THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 46, Number 1 • January–February 2016 • www.tdcaa.com

"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

Trying an aggravated sex assault with a runaway victim

Travis County prosecutors tried a heart-wrenching agg sexual assault of a child case where the child victim had run away and was nowhere to be found. How they secured justice for her and against the several men who raped her.

On June 26, 2013, Dana King (not her real name) was placed in a residential treatment center in Austin. She was there for only three days before she found a way to crawl out of the bathroom window, in the only room where she wasn't monitored, and ran away. Three days later she returned, barefoot, shaking, and speaking in an unnatural accent. She explained to her case manager that she had been sexually assaulted many times by many different men. She was 13 years old and had just been introduced to the world of sex trafficking.

By Victoria Winkeler
Assistant District Attorney in Travis County

A heart-wrenching story

Dana's life story is heartbreaking. CPS was a normal fixture in her life until she was adopted at age 7. At age 12 she began running away, and she was 13 when she made an outcry about sexual abuse by her adoptive father. Her adopted parents refused to parent her any longer, and CPS became her guardian. About a month after her outcry, Dana was placed in the Austin residential treatment center. She ran away initially to get to her adopted brother in a nearby central Texas town, but he hung up on her when she called. This left her alone on the streets in a bad part of town with nowhere to go.

She was originally picked up by a couple of men who took her back to their apartment. In that apartment lived eight to 10 men who all worked at the same landscaping company. All but one participated in giving her alcohol and took turns sexually assaulting her. After they were done, they dropped her off at a convenience store near where they had met her the day before. From there she met a prostitute named Jeana, who introduced Dana to her pimp, Don Lewis. Don, in turn, introduced Dana to crack and prostitution. He sold her to a number of men who came into his apartment, each of whom sexually assaulted her in every way possible. It was from Don's apartment that Dana ran and found her way back to the residential treatment center.

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Thanks to our TDCAA leaders from 2015

The key to success for TDCAA is its members—this is truly a member-driven organization. We have enjoyed some great leadership this last year, and I would like to thank those folks who ended their Board service on December 31: **Rene Pena**, 81st Judicial District Attorney in Atascosa County; **Henry Garza**, DA in Bell County; **Katherine McAnally**, Assistant CA in Burnet County; **Dan Joiner**, Assistant CDA in Taylor County; **Art Bauereiss**, DA in Angelina County; and **Danny Buck Davidson**, DA in Panola County. Thanks for the steady hand on the wheel!

By Rob Kepple
TDCAA Executive Director in Austin

2016 Board elections

In December TDCAA elected some new leadership to take office January 1, 2016. According to the by-laws, **Staley Heatly**, DA in Wilbarger County, the 2015 President, ascends to Chairman of the Board, and 2016's President is **Bernard Ammerman**, County and District Attorney in Willacy County. Newly elected to the Board are **Randall Sims**, DA in Potter County, President Elect; **Jennifer Tharp**, CDA in Comal County, Secretary/Treasurer; **Julie Renken**, DA in Washington County, DA at Large; **Woody Halstead**, Assistant CDA in Bexar County, Assistant Prosecutor at Large; **Rebekah Whitworth**, CA in Mason County, Region 3 Director; **Steve Reis**, DA in Matagorda County, Region 5 Director; **Kenda Culpepper**, CDA in Rockwall County, Region 6 Director; and **Dusty Boyd**, DA in Coryell County, Region 8 Director. Congratulations on your elections, and thanks in advance for your service.

Changes at TDCAA

I want to thank two people who have been terrific employees here at TDCAA and who are leaving us. First, thanks to **Manda Herzing**, our Meeting Planner, who is moving to Minnesota to be closer to family. Manda has loved working with y'all, and it really showed in the effort she put in every day. Second, I want to thank **Jack Choate**, our Training Director, for his work. Jack got an offer he just couldn't refuse: Executive Director of the Special Prosecution Unit in Huntsville. Fortunately for us, that means he can still be a part of our profession and future trainings. Good luck to both Manda and Jack!

Texas prosecutors lead the nation in fixing the DNA mixture snafu

By the time you read this, many of you will have spent countless hours sifting through old files to identify DNA mixture cases, sending letters to defense attorneys, and alerting individuals who were convicted in part based on DNA mixture evidence. And the fun has just started: The writs based on revised combined probability of inclusion numbers haven't started coming in just yet. But you should take pride in the fact that Texas prosecutors have grabbed this bull by the horns early and have demonstrated a real dedication to justice by aggressively seeking to solve this problem. Indeed, at recent national gatherings of prosecutors, it became apparent to us that most prosecutors in the country have no idea that this DNA mixture snafu probably exists in their crime labs as well. In the next few months we will do our best to share our experiences with the profession nationwide. Nice to see Texas prosecutors leading the way—again.

Race and gender in our profession

In the past few months we have received a number of media inquiries about the race and gender of Texas prosecutors. Some have reported that the profession of prosecution nationwide is overwhelmingly white males (see www.huffingtonpost.com/2015/07/07/race-of-prosecutors-in-us_n_7746222.html). Indeed, one research study reported that elected prosecutors in Texas are all white men. (But looking at their research shows that they counted only one person, and he isn't actually a prosecutor—[now former] Attorney General **Greg Abbott**!) So in response to these inquiries and to set the record straight, let's take a look at Texas prosecutor demographics.

When it comes to all prosecutors in Texas, we are split nearly down the middle when it comes to gender: 52 percent are men and 48 percent are women. We don't currently collect information about race in our membership renewals, so we don't have

that breakdown for assistants. But for elected prosecutors (334 total), 89 percent are white, 1.1 percent are African-American, and 8.9 percent are Hispanic. Twenty-one percent of our elected prosecutors are female.

Here is an interesting fact: In the top eight Texas jurisdictions by size, the breakdown of elected prosecutors are four white women, three Hispanic men, one Hispanic woman, and one white man. If you look at elected prosecutors in the largest 25 Texas counties, you'll find 15 white men, nine Hispanic men, seven white women, two Hispanic women, and one black man. These 34 prosecutors serve nearly 20 of the 27 million Texas residents.

West Texas justice—reported in Austin?!

We are all used to the national media taking swipes at Texas every now and again. We do our best to correct the record, but so far when it comes to East Coast tabloids, we are batting zero in getting them to acknowledge a mistake. But when a columnist for my local paper, the *Austin American Statesman*, took out after one of our West Texas prosecutors, I'd had enough.

Columnist **Ken Herman** jumped on the "mass incarceration" bandwagon in November in his article headlined, "$65 crime rates man six years in prison." Indeed, our County and District Attorney in Swisher County, **Mike Criswell**, had gone to a jury trial on a fella who forged a $65 check, and the jury returned a six-year prison sentence on punishment. Herman's article derided the prosecutor for using an enhancement because the victim was elderly and ended with the question: "Tough on crime or dumb on crime?"

As a prosecutor, you know the answer to that question off the top of your head. Six years in prison for a $65 theft is reasonable because there is clearly more to this story than meets the eye. For instance, you probably already guessed that the defendant was charged with many counts, and the prosecutor convicted on one and used the others in punishment. You probably also guessed that the defendant has many, many priors. And of course he has had many shots at probation, just to blow it time and time again. You might have even guessed that the defendant took advantage of a nice old guy who didn't have much but out of the goodness of his heart was helping an ex-con get back on his feet. Finally, you know that the prosecutor made a good plea offer that was refused before trial, and the jury came back harder. After getting the story from Mr. Criswell in Swisher County, I wrote to the columnist, Mr. Herman, to set things straight.

So what did he do when he learned all of the backstory? He agreed that the prison sentence was reasonable and acknowledged that he should have done more work to get the whole story. And he updated the online version of his article to include the details. I'm counting this as a small victory for truth, but I won't hold out hope that *The New York Times* will be as amenable to listen to the whole story as our local newspaper writers are.

Congratulations to Don Clemmer

Don Clemmer, a criminal justice policy advisor to **Governor Greg Abbott**, has been appointed to the newly created 450th Judicial District Court in Travis County. Many of you know Don from his years of service in the criminal justice section at the Office of the Attorney General; prior to his service as an assistant AG, Don was a prosecutor in the Harris County DA's Office. Don has been a great friend of our profession and TDCAA and will make a fine judge. Thanks for your work, Don.

Changing of the guard in Taylor County

In December, long-serving Taylor County Criminal District Attorney **James Eidson** ended his service by announcing his candidacy for the 42nd Judicial District Court bench. James has served as the elected CDA in Abilene for 28 years and has been a great crime-fighter. He will be missed in our profession.

He also missed out on one honor by retiring to seek a bench: The current dean of Texas district attorneys, **Bruce Curry** in Kerr County, has announced that he will retire at the end of 2016 after 32 years of service. If James had hung in there another year, he would have captured that honor! ❇

Public corruption in the Valley

By Bernard Ammerman
County and District Attorney in Willacy County

The lower Rio Grande Valley is a world apart from other places in Texas. It includes Cameron, Hidalgo, Starr, and Willacy Counties, and it is rarely visited by other than a select few categories of visitors. If you're a college student on Spring Break, the beaches of South Padre Island beckon you to hang out and bask, along with droves of other Breakers, in this tropical climate. Winter Texans, mostly retirees, also welcome the climate in the Valley, away from the frozen tundra of Canada and similar places in the United States. Avid hunters and fishermen are also drawn in great numbers for seasonal bounty of fish and wild game. There are those who have families who reside here, people who visit relatives in the Valley. And, finally, there are inhabitants who have been here for generations—the locals.

The name—the Valley—is a misnomer, as there are no mountains in the area. The terrain along the river, the Rio Grande (also referred to as the Rio Bravo), is more a delta than it is a valley. Regardless, the Valley is inhabited by over a million people. There is a cross section of economic classes among its inhabitants, as in so many other areas of the United States, but here there is also a palpable difference between glittering wealth starkly juxtaposed with significant poverty.

"Across the river," a term used by locals, is Matamoros, Tamaulipas, Mexico. Three international bridges link Matamoros to Brownsville, the county seat of Cameron County. The Gateway International Bridge is less than a mile from the Cameron County courthouse. At one time, Matamoros enjoyed a reputation as a laidback border town, celebrated for inexpensive margaritas and fine Cuban cigars. As a baby prosecutor, I used to regularly venture into Mexico for lunch with other prosecutors and investigators. Not anymore. Matamoros is a vastly different city today. In yesteryears, the worst that could happen to you while across the border was that you might run out of money before the night was over. Now, you might not be seen again. Recent data from over a five-year period puts drug-related murders in Mexico at more than 60,000. That figure doesn't include the more than 25,000 people who have gone missing. (Compare that to 5,700 homicides in the United States.) The violent deaths and vast number of missing people are a direct result of the war between two rival Mexican drug cartels: Los Zetas and the Gulf Cartel. They are in a constant battle for control of the border city of Matamoros and the billions of dollars earned in drug-trafficking. Around 90 percent of the cocaine that enters the United States comes via Mexico, and the fastest and most direct route is through the southernmost tip of Texas—that's via Matamoros.

The business of the drug corridor can be illustrated by events that occurred in the Valley in early December. It was then that law enforcement seized over $500,000 in currency, 7,868 pounds of marijuana, 359 pounds of cocaine, 16 pounds of heroin, 385 pounds of methamphetamines—and 4,128 illegal aliens. No other part of Texas even comes close. While there's no denying that the local economy does see some benefit from drug-trafficking money, the negative consequences far outweigh the good. The drug market contributes significantly to drug crimes, kidnappings, and homicides. Estimates tie five to 10 percent of the Valley's economy to illegal activity, primarily drugs. As the Rio Grande Valley thrives from the illegal trade, much money is readily available to corrupt public officials. "Partnerships" between drug traffickers and law enforcement officials to conduct illegal activities are amicably referred to as the *compadre* system: You scratch my back, and I'll scratch yours.

In 2013, more public officials were convicted of federal crimes in South Texas than in any other place in the nation: 83 such convictions stemmed from drug smuggling, vote stealing, courthouse bribery, and the like. Corruption devours South Texas public officials.

In the past two decades, no fewer than five Valley sheriffs have been convicted of receiving bribes from drug traffickers. The list includes

Cameron County Sheriff Conrado Cantu, who received a 24-year prison sentence, and Starr County Sheriff Eugenio Falcon, who got two years in prison. His predecessor, Starr County Sheriff Reymundo Guerra, received five years, and Hidalgo County Sheriff Brigido Marmolejo was sentenced to seven. Marmolejo's successor, Hidalgo County Sheriff Guadalupe Treviño, got five years in prison. One would think that it is in vogue to be included in that list of compadres.

The list also includes Mission Police Department Officer Jonathan Treviño, none other than Sheriff Treviño's son. He pleaded guilty to escorting narcotics for criminals, laundering money, and stealing drugs to later sell, and received a sentence of 17 years in prison for his extensive involvement in illegal ventures. What is amazing is that over the past two years, his entire unit of 13 officers went to prison for similar acts.

The convictions affect all facets of government, from legislators and judges to school board members, county commissioners, auditors, and mayors throughout the Valley, including some in Willacy County. Corruption continues at the federal level to include a recent United States Border Patrol Agent charged with a drug-cartel decapitation murder. That victim's body was found floating off the waters of South Padre Island during Spring Break 2015. What is most unsettling is that the criminal corruption was happening right under my nose.

In 2003, I was pursuing my Master of Laws (LLM) in San Francisco, California, when I interviewed for a job as an ADA in Cameron County. The office was headed then by District Attorney Yolanda de Leon. I was hired and immediately thrown into a courtroom. (I guess it was a sink-or-swim modus operandi.) I progressed fairly rapidly into a first-chair felony prosecutor.

In 2004, de Leon lost her election to a young, charismatic criminal defense attorney by the name of Armando Villalobos. I didn't know if I was going to have a job after moving so recently from California, but I interviewed with Mr. V, as we called him, and I was hired and assigned back to a district court. Over the next few years the office staff grew from 50 to nearly 100 employees. I kept my head down and plowed away at trying criminal cases, earning a decent track record of convictions in high-profile trials. I even prosecuted a case with my boss, Mr. V, against Tejano musician Joe Lopez. We secured a guilty verdict of aggravated sexual assault of a child. During that trial, I took note of Mr. V's intelligence and prowess in prosecuting. I knew no political office was outside his reach, as he was a rising star in South Texas politics. What I didn't know, because I did not know him personally, was that Mr. V had a dark side. I also did not know that numerous defense attorneys and a judge knew him well and that they seemed to share his questionable ethical values.

In 2012, Mr. V was among a dozen people caught in a cash-for-court-favors scandal in Cameron County. Jurors convicted him of racketeering, bribery, and extortion. The evidence showed that Mr. V participated in a scheme involving Amit Livingston, who was being prosecuted for killing his girlfriend in 2005 and then dumping her body in the sand dunes of South Padre Island. Prosecutors alleged that former District Judge Abel Limas plotted with Mr. V and with Mr. V's former law partner in criminal and civil cases involving Livingston. The scheme involved the $500,000 cash bond put up for Livingston's release. Prosecutors alleged that Mr. V set up his former law partner to represent the victim's three children in their wrongful-death lawsuit against Livingston. Both the criminal and civil cases involving Livingston landed in Judge Limas' courtroom. In the criminal case, Judge Limas agreed to convict and sentence Livingston on the same day, thereby freeing up his cash bond. It was used as the settlement in the civil suit.

However, Limas also agreed to Livingston's request that he be given 60 days to get his affairs in order before surrendering to a 23-year prison sentence. As any sensible person would predict, Livingston skipped the country, fled to India, and assumed a different name. But his $500,000 bond became immediately available to settle the lawsuit—a hefty settlement of $200,000 in attorney's fees for handling the civil case. Prosecutors said Mr. V's former law partner kicked $80,000 back to Mr. V, and together they shared about $10,000 with the judge. Later, Judge Limas ended up being one of the main witnesses in Mr. V's trial. And in 2014, Livingston was arrested by Indian authorities and was extradited back to Texas to serve his 23-year sentence.

Evidence presented at trial also revealed that, from 2006 through 2012, Mr. V and others were

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Texas Prosecutors Society reception

On December 2, the Texas Prosecutors Society gathered to honor its Class of 2015. The Foundation hosted a reception at the Elected Prosecutor Conference (held this year at the gorgeous La Cantera Resort in San Antonio and sponsored by the National Insurance Crime Bureau [NICB]), where all 131 members of the Society were invited. (See page 17 for some photos from that evening.)

NICB
NATIONAL INSURANCE CRIME BUREAU

Welcome to these new members of the Society, inducted in 2015:

New Texas Prosecutors Society members in 2015
Gerald Carruth
Ray Echevarria
Bill Hawkins
Kyson Johnson
Adrienne McFarland
Don Stricklin
Bill Wirskye

These folks were invited to be a part of this Society because of their long service and continued support of our profession, and we are honored that they chose to join us.

As you may know, the Texas Prosecutors Society is a group of prosecutors, former prosecutors, and friends of the profession organized around the common goal of ensuring support for our professional development well into the future by way of an endowment. Since the Professional Prosecutors Act passed in 1979, we have seen Texas prosecutors continue to develop into some of the most dedicated, experienced, and knowledgeable prosecutors in the country.

And that is not by accident—Texas prosecutors have continued to organize through TDCAA, and now TDCAF, to bring the best training and resources to every member of a prosecutor's office. And in this era of ever-shrinking financial support for anything governmental, we know that an ever-growing endowment promises to keep Texas prosecutors among the elite. So thanks to all of the members of the Texas Prosecutors Society, and welcome to the class of 2015!

By Rob Kepple
TDCAA Executive Director in Austin

ABOVE: (from left) ADA Nathan Wood, County Attorney Trey Maffett, and District Attorney Ross Kurtz, all of Wharton County, presented a check from asset forfeiture funds to Rob Kepple, TDCAA Executive Director, at the Elected Conference. BELOW: Ector County DA Bobby Bland (at left) presented a check for 10 percent of his asset forfeiture fund (he calls it a tithe) to Rob Kepple, also at the Elected Conference. Both donations will benefit the training mission of TDCAF.

Thanks to two other sponsors

LGS, a browser-based case management solution for county governments, and **Software Unlimited**, which provides criminal, civil, restitution, paperless office, and mobile solutions for district and county prosecutor offices, both sponsored our Elected Prosecutor Conference in San Antonio. Thanks to both of them for their support!

Two big checks

During the Elected Conference in December, **Ross Kurtz** (DA in Wharton County) and **Bobby Bland** (DA in Ector County), both pictured on the opposite page, presented the Foundation with surplus asset forfeiture funds. These donations, authorized by the Code of Criminal Procedure for traininghttp://www.texomashomepage.com/news/local-news/young-co-asst-da-may-see-30k-increasehttp://www.texomashomepage.com/news/local-news/young-co-asst-da-may-see-30k-increase, are vital for the ongoing work of our Victim Services Director and the Advanced Advocacy Courses. Thanks to Ross and Bobby for this important support! ❇

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Public corruption in the Valley (cont'd)

involved in ongoing schemes to illegally generate income for themselves and others through a pattern of bribery. Jurors found that Mr. V solicited and accepted more than $100,000 in bribes in return for favorable acts of prosecutorial discretion, including minimizing charging decisions, pretrial diversion agreements, agreements on probationary matters, and case dismissals. Moreover, Mr. V arranged for certain defense attorneys to handle asset forfeiture matters at the DA's Office.

Such was the extent of unethical and criminal practices during Mr. V's term as Cameron County District Attorney that a list of notable *compadres* ended up matriculated to penal institutions. District Judge Abel Limas got a six-year sentence, while former State Representative and defense attorney Jim Solis received nearly four years in prison. Defense attorney Ray Marchan received a 3½-year sentence, though he committed suicide by jumping off the Queen Isabella Bridge on the day he was to surrender himself to prison. Jaime Munivez, a DA investigator, and defense attorney Joe Valley each received one year, and Mr. V himself is serving 13 years at the Federal Correctional Institution in Ashland, Kentucky, for engaging in a campaign of selling justice to the highest bidder. He was also ordered to pay restitution of $339,000, including $200,000 to the children of Amit Livingston's murder victim.

Working in the Valley today, I still hear rumors of odd actions in the criminal justice system. If you are in the Valley, don't be alarmed if you receive a Valley handshake. That's an interesting and typical *saludo* (greeting): a handshake with one hand and a pat-down (to check for recording devices) with the other. Corruption in the Valley is endemic. "In the Valley we don't just tolerate corrupt government, we vote for it!" reads a local bumper sticker. It devours resources and impedes the proper carrying out of criminal justice while penalizing the honest and capable. Two former colleagues who worked under Mr. V were recently hired as federal prosecutors, and that is good. However, another former prosecutor recently went to another Texas city to interview for a position only to be questioned not about his credentials but rather about his connection with Mr. V. There appeared to be a guilt-by-association mentality.

The Rio Grande Valley is in a state of metamorphosis. The last few years have thrust on it pains of growth that it had never experienced before. It has also become a channel for the flow of billions of dollars—a second, under-the-radar economy—generated by drug-trafficking. With all the temptation and greed that this unregulated cash fosters, many of its people are caught between right and wrong. The vast numbers will prevail in doing the right thing; a few will falter. But even those who have already been caught in the tangles of wrongdoing will still love the Valley's people, its terrain, its lovely beaches, the ubiquitous palm trees, and the freedom to roam the green countryside.

Allegations of public corruption may be sent to the new Texas Ranger Public Integrity Unit at 512/424-2160 or rangers@dps.texas.gov. ❇

TDCAA Victim Services Board for 2016

New members were recently elected and appointed to TDCAA's Victim Services Board for Regions 2, 4, 6, and 8. Board members for 2016 are:

Chairperson: Serena Hooper Payne, Andrews County & District Attorney's Office
Region 1: Angel Morland, Potter County Attorney's Office
Region 2: Freda White, Ector County Attorney's Office
Region 3: Dalia Arteaga, 38th Judicial District Attorney's Office (Hondo)
Region 4: Mary Ann Sieracki, Wilson County Attorney's Office
Region 5 & Secretary: Colleen Jordan, Harris County District Attorney's Office
Region 6: Amy Varnell, Cass County District Attorney's Office
Region 7: Adina Morris, Palo Pinto County DA's Office
Region 8 & Vice Chair: Wanda Ivicic, Williamson County Attorney's Office
Training Committee Liaison: Cyndi Jahn, Bexar County CDA's Office
Immediate past president: Tracy Viladevall, McLennan County CDA's

The Victim Services Board members represent a wealth of expertise in the field of victim services. The board's purpose is to prepare and develop operational procedures, standards, training and educational programs; coordinate victim assistance programs; and address all such other appropriate matters dealing with victim assistance programs and services in prosecutor's offices across Texas. The board members serve as mentors and points of contact for their regions. Congratulations and welcome! A very special thank-you to our outgoing board members. Your willingness, dedication, and loyalty to service on our Victim Services Board is so very appreciated. We will miss you!

KP/VAC Seminar in Galveston

The Hotel Galvez in Galveston was the venue for a dynamic seminar held for Key Personnel (prosecutor office staff) and Victim Assistance Coordinators (VACs) from all across Texas in November. More than 200 members gathered to hear speakers teach on topics targeting key personnel and victim assistants. Many thanks to all of our very informative speakers! We appreciate your time and valuable assistance.

By Jalayne Robinson, LMSW
Victims Services Director at TDCAA

This seminar is held annually and provides key personnel and victim assistance coordinators from prosecutor's offices a chance to network and get new ideas from others who do similar jobs in other counties. Mark your calendar for next year's KP/VAC Seminar to be held at the Embassy Suites in San Marcos November 2–4, 2016.

Bylaw change

At the KP/VAC Seminar, a business meeting was called for Thursday, November 5, with the topic of changing the TDCAA Victim Services bylaws to allow elections for regional representatives on the Victim Services Board to be held at the KP/VAC Seminar each year rather than at the TDCAA Annual Criminal & Civil Law Update. A vote was conducted with all in favor of the elections being moved. Elections for TDCAA's Victims Services Board for Regions 1, 3, 5, and 7 will now be held at the KP/VAC Seminar in San Marcos in 2016.

For more information about running for the board , contact Jalayne Robinson, TDCAA Director of Victim Services, by email at Jalayne.Robinson@tdcaa.com.

Suzanne McDaniel Award

Sue White, a victim assistance coordinator who has worked for the Rockwall County Criminal District Attorney's Office for 18-plus years, has been honored with TDCAA's Suzanne McDaniel Award for her work on behalf of crime victims. The award from TDCAA's Victim Services Board is given each year to a person who is employed in a prosecutor's office whose job duties involve working directly with victims and who has demonstrated impeccable service to TDCAA, victim services, and prosecution.

Sue received her award at TDCAA's Key Personnel/Victim Assistance Coordinator Seminar in Galveston during a luncheon for attendees. She exemplifies the qualities that were so evident in Suzanne McDaniel herself: advocacy, empathy, and a constant recognition of the rights of crime victims. Congratulations Sue! (See a photo of us on the opposite page.)

Sue White (at left), a victim assistance coordinator in Rockwall County, was honored with the Suzanne McDaniel Award for her work on behalf of crime victims. She's pictured with Jalayne Robinson, TDCAA's Victims Services Director, at right. Congratulations, Sue!

Victim Impact Statements

Every odd-numbered year, according to Art. 56.03(h) of the Code of Criminal Procedure, and after each legislative session, the Texas Crime Victim Clearinghouse (TxCVC) convenes a Victim Impact Statement (VIS) Revision Committee. The committee members take a fresh look at the VIS forms and provide valuable input to develop a VIS form that will give victims the voice in the criminal justice process they deserve.

In 2015, the committee meetings took place in the summer and included discussion on new legislation from the 84th Legislative Session that relates to the VIS, the format of the document, and proposed changes from committee members based on their daily interactions with crime victims and the criminal justice system.

TDCAA received a word from Angie McCown, Director of Victim Services for the Texas Department of Criminal Justice, about these revisions:

"In accordance with Code of Criminal Procedure article 56.03, the Texas Crime Victim Clearinghouse (TxCVC) completed revisions to the Victim Impact Statement (VIS) form with the assistance of the 2015 VIS Revision Committee. The VIS form is designed to allow victims of crime to receive a clear statement of their rights, to indicate their notification preferences, and to describe the impact of the crime to the attorney representing the state, the judge, and the Texas Board of Pardons and Paroles.

"The revised VIS form and additional materials can be viewed on the Texas Department of Criminal Justice website, www.tdcj.texas.gov/publications/pubs_victim_impact_statement.html. The VIS form for victims of juvenile offenders and all of the Spanish editions of the VIS are being updated, and all of the TxCVC brochures will be available in print by early 2016. Please feel free to print copies of the online documents.

"The TxCVC has regional staff who provide VIS training and assistance with any questions you have about the VIS. If you or your staff are interested in VIS training, please contact the TxCVC staff at tdcj.clearinghouse@tdcj.texas.gov or 512/406-5931."

If you are a VAC or staffer in a prosecutor's office who is in charge of delivering VIS forms to crime victims, please make sure you have downloaded the latest version of the VIS (dated September 25, 2015, on the bottom left corner of the form). In addition, the Victim Impact Statement brochure, "It's Your Voice," explains the importance of the Victim Impact Statement and how it is used during court proceedings and the parole review process. When you are mailing out your VIS packets to crime victims, be sure and include an "It's Your Voice" brochure too! This brochure and other free publications may be ordered from the Texas Crime Victim Clearinghouse website at www.tdcj.state.tx.us/divisions/vs/victim_clearinghouse_order_form.html

National Crime Victims' Rights Week

Each April communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 10–16, 2016. Check out the

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Office for Victims of Crime (OVC) website at http://ovc.ncjrs.gov/ncvrw for additional information. If your community hosts an event, *The Texas Prosecutor* journal would love to publish photos and information about it. Please email me at Jalayne.Robinson@tdcaa.com to notify us of plans for your event.

In-office VAC visits

TDCAA's Victim Services Project is available to offer in-office support to your victim services program. We at TDCAA realize the majority of VACs in prosecutor's offices across Texas are the only people in their office responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We also understand VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support.

My TDCAA travels have recently taken me to Gilmer, Liberty, Lufkin, Rockport, George West, Fredericksburg, and Georgetown to sit down with VACs for in-office consultations. (Whew! Check out the pictures, at right and on the opposite page.) Thanks each of these offices for allowing TDCAA to offer support! I thoroughly enjoy helping VACs because I have been in their shoes and realize how nice it is to have someone to turn to when there are questions.

Please e-mail me at Jalayne.Robinson@tdcaa.com for inquiries, support, or to schedule an in-office consultation. ❇

TOP PHOTO: From the Aransas County Criminal District Attorney's Office (left to right) are Dayna Justice, Paralegal; Kelsey Downing, ADA; Douglas Mann, ADA; Marsha Perez, ADA; Kori De Los Santos, Investigator; and Mollie Whitfield, VAC and Administrative Assistant. ABOVE LEFT: From the Live Oak County Attorney's Office, Jo Ann Palacios, VAC. ABOVE: From the Liberty County DA's Office, Belinda McCormick (seated), VAC, and Cathy McClusky (standing), Grand Jury Coordinator. AT LEFT: From the Angelina County DA's Office, Stacy Richardson, VAC.

Using error preservation rules to clarify defense arguments

TOP PHOTO: From the Williamson County DA's Office (left to right), Gayla Schwab, VAC, and Alma Vasquez, Victim/Witness Coordinator. MIDDLE PHOTO: From the Gillespie County Attorney's Office (left to right), Meg Burdick, VAC, and Christopher Nevins, County Attorney. ABOVE: From the Upshur County Criminal District Attorney's Office (left to right) Yecenia Vargas, VAC, and Becky Ojeman, ADA.

Preservation of error is often seen as a "gotcha" trick or something of interest only to appellate attorneys. But preservation rules can also help trial attorneys narrow broad claims and make sure they are able to address a defendant's actual arguments. Moreover, it can keep a hearing focused on the issue at hand and prevent the State from being ambushed by additional arguments long after the fact.

By Andrea L. Westerfeld
Assistant Criminal District Attorney in Collin County

The Court of Criminal Appeals does not often address simple preservation arguments, but in *Douds v. State*, it considered a preservation analysis in a mandatory blood draw case.[1] The principles laid out by the court in this review can be applied broadly, both in suppression hearings and in trials in general, to make sure the arguments the defendant raises are addressed and time is not wasted on generic global claims.

The facts

Mr. Douds was arrested for driving while intoxicated. He rear-ended another car while driving with his wife after a party. His wife complained of chest and rib pain and said she could not move her right arm, but she refused to be transported to the hospital by EMS. The officer suggested after EMS left the scene that she needed to be checked out, and her companions in another car said, "We're taking her." Officer Tran believed that meant they were taking Mrs. Douds to a hospital or emergency care. Thus, after he conducted field sobriety tests and arrested Mr. Douds for DWI, he determined Douds was subject to a mandatory blood draw.[2] He took Douds to a medical center, where blood was drawn without a warrant and showed a blood alcohol level of 0.209.

Douds filed two motions to suppress. One sought to suppress the blood test on the grounds that it did not comply with the Transportation Code. The other generically asked to suppress all evidence seized as a result of the illegal search and seizure. The trial court held a hearing, which was entirely focused on whether the blood draw complied with the Transportation Code. The provision upon which Officer Tran relied required an officer's reasonable belief that a person was injured in a car accident caused by the defendant *and* that the other person's injuries require transportation to a medical facility or hospital. Douds argued that his wife had not been transported a hospital because she refused the EMS transportation and the officer did not know whether her friends actually took her to a hospital. The trial court denied both motions. This hearing was conducted two years before the Supreme Court issued its opinion in

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Missouri v. McNeely, which has been used to challenge blood draws conducted pursuant to Texas's mandatory draw statute.[3]

The court of appeals

On appeal, Douds again argued that the statutory requirements of the mandatory blood draw were not met because his wife did not seek medical treatment. He also argued that the statute, as applied to him, had resulted in a warrantless seizure of his blood. The Fourteenth Court of Appeals originally denied his claims.[4] Douds applied for *en banc* reconsideration, which was granted. In June 2014, eight months after the original opinion, a closely divided court vacated the prior judgment and issued a new opinion concluding there were no exigent circumstances justifying the warrantless seizure of Douds's blood.[5] The court concluded that Douds had preserved this complaint because he raised the issue of warrantless seizure; thus, it was the State's burden to prove the search was reasonable. Because there were "no facts from which to conclude" that a reasonable officer would have decided that obtaining a warrant was impractical, it reversed Douds's conviction.

Preservation of error requires more than a global complaint

To preserve an issue on appeal, the opponent must make a timely objection with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context.[6] There are two purposes to this rule: 1) it informs the judge of the basis of the objection and gives him an opportunity to rule on it, and 2) it gives opposing counsel an opportunity to respond. No specific words are necessary so long as the opponent lets the trial judge know what he wants and why he thinks he is entitled to it, and does so at a time when the court is in a position to do something about it.[7]

The Court of Criminal Appeals acknowledged that, read in isolation, Douds's first written motion could be construed as raising a challenge based on Officer Tran's failure to obtain a warrant.[8] But complaints cannot be considered in isolation. The reviewing court must consider the entire context of the suppression hearing. The evidence and arguments at the hearing were focused solely on whether Officer Tran reasonably believed Mrs. Douds was being transported for medical care. Douds and the State even submitted post-hearing trial briefs arguing the reasonableness of the officer's belief. Douds never mentioned a general Fourth Amendment challenge and discussed Fourth Amendment law only briefly as part of his explanation for why the mandatory blood draw statute should be narrowly construed. The question of whether a warrant was required or the possibility of obtaining one was never discussed at all.

Although the Fourth Amendment was mentioned in passing, such a broad complaint cannot be said to have fairly raised a *McNeely*-type complaint. Not only did Douds himself limit all of his argument and evidence to the issue, but the State and the trial court did as well. No one considered at the time that Douds was raising any other complaint than the Transportation Code violation. Therefore, Douds did not preserve this error on appeal.

Practical applications

While it's rather interesting to appellate attorneys, what relevance does this case have for the trial prosecutors out there? It is important to remember that the Court of Criminal Appeals can pick and choose its cases, unlike the lower courts, so while the intermediate appellate courts address preservation routinely, it much more rarely makes its way to Austin. This session has also been fairly light on opinions issued. For the Court to choose to address a simple error preservation issue particularly shows the importance it places on the issue.

Many suppression motions throw out a long laundry list of objections, complaining generally that the detention and/or stop and/or seizure and/or search and/or arrest and/or statements were all illegal. This can certainly be a challenge for the prosecutor attempting to prepare for the hearing. Indeed, some judges have been reluctant to ask a defendant to specify his precise complaint, leaving prosecutors guessing exactly what they are preparing for. The lower court opinion in *Douds* shows exactly the danger inherent in this for the State—the court ruled against the State because there was no evidence presented on an issue that was never brought up during the hearing.

Fortunately, the Court of Criminal Appeals recognized the impossible situation in which the lower

court placed the State. Its opinion in *Douds* sends a message to trial courts and attorneys alike that complaints must be specific to preserve error. Prosecutors are entitled to know what arguments they are responding to and thus what evidence they must present to prevail. Trial courts are entitled to know what they are being asked to rule upon. And a good defense attorney should want to specify his exact complaint so the judge can rule on it. Trial attorneys should not be afraid to ask a defense attorney to clarify the exact nature of his complaint if they are left guessing what to respond to, and *Douds* gives trial courts support in requiring the defense attorney to do so.

Although it does not lay out any new law, *Douds* reminds attorneys and judges alike of the importance of a clear objection, both for its own sake and for the importance the appellate courts place on it. It is a useful tool to ensure that a trial prosecutor is able to spend his time preparing for the right issues and make sure suppression hearings are not mere exercises in frustration. Far from being an esoteric concept of appellate law, rules of error preservation can make a trial clearer on the ground so there are no nasty surprises later.

What it did not do

It is important to remember that this case was argued two years before *McNeely*, so the defense did not raise any arguments that the blood draw was not justified by exigent circumstances. That issue was thus not before the Court of Criminal Appeals here. This case will not be useful for arguing any *McNeely* or *Villareal*[9] issues or in resolving when a warrantless blood draw was justified. ❇

Endnotes

1 *Douds v. State*, No. PD-0857-14, 2015 WL 5981121, at *1 (Tex. Crim. App.—Oct. 14, 2015).

2 See Tex. Transp. Code §724.012(b)(1)(C), which requires an officer to collect a blood specimen if he reasonably believes that the suspect has caused a car accident that resulted in bodily injury to another person requiring that person to be transported to a medical facility for treatment.

3 *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

4 *Douds v. State*, No. 14-12-00642-CR, 2013 WL 5629818 (Tex. App.—Houston [14th Dist.] Oct. 15, 2013).

5 *Douds v. State*, 434 S.W.3d 842 (Tex. App.—Houston [14th Dist.] June 5, 2014).

6 Tex. R. App. P. 33.1(a)(1)(A).

7 *Douds*, slip op. at 8-99.

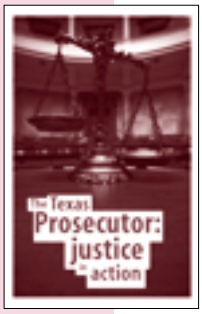
8 *Douds*, slip op. at 9-13.

9 *State v. Villareal*, ___ S.W.3d ___ (Tex. Crim. App. Dec. 16, 2015).

News Worthy

Prosecutor booklets available for members

We at the association offer to our members a 12-page booklet 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 email 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. ❇



Photos from our Key Personnel and Victim Assistance Coordinator Seminar

Photos from our Elected Prosecutor Seminar

A roundup of notable quotables

"I agree. [pause] That's the first time, isn't it?"

San Antonio lawyer Michael McCrum, special prosecutor in the abuse-of-power case against former Governor Rick Perry, responding to a statement by Anthony Buzbee, Perry's lead attorney. Buzbee had told reporters that Perry would not be present for arguments before the Court of Criminal Appeals November 18, as "it would be very unusual" for a defendant to attend. (http://www.mysanantonio.com/news/local/article/Rick-Perry-enjoying-road-trips-around-the-6593797.php)

"My sense was that we had to make changes or a federal court is going to strike down the whole program, and we need this program—some of these people would scare the hell out of you."

State Senator John Whitmire, as quoted in *The New York Times* newspaper, about Texas' recent overhaul of the civil commitment program for sexually violent predators. (http://www.nytimes.com/2015/10/30/us/states-struggle-with-what-to-do-with-sex-offenders-after-prison.html)

"If you're accused of a crime & you respond with a question about the statute of limitations, you probably did it."

Patrick Wilson, County and District Attorney in Ellis County (@Ellis-CountyDA), on Twitter.

"Both subjects advised they had been Dumpster-diving, and judging by all of the trash in their vehicle, I believed them."

From a Granbury Police Department police report. The officer had stopped the men after a report of suspicious activity behind a shopping center past business hours. (Submitted by Hood County Attorney Lori Kaspar.)

"Fingerprints. DNA. Blood tests. Surveillance cameras. Whatever. I've seen more cases turn on what people posted about *themselves* on Facebook than all these other kinds of evidence combined."

Jon English, Assistant Criminal District Attorney in Galveston County, posting on Facebook

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes a quote to this column will receive a free TDCAA T-shirt!

"I wasn't driving that car. My dog was driving that car."

Reliford Cooper III, age 26, to sheriff's deputies in Manatee County, Florida, after he led officers on a short chase that ended when Cooper crashed into a house. Cooper, who smelled like "booze and burnt pot," fled on foot, ended up at a church, and was forced back outside by churchgoers, where he was arrested. He denied driving the crashed car, blaming his dog instead. No dog was found at the scene. (http://www.huffingtonpost.com/entry/reliford-cooper-dog-driving-car_561bbe80e4b0e66ad4c87505)

Continued from the front cover

Trying an aggravated sex assault with a runaway victim (cont'd)

Tracking down suspects

After Dana told her case manager that she had been assaulted, the case manager called the Austin Police Department. Officer Nathan Blake took Dana's statement, and Dana felt comfortable enough to ride along with him and point out the places she had been. The officer then returned her to the residential treatment center so her case manager could take her to a local hospital for a sexual assault forensic examination. As Dana began the long and invasive process of a sexual assault exam, Officer Blake parked his car at one of the apartments Dana pointed out so he could observe it while writing up his report. When he noticed two men exit the apartment, Officer Blake met them, identified them, and included that information in his report. This would prove to be an important chance encounter as the task of investigating this complex set of crimes began.

The case was assigned to Detective Brent Kelly at the Austin Police Department. He first spoke with Dana's adopted brother, who confirmed that she had called and that he had hung up on her. He fortunately still had the phone number Dana had called from. Next, Detective Kelly interviewed Dana and separated the different incidents of sexual assault that took place at different locations. Dana gave very specific identifying information about the various apartments where she had been, including their layouts and items she saw while inside. She even drew pictures of the apartments' interiors. A few days after this interview, Dana went on another ride-along, this time with Detective Kelly, to confirm the locations of the different incidents.

Once he had detailed information from Dana, Detective Kelly went about identifying suspects. He was able to trace the phone number from Dana's brother to a man named Juan Lozano. Detective Kelly found that Lozano's address was in the apartment complex Dana had identified as the first location where she was taken. Additionally, Detective Kelly communicated with the manager of the apartment complex where "Don" (the pimp) lived and determined that a man named Donald Lewis leased the specific apartment that Dana had identified. This was the same apartment Officer Blake had watched when the offenses were reported.

Based on this information, Detective Kelly obtained search warrants for the two apartments. The search of Lozano's apartment yielded identifying information on many additional suspects, and the search of Don's apartment yielded seizure of many items Dana had described, including a small Hello Kitty-themed television. There were also a couple of people in Donald Lewis's apartment at the time of the warrant's execution, including a woman named Jeana. Detective Kelly was able to create photo line-ups that were shown to Dana, during which she positively identified multiple men as her assailants, including Juan Lozano and Donald Lewis.

Detective Kelly then began interviewing suspects. He had to call in help from Spanish-speaking detectives for the men from Lozano's apartment, but he was able to interview Donald Lewis himself. Lewis, who had been arrested on a parole warrant while officers were executing the search warrant, agreed to the interview and orally waived his rights, but he refused to sign the *Miranda* card. Detective Kelly didn't feel comfortable interviewing him without that signature, but Lewis nevertheless began talking for nearly 25 minutes without being asked a question. During his soliloquy, Lewis indicated that "the girl" had been in his apartment but that he did not rape "the girl." He also said that "his roommate's girlfriend" was teaching her how to get into "the business" and that he knew "the girl" was young because of her braces. Lewis further stated that he talked with Dana about her parents, that she said she didn't have parents and was staying in a juvenile home. After Detective Kelly left the room, Lewis mumbled an expletive and placed blame on "Jeana." He specifically had not used that name when talking with Detective Kelly directly.

Despite the excellent police work, only five men were arrested. Some suspects fled, and many men who paid Donald Lewis for sex with Dana were never identified. The five defendants' cases were set in the same district court, all charged with

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aggravated sexual assault of a child. We did not charge any of the defendants with human trafficking, even though what Don Lewis did to Dana (prostituting a child to other men and giving her crack) does fall under Texas' definition of Trafficking of Persons in §20A.02 of the Penal Code, and Dana did exhibit many of the signs of trauma common to survivors of human trafficking. (Read more about that in a companion piece to this article on page 24.) However, we had so much evidence of aggravated sexual assault of a child—and that charge is easier to prove and for a jury to understand—that that's how we charged Lewis as well as the other defendants.

The perpetrators all had different backgrounds, with some having no or minimal criminal history (Juana Lozano was one such man), while Donald Lewis had an extensive criminal background. The cases moved slowly as we waited for the evidence from the sexual assault examination kit to be tested.

Biological evidence

DNA testing took on a life of its own. The vaginal and cervical swabs from the kit tested positive for semen, as did stains from Dana's underwear. The DNA results came back seven months later and showed that the semen on the cervical swab belonged to Donald Lewis. The statistics attributed to the findings indicated this was source DNA. Results from the vaginal swab and underwear stains were also positive for Lewis's DNA, but other DNA was present with no known contributor. One sample had a mixture of at least four different contributors, meaning that we had semen from men who had yet to be identified as suspects.

Additionally, two hairs were found in Dana's vaginal canal. Testing on the hairs did not begin until after completion of the semen analysis. DPS first examined the hair for trace analysis, after which APD completed DNA testing. That process took a couple of months, and the results were inconclusive. Dana was the major contributor of DNA on the hairs; however, the minor component was too small for comparison. It was believed that Y-STR testing could produce helpful results, and at least one of the defense attorneys requested we do the Y-STR test. But this test would deplete the sample, and because of that we hit a wall. The five different defense attorneys could not agree on what to do next. Ultimately the judge gave them a deadline to find a lab they could all agree on or the State would be allowed to send the hairs to a lab of our choosing. The deadline passed with no agreement on the defendants' side, and we sent the hairs to the University of North Texas Center for Human Identification to complete the tests. In the end, Donald Lewis could not be excluded as a contributor to the minor component of the DNA from the hairs. This evidence further corroborated Lewis's guilt and, most importantly, meant we could finally proceed to trial.

As these cases were slowly trudging through the criminal justice system, Dana was reacting in the way many girls in her situation do: She was running away. A lot. Each time she ran away, she found herself at the mercy of a new pimp and the men who were purchasing her. She would either be found or turn herself in, but each time, new criminal cases began in other jurisdictions. We had to keep providing this information to defense counsel, and all of them were very aware that we had no idea if we would be able to produce her to testify at trial. Due to this reality, a couple of defendants, such as Juan Lozano, pled out to lesser sex-offense charges. We knew we had to focus on the worst of the worst, Donald Lewis. He refused to take any plea deal, and we spent some time determining whether we really needed Dana to testify to prove our case against him.

We believed we had one real chance to do so, and it rested on the shoulders of Joseph Quander III. Quander was one of the men identified by Officer Blake when he watched the apartment on the day the crimes were first reported. Quander was actually arrested for his offense at a later date than the four other defendants. Detective Kelly had originally sought arrest warrants for multiple men in the first apartment where Dana was assaulted and for Donald Lewis, and he continued his investigation and eventually interviewed Quander. In that interview, Quander took responsibility for his crime (penetrating Dana's sexual organ with his mouth) and stated that he was in the room when Lewis was penetrating Dana's mouth with Lewis's sexual organ. Quander said that Lewis asked him to leave the room, which he did.

We believed that if Quander would testify truthfully to these facts, then we would have the evidence necessary to convict Donald Lewis. We traveled to the Wynne

Unit in Huntsville to speak with Quander and held our breath. He had already pleaded guilty to sexually assaulting Dana and was doing his time—we didn't know how he would react to the very prosecutor who had a hand in his incarceration showing up to ask for his help. Quander met with us and recalled what he could about the incident, which was almost everything, and while he did not agree to testify, we left with the impression that he would be truthful if we brought him to court. With his testimony, we felt we could proceed with or without Dana.

Dana was in a drug treatment facility in March 2015 when the judge set Lewis's case for trial the last week of April. She was then 15 years old. Before we could let her know about the trial setting, she ran away again. We had about a month for her to be found or turn herself in so she could testify at trial. At this point, we had to prepare for two different trials: one if she appeared and one if she did not.

Preparing for two trials

We first began preparing as if Dana would not appear to testify. Without her as a witness, we couldn't call any outcry witness or anyone else under the hearsay exception who could testify about what Dana said because that testimony would violate the Confrontation Clause. We also had to decide what to do about the sexual assault examination. The nurse noted many injuries to Dana's sexual organ as well as bruises over her entire body. If we attempted to discuss the physical findings, then we would have to discuss the fact that there had been different incidents at different apartments with different men. Our concern was that even though she had been only 13 at the time of the assaults, the jury would blame Dana. That's all the defense had wanted to talk about prior to trial, and it was the main reason we had hoped the jury would get to meet the girl. If jurors could only see her in person, they would understand that she was a broken child, not an oversexualized teen. It's truly hard to articulate what exactly it is about Dana that makes her brokenness so apparent, but every single person who has come into contact with her feels it profoundly. In the end, we decided to have the sexual assault nurse testify only to what a sexual assault examination is and how she collected evidence. We would use her to begin the chain of custody on the DNA, and that was it. What would normally be one of the strongest testimonial accounts in a child abuse case—a nurse who could describe Dana's physical injuries as well as whatever statements Dana may have made during the exam—became merely perfunctory.

Next, we strategized about how to prove each element of the offense without Dana. We had our investigator get a certified copy of Dana's birth certificate to prove her age. We tried to find a picture of her around the time of the offense. (Surprisingly, nobody involved with the investigation had actually taken a photo of her.) We also noted the common observation from each witness that upon her return to the residential treatment center, Dana spoke in an odd accent. Everyone from the caseworker at the center, to the sexual assault nurse, to the detective, and even Joseph Quander mentioned that accent. In trial prep meetings we asked each one if they recalled anything unusual about her voice, and they all recalled her accent. Maybe we were being paranoid, but juries do funny things, and we wanted to be sure to present every piece of evidence we could to tie Dana to the case. Her accent was just a unique identifier to point out throughout the trial.

Finally, CPS was able to provide some photographs of Dana from around the time of the offense. In one of the photos Dana was making a silly face where the braces on her teeth were noticeable. This corroborated Donald Lewis's statement that she had braces, and it didn't hurt that a mouthful of braces is one of the most well-known signs of adolescence.

We then tackled how we would prove that the offense happened in Travis County. We had bags full of great evidence that was seized from inside Donald Lewis's apartment. All were items that Dana described with detail, but we couldn't use any of them without her testimony. Our best evidence on venue and jurisdiction was Officer Blake's observation of Quander leaving that address and Lewis's statement admitting that "the girl" was inside his apartment.

We knew we would not have anybody to say the magic words that Donald Lewis's sexual organ penetrated Dana's sexual organ, but we did have his semen on the vaginal and cervical swabs. We also had Joseph Quander stating that he had left the two of them alone in the midst of a (different) sexual act. We

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hoped that it would be easy for the jury to make the reasonable inference that the only way the semen could have gotten inside her vagina and onto her cervix was through penetration. It should be noted that most of our case was resting on Joseph Quander III, a convicted child abuser, testifying against a lifelong, hardened criminal. Logically it seemed crazy; however, having met with Quander, we felt strongly that he would give us what we needed. Friday before trial we met with him one last time and let him air all his concerns about testifying. We said we understood but that we had to call him to testify anyway. We left a bit anxious hoping our instincts about him were right.

The trial

Our trial date arrived, and we still did not know Dana's whereabouts. We needed to address that aspect of our case in voir dire, and luckily we came upon an organic opportunity. In voir dire, we usually discuss what types of evidence may be presented in our cases. We do this to both debunk any myths about what is typical and to explain what is admissible versus inadmissible (i.e., criminal history is not usually admissible). During that discussion, one member of the venire on her own accord stated that she didn't expect the child victim to testify. We were easily able to open up that topic for discussion to the entire panel, and it seemed the majority of them felt that they did not need the child to testify if the State could prove its case with other evidence. In the past, we had gotten juries who claimed they did not need to hear from the child, but we have also encountered the opposite. It seemed we had a good pool of jurors to choose from and we were starting off strong.

In opening statement, we felt it was important to introduce Dana as best we could. We also wanted to own all of the case's problems. We started by explaining that jurors would hear evidence of why Dana was in the residential treatment center and that she had no real parents. We talked about the types of evidence we would use to prove our case and admitted that we had no idea where Dana was. We said she could walk through the front doors of the courtroom at any time and that we truly believed and maybe hoped that could happen. It set the proper tone for the State's case.

Our witnesses' testimony all worked out as planned. Prosecutors know that it's important to expect the unexpected in trial because it always seems like something unforeseen pops up, but the only real surprise in our case was that it proceeded smoothly. We had told our witnesses that they could not speak about anything Dana had told them. The residential treatment center case manager testified only to the pertinent dates as well as Dana's demeanor when she returned. The bonus from her testimony was that we were able to get a little information about Dana's life introduced when the case manager talked about what type of children come to stay at her facility. She also stated that many girls who stay there run away because they are used to chaos and do not know how to live in a structured, caring environment. Dana's CPS caseworker was also able to discuss more about the generalities of the children in her care. She explained that Dana had run away multiple times and that her whereabouts were anyone's guess.

Joseph Quander III testified almost exactly as we had hoped. After that, we had a number of professional witnesses who were either law enforcement or forensic experts. The defense did not engage in a strong cross-examination of many of our witnesses, but they did have a forensics expert from Orchid Cellmark state that she had reviewed the DNA analysis and believed the records were sloppy. The defense expert pointed out some places in the DNA analysts' paperwork where there were corrections and opined that if the paperwork was messy, then the actual analysis may have also been messy. But she did not claim there was any contamination or scientific reason why the evidence would not be accurate. We did not have a child abuse or human trafficking expert testify, a decision we made during trial based on how the trial was proceeding. We felt the jury had a clear picture of who Dana was and how her absence for court could happen.

Closing arguments focused on Dana being a child of unfortunate life circumstances. The defense tried to delicately disparage her and attacked the testimony of Joseph Quander III. We reminded jurors that Dana had nobody and that we could only hope that she was still safe and alive. The evidence was clear, and it felt like we had done our job in making this child victim as real and as present as we could. It

took about an hour and a half for the jury to convict Lewis of aggravated sexual assault of a child and indecency with a child by contact.

The punishment trial was fairly technical. Lewis pled true to his prior offenses, which established he was a habitual felon. We introduced his prison records and testimony from his parole officer. His records showed he had been unsuccessful on probation in the past. He was also unsuccessful on parole as he had stopped checking in and tested positive for cocaine. His defense attorney argued in closing that Donald Lewis was a product of the prison system because his first prison stint happened when he was still a teenager. He also painted Lewis as the victim of a girl who "creates" defendants. The defense attorney claimed we were trying to put her in a white dress, even though that was not who Dana really was. We countered by pointing out that we never tried to put her in a white dress; we were honest about who she was. Dana was just a child who was born into a bad situation and never had anyone truly give her a chance.

The jury sentenced Lewis to 40 years and jurors told us afterward that they hoped we would see Dana again to tell her that they cared about her. Jurors told us they felt like they knew her and were grateful we stood up for her even when she could not stand up for herself.

Conclusion

Saying we learned from this case is an understatement. Basic principles of being a prosecutor were affirmed. And two lessons really stand out. First, follow your gut. It just felt like we had to fight for Dana even if she never comprehended what we were doing or why. Someone needed to follow through for her just once. We had been in contact with her while the different cases were pending, and she even called a couple times when she was on the street just to check in. We felt confident we would see her one day and wanted to pass along good news.

We had that chance a couple weeks after the trial ended. Dana turned herself in because she felt she was in danger. We met with her promptly, and she was still in the throes of weaning her body off of drugs and dealing with all the trauma she had endured. She was glad to hear of the trial results and was surprised that Joseph Quander had the guts to testify against Don Lewis (something she did not feel she could do). She talked about how scary Donald Lewis really was. It was a bittersweet moment.

Second, lean on the talent and support around you. I am fortunate to work with many intelligent and justice-minded prosecutors. I use the pronoun "we" throughout this article because while I was the lead prosecutor, I spent a great amount of time discussing the case with my colleagues. The second chair on the case, Jeremy Sylestine, listened to me while I lamented the injustice of the entire situation and worried about Dana. He, along with my supervisors, supported and thought through the reality of trying Donald Lewis without Dana: We all agreed it was counter-intuitive to rely on a convicted child abuser to substantiate our case. We knew it was risky to proceed without the jury meeting a teenage victim who would be painted as a willing participant—and yet we believed that it just might work. When we were right, it was a great day to be a prosecutor. ❇

Editor's note: To read the victim assistance coordinator's account of the same trial, please turn the page.

Our missing victim

The challenges in working with juvenile runaways and human trafficking victims

By Jeni Findley Murphy
Senior Victim Witness Counselor in the Travis County District Attorney's Office

My role as a professional is to support victims through the criminal justice system and trial process; typically, this involves meetings, phone calls, and emails. The work I did with Dana King (not her real name), a 13-year-old victim of unspeakable sexual assaults, was definitely different from the norm.

Anyone who has met Dana will tell you that she's a very special young gal. She's incredibly intelligent and the most honest person I've ever met. She enjoys coloring books and loves pretty nails, as many teenage girls do. However, she also knows more than most adults about how to survive in the sex trafficking industry.

Dana has endured many hardships in her short life. She became involved in the foster-care system as a young child. As is common with most girls who enter "the life," as forced prostitution is often called, Dana was sexually abused for several years. She began to run away from her abuser (the father in her foster family) and was ultimately abandoned by that family after she finally told someone about what was happening at home. Following this abandonment, Dana was placed in a group home for girls.

Shortly after her placement, Dana ran away from the group home by crawling through a bathroom window. A girl on the streets, Jeana, took Dana to her pimp, Don. Forcing another girl to search for young runaways is actually a very common tactic pimps use to gain access to vulnerable youth. Don fed Dana drugs and alcohol, and he sold her to several men who brutally sexually assaulted her for hours on end over several days. (Our trial of Don Lewis is detailed on the front cover.) Dana eventually managed to escape and returned to the group home, disoriented and speaking in a strange accent. She told her case manager what happened, and a police report was filed with the Austin Police Department's Child Abuse Unit.

As the investigation and prosecution proceeded, Dana was in and out of different homes and treatment facilities and was constantly running away. She will be the first to tell you that if she's not in a secured facility or if she's around other girls trying to convince her to go back to the streets, she will run away. And sure enough, that's what she did. That was an obstacle we faced throughout this case. We would hold our breath waiting to hear from her or from someone else with an update. Dana shares a close connection to the prosecutor on Don's case, Victoria Winkeler, and she would occasionally call Victoria to check in, usually from her pimp's phone and sometimes at 4 o'clock in the morning. Before the trial, Victoria and I learned that Dana had recently turned herself in and was residing in a juvenile facility in another county, so the two of us planned a road trip to see her as soon as we could.

This was the first time I had seen Dana in quite a while. She had been detoxing for two weeks and was in good spirits, considering the situation. I have found that when working with young people trapped in the world of sex trafficking, one of the most important things we can do is tell them that we care and that we support and believe them. There is no such thing as a child who "prostitutes herself"—rather, these children are sexual assault victims. Yet these youth frequently feel like they are responsible for the violence they suffer because they made certain choices (such as running away from home). It's important to validate their emotions and stress that they do not deserve what happened to them, regardless of the circumstances of their lives that lead them to their current situations.

I also feel strongly that direct and honest communication is one of the most important things that can build trust. These victims are neither naïve nor unintelligent in most cases—it takes a great deal of strength and skill to survive in their world. Dana, for example, is an extremely

direct, blunt, and genuine person. It was critical for us when building rapport with her not to sugarcoat the case's facts or the difficulties we were facing in holding Don accountable for his crimes. We were forthcoming with Dana about how important it was that we knew where she was so she could be present to testify, explaining that certain evidence (such as Don's semen on her cervix, linking him to her sexual assault) can't come in without her direct testimony. Dana was frustrated to hear that the case potentially hinged on her presence, and we had to explain that defendants have the right to face their accusers. "What about my rights?" was her response. Ultimately, she said she would do her best to be there because she wanted Don to be punished for what he did to her and to save other girls from suffering the same fate.

Victoria and I told Dana that we feared for her safety and tried to come up with a plan for her to effectively transition out of juvenile detention and out of "the life" for good. We told her that we could see her doing amazing things for other girls in the future. Dana even told us that she thinks about that sometimes and wants to help others going through what she has survived. We left the juvenile facility feeling somewhat encouraged but with that same, haunting anxiety that we always had when it came to Dana, and we hoped that we would see her again for the trial.

Shortly after our visit, we received word that Dana was placed in a rehabilitation facility in a bigger city. This new facility was not secured, and Dana ran away again, as she said she would. Running away is unfortunately par for the course when working with girls caught up in the sex trafficking industry. It may seem counter-intuitive, that these girls would leave a relatively safe living situation. The reason why is not simple, and the truth is that every victim is different and has her own reasons for leaving. Most are accustomed to a very chaotic lifestyle and find that a structured situation is unnatural, threatening, and sometimes scary. Other times, it's because other girls in these homes actively recruit for their pimps. Frequently, girls choose to run away because they encounter more abuse in their own homes than they do on the streets. To a certain extent, they can make more choices on the streets than when they are in placements.

We also can't ignore the effect of addiction and drug use on these young people. Not many placements are equipped to support victims through active drug withdrawal, and those that are sometimes refuse to admit these girls due to the challenges typical to this population. Another significant problem is that these children are not frequently identified as victims of trafficking. Sex trafficking is still very much a hidden crime that is not often acknowledged or discussed. These children are more commonly viewed as "throwaway kids" or rebellious teens "choosing" to prostitute themselves. This is why an open dialogue is imperative amongst professionals working with these kids. They present as very tough and resistant at times, and they are a lot of work, but deep down, these are our most vulnerable, at-risk population.

We didn't hear from Dana for several months, and she didn't show up for trial. It wasn't until the trial was over that we had any new information about her. She had escaped from a very dangerous situation. The pimp who got her this time was extremely violent and engaged in high-level criminal activity. Dana witnessed him assault another pimp who was infringing on his territory and trying to poach his "girls." He had multiple weapons and was a "gorilla pimp," meaning a particularly violent pimp. This pimp forced Dana to recruit and sell another girl, something that she felt extreme remorse and guilt over, and was violent with Dana and forced her to use excessive amounts of crack. Dana estimated that she was smoking $100 of crack an hour before she managed to get away. Dana called police, turned herself in, and was being held in the same juvenile facility where Victoria and I had visited her previously. Once again, the two of us dropped everything and went to see her. We wanted to tell her the outcome of the trial, certainly, but mostly we just wanted to tell her we were scared for her and that we care about her.

This time, Dana's spirits weren't as high. She had been sold to more people than she could count in several different cities and had been assaulted multiple times. She explained that the men had forced her to use the drugs, but she also said that being high was better than being present for what happened to her. She was in full detox and really struggling with what she had been through the past few months. We listened to her talk about how she was

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feeling and about the horrible things that were done to her, our hearts breaking the whole time. Dana begged to go to a state hospital so that she could get the psychological and rehabilitative care that she so desperately needed, but there was little we could do. Another significant challenge when working with many of these victims is that they are often in the foster care system and Child Protective Services is their legal guardian, so our hands are tied in terms of making decisions for her placement. We told Dana that we would advocate for her and help to educate CPS caseworkers on her behalf, but ultimately, CPS would have the final decision on where she would be placed. Dana expressed frustration with the system and didn't understand why she, a crime victim, was treated like a criminal. I had no answer for this question except to acknowledge that she is right. We gave her all the phone numbers for services and caseworkers we could and pleaded with her to call us if she needed help.

We also told her what the jury had to say about her after the trial. They all wanted to know if she was OK or if we had heard from her. The jury asked us to tell Dana that they care about her and hope that she is pleased with their decision. This information meant a great deal to her. She again discussed wanting to share her story and help other girls. I told her she could do that and I even promised that if she can break free from the life, I would find a way to get her on the "Dr. Phil Show," which is something Dana has always wanted to do. Dana says that she loves Dr. Phil and that she had seen girls like her on his show before and felt like Dr. Phil would like her. I agreed. We said goodbye and drove away, uneasy about the future of this incredible child. I truly believe that if we can find a way to save her from the streets, she absolutely will do amazing things in the future.

Working with traumatized children

What I found to be most helpful when working with Dana was the extensive training and experience I have in working with sex trafficking survivors, both adult and adolescent. I had previously been employed at a domestic violence/rape crisis shelter where I was working directly with victims of human trafficking. Following my time at the shelter, I worked as a forensic interviewer at a Children's Advocacy Center, where I interviewed and supported child and adolescent trafficking and exploitation victims. I have attended multiple statewide and national conferences focused on human trafficking and the commercial sexual exploitation of children, and I also served on a local coalition against human trafficking representing the Children's Advocacy Center. Trafficking has been an area of focus in my professional development, as I possess a particular interest in working with this volatile population. One of the most serious problems we encounter with these survivors, especially for domestic minors, is that they have very few options for safe housing. These particular victims need a specialized environment with staff who are trained to practice trauma-informed care. Some helpful websites for learning more about trauma-informed care are: http://traumapro.net/wp-content/uploads/2014/06/IJTRP-V1-I1.pdf and http://traumainformedcareproject.org/index.php.

Domestic trafficking can also be an overlooked issue. When most people think of human trafficking, international victims come to mind. However, the domestic trafficking of minors is much more prevalent. The Department of Justice estimates that the average age of entry into commercial sex trafficking is 12–14 (Dana was 13 when she was introduced to the life). The numbers are astounding, and pimps know what they're doing. They specifically target vulnerable children like Dana. The National Human Trafficking Resource Center reported that in 2013, Texas had 2,236 "substantive" calls into Polaris' national hotline (across all victims and reporter categories). The only state with a higher number was California.[1] The above report is referenced in the 2014 OAG report, which lists 764 child victims of human trafficking reported in Texas since 2007.[2]

It is imperative to understand the complex dynamics involved in domestic commercial sex trafficking to get through to this unique and oftentimes misunderstood population. Our meetings with Dana provided special insight into what exactly these children are being forced to do out on the streets, the details of which are graphic and disturbing. (Please reference the endnotes for examples.) Though Dana does qualify for Crime Victims Compensation and therapeutic services, until she is in a stable, drug-free, rape-free envi-

ronment, getting set up with a therapist is an unobtainable goal. While many therapists are available to work with victims like Dana, specialized care is essential. These children need therapists who are educated in working with the specific challenges this population presents. Dana has more on her plate than most healthy adults, and therapy is not going to outrank her need for food, shelter, and survival. It is not realistic to expect a girl like Dana to make a weekly appointment with a therapist when she doesn't even know where she'll sleep at night, what her pimp has planned, or how many sexually transmitted infections she's contracted. This is why the need for shelters specifically aimed at this population is so imperative in breaking this cycle.

Every time Dana runs away, we hold our breath and wonder if or when she'll turn up again. We need to hold defendants like Donald Lewis accountable to send the message that preying on and selling human beings is not acceptable. Even though these cases are challenging on multiple levels, we need to prosecute cases like Dana's. As professionals, we need more training and education for all who may come across these victims so that we can identify them as soon as possible. More training on the cultural dynamics of the victims and how to support them through the criminal justice process is also crucial to ending sex trafficking in our communities. Though it may seem daunting, if we can get through to just one victim, there is hope. ❇

Endnotes

1 www.traffickingresourcecenter.org/sites/default/files/NHTRC%202013%20Statistical%20Overview.pdf.

2 www.texasattorneygeneral.gov/files/agency/20142312_htr_fin.pdf; see page 5.

TDCAF News

*Recent gifts to the Foundation**

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Handling mentally ill offenders

How police and prosecutors interact with mentally ill offenders has gotten a lot of publicity lately. To gauge various policies and practices with regard to those with mental illness, we asked prosecutors in five offices across Texas how their jurisdictions identify and handle offenders with mental illness.

Does your local law enforcement have a way to identify mentally ill people in crisis? If so, do your agencies have a way to divert these people to a treatment center versus a booking center?

Art Clayton
Assistant Criminal District Attorney in Tarrant County

Many times officers are called to a case clearly involving mental health issues. In those cases, the officer may be able to make a decision about where to direct a situation. Specifically, the Arlington Police Department has been training to identify low-level offenses where there may be a mental health component, such as criminal trespass. The City of Arlington also has the Mental Health Patrol Response Program, which is staffed on each shift by officers who are trained to identify mental health issues. When the police department encounters a suspect who may be suffering from mental illness, these officers are routed to the call. They are better versed on resources in the community and can make a decision to send a person to treatment versus needing to use the criminal justice system to steer offenders to get mental health treatment. The City of Arlington has developed relationships with mental health facilities to assist in this process.

In addition, during the day shift, the City of Arlington utilizes the Tarrant County Law MHMR Liaison Program. In these situations, a licensed clinician with MHMR will go out on follow-ups to check in on people who may be in crisis. This works like a mini-crisis team.

George Havlovic
Assistant District Attorney in El Paso County

Local law enforcement agencies have provided mental health crisis training to their officers. Currently our county does not have a pre-booking diversion program, but law enforcement does have the option of utilizing an Emergency Detention Order under the Mental Health Code in appropriate cases in lieu of booking into the county jail. Additionally, all detention officers are required to have Mental Health First Aid training in addition to the state-required mental health training.

Denise Oncken
Division Chief, Mental Health Division, Harris County District Attorney's Office

Yes. Both the Houston Police Department and the Harris County Sheriff's Office have Crisis Intervention Response Teams (CIRT), which are specially trained units who ride with clinicians from the local mental health authority. Like all officers, they have the discretion to take individuals in mental health crisis to a treatment center rather that jail.

Lee Pearson and Carmen White
Assistant Criminal District Attorneys in Dallas County

The Dallas Police Department requires that all officers complete 40 hours of mental health training to aid and assist in responding to a situation involving mental illness. Currently, there is no treatment center to take a person in crisis; officers must determine if there is a spot at one of the various hospitals set out to help mentally ill people. If not, then the person is booked into jail.

Jason Steans
Mental Health Court Chief, Travis County Attorney's Office

Both the Travis County Sheriff's Office and the Austin Police Department have units assigned as a Crisis Intervention Team. The officers assigned to the Crisis Intervention Team are tasked with responding to calls that involve mentally ill people who are in crisis, and with diverting those people to mental health services when possible instead of involving them with the criminal justice system. Any and all officers, regardless

of whether they are with CIT, have the ability to apprehend a person with mental illness and to transport that person to an appropriate facility for inpatient treatment if they believe that there is a substantial risk of harm to that person or others unless the person is restrained (Health & Safety Code §573.001). Officers are required to file a notification of detention with the facility, and a probable cause hearing for the detention will be set within 72 hours to determine whether probable cause exists to hold the individual.

At the jail, how does your county screen and assess defendants for mental illness?

Art Clayton (Tarrant): The City of Arlington has a mental health care evaluation at the jail. Authorities there question medications, treatment for mental health, and drug treatment, thus allowing the inmate to be flagged for referral to the Tarrant County MHMR Law Liaison Program or the Diversion Empower Treatment Opportunity Understanding Reduce Recidivism (DETOURR). They look to steer inmates into the diversionary programs offered at the courthouse.

The Mansfield Law Enforcement Center (MLEC), which handles most of the housing for the City of Fort Worth prior to transfer to the country jail, utilizes a jail intake form questioning mental history and whether the inmate is suicidal at the time of intake.

At the county jail, intake offices also utilize a screening form, which goes into the inmate's mental health history and suicidal ideations. The jail intake officers are required to look inmates up in the Continuity of Care Query (CCQ) to see if the inmate has a history of mental health treatment. (SB 839 from the 80th Legislature created the CCQ to replace the Client Assignment and Registration System, known as the CARE check system.) From that, MHMR staff is notified, and additional screening and mental health services are provided.

George Havlovic (El Paso): At booking, a nurse interviews the inmate concerning his mental illness history. A correctional officer asks the inmate the required suicide questions and completes the required form. Also during the booking process, a query of state mental health services databases is completed on each inmate. Each jail facility has special-needs officers who respond to inmates who may have mental illness issues but were not identified during the booking process.

Denise Oncken (Harris): Sheriff's Office personnel are able to identify mentally ill individuals by accessing records and by speaking to and observing individuals as they are being screened before the actual booking. The officer completes the jail standard mental health screening form.

Lee Pearson and Carmen White (Dallas): Everyone charged with an offense is screened for mental illness when they enter the jail. This is done by jail staff and staff from Parkland Memorial Hospital (the county hospital), who are housed at the jail.

Jason Steans (Travis): Our jail screens people at booking by use of a questionnaire about mental health issues, an interview with jail counselors, information provided by arresting officers, information provided by family of the defendant, a check of the defendant's prior mental health records from previous trips to the jail, and a query of a state database to see if the defendant has been treated by a state funded mental health treatment provider. If the person is found to have a mental illness, that person is assigned a special "PSY" classification code in the jail and is routed into appropriate medical housing and services. The PSY code also serves as the mechanism by which jail cases are routed into the court's misdemeanor mental health dockets, with defense attorneys from a specialized mental health list appointed to work those cases.

If someone is identified as mentally ill at the jail, how is this information transmitted to the prosecutor and defense attorney?

Art Clayton (Tarrant): Mental health issues are documented in inmate information at the local jails. When the inmate goes from the city jail to the county jail, that mental health information goes with him. In addition, detectives may give referrals to the mental health court when the case is filed or tell a defendant's family members about mental health diversionary programs.

Article 16.22 of the Code of Criminal Procedure requires that the jail notify the magistrate if someone

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has a mental health issue within 72 hours. The magistrate then requests that MHMR provide an assessment and answers whether the inmate has mental illness or mental retardation and asks if the person could benefit from a competency evaluation. The information from this assessment is given electronically to the prosecutor, defense attorney, and judge of the court where the case is pending.

Referrals can come from the medical department, officers on the floor, family members, or the court to see if the inmate needs services or a modification of existing services.

George Havlovic (El Paso): Currently El Paso County is establishing a procedure for transmitting a jail inmate's mental health information gathered under CCP Art. 16.22 to the appropriate individuals. A Pre-Trial Services Department is being developed and the newly hired director of that department reported to work in November 2015.

Denise Oncken (Harris): Special Needs Forms are delivered to each court's coordinator the day that the defendant is on docket. Copies of this form, which contain information regarding past and current diagnoses and medications, are generally available to both defense counsel and prosecutor. The DA's office electronically receives these forms (by a standing order of the county court administrative judge) daily for all misdemeanor defendants, which are forwarded out to all misdemeanor court chiefs so they have it as they are screening the new cases in their court. And what happens to that defendant upon identification? The defendant may be assigned a defense attorney who has specialized training in representing defendants mental illness. Prosecutors use this information in deciding how to resolve each case.

Lee Pearson and Carmen White (Dallas): There are two ways in which information is disseminated to the District Attorney's Office. A list of people in jail who are suspected to have mental illness is forwarded to the mental health division intake attorney for the District Attorney's Office. Those on the list are then reviewed to determine potential placement into a specialty program for felonies called SET (Stabilization Education Transition), which has recently been developed by the Dallas County Criminal District Attorney. If they are not placed in the SET program, then they are assigned to one of three prosecutors who handle cases in involving mentally ill defendants. A determination of how to proceed with the case will be made by each individual prosecutor.

All those booked into the jail who were previously diagnosed with a mental illness and who have received mental services in the past are placed on a computer database known as the Jimi Bot. Limited information on the Jimi Bot is then disseminated to two prosecutors who are assigned to evaluate to determine if an individual is eligible for misdemeanor mental health judicial diversion or the SET program. The limitation is that the prosecutors get only the individuals who met specific criteria.

Jason Steans (Travis): The docket that I work on (i.e., the Special Reduction Docket) receives all Travis County misdemeanor cases for defendants who have been classified by the jail with a mental health code. Therefore, for jail cases I am notified that a person has mental illness by virtue of the fact that they appear on my specialized docket. If a defense attorney is assigned to a jail case and does not believe that a discussion of mental health issues is appropriate for the case, he is free to move his case back to a regular trial court docket. For cases where defendants are out of jail or have retained attorneys, those attorneys are free to come see me at my office if they want a recommendation that takes mental health issues into account. Retained attorneys are free to come talk to me about their cases at any point if those cases involve mental illness, but I require written documentation of a diagnosis from a licensed healthcare provider before assessing them. Court appointed attorneys for our mental health cases are part of a special "wheel," a roster of special attorneys who are assigned mental health defendants by court administration after those individuals have been identified by the jail.

Does your office have a policy on who should be considered for release on a MH PR bond under Article 17.032 of the CCP?

Art Clayton (Tarrant): We do not generally do PR bonds. Instead, we refer the case to the enhanced mental health services docket. This docket is comprised of misdemeanor cases

with defendants who have two or more arrests and mental health history. In that program, the defendant's bond does not have fees but includes services through MHMR as a condition of bond.

In felony cases, inmates are referred to the Tarrant County Assertive Treatment Program (TCATP). TCATP works with the rise program and the mental health diversion program. Through TCATP, the defendant is released into the community with wrap-around services, meaning they are connected with resources in the community and treatment. The case remains pending while the defendant is in the program.

George Havlovic (El Paso): Our office does not have a policy on who should be considered for release on a bond under CCP 17.032. Motions to release on bond pursuant to CCP 17.032 are considered on an individual basis.

Denise Oncken (Harris): No. When screening defendants for bond, specialized mental health ADAs screen each case on an individual basis, taking into account the nature of the offense, criminal history, feelings of the complainant, and a review of relevant records.

Lee Pearson and Carmen White (Dallas): Policies are currently being developed to determine who is to be released on a MH PR bond as set out in Art. 17.032 of the Texas Code of Criminal Procedure. The new policy will likely require that a qualified mental health assessor determine an individual's diagnosis and mental health status. After this assessment is completed, those who are identified as eligible for a bond will be given a PR bond and monitored to make sure they are maintaining stability on their medication and engaging with their service provider. After this time period, they will be considered for the SET program or other alternatives as determined to be appropriate.

Jason Steans (Travis): Our pretrial services office has specially designated mental health supervision officers who do a good job of staying in contact with defendants who have been released with mental health bond conditions. They keep us updated on their progress in terms of attending treatment appointments, taking meds, and maintaining a healthy living situation (e.g., whether the person is working, in school, or engaged in other activities). We generally try to remain receptive to the possibility of bonding out defendants with mental health issues in order to facilitate treatment so long as the person is stable enough to return to court and the release doesn't appear likely to present a safety risk or a significant disruption to the community.

How do you share mental health information among the prosecutor's office, defense, and judiciary?

Art Clayton (Tarrant): The courts are notified via email and attachment of mental health evaluations and any related reports.

George Havlovic (El Paso): El Paso County is establishing a procedure through a new Pre-Trial Services Department for sharing mental health information with the appropriate parties.

Denise Oncken (Harris): One of the major tools is the "special needs form" (formerly known as the orange sheet) which is sent to the courts. This form contains mental health information from while the defendant was in custody in the county jail. It includes current medications they are on, as well as current and prior mental health diagnoses. It is prepared by the local mental health authority in the county jail. Each court coordinator receives the electronic distribution of these each day as a defendant is on the docket.

Lee Pearson and Carmen White (Dallas): Once a case is assigned to a mental health prosecutor and/or a mental health public defender, there is a collaborative effort on the part of all attorneys to share any information that may assist in evaluating the case to determine the availability of services and programs for the defendant. Until a case is actually assigned to one of the mental health attorneys, there is not an open flow of information among all the parties. However, as we mentioned above, we are developing procedures to interject the State and defense into the process immediately after arrest, resulting in all parties being able to have a more free flow of information.

Jason Steans (Travis): The presiding judge for our docket has issued a standing order for cases on the mis-

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demeanor mental health docket (i.e., the Special Reduction Docket) which allows the jail medical staff to share relevant information with the defense attorneys and prosecutors. Information about diagnoses and treatment history is shared fairly freely, but attorneys are ordered to meet with their clients before attending docket, and they are free to move their clients off of our docket and never discuss mental health information with the prosecutor or judge if they don't believe that the health information is relevant or if they don't believe their client wishes for it to be disclosed. Of course, if a defense attorney has reason to believe that their client is incompetent, they have a duty to bring concerns about mental health to the attention of the court whether or not their client is in agreement. Additionally, we are fortunate enough to have a representative from our local mental health authority (i.e., Austin Travis County Integral Care) who attends our docket and who not only provides information about defendants upon request, but also helps to connect defendants to various treatment programs.

How can bond schedules and policies be modified to allow for more diversions to treatment?

Art Clayton (Tarrant): We convert their bonds to pre-trial conditions and maintain the conditions while the case is pending. The diversion treatment program usually takes 12 months to complete, while some people take up to two years.

George Havlovic (El Paso): This will be a point of discussion through the new Pre-Trial Services Department.

Denise Oncken (Harris): On our felony competency restoration docket—those defendants who cannot be restored to competency—we utilize the following procedure: On that docket for felony offenses, we often do not want to just dismiss the case and let incompetent defendants out on the street without services or the long arm of the court watching them (even though we cannot proceed on the criminal case because they are incompetent). So the court utilizes pretrial release bonds for those who can safely be out in the community (and whose offenses are nonviolent) with conditions that require them to get into treatment. The court can address issues if they are non-compliant because these defendants are on a pretrial release bond. Because it is a felony case, it give the court time to monitor and make sure services and treatment are provided, even though we might ultimately dismiss the case (unless they can be restored to competency).

Lee Pearson and Carmen White (Dallas): Continued collaboration between the District Attorney's Office, Public Defender's Office, private bar, and judiciary is needed to address this challenging population. Currently, efforts are being made to identify individuals with mental health issues early in the process and receive complete mental health information to determine appropriate placement.

Jason Steans (Travis): Our Mental Health Pretrial Diversion Agreements are, essentially, a modified personal bond, accompanied by a signed agreement that promises a dismissal in exchange for compliance with specific terms of a mental health supervision bond. For cases which are too serious for a promise of dismissal, similar results can be often be achieved by releasing a person on a mental health supervision bond with two pending sentencing recommendations—a standard sentencing recommendation similar to what the person might receive on a regular docket and a more lenient recommendation which the defendant can earn by way of treatment and supervision compliance.

In some unusual cases, particularly where we have located family who are willing to lend support but live out of state, we will release a defendant on bond to move to the new location and to engage in treatment there. Once the defendant has reached his new location and can provide proof that he has been complying with treatment there, we will dismiss the case or allow him to resolve the case through a plea in absentia.

Does your county have a diversion program for defendants with mental illness?

Art Clayton (Tarrant): Yes; we've had one since 2003. Since then, it has carried a caseload as large as 53 in 2008 and as little as 31 in 2014. Currently, we have 35 people in the program, and 10 have graduated this fiscal year.

To be considered for the program, the defendant must have significant mental impairment documented by a mental health professional prior to the offense, and the

current offense must be related to the mental impairment. Misdemeanors and low-level, nonviolent felonies are considered for admission into the program. (Violent criminal offenses and offenses involving a weapon are not accepted.) Family violence cases are considered on a case-by-case basis. All cases admitted into the program are reviewed by the Tarrant County Criminal District Attorney's Office, where three prosecutors (Assistant Criminal District Attorneys Lucas Allan, Mary Butler, and myself) review them for admittance. Furthermore, the prosecutors attend weekly diversion court settings for the caseload.

The defendant must comply with the conditions of the program. He must:

1. admit to the commission of the offense by entering an open guilty plea and agree that the admission may be used against him in court;
2. not commit a criminal offense for the duration of the program;
3. not consume alcohol or non-prescribed controlled substances;
4. submit to random chemical testing;
5. cooperate with mental health treatment and/or counseling as recommended;
6. take all psychiatric medications as prescribed;
7. keep all appointments and attend all compliance hearings as scheduled;
8. agree to report to the Mental Health Diversion Program (MHDP) office and all other appointments as directed;
9. keep the program staff informed of any changes in address, telephone number and employer;
10. consent to the release of protected information as permitted under Texas law;
11. have no contact with any person of disreputable or harmful character;
12. waive his rights relating to speedy trial;
13. acknowledge that failure to comply with any term of this agreement will cause the State to withdraw from the agreement and proceed with prosecution of the offense;
14. attend monthly compliance hearings held in open court as directed; and
15. agree to follow directives given by MHDP in accordance with their individual treatment plan and program goals.

Upon successful completion of the diversion program, the defendant is allowed to withdraw the guilty plea, the State dismisses the charge, and the charge is eligible for expunction.

George Havlovic (El Paso): Currently El Paso County does not have a pre-indictment diversion program, though it does have a mental health court for already-indicted cases.

Denise Oncken (Harris): Yes. Senate Bill 1185 (from the 83rd Session in 2013) is designed to get people out of custody and into treatment. We also have other specialized mental health dockets—felony mental health court, competency restoration docket, etc.

Lee Pearson and Carmen White (Dallas): Yes. There are two specialty programs available and a conditional dismissal program. The first program is the SET program, which will begin in January 2016. It is for felony offenders who are considered high-risk and high-need. It is a 9–18-month program that results in a dismissal of the case and an expunction upon successful completion. If a defendant is accepted into the SET program, he is assigned a case manager who will monitor him and engage him in all services necessary to address his mental health. Participants will be required to meet once a week at court and complete three phases to successfully complete the program.

There is also a misdemeanor judicial diversion program for those who have been identified as having mental illness. This program is also done in phases and is six months long. If accepted, an individual will be assigned a caseworker and be required to attend court sessions at least twice a month or more frequently if needed. Upon successful completion of the program, the defendant's case will be dismissed.

Finally, there is a conditional dismissal program run by the Public Defender's Office. Conditional dismissals are for individuals who do not qualify for one of the diversion programs but who still need more specialized monitoring than probation can offer. The terms of the conditional dismissal are determined on a case-by-case basis, and individuals are monitored by the mental health attorneys in both offices as well as the case managers on staff at the Public Defender's Office. Regular check-ins are required, and terms can be modified as necessary if there is non-compliance.

Jason Steans (Travis): We have instituted a Mental Health Pretrial Diversion program for certain defendants; it releases them on bond with

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the possibility of earning a dismissal through treatment compliance. The defendants are released on a mental health bond, check in on a weekly basis with Pretrial Services mental health supervision officers, return to court monthly to check in with the court, provide proof of attendance at health care appointments, and submit to substance abuse testing upon request. Participants in the program sign a written agreement up-front (also signed by the prosecutor) outlining the terms. We typically allow into the program only people who have a permanent address and/or other assurances that they are stable enough to make it to appointments and check in with supervision regularly. ❇

Post-conviction Art. 11.09 writs of habeas corpus

These types of writs are exceedingly rare, so if you're faced with one, let this checklist guide your next steps.

Article 11.09 of the Texas Code of Criminal Procedure applies to writs of habeas corpus at every stage of a misdemeanor (from charge to post-conviction), and post-conviction Art. 11.09 petitions are as uncommon as they come. Therefore, even the most experienced writ prosecutor must take a moment to regroup before organizing a plan of attack.

By Andréa Jacobs
Assistant Criminal District Attorney in Tarrant County

Protect your conviction by being proactive—don't wait for the judge to grant relief before you file a response. Also, don't think of such a case as "just a misdemeanor." While you might have a strong desire to brush this off because it seems less important than a felony, make sure this conviction has not been used to enhance another conviction (e.g., DWI, FV assault, etc.).

Here is a checklist specifically for post-conviction Art. 11.09 petitions for writ of habeas corpus (misdemeanor convictions—*not* unrevoked community supervision cases—ruled on by the trial court and generally appealable).

Editor's note: One copy of Andréa's upcoming Writs *book will be sent to all prosecutor offices in Texas this spring, courtesy of our Court of Criminal Appeals grant. Be on the lookout for it!*

Get served

- Have a good relationship with the court staff (so they'll let you know when a writ comes in or if a defense attorney requests a hearing).
- Also know the local defense attorneys, especially the ones who would try to have the court rule without your knowledge.

Will the court refuse to issue a writ?[1]

- If the writ is frivolous on its face, the trial court can refuse to "issue" it before ever considering it on its merits.
- Is this a misdemeanor *conviction*? (CCP Art. 11.072 governs writs in deferred adjudication or community supervision cases.)
- Is the applicant confined? (No confinement equals no jurisdiction.)
    * Is the applicant physically confined?
    * Is there a collateral consequence, such as deportation, conviction used for enhancement, license prohibition, etc.?

Calendar deadlines[2]

There are no set deadlines, so request a scheduling order. My recommendations:

- 14 days from State's receipt of petition: motions for affidavits, request for hearings, and preliminary discovery requests are due.
- 30 days from State's receipt of petition: Answer is due if no affidavits or hearings are ordered.
- 14 days after affidavits are filed or hearings are held: All final pleadings are due (including proposed findings of fact and conclusions of law).
- seven days after all pleadings are filed: court's order.

Investigation

- Are the claims cognizable?
- Order records (appellate and trial files).
- Do you need evidence to properly respond to claims? (Is it a purely legal claim?)
    * Are the claims barred by laches because the evidence is no longer available? (Is the attorney dead? Are the files destroyed?)
    * Do you have the evidence (e.g., the appellate record, witness statements, lab reports, photos, videotapes, digital media, etc.)?
    * Do you need affidavits (e.g., *Padilla*, ineffective assistance of counsel [IAC], and involuntary plea claims)?
    * Is a hearing needed (e.g., actual innocence, IAC, etc.)?

State's Response

- Request scheduling order for deadlines.
- Request order for affidavits.
- Request a hearing.
- Respond on the merits.

Findings of Fact

- These should be separate from Conclusions of Law (addressed on the next page).
- Address every claim.
- If there are multiple grounds, organize findings of fact under each ground for purposes of clarity.
- Every finding should have a citation to the record or a clear explanation as to origin (e.g., trial court's personal recollection).
- Each finding should contain only one fact.
- List the findings of fact in logical order to create a step-by-step, easy-to-follow progression for the trial court.
- If your trial court or judge has a particular custom that is important to resolving the issue, have her make a factual finding about that custom (e.g., "As a matter of custom and procedure, this court always asks the defendant's attorney if he believes the defendant is mentally competent to enter the plea and receives an affirmative answer before this court will consider accepting the plea").

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Conclusions of Law

- These should be separate from Findings of Fact (addressed on the previous page).
- Address every claim.
- If there are multiple grounds, organize conclusions of law under each ground for purposes of clarity.
- Provide a legal basis for each legal conclusion (citation to caselaw, statute, rule of evidence, rule of appellate procedure, rule of civil procedure, local rule of court, treatise, etc.).
- Each conclusion of law should contain only one conclusion.
- List the conclusions of law in logical order to create a step-by-step, easy-to-follow progression for the trial court.

Order[3]

- Unless local rules require otherwise, always prepare a proposed order for the trial court to sign adopting your proposed findings/conclusions or a proposed order that includes the desired findings/conclusion.
- The trial court rules on the petition.

Objections

- If there is a concern that the trial court will adopt the applicant's proposed findings, file objections to those proposed findings as soon as is reasonably possible.
- If trial court grants relief without making findings of fact and conclusions of law, request that the trial court make them for purposes of appeal.

Appeal

- If the trial court refuses to issue the writ, no appeal can be made.[4]
- If the trial court denies the writ, the applicant can appeal.
- If the trial court grants the writ, the State can appeal.[5]
- The State has 20 days from the date of order or ruling to file a notice of appeal.[6]
- The elected prosecutor must personally sign the notice of appeal.[7] ❇

Endnotes

1 Tex. Code Crim. Proc. Arts. 11.10 and 11.15.

2 Tex. Code Crim. Proc. Art. 11.10.

3 Tex. Code Crim. Proc. Art. 11.44.

4 *Ex parte Noe*, 646 S.W.2d 230, 231 (Tex. Crim. App. 1983).

5 Tex. Code Crim. Proc. Art. 44.01(a)(1)–(4).

6 Tex. Code Crim. Proc. Art. 44.01(d); Tex. Rules App. Proc. 26.2(b).

7 Tex. Code Crim. Proc. Art. 44.01(i); *State v. Muller,* 829 S.W.2d 805, 811 (Tex. Crim. App. 1992).

Serving on a jury

Ever wondered what goes through a juror's mind during voir dire? During trial? During deliberations? Here's your chance to find out: We asked a woman who recently served on a Travis County jury to write about her experience.

By Natalie Price
Travis County Citizen and Juror

I was surprised by all the (unsolicited) advice I got after I received a summons in the mail to appear at the Travis County courthouse for jury duty. Bosses, supervisors, and friends all chimed in on how to avoid it.

"I just said I was a student and they let me go."

"I told them I was a foster parent."

"I said I believe in the death penalty." And on and on.

I wondered why was everyone assumed that I, like them, wanted to get out of serving—no one dreamed that I could possibly *want* to be on a jury. But I'm 28 and had never served before, and I was curious. My only supportive friends were the ones who wished they could serve but were unable to, including my roommate (she works for lawyers) and a friend (now an attorney) from college. Their curiosity is what encouraged me most, so I trekked bravely to the courthouse on a Monday morning.

That day, a major source of stress was finding parking in downtown Austin. Most meters max out at only three hours, and there's no telling how long the impaneling process would take (it turns out, longer than any of us expected). A half day at a garage was $15 to $30, and that wouldn't have even been enough time. But my roommate let me park at her downtown office, just a short jaunt to the courthouse, so crisis averted!

We were supposed to show up by 9:00 a.m., but it took awhile before we were actually brought into the courtroom—close to an hour and a half. I'm not sure why we were delayed, and it would have been helpful to know as we sat there. But finally the bailiff came out, took roll, and handed out numbers on sticky notes.

Voir dire

I wasn't sure what to expect during voir dire. I was No. 56—did that mean anything? The room was very cold, and I was shivering most of the time, even while bundled in my jacket. Once we were seated in numerical order, the prosecution, defense attorneys, and the defendant were introduced to us, and we were sworn in.

As the prosecution began introducing the generalities of the case, my heart sank. I could immediately tell that the crime was very serious (involving a felony charge), and I wished I didn't have to hear about it. Within a few minutes the prosecutors were legally defining "sexual assault," along with "penetration" and the differences between "sexual assault" and "aggravated sexual assault." It was all very alarming, and I felt like I had had the wind knocked out of me.

The prosecution asked if anyone had experienced sexual assault as a minor or knew someone who had, and between a quarter and a third of the jurors raised their paddles. I have some close friends who just discovered ongoing sexual assault on two of their children, so their faces came to mind as the prosecutors discussed these things in the courtroom. To be honest, I did not want to hear any more about the case because it was alarming, heartbreaking, disgusting, and overwhelming. At the same time, I realized that I was willing to be an advocate for a child out there who's been victimized.

The prosecution asked questions about detecting signs in a child that might indicate abuse. They also explained that if sexual abuse on children is ever reported, the outcry is usually delayed, resulting in no DNA or other evidence. That all made sense to me. Then they asked the panel, "Would you be able to apply the law and convict someone based on the evidence and testimony

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of a single witness?" That was hard for a lot of people, and it was conflicting for me too, but I answered "yes."

This question was key, and it ended up that one man selected for our jury (I'll call him Ted) ultimately decided he could not convict on the testimony of one witness, though I do not remember him saying anything out loud during this part of the selection process. Later, I wondered if there was another question that could have been asked here, to help potential jurors like Ted realize and report their bias.

I liked the prosecutors immediately. They were both women and both beautiful, charming, intelligent, to the point, and Texans. No games. They seemed honest and likable. It was an obvious contrast to the defense attorney, whom I immediately did not like. His tone of voice, his line of questioning, even his appearance and his glasses. He was not smooth, he was not charming, and he did not even seem confident. The contrast between him and the prosecutors was so striking, I almost felt like it was a joke. Was this a clever (or not-so-clever) ploy on his part? I was surprised how clearly I liked one set of attorneys over the other side. But I also had never been in court before—I've only seen things on TV, where all the attorneys are gorgeous and polished and have every point covered. This real-life courtroom experience made me realize that TV attorneys are not reality and that it is unlikely a real attorney, covering dozens of cases at once, could actually be perfectly prepared and smooth in real life. But what we see on TV affected more than just me—the rest of the jury discussed this in deliberations, nitpicking where the attorneys could have probed more during the trial.

The defense got up and began asking questions. From the start, he was unclear and I could never quite tell where he was going. At one point he asked if we would count it against his client if the defendant chose not to take the stand and remained silent. This was probably the hardest question for me in the entire process, and my answer (that a defendant not taking the stand would seem suspicious to me) prompted the attorneys to call me in later to clarify. In my mind, it doesn't make sense why anyone would not take the stand if they really didn't commit the crime.

The defense asked us what we thought his job was, and he got a variety of answers, some ridiculous. He asked, "Do I have to prove my client innocent?" Most people said, "Yes, it's your job to defend your client and prove his innocence." It was somewhere in here that I suddenly remembered two things: that suspects are "innocent until proven guilty" and that they have "the right to remain silent." (Maybe TV helped a little after all?) I understood finally what he was getting at: He didn't have to *prove* that his client is innocent; innocence is *assumed*. Instead, the *prosecution* has to prove he is guilty. That was what all the talk of "the State's burden" was about. As I sat there, it dawned on me that my personal feelings about how to determine someone's guilt were contrary to how the *law* determines someone's guilt. I also realized that my previous answer about someone remaining silent would have to change too if I were to abide by the law. That moment was a turning point for me, and when I was called back in to clarify my answer about a defendant's right not to testify, I confidently confirmed that I was able to obey the law.

The final selection process must have taken longer than anyone expected because we didn't break for lunch. It was well into the 2 o'clock hour when we were brought back into the courtroom and the 12 jurors announced. I did not know whether to feel privileged or burdened when I was selected—an odd feeling. The bailiff took us to the jury room to give us parking badges and further instructions on code of conduct. We left around 3:15 p.m., and I was very glad I didn't have to worry about a parking ticket on my windshield.

Trial

We were scheduled to show up the next day at 9:30, and we all made it on time. Then we sat and waited for about an hour and a half before anything happened. This was a poor start, and a couple jurors were already antsy and frustrated. We had no idea what was going on; we felt forgotten and a bit trapped. It would have been nice if we had received an update every 20 to 30 minutes. Also, the coffee was bad. A small thing, I know, but bad coffee on our first day of jury service with 11 strangers and things already running more than an hour late? It was harsh. I made a mental note to bring my own fresh grounds the next day. In the meantime, I did my best to introduce myself to and make small talk with the other jurors so we didn't feel like the 12 strangers we were.

We finally entered the courtroom around 11 o'clock, and the trial officially began. I'd never been in a courtroom before, and I tried to remain open-minded and logical, listening for what the State and defense had promised during voir dire. The opening statement from the prosecution felt dramatic, confident, and bold, detailing whom we would hear from and laying out their story of the defendant. The prosecutors ended their opening by saying they were confident we would find the defendant guilty on all charges. The defense attorney's remarks were much shorter and ended with the opposite sentiment, his sureness that we would find the defendant not guilty. I did find it interesting that he begged us to consider all the charges as one unit in our verdict.

When the prosecution read the charges, I was surprised by how literal and specific they were. There was a charge for each body area that was reportedly violated. I noticed the felony charge was listed first—digital penetration—followed by the lesser (but no less disturbing) charges. It was a lot to take in; I knew that these things happen in the world and in movies, but it was hard to realize that it happens in my city, in neighborhoods I've frequented.

When we heard from the victim, we had high expectations. The defense had claimed in its opening remarks that she would be poised and composed, bold in overcoming her fears to find justice. But when the victim finally took the stand, she was soft-spoken and seemed shy. I knew it had to be terrifying to sit there within sight of her alleged perpetrator. I could also see her discomfort as she almost hid underneath the jacket she had draped over her shoulders. The jury discussed these details at length in deliberations later.

Her testimony was the hardest to listen to and made me very uncomfortable. The most awkward moment for me was when the prosecution used the opening of a Kleenex box to represent the female sexual organ and asked the victim to demonstrate the motion she had experienced (I assumed to clarify for the jury whether penetration had happened). The victim was shy here but followed through, and I thought she was brave. I wanted to avert my eyes from her (she was describing things that are hard to talk about), but I also felt like I needed to look into her face and watch her to determine her credibility. It was hard to keep looking at her, but I knew the trial and our deliberations would hinge on her testimony, as her testimony was the primary evidence.

I noticed fairly soon into her testimony that her story didn't align in perfect detail with the other witnesses involved. However, most of my doubts about her credibility left when I heard from the expert witnesses later (doctors and forensic interviewers). There was an acceptable amount of historical error to me—her allegations didn't change. I greatly appreciated the clarity one expert witness provided. She was trained in forensic interviewing with children, and her testimony helped me understand the nature of assault on children's minds and why some details of their stories will not always match up each time they tell it (like the exact number of times the assaults happened, the places where they lived, or exactly what date it occurred). The other expert witnesses explained why there would be no other physical evidence in the case of a delayed outcry. To me, the prosecution built a solid case for the victim's credibility.

As for the defense, we were all surprised when the defense attorney called the defendant to the stand, me especially because I had gone through all the trouble of clarifying whether I could apply the law if he chose to remain silent. I think we all respected him more for taking the stand, but his testimony ultimately did not help his case much. There was a moment when the prosecution zeroed in on a careless comment and asked the defendant if he would lie to keep himself from going to prison. He replied, "Honestly, yes, I would." What? The jury could tell he was being honest in that moment—but he was being honest *about lying* … and he said all of this while facing prison time.

Throughout the trial it was hard to remember our oath and not talk about the case on our breaks, but our jury took our role and that oath very seriously. There were a couple times when general talk about the court system would begin to get too specific, and we reminded each other that we shouldn't talk about such things and distracted ourselves by changing the subject. We discussed one attorney's full-arm tattoos (they were peeking out from his sleeves), the animated blond woman in the back of the courtroom (she turned out to be the defense attorney's girlfriend), Austin's horrendous traffic, and outrageous property taxes. We talked, laughed, and bonded together dur-

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ing our breaks, trying to keep our minds off the case. As far as I could tell, all the jurors took their oath seriously and did not talk about the case at home either. I was proud of everyone.

Deliberations

Finally, the prosecution and defense rested around 11:00 a.m. on Thursday. The judge read us the charge and dismissed us to the jury room. They had taken our orders for lunch and delivered our food so we could begin deliberations immediately. Once everyone was in the room with food, we took an initial poll before talking freely about the case. I felt the defendant was guilty when I was sitting in the courtroom and I assumed everyone else felt the same way. But as we went around the table, the first three confidently voted "not guilty." By the time I gave my initial answer, I became "undecided." I think there were three solid guilty, at least five not guilty, and the rest were undecided. That's when I knew deliberations would take longer than a lunch hour.

As we began to talk, the conversation got slogged in some details that weren't helpful. Ted—the man I mentioned before from voir dire—called us to order and went over some definitions. This action was important in setting the stage for what we would consider as we deliberated. Ted had previously worked as a private investigator, so he claimed to have experience with the law and how it worked. He went on to define the words "fact," "evidence," and "not guilty" versus "innocent." This was helpful in focusing us as a team, but I also noted how quickly he dominated the conversation.

A few jurors suggested Ted be our head juror, but Ted actually handed off the job to a man we'll call Ron. This was a surprising gesture but I was grateful for it. Ron was a much more open-minded and diplomatic person, and he kept cool even when the discussion got heated. We continued discussing, and as Ted talked through the case, another juror wrote out what we were considering on the white board. We wrote out the allegations, evidence, and timelines. Ted explained apologetically that the only real evidence we had was a single witness's testimony, which wasn't that great (in his opinion). He made the case that we literally had nothing else: no physical evidence, no videotape, and no other witness. "It's a he-said, she-said case," he said over and over throughout deliberations. As he explained everything, my hope of declaring the defendant "guilty" sank. Was there any way I could convict a man on the testimony of one girl? What if she was lying?

We took one or two more votes to gauge our progress. We decided we had reached an impasse after a couple of hours and informed the judge, who promptly ordered us to continue deliberating. We deliberated until 6 that night. By the end of the day, my vote had changed to "not guilty," but I was not happy about it—I believed the defendant to be guilty, but I was not sure there was enough evidence to prove beyond a reasonable doubt that he was guilty. That was where I wrestled. The judge gave us an option to order dinner and deliberate into the night, or to break and come back to deliberate at 9 the next morning. We all voted to break and come back the next day (which turned out to be a great decision—we all needed a breather). The only thing we all agreed on that day was deciding to treat the allegations as a unit (meaning we would convict the defendant the same way on all three charges), something the defense lawyer had suggested during his opening statement. Either we believed the victim or we didn't.

Two (maybe three) jurors were particularly closed off to any change and would consider no other option than where they stood at the end of that first day. The other jurors seemed open-minded enough to hear both sides. When we left Thursday night, the vote stood at eight "not guilty," two "guilty," and two "undecided." I left very frustrated. I had heard some sobering viewpoints from my fellow jurors and witnessed some close-minded, even borderline racist views, and my heart was heavy. I went to a concert that evening (one I'd been excited about for weeks), but I was so tired I left early. Sleep did not come easily that night, as I was thinking back over the case and praying for wisdom. I had been praying all week over the case, for the people involved and for the jury, and I was at a loss with how to proceed with my fellow jurors. I prayed for justice for the defendant and the victim, whatever that might mean, and I prayed for my fellow jurors to be soft-hearted and open-minded, faithful to consider all of the evidence we heard during trial. I was reminded that night that it is lawful to convict someone based on the testimony of one witness if we consider her credible, though Ted had made it

sound like that was illegal or immoral during deliberations.

The last day

On Friday morning, several other jurors reported that they had not slept well or at all and had been thinking through the case all night. Shockingly, almost every vote had changed in some way since the evening before: Only two people remained "not guilty," and there were now four or five leaning toward "guilty," and the rest were "undecided." The victim's testimony was discussed again, and more people agreed that she was credible. It wasn't too long, though, before the conversation got heated. In one tally, only Ted was holding out on his "not guilty" verdict; everyone else had swung to "guilty." It finally came out that Ted refused to convict based on the testimony of only one witness (contrary to our vow in voir dire). His decision was based on a verse from the Bible he wrote out on the white board (Deuteronomy 19:15, which states you must have more than one witness to convict someone), and then called anyone who was a Jew or Christian to submit to what the Bible says. As you can imagine, the room got hot pretty quickly, almost volatile.

A few people had some words for Ted, but our head juror, Ron, called for peace. I confronted Ted respectfully with Romans 13:1–7, which clearly talks about how Christians are called to submit to governing authorities, but to no avail. Ted was angry and unmoved. There were two people on the "guilty" side who were also unmoving—they were convinced the victim was credible. At this point, we all felt that we had reached an impasse, and around 11 o'clock we informed the judge. Again, he urged us to continue deliberating and reminded us that a mistrial would mean that the trial process and jury selection would start over for all those involved in the case. But he also told us not to vote in violence to our conscience.

When we all came back into the room, I asked if the rest of the jurors would allow me to pray over our deliberations and the trial. To my surprise, they all agreed. When I finished, we were quiet for a bit before beginning deliberations again. Ultimately, we didn't make any progress. We were still grid-locked, and Ted was unchanging in his "not guilty" stance. We reviewed the judge's written order and wrote a third note declaring that we were at an impasse—there was at least one person on either side of the verdict who would be doing violence to his conscience to change his vote. After this note, the judge called us back to the courtroom, declared a mistrial, and explained what would happen next. He thanked us for serving and had us escorted back to the juror room. The judge came back to personally to thank us all again, and we were officially dismissed. He let the prosecution and defense attorneys ask us some questions about the deliberations, and we were told we would get our checks for serving in the mail. I left the courthouse dazed and a bit frustrated but with a clear conscience.

Conclusion

Reflecting back over the trial and deliberations, I see how emotionally intense that time was for me. As the week dragged on, I felt more and more exhausted, and I needed a lot of rest over the weekend after the mistrial. I had to process my frustrations alongside my roommate, pray through what happened, and release the outcome back to God. In the few weeks that have followed, I've become more interested in the trial process and even (for a quick minute) fancied the idea of becoming a bailiff. I've been more interested in how people search for the truth and have found a couple of TV shows and podcasts in this vein.

But the most tangible way that this trial has affected me (besides writing an article about it) is that I now actively encourage people to go through jury duty. My hope is that my generational peers will become educated about the trial process and be willing participants and positive voices in the justice system. ❇

Donuts with the DA

As part of a concerted effort to reach out to the community, Montgomery County prosecutors and staff organized a program to interact with citizens at five local donut shops. Here's how they did it.

By Tiana Jean Sanford and Tyler Dunman
Assistant District Attorneys in Montgomery County

One does not have to look very hard to see that prosecutors and law enforcement officers are often the center of media attention and scrutiny these days. Right or wrong, media reports are often critical of what we prosecutors do and how we do it. From grand jury processes to officer-involved shooting investigations, we are under a microscope. Consequently, one might say that as a profession, we are at crossroads in how we handle public perception: We can continue doing "the Lord's work," paying little attention to public perception, or we can make efforts to interact with, engage, and educate our communities.

Starting in 2015, our office chose the latter and made it a priority to further expand our community outreach efforts. We've had great success in raising awareness of the dangers of driving while intoxicated (DWI) offenses, for example. Every opportunity that we were given to engage with groups of people was an opportunity to empower them to get involved, establish a partnership, solve a problem, and gather feedback on past initiatives. We were finding success in reaching out to schools, churches, non-profits, and law enforcement agencies, and we wanted to replicate this model in all areas of criminal prosecution. Simply put, our vision was a community informed on what we do, how and why we do it, and their role in the process.

We solicited ideas from others in the office about where to focus next. And while everyone had ideas, not all of them had a catchy title—or were the brainchild of the elected prosecutor himself—until one day.

It was then, in passing, that Brett Ligon, our elected DA, told us that he had just come from an event called Coffee with the Constable. While his mentioning it was casual and the whole conversation was no more than a minute in duration, it was evident that Mr. Ligon was energized by his experience and believed that something similar could be an opportunity for our office to reach out to citizens too. If people would have coffee with the constable, then someone would definitely have at least one donut with the DA! And so the idea for reaching out to the donut-craving citizens of Montgomery County was born.

Time to make the donuts

The first thing we did was to identify days and times for our gatherings. This part was challenging. We took many things into consideration including peak hours of donut demand, school start times, and the potential number of attendees. We eventually settled on Tuesday and Wednesday mornings between 8:00 and 10:00 am. We figured that this was early enough in the morning to get some foot traffic without being in the way of those busy with the morning rush. Once we settled on days and times, we needed to figure out how many gatherings we were going to host. This part was simple, as Montgomery County is split into five precincts and each one of those precincts has a sitting Justice of the Peace. We determined that our first "Donuts with the DA" tour would include a stop at a donut shop in each of the five precincts.

It was an easy decision for us to hold the gatherings as close to the location of the Justice of Peace courts as possible. These locations are centrally located enough for everyone in the county to have access, and most people have had a speeding ticket before and are familiar with the location of their nearest JP. A quick search on Google Maps provided us with a short list of potential locations, which we then ranked solely based on location. However, a phone

ABOVE: The local newspaper ran a cover story on the Donuts With The DA program. TOP RIGHT: Tyler Dunham and Tiana Sanford pose with Montgomery County DA Brett Ligon (seated and about to take a big bite of donut) and DA Investigator Kelly Fortune at one of their stops on the Donuts With The DA tour. MIDDLE RIGHT: Ligon meets with a couple of citizens. BOTTOM RIGHT: Ligon poses with two employees at one of the donut shops.

call and visit to each donut shop on the list was necessary to commit to the final location. The response from the donut shop owners was mostly positive. Only one owner suggested we find another shop. He was concerned that his store did not have sufficient space and that parking was a pain. A site visit revealed that his assessment was spot-on, so we chose another donut shop in that precinct. Each location had to be clean and with adequate seating and adequate donuts—every flavor of donut. After our rigorous selection process was complete, we had commitments from donut shops all over the county and were well on our way.

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The next step was getting everyone in the office on board. Now some of you are reading this and thinking, "Wow! This is neat! I am sure everyone thought this was a great idea!" Some of you may be on the fence thinking, "OK: Fun name, minimal commitment … Let's see where this goes." And then there are also those of you who are saying to yourselves, "The elected DA eating donuts. In public with random people. Wait—would I be expected to eat donuts with the elected and these random people *and* talk to them? Horrible idea." We aren't actually reading your mind here; it's just that all of these sentiments (and more, some of which are not suitable to print) came out of our coworkers' mouths too. But getting everyone on board is imperative in community prosecution initiatives. While it is not the most difficult task, it does take a continuous and deliberate approach. Prosecutors are generally service-oriented, so enforcing the principles of community prosecution and relating them back to a specific initiative is usually all it takes to wrangle them in. Most everyone was positive about the Donuts with the DA initiative, and the naysayers had valid concerns (mostly about safety, whether anyone would show up, and that it would not be received well and seen as simply political). But at the end of the day, we were able to dispel the concerns and move forward with getting the word out.

A press release announcing our initiative, dates, and locations got the ball rolling. Our local news media followed up, and stories on Donuts with the DA were heard on the radio and read in our local newspaper and blogs. On the days leading up to each event, we used social media to post and tweet our location and also posted flyers in the donut shops. We even had Boudreaux from Montgomery County Lifestyle, a popular social media presence, broadcast live from the downtown Conroe event.

Eating donuts and shaking hands

On the morning of each event, we would arrive to the location early to set up. We hung a District Attorney's Office banner, laid out some of our office scrapbooks, and purchased a variety of donuts. Each Donuts with the DA event was attended by Mr. Ligon, a handful of assistant DAs, and at least one investigator from our office. The investigator's presence not only addressed concerns for safety but was also an opportunity to make sure the public knew that it's not just prosecutors who do the work of justice every day. There is a whole team of individuals, from administrative and legal assistants, to investigators and victim assistance coordinators, who are passionate about the work we do and are imperative to the pursuit of justice.

With that, we had the team and we had the donuts. All we needed now were the people.

Remember the way you felt at your first middle school dance with all sorts of worries? Did you show up too early or too late? Would anyone ask you to dance? Would your classmates look at you weird? Would anyone talk to you? Did you pick just the right outfit to make you look cool and approachable, yet legitimate and not to be toyed with? The waiting was certainly the hardest part—but all of those worries went out the window after the first handshake. The citizen interactions we had were all positive. There were two distinct groups of people: those who knew we were coming and planned to be there to meet us and those whose only plan was getting a donut and going about their day. At first people appeared apprehensive. You could see in their eyes that they wondered what they had stumbled upon and if their local donut shop was safe with the obvious presence of law enforcement. As soon as they found out that we were there as part of our community outreach, though, they relaxed and were incredibly supportive of our continued efforts.

We met a lot of different and interesting people during our donut tour. At our first event, the foot traffic we experienced was steady. We had set up our table outside and were greeting people as they walked into the store. Each interaction was similar: We'd all smile and say hi, our body language was reciprocated by the customers, and a minute or two later we'd met someone new, talked to them about why we were there, and sent them away with information on how to contact us in the future.

One experience was notably different. A car pulled up and a large man in his early 40s stepped out of the car, followed quickly by a little girl dressed in a green polo shirt, plaid skirt, crisp white socks, and saddle oxfords. The smile they both wore from ear to ear was identical. They approached and said hello first,

though they were not at the donut shop to see us. They were there to celebrate! After pleasantries were exchanged, the man informed us that he and his 4-year old-daughter had just left MD Anderson, where she was being treated for cancer. The appointment had gone well and they wanted to celebrate with a donut, and we were honored to be a part of their celebration. We chatted with dad and daughter about our office, and dad looked at his daughter and told her she could do what we did when she grew up. She was shy but seemed pleased; then she gave us a hug and they went on about their day. From our experience with this dad and daughter duo—as well as an elderly lady we were able to help with an identity fraud issue—each interaction solidified the need for us to make ourselves accessible to the community we serve.

Imagine having a question or concern about the District Attorney's Office but not knowing whom to contact to answer that question. There are people in our jurisdictions who want to know how prosecutors fit into the larger criminal justice system but do not feel as though they have the access necessary to get the information they need. People may know where our office is located or even our office phone number, but the obstacles to reach us may result in confusion about what we do and how we do it.

There are those who will claim that this effort was purely political, and while they are wrong, that's not an unexpected response to community prosecution efforts. This is in part because the concept of intentional community prosecution model is fairly new. Prosecutors may be aware of core principles of community-based prosecution, but the public at large is not used to seeing the role of a prosecutor in this way. As prosecutors, we are in a unique position to act as ambassadors for the criminal justice system. Creating opportunities where partnerships can be established and problems can be solved is one way we can affect the way our community perceives us. This is why community outreach efforts will be largely successful no matter how many people show up to eat donuts with the district attorney. The mere existence of these events and efforts by our offices to support them sends a message to our communities that we recognize their value in this process and that they can trust us to represent them well. As prosecutors, we recognize the value of people feeling safe in their communities, and we are fiercely and unapologetically committed to seeing that justice is done. While community outreach may be challenging, given our unique role, it makes us more effective at doing justice, and we are the individuals best suited to meet these challenges. ❇

NEWS WORTHY

Upcoming TDCAA seminars

Prosecutor Trial Skills Course (open to prosecutors with less than six months of experience), January 10–15, 2016, at the Radisson Town Lake, 111 E. Cesar Chavez, in Austin.
Investigator School, February 8–12, 2016, at the Omni Colonnade, 9821 Colonnade Blvd., in San Antonio.
Crimes Against Children, April 12–15, 2016, at the Wyndham San Antonio Riverwalk, 111 E. Pecan St., in San Antonio.
Civil Law Seminar, May 11–13, 2016, at the Omni Southpark, 4140 Governor's Row, in Austin.
Evidence Seminar, June 15–17, 2016, at the Intercontinental Dallas, 15201 Dallas Pkwy., in Addison.

Registration for seminars is online only and is available at www.tdcaa.com/training about three months before the seminar. Hotel information is also on our website. ❇

What to do about a disabled juror

A refresher on how to handle juror disability and alternate jurors

You have spent countless hours preparing for trial. You have reviewed the evidence, met with your witnesses, anticipated every conceivable argument opposing counsel might make, and even bench-briefed them. But then one of the jurors gets arrested mid-trial.[1] Now what?

This article is designed to prepare prosecutors for just such a situation by presenting the possible causes for juror disability and the remedies available at the different stages of the trial proceedings with citations to relevant statutes and caselaw. I hope it is helpful.

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Juror disability

Generally, not fewer than 12 jurors can render a verdict in a felony case.[2] However, in two instances the law allows a trial to proceed with 11 jurors: 1) when the parties consent or 2) regardless of the parties' consent, where a juror dies or becomes disabled after the trial of a felony case begins but before the charge is read to the jury. In such a case, the remaining jurors may return a verdict.[3]

The second scenario is modified when a juror dies or becomes disabled *after* the court's charge is read to the jury. In that scenario, "the jury shall be discharged, except that on agreement on the record by the defendant, the defendant's counsel, and the attorney representing the state, 11 members of a jury may render a verdict."[4]

I know what dead means, but what about disabled?

The Code of Criminal Procedure does not define the term "disabled." However, a body of caselaw dealing with juror disability offers an outline of what constitutes a disability.

The determination of whether a juror has become disabled and cannot continue with the trial is within the discretion of the trial court.[5] The Court of Criminal Appeals has held that Art. 36.29 requires that a juror "suffer from a 'physical illness, mental condition, or emotional state that would hinder or inhibit the juror from performing his or her duties as a juror'" to be found disabled.[6] A trial court may not dismiss a juror "for reasons related to that juror's evaluation of the sufficiency of the evidence."[7]

Conditions that have been upheld as constituting a disability include Alzheimer's disease;[8] intoxication;[9] inability to secure care for special needs children;[10] and deaths of family members.[11]

By contrast, a juror merely knowing the defendant does not constitute a disability.[12] For that matter, neither does a juror's bias or prejudice for or against a defendant.[13] Either of these things can ultimately make the juror disabled, but what is critical is not the *existence* of knowledge of a defendant or prejudice for or against a defendant, but rather the *effect* these things have on the juror—whether they inhibit him from fully and fairly performing the functions of a juror.[14] Even a juror's arrest during the course of a trial does not necessarily constitute a disability if the juror is able to set that experience aside and continue to fully and fairly perform the functions of a juror.[15]

A juror's admission to being unable to follow a given law after being empaneled is *not* a basis for finding that juror disabled, despite the fact that it would have been a basis for a strike during voir dire.[16]

What about alternates?

The Code of Criminal Procedure specifies that up to four alternate jurors may be called and impaneled in a felony case, and up to two alternate jurors may be called and impaneled in county court.[17] The Code mandates that alternates be used to replace jurors who, "prior to the time the jury renders a verdict on the guilt or innocence of the defendant, and if applicable, the amount of punishment, become or are found to be unable or disqualified to perform their duties or are found by the court on agreement of the parties to have good cause for not performing their duties."[18] The same rules apply to determining a juror's disability and

properly discharging that juror when alternates are available as when there are not alternates available.[19]

What happens if a juror is wrongly discharged?

When a juror is wrongfully discharged and the trial court mistakenly grants a mistrial without a manifest necessity, the results are dire for the State, as further prosecution will be double-jeopardy barred.[20] Where the trial court does not mistakenly grant a mistrial but nonetheless errs in some form by either discharging or failing to discharge a juror, this can still result in a reversal and remand for another trial.[21]

What if you're in misdemeanor court? The statutory provisions cited above apply to felony cases rather than misdemeanors. This then begs the question, What is to be done when a juror dies or becomes disabled in a misdemeanor case?

In short, there is no statute answering that question. However, the Court of Criminal Appeals has recognized that "the Code of Criminal Procedure does at least implicitly permit waiver of the right to six jurors in cases tried in county court."[22] The Court of Criminal Appeals has approved of the use of fewer than six jurors in county court where the defendant, court, and State consent, despite there being no statutory authority for this procedure.[23]

Conclusion

Should a prosecutor come across a case wherein a juror dies or becomes disabled, there is a useful body of statutory and caselaw laying out the procedures to be followed. Referencing these materials should provide a sufficient guide for dealing with such situations, but as oftentimes happens, the unpredictable will occur in trial.

One final word of caution when dealing with these situations: The prosecutor should always be wary of a mistrial and make certain that the trial court has examined and exhausted every alternative. If a mistrial is necessary, the State should ask that a showing of manifest necessity is made clear on the record.[24] In particular, prosecutors would do well to remember that where a juror is disabled, the trial court's first option must be to proceed with 11 jurors rather than to declare a mistrial.[25] ❇

Endnotes

1 *Brooks v. State*, 990 S.W.2d 278, 286 (Tex. Crim. App. 1999).

2 Tex. Code Crim. Proc. art. 36.29(a).

3 *Id*; Tex. Gov't. Code §62.201; *Hill v. State*, 90 S.W.3d 308, 314 (Tex. Crim. App. 2002) (en banc).

4 Tex. Code Crim. Proc. art. 36.29(c).

5 *Scales v. State*, 380 S.W.3d 780, 784 (Tex. Crim. App. 2012).

6 *Id* at 783 quoting *Valdez v. State*, 952 S.W.2d 622, 624 (Tex. App.—Houston [14th Dist.] 1997, writ ref'd (other citations omitted).

7 *Id* at 783.

8 *Timmons v. State*, 952 S.W.2d 891, 894 (Tex. App.—Dallas 1997, no pet.).

9 *Griffin v. State*, 486 S.W.2d 948, 951 (Tex. Crim. App. 1972) (juror was arrested for driving while intoxicated during the lunch break, and the Court of Criminal Appeals held that the trial court did not abuse its discretion in finding the juror disabled based on his intoxicated state).

10 *Owens v. State*, 202 S.W.3d 276, 277 (Tex. App.—Amarillo 2006, pet. ref'd).

11 *Ricketts v. State*, 89 S.W.3d 312, 318 (Tex. App.—Fort Worth 2002, pet. ref'd).

12 *Reyes v. State*, 30 S.W.3d 409, 412 (Tex. Crim. App. 2000) (en banc).

13 *Id*.

14 *Id*.

15 *Brooks*, 990 S.W.2d at 286 (trial court's decision to allow juror to continue to sit on case after being arrested for entering the courthouse with a gun was not an abuse of discretion where the juror said the arrest would not affect his ability to act as a juror).

16 *Landrum v. State*, 788 S.W.2d 577, 579 (Tex. Crim. App. 1990) (en banc) (trial court abused its discretion when it excused a juror based on his post-empanelment statement that he could not follow the punishment range).

17 Tex. Code Crim. Proc. art. 33.011(a).

18 Tex. Code Crim. Proc. art. 33.011(b).

19 See *Scales*, 380 S.W3d at 786 (trial court erred when it replaced a juror who would not deliberate with an alternate without ascertaining why the juror would not deliberate).

20 *Hill*, 90 S.W.3d at 315-16.

21 See, e.g., *Landrum*, 788 S.W.2d at 579 (case reversed where trial court found juror's post-empanelment acknowledgement of bias against the law constituted disability); *Solis v. State*, 946 S.W.2d 591, 593-94 (Tex. App.—Corpus Christi 1997, no pet.) (case reversed where trial court discharged juror as disabled based on post-voir dire burglary of juror's home).

22 *Ex parte Garza*, 337 S.W.3d 903, 912 (Tex. Crim. App. 2011) (listing cases approving the use of fewer than six jurors in a misdemeanor case where the defendant consents).

23 *Id*. at 915 (approving of this procedure in dicta).

24 See *id*., addressing trial court's granting of mistrial in misdemeanor case where trial court did not explore and exhaust all available alternatives); *Hill*, 90 S.W.3d at 315-16 (capital murder prosecution double jeopardy barred where mistrial granted [apparently] based on juror disability where trial court did not consider possibility of proceeding with 11 jurors).

25 *Hill*, 90 S.W.3d at 315-16.

Painting a picture with a defendant's words

Tarrant County prosecutors re-enacted a vicious murder in court, all narrated by the defendant himself as he testified from the stand. Their demonstrative display unraveled the murderer's story and led to his conviction and a life sentence for killing his girlfriend and unborn daughter.

By Art Clayton and Lisa Callaghan
Assistant Criminal District Attorneys in Tarrant County

It is a sad fact that, for some, there is an exceedingly fine line between love and hate. Often, the fulcrum on which the difference rests is the idea of power, of control. When one person asserts independence or control over a situation, it can result in a display of explosive violence as the other person attempts to prove *who is really in charge*.

That was the case with Tracy Renee Anderson, a young woman in our county who was murdered by her boyfriend. In March 2014 she was pregnant with her first child, a girl whom she had decided to name Ashton Makenna Rae. On the day she died, she was 37 weeks pregnant, but both she and her baby were killed at the hands of the baby's father, Robert Charles Atlas.

A tumultuous history

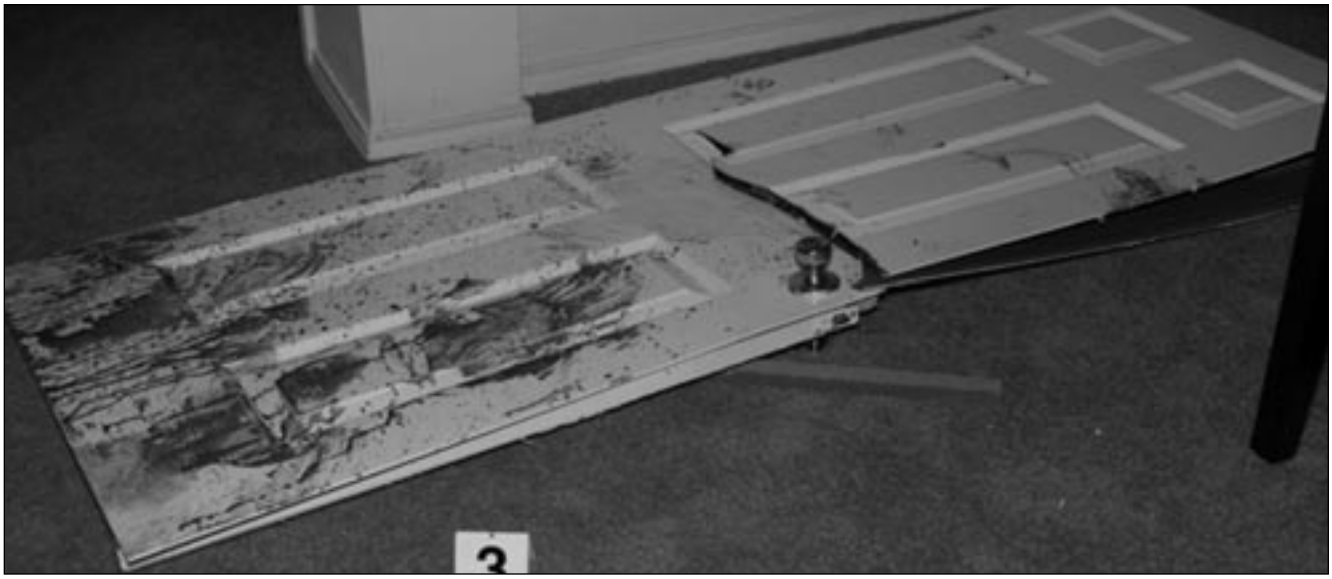
Tracy Anderson and Robert Atlas met in May 2013 on a dating website, Plenty of Fish. The two became close very quickly, but their relationship was a tumultuous one. Atlas once pushed Tracy down some stairs in July 2013, breaking her collarbone. A few months later, Tracy called the police because Atlas had assaulted her. He was also carrying on an affair with another woman, which Tracy discovered after coming home to her apartment at an unexpected hour and catching the two of them together.

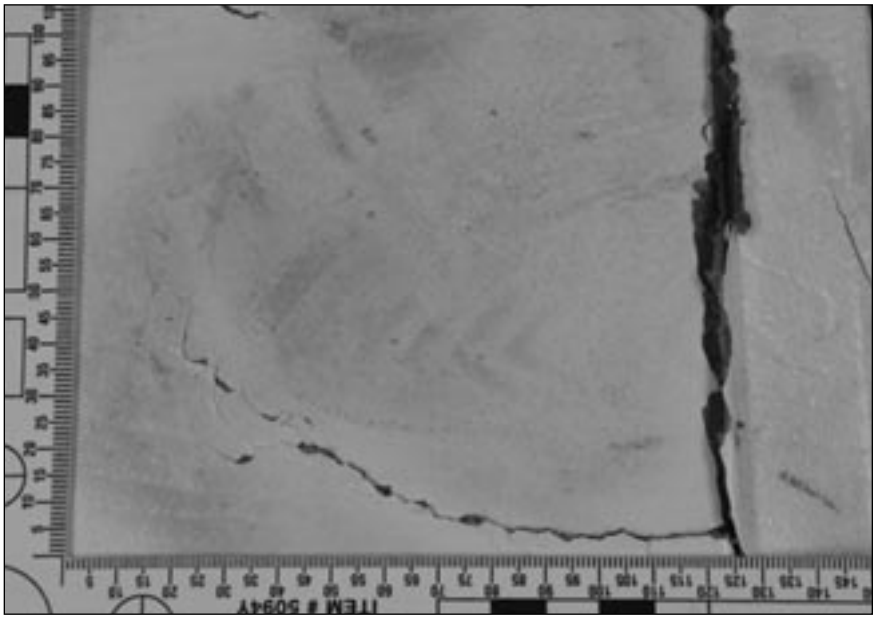
The final documented altercation between the two occurred on February 1, when Atlas called police claiming Tracy was assaulting him and had gone for a gun. However, the 911 recording of the incident depicted Tracy only asking for the power cord for her phone after Atlas had locked himself in the room to wait for the police. Despite the fact that he said he was in a "life and death" struggle with her, this claim was not supported by the 911 tape at all. But Atlas's claims of Tracy's violence were eerie foreshadowing to what would happen less than two months later.

Tracy's death

On March 21, Tracy Anderson went out to celebrate the birthday of her friend Nakaiya Walters. Tracy returned home after 1 a.m., texted Nakaiya to say she'd gotten in safely, and left again to meet Atlas at another bar. Witnesses reported that the couple argued at the bar and that Tracy left, ostensibly going home. She sent Atlas strongly worded texts telling him he would not be sleeping in the apartment that night—but he showed up at the apartment around 2:40 that morning, forcing open the front door.

Only Atlas lived to tell what happened next, but physical evidence on the scene implied a violent attack. The bathroom door had been torn from its hinges and almost completely ripped in half, and it was lying on the living room floor when police arrived. (See the photo at the top of the opposite page.) It sported a partial footprint, which matched the shoes Atlas was wearing that night. (Again, check out the photo on the opposite page, middle.) The bathroom was a scene of horror: Blood coated the floor and closet door. Most of the blood was below doorknob-level, and a clear blood trail led from the bathroom into Tracy's bedroom. (It was likely she had stumbled to the room for her phone, which was charging by the bed.) But she did not survive long enough to make a call; her naked body was found at the foot of the bed. Tracy had approximately 56 injuries all over her body, 36 of which were significant cut and stab wounds, with some as deep as 6 inches. Her unborn baby, too, had been stabbed, and she died as well.





TOP PHOTO: The bathroom door, torn nearly in half, was ripped from its hinges and was lying on the living-room floor when police arrived. ABOVE: A shoe print, which matched what the defendant was wearing the night of the crime, clearly marked on the door. LEFT: Tracy Anderson (at right) with her friend Nakaiya Walters (at left), who testified about the night of Tracy's death at trial.

After fleeing to Shreveport, Louisiana, Robert Atlas was arrested without incident, extradited to Texas, and charged with murder. From early on, he claimed self-defense in Tracy's killing. In a recorded statement given to the police, the defendant claimed that the victim had attacked him with the knife, and that he inflicted all those wounds in self-defense.

He also initially claimed that he had inflicted only a few wounds, as though police would not be able to count them for themselves. He did not mention the wounds to the victim's back, which could not have happened if he were truly defending himself from Tracy's attack. He did not explain the truly horrifying number of defensive wounds to her hands and arms, and he also never explained why he left her dying and never tried to get her help—knowing that if she died, his child did too.

Demonstrations at trial

To counter Atlas's story that he had stabbed Tracy and her unborn child out of self-protection, we prepared

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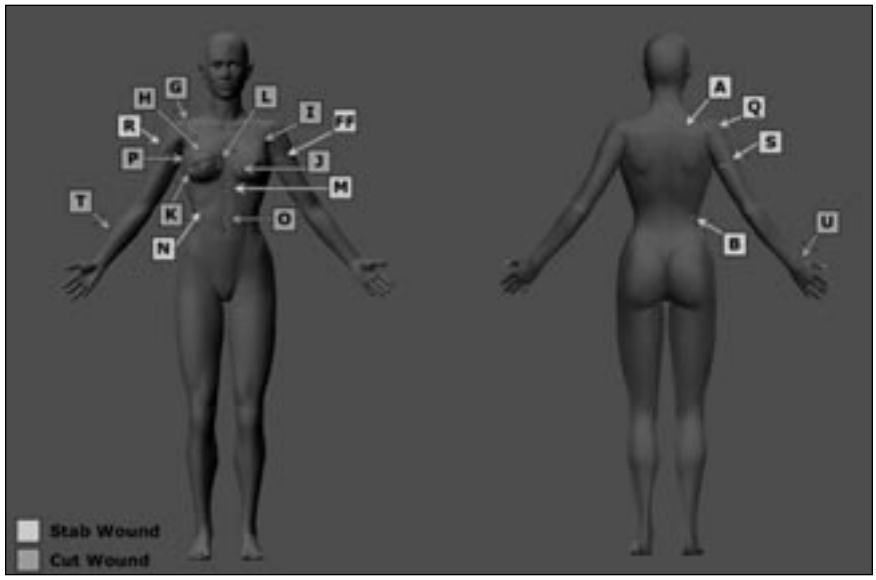
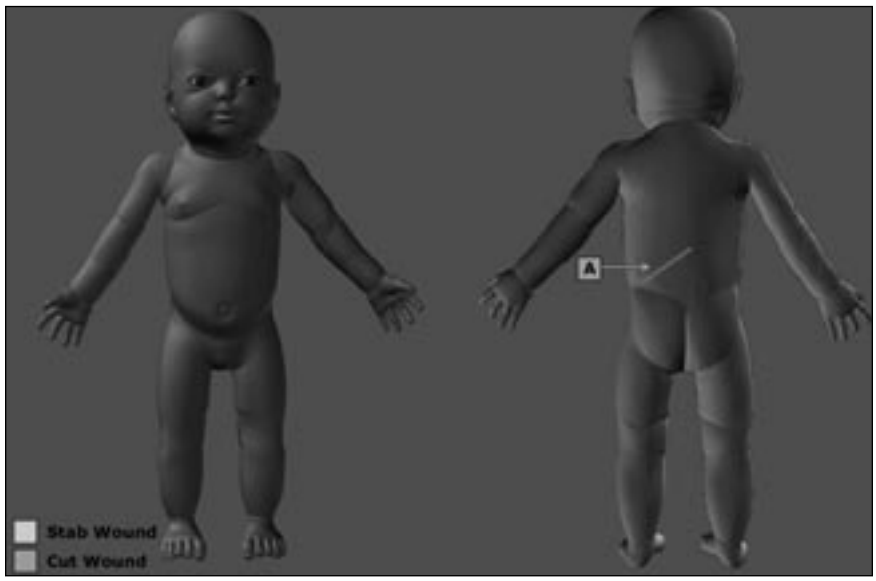
several visual aids for trial. Rhona Wedderien, the Digital Media Evidence and Trial Art Coordinator for the Criminal District Attorney's Office, prepared Poser diagrams of Tracy and the baby (see the illustrations at right) to show the exact locations of the wounds on their bodies. The wounds were numbered, just as they were in the autopsy, and we set up the presentation so that when we clicked the numbers in front of the jury, each was linked to the corresponding autopsy photo of the wound in question. It was an outstanding use of technology to make complicated expert testimony more accessible to jurors.

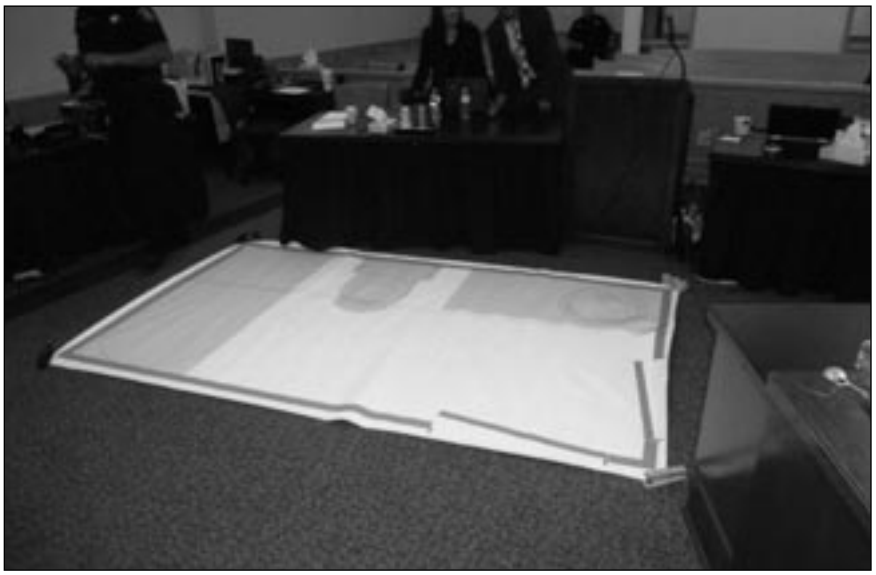
When we were laying out the trial photos and the diagram of the bathroom, Art had an epiphany: The room was too small for the offense to have occurred the way the defendant claimed it did. How could we show that to a jury? Art suggested a floor mat—like in the kids' game Twister. After more conversation between the two of us, investigator Maria Hinojosa, and Rhona, the idea of a rubber mat was born. We envisioned a mat that was the exact dimensions of the bathroom where Tracy was killed and marked with the bathtub, sink, toilet, linen closet, and door. It was obvious to all of us that the defendant was likely to testify to tell his side of the story and even more likely to lie about what happened—the mat was a way to catch him in his lies, show the jury how the offense likely occurred, and back it up with objective evidence, such as the autopsy photos and blood spatter.

Trial work is all about effective communication. Our office is known for innovative trial presenta-





TOP PHOTO: The Poser diagram (prepared by the DA's office) of Tracy showing all of her stab wounds. ABOVE: The Poser diagram for Tracy's unborn daughter, who was also stabbed and killed in the attack. RIGHT: Robert Charles Atlas.



TOP PHOTO: The rubber mat that prosecutors had made for demonstration at trial. Its dimensions match those of the bathroom where Tracy Anderson was murdered, and the locations of the tub, toilet, and sink are shaded. ABOVE: Chris McGregor and Maria Hinojosa of the Tarrant County Criminal District Attorney's Office match the defendant's and victim's heights, respectively, and re-enacted the scene as the defendant testified from the stand.

tions, such as mock video simulations, life-size cardboard cutouts of police officers (read an article on that particular trial in the September–October 2012 issue of this journal or online here: www.tdcaa.com/journal/mother-all-%C2%AD demonstrative-evidence), and other creations that bring defendants' crimes to life. This was an opportunity to use our skills once again to create an interesting, dramatic presentation that brought jurors to their feet and leaning out of the jury box to watch what was happening on the mat.

Rhona designed the mat with the assistance of the crime scene officers from the Bedford Police Department (they had taken measurements of the bathroom during their investigation), and she sent her design to a local contractor who works with our office. Because we did our own design, the cost was low, only $62.

The highlight of the trial was cross-examination. When I offered the mat as demonstrative evidence, both the judge and the defense attorney were a bit shocked—they had never seen anything like it before. The judge, however, quickly understood that it was really no different from any other demonstrative evidence. It was simply an aid to explain how the offense occurred—once we made clear that its dimensions were accurate. The defense objected, but they really had no basis except that they had never seen such a thing before. Defense objections were overruled, and we rolled out the mat.

Atlas is a good-looking man with a smooth speaking style, the kind who might have been difficult to cross-examine adequately. We asked the defendant to stand up so that he could clearly see the mat as it was laid out, and we asked him to position two volunteers who were the same height as the defendant and the victim (Chris McGregor and Maria Hinojosa, respectively, of our office) in the same position he and Tracy were in when the "self-defense" purportedly occurred.

When he did so, it immediately became obvious the defendant was lying. First of all, he positioned himself and Tracy face to face on the bathroom floor, but the mat made it clear that the bathroom wasn't big enough for them to be in that posi-

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tion. He also placed Tracy on her right side—but most of her stab and cut wounds occurred on her right side. He could not explain how that could happen if she were laying on her right side. He was also unable to explain how he stabbed her four times in the back in "self-defense." When he left the witness stand, his credibility was in tatters.

Swift justice

The defendant was convicted in two hours and 20 minutes of capital murder and automatically sentenced to life without parole. This case was a marvelous example of teamwork in action. The Bedford Police Department worked as a team to put together a compelling case against the defendant, and Shreveport police worked with them to catch him after he fled to Louisiana. The prosecution team worked together to take the evidence from local police and paint a picture in the courtroom that no juror could mistake or forget. The result was that Mr. Atlas is now where he belongs: in the custody of the Texas Department of Criminal Justice. If hate is, as Euripides said in *Medea*, a bottomless cup, then it is one the defendant will have to drink alone in the Texas Department of Criminal Justice for the rest of his life.

Much of the practice of law is knowing and following precedent. Trial work, however, is where we can let our imaginations soar and try new and innovative things. We live in times when the expectations of jurors are often guided by television: They expect all the bells and whistles we can provide. Technology, when paired with out-of-the-box thinking, can provide fresh and compelling ways to present evidence. We would encourage other prosecutors to think about how we present evidence and experiment with new ways to bring a case to life. ❇