



Between the Lines

American Prosecutors Research Institute

The Research and Development
Division of NDAA

UPCOMING EVENTS

The Lifesavers 2007 Conference

March 25–27, 2007
Hilton Chicago in
Chicago, Illinois
www.lifesaversconference.org/

Lethal Weapon: DUI Homicide

April 16–20, 2007
NDAA's National Advocacy
Center, Columbia, SC
www.ndaa.org/education/

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Serious Facts Require Serious Charges: Combating Habitual DWI Offenders Who Kill

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The proper charge for an intoxicated person behind the wheel of a motor vehicle that kills another person is usually some form of legislatively created statute increasing the range of punishment from a misdemeanor to a felony. There are instances, however, where this legislatively created statute may not fit the facts that constitute the crime. One such serious factual scenario is when a habitual DWI offender continues to drive and ultimately takes the life or lives of an innocent victim(s). Prosecuting these offenders under the "Felony Murder" statute may be one method available to make the punishment more appropriate for the facts of the case. This *Between the Lines* article will be followed by an in-depth factual and legal overview of these theories in an upcoming edition of *The Prosecutor* magazine (the bi-monthly publication of the National District Attorneys Association).

Consider the case of Mark Lomax, who had two previous convictions for Driving While Intoxicated, when he took the life of six-year-old Alexea Castillo on March 23, 2002, on a busy Harris County (Texas) road. Harris County encompasses most of the City of Houston, the fourth largest city in the nation. Lomax was driving recklessly on a state highway while under the influence of alcohol. After the crash, his blood alcohol level was tested at almost three times the 0.08 standard in existence at the time. Lomax fled from the hospital that obtained his blood sample. Castillo died in her mother's arms. Existing legislation provided that the punishment range for a person under these facts was from two to 20 years in prison under the Intoxication Manslaughter statute. This range of punishment did not seem to fit the facts of the crime. A jury ultimately convicted Lomax of Felony Murder and assessed his punishment at 55 years in prison.

When deciding how to address the punishment issue, the first question was whether or not the offense of Felony Murder would apply. The State of Texas has a broadly written statute that covers the offense of Felony Murder. The statute essentially provides that a person commits the offense of Felony Murder if that person commits any felony (other than Manslaughter) and during the commission of that felony, a reckless or reckless acts are committed resulting in the death of another person. A person's third

DWI in Texas is classified as a felony. Research into similar cases around the country was helpful. Although Lomax would ultimately be the first DWI defendant convicted by a Texas jury of Felony Murder, prosecutors in a handful of other states had filed Felony Murder on repeat DWI offenders that took the life of another individual. The basic difference was that in those states, the legislature had designated repeat DWI offenses as inherently dangerous crimes.

Thus, there are one of two general statutes covering conduct under this factual scenario: general statutes like the one in Texas, or enabling statutes. If a state statute lists inherently dangerous felonies and repeat DWI offenders are not listed, this charge will most likely not be legally appropriate. If a state Felony Murder statute does not name inherently dangerous felonies, but is a general statute as in Texas, the charge of Felony Murder will most likely be available as a consideration. Additionally, Texas caselaw has a long and favorable history addressing the lack of a mental state for Felony Murder offenses. Under this first consideration, the general rule seems to be that unless your jurisdiction's statute or caselaw specifically prohibits the use of Felony Murder in this scenario, this charging option should be available for use.

The second question was whether there was a valid reason under the punishment range to charge the defendant with Felony Murder rather than indicting him under the usual Intoxication Manslaughter statutory scheme. A second case prosecuted after Lomax demonstrates this point. Jake Strickland, like Lomax, had two prior DWI convictions when he decided to drive while intoxicated in Tarrant County, Texas, on December 21, 2003. As a result of his conduct, Strickland took the lives of Brent and Julie Jones, proud parents of newborn twins who were about to celebrate their first Christmas together as a family.

Richard Alpert, assistant criminal district attorney, Fort Worth, Texas, has a long and dedicated career combating DWI in Texas, and prosecuted the Strickland case. Alpert, concerned that Strickland would face only a maximum sentence of 20 years in prison with no guarantee of stacked or cumulated sentences if convicted of Intoxication Manslaughter, decided to seek an indictment using the Lomax Felony Murder theory. Whereas the punishment range for

Intoxication Manslaughter in Texas is two to 20 years in prison, the punishment range for Felony Murder is from five years to life in prison. The prime consideration in this case—the horrific fact situation—mandated a harsher punishment than what would have been the maximum sentence under the usual charging scheme.

Alpert presented the facts of his case to a grand jury and obtained an indictment for Felony Murder. At trial, the defense repeatedly reminded the jury that the maximum punishment range for Intoxication Manslaughter was 20 years in prison. The jury convicted Strickland of Felony Murder and assessed his punishment at 35 years in prison, thereby rejecting the defense argument that Strickland was charged with the “wrong offense.” In fact, Strickland’s punishment was 15 years greater than what he could have received had he been charged with the “correct offense.”

Several other habitual DWI offenders in Texas have subsequently been charged under the Lomax Felony Murder theory. Every one of them has received a sentence greater than 20 years in prison.

This underscores the point that the facts of the case should have additional aggravating circumstances so as to justify a more serious charge. That is not to say that other traffic deaths involving alcohol are not severe. Individuals who are not repeat DWI offenders will commit the majority of the alcohol-involved traffic fatalities. The normal statutory charging scheme will adequately punish those offenders. The point is that for a more serious charge to be considered, there should be additional aggravating circumstances such as occurred in Lomax and Strickland.

The third, and important, question is whether or not other personnel involved in the process will support the conviction. The district attorney, Charles Rosenthal, Jr., has recognized that Harris County is one of the deadliest jurisdictions, if not the

deadliest, in the country for alcohol-related traffic fatalities. The mere filing of serious criminal charges in most jurisdictions prompts media attention. A crime involving a legal theory that has never been attempted before will likely attract serious media attention thereby mandating a conference with the district attorney and any other individuals who may become significantly involved in the case, such as appellate attorneys. In Lomax, the response of these individuals was simply that the legal theory was sound and the Felony Murder approach sends a strong message to repeat DWI offenders in this county that offenders meeting the aggravating circumstance requirement will be labeled as murderers and sent to prison for an extended period should they choose to drink, drive, and cause a crash resulting in a traffic fatality. At least three other district attorneys around the state have now used this theory to successfully prosecute similarly situated offenders. The intermediate appellate courts have considered the Lomax Felony Murder Theory and have upheld the convictions.

Simply stated, there are some DWI offenses resulting in fatalities that require extraordinary remedies. In states where statutory authorization or caselaw allow for its use, the Felony Murder Rule is an alternative tool in combating repeat DWI offenders. For those who continue to drink and drive and then kill, prosecuting under a murder theory removes them from the streets for the longest period of time possible. The message: repeat offenders who kill will receive justice.

¹ Warren Diepraam, assistant criminal district attorney, Harris County, Texas is responsible for the Lomax prosecution under the Felony Murder statute. In July 2006, Mr. Diepraam was the recipient of the first national Prosecutor of the Year Award, presented by the National Association of Prosecutor Coordinators in conjunction with the National Highway Traffic Safety Administration in recognition of his many efforts to both prosecute and prevent impaired driving cases.

TSRP UPDATE

Traffic Safety Resource Prosecutors facilitate a coordinated, multidisciplinary approach to the prosecution of impaired driving and other traffic crimes.

A Traffic Safety Resource Prosecutor (TSRP) is generally a current or former prosecutor who provides training, education and technical support to prosecutors and law enforcement agencies throughout their state. Traffic crimes include but are not limited to: alcohol and/or drug impaired driving, vehicular homicide, and vehicular assault. Each TSRP must assess the needs and demands unique to his or her own state and work in conjunction with many agencies to meet these needs. NHTSA, law enforcement agencies, crime laboratories (including forensic toxicologists), medical examiners, local media, governor’s highway traffic safety offices (GHTSO), and victim advocate groups should all be utilized to facilitate services to all prosecutors and law enforcement.

As of October 2006, TSRPs have been hired in 29 states and efforts are under way to establish several more within the next year. A current list of all state TSRPs may be located at

http://www.ndaa.org/apri/programs/traffic/legal_issues_resources.html. In August, the NTLC, with assistance from the New York Prosecutors Training Institute (NYTPI), held a TSRP workshop at NYTPI’s offices in Albany, New York. This workshop, attended by 23 TSRPs from across the country, provided the opportunity to meet face-to-face and exchange information and materials. This meeting also served as the impetus for the development of a TSRP Manual by the National Traffic Law Center in conjunction with the National Highway Traffic Safety Administration. The manual will provide TSRPs with important information regarding networking, training programs and materials and other available resources to facilitate their working relationships with prosecutors, law enforcement, victim advocate groups and other agencies.

Finally, on behalf of the National Traffic Law Center, we would like to take this opportunity to thank Kimberly Overton, North Carolina’s TSRP, for her dedication, commitment and exceptional work as the NHTSA Prosecutor Fellow for 2005 and 2006. Her successor is expected to be named by early November. We will provide updated information in our next issue.

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