



“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

‘I’ve been shot!’ Or maybe not

The tangled tale of a Montgomery County woman who called 911 saying she had been shot by an intruder—but investigation revealed that the crime scene had been staged. How investigators and prosecutors got to the truth.

It is every person’s worst nightmare. Someone breaks into your house and shoots you, and you call the police asking for help while blood and the smell of gunfire fills the room. Police respond with the full force of law enforcement to save a life and capture a villain.

But what if there is no villain? What if there was no break-in?

The Montgomery County Sheriff’s Office recently grappled with these questions when a woman, Alison Lawrence, reported that a masked man had entered her home, wrestled with her for a gun, and shot her before fleeing the scene. Finding the truth took serious investigation and staged crime scene analysis.

When most people think about staged crime scenes, they think about a criminal trying to cover up a murder, either by making it look like a suicide or an accident. However, providing false information about how a crime scene formed is also staging. When a serious crime is reported in Montgomery County, we roll out the cavalry without delay or hesitation. Seconds can be the difference between life and death. So when this towering

response is elicited based on a lie, a sacred trust is broken. And when this woman refused to accept responsibility for lying to police about her injury, we felt it was important to try the case.

Alison Lawrence claims a break-in

On Saturday March 15, 2014, during the noon hour in a quiet Montgomery County neighborhood, Alison Lawrence said she was shot by a black male wearing a black mask and a black jacket. She said the intruder came in through a back door, took nothing, and attempted no other crime before he ran away—he even left the gun behind. When officers arrived on the scene, it was clear that she had been shot in the arm, as blood covered the floor. A jammed gun, a live round, and an empty cartridge littered the living room.

The first officer on scene cleared the house and organized a small army of other officers to scan the neighborhood for witnesses, evidence, and any lead that would bring the daytime attacker to justice. In the house, they found blood smeared on the floor down the hall towards the bed-



By Celestina Rossi
 Montgomery County Crime Scene Investigator, and
Brian Foley
 Assistant District Attorney in Montgomery County

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HOW COMPLIANT ARE YOU WITH THE MICHAEL MORTON ACT?

The software interface on the monitor features a navigation bar with icons and labels: Explore Drawers, Search Folders, Search Documents, Scan, Saved Searches, and Workspaces. Below this is a table with the following data:

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COHouston	John	2015-0202	14105E	
Adams	Jim	12345	12345E	
Ariazaga	Deniel	2014-0272	14001E5	14-04-14678
Eailey	Brandon	2014-0355	20140109	14-04-14684
	Ronald	2014-0322	14002E5	14-04-1463E
	Jonahan	2014-0203	TX140504FF3C5	14-03-1465E
	Donald	1401187	005-0001	

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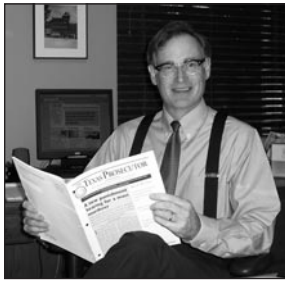
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TDCAA Leadership Report

On November 30 the Association held its annual business meeting to elect leadership for the new year. I am pleased to report the following election results: In 2017, **Randall Sims** (DA in Potter County) will serve as your President. Under TDCAA by-laws Randall will also serve as Chair of the Board for 2017 as our current President, **Bernard Ammerman** (former C&DA in Willacy County), left office at the end of the year. **Jennifer Tharp** (CDA in Comal County) will serve as President Elect, and **Jarvis Parsons** (DA in Brazos County) was elected Secretary-Treasurer. **Greg Willis** (CDA in Collin County) was elected to a two-year term as the Criminal District Attorney at Large, and **Teresa Todd** (CA in Jeff Davis County) will serve as County Attorney at Large.



By Rob Kepple
TDCAA Executive
Director in Austin

We also have new Regional Directors, who will serve two-year terms: Region 1, **Landon Lambert** (CA in Donley County); **Wally Hatch**, DA in Hale County, outgoing; Region 2, **Dusty Gallivan** (CA in Ector County); **Bill Helwig**, CDA in Yoakum County, outgoing; Region 4, **Stephen Tyler** (CDA in Victoria County); **Jose Aliseda**, 156th Judicial District Attorney, outgoing; and Region 7, **Kriste Burnett** (DA in Palo Pinto County); **Mike Fouts**, 39th Judicial District Attorney, outgoing).

I want to take a moment to thank the regional directors and other members who are going off the Board, including **Vince Ryan** (CA in Harris County, serving as County Attorney at Large), and **Jack Roady** (CDA in Galveston County, serving as CDA at Large). And although all of these folks have for the moment rotated off the Board, their contributions have been great, and we hope they don't go far. Personally, I have appreciated how Vince has brought the power of his civil office to

the benefit of all civil practitioners in our offices all around the state. And Jack did a masterful job of leading our profession through this mixture DNA quagmire. Bill Helwig has been, to steal a campy term from today's business work, the Chief Innovation Officer. It has been a team effort of all who led us through another successful year, and the leadership is much appreciated.

Welcome, newly elected prosecutors

This election cycle we have a large class of just-elected prosecutors. Some have already taken office by appointment, but most were sworn in on January 1. Our running list of newly elected prosecutors appears on the opposite page. I say "running list" because with 337 elected prosecutors in Texas, we invariably will miss one or two election results (sorry!).

This is a reminder that our profession is ever-changing, and if we are to be at our best TDCAA has to be at its best. We started with the Newly Elected Boot Camp at the end of November, and we will host a follow-up just for the new folks on February 23 and 24 in Austin. The follow-up training has been pretty popular—a lot of unexpected questions come up in the first month in office, and this is a chance to get them answered by other experienced prosecutors.

And a new State Prosecuting Attorney

Also welcome to **Stacey Soule**, who takes over as State Prosecuting Attorney in Austin after **Lisa McMinn** retired. Stacey had been an assistant SPA before taking the head job, so she knows her way around. We're glad to have you on board!

Thanks to those who have announced "ready" for the State

I can't begin to thank all the folks who left elected office at the end of December for your dedication, energy, and leadership. It has been our privilege to be there for you. Out of the 52 people leaving office, I count over 20 as career prosecutors. Y'all have stuck with the profession through some hard times and helped us redouble our efforts to seek justice. You've left the profession in better shape than when you started, and for that we thank you. We are stronger for your service, and I hope you won't be strangers. (And on a

personal note, **Bob Adams**, I hope that you will continue to send me one of your underwater photos every now and again!

The new Dean of Texas District Attorneys

With the retirement of **Bruce Curry** (DA in Kerr, Gillespie, and Kendall Counties) after 30 years of service, please congratulate **Charles Bailey** (DA in Camp and Titus Counties) as the new Dean of Texas District Attorneys. Chuck took the helm as DA in the 76th Judicial District in September 1987, which means he has 29 years of elected service. Chuck, you are going to need to keep at it awhile longer if you want the overall Texas prosecutor title. That belongs to **Joe Warner Bell**, the CA in Trinity County, who has been at it for 38 years and has the title Dean of Texas County Attorneys locked up! ❁

Running list of new elected prosecutors

New County & District Attorneys

Brian Evans, C&DA in Freestone County
Jose Meraz, Jr., C&DA in Ochiltree County
Annette Hinojosa, C&DA in Willacy County

New Criminal District Attorneys

Faith Johnson, CDA in Dallas County
Pam Guenther, CDA in Jackson County
Nicole Bishop, CDA in Kendall County
Jim Hicks, CDA in Taylor County

New District Attorneys

Kimbra Ogg, DA in Harris County
Elmer Beckworth, Jr., DA in Cherokee County
Robert Lassmann, DA in DeWitt, Goliad, and Refugio Counties
Shawn Dick, DA in Williamson County
Kriste Burnett, DA in Palo Pinto County
Richard Thompson, DA in Nolan, Fisher, and Mitchell Counties
Samuel Smith, Jr., DA in San Patricio County
Jennifer Dick, DA in Baylor, Cottle, King, and Knox Counties
Margaret Moore, DA in Travis County
Michael Bagley, DA in Val Verde, Kinney, and Terrell Counties
Audrey Louis, DA in Atascosa, Frio, Karnes, La Salle, and Wilson Counties
Sandra Wilson, DA in Pecos, Brewster, Jeff Davis, and Presidio Counties
Casey Polhemus, DA in Montague, Archer, and Clay Counties
Mark Gonzalez, DA in Nueces County
Philip Furlow, DA in Dawson, Gaines, Garza, and Lynn Counties
Amanda Navarette, DA in Winkler and Crane Counties
Wade Jackson, DA in Floyd, Briscoe, Dickens, and Motley Counties
John Best, DA in Tom Green, Concho, and Runnels Counties

Stephen Shires, DA in Shelby County
Laura Nodolf, DA in Midland County
Joseph Martin, III, DA in Angelina County
Mark Hall, DA in Henderson County
Lucy Wilke, DA in Kerr, Gillespie, and Kendall Counties
Adam Sibley, Jr., DA in Bosque, Comanche, and Hamilton Counties
John Warren, DA in Cooke County
Dawn Allison, DA in Wharton County

New County Attorneys

Cary Kirby, CA in Angelina County
Cody Robinette, CA in Baylor County
Deborah Earley, CA in Blanco County
Susan Deski, CA in Burleson County
Nicholas Arrott, II, CA in Coke County
Bryan Clayton, CA in Concho County
Michael Hall, CA in Fisher County
Joseph Sindon, CA in Frio County
Kyle Miller, CA in Hemphill County
Matt Mills, CA in Hood County
Joseph Guerra, CA in Jim Wells County
Jennifer Dillingham, CA in Karnes County
Donnie Coleman, CA in Kimble County
David Hajek, CA in King County
Todd Durden, CA in Kinney County
Caleb Henson, CA in Leon County
Matthew Poston, CA in Liberty County
Sterling Burleson, II, CA in Mitchell County
Jimmy Ashby, CA in Palo Pinto County
Frank Lacy, CA in Pecos County
Rod Ponton, CA in Presidio County
Deborah Bauer, CA in Refugio County
Tamara Cochran-May, CA in San Patricio County
Lilli Hensley, CA in Sterling County
Riley Branch, CA in Stonewall County
Kenneth Bellah, CA in Terrell County
Paige Skehan, CA in Upton County
Thomas Caldwell, CA in Wilson County

Some of what I've learned

This is my first article as TDCAA President. To put it candidly, I became a prosecutor because I wanted to prosecute and do lots of jury trials, not to be an author. But as all prosecutors know (or will find out soon enough), we all have to make certain choices and take on various duties whether we're comfortable with them or not.

I have been active in TDCAA for years. Being president of the biggest and best prosecutor association in the nation is a huge honor, and I am extremely humbled when I think about all the great leaders who have held this post. I promise one thing: I will give you my best effort! Thank you for providing this opportunity to me.



By Randall Sims
District Attorney in
Armstrong and Potter
Counties

To those leaving office

Life is full of transitions. Two very consistent transitions are the changing of the seasons and the changes that elections bring. The 2016 election was no exception, with more than 50 newly elected prosecutors voted into office. That is the second largest change in my 30 years as a prosecutor. Those leaving our ranks have worked diligently to serve their communities and our State. I am greatly appreciative of all that each of you have contributed to prosecution, and I sincerely wish you the best in your future.

Many have contributed to our profession by working in our association's leadership and related services.

One person I'd like to recognize specifically is our outgoing president, Bernard Ammerman, a man of outstanding character and ethics. While taking care of his normal duties as the County and District Attorney in Willacy County, Bernard dedicated

three years to TDCAA leadership, and he leaves our office having made our association better than when he started. Thank you, Bernard!

To those taking office

For those coming into office, congratulations on becoming part of an elite group of attorneys—elected prosecutors. Welcome to the fold! I look forward to meeting, working, and assisting you whenever needed.

I have been in some different scenarios as a prosecutor: I served as the district attorney in a rural, five-county jurisdiction with a small population, in a one-attorney office, and now in a mid-size jurisdiction of two counties, 18 ADAs, and 140,000 citizens. In my 30 years of service, I've been there and done that, and I offer some of my hard-earned wisdom to those who might want it.

1 Never forget that you are a prosecutor, nor the duty that comes with the job. Your duty under Texas law is to seek justice. That means making decisions based on the law and the facts and always doing the right thing. Doing the second-best thing is the wrong choice. Doing nothing is unacceptable.

2 Prevent problems before they happen. Early in my career, a very good prosecutor I worked with was assigned a high-profile case. He was repeatedly attacked for making decisions on the case based on the defendant's status in the community and on his race. Way back then, I decided that whenever possible, I would avoid knowing a defendant's name, race, and other defining characteristics and just decide a case on the facts and the law. Do not let peace officers tell you the names or descriptions of the parties involved in an offense. Get all the information you need (factual and legal), analyze it, consult with a peer if needed, then make a decision. Remain consistent in your positions and treat all people equally. Exception: When you must distinguish one defendant from others, you must be able to articulate your reasons for doing so.

3 Be yourself. Do not let the title, the badge, or the power change who you are or your core values. As elected prosecutors and, by extension, assistant prosecutors, we are the most powerful people in our jurisdictions. We are the only ones in the criminal justice system charged with seeking justice, and you were elected by your communities to protect all of its members. And this comes from a cowboy who just happens to be the DA: Never forget you are the only one in the criminal justice system wearing the white hat! Play fair, follow the law, and give due process to all. Everyone is entitled to the same criminal justice system.

4 Meet other prosecutors. Make contact with as many as you can across Texas and nationally. You nev-

er know when you will need something from somewhere, and it is easier to get it if you have contacts far and wide. I hope our new elected folks will become involved in TDCAA once they feel comfortable with their normal duties.

Find a mentor. No matter how old you are or how long you have been doing a particular job, you can always learn more and improve. Find someone who has been prosecuting for longer than you whom you can contact for any reason at any time. Many people have helped me. One was Eddie Langwell, chief investigator in the Potter County Attorney's Office. When he gave me my first badge as an assistant prosecutor, he said, "Always remember that this badge will get you a lot of things, but it takes only one thing to lose that badge." And in all the years since, I've never once flashed my badge to get preferential treatment anywhere. It was good advice.

My second piece of advice came from a former TDCAA executive director, Tom Krampitz, whom I greatly respect to this day: "Do not say or do anything you do not want to have to explain to your mama or see as the headline on a newspaper." Both of these adages were told to me 30 years ago, and they still ring true for all of us today.

In 2005, I added one, which I pass on to any employee: "With today's technology, remember that cameras are all around us—because everyone is carrying one and there are security cameras virtually every-

where. Anything you do, anywhere you do it, there is a strong probability that it could end up on the Internet." Be careful what you do, even in your off-hours.

5 Build a team. You are the coach and cheerleader of the office. How your office operates will be based on you. Choose people you can trust to follow and uphold the law as a prosecutor should. And supervisors and elected prosecutors, remember that you could be held responsible for your subordinates' actions.

6 Never say, "No comment." Instead of stonewalling a reporter asking about a case, you can reply, "The Texas Rules of Ethics prohibit me from commenting on pending investigations as well as pending cases." An alternative stolen from the feds: "I can neither confirm nor deny the existence of any investigation."

Also remember that nothing is ever truly off the record. Reporters will take what you tell them "off the record" and then contact others to confirm or deny what you told them. Then—bingo!—what you said could be published and attributed to "an official source who chose to remain anonymous."

7 Set the tone early with plea offers. The defense bar will watch closely how you handle pleas to try to spot your patterns. I suggest you take what a jury in your community would give on a case's set of facts (which will get easier to estimate the longer you're in office) and subtract from that amount the benefits you

and the victims get from a plea (quick resolution, finality, reduction of man-hours spent, etc.).

Always make your lowest offer first, then work up. This will save you time. If you are known for starting high and bargaining down, the defense bar will hold out to the very end to get the best deal for their clients. If you are known for pleading cases the day of trial, defense counsel will wait until trial to take the lowest deal.

I hope you find this advice beneficial to your practice. Until next time, keep your white hat clean. ✱

Texas Prosecutors Society's Class of 2016

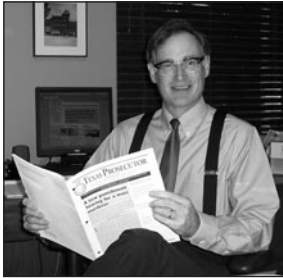
We were pleased to host a Foundation reception in December to honor the newly inducted class of 2016 into the Texas Prosecutors Society. The Society, the brainchild of the former Foundation President **Dan Boulware**, was created to recognize those who have demonstrated excellence in the profession and dedication to justice, whether they serve as a prosecutor, judge, or member of the loyal opposition, or are now retired from the criminal justice arena. Membership is by invitation only, with 132 members invited and joining in the first five years. You know someone is a member if they proudly wear the silver pin pictured at right.

Besides gathering once a year, Society members invest in the future of our profession by supporting the Society's endowment

fund. This fund, established five years ago along with the Society, is modest at \$170,000 but is growing quickly. Thanks to these visionary leaders who are providing support for excellence in our profession well into the future.

Pictured below are the members of the Class of 2016 who were able to attend the reception in their honor at the Elected Prosecutor Conference in December. And to the right is the list of all of the new members.

Congratulations to all! ❁



By Rob Kepple
TDCAA Executive Director in Austin



Texas Prosecutors Society Class of 2016

- Kari Sckerl Allen** (Polk County ADA; former Harris County ADA)
- Murff Bledsoe** (former Bell County ADA)
- Don Clemmer** (former Harris County ADA, Travis County district judge, Deputy AG, Criminal Justice Counsel to the Governor, and now a Travis County ADA)
- Judge Cathy Cochran** (former judge on the Court of Criminal Appeals, Harris County ADA, and Criminal Justice Policy Advisor to the Governor)
- Justin Cunningham** (Ector County ADA)
- David Finney** (Dallas County ACDA)
- Lynn Hardaway** (former Harris County ADA)
- Kim Judin** (former Dallas County ACDA)
- Lyn McClellan** (former Harris County ADA)
- Amanda Navarette** (Ector County ADA)
- Murray Newman** (former Harris County ADA)
- Denise Oncken** (Harris County ADA)
- Jack Roady** (Galveston County CDA)
- Daphne Session** (Houston County CA)
- Toby Shook** (former Dallas County ACDA)

So much happened at our KP-VAC Seminar!

The Embassy Suites in San Marcos was the venue for a dynamic seminar for key personnel (prosecutor office staff) and victim assistance coordinators (VACs) from all across Texas. Over 200 members gathered to hear speakers on topics from a difficult sexual assault case at Baylor University, victims' nonlinear recollection of trauma, social media, and understanding the parole process. Many thanks to all of our very informative speakers! We appreciate your time and valuable assistance.



By Jalayne Robinson, LMSW
TDCAA Director of Victim Services

This seminar is held annually and provides key personnel and victim assistance coordinators from prosecutor's offices across Texas a chance to network and get new ideas from others who do similar jobs in other counties. Mark your calendar for next year's seminar at the Westin Oaks Galleria in Houston November 8–10.

Suzanne McDaniel Award

Tracy Viladevall, a VAC who has worked for the McLennan County Criminal District Attorney's Office for over 15 years, was honored with TDCAA's Suzanne McDaniel Award for her work on behalf of crime victims. (She's pictured in the photo at right: She's on the left, and that's me on the right.) The award is given each year to someone employed by a prosecutor's office and whose job duties involve working directly with

victims. The person must also demonstrate impeccable service to TDCAA, victim services, and prosecution.

Tracy exemplifies the qualities that were so evident in Suzanne McDaniel herself: advocacy, empathy, and a constant recognition of the rights of crime victims. Congratulations!

Testing defendants and victims for STDs

At the KP-VAC Seminar, W. Clay Abbott, TDCAA's DWI Resource Prosecutor, and I presented a workshop on testing defendants and victims in sexual assault cases for sexually transmitted diseases (STDs). Although we realize that it might not come up very often for some prosecutor's offices, I have found that when you need information about STD testing of offenders and victims, you need it, like, yesterday. We decided it was worth covering as a workshop at the seminar.

Years ago when I was a VAC in a prosecutor's office, I received a call from the mother of a child victim of sexual assault. The mother was requesting that the perpetrator—a member of the family—be tested for HIV/AIDS and STDs. She also wanted information about having her daughter tested. She had read about her daughter's right to testing in the Crime Victims' Rights hand-out I had mailed to her in the victim packet. I felt so sorry for this woman and her child, and of course I wanted to do all I could to help her. But the problem was, we had never had such a request in our office, and we had to start from scratch to find out how to handle it.

My hope is that this information will be of future reference to you so you won't have to scramble for information like I did.

Our workshop covered two areas of STD testing, testing the victim and the testing process for the defendant.

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For victims

- A victim may request a free, anonymous HIV test and/or confidential STD test at a designated site and keep the test results confidential.
- Victims have a right to privacy.
- In Texas, specific sites are funded by the Department of State Health Services (DSHS) to provide free, anonymous testing and confidential counseling.

For a list of anonymous testing sites, visit www.dshs.texas.gov/hivstd/testing.

For defendants

An order can be presented to the district judge for the offender to be tested in jail or prison or while out on bond. Upon indictment, according to Code of Criminal Procedure Art. 21.31, in Sexual Assault, Aggravated Sexual Assault, Indecency with a Child, and Continuous Sexual Abuse of a Child cases, upon the court's own motion or on request of the victim of the alleged offense, the offender must undergo testing for HIV and other STDs. The defendant must pay the costs of the testing, and test results are released to both the defendant and the victim. The prosecutor cannot use the test results in any criminal proceeding.

A handout that Clay prepared is available on our website, both under the Victim Services tab (www.tdcaa.com/victim-services) and in this journal issue. It includes all of the code sections that address testing; the Centers for Disease Control report on Sexual Assault & Abuse and STDs; and a sample Bexar County order to request testing of the defendant. Please email me at Jalayne.Robinson@tdcaa.com if you would like additional information.

PVAC deadline

At this year's KP-VAC Seminar, two women were honored with a Professional Victim Assistance Coordinator (PVAC) certificate. This designation as a PVAC recognizes professionalism in prosecutor-based victim assistance and acknowledges a minimum standard of training in the field. Applicants must provide victim assistance through a prosecutor's office and be or become a member of TDCAA.

This year, Robin Sherwood, VAC in the Van Zandt County Criminal District Attorney's Office (pictured below on the left), and Wanda Ivicic, VAC in the Williamson County Attorney's Office (pictured below on the right), were given PVACs. Congratulations, ladies!

For next year, the application deadline is coming up quickly. Applicants must have either three years' experience providing direct victim services for a prosecutor's office or five years' experience in the victim services field, one year of

which has to be providing prosecutor-based victim assistance.

Training recognized for CLE, TCOLE, social work, and/or license professional counselor educational credits are accepted under this program. Training must include at least one workshop on the following topics:

- prosecutor victim assistance coordinator duties under Chapter 56 of the Code of Criminal Procedure;
- the rules and application process for Crime Victims' Compensation;
- the impact of crime on victims and survivors; and
- crisis intervention and support counseling.

Applicants need to show that they have already received 45 total hours of training in victim services (which is equivalent to the number of hours in the National Victim Assistance Academy program created by the U.S. Department of Justice's Office for Victims of Crime). Training documentation may no longer be readily available for coordinators with extensive experience, especially



in the case of basic training on Code of Criminal Procedure Chapter 56. An applicant who has 10 years' experience in direct victim services (five of which must be in a prosecutor's office) may sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts.

In addition, five professional references are required from individuals not related to the applicant. One of the letters must be from the elected prosecutor in the jurisdiction where the applicant has been employed, and at least one of the letters must be from a local victim services agency in the community who has worked with the applicant for one year or longer. The remaining three letters can be from other victim services agencies, victims, law enforcement representatives, assistant prosecutors, or other criminal justice professionals who have knowledge of the applicant's skills and abilities in the field of victim services.

The deadline for PVAC applications is January 31, 2017. More detailed requirements and the Professional Victim Assistance Coordinator (PVAC) application may be found on our website at www.tdcaa.com/victim-services.

Victim Services Board for 2017

TDCAA's Victim Services Board elections were held at the KP-VAC Seminar in early November. 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 to the following new board members:

2017 Victim Services Board

Chair: Adina Morris in the Palo Pinto County DA's Office
Region 1: Laney Dickey in the Lubbock County Criminal District Attorney's Office
Region 2: Freda White in the Ector County Attorney's Office
Region 3: Tamra Frey in the 452nd Judicial District Attorney's Office
Region 4: Paula Thompson in the Wilson County Attorney's Office
Region 6 & Secretary: Amy Varnell in the Cass County District Attorney's Office
Region 7: Laurie Gillispie in the Erath County District Attorney's Office
Region 8 & Vice Chair: Wanda Ivicic in the Williamson County Attorney's Office
Training Committee Liaison: Cyndi Jahn in the Bexar County Criminal District Attorney's Office
Chair of the Board (immediate past president): Serena Hooper Payne in the Andrews County & District Attorney's Office

A very special thank you to our outgoing board members, Dalia Arteaga and Angel Morland. Your willingness, dedication, and loyalty to serve on our Victim Services Board is so very appreciated.

In-office visits

Thanks to those who invited me to come out for victim services assistance. Traveling across Texas and vis-

iting each of your offices is so exciting to me! It is such an honor to be able to help VACs and prosecutors recognize services and resources available for crime victims and to share ideas on how VACs may assist the prosecutors for whom they work. Please reach out to me at Jalayne.Robinson@tdcaa.com, and I will develop either group or individualized victim services training for your office. ❄



TOP PHOTO: Joe Warner Bell, County Attorney, and Jessica Dean, VAC, in Trinity County. BOTTOM PHOTO: Jalayne Robinson, TDCAA Director of Victim Services; Patty Kreider, VAC; and Richard E. Glaser, Criminal District Attorney, in Fannin County.

The CCA assumes (but doesn't decide) that defendants can use revocation hearings to make "illegal sentence" claims

For decades, the Criminal Appeals law in a direction that limited appeals from probation revocations so that defendants could challenge only the revocation itself, not the underlying judgment of guilt. Since 2001, the Court has held that on appeal from a revocation, the only challenge a defendant can make regarding his underlying conviction is that it is completely void—an extremely uncommon scenario.

But in October, the Court backed off of this rule and invited additional litigation to explore how far it had backed off. In *Wright v. State*,¹ the Court assumed without deciding that a defendant could use the appeal from his revocation to raise an illegal-sentence claim that attacks the conviction itself. The Court then provided guidance on how to litigate such a claim, including pointing out that the claim would need to be litigated at the revocation hearing and not just in the appellate courts.

An illegal-sentence claim can take two forms. The most common in the caselaw (and let's hope least common in practice) is a sentence that is not in the statutory range, such as the case where a jury assessed five years for a state jail felony.² The

other kind involves a claim that the defendant has been sentenced in the wrong range. This sort of claim will involve a challenge to the validity or existence of a prior conviction or aggravating element used to enhance punishment. For instance, in a recent case a defendant convicted of felony prostitution got a court of appeals to declare her three-year sentence illegal because the prior convictions that rendered her current



By Clint Morgan
Assistant District
Attorney in Harris
County

offense a felony were invalid.³ Under *Wright*, prosecutors will need to be prepared to address these claims both at revocation hearings and on appeal from revocation.

The facts

Sir Melvin Wright Jr.⁴ was required to register as a sex offender.⁵ He failed to, and he was indicted for this failure. Code of Criminal Procedure Article 61.102(b)(1) makes failure to register a state jail felony, but Article 61.102(c) makes it a third-degree felony if the defendant has a prior conviction for failure to register. The indictment did not allege a prior conviction, nor did the State file any other pleadings alleging a prior conviction.

But the record strongly suggests the presence of a prior conviction for failure to register. The top of the

indictment described the offense as "F3," indicating a third-degree felony. When Wright pleaded guilty, in return for a recommendation of probation, the trial court admonished him that he faced a sentence between two and 10 years. And at the plea hearing the prosecutor, defense counsel, and Wright himself all made statements indicating that Wright had been previously convicted for failure to register.⁶

The trial court found Wright guilty of third-degree failure to register and sentenced him to 10 years, but it suspended the sentence and placed Wright on probation. Wright did not appeal the conviction. Sometime later the State filed a motion to revoke, and Wright pleaded "true." The trial court revoked but reduced the sentence to five years.

The appeal

On appeal from his revocation, Wright claimed that because the charging instrument reflected a state-jail felony, his sentence was illegal. The Dallas Court of Appeals noted the general rule that an appeal from revocation is limited to issues related to the revocation itself, not the conviction or sentence.⁷ However, it noted another rule holding that "a sentence outside the range of punishment is void and may be challenged at any time."⁸

Normally, on a direct appeal, if the State has failed to properly prove its enhancement allegations, that

error requires reversal without consideration of harm.⁹ Because Wright was using the appeal from his revocation to challenge the underlying conviction, however, the Dallas Court applied the harm standard from *Ex parte Parrott*,¹⁰ which is normally applied to illegal-sentence claims that are raised on habeas, not on direct appeal. Under the *Parrott* standard, the defendant must show that his sentence was “actually illegal,” not merely that the State made a pleading error.¹¹ That is, he must show that he actually did not have a prior conviction. The Dallas Court reasoned that because there was evidence in the record of a prior conviction that could have elevated Wright’s punishment range to that of a third-degree felony, Wright had failed to affirmatively show that his sentence was illegal and therefore he could not prevail under the *Parrott* standard.

In the CCA

The Court of Criminal Appeals granted review to determine whether the Dallas Court erred in applying the *Parrott* standard to a direct appeal.¹² Presiding Judge Keller, writing for a six-judge majority, held that the Dallas Court correctly applied the *Parrott* standard. Judge Alcalá wrote a concurring opinion, joined by Judge Johnson, arguing that the law of direct appeals should apply instead of *Parrott*. Judge Newell concurred without opinion.

The opinion of the Court began by noting that historically, there were only two situations where a defendant was allowed to use the appeal from his revocation to attack the underlying conviction. The first

of these was the “void judgment” exception, which the Court had stated could arise in four situations:

- 1) the indictment did not meet the constitutional minimum requirements (such as failure to name a defendant);
- 2) the trial court lacked subject-matter jurisdiction (such as a felony tried in a county court);
- 3) the record showed that there was no evidence to support the judgment; or
- 4) an indigent defendant proceeded without appointed counsel or without properly waiving the right to counsel.¹³

“Illegal sentence” is not on that list. Nevertheless, the Court assumed, without deciding, that Wright’s illegal-sentence claim could be raised as a “void judgment” claim, then it discussed what he would need to prove to win on that claim. For a judgment to be void, it must be a “nullity” that is “accorded no respect.” Routine trial error, such as what is typically raised on direct appeal, would not suffice. The Court concluded that if a defendant could not show actual harm—rather than mere irregularity—as required by the *Parrott* standard, then he could not show that the judgment was void due to an illegal sentence. Because the record in this case did not affirmatively show that Wright’s sentence was actually illegal, he failed to satisfy the requirements for the “void judgment” exception.

The second historical exception to the ban on using the appeal from a revocation proceeding to attack the underlying conviction was called the “habeas corpus exception.” It allowed a defendant to use his revo-

cation proceeding (and the appeal therefrom) to litigate any matter that could be raised in a writ of habeas corpus. An illegal sentence claim can be raised in a writ of habeas corpus. In 2001 the Court eliminated the habeas corpus exception because it caused more confusion than it was worth.¹⁴

In *Wright*, the Court pointed out that while it had eliminated the habeas corpus exception, in other cases it had continued to hold that “a claim that a sentence is illegal may be raised at any time.”¹⁵ The Court assumed, without deciding, that Wright’s claim was appropriate as “an exception to [the] abrogation of the habeas corpus exception” and gave two reasons why his claim failed on the merits. First, he “failed to litigate the matter at the revocation hearing.” Second, if his claim really revived the habeas corpus exception, the habeas corpus standard of harm announced in *Parrott* would apply, and Wright had failed to meet that standard. Accordingly, the Court affirmed the court of appeals.

In her concurrence, Judge Alcalá described the Court’s analysis as “strange” and the product of “a twisted approach.”¹⁶ Judge Alcalá observed that “aside from the absence of an enhancement paragraph in the indictment,” every other aspect of the case showed that the State intended to charge the enhanced offense and Wright knew he was pleading to the enhanced offense. In that situation, Judge Alcalá believed that Wright’s appellate complaint was not an illegal sentence claim, but rather a claim that the State had failed to properly plead the enhancement. Accordingly,

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Judge Alcalá would reject the illegal-sentence claim.

Judge Alcalá ended her opinion by criticizing the Court for “import[ing]” the law of habeas corpus into the law of direct appeals. She believed that requiring an increased showing of proof from defendants would make it more difficult for defendants with illegal sentences to gain relief.

Applications going forward

Though Judge Alcalá saw the Court’s opinion as potentially closing off relief to certain defendants, the big story of this opinion is that by “assuming, without deciding” that Wright’s claim was appropriate as either a void-judgment claim or as a revival of the habeas corpus exception, the Court is opening a door to a significant number of claims that prosecutors have long thought were procedurally barred. The Court reopened a door it more or less closed 15 years ago.

The Court’s opinion establishes a roadmap for how defendants should litigate these claims. By stating that Wright’s habeas claim failed in part because he did not litigate it in the trial court, the Court is telling defense attorneys that illegal-sentence claims should be raised at revocation hearings. Prosecutors and judges may think of revocation hearings as being about revocation; they now need to be prepared to address claims that prior convictions are nonexistent or are somehow invalid.

For instance, in *Kuol*, the prostitution case mentioned earlier, the defendant pleaded guilty to felony

prostitution and got deferred, but after revocation she attacked the validity of her prior convictions by alleging that she was a juvenile at the time.¹⁷ The Court of Appeals treated this as an illegal-sentence claim and reformed the judgment to make the current offense a misdemeanor. *Kuol* was decided prior to *Wright*, but the Court of Criminal Appeals denied review while *Wright* was pending, and I now see why. The illegal-sentence claim in *Kuol* is the sort of claim that *Wright* has assumed, without deciding, is appropriate.

If the claims in *Wright* and *Kuol* are “illegal sentence” claims that can be litigated at revocation hearings, this area of litigation may expand significantly. Perhaps a defendant can use his revocation hearing to claim that he received ineffective assistance of counsel at a prior trial; thus, using it to enhance his current punishment renders the sentence illegal.

Prosecutors will need to be prepared to address these sorts of claims. This opinion emphasizes, though, that to be entitled to relief, the defendant has the burden of proving he was actually harmed, rather than just asserting that the State did something wrong. ✱

Endnotes

¹ *Wright v. State*, ___ S.W.3d ___, No. PD-1137-15, 2016 WL 5799667 (Tex. Crim. App. Oct. 5, 2016).

² *Baker v. State*, 278 S.W.3d 923 (Tex. App.—Houston [14th Dist.] 2009, pet. ref’d).

³ *Kuol v. State*, 482 S.W.3d 623 (Tex. App.—Houston [14th Dist.] 2015, pet. ref’d).

⁴ Though the opinion does not provide an answer

one way or the other, I assume that “Sir” is a name and not a title.

⁵ *Wright*, 2016 WL 5799667 at *1.

⁶ *Id.* at *2 (e.g., prosecutor stating that Wright “failed to do it twice” because he “didn’t learn anything last time”).

⁷ *Wright v. State*, No. 05-14-00641-CR, 2015 WL 4628189 at *2 (Tex. App.—Dallas January 27, 2016) (mem. op. not designated for publication).

⁸ *Ibid.* (citing, *inter alia*, *Mizzell v. State*, 119 S.W.3d 804, 806 (Tex. Crim. App. 2003)).

⁹ See *Jordan v. State*, 256 S.W.3d 286, 291 (Tex. Crim. App. 2008); see also *Diaz v. State*, No. 01-14-00387-CR, 2015 WL 3799463 (Tex. App.—Houston [1st Dist.] June 18, 2015, pet. ref’d) (mem. op. not designated for publication) (reversing punishment because habitual offender allegations in indictment did not occur in correct order, even though defendant stipulated to other convictions that rendered him eligible for habitual punishment).

¹⁰ 396 S.W.3d 531 (Tex. Crim. App. 2013).

¹¹ *Wright*, 2015 WL 4628189 at *2 (citing *Parrott*, 396 S.W.3d at 511).

¹² *Wright*, 2016 WL 5799667 at *1.

¹³ *Wright*, 2016 WL 5799667 at *3 n.26 (citing *Nix v. State*, 65 S.W.3d 664, 668 nn. 12-15 (Tex. Crim. App. 2001)).

¹⁴ *Jordan v. State*, 54 S.W.3d 783 (Tex. Crim. App. 2001).

¹⁵ 2016 WL 5799667 at *4 (citing *Ex parte Rich*, 194 S.W.3d 508, 511 (Tex. Crim. App. 2006)).

¹⁶ *Id.* at *4-5 (Alcalá, J., concurring).

¹⁷ 482 S.W.3d at 628.

Photos from our Key Personnel & Victim Assistance Coordinator Seminar in San Marcos



Photos from our Elected Prosecutor Conference in Montgomery



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A roundup of notable quotables

“Yes. I said Nutella.”

—Toronto detective Sgt. Paul LaSalle to the Toronto Star after police busted a car-theft ring during Project Cyclone. The far-reaching investigation uncovered links to drug-trafficking, a kidnapping plot, and the theft of a truckload of Nutella. One hundred thirty-seven charges are now pending against 23 people. (www.thestar.com/news/crime/2016/11/25/police-bust-vaughan-based-auto-and-nutella-theft-ring-recover-5-million-in-stolen-goods.html)

“I still hear voices. I try my best not to listen.”

—Joseph Cala, a Hurst man serving 30 years in prison for beating his 79-year-old mother to death, slicing her open, cutting out her heart, and biting off part of it. He claims that “witches’ spirits” took him over the evening of the murder and told him to do it. (www.star-telegram.com/news/local/community/northeast-tarrant/article118296713.html)

“From our perspective, it kind of brought a bit of comic relief from a very intense trial.”

—Judge Ralph Strother of McLennan County, about a local woman, who was serving on a jury deliberating late into the night on a robbery case, who had been reported missing by her family. Officers interrupted the jury’s deliberations at about 11:45 one night to check on the woman, who was in the jury room and was fine. (<http://abc7amarillo.com/news/offbeat/deliberations-by-texas-jury-prompts-missing-person-report>)

“We got a lot of criticism, but we thought it was the right thing to do.”

—San Francisco Superior Court Judge John Stewart, who (along with his colleagues on the court) discarded 66,000 arrest warrants issued over five years for “quality of life” crimes, such as sleeping on the sidewalk. Stewart says most of those who are cited are homeless, can’t afford the fine, and seldom show up in court. The city’s police union and some members of the public have protested. (www.star-telegram.com/news/nation-world/national/article118114428.html)

“I have looked for the good in this defendant and I have found very little.”

—Senior U.S. District Judge David Alan Ezra, about Ruben “Menace” Reyes, as Judge Ezra sentenced Reyes to five consecutive life terms in a Supermax prison. Reyes is a former enforcer for the Texas Mexican Mafia and had entered an open guilty plea to killing five people, including a police officer. (www.chron.com/news/local/article/Mexican-Mafia-hitman-sentenced-in-San-Antonio-to-10644741.php)

“Many Millennials feel like they have something to prove and want to dispel these negative stereotypes that have labeled them as entitled or lazy.”

—Sarah Berger, personal finance expert, in an article discussing that 60 percent of Millennials won’t use all of their vacation days at work, compared with 6 percent of Gen Xers and 7 percent of Baby Boomers. (<http://money.cnn.com/2016/12/19/pf/employees-unused-paid-vacation-days/index.html>)

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

“I’m getting just as much out of it as you are.”

—District Judge Marc Carter, who runs a veterans court in Harris County, on his response to those who complete the program and return to thank him for helping them turn their lives around. (www.houstonchronicle.com/news/houston-texas/houston/article/Former-officer-s-courtroom-is-filled-with-a-sense-10689900.php)

Continued from the front cover

'I've been shot!' Or maybe not (cont'd)

rooms; it could be traced back to a black leather jacket with a hole in the arm—it too was covered in blood and bits of flesh. The jacket was behind a couch facing the kitchen. On the floor behind the couch laid a 40-caliber Glock handgun with a live round jammed in the slide and two rounds missing from the magazine. A live round was found nearby and a fired cartridge casing was also found within feet of the bloody jacket. In the master bedroom closet there was an open gun case where the Glock had been stored. There was nothing missing from the house. There was no sign of forced entry. The couch was unmoved. The lamp by the bloody jacket wasn't tipped over. The remote control to the TV was still on a chair in the assailant's only path of exit. A dog kennel in that path was undisturbed. The intruder made no attempt to take the gun. Only one shot appeared to be fired. Neighbors heard nothing and saw no one.

One of the most interesting pieces of evidence was on the back patio just outside the door Lawrence claimed the intruder used to make his escape. Really, it was an interesting *lack* of evidence. It had just rained that day and the ground was wet. When the first officer entered the home, he noticed that his shoes left wet footprints on the floor. The officer's footprints showed something very important: An intruder would have also left footprints. The backyard was muddy in many places, and just over the back door was an awning, which covered a patch of the concrete patio, leaving it dry. Surely

if the intruder had entered through the back door as Lawrence claimed, he would have left some footprints there or at least some muddy marks through the sloppy backyard. But there was nothing. No muddy marks, no wet footprints on the patio, no wet spots in the kitchen or the living room. He had vanished like a ghost.

After analysis of the crime scene, photos, blood spatter, and Lawrence's statements over the course of nearly a week, Montgomery County Sheriff's Office detectives concluded that there was no masked man. Rather, Alison was home with her 11-year-old child, she had been drinking that morning, and she accidentally shot herself. She had made up the story about the intruder.

Crime scene staging

Crime scene staging falls into one of three categories. The first two, primary staging and secondary staging, deal with the offenders' behavior and motivation. (The third, tertiary scene alteration, is carried out by someone other than the offender and is not intended to misdirect a police investigation. An example was the first officer to enter the house who left wet footprints on the floor. He altered the crime scene but not with any criminal purpose.)

Primary staging is defined as "an intentional and purposeful altering or changing of physical evidence or other aspects of the crime scene, and/or providing false information to the police relative to the incident,

with specific criminal intent to misdirect or divert a police investigation away from the true facts and circumstances of the crime."¹ Lawrence engaged in primary staging when she provided false information about how she was shot.

(In secondary staging, the scene alteration is performed strictly for the offender's benefit, not to misdirect the police investigation. Common examples of secondary staging are depersonalization, body posing, and symbolic or ritualistic actions. This is the kind of stuff that you see in serial killer cases or masochistic rituals. We definitely weren't dealing with that.)

Primary staging can be further broken down into two sub-categories: premeditated and ad hoc. A premeditated staged scene is pre-planned by the offender and designed to focus the investigation on fabricated evidence to disguise the nature of the crime. Lawrence probably hadn't planned on shooting herself that day and didn't have enough time to fabricate any physical evidence, so we ruled out premeditated staging.

Rather, Lawrence engaged in ad hoc staging, which is an intentional effort to misdirect police without any preplanning. She accidentally shot herself in the arm and for some reason felt like she needed to cover it up. At first we didn't know why. Ad hoc staging typically results from an offender trying to cover up criminal acts, omissions, or negligent activity by providing an alternate explana-

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tion for what really happened. The offender's intent is to divert attention away from herself and onto someone else, usually to prevent criminal charges or avoid disgracing family, friends, and the community.²

Ad hoc staged crime scenes usually heighten investigators' suspicions because the offender's testimonial evidence contradicts physical evidence on the scene. When confronted with the inconsistencies, the offender may try to provide additional explanations that weren't previously mentioned or claim that she can't remember the details. Most often the offender will cast herself in the best light to gain favor with investigators. Lawrence would eventually engage in nearly all of these behaviors.

In both ad hoc and premeditated staging, offenders may report a scenario or explanation that vilifies someone else based on perceived police and societal prejudices and offender stereotyping.³ Lawrence had done this when she claimed the intruder was a black male in a black mask and a black jacket.

When primary staging occurs and the reported offense was actually committed by the victim, that person is not usually charged with offenses such as filing a false report or tampering with evidence. Oftentimes the offender suffers from some sort of mental illness or is looking to gain the attention of a particular audience, although statistical data on the number of staged scenes is limited because of investigating agencies' failure to file such cases or the local prosecutor's rejection of such cases.

Knowing all this, we still had a citizen who was shot in the arm, and

we couldn't explain how it happened. Lawrence's arm was missing some skin and flesh from a grazing bullet wound, but there were no bullet holes in the wall and no holes in the ceiling or furniture. Officers searched the house for hours after the initial call looking for the bullet and came up with nothing. They needed to talk to Lawrence again and get a full statement, so two homicide detectives headed to the hospital.

Lawrence's statements

Lawrence was questioned more extensively at the hospital. Detectives were hoping that her answers would clear up the picture, but the more she talked, the hazier the story became. She let officers know she was drinking wine that morning. She told detectives that she thought she saw something in the kitchen, and she ran to her bedroom where her child was asleep, opened a safe, took out her Glock, and placed in the loaded magazine. She said she made it to the back of the couch (near the kitchen) when she racked the slide, ejecting a live round. The masked man charged her and they were both standing when the gun went off, ripping through her jacket and arm.

But this story didn't make any sense. How did she have time to run through the house, open a safe, place in a magazine, and chamber a round without this intruder chasing her? And because nothing in the house was disturbed, what exactly was he doing that whole time in the kitchen? She had no answers to these questions. It all happened so fast, she said. And the harder the questions

got, the faster she said it happened.

Detectives asked for the assistance of Crime Scene Investigators Celestina Rossi and Weldon Richards. They scheduled a visit to the house (accompanied by Lawrence) to look for the missing bullet. Below, Rossi offers her perspective in her own words.

In CSI Celestina Rossi's words

To diagnose a crime scene as staged, we have to bring all our tools to the table. From experience on the street to scientific forensic education, it all plays an important role. Television and movies have created an influx in forensic degree programs at the university level.⁴ There is a misconception that once you graduate from college you can immediately be a crime scene investigator (CSI). But the Montgomery County Sheriff's Office hires only sworn peace officers with a minimum requirement of two years' patrol experience as CSIs. The two-year minimum is essential because of the invaluable experience gained from responding to dispatched calls for service as a first responder. Investigating calls of burglaries, robberies, alarms, and thefts prepare you for identifying and collecting evidence on scenes of homicides, robberies, and home invasions.

When you are the responding patrol officer, all the evidence is pristine. (CSI arrives after emergency services, first responders, and any other personnel have already left and potentially cross-contaminated the forensic evidence.) Every encounter a patrol officer experiences can be placed in his mental filing cabinet as

his “training and experience.” That way, when he encounters staged crime scenes, he gets the sense that something is wrong or different, even if he can’t put his finger on exactly how. Most of the officers who responded to the Alison Lawrence scene had this feeling. When they spent hours and hours searching the house for the bullet that went through her arm and couldn’t find it, I got that feeling too.

As a crime scene investigator, on occasion I talk to the homeowner/victim/witness when trying to recreate what happened at a crime scene. At Lawrence’s house, I asked her to explain the position she was in when she was shot, and the story she told this time was drastically different from what she had told the other officers at the hospital. She was no longer confronting the intruder or being tackled from a standing position. Instead, she was crouched down with her rear on the floor and her back and shoulders against the back of the couch. She held the gun against her chest in her right hand, and her left hand was crossed in front. (She was holding the gun like a little girl carrying books to school.) The gun was pointing toward her left shoulder (where she was injured). As she did so, I could visualize the trajectory of the shot. I looked down at the floor where I was standing and could see damage to the carpet. I placed my hand on the top of the carpet and could feel a hard rock-like bump between the carpet and the concrete slab. When I pulled the carpet away from the wall, I saw the bullet and jacketing. I felt relieved that I could recover the key piece of evidence the detectives

asked me to find. When we found this bullet, we could understand what happened when the gun was fired and match it to physical evidence. It proved that there was no intruder attacking Lawrence when the gun went off and discredited the rest of her original story.

Lawrence admitted—as she was crouched behind the couch to demonstrate her stance when she was shot—that the dog startled her, and that was the reason the gun went off. I figured that would be the end of my involvement, but Lawrence didn’t accept responsibility even then, and prosecutor Brian Foley (my co-writer on this article) later called me as a witness to testify and reenact the findings in front of the jury.

There is a symbiotic relationship between the investigating agency, the district attorney’s office, and the court system. If one part of the relationship fails, justice is jeopardized. The district attorney’s office can’t prosecute a case it doesn’t receive; this includes cases like filing a false report, even if addiction or mental disorders are an underlying factor in the case. It also requires the investigators to educate the prosecutors on the results of the crime scene reconstruction. For instance, if the prosecutors do not have a working knowledge of bloodstain pattern analysis or shooting incident reconstruction, they may not identify or value the importance of such evidence as it relates to a case. The complexity of forensic disciplines often requires weeks of preparation and meetings to ensure that the witness is prepared for her testimony and the prosecutor is versed enough in the discipline

that he can re-direct the witness if necessary. If there is a disconnect between the prosecutor and the investigative team, it can affect the outcome of the trial. Jurors may not understand the evidence and may dismiss its relevance to the case.

But we had multiple meetings about this case over the course of a few months, and it paid off in trial. The jury even talked with me after the trial for over an hour because they were so interested in crime scene investigation techniques. Most of all I am thankful that our ADAs treated the case with the same seriousness as we did during the investigation.

The trial: Prosecutor Brian Foley’s perspective

The day after finding what we called the “bullet of truth,” Lawrence was confronted again with the implausibility of her story. Officers needed to know if it was possible she was making it up or even just mistaken. If her story as she’d told it were true, a very dangerous person brazen enough to attack a woman in her own home at noon on a Saturday was still out there. If not, the investigation was drawing valuable time from multiple homicide detectives. But she wouldn’t admit that she made it up. She clung to her story that she saw someone in the kitchen who had broken into her home.

The punishment range was only a Class B misdemeanor, but the seriousness of the investigation was on par with a first-degree felony. When all plea bargaining was rejected (we had offered six months deferred adjudication and a \$500 fine), we started mapping out the process of

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proving the negative, that this burglary and aggravated assault hadn't really happened. We treated the case like a murder where the physical evidence told a tale different from the defendant's statements. (We started referring to it as "the reverse murder" case.) Our most helpful strategies were acting out the events and highlighting the changes in Lawrence's story on large courtroom notepads. The 911 call was our first piece of evidence at trial.

The 911 call

"9-1-1—do you need police, fire, or ambulance?" the operator rattled off in a mechanical but urgent tone. There was no response. A second went by and she asked again, "9-1-1?" After another second, she repeated, "9-1-1?" The operator's tone dropped to bored and annoyed.

Lawrence finally said, "Um ... I've been shot." She didn't sound frantic or scared. The words came out as slow as molasses.

"OK, let me get EMS on the line with us, ma'am—one moment." The 911 operator kicked back into urgency and a new operator asked, "Caller, what is the address of your emergency?"

"Um ... I've been shot." The molasses in Lawrence's voice was pouring a little faster.

"OK, what is your address, ma'am?"

"Um ... [Lawrence gives her address]."

Lawrence would go on to tell the operator that someone came into her house, she tried to shoot him, the two of them struggled, he grabbed her, and he shot her in the arm. Operators asked her to describe the

suspect—what was his race?

"Oh God, um ..." Here the molasses stopped running all together. The operator prompts, "White, black, Hispanic?"

"Um ... black male, black mask, black jacket." As we listened to the call in court, you could almost picture Lawrence looking around the living room at nearby objects to fill in the details of the pretend intruder. Later, officers found her black jacket on scene with a bullet hole.

Acting out the action

An important strategy for success was physically demonstrating the action for the jury in court. I had CSI Rossi play the part of the defendant, and I played the part of the phantom felon. We tried out each version of the defendant's various statements and the only one that made any sense with the physical evidence was the one that ended in finding the bullet of truth. Even the jammed gun pointed to the final version (with Lawrence pulling the trigger). Glocks tend to jam when they are not firmly held in place. The weapon fired the chambered round and the slide was unable to properly feed the next bullet into place because she was holding it sideways and loose.

The defense had asked for a motion in limine on any mention of how much manpower and money had been wasted on investigating the case, but proving the basic elements of the investigation required nearly 20 witnesses and three days of trial. The jury ended up coming to the same conclusions that we had. When they found Alison Lawrence guilty, their job was over. They all shuffled

into the courtroom to see what she had to say in punishment, and Lawrence took no responsibility. I asked how much wine she had that day and she said, "Two cups." I asked her to show me how big the cups were, and she spread her hands almost a foot apart! She received the probation she had looked to avoid and the alcohol rehabilitation she obviously needed. We did not request restitution for the lengthy investigation because it would've crippled her otherwise innocent family.

We were satisfied with the verdict. In the end we believe she lied because she was home alone with her child, she was intoxicated and had been startled by something, and she went to the other room to get her gun and check out whatever startled her. She racked the Glock, which already had a round in the chamber (it was then ejected onto the floor). She then crouched down behind the couch and accidentally shot herself. She likely lied because she was embarrassed or scared that she would get in trouble for handling a gun while she was intoxicated and discharging it in a neighborhood.

Conclusion

The thing we were most thankful for in this case was the dedicated work of law enforcement at every stage. It was humbling to see how selfless and swift first responders can be. It was an honor to see how they would stand up for you, me, or any of us—so it was important to stand up for them. Police and district attorneys seem to be attacked on all sides whether by media, the defense, or those we apprehend. It is hard

Creeped out by invasive visual recording

Even seasoned prosecutors might get the willies with these types of crimes. Here's how Dallas County prosecutors secured a guilty plea for a voyeur who installed cameras in public bathrooms across DFW.

enough to help those members of the community that really need assistance.

This case mattered because every member of the community is put at risk when the forces of good are delayed and distracted by a false report. Innocent people can be put in harm's way when citizens lie to police about something so important. (Just imagine if someone had been jogging down the road in a black hooded rain jacket matching the description of an armed and dangerous shooter!) Police and prosecutors feel the sting of being lied to on a daily basis. It's usually frustrating, it's frequently dangerous, and it's always wrong. This time it was a crime. ❄

Endnotes

¹ Chancellor, A. S.; Graham Sr. G. D. Staged Crime Scenes: Crime Scene Clues to Suspect Misdirection of the Investigation. *Inv. Sci. J.* 2014 6 (1), 21.

² *Id.* at 22.

³ *Id.* at 25, 28.

⁴ At Texas A&M University in College Station, you can graduate with a Forensic and Investigative Sciences (FIVS) Bachelor's Degree. In 2007, one person graduated from this program and in 2016 spring semester, there were 25 graduates. For the 2016 fall semester, there are currently 131 full-time students enrolled in the program.

As prosecutors, we view the world through lenses different from those of "normal people." We see images of homicides, hear horrific accounts of abuse, and review cases of different crimes daily, and we become somewhat immune to the horror we deal with every day. Yet each time I get a case where the defendant filmed someone without her consent for his own sexual gratification, I am creeped out by the twisted intrusion.

When I first reviewed the case of Andrew Boden, I realized we had a prolific voyeur. With cases in both Dallas and Tarrant Counties, police detectives in Irving and Grapevine did an excellent job of putting together a case so we could hold Boden accountable for his extreme violations of privacy. The goal of this article is to discuss this particular case, the general hurdles to investigating and prosecuting these offenses, considerations in punishment, and my recommendations for some needed changes in the law related to these offenses.

Irving investigation

My case began with the Irving Police Department's investigation of cameras found in the bathroom of a Corner Bakery on August 8, 2013. The corporate office reported that an employee at an Irving restaurant found a camera in a coat hook when a customer complained that her purse fell off the coat hook. The manager was surprised because he did not think the bathrooms had coat hooks. Once he looked at the coat hook on the floor, he realized that it con-



By Brooke Grona-Robb
Assistant Criminal District Attorney in Dallas County

tained a camera. He found a similar camera in the other bathroom. He notified his boss, who notified his supervisor. That person took out the memory card and played the video. He observed approximately 10 videos in five minutes of people going to the bathroom. He then went to the Irving Police Station and turned the evidence over to Officer Sean Bissinger, who started an investigation.

I think anyone in law enforcement will cringe at that recount of the civilians' handling of the evi-

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dence—lost fingerprints, rewritten forensic data, and uncontrolled evidence made the detectives' jobs harder. Detectives Don Cawthon and David Carmical reviewed the evidence and found clues to the owner of the camera—his picture at the beginning of the video showed him leaving the bathroom, presumably right after installation. The officers were able to get a freeze-frame capture of his face, but no one at the business recognized him. Detective Carmical also purchased a device to detect hidden cameras, but no more cameras were found at Corner Bakery. Irving PD put out a BOLO (“be on the lookout”), but they had no leads to follow.

Grapevine investigation

About nine months later and less than nine miles away, Grapevine police received a similar case. An assistant manager at Braum's noticed an electrical outlet that seemed odd. After further investigation, she observed a camera in the outlet and promptly removed the (fake) outlet cover that was taped to the wall. She called the police and turned over the evidence to them.

The video started with the suspect placing the camera. His face was captured in the mirror as he left the bathroom. Security video showed him entering the business earlier the same day and going to the hallway where the bathrooms were. Again, Grapevine had no leads and put out a BOLO. The only result was the discovery that Irving was looking for the same guy.

Grapevine police decided to put out a media release to ask the public to help them identify this man.

Within a few hours, they received several tips that identified him as Andrew Boden. Officers verified his identity through his driver's license and went to his residence. They were able to get his laptop and a thumb drive through his consent. Boden went in his own car to the Grapevine Police Station for a non-custodial interview with Detectives Cox and Graves. There, he claimed that he first bought the cameras to protect his office from theft, but he was drawn to the idea of using them for voyeurism. He admitted to placing cameras in the restroom at Braum's, as well as other locations in Dallas and Irving. He also admitted to placing a camera under the desk of a woman who worked part-time at his employment. He stated that he reviewed the material on his work computer and then erased the memory cards. He admitted that it was voyeuristic and that he did it for “visual stimulation.” Boden was allowed to leave after the interview.

Officers sought and received a search warrant for Boden's workplace. The security director there assisted and secured the suspect's office while officers obtained the warrant. Upon execution of the warrant, the police officers found evidence from the company that sold Boden the camera equipment, SD cards similar to those used in the cameras, an instruction guide for a night-vision camera, thumb drives, a laptop, and a cell phone. Grapevine officers submitted an arrest warrant for Boden for the offense of Improper Photography after searching his office, and he was arrested the same day, June 2, 2014.

Forensics wins the day

Both Irving and Grapevine police departments used their remarkable forensic capacities to organize the data and attempt to identify victims, which are two major parts of investigating this offense. After receiving a separate warrant to search the electronic evidence, Grapevine Detective Richard Weber found pictures from seven additional restrooms, in addition to several upskirt images. He passed the material to Detective Carmical from Irving for him to examine and to Dallas police because one of the bathrooms was identified as a Kroger grocery store in Dallas.

Detective Cawthon from Irving examined the material from the camera at Corner Bakery. The manager helped him identify three employees who were victims. All three wanted their identities protected if possible, but all three also wanted to prosecute. Detective Carmical identified a lead to another victim from Grapevine based on a conference name-tag that she was wearing. Detective Weber cross-referenced the conference location with email notes that Boden kept, and he found another location where Boden had placed cameras. Detectives Cox and Weber showed the management at that location cropped images of 84 unidentified victims and were able to identify more victims, including two children. To make it easy to readily locate the images that were the basis of the charge, forensic investigators Carmical and Weber both made excellent notes about where those images appeared in the recordings.

It is worth noting that cases like this can be proven only with extensive forensic examinations, tenacious

work by detectives, and meticulous work by all involved with the case. With several identified victims, hours of footage, and admissions by the defendant, police working the cases ensured Boden's conviction.

Voyeurism

Sadly, there is equipment designed just for this offense. As an example, a simple Internet search for "bathroom cameras" shows a variety of surveillance tools that can be used to observe people in private spaces. Spy cameras that appear to be shaving cream bottles, soap dispensers, toilet brushes, toothbrushes, air purifiers, hand dryers, and shampoo bottles can easily be obtained. One website says these are designed to "catch people in the act to protect your family or business."¹ Another website says that its "hot" seller is the hook spy camera (like the coat hook Boden used in the Corner Bakery bathroom)—there are several models to choose from, all for about \$200.² Most of these are motion-activated, and they have a decent amount of memory—usually around 16 gigabytes, which is about eight hours of video.

Much of this equipment seems to be designed for the voyeur. The American Psychiatric Association classifies voyeurism as a paraphilia—a sexual disorder consisting of socially inappropriate behaviors. In most cases, treatment requires long-term therapy and monitoring. Different treatments include behavioral therapy, cognitive therapy, group therapy, psychotherapy, psychoanalysis, and medication.³

There are several criminal violations that relate to voyeurism. A crime initially titled Improper Pho-

tography or Visual Recording has been in the Penal Code (§21.15) since 2001. In 2014, the Court of Criminal Appeals struck down that statute for offenses that did not occur in a bathroom or private dressing room as a violation of the First Amendment.⁴ In 2015, the Legislature aimed to fix this gap by revising the statute and giving it a new title: Invasive Visual Recording. Additionally, Voyeurism (Penal Code §21.16) was added as a crime in September 2015, but it applies only to "live" observations by an offender, not recordings of past events.

Another offense to consider in these cases is Child Pornography (Penal Code §43.26). To successfully prosecute voyeurism as child pornography in Texas, however, the prosecutor has to show that the defendant knew the material depicted a child. In this case, the choice of placement matters—this requirement is much easier to show in a school or toy store than in an ordinary dining or shopping establishment.

Charging Boden

Because our case fell under the 2013 statute, we charged Andrew Boden with Improper Photography and had to prove that he photographed or recorded, broadcasted, or transmitted a visual image of another at a location that was a bathroom or private dressing room without that person's consent or with the intent to arouse or gratify the sexual desire of said defendant. Boden's story at his interview was close to an admission that the recordings were done for his sexual desire, but because he denied masturbating to the images, we would have had to debate what he

meant by "visual stimulation" if we were to go to trial under that prong. "Without the victim's consent" was easier to prove on the identified victims, but it left us with hundreds of other unidentified victims whose cases could not be clearly proven.

In Dallas County, we had three charges of Improper Photography based on three identified victims out of the same location (the employees at the Corner Bakery). If it had been necessary, we could have used circumstantial evidence to prove that the videos were taken without consent, and we could have filed additional charges. The videos clearly reflected the surreptitious nature of the recording, and that, along with the placement of the recording devices in a private bathroom, was evidence that the images were obtained without consent.

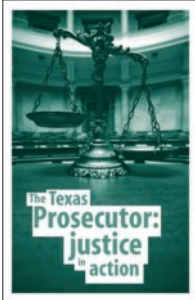
The plea

In cases like this, where there is little or no criminal history and no assurance that a judge would stack the offenses, my goal is to secure a conviction so that it would be part of the defendant's record and impede his ability to seek employment in an area that would increase his ability to reoffend. I also felt we needed to maintain supervision over Boden as long as possible, so we were able to reach an agreement on probation for five years. In addition, we requested no-contact orders with the indicted location and a condition that limited his ability to possess visual recording equipment. Because the victims were reluctant to come forward, the plea bargain allowed them not to have to relive their embarrassment in court.

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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. ❄



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Issues raised by the law

This type of offense places the prosecutor in a tricky position for discovery. Our offense did not fall under the new Code of Criminal Procedure (CCP) Art. 39.14 discovery rules, but if it had, the defense would have an argument that Art. 39.14 gives them a right to possess the video-taped evidence of the victims. If a defense attorney raises this issue, the prosecutor can request a hearing and argue for the video footage to be treated as child pornography images under CCP Art. 39.15—available for inspection but not duplication. Currently, discovery laws do not address this type of evidence, and there is not a clear right for victims to have this evidence protected. This seems to allow for re-victimization of the complainants in these cases, as these privacy violations could result in the duplication and distribution of the images to the defense attorney, who would then have an obligation to allow his client to review them. This problem could be cured with a statute that allows for this sort of private material to be viewed at the prosecutor or law enforcement office, instead of allowing for the potential distribution of the evidence.

Although Andrew Boden clearly has a severe problem, his case does not fall into any category where a judge *must* require him to enter a treatment program. He does not have to register as a sex offender or complete any of the sex offender requirements. To better address an offender like this, the legislature could require time-limited sex offender registration after the second

conviction, as with repeat cases of indecent exposure. That would allow the court to order treatment for repeat offenders, and it would provide some protection to the community from those who continue to invade their privacy. Otherwise, there are very limited resources available to prosecutors who want to hold habitual offenders accountable.

Conclusion

The effort required to investigate these offenses is great, and all the officers who assisted in investigating this case are to be commended. Their efforts resulted in felony convictions, community supervision, and a permanent mark on Andrew Boden's record. It is only by diligently investigating these cases that prosecution can be possible and voyeurs like this can be held accountable. ❄

Endnotes

- ¹ www.spycamerabathroom.com/Supply-bathroom-spy-camera_cl.
- ² www.spycamerasmall.com/house-cameras-for-sale/bathroom-spy-camera/coat-hook-camera.html.
- ³ www.psychologistanywhereanytime.com/sexual_problems_psychologist/psychologist_voyeurism.htm and [http://www.theravive.com/therapedia/Voyeuristic-Disorder-DSM-5-302.82-\(F65.3\)](http://www.theravive.com/therapedia/Voyeuristic-Disorder-DSM-5-302.82-(F65.3)).
- ⁴ *Ex Parte Ronald Thompson*, 442 S.W.3d 325 (Ct. Crim. App. 2014).

The basics of juvenile law

An introduction to the world of juveniles, from arrest to probation and everything in between

Editor's note: This is the first in a series of articles on juvenile law. They are intended to be a primer for those who practice in this area, and they will run in the next four issues of this journal. The articles will cover topics including confessions, certification hearings, "post-18" filings, the determinate sentence process, specialty courts, and trends in juvenile law (among other things). So stay tuned!



By Sarah Bruchmiller
Assistant District Attorney in Williamson County, and
Hans Nielsen
Assistant District Attorney in Harris County

Juvenile law is an area that confuses the most seasoned prosecutor. It is a realm of law that marries civil procedure and criminal law—and an area that many prosecutors seek to avoid. If you have never practiced before in a juvenile court, handling one of these enigmas can seem completely foreign. From penalty ranges to terminology, these cases differ greatly from adult criminal cases. And unless you have delved into the world of the juvenile system, one could easily be disoriented as to how to proceed.

Hans: I was first assigned to the juvenile division after prosecuting adults for 20 years. I was a total fish out of water and it took me almost a year to get a good grasp of what I was

doing in the juvenile law world. In fact, I didn't even know how to do a plea, and I had probably done thousands of them in adult courts in my career up to that point.

To understand the juvenile system, it is important to grasp its intended purpose. The Juvenile Justice Code, contained within the Family Code, states that it is not only designed for the protection of the public but also to "provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct."¹ When looking at incidents involving criminal behavior committed by a juvenile, it is important to recognize that as prosecutors we are seeking justice, but in the juvenile system, we are also seeking to help rehabilitate the youth.

Both of us have seen juveniles return to court having had their lives completely transformed because of the intervention of the juvenile system. Having the structure of a secured facility or a probation officer's intense supervision can redirect these kids onto the right path.

Hans: I once dealt with a juvenile who was charged with posses-

sion of cocaine and placed on probation. He was the son of a federal law enforcement agent and lived in a nice house in an upper-middle-class neighborhood. He was horribly addicted to drugs and ran away from home while on probation. His father could not find him for several weeks, and both of his parents were terribly worried for his safety. We found out later that he was committing thefts to survive and living with adult drug addicts to support his habit. He was eventually arrested, and with the juvenile drug court's intervention, his life completely turned around. He is now a drug-free teenager.

Sarah: I recall one particular juvenile who was heavily involved in a criminal street gang, never attended school, and thought nothing of committing violent acts. He was committed to the Texas Juvenile Justice Department, where he earned his high school diploma and welding certification. He successfully completed the violent offender's program and received positive reviews on his attitude and demeanor from the facility. In fact, he had become a positive role model for other juveniles there. Had the system not stepped in and removed him from his destructive path, he never would have made such progress and changes. In fact, it was likely he would have ended up in the adult prison system or even dead on the street.

I have often said that if you want to help make a change in the world, the biggest impact you can

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have is on the life of a child. Working in the field of juvenile law allows us to do just that.

Who is a juvenile?

In Texas, a person can be charged in a juvenile court for criminal offenses committed on or after his 10th birthday. These offenses can range anywhere from a class C misdemeanor up to and including capital murder. A person who is at least 10 years old and under the age of 17 can be charged as a juvenile. Once a person turns 17 in Texas, he is legally considered an adult, and any criminal charges would be handled in adult court.

(The Texas legislature has recently discussed moving the age of legal maturity from 17 to 18 years of age. One argument for increasing the age is that a 17-year-old is considered a minor for family law purposes, whereas the same individual is considered an adult under the Penal Code. If the age of legal maturity is raised to 18, it would provide consistency on how a minor is defined under various Texas statutes. Look for future discussion on this in the upcoming legislative session.)

The Texas Penal Code governs both adult and juvenile criminal offenses. The Juvenile Justice Code, contained within the Texas Family Code under Title Three, sets forth vital statutes on arrest procedures, hearings, and dispositions specific to the juvenile system. Other applicable codes to be aware of include the Human Resources Code, Health and Safety Code, Government Code, and the Rules of Civil Procedure. Additionally, the Code of Criminal Procedure applies to discovery issues that arise in a juvenile court.

Arrest and detention

There are several differences regarding the arrest of a juvenile compared to the arrest of an adult. A law enforcement officer may take a juvenile into custody if there is probable cause to believe that the juvenile violated a criminal law, engaged in delinquent conduct or conduct indicating a need for supervision, or violated a court-ordered condition of probation.² Family Code §51.03(a) defines delinquent conduct as conduct other than a traffic offense that violates a state or federal penal law punishable by imprisonment or jail time. Section 51.03(b) defines conduct indicating a need for supervision includes committing fine-only misdemeanors; violating the penal ordinances of any political subdivision of the state; the child's voluntary absence from his home without his parents' consent; "huffing" paint fumes or vapors; violation of a school district's written standards of student conduct; committing prostitution;³ and committing electronic transmission of certain visual material depicting minor.⁴

There is no requirement that an officer obtain an arrest warrant as in the adult criminal system, where the Code of Criminal Procedure generally requires a warrant. However, an officer may decide to obtain a juvenile arrest warrant called a Directive to Apprehend, which is similar to an adult arrest warrant. A juvenile court may issue a Directive to Apprehend, which must contain the probable cause to believe that the juvenile committed the crime alleged,⁵ if an officer needs to arrest a juvenile in another state, for example. A written arrest warrant might be needed to show that jurisdiction's law enforce-

ment or judicial authorities that he is wanted and is alleged to have committed a crime in Texas.

When a juvenile is taken into custody, he must be delivered "without unnecessary delay" directly to a juvenile processing office and his parent or guardian must be promptly notified that he has been taken into custody and the reason he was taken into custody.⁶ Within 48 hours from when the accused was taken into custody (including weekends and holidays), a court or a magistrate must conduct a detention hearing to determine whether to release or detain the juvenile in a facility until his court appearance.⁷

Detention decisions are at the discretion of the court or magistrate, and it's important to note that there is no bail system in juvenile courts and in the Family Code. A detention hearing must be conducted no later than the second working day after the juvenile is taken into custody. If he is detained on a Friday or Saturday, then the detention hearing must be conducted on the first working day after detention.⁸ Reasonable notice of the hearing must be provided to the juvenile and his parent or guardian; however, if the parent or guardian can't be located, the court must appoint a guardian ad litem for the detention hearing.⁹ The juvenile has a right to counsel at all detention hearings.¹⁰ The juvenile must be released from detention unless the court finds that:

- 1) he is likely to abscond or be removed from the jurisdiction of the court;
- 2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;

3) he has no parent, guardian, custodian, or other person able to return him to the court when required;

4) he may be dangerous to himself or may threaten the safety of the public if released; or

5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.¹¹

If the juvenile is kept in detention, a detention hearing must be held every 10 days to determine whether continued detention is warranted.¹² If the court decides to release the juvenile, it may impose specific conditions on him relating to his release.¹³ These may be similar to bond conditions set on a defendant in adult court, although the juvenile court cannot set a bond for the juvenile's release. Additionally, the court may impose conditions on the juvenile's parent or guardian who is present at the detention hearing to require that adult to assist the juvenile with abiding by his conditional release.¹⁴ Therefore, it is not only the juvenile who may have court-ordered conditions, but the court may also set conditions on the adult responsible for that juvenile.

For example, an adult may be required to move himself and the child to another residence in a child sexual assault case to keep the juvenile away from other children in the household, or the relative who takes him in may be required to keep all children away from the juvenile. Another example is a parent who may need to get permission from the court to take the child out of the county for a trip or vacation.

Charges

Criminal allegations against a juvenile are filed as a petition in a court with designated jurisdiction over juveniles, and the Texas Family Code outlines with specificity what must be included in the petition.¹⁵ The filings are styled as "*In The Matter of _____*" and must state the age of the accused to show that the court has jurisdiction over the juvenile. The name and address, if known, of a parent or guardian must also be included in the petition. The juvenile, called the "respondent," must be served with both the summons and the allegations in the petition filed by the State, or "petitioner."

Service must also be made on the juvenile's parent or guardian.¹⁶ It is imperative that the prosecutor verify that the respondent was officially served with the court documents prior to an adjudication or certification hearing. Courts in Texas have held that the juvenile must be personally served with a copy of the petition and summons.¹⁷ It is reversible error for a prosecutor to proceed on a case in which the respondent has not been personally served with the petition and summons because the court will lack jurisdiction over the juvenile. Always verify that the parent or guardian has been served with the summons and petition as well. However, the parent or guardian waives service of the summons by voluntary presence at the court proceeding.¹⁸

Juvenile charges are not presented before a grand jury for indictment. However, there are deadlines in the Texas Family Code regarding the timeliness of filing a petition. For a detained juvenile, the State has only 30 days from the initial deten-

tion hearing to file a petition alleging a capital felony, an aggravated controlled substance felony, or a first-degree felony.¹⁹ If the petition is not filed in this time, the detained juvenile must be released from custody. For all other offenses and violations of probation, the petition must be filed by the 15th working day after the initial detention hearing.²⁰ The code does allow the local juvenile board to impose an earlier filing deadline authorizing the court to release the juvenile.

Going to court

Unlike in an adult court, when a respondent appears in juvenile court, he must be accompanied by a parent or guardian. The court will appoint a guardian ad litem to protect the juvenile's interests if a parent or guardian does not attend the hearing.²¹ As in any criminal court in Texas, if the allegations are contested, the judge or a jury will decide whether the individual committed the alleged criminal offense. However, in juvenile court, the terms "guilty" and "not guilty" are not used. If the judge or jury determines that the respondent is guilty of the offense, the finding will be that he has "engaged in delinquent conduct" and is in need of rehabilitation.

During the adjudication hearing, the court is statutorily required to explain to the juvenile and his parent or guardian the allegations, the nature and possible consequences of the proceedings, and the juvenile's *Miranda* rights.²² If the respondent and State come to an agreement on the disposition of the case, the respondent "stipulates" to the evi-

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dence and enters a plea of “true” to the allegations rather than a plea of “guilty.”

One important difference in a juvenile court from that of an adult court is that the juvenile has the right to a jury trial but the State does not have this same right.²³ However, a juvenile does not have the right to a jury trial on the punishment or disposition phase unless the State has filed a determinate petition.²⁴ (More on that later.)

Once a judge or jury makes a finding that the juvenile has engaged in delinquent conduct and is in need of rehabilitation on any petition that is not a determinate petition, the parties move on to a disposition hearing before the judge. Prosecutors must remember that the purpose of the juvenile system is to protect the public and to rehabilitate the juvenile, which means that disposition may appear quite different from adult court. This may be the last opportunity to redirect criminal behavior before the juvenile’s conduct lands him in an adult court, where the penalty may result in a higher punishment and a permanent criminal record. Because one of the stated purposes of the juvenile system is “to remove, where appropriate, the taint of criminality from children committing certain unlawful acts,” juveniles may have their criminal records sealed.²⁵ Eligibility requirements and procedures for sealing records can be found in §58.003 of the Texas Family Code.

Punishment

Punishment ranges differ in juvenile court from that in adult court. With the exception of determinate petitions, there is no set minimum or

maximum sentence in the juvenile system. For instance, in adult court, a person found guilty of Aggravated Robbery faces a minimum of 5–99 years or life in the Texas Department of Criminal Justice’s Institutional Division or possibly probation. A juvenile offender convicted of the same offense would face a range of punishment varying from commitment to the Texas Juvenile Justice Department until his 19th birthday or placement on probation that can last until his 18th birthday.

Determinate sentences

In some cases, the offense itself and the facts may be so egregious that a stronger punishment is warranted and desired. The law provides two alternative routes for these types of situations. Both alternatives are available only for felonies. One option is to seek a determinate sentence, which would potentially allow the juvenile’s punishment to ultimately be transferred to adult court or adult prison. The other is to ask the court to waive its jurisdiction over the juvenile and certify the juvenile as an adult.

The key difference between the two options is that a determinate petition and sentence is kept in the juvenile court system—with the possibility of a sentence being transferred to adult probation or to an adult correctional facility after the juvenile becomes an adult—whereas a juvenile who is certified to stand trial as an adult is transferred to adult court prior to any adjudication.

The advantage of pursuing a determinate sentence is that it sets a punishment range up to 40 years. Texas Family Code §53.045(a)(1)–(17) specifically delineates which felonies are eligible for a determinate

sentence. For example, Murder, first-degree Possession of a Controlled Substance, Sexual Assault, and Aggravated Assault are all specifically eligible, but Burglary of a Habitation, Robbery, and Indecency with a Child by Exposure are not. Note that a juvenile is unable to seal his juvenile adjudication record if he is adjudicated on a determinate petition.²⁶

To obtain a determinate sentence, the prosecutor must present a determinate petition to a grand jury for approval to file it in the juvenile court. The grand jury must make a determination that probable cause exists and also decide whether to grant approval for a determinate petition to be filed.²⁷ (The grand jury is not making an indictment decision on the case.²⁸ This is the only situation in which a filed juvenile petition pending in a juvenile court can be presented to a grand jury.) Once the grand jury approves the determinate petition, it is then filed with the juvenile court and titled as an amended petition. The juvenile respondent must then be personally served with this new petition, which provides notice of the State’s intent to seek a determinate sentence.

Although not required, a prosecutor can seek advice from a grand jury in situations in which he is uncertain if charges should be filed against a juvenile.²⁹ The grand jury has the same authority to investigate the case as it does in adult cases. If the grand jury decides that charges should not be filed, the prosecuting attorney cannot file a petition concerning the offense unless the same or a successor grand jury approves filing the petition.³⁰ On the other hand, if the grand jury agrees that a

petition should be filed for the offense, the prosecutor may file the petition under §53.04.³¹

Certification as an adult

The other avenue available to prosecutors when handling a case involving a serious offense is to ask the juvenile court to waive jurisdiction and allow the case to be heard in adult criminal court—in other words, to seek to certify the juvenile as an adult. The key difference between a determinate sentence and certification is that a determinate sentence affects how the case is handled post-adjudication, whereas a certified case is handled pre-adjudication in adult court. The certified juvenile would face punishment in an adult facility and could face a life sentence with parole eligibility. Certified juveniles are not eligible for the death penalty or punishment of a life sentence without parole. Once a juvenile has been certified, all subsequent cases involving offenses occurring after the date he was certified, but before he becomes an adult, qualify for being automatically certified, with a few exceptions.³² Certification can be sought in any felony case provided the juvenile is at least 15 years old at the time he committed the offense.³³ A special exception is made for juveniles who are 14 years old and are accused of committing a capital offense, an aggravated controlled-substance felony, or a first-degree felony.³⁴

To seek certification, the State must file a new petition with the allegations and its intent to certify the juvenile with a Motion to Waive Jurisdiction. The juvenile and parent or guardian must be served with the new petition.³⁵ Once served, the

juvenile will be given magistrate's warnings from a judge prior to the certification hearing. The judge then must order a pre-hearing evaluation, consisting of a diagnostic study, social evaluation, and full investigation of the respondent, his background, and the circumstances of the alleged offense.³⁶ In Harris County, the probation department completes this evaluation. The juvenile and his lawyer may waive his participation in this social evaluation and diagnostic study. If this happens, a pre-hearing evaluation would be completed with information from only the juvenile's prior criminal record, school records, detention records, and any other records the court receives. While this does not occur frequently, it is their right not to participate.

Once the court, defense counsel, and the State have received the court-ordered evaluation of the juvenile, the court will hold a certification hearing to determine whether to grant the State's motion. During the hearing, the court must determine whether probable cause exists for the criminal offense alleged and considers four specific factors outlined in the Family Code for the discretionary transfer:

- 1) whether the alleged offense was against person or property, with the greater weight in favor of transfer given to offenses against the person;
- 2) the respondent's sophistication and maturity;
- 3) the respondent's record and previous history; and
- 4) the prospects of adequate protection of the public and the likelihood of the respondent's rehabilitation by use of the procedures, services, and facilities currently available to the juvenile court.³⁷

The court must consider these four factors when making a decision to waive jurisdiction, but it may take into account additional factors presented during the hearing.

If the court grants the waiver of jurisdiction and signs the order certifying the juvenile, the case is transferred to adult court. The juvenile may appeal the certification decision utilizing an interlocutory appeal. A juvenile's right to appeal the certification decision immediately after the certification hearing is a fairly recent change in the law that became effective September 1, 2015.³⁸

The court may also waive its jurisdiction and transfer a juvenile court case to adult court in cases involving "post-18" filings. In these circumstances, the accused has already turned 18 years of age but he committed a felony when he was a juvenile and was never adjudicated for the crime. This procedure may be utilized if:

- the offender was 10 or older and under 17 at the time he committed a capital felony offense;
- he was 14 or older and under 17 and committed an aggregated controlled-substance felony or first-degree felony; or
- he was 15 or older and under 17 and committed any other grade of felony.³⁹

The juvenile court uses a preponderance of evidence standard to determine whether probable cause existed for the State to proceed on the allegations before the accused's 18th birthday. The court also examines whether the State exercised due diligence in handling the case.

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Probation

If the juvenile is placed on a determinate sentence probation, the State must request a hearing to transfer the probation from juvenile probation to adult probation. The juvenile and his parent or guardian must be served with notice of this hearing, and the juvenile has the right to be represented by counsel. The transfer hearing on a determinate probation case must be held prior to the juvenile's 19th birthday. The State may want to present evidence of violations of probation and witnesses to support the transfer to adult court. The defense may present evidence that the juvenile has been rehabilitated and that a transfer is not warranted. If the judge determines that transfer is appropriate, the probation will be transferred to an adult court on the respondent's 19th birthday.⁴⁰

Transfer to the adult system

If the respondent was committed to the Texas Juvenile Justice Department (TJJD) on a determinate sentence, he will be sentenced for a specific time period not to exceed 40 years. If the juvenile is unable to complete his sentence before he turns 19, representatives of TJJD will determine whether it is appropriate to request a hearing to transfer him from TJJD to an adult prison or to release him from TJJD to parole. TJJD can request a transfer hearing any time after the juvenile turns 16; however, the transfer procedure must be completed prior to his 19th birthday. An offender cannot be held at a TJJD facility past his 19th birthday.⁴¹

Conclusion

The differences between practicing in the adult criminal system and the juvenile criminal system are more than dealing with a "defendant" versus a "respondent." The hearings, procedural requirements, and restrictions placed on handling a juvenile offender are exclusive to this area of law. Though the criminal offenses alleged are the same in either system, the approach and purpose behind the systems vary. Whether a juvenile is given probation or the State seeks to certify him as an adult, remember that we are tasked with prosecuting in a system established with the married purposes of protecting the public and rehabilitating the youth. While this may be an unfamiliar and possibly frustrating terrain for a prosecutor with an adult-court mindset, practicing in juvenile courts can be a rewarding and fulfilling experience once you learn the language and procedures available. ✱

Endnotes

¹ Tex. Fam. Code §51.01. All code references from here on are to the Texas Family Code unless otherwise noted.

² §52.01.

³ §43.02

⁴ §43.261

⁵ §52.015.

⁶ §52.02.

⁷ §54.01(o).

⁸ §54.01(a).

⁹ §54.01(b)–(d).

¹⁰ §54.01(b).

¹¹ §54.01(e).

¹² §54.01(i).

¹³ §54.01(f).

¹⁴ §54.01(r).

¹⁵ §53.04.

¹⁶ §53.06.

¹⁷ *Johnson v. State*, 551 S.W.2d 379 (Tex. Crim. App. 1977).

¹⁸ §53.06(e).

¹⁹ §54.01(q)(1).

²⁰ §54.01(q)(2).

²¹ §51.11.

²² §54.03(b).

²³ §54.03(c).

²⁴ §54.04(a).

²⁵ §51.01(2)(B).

²⁶ §58.003(b).

²⁷ §53.045(b).

²⁸ §53.045(c).

²⁹ §53.035.

³⁰ §53.035(c).

³¹ §53.035(d).

³² §54.02(m).

³³ §54.02(a)(2)(B).

³⁴ §54.02(a)(2)(A).

³⁵ See §§53.04, 53.05, 53.06, and 53.07.

³⁶ §54.02(d).

³⁷ §54.02(f)(1)–(4).

³⁸ §56/01(c)(1)(A).

³⁹ §54.02(j).

⁴⁰ §54.051.

⁴¹ See Tex. Fam. Code §54.111 and the Tex. Human Resources Code §244.014.

Helping kids fly high

Serving with the Legal Eagles, an internship program at a predominantly poor Austin high school, has certainly helped the students learn more about advocacy—but it's also impacted a Travis County prosecutor who volunteers with them.

Sometime in 2014, I began mentoring students who came to the Travis County Courthouse from Akins High School, which is located in mostly high-poverty neighborhoods in South Austin.

I got involved with these students because I know Robyn Katz, a teacher at Akins. I first met Robyn when she interned at the Lubbock County Criminal District Attorney's Office, where I was her supervisor. After graduating from Texas Tech School of Law, she served as an Assistant Criminal District Attorney in Bexar County prosecuting family violence cases. After she moved back to the Austin area to teach, she reached out to me to see if I would mentor and work with some of her students, and I jumped at the chance. Robyn was looking to create an internship program for Akins students who were interested in becoming attorneys (the program officially took off in 2015). Many of Akins's students are Hispanic and African-American, and most don't have plans to attend college. Because their households are low-income, there is a strong emphasis to get out and work after graduation rather than going on to college.



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And while there is something tremendously noble about getting into the workforce and contributing to one's family income, these students have no encouragement to achieve higher education, which could help them in the long run.

I love interacting with these kids. My mother has been in education for 46 years now, and she still believes that you can save the world “one kid at a time.” She hasn't stopped helping students succeed by graduating, enrolling in college, and seeking post-graduate degrees. Maybe I have a little bit of that passion too—I want to ensure that today's students have more knowledge and better opportunities to succeed than I had, so I spend time helping them.

The internship program

The law internship program, named the Legal Eagles after the school mascot, the Akins Eagles, began in 2015. Austin attorneys and respected judges, such as the Honorable Brandi Mueller and Honorable John Lipscombe, assisted in selecting the interested students, who had to go through a rigorous application process. It required students to print

out their transcripts, obtain six reference letters from teachers, write two 500-word essays on a topic relating to law, and undergo a criminal background check. After completing that process, they were interviewed by a panel of attorneys and judges. Aside from the softball question of why they wanted to be part of the internship, the students were challenged with tougher questions about their past achievements and struggles, their strengths and weaknesses, and what lessons they've learned up to that point in their lives. They were ranked on their honesty, maturity, and genuineness. Out of the number of applications, eight elite students were selected. (The number of students in the program is limited due to participation roles on the mock trial teams as well as limited space for frequent trips to the courthouse.)

The Legal Eagles partner with the Austin Bar Association (ABA) and the Austin Young Lawyers Association (AYLA). Members of ABA and AYLA meet the students at the courthouse on designated days and educate them about the procedures in the courtroom and allow them to sit in on live dockets, hearings, and trials. They also assist in evaluating the students throughout the internship to ensure the participants gain practical skills through the program.

In addition to this first-hand experience, the students compete in

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mock trial competitions, representing their school against others in the district and state. For the mock trials, they are divided into two teams, a prosecution or plaintiff team of two advocates and two witnesses, and a defense team, also of two attorneys and two witnesses. The students are given a lawsuit packet containing the issue being contested as well as the pertinent witness statements and background information, and they are given a couple of months to practice and prepare. I, along with other lawyers, watch them practice and help them improve in their roles. This time I get to spend with the students is so personally rewarding. It's amazing to see their confidence grow the more familiar they get with the issues and the more they practice. Last year, in their first time to compete for the program, they placed first and fifth in the district competition and advanced all the way to the state competition. And in 2016, they placed first for a second year in a row and are currently preparing to compete at the state level.

As if all that preparation weren't enough, each student is also required to log 100 hours of community service throughout the year. Community service is a major aspect of the program, and these students don't hesitate to participate in their communities. They have volunteered with the Travis County Children's Shelter Halloween program, Run with the Heroes 5K race (benefitting the Special Olympics), the county Veterans' Day Parade, local Austin animal shelters, and marches supporting law enforcement. All this work has not gone unnoticed: In 2016, the State Bar of Texas recognized the Austin

Bar Association for its partnership with the Legal Eagles and awarded the ABA the 2016 Partnership Award.

My involvement

Initially, when the students came up to the courthouse, I would talk to them about big trials going on. If there were none, we'd discuss the daily duties of prosecutors. I talked with them about the different types of cases, how we make plea offers, when we talk to victims and witnesses, and eventually how we decide to take a case to trial or find an alternative resolution. This interaction happened on a number of occasions, but I wasn't able to really connect to the students through such limited time together.

My involvement really expanded when Robyn asked me to come speak to Akins students on Career Day. I didn't focus the talk on my career and what I do for a living; instead I challenged the kids to begin "advocating for themselves." I started by asking them simple, everyday questions like, "Who's the best pitcher of all time?" or "Who's the best pop singer?" And after every answer they gave me, I'd ask, "Why do you think so?" And every response was the same: "I dunno."

When I moved on to more serious questions, such as, "What do you want to do after high school?" their responses were the same: "I dunno." It's not that these students aren't intelligent—they are—they just didn't challenge themselves and had stopped asking themselves why they think or want certain things. As they grow up, children go from asking "why" about everything—and

driving their parents crazy with questions—to not asking at all. Somewhere between grade school and high school, many of us stopped asking "why."

I was making an important point in my presentation. I told them that soon in their lives they would be faced with job interviews and college applications, and it's up to each student to separate himself from hundreds or thousands of other applicants vying for the same spot in a college classroom or workplace. "How can you set yourself apart from everyone else?" I asked them. "What makes you so special that the university can benefit from your being in the student body?" By challenging themselves in everyday conversations—by not only *asking* "why" but also preparing to *answer* "why" with educated reasons—they can prepare themselves for their interviews, college, and future careers. In the bigger picture, I was trying to get them to see that they've worked hard to get where they are and that it's important to be able to express that to other people. When they are competing for a scholarship, for example, it's not enough to say, "I make good grades." They are selling themselves short by not describing the sacrifices they've made (such as putting in extra work, missing various social events, and working a part-time job to help out at home) to get where they are.

After I spoke to them as a class, I increased my involvement even further. I got to participate in the interview process with those students who were interested in the Legal Eagle internship. Do you remember your first interview? For many of us,



it was a long time ago! To refresh your memory, picture this: You walk into a room with four or five people seated around a conference table. Everyone is professionally dressed. You take a seat, and these people pepper you with challenging questions—not only why you are seeking this position but also asking about your greatest achievements and biggest obstacles. The questions call on you to examine your strengths and weaknesses and to answer honestly and quickly. By now, for most of us, going through a job interview seems relatively easy because we can put our qualities and strengths in the best light as well as articulate our weaknesses and what we've done to improve on them. But can you imagine being able to do that in high school? Because that's exactly what these kids did—and much to my amazement, the students' responses and motives went beyond my expectations. They opened up about vulnerabilities and obstacles they had overcome or were currently dealing with—which is never easy, especially as a high school student.

To witness the growth of these

students from that first day in class, not only in the interest of law but also in maturity, has been amazing to me. I've worked with these students as a teacher, interviewer, and mentor, and it's not because my supervisors demand it or because my job requires it. I don't receive any additional compensation—I do it on my own time merely for the students' benefit.

My involvement is worth what I put into it 100 times over to see hope and drive begin to grow in them as they look beyond high school graduation. I tell the students, "I don't want you to be like me—I want you to be *better* than me." After all, isn't that what we are supposed to be doing? Ensuring that this world is a better place for the next generation?

An encouragement to get involved

For those reading this article, I want to stress that this article isn't about me, it's about the Akins students. I'm just sharing my involvement with them and how they have impacted my life. All these students needed was encouragement. No one in their

lives has ever told them that college is for them. In fact, many believed that college was impossible. It's amazing to see their determination and belief that they can succeed far beyond high school when before there was none.

As prosecutors, we are public servants. We serve our communities by protecting them and keeping dangerous individuals locked away. The majority of prosecutors I know don't necessarily consider themselves as role models or mentors of the next generation, but volunteering in this capacity has shown me that *we are*. Whether we realize it or not, kids look up to us. We fight for justice and accountability, and we fight for victims across the state who need us to provide a voice for them in court. Based on years of service, we have important experiences to share and pass on to the next generation. We can continue to serve not only in the courtroom, but by mentoring and getting involved in students' lives.

I encourage all of you to give back to your community beyond serving as a prosecutor. To many in your communities, you serve as a role model. When you personally get involved with students and inspire them, it is that much more significant to them. I promise that you will find the time you give to them rewarding beyond your expectations—I know I did. ❁

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