's mouth]." The court of appeals ruled that the evidence was insufficient to establish that the substance was indeed marijuana and that it had been destroyed.

Trevino v. State, (Tex. App. Corpus Christi-Edinburg, May 7, 2015): Appellant was convicted of unlawful possession of a firearm by a felon and, after enhancement, was sentenced to 35 years in prison. The indictment alleged that he "intentionally or knowingly possess a firearm before the fifth anniversary of the defendant's release from supervision under parole following conviction…." Appellant had been sentenced on an earlier felony for which he received a 13-year sentence. He was released after good time credit. He had served the full sentence. He was never put on parole for this offense. Because nature of the release is an element to be proven by the statement a material variance existed between the indictment and the evidence. The court of appeals reversed the conviction.

Drake v. State, ---S.W.3d---, (Tex. App. Houston May 5, 2015): Following a conviction for sexual performance by a child younger than 14, the court of appeals reversed the conviction and remanded for a new trial because the trial judge's actions and remarks during jury selection constituted fundamental error that prevented a fair and impartial trial.

The appellant had videotaped a sexual assault of a 14-month old female toddler on her cellphone. During voir dire, the judge made comments directly to potential jurors that reasonably chilled candid and open responses from veniremen. The judge had an exchange with a juror who stated that, based upon his religious beliefs as a Jehovah's witness, he would not look at any child pornography and that he would close his eyes. The judge stated:

> *But if you believe that a crime was committed and a child was hurt as a consequence, that child needs 12 people who have got it in them to come in here and look at the evidence and do what—if you believe in God, God wants you to protect the children. And if this happened, then there is a child who needs 12 adults to be big enough and strong enough to watch what they had to go through. So if that kid had to go through that, then adults can watch a film.*
>
> *So if it grosses you out, then you can take it out on the person in punishment because it can't possibly gross you out more than it grossed out that child. So that's what my God tells me.*
>
> *So you want to find out what I will do? You will find out what I will do. If you get on this jury and I order you to look at something, you will get yourself locked up. So you want to find out what my God will tell me to do? Let's test it, Buddy. Let's test it.*
>
> *We have Jehovah's witnesses all the time. But you know what? If you get picked on this jury, you get picked on this jury, and Jehovah can visit you in the jail.*

The judge then ordered the juror taken into custody. She then stated:

> *I know it seems like crazy, but what we don't want to do is, what we hate to do is when we bring this many people in and it wasn't enough and we have to start over again the next day with a whole other group of people. If we could let people go, we would let people go, but we are not.*

And I'm not playing, and I don't care if anybody likes it or not. That's what we have to do and we are going to do that to pick this jury.

While recognizing a trial judge's broad discretion over voir dire, the court of appeals noted the trial judge's remarks "undoubtedly influenced the jury's opinion about the case before it even began."

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