THE TEXAS PROSECUTOR

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"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Finally, justice for Ginger

The absolutely amazing story of how Fort Worth detectives cracked a cold case and prosecutors secured a capital murder conviction against the perpetrator—almost three decades after the crime

Criminal prosecution, as any assistant district attorney will tell you, is often a grueling, thankless job. We work long hours for relatively low pay and rarely receive accolades or public acknowledgment. But at the same time there are important cases in the career of a prosecutor that speak to the resolve and purpose at the core of our beings. These are the moments when you remember why you wanted to prosecute in the first place.

By Jim Hudson, Lisa Callaghan, and Anna Summersett
Assistant Criminal District Attorneys in Tarrant County

For us, one of those moments was September 21, 2012. It was on that day that a Tarrant County jury found Ryland Shane Absalon guilty of the capital murder of Ginger Hayden.

It was a long time coming—28 years. Ginger was murdered in 1984, and it had taken nearly three decades of police investigation and perseverance to catch her killer. In doing so, law enforcement was able to finally give some measure of closure to Ginger's mother, Sharon Hayden, who had carried the torch for her daughter through the long years after the police investigation had gone cold, fighting her own deteriorating health and advancing age. She wanted to stay alive long enough to see Ginger's murderer brought to justice.

The investigation lasted so long that it became part of the local lore of Fort Worth. It spanned entire careers at the Fort Worth Police Department (FWPD) and Tarrant County Criminal District Attorney's Office. It brought together two different generations of police officers, prosecutors, and forensic technologies. Investigators and support personnel would come into the investigation, work on it for years, then retire and be replaced with another, who would pick up where his predecessors had left off. This went on for decades. Meanwhile, forensic technologies were catching up and would ultimately break the case open.

The death of Ginger Hayden

The sad tale of Ginger's murder began with the anguished screams of her mother upon finding her daughter's body and ended 28 years later with her mother's cries of relief upon hearing a jury's guilty verdict at Absalon's trial. On September 5,

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Thanks again to our Founding Fellows

By Jennifer Vitera
TDCAF Development Director in Austin

We are so glad we had a chance to honor the Founding Fellows of the Texas Prosecutors Society at the cocktail reception on December 5. For those of you who could not join us this year, we will send your sterling silver, custom-designed lapel pendant in the mail. (See a photo of the pendant at right.) Thank you for your leadership and support of the Foundation. As you know, proceeds will go toward establishing a permanent endowment for the Foundation. Fifty new members will be invited into the Texas Prosecutors Society in 2013, so stay tuned for who will join in the new year.

How did the Foundation help this year?

2012 was a very busy and exciting year for the Foundation. With your help and the generosity of our fellow Texans, the Foundation has accomplished the following in 2012:

- we raised more than $145,000 in support of the Foundation;
- we raised $225,000 in pledges and $80,000 was paid on pledges in support of the endowment through the generous donations from our Founding Fellows of the Texas Prosecutors Society. This investment account will ensure long-term financial support for the Foundation and TDCAA;
- in cooperation with the Texas Department of Transportation (TxDOT), Anheuser-Busch Companies, Inc., and TDCAA, the Foundation assisted in funding the 2012 DWI Summit entitled Guarding America's Roadways. Thanks to Smart Start Inc., a $10,000 sponsor, and LifeSafer, a $1,000 sponsor;
- with the support of the Foundation, TDCAA hosted a three-day seminar in San Antonio targeting the unique role of prosecutors' office personnel in combating domestic violence. TDCAF provided $12,500 in funding for this project;
- IBC Bank and TDCAF donated $6,000 for renowned collision reconstructionist John Kwasnoski to speak at TDCAA's Advanced Trial Advocacy Course in Waco, as well as for copies of his *Little Red Book* to be distributed to attendees;
- we assisted with underwriting the cost of handing out helpful books at two Prosecutor Trial Skills Courses; and
- we defrayed expenses for the Train the Trainer seminar and the Advanced Trial Advocacy Course, thus freeing up grant funds to increase reimbursement to prosecutors and staff for travel and hotel expenses at our seminars.

And the winner is …

It was another close race this year between Investigator, Key Personnel, and Victim Assistance Coordinator membership groups in the Annual Campaign Membership Challenge. Our Investigators gave close to $1,000 in donations to this year's campaign, thus sealing the victory! Congratulations on a job well done; they will receive a happy hour at Investigator School in February as a thank-you.

Thank you, Dan!

The TDCAF Board of Directors and TDCAA staff would like to thank our 2011–12 Board Chairman, **Dan Boulware**, for his outstanding leadership to the Foundation during his two-year term as board chairman. Dan will of course stay on the Foundation board, and we hope to have him back on the executive committee in the near future.

We had so much success in such a short period of time under Dan's leadership: Just to name a few, we formed a separate board for the Foundation and established a hugely successful endowment that will support the TDCAF and TDCAA well into our future. Now we welcome **Bert Graham** as our 2013–14 TDCAF Board Chairman and look forward to much success in the upcoming years.

2013–14 TDCAF Executive Committee Slate
Board Chairman: Bert Graham
President: Judge Susan Reed
President-Elect: Bobby Bland

Support your Foundation in 2013

As we look toward next year, there

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TDCAF News

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are many more opportunities for the Foundation to enrich the training and educational resources for TDCAA members through publications, seminars, and more.

The Foundation is seeking funds in support of a new publication, the *Elder Abuse Investigation and Prosecution Manual*.The publication will be marketed to prosecutors and law enforcement. It's aimed at the people who work on criminal cases with elderly victims, rather than elder-care advocacy groups. If you can think of anyone (a private donor, foundation, or corporation) that might have an interest in supporting this publication, please let me know. The total funding needed is $36,685.

We ask that you please think about organizations and people in your community who might have an interest in partnering with the Foundation. Or visit our website at www.tdcaf.org and make your donation to the 2013 Annual Campaign before we kick off this year's campaign in April. ❇

The President's Column

A fresh start to the new year

I want to thank the members and leadership of TDCAA for the honor and privilege to serve as TDCAA President. Believe me, I recognize this new obligation as a serious and important one. The mission of TDCAA is "to promote the improvement of prosecution and government representation in the State of Texas, by providing educational and technical assistance to prosecutors and their staffs, by providing educational and technical assistance to the law enforcement community, and by serving as a legislative resource in criminal law and government representation matters." That's more than a mouthful, and I'm pretty sure our mission statement contains more words than the oath of office I recited when I became an elected prosecutor. With its wealth of programs and services, including the quality training and publications, TDCAA is the foremost support resource for Texas prosecutors. Thanks in large part to the stewardship of past president Lee Hon, I take leadership of an organization that is at the top of its game, and it is my sincere hope and mission to maintain its excellent reputation.

By David Escamilla
County Attorney in Travis County

But the true value of the organization lies in it members. With current membership exceeding 5,800, TDCAA is the largest statewide association of prosecutors in the nation. I first became a member of TDCAA over 27 years ago, and soon thereafter expanded my involvement by serving as a conference speaker, then as a member and subsequent chairperson of the Civil Committee. After taking office as Travis County Attorney in 2003, I continued my TDCAA relationship as a board member, officer, and now, president.

My longtime affiliation with TDCAA is in no way unique. Over the years I have come to know and work with many members—electeds, prosecutors, civil lawyers, investigators, and professional staff—with longer and deeper ties to the organization. TDCAA's ability to continue to serve and benefit its membership relies more on the involvement of its diverse membership than any other factor. I've been involved with several other established membership organizations and, due to the long tenure of the other volunteers and/or board members, sometimes found it intimidating to presume that I could contribute to the success of that organization. This is not the case with TDCAA. For any of you considering increasing your involvement, you will find open arms. Whether contributing to its website discussions, speaking at a seminar, or even serving on one of our many governance committees, TDCAA is dependent upon the experience and expertise of our membership to sustain its high

standard of service to our profession. I'm still new to the job, so I'm particularly open to new ideas about how TDCAA can better meet your needs. Go ahead and hold me to it—I'm anxious to hear from you.

TDCAA remains an efficient and financially stable organization. This past year we were able to purchase 505 West 12th St., the same building in which we have leased office space for the past several years. For those of us that were involved in the sale of our previous building in 2007 and nervously wondered if we would ever find our next permanent home, the extended wait was worth it. With our space needs for the immediate and foreseeable future now secured, we can resume our focus on serving our members.

Our affiliate organization, the Texas District and County Attorneys Foundation (TDCAF), continues to grow and enhance its program to support TDCAA. Thanks to the efforts of its board of directors and development director Jennifer Vitera, TDCAF has raised over $145,000 (in 2012) and $2,166,000 (since its inception) to support the mission of TDCAA. Among its accomplishments, TDCAF has underwritten the costs of an on-staff victim services director and senior appellate attorney for TDCAA. Please consider supporting the work of TDCAF by participating with your dollars in the 2013 Annual Campaign.

But the path ahead is not without challenges. While Texas has been spared the more extreme ravages of our nation's stressed economy, federal and state grant funding has diminished and local governments have faced the dilemma of doing more with less. And prosecutors' offices have not escaped the financial downturn. Many offices have endured staff layoffs and hiring freezes. My office recently lost two attorneys in our family violence division due to lost grant funding and, together with the district attorney, successfully petitioned the commissioners court to continue the positions with county funding, at least for the remainder of this budget year. Other than an improved economy, our salvation might lie in working together to share and communicate our financial needs and concerns with legislators to avoid future cuts as well as identify alternative funding sources. TDCAA can help in this effort.

And while we're on the topic of the legislature and impending challenges, we have a very important issue before us. In some corners, we currently face accusations that Texas law provides inadequate oversight of Texas prosecutors resulting in increased instances of prosecutorial misconduct and wrongful convictions. Among the "fixes" suggested is ending our longstanding prosecutorial immunity. While others might have expected our association to respond with vivid denials and indignation, TDCAA instead welcomed the discussion. In late 2011, the board of directors created an ad hoc subcommittee to "study emerging issues in criminal justice and make recommendations for addressing them." The result was the publication of a report entitled "Setting the Record Straight on Prosecutorial Misconduct" that, in addition to finding that "claims of widespread prosecutorial misconduct are vastly overstated," provided several recommendations in which prosecutors and others in the criminal justice system can prevent future wrongful convictions.

If you haven't already, it is very important that you read this report. (You can find the download link on TDCAA's main web page at www.tdcaa.com.) As is the case with most public policy debates, it is imperative that the discussion is driven by facts instead of emotion. And as leaders in the criminal justice system, prosecutors must remain prepared to respond to questions about deficiencies in our system of justice, both real and imagined. This public debate will be continued in the upcoming session of the Texas Legislature, and we all have an obligation to ensure that any legislative response is deliberative and constructive. TDCAA has, and will continue to be, an integral participant in the discussion and will depend upon the expertise and support of its members to achieve justice for crime victims and society at large. It just seems that each successive legislative session is increasingly important to us. But don't be fooled to think that Executive Director Rob Kepple or Government Relations guru Shannon Edmonds alone can carry this load for us. They can help strategize and fashion our message but, let's face it, our legislators expect to hear that message from us. You can help by staying informed on the legislative issues that impact your work and collaborating with TDCAA to communicate your concerns and solutions to the legislature.

I hope that you agree with me on the importance of our profession. I didn't start my legal career with an

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ambition to become an elected prosecutor. In fact, my grand plan was to gain three years' experience as an assistant county attorney before moving on to bigger and better lawyer work. Fortunately for me, I discovered that there was hardly anything bigger and better than working in a prosecutor's office. And almost 28 years later, I still believe that to be true. Over the course of this year I expect to write about incidents and events that tend to challenge or confirm that belief. (I never said it was easy!) And I sincerely invite you to call me or search me out at the next TDCAA event. I would love to hear your story. ❇

Executive Director's Report

Welcome, newly elected prosecutors!

By Rob Kepple
TDCAA Executive Director in Austin

The 2012 election cycle brought plenty of changes to the profession of criminal prosecution. Texas is unique in that the state constitution devolves the potent power of criminal prosecution to 334 locally-elected county attorneys, district attorneys, and criminal district attorneys. Of that 334, it appears that we set a modern-day record: Counting those who were recently appointed in 2012 to take over for those retiring a little early, we have 70 newly-elected prosecutors who took the oath of office on January 1, 2013.

With district attorneys, county attorneys, and county attorneys with felony responsibility all up for re-election, we run the gamut when it comes to jurisdiction size. We welcome a new district attorney to the largest jurisdiction in Texas, **Mike Anderson**, who will take over in Harris County. (It tops out in the latest census at 4,092,459 citizens.) Our winner of the most modest jurisdiction, population-wise, to get a new prosecutor? Kenedy County, population 416, welcomes **Allison Strauss** as the new county attorney (though it was close, with **Kimberly Kreider-Dusek** serving the 707 citizens of McMullen County and **William Weidman** serving the 929 citizens of Roberts County).

Your challenge, if you are a seasoned prosecutor, is to welcome the new people into the profession and give them a hand. The learning curve can be steep, and as you know from experience, there are always some surprises waiting for the those walking into a new office for the first time. We had a great showing at our Newly-Elected Boot Camp held in December in conjunction with the Elected Prosecutor Course, which should help, but a call or two from an experienced neighbor in the next couple months would probably be welcome.

TDCAA will continue to be there to help all the new members adjust. For those who came to Boot Camp and for the new prosecutors who missed that training, we will be having another session just for you in February. Keep an eye out for your invitation.

Finally, who are the new folks? Check out the list on page 9 of this journal. And if we missed anyone, which always seems to be the case in such a big membership, please let us know! The new edition of our *Directory of Texas Prosecutors and Staff* is being updated as we speak, and we want to be sure to get everyone before we go to print this spring.

A law review author you might actually read

Our keynote speaker at the Elected Prosecutor Conference was a law professor. Now the prosecutors who attended the conference were polite; when they saw Professor **Alafair Burke** speaking on the topic "The Ethical—Yet Still Human—Prosecutor," they kept their groans to themselves. I know this because after the session many told me that they dreaded what sounded like a professorial diatribe, only to find out that it was one of the best presentations they had heard in a long time. And they insisted that we bring Professor Burke back to Texas soon, which we hope to do.

If you have read the report, "Setting the Record Straight on Prosecutorial Misconduct," (the front page of the TDCAA website, www.tdcaa.com, has a link), then you are already acquainted with some of Professor Burke's work. Burke, a former prosecutor and now a law professor at Hofstra University, has been taking up for prosecutors in the current climate of prosecutor-bashing. Indeed, she has been riding the talk-show circuit as the opposition to those who condemn prosecutors as inherently unethical and dishonest lawyers who seek to win at all costs.

Burke's theory: What if prosecutors were human? Humans approach every decision they make with a point of view and a set of biases. People tend to look for confirmation that an earlier decision was correct, and everyone can find themselves discounting information that tends to be contrary to their beliefs. Her theory is simple: If we approach our work knowing that these issues of "cognitive bias" can indeed impact us, like they do everyone, we can do a better job as a minister of justice. For more on her concept, read her law review article on the subject at http://scholarship.law.wm.edu/wmlr/vol47/iss5/3.

But even Professor Burke acknowledged that few people rarely get all the way through a law review article. Wanting to have a readership, she hedged her bets and also became quite a novelist. She is the author of two series of crime novels, one about New York Police Department detective Ellie Hatcher and the other about Portland, Oregon, prosecutor Samantha Kincaid. If you'd like to read something she has written that doesn't sound like a law review article, head over to http://alafairburke.com. And yes, Dave Robicheaux fans, she is related to James Lee Burke.

The independent—and courageous—prosecutor

Every now and again we recognize a prosecutor who has taken a stand. And I am not talking about taking a stand on any particular public policy issue, crime, or punishment. I am talking about taking a stand for the rule of law. This often comes up when there is friction between a prosecutor and a judge as to the proper course of action or who has the duty to make a particular decision. We know that there is friction when an action is entitled: "*State ex rel. [insert prosecutor name here] v. [insert judge name here]*".

Some of these have been big cases: *State ex rel. Turner v. McDonald*, 676 S.W.2d 371 (protecting the State's right to a jury in felony cases); *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1 (protecting an elected prosecutor from disqualification due to the disqualification of an assistant prosecutor); and *State ex rel. Curry v. Carr*, 847 S.W.2d 561 (protecting the State's right to jury in misdemeanor cases).

I know from experience that prosecutors don't take mandamus actions lightly, but there are times when the issue is important and there is no other way to do the job *but* to stake out a position and fight for it. So you should probably take a look at the recent *State ex rel. Tharp v. Waldrip*, No. AP-76,916 (Tex. Crim. App. Nov. 14, 2012). In this case the Comal County Criminal District Attorney **Jennifer Tharp** contested her district judge's attempt to discharge a jury and proceed to punishment by the court when the defendant pled guilty to a jury. At issue in this felony DWI case was the State's perfectly good and proper request for a deadly weapon finding, which the judge had signaled in pretrial procedures he was not inclined to enter. Quite simply, that wasn't the court's issue to decide under the law, and the prosecutor decided to stand up for the rule of law in this case.

Even more recently, the Walker County Criminal District Attorney **David Weeks** had to call one big time-out during a capital murder trial to challenge a clearly erroneous jury charge the court had drafted. This was certainly an extreme remedy, but the danger to a just verdict under the law was great and there would be no do-overs for the State. Take a look at *State ex rel. Weeks v. Keeling*, No. 10-12-0043-CR (Tex. App.—Waco, Dec. 12, 2012). In a must-read opin-

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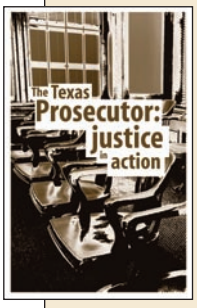
A note about death notices

The Texas Prosecutor journal accepts information to publish notices of the deaths of current, former, and retired TDCAA members on a regular basis. Such notices must come from a Texas prosecutor's office, should be fewer than 500 words, can include a photo, and should be emailed to the editor at sarah.wolf@tdcaa.com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❇

Prosecutor booklets available for members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field.



Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at sarah.wolf @tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

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ion offering some insights into the limitations of a mandamus action, the Tenth Court of Appeals ultimately decided that the formulation of the jury charge was not strictly a ministerial action, such that a mandamus would be an available remedy for a clearly incorrect charge. However, David didn't come away with nothing: While refusing to intervene, the court dropped a footnote voicing the "strong" opinion that the trial court was wrong in how it had formulated the charge. As of press time, the Court of Criminal Appeals has accepted David's appeal of the lower court's denial of the mandamus. Keep an eye on TDCAA's weekly case summaries for the CCA's final resolution of the matter.

Of course it is always easy to go along and get along, but sometimes doing the job means standing up for what you believe the law to be. So thanks to Jennifer and David for your willingness to exercise your independence, and congratulations on helping to write some good law.

Guarding America's Roadways

Congratulations to **W. Clay Abbott**, our DWI Resource Prosecutor, on his live, onscreen performance at the November 15 DWI Summit entitled Guarding America's Roadways. This show was the third in a series of satellite broadcasts from the Anheuser-Busch television studios in St. Louis to A-B distributors all over the country. This year, distributors in 14 states participated in the four-hour training event, which featured caselaw updates, the latest on blood draws, and a great presentation on crash scene preservation and investigation.

I want to thank **Sarah Wolf**, TDCAA Communications Director, for her hard work behind the scenes to make the cast look so dang good and sound so dang smart; **Kaylene Braden**, TDCAA Receptionist, for keeping Clay in the right place at the right time; and **Jennifer Vitera**, our Texas District and County Attorneys Foundation Development Director, for working so hard to develop the funding sources to make the DWI Summit a success. All totaled, over 1,400 people from every corner of the country participated in the training. Well done.

Marijwhatnow?

That is the title of an article floating around the Internet that purports to give legal advice to folks in Washington State in the wake of the legalization of marijuana. You can find this blogger's post at http://spdblotter.seattle.gov/2012/11/09/marijwhatnow-a-guide-to-legal-marijuana-use-in-seattle.

Actually, it is pretty good reading. The blogger opines that a pot-smoker probably cannot be a cop, and that the driving while intoxicated (DWI) laws continue to apply to those impaired because of marijuana. He does raise a good question about K-9 units and probable cause to search based on a dog sniff—does the dog "hit" on all drugs, or can you tell the dog, "Not the pot, Duke—only the coke"?

My favorite Q and A from the article:

> **Question**: "Seattle police seized a bunch of my marijuana before I-502 passed. Can I have it back?"
> **Answer**: "No."

Well, I guess it doesn't hurt to ask, does it? ❇

List of new elected Texas prosecutors

(listed alphabetically by county)
Timothy Jay Mason, Andrews County & District Attorney
Art Bauereiss, Angelina District Attorney
Jana Lindig, Bandera County Attorney
Jose L. Aliseda, Jr., Bee County District Attorney
James Nichols, Bell County Attorney
David Allen Hall, Blanco County Attorney
Jarvis Parsons, Brazos County District Attorney
Luis V. Saenz, Cameron County District Attorney
Shalyn Leigh Hamlin, Castro County District Attorney
Rachel L. Patton, Cherokee County District Attorney
Kelley Denney Peacock, Cherokee County Attorney
Jay E. Johannes, Colorado County District Attorney
Edmund J. Zielinski, Cooke County Attorney
Dustin Hugh Boyd, Coryell County District Attorney
Michael S. Munk, Dawson County District Attorney
Michael Scott Layh, Ector County Attorney
Michael Alan Nash, Erath County District Attorney
Carol Eugene Stump, Franklin County Attorney
Christopher G. Nevins, Gillespie County Attorney
John Franklin McDonough, Gray County District Attorney
David L. Wilborn, Guadalupe County Attorney
Judge Mike Anderson, Harris County District Attorney
Robert L. Elliott, III, Hartley County Attorney
Mark F. Pratt, Hill County District Attorney
Richard David Holmes, Hill County Attorney
Christopher E. Dennis, Hockley County District Attorney
Anna Hord, Hockley County Attorney
Lori J. Kaspar, Hood County Attorney
Will Wylie Ramsay, Hopkins County District Attorney
Michael Brad Dixon, Jack County Attorney
Teresa Todd, Jeff Davis County Attorney
Carlos Omar Garcia, Jim Wells County District Attorney
Herbert B. Hancock, Karnes County Attorney
Allison Strauss, Kenedy County Attorney
Billy Lanoy Ballard, Kent County Attorney
Scott F. Monroe, Kerr County District Attorney
Scott A. Say, Lamb County District Attorney
Logan Edward Pickett, Liberty County District Attorney
Wiley B. "Sonny" McAfee, Llano County District Attorney
Angela Rene Smoak, Marion County District Attorney
Denise M. Fortenberry, Matagorda County Attorney
Kimberly Kreider-Dusek, McMullen County Attorney
Thomas Ross Roberson, Menard County Attorney
William W. Torrey, Milam County District Attorney
Claburn Vernon Riddle, Jr., Montague County Attorney
Marcella Paige Williams, Montague County District Attorney
J. D. Lambright, Montgomery County Attorney
Barrett Dye, Ochiltree County District Attorney
Arvel R. Ponton, III, Pecos County District Attorney
Charles Miller Elkins, Reagan County Attorney
Todd P. Steele, Refugio County Attorney
William Philip Weiman, Roberts County Attorney
William Coty Siegert, Robertson County District Attorney
Kenneth H. Slimp, Runnels County Attorney
Randall Robinson, San Saba County Attorney
Kenneth B. Florence, Shelby County District Attorney
Andrew Weldon Lucas, Somervell County Attorney
Omar Escobar, Jr., Starr County District Attorney
Kitha Jo'Shae Ferguson-Worley, Terry County District Attorney
Allison Palmer, Tom Green County District Attorney
Bennie L. Schiro, Trinity County District Attorney
Julie Renken, Washington County District Attorney
Renee Ann Mueller, Washington County Attorney
Marco Montemayor, Webb County Attorney
Ross M. Kurtz, Wharton County District Attorney
Leslie A. Standerfer, Wheeler County Attorney
Jana Duty, Williamson County District Attorney
Doyle E. Hobbs, Jr., Williamson County Attorney
Daynah Jolene Fallwell, Wilson County Attorney
Dee Hudson Peavy, Young County District Attorney

Editor's note: With so many new electeds, we're sure we've missed a few by accident. Please contact Lara Brumen at 512/474-2436 or lara.skidmore@tdcaa.com to make any additions or corrections. ❇

McQuarrie jurors: "Who needs sworn testimony when we've got Google?"

By Emily Johnson-Liu
Assistant Criminal District Attorney in Collin County

If you really stopped to think about it, there are a lot of ways that jurors could jeopardize your next jury trial. They could visit the scene of the crime, flip a coin to decide the case, hold it against the defendant that he did not testify, consider how parole would apply in the defendant's case, take a bribe, get their best friend's input on how to decide the case, or read a newspaper article about the case and discover that the defendant's confession was thrown out. The Internet has made some juror misconduct a little easier. With the information many counties put online, jurors can find out if the defendant is currently in the county jail or has prior arrests, or they can bring up the street view of the crime scene on Google without ever leaving the jury room. Or if they were in conflict about some scientific, medical, technical, or even legal question, instead of a trip to the library, they may simply search for the answer from the smartphone in their pocket.

But even though jurors are the ones who know best if they (or one among them) committed this kind of misconduct, a centuries-old rule, Federal Rule of Evidence 606(b), prevents jurors from testifying about some of the misconduct that goes on during deliberation. As a general rule, once a verdict has been rendered, jurors are prohibited from testifying about what happened or what was said during their deliberations. The rule is there to prevent harassment of jurors by a party bent on finding any way he can to impeach the verdict. It encourages jurors to have full and frank discussions with each other, free from the worry that anything they say will later be publically aired and criticized after the trial. Under the rule, the trial participants and the community have a greater sense of finality that the verdict will not be endlessly questioned. It ensures that jurors with second thoughts after the verdict will not be given the power to erase the verdict based solely on their say-so. Also, it preserves confidence in our jury system that would likely be eroded if we were to know about every little misstep jurors make.

All of that said, some misconduct may be widespread and serious enough to justify an exception to the general rule. And in *McQuarrie v. State*, the Court of Criminal Appeals found that a juror who Googled information about the trial and then shared her findings with other jurors fell within the exception, rather than the general rule.[1]

The facts of *McQuarrie*

Thomas McQuarrie was accused of raping a female friend when she spent the night at his home. McQuarrie and a male friend were drinking and using cocaine. McQuarrie had given the victim a drink of water, and after she drank it, she did not feel well and went to bed. When she awoke the next morning, her shorts and underclothes were pushed to the side, and she felt that things just were not right. She was not sure she had been sexually assaulted but eventually reported it to police. McQuarrie's DNA was found on her clothes and his own admission confirmed that the two had had intercourse.[2] McQuarrie claimed it was consensual. Although the victim was a lesbian and had been in a relationship with the same woman for four years, McQuarrie claimed that she had been wanting to experiment with him. A police officer testified that it was possible that the victim had been drugged and that such drugs leave the blood quickly, making them difficult to detect.

After the first day of deliberation, the jury sent a note that it was split 9–3 in favor of guilt. They reached a verdict the next day, but in a motion for new trial, McQuarrie produced evidence from two jurors who said that during the overnight recess in deliberations, a third juror had gone on the Internet to research the effects of date-rape drugs and reported what she found to the other jurors. The jurors stated that her findings persuaded two of the jurors to change their votes to guilty. The trial judge excluded the jurors' testimony, following the general rule banning juror testimony about their own deliberations, and the court of appeals agreed.

Broader test

When the Court of Criminal Appeals decided *McQuarrie*, it ruled by a vote of 5 to 4 that jurors can testify (or write an affidavit) after their verdict about a juror who conducts research and shares that information during deliberation.[3] The decision widened the exception to the rule, allowing jurors to testify in more circumstances than that permitted by several courts of appeals. Those courts and the dissenters on the Court of Criminal Appeals were persuaded that the Texas version of the exceptions was narrower than the exceptions used by the federal courts.[4] Under Federal Rule of Evidence 606(b), jurors are generally prohibited from impeaching their own verdicts except that jurors can testify about:

1) whether extraneous prejudicial information was improperly brought to the jury's attention, or

2) whether any outside influence was improperly brought to bear upon any juror.[5]

The Texas Rule adopted the second exception but not the first.[6] So when the Court of Criminal Appeals decided whether a juror's Googling and sharing constituted an "outside influence," it had to consider if the lack of "extraneous prejudicial information" in the Texas rule was meant to narrow the exception or simply streamline two similar concepts. Judge Cochran, in dissent, outlined the distinction between the two federal exceptions, where "outside influence" was understood as something akin to jury tampering (like bribery, threats, or a communication aimed at influencing the verdict) and "extraneous prejudicial information," was information outside of the evidence presented at trial (like newspaper articles or television reports).[7] But the majority on the Court of Criminal Appeals found that the difference between the "outside influence" exception and the "extraneous prejudicial information" exception was not necessarily so stark. The court believed the plain language of "outside influence" was broad enough to include when a juror brings additional information not admitted at trial into deliberations. Under this interpretation, regardless whether the source of the extraneous information is Google or someone aiming to strong-arm a verdict, jurors can testify about either "outside influence" on their deliberations.

The upshot of this decision is that there are now potentially more circumstances where jurors will be permitted to testify. The majority does not fear their decision will open the floodgates to post-trial juror harassment, however, because the federal system appears to be functioning well enough with both the "extraneous information" and "outside influence" exceptions.

So what can and can't jurors testify about now?

Under the court's interpretation of "outside influence," jurors can testify about "something originating from a source outside of the jury room and other than from the jurors themselves." The court's interpretation talks about things that occur "outside" of the jury room, and in the *McQuarrie* case, the juror actually conducted the Internet research at home on an overnight break. But given the portability of devices that can access the Internet these days, it is only a matter of time before a juror searches for information about a case while still within the jury room itself. The court clearly stated that information originating from a source on the Internet was a source other than the jurors themselves, so it is not much of a stretch to conclude that Googling in the jury room will also be considered an "outside influence" that jurors could testify about.

Jurors should not, however, be allowed to testify about anything that was part of a juror's personal knowledge and experience *before the trial*. So if, for example, a juror on McQuarrie's jury already knew about the effects of date-rape drugs because of a medical background and shared this information with the other jurors during deliberation, jurors would still be prohibited from testifying about this. Subjecting the jury to questions about their own knowledge and experience delves too much into actual deliberations, and because jurors bring this information with them to the case, the parties have the opportunity to avoid confrontation concerns by asking about juror experiences during voir dire.

One consequence of allowing more inquiries into deliberations is that it is likely to make things messier when it comes to how much a juror can say. Under Rule of Evidence 606(b), even when there is an outside influence, this does not make anything and everything that occurred during deliberations fair game for testimony. One interpretation of the rule is that the exception

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for outside influence allows jurors to testify only about "whether" an outside influence was improperly brought to bear upon a juror. Thereafter, the general rule still provides that jurors cannot testify to the effect or influence of anything on their verdict. So courts cannot delve into the effect an outside influence had on the jury but, confusingly, before there can be an outside influence to talk about, it must have been "brought to bear" upon a juror, i.e., it must have had some influence.

In the case of bribery or threats, the difference between the outside influence and the effect it might have had on the jury is easier to see. A juror can testify that someone offered a particular reward. Then there is the separate matter of whether that reward is likely to impact a juror's verdict. But where the outside influence is information, that is much harder to parse out. That difficulty is reflected in the court's opinion—which says that courts can "inquire as to whether jurors received such outside information and the impact it had on their verdict without delving into their actual deliberations." Easier said than done.

The court goes on to say that questions asked of jurors must be limited to the nature of the unauthorized information or communication, and then instead of assessing actual harm to that particular jury, courts will apply an objective test for harm: "whether there is a reasonable possibility that [the information] had a prejudicial effect on the 'hypothetical average juror.'"[8] So while it would likely be a first reaction for many prosecutors to want to probe the jurors about what role, if any, the Internet research (or other after-acquired information) played in their thoughts or their verdict, the court seems to say this part of deliberation is still off-limits. And the standard for harm is only a reasonable *possibility*—not probability—that the average juror would be prejudiced. Hopefully, the court means prejudice in the sense of affecting the verdict. Otherwise, if the bailiff tells the jury that the defendant has not taken a bath in several days and smells revolting up close, I suppose a court could order a new trial because such information would have a "prejudicial effect" on the average juror. But the prejudice that ought to control is whether the information is likely to have an effect on the verdict.

What now?

Preventing jurors from resorting to the Internet whenever they are in doubt, in conflict, or merely curious will not be an easy task. As one article about jurors who Google observed: "The deeply ingrained habit of … resolving even minor factual disputes by getting instant answers online makes it difficult to accept the prohibition on doing so when confronted with a truly important decision."[9] So jury instructions should address those concerns head-on. Many jurors do not understand what is wrong with conducting their own research and may not even realize that doing so violates their oath and the judge's instructions. In the *McQuarrie* case, jurors were instructed multiple times that the evidence they were to consider would include only testimony heard in court and exhibits admitted during the trial, but not all jurors realize that researching information violates this rule not to look at outside "evidence." Juror instructions can do more to educate jurors about the reasons why Googling to supplement their knowledge base is incompatible with their role as a juror. Here's an example:

> In our daily lives we may be used to routinely looking for information online, on Google, or on social media. In a trial it can be very tempting for jurors to do their own research or to look up a definition of a term to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should. The information you find may be inaccurate, out-of-date, or incomplete, or it may not apply to the case for another reason. The parties are entitled to have a trial based on evidence and information that they know about, and it is only fair that the parties have the opportunity to refute, explain, or correct any evidence that you consider. For these reasons, I specifically instruct that you must decide the case only on the evidence received here in court and on the law that I give you.[10]

More examples can be found at http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf and http://bit.ly/cb3y3a.

In addition to proposing jury instructions in an important trial or in a court in which you regularly appear, you might also consider addressing the issue in voir dire, particularly if you expect the jurors will be asked to resolve an issue that lends itself to a Google search. If you

know your opponent in a DWI trial has a reputation for attacking the reliability of the Intoxilyzer, and you have concerns that jurors will want outside help in resolving any uncertainty, ask the venire about their ability to refrain from looking for any information related to the trial. Even closing argument may not be too late to caution jurors that while more information may help them resolve difficult questions in their own lives, Google is no replacement for testimony brought and sworn to in open court. ❇

Endnotes

1 *McQuarrie v. State*, No. PD-0803-11, 2012 WL 4796001 (Tex. Crim. App. Oct. 10, 2012).

2 *McQuarrie v. State*, No. 13-09-00233-CR, 2011 WL 1442335, at *3 (Tex. App.—Corpus Christi Apr. 14, 2011, pet. granted).

3 *McQuarrie*, 2012 WL 4796001, at *8.

4 See *McQuarrie*, 2012 WL 4796001 (Keller, P.J., and Cochran, J., dissenting).

5 Fed. R. Evid. 606(b).

6 Tex. R. Evid. 606(b).

7 2012 WL 4796001, at *17 (Cochran, J., dissenting).

8 2012 WL 4796001, at *9.

9 Susan Macpherson & Beth Bonora, "The Wired Juror, Un-plugged," *Trial*, Nov. 2010, at 40, 42.

10 Adapted from proposed instructions in Thaddeus Hoffmeister, "Google, Gadgets, and Guilt: The Digital Age's Effect on Juries," 83 *University of Colorado Law Review* 409 (2012).

Double jeopardy: Unraveling a Gordian knot

A motley few are frustrated, flummoxed, or even flabbergasted when faced with a double jeopardy issue. To some, such an issue is nothing less than a Gordian knot of criminal law. Were we suspended in legend, such a problem would best be dealt with by cleaving it with Alexander the Great's sword. Indeed, even in our world, such action may be preferred by those facing recurring double jeopardy issues.

By John Stride
TDCAA Senior Appellate Attorney

Alas, working in the courtroom, we are not free to swing a sword and enjoy the expedient solution it brought to the enduring problem of unraveling a perplexing knot. Instead, our approach is more akin to that of a sailor toiling with a marlinspike to carefully pick through the coils of a tarred knot so as to release the interwoven cord and follow it to its slippery end. Generally though, even if some intellectual dexterity is required in reaching a result, most double jeopardy problems can be satisfactorily untangled without too much labor or injury.[1] This article attempts to makes some sense of these ropey issues.[2]

Genesis and scope of double jeopardy protection

In the United States, the Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The clause serves to protect individuals from 1) repeated prosecutions for the same offense after acquittal or conviction and 2) multiple punishments for the same offense.[3] The clause is enforceable against the states through the 14th Amendment.[4] Texas also has its own double jeopardy provision, which is largely interpreted in lock-step with the federal provision.[5] Nevertheless, double jeopardy provisions existed for hundreds of years before the creation of the North American variants grafted from the English common law and even prior to four of King Henry II's knights slaughtering Thomas Becket within the walls of Canterbury Cathedral in 1170, taking root at least by Greek and Roman times.[6]

As befitting such a highly prized traditional protection—and a select few other claims—a double jeopardy claim can be raised for the first time after conviction.[7] So just because the defense failed to preserve the issue at trial doesn't necessarily prevent an appellate court from addressing one on the merits post-conviction. But to do so, the appellate court must find that the undisputed facts show both that 1) a violation is clearly apparent on the face of the record, and 2) enforcement of the usual rules of procedural default would serve no legitimate interest.[8] Courts occasionally reach such claims.[9]

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Successive prosecutions

"One bite of the apple" is the general rule: Once a person has been acquitted or convicted of a specific crime, he cannot be tried a second time for that offense. A significant but rarely encountered exception to the ban on repeated prosecutions for the same offense exists for different sovereigns, e.g., state A and state B or state and federal systems.[10] The federal government and some states, however, have imposed restrictions on seeking further prosecutions on the same facts where one conviction has already been pursued by another jurisdiction.

Where a person faces re-prosecution after acquittal or conviction, the critical issue is whether the same offense is involved. Of course, *Blockburger* and its "same elements" analysis govern. The test is "whether each [statutory] provision requires proof of a fact which the other does not."[11] If both statutory provisions require proof of an element that the other provision does not, the two offenses are not the same. But, if only one offense requires proof of a fact that the other does not—i.e., the elements of a lesser-included offense are wholly subsumed within the greater offense—a conviction for both the greater offense and its lesser-included offense will usually violate double jeopardy.[12]

Lesser-included offenses are determined employing the "cognate pleadings" test.[13] Under this test, the elements *and the facts* alleged in the charging instrument are used to find any lesser-included offenses. This means that the elements of the lesser offense do not have to be pleaded in the greater offense if they can be deduced from the facts alleged.[14] So an offense is a lesser-included offense of another offense if the charging instrument of the greater offense "either: 1) alleges all of the elements of lesser included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all the elements of the lesser-included offense may be deduced."[15] For example:

- **No violation** when Offense 1 has elements A, B, C, and D and Offense 2 has elements A, B, C, and E.
- **Violation** when Offense 1 has elements A, B, C, and D and Offense 2 has elements A, B, and C.

A twist to the one-bite rule?

Over a century ago, the Supreme Court of the United States ruled that where a person is convicted of an offense but later a greater offense results from the same underlying act, double jeopardy will not prevent conviction of the greater offense. In *Diaz*, the defendant was convicted of assault and battery. A month later, the victim died from the injuries sustained. The defendant was charged and convicted of homicide. The High Court held that "the plea of former jeopardy disclosed no obstacle to the prosecution for homicide."[16] Does this case survive the *Blockburger* test? It hasn't been expressly overruled and at least a brace of similar factual scenarios have come up in Texas over the last couple of years. You may want to keep *Diaz* handy.

The bar against multiple punishments for the same offense prevents an end-run around the prohibition against repeated prosecutions after acquittal or conviction. When multiple offenses are prosecuted at a single trial, the Double Jeopardy Clause "prevents the sentencing court from prescribing greater punishment than the legislature intends."[17] Claims of multiple punishments may be valid if 1) an offense is the lesser-included offense of another or 2) if the same criminal act is punished under two distinct statutes when the legislature intended the conduct to be punished under either statute but not both.[18] The Court of Criminal Appeals illustrated the former with attempted assault of Y and assault of Y *or* assault of X and aggravated assault of X and the latter with causing a single death by committing both intoxication manslaughter and manslaughter.[19]

The protections against successive prosecutions and multiple punishments are "not invariably coextensive."[20] While the difference is not apparent under a lesser-included analysis, it becomes transparent under the dual-statutes, dual-punishment analysis. If, under two statutes, the legislature specifically authorizes cumulative punishments imposed during a single prosecution for two violations—even if the two violations constitute the same offense under *Blockburger*—the protections against double jeopardy are not violated.[21]

In determining whether legislative intent permits multiple punishments, the Court of Criminal Appeals has listed non-exclusive considerations, including whether the offenses:

- have provisions contained with-

in the same statutory section,

- are phrased in the alternative,
- are named similarly,
- have common punishment ranges,
- have a common focus (i.e., similar gravamen),
- have a common focus indicating a single instance of conduct,
- have elements that differ but can be considered the same under *Blockburger* (utilizing imputed elements), and
- reveal a legislative history containing an articulation of an intent to treat them similarly or differently for double jeopardy purposes.[22]

Multiple violations of single statute

When there are multiple violations of the same statute, the *Blockburger* test does not apply.[23] Instead, the legislative intent in creating the offenses must be considered. The legislature defines statutory offenses by prescription of "the allowable unit of prosecution" and an allowable unit of prosecution is a "distinguishable discrete act that is a separate violation of the statute." So when there are multiple violations of the same statute, the allowable unit of prosecution must be ascertained by reviewing the statute's literal text. Words and phrases are read in context and are construed according to the rules of grammar. It is presumed that every word in a statute has been used for a purpose, and each word, phrase, clause, and sentence should be given effect if reasonably possible. Only if the statutory language is ambiguous or leads to absurd results are extra-textual resources consulted.[24]

If the statute lacks an express indication of the unit of prosecution, the gravamen of the offense is gleaned. Several factors can assist with determining the gravamen of an offense, including the rules of grammar, use of the singular person, and identifying the offense element that requires a completed act. Employing these factors, the Court of Criminal Appeals has determined that the unit of prosecution for indecency with a child by exposure is not the number of children involved but the exposure.[25]

Remedy

When a defendant is subjected to multiple punishments, the remedy is to affirm the most serious offense and vacate the other convictions.[26] Sometimes, the offenses may provide similar consequences or, even, the greater punishment attaches to the lesser crime. Fortunately, the most serious offense can be the more heinous conviction or the offense carrying the more severe punishment.

Where a prosecution results in a defense-requested mistrial goaded by the actions of the prosecution, retrial may be forbidden. In *Ex parte Lewis*, the Court of Criminal Appeals ruled that retrial after a defense-requested mistrial is jeopardy-barred only when the prosecutorial "conduct giving rise to the successful motion for a mistrial was intended to provoke [or goad] the defendant into moving for a mistrial."[27] The purpose of the rule is to prevent the State from seeking a better opportunity to obtain a conviction on retrial. The court has euthanized the extension under *Bauder* for reckless prosecutorial conduct, but in *Ex parte Masonheimer*, the State had failed to disclose *Brady* material both at trial and on retrial. The court held itself "constrained to decide that the extensive portions of the record set out in this opinion support a finding that [Masonheimer's] mistrial motions were necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence that was available prior to [Masonheimer's] first trial with the specific intent to avoid the possibility of an acquittal."[28]

Ex parte Masonheimer is an extension of *Ex parte Lewis*. As the dissent observed, *Masonheimer* involved a prosecutor who intended to "win at any price" before a first jury, not one who intended to "get rid of this jury" so that he would have a better chance to win before a second one.[29] An anomaly or aberration driven by the particular facts of the case, we may hope, but it remains out there.

Just like knots, double jeopardy issues can be easy to unravel, but some are more are difficult. For the more tangled problems, we may still dream of the stroke of a sword to cut through the interlacing threads, but the marlinspike teasing out the ropes better preserves the integrity of the law and is a tad more subtle—even more lawyerly. Just avoid a bloody finger. ❇

Endnotes

1 I The small marlinspikes available on some penknives must have caused many a painful and even bloody jab to fingers. The things seem designed for nothing better than slipping from the work at hand to deeply penetrate the softest, most sensitive areas of skin. Swords may be safer!

2 I tender this article with some trepidation. I have

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News Worthy

TDCAA e-books are available!

TDCAA announces the launch of two e-books, now available for purchase from Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both strikethrough-underline text to show the 2011 changes and annotations. Note, however, that these books contain single codes—just the Penal Code (2011–13; $10) and Code of Criminal Procedure (2011–13; $25)—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files.

New editions of these e-books will be available after the 2013 leg-

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attempted to map out the basic tests but the caselaw is not always consistent or clear—the less so at the intermediate court level. There is no substitute for your own research.

3 *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Ex parte Chaddock*, 369 S.W.3d 880 (Tex. Crim. App. 2012).

4 *Benton v. Maryland*, 395 U.S. 784, 793 (1969).

5 Tex. Const., Art. 1, §14. Even in the context of mistrials, the Court of Criminal Appeals has ostensibly reverted to a parallel construction of the two provisions. See *Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007), overruling *Bauder v. State*, 921 S.W2d 696 (Tex. Crim. App. 1996); but see *Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007) (three judges dissenting) (fudging the sharp boundary delineated in *Oregon v. Kennedy*, 456 U.S. 667 (1982)).

6 David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy,* 14 Wm. & Mary Bill of Rts. J. 193 (2005), http://scholarship.law.wm.edu/wmborj/vol14/iss1/8. Maybe something of the sort existed in a more primitive form at the time of Alexander the Great too.

7 This claim, however, has more restrictive relief than other claims that may be raised for the first time on appeal such as jurisdiction, sufficiency of the evidence, and jury charge issues.

8 *Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App 2000) (any violation not clearly apparent on the face of the record because more than one manner and means presented); *Langs v. State*, 183 S.W.3d 680 (Tex. Crim. App. 2006).

9 See, e.g., *Teeter v. State*, No. PD-1169-09, 2010 Tex. Crim. App. LEXIS 1206 (Tex. Crim. App. Sept. 22, 2010) (holding that convictions on the same facts for capital murder and the lesser-included offense of aggravated assault violated double jeopardy). Of course, double jeopardy claims may also be redressed in habeas proceedings. See, e.g., *Ex parte Chaddock*, 369 S.W.3d at 880.

10 See *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Similarly, with tribal and federal courts. See, e.g., *United States v. Wheeler,* 453 U.S. 313 (1978).

11 *Blockburger v. United States*, 284 U.S. 299 (1932). Not *Blockbuster* as it has been called in all seriousness—but possibly inadvertently—on more than one occasion in open court. The *Blockburger* test was reaffirmed in *United States v. Dixon*, 509 U.S. 688 (1993), overruling *Grady v. Corbin*, 495 U.S. 505 (1990).

12 See *Brown v. Ohio*, 432 U.S. 299, 304 (1977); *Ex parte Chaddock*, 369 S.W.3d at 883.

13 See, e.g., *Ex parte Watson*, 306 S.W.3d 259 (Tex. Crim. App. 2009) (op. on reh'g) (failing to yield while turning is not a lesser-included offense of intoxication assault).

14 *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007) (explaining and rejecting "strict statutory" and "cognate evidence" tests).

15 *Ex parte Watson*, 306 S.W.3d at 273.

16 *Diaz v. United States*, 223 U.S. 442 (1911).

17 *Missouri v. Hunter*, 459 U.S. 359, 366 (1983).

18 *Bigon v. State*, 252 S.W.3d 360 (Tex. Crim. App. 2008).

19 *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006).

20 *Ex parte Chaddock*, 369 S.W.3d at 883.

21 *Missouri v. Hunter,* 459 U.S. 359 (1983); Compare *Ex parte Chaddock*, 369 S.W.3d. at 883 (forbidden multiple prosecutions obtaining multiple punishments) with *Garza v. State*, 213 S.W.3d 338 (Tex. Crim. App. 2007) (permitted single prosecution obtaining multiple punishments).

22 *Ex parte Ervin*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999) (convictions for manslaughter and intoxication manslaughter for same offense offend the Double Jeopardy Clause.).

23 *Harris v. State*, 359 S.W.3d 625, 629 n.4 (Tex. Crim. App. 2011).

24 *Id.* at 629-30 (deciding that the act of exposure in an indecency with a child by exposure—a circumstances of conduct—offense constitutes a single unit of prosecution despite the number of victims per incident).

25 *Id.*

26 *Ex parte Cavazos*, 203 S.W.3d 303, 337 (Tex. Crim. App.2006); *Landers v. State,* 957 S.W.2d 558, 559 (Tex. Crim. App. 1997).

27 *Ex parte Lewis*, 223 S.W.3d 372 (Tex. Crim. App. 2006).

28 *Ex parte Masonheimer*, 220 S.W.3d 494 (Tex. Crim. App. 2007).

29 *Id.* at 514-15 (Cochran, J., dissenting).

Photos from our Key Personnel/Victim Assistance Coordinator Seminar

Oscar Sherrell Award winner

Congratulations to Debbie Willmon, the Oscar Sherrell Award winner for 2012. She is pictured above with her boss, recently elected District Attorney Chris Dennis of Hockley County.

Congratulations to Cyndi Jahn, victim assistance coordinator in Bexar County (pictured at far left) and recipient of the first-ever Suzanne McDaniel Victim Services Award for service to the association and excellence in the profession. She is pictured with Diane Beckham, TDCAA senior staff counsel.

Photos from our Elected Prosecutor Conference

Chairman of TDCAA's Board, Mike Fouts (at left), presents the President's Plaque to outgoing TDCAA President Lee Hon (at right).

*Recent gifts to the Foundation**

Richard B. Alpert
Bernard Wayne Ammerman
D'An Anders *In Memory of Suzanne McDaniel*
Eduardo Arredondo
Diane Beckham
Kathleen A. Braddock *In Memory of Suzanne McDaniel*
John M. Bradley
Thomas L. Bridges
Laura F. Cahill
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Gregory T. Miller *In Memory of Tim Curry*
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Mary Christy Rodriguez
Jimmy Ray Ruiz
Johnny Sutton
Sherri K. Tibbe
Carol S. Vance *In Memory of Thomas C. Dunn*
Martha Warren Warner
Mark Yarbrough

* gifts received between October 6 and December 12, 2012

Behind-the-scenes photos from our DWI Summit at Anheuser-Busch in St. Louis

ABOVE: The on-air talent (John Kwasnoski, Joe McCormack, Joanne Thomka, and W. Clay Abbott) prepping before the broadcast as crew members adjust the lighting. BELOW: The view from the conference table as moderator Sandy Miller mikes up.

ABOVE: A view of what the camera saw (before the show). BELOW: Bill Conerly, who produced the broadcast, presided over every element, from the on-screen graphics to the camera operators to verbal instructions to the "talent" via earpieces.

LEFT: The entire crew (from left): Joe McCormack, Joanne Thompka, W. Clay Abbott, Sandy Miller, Bill Conerly, John Kwasnoski, Susan Glass, and Sarah Wolf.

A very special thanks to all of the people from the Corporate Social Responsibility department of the Anheuser-Busch Companies, all the local distributors, the 13 Texas prosecutors who served as faculty, and so many others who contributed to make this program a success.

Jack Strickland, ADA and mountaineer

Having twice ascended Japan's Mount Fuji as a boy and after spending years as an "arm-chair" enthusiast, I decided at age 55 to set aside my fears, get off my butt, and try some real climbing. In the subsequent 15 years, I have now gone on to summit peaks in Alaska, Canada, the Alps, the Cascades, and South America. The decision to go to the mountains has changed my life in innumerable ways—mostly for the better.

On my 66th birthday, I flew into base camp on Denali, North America's highest, coldest, meanest mountain. Talking with other climbers during the ensuing 23-day climb, I was invariably asked: "Hey, aren't you the dude who just started Social Security?" (Climbers, who after all are mostly in their 20s, say "dude" a lot.) After enduring an earthquake, several too-close-for-comfort avalanches, 5 feet of new snow, and a white-out with an accompanying wind chill of –92°, reaching the 20,390 foot summit of Denali remains my proudest accomplishment in the mountains. (There's a photo at near right.)

In addition to big-mountain alpine climbing, I spend a week or two each winter ice-climbing in Colorado and Canada and have now scaled 100 frozen waterfalls that range from 60 to 1,100 feet in height. (See the photo at far right.)

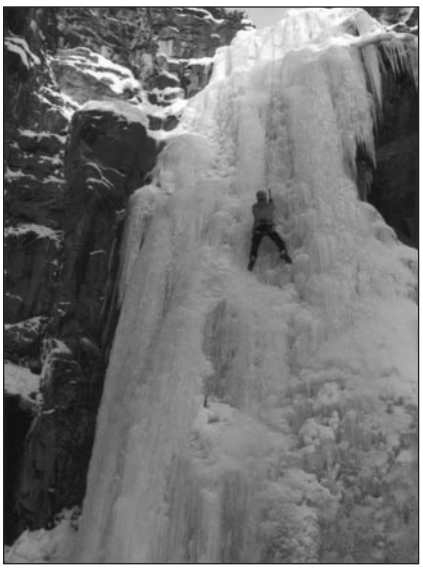
Mountaineering, with its inherent sufferings and risks, is not an activity that most folks care to pursue or profess to understand. But I submit that it shares some characteristics in common with trial practice. Successful climbing, like litigation, requires meticulous—some might say obsessive—preparation. Alpinists compulsively weigh everything in our packs, calculating the totals and discarding the superfluous items. Who amongst us knows (or cares) that high-altitude mittens weigh 8.1 ounces, thick mountaineering socks weigh in at 4 ounces, and that the cardboard center of a roll of toilet paper tips the scales at 0.2 ounces? I do, that's who. And just as is true of trial, the climb itself teaches you to be very, very attentive to details, particularly when the consequences of a moment of carelessness may be a long fall with a sudden stop. Climbing, like trial or oral arguments, demands that you make difficult, game-changing decisions quickly and while on your feet.

Contrary to popular opinion, most climbers are neither suicidal nor crazy. That is not to deny that climbing involves inherent risks, but

there are both avoidable and unavoidable dangers in climbing. Part of what you strive to do is strike a balance between the two. Most climbers indulge their vertical passion not *because* of the dangers that attend the sport but rather *in spite of* them. Thoughtful climbers focus on the many admirable aspects of climbing rather than the negative ones.

What climbing does do is pose an intense physical and mental challenge, regardless of the size of the mountain, difficulty of the route, or weather. When climbing a mountain or a frozen waterfall, you are forced to face your own physical shortcomings, capacity to endure cold and deprivation, and willingness to confront and manage your fears. It concentrates your mind wonderfully.

Neither the mountain nor other climbers care the slightest about who you are (or who you think you are), how much money you earn, or what you own. Respect on the mountain must be earned, and the criteria for earning that respect are uncomplicated and uncompromising: Can you maintain a balance between prudent caution and paralyzing fear? Can you keep your wits about you when the snow hits the fan? If the climber to whom you are roped falls off one side of a knife-edge ridge, will you automatically and without hesitation



jump off the other side to halt his fall—and hopefully your own? Obviously, you can never know the answers to these questions for certain until you are on the mountain and confronted by the circumstances.

Continued from the front cover

Finally, justice for Ginger (cont'd)

1984, Sharon Hayden lived in a modest two-bedroom apartment in southwest Fort Worth with her daughter, Ginger. Ginger was 18 years old, having just graduated from Arlington Heights High School three months earlier. Ginger was, by any measure, a very beautiful young lady with her whole life ahead of her. She was very close to her mother and worked a part-time job to help her pay their bills. Ginger was excited about her plans to fulfill her dream of becoming a physical therapist. September 5 was supposed to be Ginger's first day of college at the nearby University of Texas at Arlington.


Ginger Hayden

Sharon worked a very late shift at the post office the night before and had returned home to the apartment around 2:00 a.m. When she entered the apartment, nothing seemed amiss. Sharon went to the bathroom to clean up for bed and noticed a small puddle of water on the floor near the bathtub. The puddle had a red tint to it. In her weariness, Sharon simply assumed Ginger had made the mess while dyeing clothes. Sharon laid a bath towel over the water puddle and walked down the hall. She peeked through Ginger's cracked bedroom door and thought she could see Ginger in bed in the dark room. Sharon headed to bed and went to sleep.

The next morning, around 6:00 a.m., Sharon awoke to the sound of Ginger's alarm clock ringing in her bedroom. After yelling several times for Ginger to turn it off, Sharon finally got out of bed and stumbled wearily into her daughter's room. What Sharon discovered in Ginger's bedroom was so surreal that her first sleepy thought was that Ginger was somehow playing a prank on her. Ginger's bedroom was a horror of blood. It was everywhere—on the bed sheets, carpet, nightstand, walls, closet doors—and it was on Ginger. Ginger was, from head to toe, covered in blood and stab wounds.

Sharon found her daughter laying face down on the floor next to her bed, semi-nude and in an odd kneeling position. In a daze, Sharon hesitantly touched Ginger's body and felt that she was cold. Ginger was dead and, for the first time, Sharon realized that she had lost her precious daughter. Sharon staggered out of the bedroom that was now a crime scene, literally having to hold herself up against the wall. She finally got to the phone and called the operator (there was not yet a 911 phone system in existence). "My baby's dead," she hysterically told the operator. Then her screams rent the morning air, waking her neighbors and eventually bringing the police. Her daughter, who was supposed to have gone to her first college class that morning, instead left the apartment in a body bag.

The investigation

The discovery of Ginger's lifeless body set in motion a massive criminal investigation by the Fort Worth Police Department. Police officers swarmed to the apartment and secured the crime scene, which was so gruesome even seasoned officers were left in shock. Officers immediately canvassed the apartment complex to see if any of the neighbors had any knowledge of the murder and interviewed Sharon about Ginger's last night alive. It was from Sharon that they learned that Ginger had been dating a local boy named Jeff Green. The officers immediately went to Jeff's nearby house and, finding him asleep, woke him up and interviewed him. They then took him to the police station.

Meanwhile, the task of forensically processing the bloody crime scene began slowly. Crime scene officers methodically photographed Ginger's body and the surrounding scene, then set about collecting samples of the extensive bloodstains and trace evidence. In 1984, DNA technology was still unheard of in Fort Worth. At that time, forensic protocols focused on collecting evidence for serology and hair or fiber comparison. Officers found a wood-handled kitchen knife on the bedroom floor by Ginger's feet. The knife, which belonged to a set in the kitchen, was bloody and bent, the wood handle broken. An inspection of the glass patio door in Ginger's room revealed it was unlocked.

In the bathroom, officers found

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the bath towel Sharon had set down on the water puddle. They also discovered two bloody socks on the countertop near the basin. The socks were later identified as belonging to Ginger. The officers immediately suspected, in light of the bloody scene in Ginger's room, that the killer used the bathroom to clean up after the murder. They also suspected the killer had used the socks as makeshift gloves to avoid leaving fingerprints on the murder weapon.

The socks were later forensically examined at the Fort Worth Crime Lab. Lab technicians discovered the socks contained a small wood splinter that eventually was matched perfectly to the broken handle of the kitchen knife. This confirmed the officers' suspicion about the socks being used as gloves was correct. Additionally, lab technicians found a mysterious pubic hair on the bloody socks; there was, however, no evidence that Ginger had been sexually assaulted. The pubic hair, along with the blood stains on the bath towel, were preserved for future testing, although at the time no one knew just how far into the future that testing would be.

Back at the police station, Jeff Green was shocked to hear that Ginger had been killed and quickly told the officers everything he knew about her. Jeff said he began a whirlwind romance with Ginger the previous summer, having met her at a pool party at her apartment complex. That was also how Jeff met another young person who lived in the complex. His name was Ryland "Shane" Absalon.

Jeff told police that, over the course of the previous summer, he had also become very good friends with Shane, who lived with his father directly above Ginger's apartment. All three of them spent the summer hanging out together at the swimming pool, bars, and Ginger's apartment. Jeff described Shane as a quiet young man, a loner with no girlfriend.

Regarding the night before, Jeff told the officers that he spent Labor Day hanging out with Ginger and Shane. Ginger had to work the afternoon shift at her job, so he and Shane hung out together during that time. Later that evening, Jeff left Shane and picked up Ginger from work. He and Ginger had then returned to her apartment, where they had sex and made plans for their future together. Jeff and Ginger had just found out that Ginger was pregnant and they were trying to decide what to do. After spending several hours together, Ginger dropped Jeff off at his father's house around 11:30 p.m. That was the last time Jeff saw her alive.

Detectives immediately contacted Shane and his father. Shane's father said he woke up that morning to the sound of Sharon's screams in the apartment complex. He found Shane awake in the living room and noticed that the front of Shane's T-shirt had a large reddish stain on it. Shane claimed he spilled strawberry soda on his shirt. The officers asked to see the shirt, but neither Shane nor his father could find it, and Shane had no explanation for where it went. During their search, the officers themselves failed to find the shirt but did collect a pair of Shane's shoes that had a small bloodstain on them.

The detectives suspected Shane was somehow involved in the murder but could not find enough evidence to link him to it. There were no witnesses at the apartment complex other than a neighbor who vaguely remembered seeing a young man knock on Ginger's patio door the night before. Shane's father claimed to have no knowledge about events of the night before, as he had been drinking heavily after working a late shift at his job. Shane also claimed to have no knowledge, but he refused to take a polygraph when asked by the police.

Detectives interviewed and reinterviewed dozens of witnesses in the days following Ginger's murder, but no leads were found. As the investigation dragged out, the list of interviews soared as the police department toiled to break the case open.

To compound matters, the Fort Worth community was already in the grips of near-hysteria. The *Fort Worth Star-Telegram* newspaper asserted in news reports that there was a possibility that a serial killer was at work in the city. A FWPD task force had been created due to a number of unsolved murders of young women; the *Star-Telegram* jumped to the conclusion that one man was responsible for the crimes. The task force was working furiously to solve those cases and, when the detectives on Ginger's case hit a wall, the task force took over. Despite their efforts, no new leads were uncovered.

The forgotten case

More than two decades passed. The responsibility for the investigation

changed hands over and over as detectives retired or were reassigned. Importantly, the available forensic technologies finally improved to the point where DNA could be used to identify unknown biological samples. Fort Worth police created a Cold Case Unit, specifically tasked with using new DNA technology to review old, unsolved cases. Federal grant money financed the expensive testing. In early 2009, the Cold Case Unit dusted off the Ginger Hayden murder file and began reviewing it with a mind toward DNA analysis. Dozens of items from the physical evidence were analyzed for DNA and compared to other samples.

At first, no real progress was made. The DNA samples from Ginger's body matched to Jeff Green, as expected since they had had sexual intercourse the night of her death. However, in late 2009, an important breakthrough finally occurred. Lab technicians determined that DNA from one of the blood stains on the bath towel (the one Sharon laid down on top of the water puddle in the bathroom) matched DNA from Shane's leather deck shoes that were collected in 1984. Moreover, the unknown person's DNA also matched the DNA from the mysterious pubic hair that was recovered from the bloody socks on the bathroom counter.

Based on this new information, the Cold Case Unit detectives decided to get a DNA sample from Shane Absalon and compare it to the unknown sample that matched the blood stains and pubic hair. One of the detectives got a search warrant and tracked Absalon down to his home in Arizona. Absalon refused to voluntarily give a sample, so the warrant was executed. The buccal swab was taken and transported back to Fort Worth for analysis.

Several months later, the Cold Case Unit detectives were notified that Absalon's DNA matched the unknown sample. Now, for the first time in 26 years, they had definitive proof that Absalon was physically connected to the crime scene of Ginger's murder. They immediately obtained an arrest warrant for him for capital murder-sexual assault. However, the case was ultimately indicted as capital murder-burglary with intent to commit aggravated assault with a deadly weapon, as there was no evidence that Ginger had been sexually assaulted. Absalon was arrested outside his home in Sierra Vista, Arizona, on August 29, 2010, and transported back to Fort Worth.

All that remained was to formally file the capital murder case with the district attorney's office; however, the detectives were in for a surprise. When the local Fort Worth media broke the news of Absalon's arrest, the detectives received a phone call from a man named Shawn Garrett.

Incredibly, Garrett saw the news report of Absalon's arrest and instantly recognized him as someone with whom he had attended drug rehab in 1985. The reason Garrett remembered Absalon so well was because Absalon had made a stunning confession to him about stabbing a female friend to death, a revelation that he and other people in the rehab facility had kept secret for decades.

4,500 pages in the file

Shane Absalon's case was assigned to Judge Everett Young's district court. Absalon refused to admit any guilt, and we all knew that we were going to have, to put it mildly, a hard time preparing the case for trial. It was going to require a herculean effort to dig through a police file that contained almost 4,500 pages of documents and a potential witness list with more than 450 names.

Originally, the entire case file was packed into nine different binders seemingly organized only by the chronological order in which they were filled. By scanning and digitizing the contents of each binder, we were able to Bates-stamp an original copy and preserve it for defense discovery before beginning the first of many attempts to reorder the file logically. Using Adobe Acrobat, we were able to combine the files into a single PDF, organize them with digital bookmarks, and run them through the software's text recognition feature to make all 4,500 pages searchable by keywords or phrases. Digitizing the file and making it searchable allowed each prosecutor on the trial team to personalize his or her own copy by highlighting the reports and statements most pertinent and adding annotations to assist. During pre-trial interviews, this feature also allowed us to search the file for any reference to a particular witness and stitch the pages together, providing a physical copy for review and retention.

Once we'd solved the problem of figuring out what was in the file, there was the additional problem of discovery for the defense. Absalon was represented by Gary Udashen

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and Katherine Borras of Sorrels, Udashen, and Anton, a top-tier criminal defense law firm in Dallas. While Tarrant County has an electronic case filing system (ECFS), which permits most discovery to be done online, each of the estimated 4,500 pages had to be checked and double-checked against the files already uploaded into the system, in addition to providing copies of evidence in formats not accessible via ECFS, such as audio statements, photographs, and crime-scene diagrams. The prosecution and defense sat side-by-side at a conference table for months on end, confirming that nothing was inadvertently left out. Here is where the original, Bates-stamped copy of the file became particularly useful. Throughout the year of trial preparation, the defense was able to call our office and reference any page number to confirm discovery, pinpoint a specific issue, or lodge objection.

In addition to the time spent poring over the file, we spent hours on the road. Jim Ford, the Tarrant County District Attorney's investigator assigned to this case, barely got out of his car or off the phone from June through September. The witnesses, not surprisingly, were spread out all over the state. Some had moved away and some had retired. Others had even died in the years since the investigation started. To make matters even more frustrating, even if we were lucky enough to actually locate a witness, the memories usually had faded down to just a bare recollection.

No one ever saw Jim eat lunch in those months, just peanuts at his desk. He was absolutely indefatigable in his efforts. He located witnesses (some of them last seen in the 1980s), drove out to their homes, served them, and then spent a huge amount of time talking to them, calming fears, and making travel arrangements. No investigator could have done a better job.

The trial

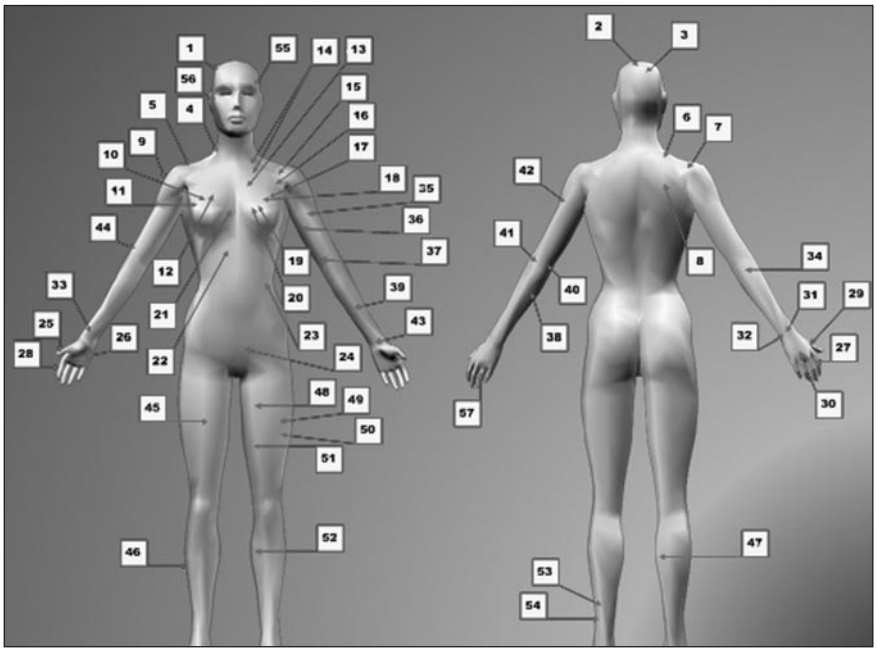
The case was set for trial the week of September 17, 2012. The first two witnesses, retired Fort Worth Officers J.L. Henderson and B. R. Patterson, described the crime scene to the jury as they found it. Henderson, the first responding officer, testified he spent the rest of his career trying to forget the horror he saw in Ginger's bedroom. Patterson was the crime scene officer. We painstakingly reconstructed for the jury the crime scene work performed in 1984, bringing in box after box of evidentiary items. The packaging of physical evidence was so old that it practically disintegrated in our hands. Also presented to the jury were the two folding closet doors removed by the officers from Ginger's closet. We wanted the jury to see the rust-colored blood stains still visible on the fronts of the doors and how it was possible to actually see through the doors' slats.

The photos in the case were taken in 1984, of course, but were placed on a CD and published in the courtroom on a projector screen. The color in the photos from the original notebooks was faded, and while gory, they were not as shockingly bloody as the ones obtained from the photo negatives by our trial technology specialist, Rhona Wederien. Once these copies were published, they were vivid and many times larger than their original size. They gave the jury a good idea of what that scene looked like to Sharon Hayden and the police officers who arrived at the scene. Glancing at the jurors, we could see many of them were weeping.

We next presented a parade of forensic technicians, some young and some old, who testified to the years of forensic examinations conducted on the physical evidence. The jury heard about the wood fragment from the knife handle found in the bloody socks, along with Absalon's pubic hair. They also heard about the DNA connection between Absalon and the bloodstain on the bathroom floor.

Dr. Marc Krouse of the Tarrant County Medical Examiner's Office testified that he performed the autopsy on Ginger's body in 1984. He testified the victim had 57 different cut or stab wounds. Four of these wounds were sufficient by themselves to cause Ginger's death, and the rest contributed to her death, which was actually by exsanguination, or blood loss. We used Poser by SmithMicro Software to create a 3D image of the victim and her wounds (see the diagram on the opposite page). Each of these wounds was identified by number, which was hyperlinked to a corresponding photo of the injury. Dr. Krouse's testimony, therefore, flowed seamlessly as he both described and showed the jury the injuries and their consequences for the victim.

The second half of the case focused on the testimony of Shawn Garrett and several other people who attended a drug rehab, called



Straight Inc., with Absalon in 1985. Garrett was a reluctant witness for the State, despite the fact that he had initiated contact with FWPD. Garrett hesitantly entered the courtroom and sat down in the witness chair. Under direct examination, he spoke slowly and quietly as he recounted to the jury his friendship with Absalon in 1985.

Absalon had been court-ordered into the Straight Inc. program as a condition of probation for an offense out of Tarrant County. Garrett testified that the defendant was temporarily living with him, even sleeping in the same room, while they both attended the program. Garrett testified that, over the course of about two weeks, Absalon confided about a murder he had committed. He said that as Absalon opened up more and more, he revealed more details about the crime.

By this point in Garrett's testimony, the courtroom was absolutely quiet. All eyes were on Garrett as he slowly told the jury about Absalon's confession to him. Absalon told him that he had a female friend who lived in the apartment beneath his. He had romantic feelings for this woman, but she did not feel the same about him. He said that this woman, in rejecting him, had embarrassed and angered him. He decided to kill her. Absalon said he entered into the woman's apartment through a large glass window and retrieved a knife from the kitchen. He then went into the woman's room and hid inside her closet, where he waited several hours for her to return.

Absalon told Garrett that eventually the woman did return, and he described watching her through the closet door as she got ready for bed and fell asleep. He then exited the closet and stood over her, watching her. Finally, he began to stab her. Absalon told him that he stabbed her repeatedly until he thought she was dead. She moaned at that point, so he continued to stab her. He counted how many times he did so, telling Garrett that it was "50-something times." When she was dead, he left the room and cleaned up in the bathroom. Absalon said he left the apartment and threw some of his clothing away.

Two other people, Stephanie Knight and Michelle Valencia, confirmed Garrett's recollection by testifying that the defendant admitted in a counseling session at Straight Inc. that he had stabbed a girl to death.

The explanation of all three witnesses for not reporting the confession earlier was uniform: The Straight Inc. program continually stressed that the statements made in treatment were confidential and could not be repeated to anyone. Most of the people who testified for the State were teenagers at the time they were in the program, and they believed implicitly that they were not supposed to reveal information about the killing. Eventually, however, they saw the news coverage of Absalon's arrest and came forward when they realized the victim's mother had been waiting all that time for justice.

The defense

The defense in this case was twofold. First, they contested that the DNA evidence was significant, namely, that the reddish-brown substance from the towel on the floor was blood. They insisted this substance could have been DNA from a non-blood source, including skin cells. This tied in to their observation that the defendant was a friend of the victim and therefore could have left DNA in the bathroom for totally innocent reasons.

They attacked the defendant's

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confessions at Straight Inc. by claiming they were coerced and bullied out of him by the rehab staff. They posited that Absalon would have said anything to get out of the first level of the program, which was the most unpleasant and the most physically strict. They acknowledged that he said the words that the State was attributing to him but denied their veracity.

Our rebuttal to these defenses was comprised largely of commonsense arguments. For example, the presence or absence of blood on the floor was less significant than the multiple sources of Absalon's DNA on items clearly used in or related to the cleaning-up process. In addition, we pointed out that none of the other people in the Straight Inc. program seemed compelled to admit to things they did not do, such as capital murder. Most of them discussed sexual peccadilloes or substance abuse-related problems.

The most extensive rebuttal, however, actually came in final argument. Trial technology specialist Rhona Wedderien prepared a visual aid designed to point out the connection between the details Shawn Garrett gave about the defendant's confession, and how it was corroborated by the crime scene photos and physical evidence. In fact, this visual aid, with the touch of a button, directly connected 27 of the defendant's various statements with photos and the names of witnesses who testified to them. It was an amazing use of technology that enabled us to orally and visually connect the crime scene to the confession. As Jim Hudson said in his final argument, "Are the defense attorneys saying that the defendant stole the detectives' case file? Because that is the only way someone who didn't commit the crime could know all these details."

The defendant did not testify in this case. However, during the entire trial he had been giving the prosecutors bizarre, exaggerated grins whenever one of us was doing something in front of the jury. It was impossible for us to truly tell what he was thinking, but the expression on his face said, "Catch me if you can."

The verdict

The jury deliberated three hours before returning a verdict. Sharon Hayden, sitting in the courtroom in her wheelchair, was leaning against her husband with her eyes closed. The defendant came out of the holdover with a big grin on his face, like he had just won the lottery. Then the judge read the verdict of "guilty" to count one. We peeked at the defendant when the verdict came back. His face was crumpled, and the bizarre smile was gone. Because the death penalty was waived, Absalon was immediately sentenced to life in prison. However, given the law at the time of the offense, he will be eligible for parole when he has served 20 years of his sentence.

Sharon was taken to the back immediately after the verdict. Everyone with her stood and watched as 28 years of waiting for justice streamed down her face in tears. "I am so haaaaappyyyyy!" came out as a long cry, half words and half sob. After about an hour she finally regained composure enough to speak to some reporters waiting outside the courtroom doors. She declined to give an allocution personally, however, stating that she had nothing to say to the defendant. A family friend instead read some written remarks.

Conclusion

The wait for justice can be long and agonizing for the families of homicide victims. Some never get the justice that they crave, or what they get is insufficient to help them heal. Sometimes, however, justice is served in such a way that the healing process for crime victims' families can begin. When it happens, it is a good day for justice.

We would like to extend our heartfelt thanks to the Fort Worth Police Department, the task force, and all of the individuals, public and private, who contributed to making this day happen for Sharon Hayden and the citizens of Tarrant County. We at the Tarrant County District Attorney's Office felt privileged to be a part of that process. ❇

How to attach a witness who has failed to appear

Rather than ask for a continuance or, gulp, dismiss the case, why not seek an attachment?

Imagine the following scenario: It is trial day in your court and the judge is conducting docket call, asking if you are ready on a case in which you have a non-law enforcement witness whose testimony is necessary to prove your case. You have called out in the lobby a few times for the witness, who was successfully served a subpoena, but she has failed to appear. You can't reach her by phone, and you have no idea whether she will appear to testify. Furthermore, you know the judge will not grant a continuance. What do you do? Dismiss? Or take a deep breath, announce ready, and seek an attachment?

By Ronald Banerji
Assistant District Attorney in the Appellate Division of the El Paso County District Attorney's Office

Before seeking an attachment, ask yourself whether you truly need the witness's testimony to prove your case. For example, in the case of a family-violence assault, where oftentimes victims are uncooperative at trial, you may be better off without the witness if you can prove your case through other evidence, such as hearsay-exception statements, 911 recordings, party-opponent admissions, photographs, medical records, and the like. However, in situations where you simply do not have this type of evidence and you feel that a dismissal is not in the interest of justice, you may have no choice but to seek an attachment.

Article 24.11 of the Code of Criminal Procedure covers the requisites of an attachment. Specifically, it is a writ issued by a magistrate (i.e., the judge) commanding a peace officer to bring a witness to court "on a day named, or forthwith, to testify." Article 24.12 governs the requisites for an attachment to issue. The witness must:

1) reside in the county,
2) have been served with a subpoena, and
3) have disobeyed the subpoena (i.e., failed to appear). (Sample attachment motions and orders can be found in the book *Family Violence Investigation & Prosecution* by Ellic Sahualla and Patricia Baca, published by TDCAA and available for sale at www.tdcaa.com/publications.)

Generally, a trial court should not require sworn testimony or an affidavit before granting a writ of attachment. A prosecutor's unsworn assertion in open court on the record as to the grounds for the motion and why the testimony is material should suffice.[1] The issuance of a writ of attachment for a witness who has been duly served with a subpoena is a matter of right.[2]

If the attachment request is denied, the State has no right to appeal per Article 44.01 of the Code of Criminal Procedure. At best, the State is limited to a mandamus action, and at worst, proceeding without the witness. A mandamus action is governed procedurally by Rule 52 of the Rules of Appellate Procedure and substantively by caselaw. Because the issuance of a writ of attachment is a matter of right, the prosecutor should assert in his mandamus petition that the granting of a writ of attachment is a ministerial act because it constitutes a duty clearly fixed and required by law and can be accomplished without the exercise of discretion or judgment.[3]

Logistically, it is difficult to mandamus a court while in trial, as it is up to the trial court to stay proceedings while the State prepares and files a mandamus, which the court may not be inclined to do. So be prudent and prepare the mandamus in advance if you think the court will deny the request for attachment (or have your favorite appellate prosecutor on notice to help you).

Beware seeking a continuance to buy time to bring in a witness, as once a case has been continued, the witness is no longer subject to the

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A note from TDCJ's VAC Bulletin

Some victims of crime may not wish to complete a written Victim Impact Statement (VIS), but instead choose to do an Oral Victim Impact Statement (allocution) in court, after the offender has been sentenced. Victim assistance coordinators may want to encourage victims to write down what they plan to say in court and advise that what is written down may also be submitted as a Victim Impact Statement should the offender be sentenced to the Texas Department of Criminal Justice (TDCJ).

However, it is important to let the victim know that if there is not a Confidential Information Sheet included with the narrative the victim wrote for the allocution, he/she will not be added to the Victim Notification System (VNS). To be added to the VNS, a Confidential Information Sheet must be completed and attached to the allocution narrative when it is sent in the pen packet to TDCJ. If there is no Confidential Information Sheet attached to the narrative, it will be filed in the offender's file and viewed by the Board of Pardons and Paroles should the offender become eligible for parole, but the victim will not receive notice that the offender is in the review process and will not be given the opportunity to protest parole. Be mindful that victims and concerned citizens can also register for the VNS by calling the TDCJ Victim Services Division (VSD) hotline at

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subpoena,[4] which means there is no longer a right to seek a writ of attachment.

Courts have wide latitude in how they handle the trial once the writ of attachment has issued, and there is no caselaw that provides guidance. For example, here in El Paso, some courts will give prosecutors only until the end of the case-in-chief to bring a witness to testify. If the State is not able to locate and bring in a witness by the time you close, then you stand a high chance of being directed out by the judge or receiving a not-guilty verdict. In a misdemeanor trial, this can be a huge challenge, as voir dire is typically conducted in the morning with the trial taking place in the afternoon, giving you only a few hours to find and bring in your witness. In a typical felony trial, you will have more time, as voir dire may take the entire day (with the trial taking place the next day), so you have at least a day to find and bring in your witness. Either way, though, you need to get people looking for the witness immediately. Other courts in El Paso will recess the trial until the witness is served with the writ, brought before the court, and admonished (the State will serve a new subpoena upon the witness at this time as well), and then they will continue the trial to a new date.

To conclude, if you think a State's witness will not show, prepare a writ before court, be ready to show the judge why you need that witness's testimony, have your investigator ready to find and bring in your witness, and be prepared to file a writ of mandamus if the judge does not grant the attachment request.

❇

Endnotes

1 See *Sturgeon v. State*, 106 S.W.3d 81, 82-83 (Tex. Crim. App. 2003) (holding that counsel's assertion of the anticipated testimony on the record in open court is sufficient to preserve error).

2 *Sturgeon*, 106 S.W.3d at 90.

3 *Perkins v. Ct. App. for Third Supreme Judicial Dist. of Texas at Austin*, 738 S.W.2d 276, 284 (Tex. Crim. App. 1987).

4 *Gentry v. State*, 770 S.W.2d 780, 785-86 (Tex. Crim. App. 1988).

Misdemeanor voir dire

How to pick a jury for a DWI or other misdemeanor

There is little to no instruction in law school on picking a jury, so prosecutors must learn on the job. The purpose of this article is to share what I have learned since making it my goal to turn a weakness of mine into a strength.

By Brian Foley
Assistant County Attorney in Bryan County

Picking a misdemeanor jury boils down to four things: 1) making a good impression, 2) finding (and striking) the worst three jurors, 3) getting the jury to see things our way, and 4) getting better through practice and honesty.[1] I hope these suggestions are helpful to you, but stick with what you do best and understand your style. Don't try to copy someone else, but take great ideas and incorporate them into your presentation.

Making a good impression

The bottom line is that as prosecutors, we are trying to find six people who will do what we ask them to do. And we need to make a good first impression.

Our first impression happens a lot faster than we might think. By the time we say, "Good morning, my name is … " it's already over. Most jurors' understanding of what prosecutors do is portrayed on their favorite television shows. The show that makes the prosecution look the best is "Law & Order," so I try to look as close to the show's prosecutors as I can. I show up early and test any equipment before the jury arrives. I prominently display a PowerPoint slide with my county's seal and the words "Voir Dire" so that the first thing jurors will see is this symbol of authority and order. It tells them what is happening and that they are in the right place. When you begin your presentation on the same screen, jurors will see that you are part of that authority.

Looking professional and organized is part of the "Law & Order" routine. If you have 15 files, a binder, two notepads, and a Starbucks cup on the trial table, you don't look like "Law & Order"; you look like an overworked government employee who had a hard time waking up this morning. Leave these items outside the courtroom or concealed under the desk during voir dire. If you don't want the jury looking at it for an intentional reason, keep it off the table.

It may sound ticky-tack, but clothing matters. I'm a believer in dark, non-pinstripe suits, white shirts, and blue or red ties. (Female prosecutors have more options than their male counterparts but I would be overestimating my own abilities if I tried to give advice on that topic.) I also wear a Texas flag pin on my lapel so the jurors can identify me as the representative of the State of Texas. Nothing is worse than the jurors thinking the State's attorney might be the defendant. In a misdemeanor trial, especially in a DWI, the defendant and prosecutor probably look pretty similar.

Once we have made a good first impression we need to connect with potential jurors. The first step is making them comfortable. So far they have been herded in and out of the courtroom like cattle and have been waiting for a long time. I tell them who I am and that I work for their elected county attorney, then I tell them, "If I were sitting in your shoes right now, I would probably have some questions." Then I show them a slide that you can absolutely steal and works every time. It reads:

"1) 'Why am I here?' Maybe you're here because you know you can get in trouble for not being here. But there is something inside you that said this process is important to our legal system and our country. Not everybody comes to jury duty but you did. I want to thank you for being here and making this trial possible.

"2) 'When can I go home?' You can go home about 5:00 p.m. today. And a lucky six of you can return in the morning.

"3) 'What do I have to say to not get picked?' I can't really tell you what to say and what not to say. You just have to tell the truth. But I can tell you that the defense attorney and I get three strikes for almost any rea-

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son at all. There is this old saying that those who talk, walk, and those who have nothing to say, stay. The more you say, the more likely you are to say something that either the defense attorney or I do not like. So if you are crossing your arms and scowling at me, please just raise your hand and make sure I make a note of that. It's OK to feel a certain way or dislike something about the process. It's just not OK to feel that way without telling me about it."

I present one bullet at a time and let the jurors read to themselves. I used to read these bullet points out loud but I always get more laughs when I let jurors read them on their own. After the initial chuckle I playfully ask for a show of hands and inquire, "Is anyone thinking these three questions—maybe Questions Two and Three?" The important part is that the jury knows we have been thinking about them and we understand how the process feels from their perspective.

Finding (and striking) the worst three jurors

Misdemeanor prosecutors get three peremptory strikes, so we must use them wisely.[2] So how do you find the worst three jurors? Ask every possible juror a question to hear how each juror responds, and read body language and tone when they answer. Do not end your presentation until you have some gut reaction about every juror in the strike zone.

Any question is better than no questions. Tell them, "You know I haven't heard much from you, Mr. Quiet Juror. What are your thoughts on the laws of Texas?" Sometimes I ask questions without particularly caring what the answer is. In a theft or resisting arrest case, I ask each juror, "What do you like about Texas?" Reasonable people give reasonable answers, while skeptical people say things like, "I like how the government leaves you alone and people stay off your land." This guy might be nice enough at home, but he just sounds like someone who won't get along with the other jurors. I have also had jurors respond, "I like the fact that people follow the law." Now *that* is a good State's juror. The other great part of this question is the jurors all say something positive about Texas and then we get to say, "Today, I represent the State of Texas."

There is a great slide on circumstantial evidence involving a little girl getting caught with cake on her face. Ask each juror, "Did she eat the cake?" If they say anything but a quick and easy "yes," move on and mark them down as a no. If I got to ask jurors only one question, I would ask the cake question. Skeptical jurors will invent a friend or a brother who came in and helped the little girl or even say, "Maybe the dog did it." These jurors will make up alternate realities in your case as well. You can use this as an opportunity to tell jurors that they will be restricted to considering only the evidence at the trial, and nobody said *anything* about a dog or a brother or a friend.

Striking a juror for cause

No prosecutor ever lost a case because a juror struck for cause voted not guilty. OK, that is a bit Yogi Berra,[3] but it's true. If you can strike a juror for cause, great—just make sure you have a reason for striking him. (For example, in a DWI case, we may want to strike every juror who would absolutely require a breath or blood test.) Though there are many legitimate challenges for cause, the most important for a misdemeanor prosecutor are that the juror has been convicted or is under accusation of theft or a felony, that the juror has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment, and that the juror has already made up his mind as to the defendant's guilt or innocence.[4] It's easy to strike a juror because he has a conviction for theft or a felony, or is under an allegation of either (normally presenting this information to the judge in some reliable form will be sufficient), so I will focus on the other two.

Bias or prejudice

Getting jurors to admit they have a bias or prejudice against the law can be tricky. The law requires that the "bias or prejudice substantially impair [her] ability to carry out [her] oath and instructions in accordance with the law."[5] Jurors don't like the words "bias" and "prejudice." They sound like "racist."

The best way to get a juror to admit she is prejudiced or biased in some way is to tell her that it is perfectly normal to feel that way and in fact we all feel that way every day. Bradlee Thornton, another prosecutor in my office, does this effectively by telling jurors about his own biases and prejudices. "Biases and prejudices aren't bad," he tells them. "They are just another way of describing the way we see the world. They reflect our thoughts that we

have gained from the experience of our lives. When I was younger I owned a Ford truck that came from the factory with an STX decal and an after-market Sony stereo. It turns out the decal was a giant advertisement to car burglars that there was a $2,000 stereo only a popped lock away. My truck was broken into over a dozen times. Obviously that experience was extremely frustrating for me. If I was ever called for jury duty on a burglary of a motor vehicle case, the way I looked at the law and the evidence would be affected by my experiences. And that is perfectly reasonable. But another way of saying this is, 'I have a bias or prejudice in that kind of case.'" You can then remind jurors of this story later on if they start feeling uncomfortable admitting they may have a bias against the law.

Conclusion as to guilt/innocence

This strike for cause is very technical, and there are two ways to exclude jurors under this provision.[6] First, we must ask the juror if he will in fact be influenced by his conclusion as to guilt or innocence. If he says yes, then the judge must strike him for cause at that moment without the opportunity for the defense or even the judge to rehabilitate him. If we haven't talked to the judge about this beforehand, she probably won't follow this rule strictly. It is a pretty harsh rule but if we use this exact language and get the right answer, then we should be on solid legal ground. The second way to excuse someone under this rule is if he is vacillating. Even then if we get him to say something like, "It would be pretty hard to keep it out of my mind but I would try," that may be enough for the judge to decide he is not impartial and strike him.

When questioning a panelist on these matters, remember that if he is not struck for cause, then you may not have enough peremptory strikes to get rid of him. Don't argue with a juror or let it look like you want him off the jury. The best path is to follow your conscience as a prosecutor. You are there to make sure the law is followed. Don't try to word things in a tricky way to get them to jump on the "right" answer. Just ask the correct legal questions and let the chips fall where they may. The judge will appreciate it and so will prospective jurors.

A good prosecution voir dire will also protect strong State's jurors by telling them what the law is with regard to the Fifth Amendment right against self-incrimination and police officer testimony. Normally all it takes to protect a good juror is to let her know which words to use when talking about these typical defense strikes for cause: "Everyone here understands that we would *like* to hear from the defendant. But you understand that the judge is going to require that you not consider it against him if you don't. You could be fair to the defendant in that way, couldn't you, Mr. State's Juror?" Additionally, "Everyone knows that police get experience and training through their official duties and that can increase their reliability as a witness. But Mr. State's Juror, you would start them off on the same scale as everyone else and would wait until you heard their qualifications before believing what they have to say, right?" These juror-saving strategies are more useful as the offense becomes more heinous. I hardly ever have to go over these things in a DWI case but almost had a panel busted because I skipped over them in a theft voir dire.

Commitment questions

The law on commitment questions sounds difficult but it really is fairly simple. A commitment question asks a prospective juror to decide an issue in a particular way after being offered a set of facts.

It is proper to ask a commitment question if it relates to an area of the law that the juror would be required to follow during the course of the trial.[7] A commitment question that leads to a challenge for cause is proper so long as it does not include more facts than necessary to determine if the juror would follow the law. For example, it is OK to ask, "Can you consider probation for a felony case?" However, it is improper to ask, "Can you consider probation for a felony case involving violence?" The difference is that the latter includes more facts than are necessary to determine if the juror can follow the law.

The best commitment question in a DWI is normally, "If you believed someone lost his normal mental faculties because of alcohol and you believed that beyond a reasonable doubt, would you still require the State to provide scientific evidence of breath or blood alcohol levels before you found someone guilty?" If defense counsel jumps up and screams "Commitment question!" you can simply reply, "Yes, that is exactly right and I am entitled to ask it."

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If jurors don't have to follow that law stated in the question, then the question is improper. A question is also improper if the jurors can follow the law without accepting all of the facts offered.

Getting the jury to see things our way

Prosecutors have been exposed to the criminal justice system for three years of law school and our entire legal career, while jurors normally have absolutely no idea what should or should not be happening. They will follow our lead, so start explaining how to view the legal landscape. This could be as simple as saying, "This is not a complex case. There are only six elements that you need to worry about. And some of them won't even be in dispute."

Don't confuse the jurors with fancy legal mumbo-jumbo—let the defense attorney be the confusing lawyer in the courtroom. The two situations that confuse jurors most are 1) explaining intent, knowledge, and recklessness and their differences, and 2) the DIC–24.

I will go out on a limb to say that no juror has ever understood the difference between intentionally, knowingly, recklessly, and with criminal negligence. I will go out even farther on a limb and say that most jurors don't care because your facts probably *very* clearly show that the defendant's action was intentional. People don't accidently resist arrest or forget to pay when they leave Wal-Mart with a purse full of clothes. If you try to explain these fine distinctions to the jury, all of a sudden you have become the persnickety lawyer who wants them to focus on legal minutia instead of just common sense. My suggestion is not to even try—let defense counsel stand up and explain intent if he wants to. Remember that the judge will go over it in the jury charge, too. And we can remind the jury in closing argument, "Look, ladies and gentlemen, all you have to know about intent in this case is laid out in the evidence and the testimony."

The other area where you can avoid confusing the jury with "lawyer talk" is covering the DIC–24. Some prosecutors, even very successful ones, argue that when you refuse a breath test or blood test after reading the DIC–24, that means the defendant wanted to hide her alcohol concentration so badly that she was willing to give up her driver's license. Any good defense attorney is going to counter with, "Well, this is a complex legal form. If she could make that choice, it means my client had her mental faculties." The defense lawyer is right: The DIC–24 is a complex legal form. Nobody understands it the first time they read it. But we should not focus on the complexity of the DIC–24—rather, tout its simplicity.

I tell the jurors, "Look, here is the DIC–24. It's a bunch of legalese written by the legislature. But right here at the end is a very simple question: 'I am now requesting a specimen of your [ ] breath or [ ] blood.' The only thing running through the defendant's mind is, 'I've been arrested for DWI and I'm drunk.' When he refuses without hesitation he is doing so only to conceal evidence from you." Remind the jurors that they can absolutely use refusal as evidence against the defendant proving intoxication.

The jury won't know that they can use certain pieces of evidence unless you tell them the judge says it's OK. When you avoid confusing the jury, they start to trust in what you say because they understand each part.

Get better through practice and honesty

Our final objective of voir dire is to educate ourselves. If we aren't trying to get better, then we are getting worse. If your judge will talk to you about your voir dire, then ask for his honest critique. There is always something we can do better, even if the jury came back with a guilty verdict in 15 minutes.

Also, there is no substitute for experience. You can know something to be true but not really believe it until it happens to you. For example, I *knew* about the importance of primacy and recency, which is the theory that jurors remember the first thing they hear and the most recent thing they heard. But when I first started out as a lawyer and gave a voir dire presentation, jurors seemed to be listening to and understanding the entire presentation, and I neglected primacy and recency—but time after time jurors forgot things that happened in the middle. Primacy and recency were no longer a theory I knew about but rather a lesson I'd learned (the hard way).

Some of the best experience and feedback we can get comes from practicing voir dire on non-lawyers. They don't look at the world the way we do. I practice on my office's court

secretaries and my in-laws. Keep a laptop with your presentation handy and practice it on people who haven't seen it before. Ask them to explain the definition of intoxication back to you after you are done. This is something you can't do with a jury for fear of making someone look or feel stupid—in front of a group nobody is going to admit that they didn't understand what you just said. In a one-on-one environment, a court secretary or mother-in-law won't feel that pressure. (Use discretion with the mother-in-law.) This will help you practice reading confusion on people's faces without their speaking up.

New prosecutors always talk to the jurors after the verdict. If it is a guilty verdict, then everything the State did was golden sunshine and the defense attorney was "just doing his job" or "didn't have a lot to work with." But jurors who vote not guilty will have endless excuses for the defendant. My piece of advice is to talk to jurors about the trial and ask open-ended questions about broad topics, but don't necessarily take their advice to heart. Don't change something that worked because they said they didn't care about it. We have to start looking past their words and find out what they are actually telling us about our performance. When you start getting strange answers after a not-guilty verdict, you may be quick to label that jury as unreasonable, but don't let yourself fall into that trap. Those jurors stopped looking at the case from your perspective or lost trust in the State at some point during the trial. The reasons they are giving are just what they came up with to justify doing what they wanted to do.

Conclusion

I hope this article has offered some suggestions that you find helpful. If nothing else, perhaps the best point to make is that we, as prosecutors, are trying to do four things during voir dire: 1) make a good impression, 2) find (and strike) the worst three jurors, 3) get the jury to see things our way, and 4) get better through practice and honesty. ❇

Endnotes

1 The Court of Criminal Appeals says there are three possible purposes for voir dire: asking questions to challenge for cause, asking questions to use peremptory challenges, and "not necessarily a legally legitimate one is to indoctrinate the jurors on the party's theory of the case and to establish rapport …" *Sanchez v. State*, 165 S.W.3d 707, 710-11 (Tex. Crim. App. 2005).

2 Peremptory strikes in misdemeanors are limited to three per side or with multiple defendants, three per defendant. That is, unless you are trying your misdemeanor in district court, then you get five strikes or three per multiple defendant. Tex. Code Crim. Proc. art. 35.15.

3 Yogi Berra is a famous baseball player who coined phrases that are often tautologies. For example, "It ain't over till it's over."

4 Tex. Code Crim. Proc. art. 35.16 (a)(2), (3), (9), and (10).

5 *Feldman v. State*, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

6 Tex. Code Crim. Proc. art. 35.16 (a)(10).

7 *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001).

How to spend discretionary funds

What the law allows when it comes to hot check and asset forfeiture funds

In keeping with the tradition of the esteemed TDCAA research attorneys of the past,[1] the time has come for us to bring you an update on the law governing expenditures of hot check and asset forfeiture funds. These issues are ever on the FAQ list of the research attorney, and with all the changes that have occurred since the last update in 2008, we figured it was time to fill you in on some new restrictions as well as give you a refresher course on all things discretionary funds-related.

By Lauren Owens
TDCAA Research Attorney in Austin

While the hot check provisions have essentially stayed the same, the legislature made a number of significant changes to Chapter 59 of the Code of Criminal Procedure in 2011 that affect how prosecutors and law enforcement can use asset forfeiture proceeds. Responding to reports of abuse and misuse of funds, the legislature delineated several prohibited expenditures in CCP art. 59.06 and created new procedures for auditing and enforcement. Below is a brief review of the rules governing hot check funds and a highlight of some of the most important asset forfeiture fund guidelines for prosecutors.

Hot check funds

There are no significant changes to report regarding hot check fund administration. CCP art. 102.007 provides that a county attorney, district attorney, or criminal district attorney whose office collects and processes hot checks and sight orders may collect a fee not exceeding:

- $10 if the face amount of the check or sight order does not exceed $10;
- $15 if the face amount of the check or sight order is greater than $10 but does not exceed $100;
- $30 if the face amount of the check or sight order is greater than $100 but does not exceed $300;
- $50 if the face amount of the check or sight order is greater than $300 but does not exceed $500; and
- $75 if the face amount of the check or sight order is greater than $500.[2]

Nothing in the law prohibits the collection of a fee for each hot check written.

The legislature did make a slight change in the wording of the statute allowing the collection of a processing fee for the benefit of the check holder, but the effect remains the same: The maximum fee that may be collected is $30.[3] The attorney for the state must also collect the amount spent by the check holder in delivering notification by registered or certified mail. This fee must be remitted to the holder of the check or sight order upon receipt of proof of the actual amount expended.[4]

The rules regarding expenditures that may be made from a hot check fund have not changed since our last update. The elected prosecutor still retains sole administrative discretion over the hot check fund and need not get commissioners court approval before making expenditures.[5] That is not to say the fund is free from all county oversight, however. The fund is still subject to audits by the county auditor,[6] and all interest that accrues on the account must be severed from the principal for the benefit of the county.[7] See page 36 for a quick summary of the major do's and don'ts when it comes to spending hot check funds.

Asset forfeiture funds

The legislature made sweeping changes to CCP chapter 59 in 2011, adopting new restrictions on the ways asset forfeiture funds can be used and providing for new auditing and enforcement mechanisms by the attorney general.[8] But generally speaking, the ways in which property and their proceeds are initially to be divided between prosecutors and law enforcement stayed the same, with only a few exceptions.

Under CCP art. 59.06, the attorney representing the state may enter into a local agreement with law enforcement to administer forfeited property in one of two ways. First, the forfeited property may be transferred to law enforcement agencies to "maintain, repair, use, and operate the property for official purposes." The law enforcement agencies may opt to transfer or loan the property to another municipal or county

agency, a groundwater conservation district, or a school district, but the commissioners court or governing body of the municipality retains the right to revoke the loan at any time.[9]

Alternatively, all forfeited "money, securities, negotiable instruments, stocks or bonds, or things of value, or proceeds from the sale of those items" must, after the deduction of court costs under art. 59.06(f), be divided according to the terms of the local agreement and deposited into special funds for the benefit of the prosecutor's office and the law enforcement agencies. Funds deposited in a prosecutor's account must be used solely for the "official purposes" of that office, while funds deposited in a law enforcement agency's account may be used only for "law enforcement purposes."[10] If no local agreement exists, forfeited property must be sold on the 75th day after the date of the final judgment, and the remaining proceeds, after any deductions for interest holders and court costs, must be deposited in the state's general revenue fund.[11]

The legislature recently changed the allocation of property between prosecutors' offices and DPS in certain drug cases. Under the new CCP art. 59.06(c-3), when a default judgment is entered in favor of the State in those cases, the local agreement between the prosecutor and DPS must either: 1) transfer the forfeited property to DPS to be used for official purposes; or 2) allocate 40 percent of the proceeds from the sale of the property to DPS for law enforcement purposes, 30 percent to the prosecutor's office for official purposes, and 30 percent to the state's general revenue fund. If the property was seized by DPS in conjunction with any other law enforcement agency, the prosecutor may allocate the proceeds according to a memorandum of understanding between all parties.[12]

Before proceeds from asset forfeiture funds may be spent, a detailed budget clearly listing and defining the categories of expenditure must be submitted to the commissioners court or governing body of the municipality (even though their approval of the expenditures is not required). The budget should not list details that would endanger an investigation or prosecution, and the commissioners court or governing body may not use the budget to offset or decrease salaries, expenses, or allowances that the attorney's office or law enforcement agency is receiving at the time the proceeds are awarded.[13]

Perhaps of most interest to prosecutors is CCP art. 59.06(d-1), which outlines several new express spending prohibitions applicable to both prosecutors and law enforcement agencies. Prohibited expenditures include campaign contributions, generalized donations, and the purchase of alcoholic beverages. Also new is the requirement that "lame duck" officials get commissioners court approval before making any expenditures from the fund.[14] All of the new spending prohibitions are outlined in the chart on page 37.

Other changes

The final major changes made in 2011 invested the state auditor and the attorney general with auditing and enforcement authority. The state auditor now has authority to access books, accounts, vouchers, reports, and other records maintained by attorneys and law enforcement agencies under CCP art. 56.09 and must notify the attorney general of possible spending violations.[15] The attorney general may then initiate a suit for injunctive relief, a civil penalty of up to $100,000, or both if a law enforcement agency or attorney for the State is found to have knowingly violated the law.[16] Prosecutors should keep these new provisions in mind and take note of all spending restrictions before making expenditures from an asset forfeiture fund.

Conclusion

Determining how hot check or asset forfeiture funds may or may not be used might seem like a convoluted process, but if you use the charts provided and ask yourself a couple of questions before making any expenditures, the process can be greatly simplified:

For hot check funds:

- Is the expenditure related to the official business of the office?
- Are there any other constitutional or statutory provisions prohibiting the expenditure?

For asset forfeiture funds:

- Is the expenditure for an official purpose of the office (prosecutors) or for a law enforcement purpose (agencies)?
- If the forfeited property is real or personal property, will the law enforcement agency maintain, repair, use, and operate the property for official purposes?

Remember that you can always call the association at 512/474-2436 with questions you may have about

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hot check and asset forfeiture funds, or any other issues that arise. We are here to help! ❇

Endnotes

1 Markus Kypreos wrote the original article on asset forfeiture and hot check funds in 2005, and Sean Johnson brought you an update in 2008.

2 Tex. Code of Crim. Proc. art. 102.007(c).

3 Tex. Bus. & Com. Code §3.506 (substituting "maximum processing fee of $30" for "reasonable processing fee of not more than $30").

4 Tex. Code of Crim. Proc. art. 102.007(g).

5 Op. Tex. Att'y Gen. JM-0313 (1985).

6 Op. Tex. Att'y Gen. GA-0053 (2003).

7 Op. Tex. Att'y Gen. JC-0062 (1999); Tex. Loc. Gov't Code. §113.021(c).

8 Most hot check and asset forfeiture expenditures guidelines come from Attorney General opinions, but as the attorney general's own spokesperson recently reminded everyone, prosecutors still proceed at their own risk when abiding by those opinions: "It's important to keep in mind that this opinion wouldn't bind a court or a prosecutor to do anything at all. These opinions are purely advisory. They have no legal force or effect." Tom Kelly, in a statement to the *Austin American-Statesman* newspaper on Friday, September 7, 2012.

9 Tex. Code of Crim. Proc. art. 59.06(b).

10 Tex. Code of Crim. Proc. art. 59.06(c). Note that the "official purposes" language applicable to prosecutor's offices is arguably broader than that for law enforcement agencies; however, the extent of that leeway is not clearly defined.

11 Tex. Code of Crim. Proc. art. 59.06(a).

12 Tex. Code of Crim. Proc. art. 59.06(c-4).

13 Tex. Code of Crim. Proc. art. 59.06(d).

14 Tex. Code of Crim. Proc. art. 59.06(d-1).

15 Tex. Code of Crim. Proc. art. 59.061.

16 Tex. Code of Crim. Proc. art. 59.062.

Can I use hot check fund proceeds to…	Yes or No	Authority
Defray the salaries and expenses of the prosecutor's office?	Yes	JM-313 (1985)
Pay for employee parking (as additional employee compensation)?	Yes	JM-313 (1985)
Pay State Bar dues for assistants (as additional employee compensation)?	Yes	JM-313 (1985)
Make an employee a notary public if the office needs one?	Yes	JM-313 (1985)
Pay CLE costs if the program is substantially related to the office's "official business?"	Yes	JM-313 (1985)
Pay college tuition on courses to train the employee for a different position or additional duties that are part of the office's official business?	Yes	JM-313 (1985)
Reimburse for "official business" travel?	Yes	JM-313 (1985)
Pay for a vacation retreat as part of a pre-established employment compensation contract?	Yes	JM-313 (1985)
Pay to conduct a formal educational or training program at a retreat?	Yes	JM-313 (1985)
Pay for computerized security devices?	Yes	JM-313 (1985)
Pay for office furniture, carpet, office supplies, and equipment?	Yes	JM-313 (1985)
Hire an investigator without commissioners court approval if the salary is paid entirely by the fund?	Yes	JM-738 (1987)
Pay salary supplements without the commissioners court reducing an employee's salary to offset the hot check increase?	Yes	JM-313 (1985)
Pay assistants' employment taxes on salary supplements?	Yes	JC-0397 (2001)
Sponsor a children's book related to the attorney's official business?	Yes*	GA-045 (2003)
Pay for general college education?	No	JM-313 (1985)
Supplement the salary of the elected prosecutor?	No	JM-313 (1985)
Reimburse restitution to a merchant out of the hot check fund?	No	JC-0168 (2000)
Pay a multi-year contract such as a car loan?	No	GA-053 (2003)

*If no other law prohibits such expenditure.

Can I use asset forfeiture fund proceeds …	Yes or No	Authority
To maintain, repair, use, and operate the property for official purposes?	Yes	CCP 59.06(b)
To pay salaries and overtime pay for officers?	Yes	CCP 59.06(c)(2)
To pay for officer training?	Yes	CCP 59.06(c)(2)
To pay for specialized investigative equipment and supplies?	Yes	CCP 59.06(c)(2)
To purchase items used by officers in direct law enforcement duties?	Yes	CCP 59.06(c)(2)
To lease forfeited property itself?	Yes	GA-0122 (2003)
To make donations to an entity that assists the office in its official duties?	Yes	See CCP 59.06(d-2) for the specific requirements.
To pay bonuses or increase salaries in the prosecutor's office?	Yes, but…	JM-1253(1990); CCP 59.06(d-1)(7). The payment is contingent upon approval from the commissioners court. Bonuses are prohibited unless approved as part of compensation before services are rendered. Art. 3, §3, Tex. Constitution.
To pay for the prevention of drug abuse and persons with drug-related problems?	Yes, but…	See CCP 59.06(j) for a limitation of 10 percent for expenditures in a 59.06(c)(4) fund.
For travel expenses related to attending training and education seminars?	Yes, but…	CCP 59.06(d-1)(4). The expenditures may not violate generally applicable restrictions established by the commissioners court.
As a "lame duck" elected official?	Yes, but…	CCP 59.06(d-1)(6). The expenditures must be approved by the commissioners court.
To make donations to a random charity?	No	CCP 59.06(d-1)(2)
For expenses related to the training and education of members of the judiciary?	No	CCP 59.06(d-1)(3)
To purchase alcoholic beverages?	No	CCP 59.06(d-1)(5)
To pay for district attorney's legal defense in a suit related to official duties?	No	GA-0755 (2010)

Animal hoarding crimes

How to distinguish between a caregiver who simply got overwhelmed and an animal exploiter in these heart-breaking cases

By Belinda Smith
Assistant District Attorney, and
Tosha Mayo
Intern, both in Harris County

When the Houston Fire Department responded to a house fire in Tomball, they got much more than they bargained for. Shortly after the fire began, dozens of dogs poured out of the burning home and ran wild throughout the upscale subdivision. Neighbors rounded up over 40 dogs and called the Society for Prevention of Cruelty to Animals (SPCA) to send a rescue team to handle the unusual situation. After the fire was extinguished, a responding SPCA officer entered the home to perform a welfare check and gauge the situation. Immediately, he was overwhelmed by the stench of feces, urine, and trash, which was piled from floor to ceiling (see a photo of the scene at right). The officer found many more dogs throughout the home and all of them suffered from fleas, skin infections, and eye ulcers. Several dogs were in such poor condition that they had to be euthanized, and others will require long-term veterinary care and prolonged behavioral socialization. Fortunately, the owner agreed to relinquish custody of all the animals and surrendered a total of 108 dogs to the Houston SPCA, allowing those authorities to provide proper care and treatment.

Animal hoarding cases are particularly challenging for prosecutors because of the defendant's mental health issues and the large number of animals involved. The number of animal victims in a hoarding case typically ranges from dozens to hundreds but can climb into the thousands in the most extreme cases. Oftentimes, these animal victims have to be kept as evidence, requiring rescue agencies to hold large numbers of animals up to years at a time, which can quickly wipe out their resources. Additionally, cases can be difficult to coordinate because they can span across multiple jurisdictions and involve many different agencies.

The ultimate challenge for a prosecutor is determining whether a person should be criminally prosecuted for her hoarding behavior or if the civil remedy of seizing the hoarder's animals sufficiently serves justice. This article addresses factors that prosecutors should consider to successfully resolve this type of case.

To make the right charging decision, a prosecutor must first understand the hoarding mentality. Secondly, the prosecutor should form a partnership with local animal welfare organizations to treat and care for any animal victims and understand the potential seizure or impound issues involved. Finally, a prosecutor should recognize the ramifications of civil versus criminal proceedings, charging decisions, and sentencing options. A clear understanding of

these factors will help the prosecutor make a charging decision designed to prevent the offender from hoarding and hurting animals again.

What is animal hoarding?

According to the Hoarding Animal Research Consortium (HARC), animal hoarders are not just individuals who own a lot of pets. As defined, hoarders collect a large number of animals, fail to provide adequate food, water, sanitation, and veterinary care, and, more often than not, are in denial about their inability to provide adequate care.[1] This type of abuse differs from other kinds of cruelty because many hoarders do not accept or recognize the suffering they inflict on animals. Leading animal cruelty researchers believe that many hoarders suffer from mental health problems, in particular, a delusional disorder combined with an obsessive-compulsive drive to collect.[2] The delusional component is a recent addition to the mental illness theory and explains why many hoarders sincerely believe that they provide adequate care despite abundant evidence to the contrary.

Although animal hoarders typically "are female, well over 40 years old, and single, widowed, or divorced," hoarders can be any age, gender, or from any socio-economic background.[3] According to HARC, there are three types of animal hoarders: 1) the overwhelmed caregiver; 2) the rescue hoarder; and 3) the exploiter hoarder.[4] An overwhelmed caregiver is usually a breeder who has gotten in over her head. Rather than being spurred on by a mental illness, an overwhelmed caregiver has a stronger grasp on the reality of the situation and is better able to recognize that she can no longer provide adequate care for all of their animals. By comparison, a rescue hoarder operates on the principle that she is saving the animal from certain death at the hands of a shelter and truly believes she is the only person who can provide the animals with proper care. However, a rescue hoarder prolongs and intensifies the animal's suffering, thereby inflicting greater harm than euthanasia.

The final category, the exploiter hoarder, demonstrates the strongest traits of mental instability. Exploiters are very manipulative, lack empathy for the animals they harm, and still are intellectually savvy enough to know how to work the judicial system to their advantage.[5] Both the overwhelmed caregiver and rescuer generally hoard with "good intentions" and have a better chance of rehabilitation than the exploiter who collects animals without any regard for their wellbeing.

Based on these categories, criminal prosecution is usually warranted for the exploiter hoarder, whereas the civil proceeding may be the appropriate remedy for the overwhelmed caregiver and possibly the rescue hoarder.

How does hoarding cause animal suffering?

Animal hoarding is one of the largest sources of animal violence with a greater number of animal victims than intentionally violent acts.[6] Authorities identify between 700 and 2,000 new cases of animal hoarding nationwide each year, and a single hoarding event averages around 40 animal victims.[7] Animal hoarding victims endure extreme neglect in overcrowded and unsanitary conditions. Most rescued animals are in poor physical condition, suffering from weight loss, parasite infestation, and severe skin infections from feces and urine caking their haircoat. The animals suffer psychologically as well from their cramped confinement. The stress of being surrounded by so many other animals is compounded by the fact that many have not been properly socialized. When rescued, some animals will lash out at handlers from fear or display other bizarre reactions to normal stimuli. As a result of these physical and mental problems, euthanasia is the best option for many of the rescued animals.[8]

There are also numerous health hazards to people living in the hoarding home and neighboring residents. Rescue workers frequently have to wear respirators to even enter the property as a result of increased ammonia levels from feces and urine.[9] In severe cases, infectious diseases spread because of the extreme levels of rodent infestation typically associated with all of the filth and debris. One such disease is Hantavirus, a rare but deadly disease that is contracted by breathing air that has been contaminated by rodent droppings and urine containing the virus.[10] While an episode of "Hoarding: Buried Alive" was filming for the Discovery Channel, a home in the Houston area was quarantined out of fear that it contained Hantavirus. Fortunately, a second round of tests came back negative for the disease, but earlier this year an outbreak at Yosemite National Park infected 10 people and caused three

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deaths.

Beyond the animals or humans immediately involved, there are other victims in hoarding's wake. Animal shelters suffer financial strain because they lack the space or resources to deal with a large influx of animals. Many shelters are already overwhelmed, and the abrupt arrival of a large number of animals can force them to euthanize healthy, adoptable pets to make room for sickly, skittish hoarding victims. If the owner declines to relinquish custody, they often must be kept alive as evidence, prolonging their suffering and taxing a shelter's resources.[11]

Because of the impound issues, every prosecuting agency should have a working partnership in place with an animal welfare organization to handle animals seized in cruelty cases. In Harris County, we are fortunate to have a great partnership with four animal welfare organizations: Houston Humane Society, Houston SPCA, Bureau of Animal Regulation and Care (BARC), and Harris County Veterinary Public Health. Two of the agencies are private, non-profit organizations and two are government animal-control agencies. We initiated the partnership by asking to meet with each organization to discuss their willingness to assist us in animal cruelty cases. We discussed their resources and limitations, and we also explained our evidentiary needs, including the need for photos, chain of custody protocol, a veterinarian report for each animal, and the need for a necropsy.

Based on our discussions, we developed a standard protocol, which provides for 24/7 veterinary coverage utilizing the four animal shelters. It outlines which animal welfare agency will provide assistance and under what circumstances. Because of this partnership, we have a plan in place and can handle any animal cruelty case, including large seizures, in a coordinated and efficient manner. (If you live in an area that does not have animal shelter resources, you can contact Katie Jarl, the Texas State Director of the Humane Society of the United States, for assistance at Texas@humanesociety.org.)

Seizure issues

Under Texas law, animals may be seized with a criminal search warrant pursuant to §18.02(10) in the Texas Code of Criminal Procedure or by a civil warrant pursuant to §821.022 in the Texas Health & Safety Code. However, even in criminal cases, it is always preferable to seize the animals with a civil warrant because the civil statute is animal-friendly and provides for a swift disposition of the animals seized. Under the civil statute, a hearing regarding the disposition of the animal must be held within 10 days; it also provides that if the defendant wants to appeal, he must post an appeal bond determined by the court. These conditions are beneficial to animal welfare agencies because it minimizes their costs in caring for the animals. Additionally, it reduces animal suffering by offering the agencies that gained custody of the animals the ability to adopt healthy animals soon after the civil hearing without having to wait for the disposition of the criminal case.

Even in situations where a criminal search warrant is necessary to gain access to the animals, law enforcement officers should also obtain a civil warrant. With both warrants in hand, officers should use the criminal search warrant as authority to gain access to the animals; however, officers should seize the animals pursuant to the civil warrant. By seizing the animals pursuant to the civil warrant, officers do not need to list the animals as inventory in the criminal search warrant. The officer will then file the civil warrant with the appropriate justice or municipal court and a hearing will be held within 10 days to determine the disposition of the animals. Once the civil hearing is over, the prosecutor can file criminal charges, if appropriate.

Finally, there are two common scenarios where an officer may seize animals without a warrant. One way is to have the owner/caretaker sign a voluntary surrender form, which alleviates the need for both a warrant and subsequent civil hearing. The second scenario is when an officer, who is standing in a lawful place, observes an animal in dire need of medical care. Under this scenario, the seizure of the animal is proper under the emergency doctrine. In *Pine v. State*, the defendant had a malnourished colt and the sheriff removed the colt from the defendant's farm without first obtaining a warrant.[12] Although the court was unable to find precedent for applying this doctrine to an emergency involving saving the life of an animal, it found that the deputy was presented with an emergency situation that made the warrantless seizure reasonable. (The officer

should still obtain a civil seizure warrant as soon as practicable after seizing the animals.)

Remedies

Texas law provides two avenues for handling animal cruelty cases: civil and criminal. Although each statute serves a different purpose and a single case can be prosecuted under both statutes, the prosecutor should wait until the disposition of the civil hearing before filing criminal charges. The civil statute focuses on the welfare of the animals and provides a mechanism to remove them from an abusive situation, whereas the criminal statute focuses on the abuser and seeks justice for her actions. Additionally, the civil statute differs from the criminal statute in that it has a broader definition of "animal," a lower burden of proof, and does not require a culpable mental state. For these reasons, the vast majority of animal cruelty cases, including hoarding cases, are handled civilly and do not result in criminal prosecution.

Charging options

Texas does not have specific hoarding legislation; therefore, animal hoarders must be prosecuted under §42.092 of the Penal Code, which makes it a Class A misdemeanor for animal owners to fail to provide necessary food, water, care, or shelter.[13] Prosecutors should always file multiple charges because the statute provides for enhancement provisions for repeat offenders. After reviewing the complete file, the prosecutor should file charges on two or three animals that are in the worst medical and/or environmental condition. These animals should specifically be identified by their tag or identification numbers in the charging instrument. The prosecutor can also file multiple charges using a different manner and means for each animal. Finally, the prosecutor should give notice to the

From left to right: Belinda Smith, Jessica Milligan, and Trina Burkes, all of the Harris County DA's Office, visiting with some of the dogs from the Tomball fire (mentioned at the beginning of this article) before the animals were adopted out to new families.

defense of extraneous offenses regarding the animals that were harmed but were not the bases of any charges. The enhancement provisions are especially applicable to animal hoarders, who have nearly a 100-percent recidivism rate.[14]

A noteworthy challenge to Texas law was discussed in *State v. Kingsbury*.[15] In *Kingsbury*, Cameron County Animal Control workers found approximately 76 dogs that were emaciated and dehydrated. The workers also found four other dogs that had died of starvation. The indictment alleged that the defendants intentionally or knowingly tortured those four dogs by "leaving them without food and water to such an extent as to cause the death of said dogs."[16] The court held that the felony offense of "torture" did not include failing to provide necessary food, care, or shelter and to rule otherwise would defeat the statute's categorization of "torture" as a more serious crime. Therefore, to avoid the problems in *Kingsbury*, even in the extreme cases where animals die from starvation, prosecutors must file misdemeanor charges under §42.092 charging that the animal owners failed unreasonably to provide necessary food, water, care, or shelter by failing to provide adequate nutrition or medical care or sanitary shelter.[17]

Sentencing options

Due to the high likelihood of reoffending, probation is often preferable to incarceration because the defendants can be strictly monitored. As a component of the probation, courts should order mandatory psychological evaluation and treatment to help diagnose and treat any underlying mental illnesses.[18] Additionally, offenders should be prohibited from owning, possessing, caring for, or having any contact with an animal during their probation. If the court permits an offender to keep animals, humane law enforcement officers should provide close supervision and make periodic unannounced visits to monitor compliance.[19] The prosecutor specifically needs to have the defendant consent to these visits in the plea paperwork. This ensures that the offender adheres to any limitations (or prohibition) on the number of pets permitted and provides the animals with adequate care. A judge should also order restitution to the animal rescue organizations or municipalities involved to compensate for medical care, housing, and transportation for rescued animal victims. A

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prosecutor could also ask for jail time as an option, but typically this should be reserved for extreme cases and repeat offenders.

Conclusion

To successfully handle a hoarding case, a prosecutor needs to understand the nature of the hoarding mentality. Not all hoarders are created equally, so it is beneficial to understand the categories of hoarders to determine whether civil, criminal, or both remedies are appropriate in a given case. A successful prosecution also requires a multiple-agency response. Animal rescue officers, shelters, and veterinarians must work together to provide health care, food, and housing. Reducing the health, financial, and legal risks associated with responding to a hoarding incident hopefully will help prosecutors bring more animal hoarding cases to court and feel confident that with a coordinated effort, care can be provided to both defendants and their animal victims. ❇

Endnotes

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4 Debra L. Muller-Harris, Animal Violence Court: A Therapeutic Jurisprudence-Based Problem-Solving Court for the Adjudication of Animal Cruelty Cases Involving Juvenile Offenders and Animal Hoarders, 17 *Animal* L. 313, 326 (2011).

5 *Id.* at 326-327.

6 Lisa Avery, From Helping to Hurting: When the Acts of "Good Samaritans" Become Felony Animal Cruelty, 39 Val. U. L. Rev. 815, 818 (2005) (citing that the ratio of animal victims injured in intentional violent abuse compared those injured in hoarding incidents is 2.3 to 30. Randall Lockwood, Animal Cruelty and Violence Against Humans: Making the Connection, 5 ANIMAL L. 81, 85 (1999)).

7 Allen, at 29 (citing authors Randy Frost & Gail Stektee of the book "Stuff: Compulsive Hoarding and the Meaning of Things," (2011)).

8 Patronek, at 6.

9 Colin Berry et al., Long-Term Outcomes in Animal Hoarding Cases, 11 Animal L. 167, 169-170 (2005) (stating that an "ammonia concentration of 300 ppm or greater is a threat to life and health."). See also Avery, at 826-827 (noting that hoarding homes can become biohazardous sites requiring hazmat groups to clean the contaminated homes).

10 Centers for Disease Control and Prevention, Hantavirus, http://www.cdc.gov/hantavirus/index.html.

11 Allen, at 31 (stating that "[e]ach animal has to be documented for court; this time-consuming process involves photographing the area where the animal was found, and then the animal himself from multiple angles in order to capture his physical condition.").

12 *Pine v. State*, 889 S.W.2d 625 (Tex.App.—Houston [14th Dist.] 1994, pet. ref'd).

13 Tex. Penal Code §42.092.

14 Mueller-Harris, at 335.

15 *State v. Kingsbury*, 129 S.W.3d 202 (Tex. App.—Corpus Christi 2004, no pet.).

16 *Id.* at 203.

17 Tex. Penal Code §42.092.

18 Mueller-Harris at 334-335.

19 Id. at 333-334. Courts will sometimes allow an offender to keep one or two pets despite their crimes against animals to assuage the offender's trauma of having all of her animals removed and to enhance the likelihood of a successful rehabilitation by "foster[ing] a cooperative relationship with the hoarder while recognizing the importance animals have in the hoarder's life." Avery, at 853.

Interviewing family violence victims

They don't teach a class in law school on how to empathetically, professionally interview a crime victim; you learn it on the job. Here is the best advice from a seasoned domestic violence prosecutor—which he learned the hard way.

I never read a textbook on how to have a sit-down with a family violence victim. I never took a law school course about the delicate nuances of interacting with folks who are fragile or frightened or fighting me—or all of those at once. I never heard any learned professor pontificate on the history of attorney-victim dialogue, reverently noting the watershed moments of enlightenment that dragged our Western legal tradition out of the murky depths of barbarism and into a refined contemporary model of effective interviewing. And I can't give any of that to you now if you're in the same boat. What I can do, though, is tell you some of what I've learned the hard way about interviewing victims.

By Ellic Sahualla
Assistant District Attorney in El Paso County

Preparation

Doing your homework before an interview is absolutely essential, which means insisting on a format where preparation is possible. Although victims will regularly show up at court hearings or your office unannounced, it's best to insist on a later appointment unless this one represents a fleeting opportunity to make contact with someone you've had trouble finding. At the very least, have them speak with an advocate or investigator while you get ready.

Postponing the interview gives you the opportunity to thoroughly review the case beforehand so that you know all of its details and quirks. Look at the photos, listen to the 911 recording, and take a close look at any other evidence you have. You need to know what to follow up on and be able to tell if she's[1] lying to you. In fact, take the time to learn everything you can about the victim, the defendant, and their relationship outside of the case at hand. What's their history? What are their criminal histories (including the victim)? Are children, job security, mental health, or any other issues likely to be in play? Try to answer these questions yourself before you meet with her.

Also think about where to conduct the interview. Ideally, it should be a clean, quiet, well-lit place with enough room for comfort. Try to avoid spaces with a lot of distractions, from foot traffic to noise to bold decorations, and steer clear of environments that are overly formal. Even your own office isn't ideal if it puts you behind a clunky desk. You want to be able to sit close to the victim with no obstructions between you. If you usually take notes on a laptop, scrap that and use a notepad if that's feasible, or better yet, don't take notes at all if you don't have to. And do actually sit; standing over the victim isn't going to make you seem approachable.

Block off enough time for the interview and hold off on answering calls, texts, or emails—the victim shouldn't feel as though you're ignoring or sidelining her concerns. Finally, recruit a victim advocate, investigator, or preferably another attorney to attend the meeting with you. Another person will provide an additional perspective during your talk in case you overlook something, and they can back you up if a dishonest victim accuses you of doing anything inappropriate. If you don't have access to a "second chair" for the interview, then at least record it, which you can do with or without the victim's knowledge or permission.[2]

Cooperative witnesses

All this planning might make it seem like an interview is some stiff, formal affair, but it's just a talk you're trying to be smart about. I look at this interview as really *three* mini-interviews (which I'll explain further), each with its own focus, and it needs to start like any conversation: introduce yourself, shake hands, make small talk, and *relax*. Don't go overboard—the victim isn't your buddy—but the interview isn't going to be effective if you don't establish

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some rapport in the beginning.

Once you're ready to get down to business, ask the victim to tell you how things started (that is, what was going on that day that led up to the crime) and have her take it from there chronologically. I call this the "first interview" because it, well, comes first and because it goes straight into what happened on the day of the offense. Don't go into the background of the relationship before the crime or what's happened since; doing that now can distract the victim with thoughts of happier times, which might make her think twice about cooperating with you. Just ask her to tell you what happened and then let her. For now, you absolutely shouldn't interrupt, no matter how important your question or comment is.

Keep in mind that this is just the first pass through the story—pay attention to the big picture. What does the victim emphasize? What sticks in your mind about her recollections? How's she going to come across to a jury? Get a handle on the broad strokes and make note of the things you want to follow up on.

Unanswered questions and small details are what the "second interview" is all about. Loop back to the beginning, right where she started her narrative, and tell her you want to make sure you understood everything she told you. Then repeat her story back to her and ask open-ended questions as you go so that you really get a clear picture of what happened; never just assume you got it right. For example, you might ask, "Earlier, you said that he grabbed you by your shoulders as you were walking into the house. Where was your purse then and what happened to it?" Clarify the sequence of events and the particulars that might be important during trial.

This is a great time to review any evidence you'll introduce through the victim. If you've got pictures you're going to ask her about, show them to her and explain exactly how it'll work. If you've got medical records that she's going to say something about, make sure she's comfortable reading, understanding, and pronouncing everything you'll be going over. Have her do some tactile work, too. She should draw a map or diagram of the place things happened so she can show you where everyone was as things progressed. It might be useful for her to create a simple timeline or even write out how things happened so that it clears up any confusion. All of that will help her memory and your understanding.

Once you've gotten through the victim's narrative twice, you're ready for the "third interview": everything surrounding the crime. Tell her you'd like to talk about how things got this bad, and ask her to go all the way back to how they met and take it up to the present. Be sure you know exactly what sort of interaction they've had since the crime and what issues are out there—child custody, residency status, employment issues, and so forth.

Also cover cross-examination. If trial is the endgame here, prepare the victim for a defense attorney attacking her story and her credibility. Be sure to couch it in those terms—that you believe her, but that the defense will be trying to make her look like a liar. With that caveat, you can really go after every issue in her account of things: "The defense is going to say that there was no way he was strangling you for that long because you would've passed out. How do you explain that?" Give her some guidance about how to respond to defense tricks and emphasize how important it is for her not to become angry or confrontational during cross. She should also be warned about embellishment. It's easy for a victim to exaggerate without even meaning to when she feels like someone else is diminishing her experience, so make sure she knows to keep that in mind.

When the three interviews are complete, it's "what's next" time. Tell her what to expect as far as the timeline of the case, upcoming court settings, subpoena service, and the like. And find out what's next for you. Can she bring you any additional evidence? Are there other important witnesses (including for punishment) whom you don't know about but she can put you in contact with? Don't conclude an interview until both of you know exactly what the game plan is.

The subtle stuff

If everything above is *what* to talk about, there's still a lot to be said for *how* to talk about it. Your first consideration is your tone throughout the interview. For you, this is a conversation with just another victim; for her, it's one of the most important things going on in her life, with real consequences that are going to stay with her long after you've moved on to another trial. Make sure you adopt her perspective and that it comes across in how you treat her.

On the other hand, you need to temper compassion with objectivity if you want to do a good job and command the victim's respect. No matter how heartbreaking her tale of abuse is, keep your emotions in check or you won't be in control of the interview.

Improve your communication throughout the interview by paying attention to the way she describes things and responding in kind. Some call this "mirroring." Make an understated shift in your style, cadence, and word choice to match whatever she's doing. Don't do anything silly—no fake accents or inauthentic slang—but do try to adjust. Also, use sensory language when asking questions, and try to key in on the descriptive mode she's using most frequently. If she's always talking visuals, ask how things looked; if she keeps discussing emotions, focus on how things felt. These cues will help her remember more of the information you might be looking for.

Sometimes, what the interview needs to cover is traumatic and difficult for the victim to talk about. When you broach those topics, don't drag her through a gauntlet of distressing memories unnecessarily. You don't want to "waste" tears in an interview room when they should be in front of a jury, and that's a real risk: The more times she tells her story, especially in detail, the more comfortable she'll become telling it. You as a prosecutor might recognize a victim who's numb to the pain on the stand, but a jury might see a flat affect that seems dishonest. When you've got a tough topic, carefully tailor your questions to get out only the information you need, even stopping her narrative if necessary. This is an exception to the "don't interrupt" rule from earlier. You might even need to go away from the story into something mundane as a bit of distraction to calm her down before returning to the gritty details. Use a delicate touch.

Uncooperative victims

That should be a solid foundation for interviewing some family violence victims—the whopping 15 percent who are cooperative. Unfortunately, the vast majority are going to be uncooperative or even outright hostile. Explaining why would take a lot more space than I've got, but it's worth learning about elsewhere—it'll definitely make you care more about these cases. What matters here, though, is that most victims are going to be against you.

If you have a victim who doesn't want to talk to you at all, then all you can do is try to change her mind. Empathy and respect are the keys to unlocking that door. Failing that, subpoenas, writs of attachment, and material witness warrants are ways to batter it down if you have to. When you do get a conversation going, the principles above are still applicable, but there's an additional playbook you'll need to be effective with antagonistic victims.

It goes all the way back to setting up the meeting. An outright refusal to talk is relatively rare; as soon as a victim decides she doesn't want to prosecute, she'll probably want to tell you about it. But wait until very close to your trial day. That way, if you convince her to cooperate, it has a good chance of "sticking." (If you flip her to your side six months before trial time, she'll have flipped back by then.) Waiting until you have a firm setting is also best because you can serve her with a subpoena for trial if you still want her to testify. Wait until the end of the interview—it'll just make her angry if you haven't earned her trust first—but if you get her personally served, she's more likely to appear and you'll have the option of applying for a writ of attachment if she doesn't. (See the article on page 27 for more on writs of attachment.) Note too that any recantations constitute *Brady* material that must be disclosed to the defense.

As you begin the interview, use the same techniques I described above to get her talking. An additional concern here, though, is your safety. It's rare, but it's always possible that an angry victim might make the move from verbal hostility to physical violence. Always listen to your gut; if something you can't quite put your finger on has you worried, end the interview and be ready to call for help in the meantime.

Let her tell her story. As she does, you'll quickly figure out whether she's telling the truth (perhaps with some minimization) despite not wanting to prosecute or whether she's peddling an outright lie. Whichever way she goes, withhold judgment and don't interrupt. It's crucial that you listen closely. Most importantly, she might be telling the truth now—maybe the defendant really is innocent. Usually, though, you'll need to listen for clues about why she doesn't want to cooperate. You've got to get some solid

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insight into her motivations if you want to make any headway during the interview. Also, keep your ears open for holes in her story because those can be useful later on. (While a desire not to prosecute doesn't mean anything procedurally,[3] some statements do. If at any point during the interview she recants or provides a legal excuse for the assault, such as saying she attacked the defendant first, you're obligated to disclose that fact to the defense immediately.[4])

Once she gets completely through her explanation, delve into everything surrounding the case as the second interview instead of the third. Gather all the information you can to understand her interests and the pressures she's struggling with, and getting a handle on the background of the relationship is a big part of that. If nothing else, it might yield a treasure trove of impeachment material for when she takes the stand if she remains uncooperative.

The next step requires a bit of a different approach. Like the second interview I talked about before, you'll still be doing the bulk of the talking here, but this time it's going to be something of a confrontation. The reasons why she doesn't want to prosecute will let you know what approach you should take. It might be simple. If she doesn't want to go forward because she's worried that the defendant will lose his job or be away from the family serving of a prison sentence, you can undercut that by showing her and explaining the written recommendation you've made if it's for probation.

Often, she's uncooperative because she still loves the defendant and thinks he'll change. That's where a little verbal jujitsu comes in handy: Turn her concerns back around on her. If it's a probation case, get her to identify the problems in the relationship and show her how community supervision can address them. Probation means that the defendant is going to *have* to stop drinking, get a job, stay home at night, take care of the kids, attend counseling, and so forth. If this is a case that's likely to end in prison time, you might need to take her through all of his prior criminal history—the failed opportunities for him to change—so that she appreciates that his own actions (not hers) brought him to this point, that this kind of big wake-up call may be his last chance to become a better man, and that without it you'll be sitting down with her again soon for the next, worse bout of violence.

When any reason leads her to lie, and especially when her noncooperation comes from the defendant's prodding, confront her with the consequences of lying and proof of the truth. This takes some finesse to do conscientiously—there's a fine line between protecting a victim and threatening her. Your office will have to decide its policy on prosecuting recanting victims for false report or perjury. Given the rock-and-a-hard-place situation that family violence victims are often stuck in, my position has always been that it's wrong to prosecute real victims, regardless of what they say, but it's imperative to punish real liars who actually make false accusations. If you think a crime happened, don't victimize her again. If you don't, then this "victim" is undermining our entire system of justice and you ought to go after her with everything you've got.

When you have a true victim who's changing her story, it's perfectly fine to explain the possible consequences of false report or perjury to her. Make sure she knows that you don't represent her and that she should consult with her own attorney (*not* the defendant's),[5] and never directly threaten to charge her with anything.[6] Instead, put the focus back on the defendant. Emphasize that things are this way because of his choices and actions then sweep aside her lies and excuses using the evidence you have. Recantations rarely take into account that the emergency call was recorded, that officers took pictures of the injuries, and that there's a police report documenting everything. Show her systematically what you've got and how it disproves her lies, and don't let her come up with new ones. She'll soon start trying to refine, qualify, or expand on her story, and you need to cut off these new denials immediately or you won't get anywhere. Point out that her children deserve the example of a mother telling the truth and standing up to abuse, that you know what really happened given the evidence you have, and that you want the whole truth from her now. Does she really want to risk getting in trouble for a man who hurt her? If you're convincing, her answer will probably be "no."

Again, you can serve her with a subpoena for trial at the conclusion of the interview if you want, but the next steps depend on how things went. If she's had a change of heart and wants to prosecute or if she tells the defendant about the recommendation (which his attorney may not have done accurately for any number

of reasons), you might find the case turning into a plea. Take extra care to explain the trial process to her, though, to make her as comfortable as possible with her reluctant testimony. If she doesn't change her mind (and even if she does—it might change again!), assume that what she's told you will be a big part of the defense's case at trial and prepare for it.

These techniques may or may not get an uncooperative victim on your side. You'll have a lot better chance of turning her around, though, if you acknowledge the impossible situation she's in, both explicitly and through your tone and demeanor. She's under an incredible strain already, and if you're going to ask her to hop onto an emotional rollercoaster, you can't push her—you've got to hold her hand and make her feel like it'll be OK. Family violence victim interviews are some of the most difficult you'll ever have, so put in the effort they deserve and don't abandon common sense. If you give some real thought to your approach, listen to your instincts, and connect with the victim as human being, then what seemed like an obstacle will absolutely become an opportunity. ❇

Editor's note: For more information about dealing with family violence victims, see Family Violence Investigation & Prosecution *by Ellic Sahualla and Patricia Baca (© 2012), available at www.tdcaa.com.*

Endnotes

1 There are lots of male victims. Abuse in the home isn't restricted to any gender, race, sexual orientation, or religion, and all victims deserve recognition and justice. However, the fact remains that the overwhelming majority of family violence victims are female, so this article will use those pronouns rather than sacrificing readability on the altar of gender-neutrality.

2 Texas is a "one party consent" state. Tex. Pen. Code §16.02; Tex. Civ. Prac. & Rem. Code §123.001(2); see generally Tex. Code Crim. Proc. art. 18.20 (providing relevant definitions). In other words, if you're a party to a conversation and you consent to its recording, you don't have to get permission to record from anyone else who's involved.

3 See *Easterling v. State*, 710 S.W.2d 569, 574 (Tex. Crim. App. 1986) (victim's desire not to prosecute was inadmissible at trial); *Iness v. State*, 606 S.W.2d 306, 310–11 (Tex. Crim. App. 1980) (*Brady* doesn't require disclosure of inadmissible evidence).

4 *Ex parte Johnson*, No. AP-76153, 2009 WL 1396807, at *2 (Tex. Crim. App. May 20, 2009) (not designated for publication); see also *Ex parte Zapata*, 235 S.W.3d 794, 794 (Tex. Crim. App. 2007) (plea involuntary where no notice of victim recantation given in sexual assault case). Note that this doesn't apply to potential impeachment evidence, such as information that might show bias—that only needs to be disclosed if and when you go to trial. *United States v. Ruiz*, 536 U.S. 622, 633 (2002); *Orman v. Cain*, 228 F.3d 616, 620 (5th Cir. 2000); *Johnson*, 2009 WL 1396807, at *2.

5 See Tex. Disciplinary R. Prof'l Conduct 4.03 (describing duties towards unrepresented persons).

6 If you do, that gets awfully close the prohibition against tactics used solely "to embarrass, delay, or burden" potential witnesses or "methods of obtaining evidence that violate the[ir] legal rights." *Id.* 4.04 (a).

Reaching out to local citizens

Dallas County launched a Citizens Prosecutor Academy last fall to get the word out that prosecutors are ministers of justice. Read the inspiring story of how they did it and the response they're receiving.

By Stephanie N. Mitchell
Assistant Criminal District Attorney in Dallas County

What does it mean to be a prosecutor? When we asked this question at one of the sessions of our Citizens Prosecutor Academy, a Dallas County resident replied, "Prosecutors are youngsters trying to get a start and who are not good enough for private practice." Ouch.

The truth of the matter is, the average citizen has no idea what it means to be a prosecutor. Why would they? Unless a citizen has served on a jury or been the victim of a crime, he has little to no interaction with prosecutors, and his perception of who we are and what we do is defined by what he sees on television or reads in the newspaper.

The Citizen Prosecutor Academy (CPA) aims to change that. Last fall, James Tate, a graduate student in the Master of Public Policy program at the University of Texas at Dallas, approached our office with the idea of starting such a program in Dallas County. Tate had participated in a similar program in Collin County, and after hearing about his experience we were inspired to implement our own academy with the hope that the students would share what they learned with others in their communities. We decided to have the program twice a year, with a spring and fall semester.

Planning and publicizing

A diverse team of prosecutors and support staff met weekly for several months to develop the curriculum and application process. We developed a comprehensive 10-week program that took students step by step through the judicial process. Our mission was to expose Dallas County residents to the numerous divisions and procedures within the Criminal District Attorney's Office, provide them with an opportunity to engage in open dialogue with prosecutors and leaders in the community, and allow them to discover the inner workings of the judicial process.

The curriculum we established was as follows:

Week 1: Opening Ceremony
Week 2: Jail Tour, Juvenile Division, and Civil Division
Week 3: Divert Courts, Grand Jury, and Intake
Week 4: Intoxication and Property Crimes, ID Theft, and White Collar Crimes
Week 5: Family Violence and Child Abuse
Week 6: Narcotics, Gangs, and Homicide
Week 7: Medical Examiner Office Tour and Conviction Integrity Unit
Week 8: Investigations and Trial
Week 9: War Stories (Behind the Scenes)
Week 10: Graduation

The planning committee divided the weeks up and were responsible for organizing speakers for each class. To offer an idea of how much work went into it, we met every week for about three months for two to three hours per week to check on everyone's progress as well as review any new applications. The speakers took approximately an hour to prepare their own presentations and were expected to speak for 35–40 minutes and allow 5–10 minutes for questions.

With the program outline complete, we started publicizing CPA. Information about the academy and the application were posted on our office website. We also issued a press release to various media outlets and reached out to local universities with criminal justice departments. Shortly thereafter, applications began coming in. Aside from basic contact information, we asked why applicants were interested in participating and whether they or any of their relatives had ever been arrested or convicted of any criminal offenses. An

affirmative answer didn't automatically bar an applicant from participating, but we wanted to avoid people using this program to gain inside information on criminal matters, so we reviewed those applications on a case-by-case basis.

Our goal was to admit 35 participants that represented Dallas County's diverse population. Unfortunately we did not have enough spots to accept every application we received (we got more than 80!), and those who were not admitted were notified and encouraged to apply again in the future. Students in the class ranged from age 18 to 70; some worked for other government agencies, such as the Attorney General's Office, and others had no prior experience in the criminal justice system. Our spring class also had two students who worked for the media and wrote articles on their experience in the program.

The students we selected were advised that class would meet every Thursday evening from 6:30 to 8:30 starting March 1. To graduate from the program, they had to attend eight of the 10 classes. Aside from two planned field trips (to the county jail and the medical examiner's office), class was held in the courtroom of Dallas County Criminal District Court 3. Dinner was provided at each class. Students were given a binder that outlined the course schedule and weekly handouts of the presentations.

Class is in session

The opening ceremony was a huge success. Students were welcomed into the academy by Dallas law enforcement leaders including District Attorney Craig Watkins, Mayor Mike Rawlings, and Police Chief David Brown. Participants learned how the various agencies interact and work together with the shared purpose of serving and protecting Dallas County citizens. They were given an opportunity to ask questions and express any concerns they had. As students left that evening, many of them expressed enthusiasm about the weeks to come.

Week Two of the academy presented some challenges when a pipe unexpectedly burst causing a flood in the courthouse. The building was evacuated and class had to be cancelled. The planning committee decided to forgo the class and pick up as scheduled the following Thursday. The students, on the other hand, expressed their desire to extend CPA a week and make up the cancelled class. To avoid scheduling conflicts with the planned speakers, we decided to push graduation ahead one week to make room for the rescheduled Week Two presentation.

The subsequent weeks went off without a hitch. Assistant district attorneys within various divisions/units of our office made presentations about the topics outlined in the curriculum. Presenters gave students an overview of the types of cases their divisions handle and explained some of the evidentiary issues they have to deal with. There were also presentations from Dallas Police Department detectives and our various service providers, such as The Family Place (the largest family violence service provider in Dallas). An effort was made to ensure that the students not only enjoyed the presentations but also developed an understanding of what a prosecutor's workday is like. They were taken on tours and allowed to view our offices, divisions, victim waiting areas, and the grand jury rooms. Students were amazed by everything that prosecutors do outside of the courtroom.

Week Seven was especially exciting for the students. The class met at the Southwest Institute of Forensic Science, commonly referred to as SWIFS. Following a presentation from our Conviction Integrity Chief, Russell Wilson, the students heard a presentation from Charles Chatman. Chatman was wrongfully convicted and received a 99-year sentence for aggravated sexual assault in 1981. He was exonerated in 2008 after DNA evidence proved his innocence. He spoke to the students about his experience and commended the work of SWIFS and our office for giving him his life back. The students were then taken on a tour of the facility. They learned about the testing processes for DNA, trace evidence, firearms, and toxicology. At the close of this evening one student wrote that this experience made him "proud to be a part of this county and under the leadership of those who fight to serve true justice."

Week Nine was dubbed War Stories night. Senior prosecutors from our office presented a behind-the-scenes look at high-profile Dallas County cases they have tried. We wanted the students to walk away with an understanding of each case, but more importantly with an insight on the personal effect these cases have on the prosecutors handling them. They were able to hear about the sleepless nights we experi-

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ence during trial and about our drive to pursue justice for our victims and their families. The highlight of the night for them involved a case that is deeply rooted in American history: the trial of Jack Ruby. Jack Ruby was tried in Dallas County for the 1963 murder of Lee Harvey Oswald, the accused assassin of President John F. Kennedy. The lead prosecutor in that case, Bill Alexander, visited and spoke to the students about the issues he dealt with preparing for trial. The students described this class as a truly eye-opening experience.

The CPA concluded with a graduation ceremony. The students received a certificate and small gift for their participation. Special announcements and recognition were made for those having perfect attendance. Students used this time to express their gratitude to our office. One by one, they took the stage and shared their appreciation for all that we do. Not only did they feel more informed about the Dallas County judicial system, but they also felt empowered to do more in their communities. This was largely impacted by the efforts we made to integrate them in all that our office is doing. Outside of the academy, students joined our office in various community outreach projects such as the Mothers Against Drunk Driving (MADD) walk and the Big Brothers and Big Sisters Bowl For Kids' Sake event.

Reflections

After each class, students were asked to complete a presentation evaluation. We reviewed these for suggestions on how to improve the academy going forward. Surprisingly, the overwhelming criticism was that the classes weren't long enough. Students suggested extending the academy a few weeks to allow presenters more time, so we extended the fall semester of CPA to 12 weeks long.

Since graduating from the academy, the students have continued to be active, from sharing what they learned to encouraging others to participate. In fact, the number of applications we received for the fall semester nearly doubled from the spring. Due to the high application response we decided to accept more students. The fall 2012 semester had 42 students enrolled. Our spring graduates joined us to welcome the fall participants at the opening ceremony and continue to come to some of the classes.

The overall response to CPA has been incredible. We anticipate that with each semester, interest will continue to grow. It has made our citizens more informed about the justice system and aware of how hard prosecutors work to protect them. There was a 180-degree turnaround in their perception of what it means to be a prosecutor from the first night of class to the last. We would encourage all district attorney's offices to start a program like this if you don't already have one.

Please feel free to contact our office with any questions you may have. It's time to make our communities aware of all that we do. We take great satisfaction in knowing that when our citizens are asked what they think of prosecutors, they proudly say that prosecutors are public servants full of integrity and passion, working to ensure that justice is served. ❇

So you just got assigned to juvenile court

Welcome to the quasi-criminal world of juvenile law! Dorothy, you aren't in Kansas anymore—here's an introduction to this strange new world.

As a slightly seasoned prosecutor of about two years, I thought (foolishly) I was ready for anything. I had tried felonies and misdemeanors and had even supervised newer prosecutors as a chief in a misdemeanor court. Yet when I was assigned to a juvenile unit, I was amazed and at times confused by the quasi-criminal world of juvenile law. The very language and focus are entirely different for everyone in the system. I liken it to Dorothy's experience finding herself in the strange, Technicolor world of Oz after the gray of Kansas.

By Jessica Caird
Assistant District Attorney in Harris County

Now an appellate prosecutor, I am part of the team addressing questions from our juvenile prosecutors to assist them with the unique set of legal issues that arise in such prosecutions. This article is intended to serve as an introduction for those newly assigned to juvenile prosecution to the basic differences between juvenile law and adult prosecution.

A whole new vocabulary

The first challenge a new juvenile-law prosecutor will face is the terminology. First and foremost, strike the word "defendant" from your vocabulary, at least while you are in juvenile court. Because the system is civil in nature (at least according to the Family Code) we revert to civil law terms: "respondent" not "defendant" and "petitioner" not "prosecutor." Likewise, a juvenile does not face trial on an indictment. No, he answers to a petition as he would in a civil suit. The petition may change over the course of a case because you, the petititioner, amend it under the same cause number (rather than re-indicting it).

For example, the State might decide to seek grand jury approval for a determinate sentence that offers the judge or jury a set sentencing range unlike the usual indeterminate range left to the discretion of the court, juvenile probation, or the authorities with the Texas Youth Commission (TYC). Or you may seek to amend it or file it directly as a petition seeking wavier of jurisdiction and discretionary transfer to adult district court if the offense and circumstances of the incident warrant it, colloquially known as a "certification petition."[1]

Moreover, a child does not commit a crime. Rather, he engages in delinquent conduct or is a child in need of supervision (often abbreviated as CINS). The CINS offenses are generally class C misdemeanors, with the exception of huffing (chemical inhalation),[2] whereas engaging in delinquent conduct includes the statutes for most class B and above offenses.[3] The determination of whether the offense falls into the CINS or delinquent conduct category matters, as it would in adult court, because the range of potential sanctions changes depending on which category it falls into (similar to the difference between misdemeanors and felonies).

Yet what happens when a child engages in delinquent conduct or commits a CINS offense? A child is not arrested—that would again sound too similar to criminal courts. Rather, a child is detained or taken into custody. These distinctions relate to potential consequences of the police interaction and suppression-law issues, and prosecutors (ahem, petitioners) need to be aware of the distinction in terms. Moreover, a child may be taken into custody without the need for an arrest warrant merely upon a showing of probable cause, but were the juvenile court to issue an order instructing officials to take the child into custody it is called a directive to apprehend—not a warrant.[4]

Also in the vein of not making things seem like criminal court, the judge or jury finds the child "responsible" or "not responsible" instead of "guilty" or "not guilty." The system, similar to criminal court, is broken down into two parts, but rather than guilt/innocence and punishment, we call the first part the adjudication phase and the second part the disposition.[5] Yet, unlike the adult system, the Family Code provides for the possibility that a court may adjudicate a child delinquent but find that no disposition is necessary.[6] The fact-

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finder, be it the judge in most cases or a jury on a determinate petition, must make the finding that rehabilitation or protection are necessary before it can make a disposition on the case.[7] Interestingly, unlike the adult system, the default position would be "no disposition" or no punishment.

More people involved

The participating parties and overseers of the system also change. The juvenile board is a committee of judges who have responsibility to oversee the juvenile justice system in their particular county.[8] A "juvenile processing office" is where police usually take a custodial statement from a juvenile. A juvenile board must designate each particular location used as a "juvenile processing office" and certify that it meets the requirements designated by the Family Code.[9] Just remember that each county must have such a board, and the designations it makes will matter on search and seizure, as well as custodial statements taken from juveniles.

Next, to whom the State presents its case may also change. The Family Code permits for a magistrate, master, referee, or associate judge to hear contested matters in certain circumstances. The magistrate (also known as the substitute judge) may be any judge, including a justice of the peace or municipal court judge, and he is allowed to hear detention hearings or to meet privately with the child before and after giving a custodial statement.[10] The referee, master, or associate judge (although not a true, independent associate judge) may conduct hearings and making findings of fact and recommendations for the presiding judge, but it is then for the presiding judge to accept, reject, or modify those findings and recommendations.[11] Either party may oppose the use of the master to hear the case and instead demand that the matter be heard by the presiding judge.[12] Masters, referees, and associate judges are specifically prohibited from conducting discretionary transfer hearings (yes, also called a certification hearing—see, you are already getting the lingo!) or adjudicating and disposing of a case based on a petition approved by the grand jury (yep, otherwise known as a determinate petition).[13] Finally, the presiding judge is generally elected to the designated juvenile court, but he may assign a visiting judge under the Government Code.[14] However, the parties may object to the visiting judge, just as they may to the referee.[15]

If that were not enough, you might begin to notice a particularly crowded courtroom during the hearing. Who are all these people? The child is not only represented by an attorney, but his custodian, guardian, or parent is also a party to the suit and must be served and appear as such[16]—she is there to protect the juvenile's best interests. The juvenile court may even hold in contempt and fine a guardian or parent who was properly given notice of a hearing but fails to attend it; alternatively, the court may order the parent/guardian to receive counseling, attend educational courses, or pay restitution for the child. Therefore, to protect the adult's due process rights, she must be given notice and an opportunity to attend the hearing.[17] In the event that a parent, guardian, or custodian may not be found or fails to attend a hearing, however, the juvenile court must appoint a guardian *ad litem* to protect the child's interests.[18] The court may also appoint one if it appears the child's parent or guardian is incapable of or unwilling to make decisions in the best interests of the child; the attorney for the child may act as the guardian *ad litem* at the same time he represents the child if the juvenile court appoints him.[19]

Jurisdiction

The juvenile court is a court of limited jurisdiction but still possesses exclusive original jurisdiction over children engaging in delinquent conduct or CINS when the child is over age 10 but under 17.[20] The jurisdiction extends in some cases to permit modifications and disposition for those under 18 and for release or transfer of those over 18 into the adult system (be it transfer to adult district court, adult probation, adult prison, or adult parole), but with some limitations.[21]

Yet, being a court of limited jurisdiction and following the Rules of Civil Procedure in most matters creates different burdens on the State. For one, it is an open question between various appellate districts about whether the age of the child at the time of offense is an element that the petitioner must prove at trial. The El Paso Court of Appeals requires that a child must object to a lack of jurisdiction during the adjudication or transfer hearing or he waives it, thereby not requiring that

the petitioner prove the child's age to show jurisdiction.[22] Yet, even if not a true element, for safety's sake it is best to establish it, and one need do so only by a preponderance of the evidence.[23] This is easily done by producing a birth certificate or any person with knowledge of the child's age (including the parent who is helpfully sitting at counsel table with the child) to testify the child was over 10 and under 17 years old on the offense date alleged in the petition (or the respondent can stipulate to his age). Additionally, the netherworld of juvenile law relying on the civil rules harkens back to our law school education on *in personam* and subject-matter jurisdiction because the petitioner is responsible for proving the parties were served. That leads into the next section: how to go about prosecuting a juvenile.

The process

Investigation and detention

Upon taking the child into custody, the Family Code requires certain actions. Instead of going into all the particulars the code requires for properly and appropriately detaining a juvenile (which would no doubt fill a book—and has [TDCAA publishes one, and it's available at www.tdcaa.com]), suffice it to say the peace officer must:

1) issue a warning notice to the child and release the child to his parent, guardian, or other responsible adult upon a promise to bring the child to court;[24]

2) take the child to an office designated by the juvenile board (also known as a juvenile processing office);

3) take the child to a designated detention facility, secure facility, medical facility; or

4) take him back to his school principal if school is in session and the school will accept responsibility for him.[25] The officer must also promptly notify the child's guardian and the official designated by the juvenile board.[26] Failure to comply with these provisions can require suppression of evidence, such as a statement obtained from the child, when there is a causal connection between the statutory violation and police obtaining of the evidence.[27] These provisions apply even if the juvenile court certifies the child and you are the prosecutor in adult district court. It is vitally important to check that the officers followed guidelines for properly detaining the juvenile. These procedures must be followed *before* police can take the child to find evidence or take a statement from the child under §51.095.

Once detained, there is no "bonding out." Rather, after the child is taken to a detention facility, an authorized officer must determine if release is warranted, whether conditional or otherwise.[28] If not released (see the reasons listed in §53.02(b)) a detention hearing should be conducted no later than the second working day. The child's parent or guardian should receive notice of the hearing, the child has the right to an attorney at the hearing (one should be appointed if the child is indigent), and the magistrate must read the child his statutory warnings regarding the child's right to remain silent. The magistrate or juvenile court hears probable cause from the prosecutor and may review written reports from the probation department in this informal hearing to determine whether the child is likely to abscond, has suitable supervision at home, whether the guardian will return him to court, whether the child is dangerous, and whether he was previously found delinquent.[29] If detained, the order lasts for 10 working days, and then the hearing must be redone.[30]

Legal issues that may arise

Little of the law from the Code of Criminal Procedure will follow you to juvenile court; in general, only those provisions addressing discovery, Article 37.07 and Chapter 38, as well as some miscellaneous provisions regarding interpreters and aliases, apply to juvenile cases. And unless in conflict with a provision of the Family Code, the Texas Rules of Civil Procedure govern proceedings under Title III.[31]

In the civil world, we now have to consider issues such as service of process. It is no longer enough to merely file a petition (what would otherwise be an information or indictment), expecting that the child will eventually be arrested and brought before the court, thereby providing the trial court with jurisdiction based on the level and venue of the alleged offense. Now, the petitioner is responsible for having the relevant parties served with a summons to appear that includes a copy of the petition served on both the child and parent or guardian.[32] Failure to do so can, at times, be fatal to a case.[33]

Some appellate courts have permitted even collateral attacks on adjudications when the child was not served with the original petition

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because the Family Code does not permit the child to waive service of summons by written stipulation or voluntary appearance at trial. Therefore, "When the record contains no affirmative showing of service on the juvenile, the juvenile court lacks jurisdiction, despite the juvenile's appearance at trial." Any other party to the suit may waive service by written stipulation or voluntary appearance, however.[34] An affirmative showing of service for subsequent amended petitions is not generally required to show that the juvenile court retains jurisdiction, but a petition to waive jurisdiction and transfer on an amended petition does require separate service on the child with a copy of the petition before the juvenile court may hold a certification hearing.[35]

As a practical matter, in both a certification hearing or at trial, it is best to offer a certified copy of the certificate of service with the attached petition as part of the evidence that the juvenile court had jurisdiction over the child at the time it heard the case. This protects the State for direct and collateral attacks for lack of jurisdiction.

Yet, just when you have gotten a handle on the civil-law angle, do not forget that Chapter 38 of the Code of Criminal Procedure still applies (but only to the extent that it doesn't conflict with the Family Code). That requires the petitioner to keep in mind search and seizure law when advising officers and evaluating cases for trial, even when dealing with certified juveniles in adult district court. As discussed above, failure to comply with the proper procedures for taking a child into custody, including notifying his parents or taking him "without delay" to a detention facility or juvenile processing office, can lead to suppression when causally connected to obtaining the evidence.

Additionally, officers are still expected to comply with the requirements of the Texas and United States constitutional provision prohibiting illegal searches and seizures, but children have a lesser expectation of privacy, at least at school.[36] A principal or school police officer cannot disregard the Fourth Amendment, but the official does not need probable cause to search a locker, for example. Rather, a reason to believe the student is engaging in a violation of the law or of a school rule will suffice to permit the search. The United States Supreme Court laid out a two-part test regarding school searches:

1) whether the search was justified at its inception (i.e., did the official have reasonable grounds for suspecting the search would lead to evidence the child was violating the law or the institution's code of conduct); and

2) whether the search conducted was reasonably related to the circumstances justifying it.[37]

If the standards are a bit easier when it comes to searching a child, they are all the harder when it comes to obtaining a statement from one. Because police must comply with §52.02, they must take the child home to a parent, a secure facility for juveniles, a medical facility, or a juvenile processing office.[38] And, once at a juvenile processing office, the child may be kept only for as long as it takes to complete the necessary forms, photograph and fingerprint, issue a warning, or obtain a statement from the child, and the child may not be left unattended in the office. Moreover, the child is entitled to have his custodian and attorney with him.[39] Another causal-connection peril is that police should not attempt to keep the parent or attorney out of the room when taking a statement, because if shown to be causally connected, it can lead to suppression under Code of Criminal Procedure article 38.23.[40] Likewise, failure to take the statement at a *designated* juvenile processing office can affect admissibility of the statement at trial.[41]

In addition to location, an extra layer of protection is afforded to juveniles. Before taking a custodial statement, the child must be taken to a magistrate who privately interviews the child without police present to inform the child of his rights and for the magistrate to determine that the child understands the nature and contents of his statement and is voluntarily providing it.[42] For a written statement, the child not only meets with the magistrate before providing the statement, but he must also be returned and sign the statement in the presence of the magistrate after the magistrate determines his voluntariness. And, in the case of a recorded statement, the magistrate's warnings must be recorded on the same audio or videotape with the statement, before the statement complies with the requirements of §51.095. Similar to criminal procedure, exceptions to the strict requirements are made for *res gestae* statements and oral unrecorded statements found to be true, which establish the child's guilt such as finding secreted property. Nothing prevents authorities from seeking a non-custodial statement from a child, but a determina-

tion of whether the child understood he was free to leave and not provide a statement does take into consideration the child's age when known to the officer.[43]

The hearing

Rather than focus in this article on the adjudication hearing, which is similar to a criminal trial with the additional jurisdictional evidence the State should seek to provide, let us discuss the differences in the disposition hearing and the potential punishment the child could face. As addressed above, the default position is no disposition unless the fact-finder determines the child needs one. Except on a determinate petition, the juvenile has no right to have a jury assess his disposition.[44] On a determinate petition, the jury or judge assesses a term of years incarcerated or placed on probation; on an indeterminate petition, the code dictates a progressive sanction model.[45]

The local juvenile probation department will usually assess a suggested sanction level on the probation report it supplies each time you appear in court or on a detention hearing.[46] This social history report is evidence offered to the judge—but not a jury—under §54.04(b) during the disposition hearing, as well as any relevant testimony that would assist in determining the proper rehabilitative efforts that should be made as part of the disposition. And because article 37.07 of the Code of Criminal Procedure applies to juveniles, the State may present extraneous bad act evidence during a disposition hearing to either the judge or the jury.

Chapter 59 of the Family Code addresses the sanction levels and possible rehabilitative measures the juvenile court should take for each, but neither the petitioner nor the juvenile court is bound by the level assigned by the probation department. If you see the need for greater or lesser levels of supervision, by all means, say so. Just keep in mind that a child prosecuted for a CINS offense must be placed on either deferred prosecution or probation.[47] It is in only a very rare circumstance that the evidence will be sufficient to remove a child from his home on a CINS offense.[48]

So you have a starting point when making plea offers or dispositional requests from the court at a hearing, assume anything in the first and second sanction levels require less supervision, usually consisting of deferred prosecution.[49] Levels Three and Four dictate probation, Level Four being intensive supervision by juvenile probation with programs and rehabilitative services.[50] Level Five provides for placement outside of the child's home in a secure facility such as a boot camp program, and Level Six leads to the security of TYC for an indeterminate period.[51] Level Seven, the final level, is reserved for determinate sentences.[52] The local probation department will also be willing to acquaint you with all the possible programs and services available to help rehabilitate the child and even provide appropriate assistance to the parent through counseling and education. Do not be afraid to ask what programs probation recommends when assessing what to include as suggested conditions of probation on a plea or a request to the juvenile court during disposition.

As for the more severe action of removing a child from his home, the juvenile court or jury must make specific findings, and the record must support those findings. The code requires that the court include it its order that:

1) it is in the best interest of the child to be placed outside of his home;

2) reasonable efforts were made to prevent or eliminate the need for the child's removal from the home and to make it possible for him return home; and

3) the child cannot receive in his home the quality of care, level of support, and supervision needed to meet the conditions of probation.[53] Be prepared to offer evidence to establish these elements during a disposition hearing or plea without an agreed recommendation if not found in the probation report that you intend to offer as evidence to the judge or in the rare circumstance when you try disposition to a jury.

Sealing and confidentiality

The last big difference you will come across is the special confidentiality provisions for juveniles. An entire chapter of the Family Code is devoted to sealing, confidentiality, and record-keeping in the juvenile justice system (Chapter 58). Suffice it to say, the public's access to adult criminal records is far greater than its access to juvenile records.[54] The tradition has been to limit access so the stigma of an adjudication does not follow a child into adulthood when rehabilitated by the juvenile system. Sex offender registration, which may

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apply to juveniles depending on the juvenile court's determination, may make some adjudications and dispositions more public, but the tendency is still toward confidentiality.[55] Certain school notifications are required by law for felonies and specified misdemeanors despite the confidentiality requirements;[56] otherwise, when in doubt, check the Family Code list of parties to whom the State can release information or get permission from the juvenile court before releasing any information.[57]

The confidentiality provisions may apply even to those that are permitted to attend a hearing. A juvenile court may close the courtroom and exclude the public when good cause is shown, but it must permit the victim and victim's family to attend unless removed because of the Rule of Sequestration of witnesses.[58] Moreover, the presumption shifts *toward* closing the courtroom when the child is under the age of 14 at the time of the hearing "unless the court finds that the interests of the child or the interests of the public would be better served by opening the hearing to the public."[59] Do not assume everyone and anyone will be allowed to hear the trial or plea.

Unlike the difficulty in expunging a criminal conviction, the presumption leans heavily in juvenile law to the sealing of juvenile adjudications. The juvenile court, on its own motion or the motion of the child, *shall order* the sealing of the records when it finds that two years elapsed since the final discharge of the person or the last official action as long as the person has not been convicted of a felony or misdemeanor involving moral turpitude or had a further adjudication for engaging in delinquent conduct or a CINS offense. The court *may* have records sealed on an adjudication for having engaged in delinquent conduct violating a felony law if the person is 19 or older, was not transferred to adult district court, the records have not been used as evidence in a criminal proceeding under §3(a) of Article 37.07 of the Code of Criminal Procedure, and the person has not been convicted of a felony after turning 17. But the juvenile court *may not* order the sealing of the records for a person that received a determinate sen-tence.[60]

Conclusion

There are far more intricacies in juvenile law than I had time or space to address in this article. But I encourage you to not only curl up with your copy of the Family Code and Texas Rules of Civil Procedure, but also to review relevant sections of Robert O. Dawson's book, *Texas Juvenile Law*, considered the authority on such matters. They will lead you to answers when you have questions about juvenile law, more often than not.

I wish you good luck upon entering juvenile court! You *will* survive your time there and may even come to truly appreciate the experience you gain. I know I did. But if not, although not as quick as clicking your ruby red heels, you will eventually return to the familiarity of criminal court, and be the more knowledgeable for your time in juvenile. ❇

Endnotes

1 Although the Family Code does not refer to it as such, prosecutors and courts have come to call discretionary transfer to adult district court as "certifying the juvenile" or as a "certification petition," but the proper title for it is "Petition to Waive Exclusive Original Jurisdiction and Discretionary Transfer." See Tex. Fam. Code §54.02.

2 "Huffing," is a violation of Tex. Health & Safety Code §485.001 wherein an "abusable volatile chemical" with a label cautioning against inhalation is inhaled or ingested which affects the user's central nervous system, and can induce intoxication, hallucination, or elation, but further may distort thinking process, balance, and coordination.

3 Tex. Fam. Code §51.03.

4 Tex. Fam. Code §§52.01(a) and 52.015.

5 See Tex. Fam. Code §54.04.

6 Tex. Fam. Code §54.04(c).

7 Tex. Fam. Code §54.04(a) and (c).

8 Robert O. Dawson, *Texas Juvenile Law*, (7th ed. 2008) at 6.

9 See Tex. Fam. Code §52.025(a).

10 Dawson at 15-16.

11 Dawson at 17.

12 Tex. Fam. Code §54.10.

13 See Tex. Fam. Code §54.10(a) and (e).

14 See Tex. Gov't Code §74.053(b).

15 Such objections follow the procedures dictated under the Tex. Gov't Code §74.053. See also *In re M.A.V.*, 40 S.W.3d 581 (Tex. App.—San Antonio 2001, no pet.) (holding timely objection to visiting judge required that visiting judge not hear certification hearing).

16 Tex. Fam. Code §51.115.

17 *In re D.M.*, 191 S.W.3d 381, 390 (Tex. App.—Austin 2006, rev. denied).

18 Tex. Fam. Code §51.11(a).

19 Tex. Fam. Code §51.11(c).

20 Tex. Fam. Code §51.02(2) and §51.04.

21 Tex. Fam. Code §51.041; but see Hum. Resources Code §61.084(e) and (g) (requiring that juvenile reaching age 19 must be released or transferred out of the Texas Youth Commission).

22 *In re E.D.C.*, 88 S.W.3d 789 (Tex. App.—El Paso 2002, no pet.).

23 Dawson, 37; see also Tex. Fam. Code §51.17(a) (applying civil rules unless in conflict); c.f. *Fairfield v. State*, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981) (holding State must prove venue by a preponderance of the evidence pursuant to Tex. Code Crim. Proc. art. 13.17, but that it is not an element of the offense, rather a jurisdictional component that can be waived by failing to object in the trial court).

24 Tex. Fam. Code §52.02(a)(1).

25 Tex. Fam. Code §52.02(a) (2)-(7). Please note there are exceptions for DWI cases permitting breath testing. Refer to Tex. Fam. Code §52.02(c) and (d) for those exceptions.

26 Tex. Fam. Code §52.02(b).

27 *Gonzales v. State,* 67 S.W.3d 910 (Tex. Crim. App. 2002) (requiring causal connection between violation of §52.02(b) parental notification requirement and the obtaining of the evidence, namely would notification of the parent have affected police obtaining of the evidence); *Pham v. State*, 175 S.W.3d 767, 773 (Tex. Crim. App. 2005) (burden of persuasion on respondent to show causal connection between statutory violation and the evidence for which he seeks suppression); *Roquemore v. State*, 60 S.W.3d 862 (Tex. Crim. App. 2001) (requiring suppression when officer detoured from route to juvenile processing office to obtain the stolen property).

28 Tex. Fam. Code §53.02(a).

29 Tex. Fam. Code §54.01(e).

30 Tex. Fam. Code §54.01(h).

31 Tex. Fam. Code §51.17(a).

32 Tex. Fam. Code §§53.04, 53.06, and 53.07.

33 *In re X.B.*, 369 S.W.3d 350 (Tex. App.—Texarkana 2012, no pet. h.) (holding trial court did not have jurisdiction to modify disposition and commit juvenile to TYC when child not served with the petition and citation for the initial adjudication, permitting the later collateral attack because initial judgment of disposition was void for lack of jurisdiction).

34 Tex. Fam. Code §53.06(e).

35 Tex. Fam. Code §54.02(b) (requiring separate compliance with §§53.04, 53.05, 53.06, and 53.07 with a petition stating that the purpose of the hearing is to consider discretionary transfer).

36 See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Coronado v. State*, 835 S.W.2d 636 (Tex. Crim. App. 1992); *In re S.M.C.*, 338 S.W.3d 161 (Tex. App.—El Paso 2011, no pet.) (interpreting *New Jersey v. T.L.O.* in the most recent published case in Texas); S.M.S., 338 S.W.3d at 165 (citing *T.L.O.*, 105 S.Ct. at 745) (holding "sufficient probability, not certainty, is the touchstone of reasonableness").

37 *Id.*

38 Tex. Fam. Code §52.02(a).

39 Tex. Fam. Code §52.025.

40 See *In the matter of D.J.C.*, 312 S.W.3d 704 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (reversing in part because police excluded the grandmother from the interview room despite express request to be present in violation of §52.025 permitting accompaniment by parent or guardian); see also *Cortez v. State*, 240 S.W.3d 372 (Tex. App.—Austin 2007) (holding child did not assert right and finding record did not support that father asked to be present, then analyzing facts in terms of lack of causal connection).

41 *Comer v. State*, 776 S.W.2d 191 (Tex. Crim. App. 1989) (requiring strict compliance with §52.02(a) and applying Article 38.23 to suppress juvenile's statement that complied with §51.09 because officers violated §52.02(a) by delay when obtaining the statement before complying with the requirement to take juvenile to a processing office or detention); *Baptist Vie Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999) (suppressing statement for failure to comply with §52.02(a)); *In the matter of D.J.C.*, 312 S.W.3d 704 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (failure to comply with Family Code to take statement in a designated juvenile processing office required suppression because State did not comply with all the terms of §51.095, but including in rationale other violations of the Family Code such as excluding grandmother); but see *Gonzalez*, 67 S.W.3d 910 (requiring causal connection between violation and obtaining evidence to suppress).

42 Tex. Fam. Code §51.095.

43 *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011) (taking a child's age into account when determining voluntariness of statement and considering a child's age in the custodial analysis, although not as a determinative factor, but as a significant one); *Yarborough v. Alvarado*, 541 U.S. 652, 662-63 (2004) (considering the age of a child as a factor in determining whether reasonable person would have considered self in custody); *Jeffley v. State*, 38 S.W.3d 847 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (same).

44 Tex. Fam. Code §54.04(a).

45 Tex. Fam. Code §54.04(d)(3).

46 Tex. Fam. Code §59.002.

47 Dawson at 233.

48 Dawson at 232 (citing *In the Matter of E.T.,* No. 04-03-00796, 2004 WL 2533552 (Tex. App.—San Antonio 2004, no pet.) (mem. op., not designated for publication) (holding juvenile court did not abuse its discretion by removing child from him on a contempt of court for violating a justice court order because record supported child uncontrollable and parent requested the placement).

49 Tex. Fam. Code §§59.004 and 59.005.

50 Tex. Fam. Code §§59.006 and 59.007.

51 Tex. Fam. Code §§59.008 and §59.009.

52 Tex. Fam. Code §59.010.

53 Tex. Fam. Code §54.04(i).

54 See Tex. Fam. Code §58.005.

55 See Tex. Fam. Code §54.0405 and Tex. Code Crim. Proc. art. 62.352.

56 See Tex. Code Crim. Proc. art. 15.27.

57 Tex. Fam. Code §58.005.

58 Tex. Fam. Code §54.08.

59 Id.

60 Tex. Fam. Code §58.003(b).

What a State's expert can tell a jury about domestic violence

In Travis County, an on-staff licensed professional counselor with 25 years of experience has been asked to testify as an expert in DV cases.

By Margaret Bassett
Licensed Professional Counselor in the District Attorney's Office in Travis County

In early 2012, I was asked to testify as an expert witness in our office's case against Vondrick Ware. Mr. Ware was charged with the offense of strangulation and continuous violence against the family after a fight with his girlfriend, whom I'll call Samantha.

She and Ware had been together for about a year and a half and had come to Texas from another state on one of Samantha's business trips (they stayed in a local hotel). During an argument, Samantha asked Ware to leave and return to their home state, and he responded by punching her several times in the face, head, and arm. When she screamed for help, Ware grabbed her by the neck with both hands and strangled her—Samantha couldn't scream or breathe. She doesn't remember blacking out, but she wasn't far from it.

Over and over Ware told Samantha that she could never leave him, but he eventually left the hotel room they were sharing and got another room. The next day, Ware returned to Samantha's room and began banging on the door. She opened the door and Ware punched her in the face, yelling, cursing, and threatening that she could never leave him. He eventually left, but he continued to text her repeatedly. Samantha called a friend to tell her what had happened, and that friend called the police. Samantha was cooperative with the peace officers and prosecutors, even when Ware's mother began calling her, asking her to have mercy on her son and drop criminal charges against him. (Samantha saved those voicemail messages, enabling us to contradict Ware's claim that his mother had never called her.)

At trial, the prosecution called two expert witnesses to testify: me, as an expert in intimate partner violence and an EMS worker to testify as an expert in strangulation. The jurors indicated that the connections established by both of us were instrumental in validating other evidence and that our testimony eliminated any reservations they had. The jury found the defendant guilty of family violence with strangulation and sentenced him to six and a half years in prison.

Admitting expert testimony

Expert testimony is admissible on a subject "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence."[1] Essentially the prosecutor must establish that the expert witness's testimony will assist the trier of fact; that the expert is qualified on the basis of "knowledge, skill, training, experience, or education" as required by Rule 702; and that the expert meets the reliability requirements of *Daubert*[2] and *Kelly*.[3]

I have been able to testify as an expert witness in cases involving intimate partner violence based on my education, training, skill, and experience. (Most of the times I have testified, it has been for cases that I was not a part of—I had no prior knowledge of the case before I testified other than what the prosecutor shared with me.) I have a master's degree in education with an emphasis on counseling. I am a licensed professional counselor and also hold a license to supervise counseling interns. I have worked primarily with victims of intimate partner violence and sexual assault for more than 25 years. Prior to becoming an adjunct professor at the University of Texas at Austin, I was a guest lecturer for three years. As an adjunct professor for five years at UT, I have taught classes covering Contemporary Issues in Domestic Violence and Public Policy as it relates social work. Finally, I have presented at various conferences on the topic of intimate partner violence. In my current posi-

tion at the Travis County District Attorney's Office, I work specifically with victims of intimate partner felony crimes and actively participate in the Family Violence Protection Team.

Myths and misconceptions

Prosecutors in domestic violence trials don't always call an expert witness to testify on the dynamics of an abusive relationship, but Travis County has found that it helps immensely in dismantling the myths and misconceptions a jury may have regarding a victim's behavior after an abusive episode. Any misconceptions or biases the jury might have about intimate partner violence could impact their perception of the victim's credibility and minimize the seriousness of the violence; the jury could end up focusing on the victim's behavior out of context, which could impact jurors' ability to evaluate the evidence appropriately.

As an expert witness, I can talk about common myths and misconceptions that people have about domestic violence, as well as educate the jury on the impact domestic violence has on its victims in the appropriate context. This education allows jurors to overcome any biases they may have, as well as create an understanding regarding a victim's response to the violence.

In my testimony in the Ware case, I talked about some common myths and misconceptions that the general public may hold, and I explained what's actually true. For example, one common perception is that that victims are helpless and unable to make decisions for themselves. On the contrary, victims are usually really active in their relationships and work very hard to keep themselves safe. Victims have learned that physical violence can escalate when the batterer perceives a loss of control, and batterers need contact with the victim to maintain control. Completely cutting off contact with a batterer increases the likelihood that the batterer will escalate his attempts to make contact with the victim, so a victim will often maintain some contact with the batterer to pre-emptively de-escalate the immediate situation. Explaining this dynamic helped the jury better understand why Samantha continued engaging in contact with the batterer and in fact agreed to marry him via text. The number of text messages from Ware and their tone changed at that point, providing some relief from the onslaught.

Another important myth I discussed was that leaving an abusive relationship means the abuse will end. What victims of intimate partner violence know is that leaving or taking steps toward leaving can be the most dangerous and life-threatening times for them. In an abusive relationship, the batter establishes a coercive pattern of power and control by minimizing and denying the abuse and belittling, bullying, and manipulating the victim. A batterer must have power over and control of his victim, and he can achieve and maintain this power only if he has contact with her. If the victim takes steps to reclaim her power and set boundaries, the batterer must reassert himself. Situations escalate to physical violence to reinforce the control and to emphasize who is in charge.

Another misconception I addressed was that if someone is abused in a relationship, she should just leave. As discussed above, that can be dangerous. It is also true that the victim may still have feelings for the batterer. Anyone who has had to end a romantic relationship can understand how difficult that can be—a person can know that a relationship needs to end but still love the other person. Victims will frequently say that they still love the batterer, but they just are no longer "in love" with him. It is also important to remember that the batterer has a wealth of knowledge about the victim (her routines, work, schedule, friends, family), all of which can be used to manipulate and control her.

In the Ware trial, it was helpful for me to address why someone who has been violently abused may allow that abuser to return to the home (hotel), may agree to get married, or may not immediately call the police after an attack. Again, putting behavior in the context of an abusive relationship, I was able to testify about the safety concerns that victims struggle with that others may not know about and how that can lead us to misjudge victims' behavior. I could also discuss risk assessment, what to be aware of if a situation is escalating, and how to put a batterer's behavior into the context of increased potential for lethality toward the victim.

It is not uncommon for batterers to talk about needing help for mental health issues such as depression, substance abuse, or anger. An example I used in this case was when a

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batterer may express feeling suicidal. Normally if someone expresses suicidal ideation, it is a cry for help. However, in the context of an abuser, one must always consider the increased potential for homicide. This sort of relationship is about coercive power and control, and a batterer will not choose to end his life without also considering ending the life of his partner.

Conclusion

For those offices without an expert on staff, I recommend finding one at the local domestic violence or sexual assault resource center or shelter. Debunking jurors' misconceptions about why victims and abusers behave the way they do is worth the effort in calling an expert witness to the stand. ❇

Editor's note: A training conference, "Establishing Expertise as an Ethical Expert Witness," will be offered in Austin May 20–22, 2013, as a collaboration between the National Center on Domestic and Sexual Violence, the University of Texas at Austin's School of Law and School of Social Work, and the Institute on Domestic Violence & Sexual Assault. Scholarships for the tuition, fees, and hotel lodging are available; check out our website for details. (Go into the journal archive under this issue's stories to find a Word document of additional information.)

Endnotes

1 Texas Rule of Evidence 702.

2 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

3 *Kelly v. State*, 824 S.W.3d 568, 573 (Tex. Crim. App. 1992).