THE TEXAS PROSECUTOR

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

He 'sinned against God and man'

This is the story of Austin's coldest case, a 25-year-old murder that was prosecuted by the Travis County DA's office with no DNA, no fingerprints, no eyewitnesses, and a lot of faded memories.

By Mark Pryor
Assistant District Attorney in Travis County

In the early hours on October 13, 1985, Natalie Anontetti, 38, returned from a night out on Sixth Street in Austin and found her roommate, Susan Otten, awake. They chatted for a few minutes, then Natalie ran upstairs and changed into blue jogging shorts and a pink T-shirt. She told Susan that she was going to take a brief walk outside by the apartment complex's pool. Susan remembers telling her to be careful.

After about 10 minutes, Natalie came back into the apartment and found Susan watching television. Natalie lay down on the couch and started to doze, so after a few minutes Susan turned off the TV and prepared to go to bed. Before she went upstairs, she walked over to the front door and pushed it to make sure it was shut. She asked Natalie if she'd locked it and got a grunt in return, which she took to mean "yes." Susan didn't check.

Two hours later, Susan got up and went downstairs to fetch a glass of water. As she later told police in a sworn statement, she saw Natalie sleeping peacefully on the couch and made sure not to wake her.

At 5:15 a.m., barely 45 minutes later, Susan woke again. As she told police in her statement: "I heard moaning and some thumping noises from downstairs. I also heard a door shut. I thought this was strange because I still heard someone down there (the moaning noise) even after the door shut."

Susan went to investigate and, to her horror, saw Natalie sitting on the couch, covered in blood from an injury to the top of her head; the blood ran down her face and drenched her clothes. Susan rushed over and found Natalie trying to speak but unable to do so. Susan grabbed the phone and dialed 911, calling for the police and an ambulance. In a panic, she ran upstairs and woke Johnny Goudie, Natalie's 16-year-old son and Susan's boyfriend, bringing him down to his bloodied and incoherent mother.

Johnny pleaded for her to explain what was going on and who had done this. She couldn't tell him, but the boy recognized something that he would later describe to police in a simple sentence: "I can't say for sure, but judging from the look in my mother's eyes she knew what had happened to her." (We later thought she might have

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PowerPoint training courtesy of TDCAF

Need some help with your PowerPoint skills for trial? Here's your chance to polish your presentation while supporting the foundation!

We are proud to offer "PowerPoint for the Courtroom," a training CD created by **Todd Smith**, Chief Investigator in the Lubbock County Criminal District Attorney's Office, Course Director for TDCAA's Digital Evidence School, and all-around technology guru. This CD walks through almost every element of PowerPoint, from creating new slides to importing and editing video clips. It's a must-have for every office, and it's only $25!

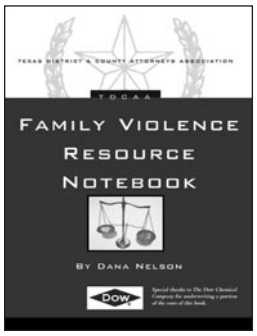
By Jennifer Vitera
TDCAF Development Director in Austin

And thanks to Todd's generosity, a portion of the sales of each disk will benefit the Texas District and County Attorneys Foundation, which you know is a 501(c)(3) nonprofit educational foundation. The money raised will go directly to advancing the education, training, and resources for Texas prosecutors and law enforcement personnel. Please visit our website for details at www.tdcaf.org.

Texas Bar Foundation supports TDCAF

We are thrilled to announce that the foundation has received a grant for $10,500 from the **Texas Bar Foundation** in support of the Domestic Violence Training Initiative. Back in March, each prosecutor's office and each VAC received a copy of the *Family Violence Training Manual* for free, courtesy of the Foundation and the **Dow Chemical Company**. The Texas Bar Foundation's donation will cover the cost of 1,000 additional copies of the book, which we will divide among the state's 333 prosecutor offices.

Since its inception in 1965, the Texas Bar Foundation has awarded more than $12 million in grants to law-related programs. Supported by members of the State Bar of Texas, the Texas Bar Foundation is the nation's largest charitably-funded bar foundation.



The Domestic Violence Training Initiative will also include a three-day seminar aimed at prosecutors, investigators, and victim assistance coordinators to help them effectively investigate and prosecute domestic violence crimes as well as more compassionately and effectively provide assistance and information to domestic violence victims. We are still looking for corporate contributors, private donors, and foundation partners from across the state to support the initiative. Our total budget goal for this program is $100,000.

Please contact me at vitera@tdcaa.com if there is someone in your area to whom we can send more information regarding this effort.

Leadership Texas update

Last issue I mentioned the Leadership Texas Program in which I am participating. This past month I traveled to Midland and Odessa where I met with local leaders and learned more about the state of energy in the Permian Basin and various aspects of the future of energy, including oil and gas, water, coal, and nuclear energy. We stopped by the Permian Basin Petroleum Museum, toured a working oil well, visited the new Midland County Courthouse hosted by the **Honorable Mike Bradford**, and attended a dinner at the home of **Mr. and Mrs. Ray Perryman**. I am grateful to have had the opportunity to meet so many wonderful people in the area and plan on going back in the next few months for TDCAA/ TDCAF introduction meetings. Thank you to **Teresa Clingman**, the district attorney in Midland County, for taking time to visit with me in Midland, and a big thanks to **Bobby Bland**, the district attorney in Ector County, who set up several introduction meetings in Odessa. I will be in Corpus Christi this July where I also plan on visiting with members and corporations along the way.

Also, a big thank you to **Mike Guarino** (TDCAF Advisory Com-

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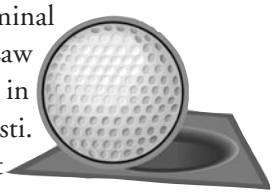
mittee) and **Bert Graham** (TDCAF Board of Trustees) for helping with TDCAF introduction meetings in Galveston in May.

Save the date

The 3rd Annual Foundation Golf Tournament will take place Wednesday, September 21 (the week of the Annual Criminal and Civil Law Update) in Corpus Christi. (The exact location of the tournament will be announced later.) We are also planning on adding a silent auction to the TDCAF dinner this year. Funds raised through the golf tournament and silent auction will support the 2011 Annual Campaign. We are asking members to please help the foundation identify corporations and individuals who might be interested in sponsoring or donating an auction item this event. Sponsorship levels are: Platinum: $10,000; Gold: $5,000; Sterling: $2,500; and Bronze: $1,000.



"Why I Give to TDCAF"

By now you have received the 2011 Annual Campaign brochure or postcard, which is your invitation to be a part of the foundation. It is committed to continuing and improving the excellence TDCAA provides in educating and training Texas prosecutors, law enforcement, and key personnel. Please check out personal stories from just a few our members who support the foundation at www.tdcaf.org.

Just like last year, we've got two different fundraising goals for our membership groups, one for elected prosecutors and one for investigators, key personnel, and victim assistants. Last year the investigators took home the win, but 2011 is a new year—though, as of May, our Investigators are in the lead in their fundraising efforts. It's not too late to give them a run for their money, key personnel staff and victim assistance coordinators! Send in your donations today! ❇

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Neighborly advice on getting on well with cops

Any time a group of prosecutors get together to talk shop, soon enough the conversation will be directed toward local law enforcement, or "my cops," to use technical jargon. I am perplexed sometimes at the fussing that goes on about law enforcement officers, and what they won't do or don't do for their respective prosecutor's office. I don't mean to imply that prosecutors and their staff don't appreciate and support law enforcement—to be sure they do—but there seems to be a disconnect on some level between law enforcement and prosecutors.

By Mike Fouts
District Attorney in Haskell, Stonewall, Kent, and Throckmorton Counties

Maybe I am delusional, but I will readily admit for the most part I experience few to no problems with law enforcement officers in my district. I don't gripe about them (well, maybe sometimes) and to my knowledge they don't bad-mouth me. Now, I don't want to imply that there have never been issues; there have been. I further don't want to imply all of the officers within the 39th Judicial District are the reincarnation of Starsky and Hutch; they are not. In fact, only a couple could not legitimately claim to be the reincarnation of Barney Fife, and I am being generous with my description here.

This begs the question: Why do so many prosecutors have issues with their officers and I don't? I can't answer this, but I can say how I relate to my cops. First and foremost, living in a small community has its advantages. I know my officers and they know me personally. I know their families and in some instances I have known them my entire life. Perhaps the personal relationship is helpful. When an officer brings a case report in, we have something to visit about in addition to the case. I can find out if the fish are biting or how little Johnny's Little League team is doing. These officers are genuinely my friends.

Because intake is a vital part of the prosecution of cases, I think prosecutors have to be mindful we don't convey the idea we are better or smarter than our officers. I will confess here and now, I get way too many three-line felony offense reports: "saw drunk, arrested same, end of report." When I send this back to the officers, sometimes multiple times, I only rarely tell them how stupid they are, and I am only mildly demeaning. Really I never do that. I might give them some good-natured ribbing regarding their report and send them on their way. They will generally give me some smack back, something like a competent prosecutor would run with that case. I do convey how important this information is and I provided a copy of TDCAA's *Guide to Report Writing* to each of them. I will sometimes pull a manual from my desk and say, "I must not have given you one of these. Use it—you will find it helpful." A few dirty words later and they are off to finish the report.

My investigator, Luke Griffin, really should be a law clerk for the Court of Criminal Appeals. He refers to himself as a retired wrecker driver and frequently brags he aced his GED. But don't let that country drawl fool you: He is one smart dude. I put him only slightly behind Ted Wilson on search and seizure law. I kid you not—if you have a search question, call him and he can answer it. Each week, as we receive our recent case summaries from TDCAA, I will usually read through them, sometimes scanning them to see if anything interests me. Not Luke. He reads, catalogs, and indexes them. When he sees something that has to do with our officers, he will catch me and tell me he thinks this case will have an impact on how officers conduct an investigation. We call a meeting of our officers and alert them to the case. The officers are appreciative of this, and it gives us a chance to talk about other issues.

My office door is always open for any officer at any time for anything. Most of the officers will drop by every couple of weeks for a cup of coffee and to shoot the bull. When they do a particularly good job on a case, I try to remember to tell them that I appreciate their hard work and that they did well. An officer in the 39th Judicial District does not get paid much; they could double their salary tomorrow in the oil field. They do their jobs because they like it and because they want to make their communities a better place to live. I take the opportunity to convey my appreciation for that.

Another thing I do is work hard not to reject the officer's case. I don't accept a case if it doesn't constitute an offense, but I do my best to prose-

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cute their cases. This takes a little extra work and some extra time on my end. The easy thing to do is to reject the case, but oftentimes, with a little additional effort the case will fly. These officers work hard and appreciate it when you prosecute their cases. They don't like to stay out late and write reports only to be told they have done it all wrong and that the case won't work. The quickest way to get on the wrong side of law enforcement is to arbitrarily reject their hard work.

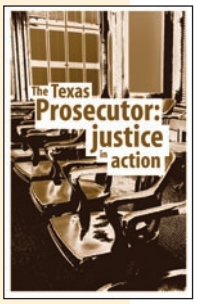
I solicit input from my officers on punishment recommendations. They often know the defendants and their history in our community better than I do. If an officer tells me a defendant is not a suitable candidate for community supervision, I will give a great deal of consideration to that. This caveat, though: For some of my officers, a suitable candidate for community supervision never existed. A few years ago I prosecuted an elderly lady for delivery of a controlled substance. Despite a lengthy criminal history and despite recommendation to the contrary from law enforcement, I succumbed to her lawyer's persistence that she was on her last leg and offered community supervision. Not long after an officer came by for coffee and told me he heard she wasn't reporting to the probation department and that I should revoke her. I told him I would check on it. It turns out she was bedridden in the nursing home … so I didn't revoke her. I chided the officer, and he informed me she had been slinging crack for 30 years around here and was probably just faking.

It is my philosophy that you must have an appreciation for what your officers go through on the street. My wife is a prosecutor, and she is more tender-hearted while I am more tender-footed. Sometimes she kids with the officers about them being so mean, and they tell her go out there and let them cuss at her, spit on her, and fight her—and that is just before breakfast—then see how sympathetic she is.

The effective prosecution of crime is a team sport. A quick coaching cliché: No member of the team is more important than the other. Foster the sense of team with your officers and let them know you are all working together to lock up the bad guys. The next time you deal with an officer, remember that because of the job he does, you and everyone in your community can sleep a little easier at night. Let them know you appreciate them and prosecute their cases, and you won't have any problems with your cops. And on that rare occasion that you have an officer who just doesn't get it, call them into your office, lay your cards on the table, and as gently as you can, tell them, "Sorry, but you, sir, are an imbecile." ❇

News Worthy

Prosecutor booklets available for members



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

Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at 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. ❇

A note about death notices

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

TDCAA Annual Business Meeting

Our association will conduct its annual business meeting in conjunction with the Annual Criminal and Civil law Update in Corpus Christi. The meeting will be held at 5 p.m. on Wednesday, September 21 in the ballroom of the Omni Bayfront hotel.

By Rob Kepple
TDCAA Executive Director in Austin

At the meeting the membership will elect the TDCAA executive committee leadership for the 2012 calendar year. In addition, there are three regional director spots open, listed here with the name of the current regional director: Region 3 (**Eddie Arredondo**, County Attorney in Burnet County); Region 6 (**Doug Lowe**, Criminal District Attorney in Anderson County); and Region 8 (**Larry Allison,** County and District Attorney in Lampasas County). If you are thinking about running for a spot, give us a call for more information.

Houston prosecutor featured in *Glamour*

So I was thumbing through my June 2011 edition of *Glamour* magazine—it's the "summer secrets issue," in case you haven't gotten yours in the mail yet—when I came across an article honoring one of our own, **Alicia O'Neill**, who is recognized for her work at the Harris County District Attorney's Office post-conviction section, where she works to evaluate claims of innocence. The story is part of a regular feature called "Real Stories (the lives, dramas, and triumphs of women just like you)," but I could make a pretty good argument that prosecutors like Alicia, and everyone reading this, are *not* just like other folks. After all, prosecutors and their staffs have decided to use their gifts for the good of their communities. But it's nice to see recognition in a publication of general circulation. Congratulations, Alicia!

Meeting planner lauded

And in another glamorous magazine, *Texas Meetings and Events*, our own **Manda Helmick** was featured as one of four outstanding meeting planners. Of course she would be, because she has done an outstanding job for y'all the last three years.

She also takes time in the article to praise you, the TDCAA membership, on how appreciative you are of her and the association's efforts to meet your needs. It is indeed a far cry from her previous job in New York City working as an assistant for a high-maintenance MTV executive (picture Meryl Streep in *The Devil Wears Prada*). Just ask Manda about the time she got a call from her boss in the middle of the night demanding that Manda phone in a room-service order for her. (The boss was hungry. And at a hotel. In London.) Indeed, I think our membership is a tad less needy and a lot more fun. To read the article, go to http://tx.meetingsmags.com/article/four-planners-four-paths.

Prosecutorial misconduct vs. prosecutorial immunity

You may have noticed an uptick in the use of the term "prosecutorial misconduct" in the mainstream media. Indeed, it appears that there is a concerted effort in some corners of the criminal justice community to paint prosecutors in a bad light. You'd think that **Mike Nifong**, the North Carolina DA disbarred for his disastrous prosecution of four Duke University lacrosse players falsely accused of rape, was a Texas prosecutor in your courthouse given the way some folks whip out his name to put you on the defensive.

So why? To undermine prosecutors' immunity from a civil lawsuit, that's why. Detractors were pretty disheartened when the Supreme Court of the United States ruled to preserve prosecutorial immunity in *Connick v. Thompson*, 2011 WL 1119022 (March 29, 2011). (See this link for the opinion: www.supremecourt.gov/opinions/10pdf/09-571.pdf.) Take a look, for instance, at an article in the *National Law Journal* written by a law school dean. In it, Dean Erwin Chemerinsky at the University of California at Irving accuses the Supreme Court of being oblivious to "study after study" demonstrating serious prosecutorial misconduct. (To read the editorial, go to: www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202491215314&slreturn=1&hbxlogin=1.)

But those studies invariably lump together all sorts of regular trial error, rebadged as "prosecutorial misconduct," in an effort to beef up their claims. Some studies are based

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on a simple computer search of caselaw and a tabulation of the number of times the term "prosecutorial misconduct" appears in print.

We need to be sensitive to this issue because others certainly are. During this last legislative session, a bill that rolled back prosecutor immunity to a qualified immunity surfaced in an amended form. The bill didn't move out of committee, but you can bet we will see it again.

A novel solution to prosecuting barratry

In a typical session, the legislature generally fights crime by enhancing punishments and putting little doodads into the Penal Code. But every now and then, legislators pass some new criminal statute that is practical and useful to prosecutors. This session, the legislature did something unexpected to fight crime: It turned to the civil statutes.

The problem is barratry: runners for lawyers aggressively recruiting potential clients, which violates the law. It is a difficult case to make because often the "victim" gets a satisfactory outcome thanks to the lawyer who got the case because of the barratry. And when we do get a victim willing to testify, it is generally because he is the disgruntled loser in the civil case at issue—not exactly sympathetic.

Enter SB 1716. This bill does not fight the problem with an enhancement or other criminal law amendment but rather recruits a new type of prosecutor: the civil bar. In this new civil statute, a victim of barratry, after the successful conclusion of the civil suit at issue, can turn around and void the contract with the original lawyer and recover all legal fees and costs, along with a hefty civil fine. In addition, that original "victim" can hire a lawyer to sue the original lawyer, and the new lawyer may recover fees and costs.

Empowering lawyers to shut down the illegal conduct of other lawyers by using a profit motive? Brilliant.

Session thanks

Since the original Texas Penal Code was passed in 1974, the legislature has requested the presence and the input of the attorneys for the state. Not every legislator has liked what you had to say, of course, but they desperately need your input lest they make a serious mistake in our criminal law.

As we begin our summer Legislative Update series, I want to thank some prosecutors who made it a priority to work with the legislature during the session. Thanks to **Judge Pat Lykos** (District Attorney in Harris County), **Judge Susan Reed** (Criminal District Attorney in Bexar County), **Joe Shannon** (Criminal District Attorney in Tarrant County), and **Craig Watkins** (Criminal District Attorney in Dallas County) for sending folks to Austin to work with the legislature. And thanks to their assistants in the trenches: **Kevin Petroff** (former Assistant District Attorney in Harris County, now in Galveston County); **Katrina Daniels** (Assistant Criminal District Attorney in Bexar County); **Darrell Davila** (Assistant Criminal District Attorney in Tarrant County); and **Mike Ware** (former Assistant Criminal District Attorney in Dallas County). Great work for the people of the state!

The problem of deployed witnesses

In the last 10 years missing witnesses—deployed to battle zones all over the globe—has been a real problem for prosecutors. As you may know, quite a few peace officers also serve in our armed forces and have done multiple tours of duty. This causes a big problem when it is time to call that officer-cum-soldier to the stand.

Montgomery County Assistant District Attorney **Warren Diepraam** solved the problem using Skype, a common software program that allows desktop computers, equipped with small cameras, to transmit audio and visual images of both sides of the conversation no matter where in the world the two parties are. Using this technology, U.S. Army Texas National Guard Sergeant Tom Taylor, a Conroe crime scene investigator, was able to testify in a Montgomery County courtroom. The defense attorneys objected, but after arguments the court found that the procedure properly guarded the defendant's right to confront the witness. Apparently the only hard part was getting the witness to the "stand" in Iraq; his testimony was delayed once because of rocket attacks.

A towering figure

I would like to take time to honor a friend and former Harris County prosecutor who passed away last month, **Joe Roach**. Although Joe had dwarfism, those who knew him never really noticed because he had a

powerful presence in the room. As you might imagine, criminal defendants had a tough time telling a sob story to the jury when Joe, standing on the stool he carried to court, prosecuted a case. (Joe had asked for permission to stand on his table when he spoke because he thought that would be fun, but judges uniformly denied that request).

I think it was tougher on Joe than we thought. Joe told me of a question asked of him during an interview for his job, in which a black prosecutor asked him if he felt discrimination for being a little person. His answer, which was telling, went something like this: "Your people were sold into slavery, but my people were given away as gifts." I learned that many little people fail to gain traction in this world, and Joe, as a leader of the national little people community, struggled to improve the public's perception—and their own vision—of their value to the community.

I'll never forget his response to a rude guy on the street who came up to Joe and asked, "Man, how tall are you?" Joe's reply? "Tall enough." Indeed. Rest in peace, Joe. ❇

Expediting pretrial habeas writs

By John Stride
TDCAA Senior
Appellate Attorney

The courthouse is open. As usual, you are juggling court appearances, plea negotiations, telephone calls, research, witness interviews, coordinating with investigators, and preparing for upcoming cases. You are busy. A staff member approaches to hand you a document. The document is freshly filed and labeled "Writ," "Pretrial Writ," "Pretrial Writ of Habeas Corpus," or some variant of these titles. Mentally you run through some especially scurrilous words that come to mind on such occasions, but you move past the internal outburst and ask yourself, "What to do?"

This article aims to provide a solid foundation for dealing with pretrial writs of habeas corpus. It lays out when a pretrial writ is appropriate, the issues that are entertained, the requirements of the petition, how to respond, the nature of hearings, and appellate remedies.

When a writ is appropriate

A pretrial habeas proceeding is considered a separate criminal action from the primary criminal proceeding.[1] An important consequence is that, in contrast to a challenge to an order denying a motion to dismiss—which would be addressed only on appeal after conviction and sentencing—an order denying pretrial habeas relief on the merits is immediately appealable—before trial begins.[2]

By providing an avenue of relief before trial, some rights, such as those against double jeopardy and excessive bail, are best protected. At the same time, the courts have been careful to circumscribe pretrial habeas so as to prevent the procedure from becoming a method to secure review of matters that should reach the appellate courts only after trial. Thus, a pretrial writ is not available if there is another adequate remedy at law, for instance, an appeal.[3] Fundamentally, the Court of Criminal Appeals has announced, "Pretrial habeas should be reserved for situations in which the protections of [the] applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory appeal."[4] Simply, pretrial habeas is an "extraordinary" remedy.[5]

The issues that are entertained

As a preliminary matter, even before considering the merits of the claims made, prosecutors should determine whether the claims are permitted. Should the claims be outside the scope of those allowed in a pretrial writ—and, therefore, not cognizable—and relief granted, the writ has been misused and the State should

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appeal to correct the abuse.[6] It also bears remembering that it is the substance of, rather than the label attached to, the document that controls how it is treated.[7] Therefore, the nature of a document labeled as a writ may reveal that it is no more than a motion to dismiss.[8] If so, the writ should be dismissed.

Permissible—or cognizable—pretrial claims are few.[9] Over the years, the courts have rejected many pretrial challenges. Generally, a claim is addressed in a pretrial writ of habeas corpus only if, resolved in the defendant's favor, it would deprive the trial court of the power to proceed and result in the defendant's immediate release.[10] Accordingly, "First, the accused may challenge the State's power to restrain him at all. Second, the accused may challenge the manner of his pretrial restraint, i.e., the denial of bail or conditions attached to bail. Third, the accused may raise certain issues which, if meritorious, would bar prosecution or conviction."[11] Broken down further, those claims that may be challenged in a pretrial writ include (because some claims are superficially alike, it is advisable to check both lists below):

- failure to timely charge after arrest (i.e., pre-indictment delay);[12]
- failure to allege any tolling language in the indictment;[13]
- facial challenges to a statute (i.e., claims that a statute is unconstitutionally vague in all applications);[14]
- extradition;[15]
- pretrial bond (i.e., the amount, conditions, and reinstatement of personal bond);[16]
- double jeopardy challenges (i.e., asserting a prior conviction or acquittal);[17]
- collateral estoppel;[18]
- selective prosecution;[19]
- the existence of probable cause to believe that a person is guilty of an offense;[20] and
- affliction with disease.[21]

Rejected pretrial claims include:

- speedy trial claims (i.e., post-indictment delay—constitutional and statutory);[22]
- Interstate Agreement on Detainers claims;[23]
- "as applied" constitutional challenges to a statute (i.e., a claim that a statute is unconstitutional as applied to a defendant's particular facts and circumstances);[24]
- sufficiency of pleading language;[25]
- sufficiency of tolling language;[26]
- *in pari materia* claims (i.e., when statutes cover similar subjects—the specific controls over the general);[27]
- disqualification of the elected attorney;[28]
- request for a court-appointed attorney;[29]
- separate jury determination of retardation;[30]
- denial of motion to suppress;[31] and
- double jeopardy claims asserting multiple punishments.[32]

Requirements of the petition

Chapter 11 of the Code of Criminal Procedure governs all pretrial habeas proceedings.[33] In the event of your receiving a petition, it is worth reviewing this chapter because most prosecutors are not familiar with its 60-plus provisions. Disappointing as it is, I'm sure, in this article we can hit only the highlights.

Unlike an application for a state writ of habeas corpus after a felony conviction becomes final, there is no particular form that must be used to generate a petition for a pretrial writ.[34] Nevertheless, a petition should conform to certain procedural requirements.[35] Most importantly, an oath must be made that "the allegations of the petition are true, according to the belief of the petitioner." A prayer for specific relief is also required. Although these statutory requirements are not jurisdictional, a court may dismiss the petition for non-compliance.[36]

The petition should be filed in a court having jurisdiction over an original petition for writ of habeas corpus, usually a county or district court. Courts of appeal do not have original jurisdiction to issue writs of habeas corpus in criminal law matters.[37] The person on whom the writ is served must make a "return."[38]

If a defendant has already sought a writ, he may seek a second if he states in a motion that, since the hearing on his first motion, he has obtained further "important testimony which … was not in his power to produce at the former hearing."[39] Additionally, he needs to set forth the "newly discovered" evidence and, if it be a witness' testimony, include the witness' affidavit.

Once the return of the writ has been made and the applicant has been brought before the court, he is no longer detained on the original warrant or process but rather under authority of the habeas corpus.[40]

How to respond

Although there is no statutory duty on the State to respond as there is for an art. 11.07 writ, most trial courts probably expect a response, and a prosecutor is wise to file one.[41] Given the opportunity to do so, if prosecutors do not file a reply, we cannot expect the trial court to consider all our arguments or an appellate court to give us the benefit of the doubt should we attempt to appeal the trial court's ruling.

As with a written reply to most defensive pleadings, prosecutors should prepare a comprehensive (but succinct) response, laying out the pertinent facts and relevant law, in addition to raising any alternative arguments. Remember a couple of important appellate rules: If a trial court's ruling is correct under any theory applicable to the case, it will be upheld.[42] Also, if a theory was not presented to the trial court to consider, an appellate court will hold the theory forfeited on appeal.[43] Thus, if a dismissal is appropriate, seek it. If relief should be denied, assert it. If a hearing should not be held, argue it. Likewise, remembering our duty to "see that justice is done," if a hearing is necessary or relief appropriate, request them.[44] On occasion it may even be necessary to agree to some relief but not all. Employ lots of headings to assist the trial court in scanning through and understanding the State's position.

Subsequent events can render a claim moot, and the State should be ready to put to sleep such a claim. The usual example is where a person not yet indicted files a writ complaining about the absence of an indictment. Meanwhile, an indictment is returned. If this occurs, the appellate court should dismiss the claim raised in the writ as moot.[45]

Because there is no briefing schedule applicable to pretrial writs—except that imposed by the trial court, if any—a response should be promptly prepared, filed, and served. Statute requires that a writ be granted "without delay," unless it is clear that no relief is appropriate.[46] Besides the risk of incurring the wrath of the trial judge, there are statutory penalties, both criminal and civil, for disobeying a writ.[47] Most trial judges are acutely aware of any pending pretrial writs, so it is incumbent on prosecutors to act and act promptly.

The nature of hearings

Once a petition for pretrial habeas corpus relief has been filed, the trial court must schedule a hearing on the application for the "earliest day" that the trial court can devote to such a hearing.[48] Hearings can be live, in open court with the arguments of counsel and even the testimony of witnesses, or simply conducted on the paper pleadings and attached documentation.[49] In the face of any contradictory affidavits, however, a live hearing is the better practice to permit a proper evaluation of credibility and demeanor and the use of cross-examination to assist in exposing the truth.[50]

The trial court has an obligation to: 1) examine the return and all documents attached and 2) hear the testimony of both parties before remanding the defendant to custody, admitting him to bail, or discharging him.[51] But if the defendant has been indicted, the trial court cannot discharge him without bail.[52] The burden of proof is upon the petitioner, and the decision of the trial court to grant or deny relief is a matter of discretion.[53]

Appellate remedies

As is usually the case, an appeal from a trial court's ruling will lie in the court of appeals' district in which the trial court is located. But a defendant's appeal is restricted to situations where the trial court held a hearing on the merits and denied relief. No appeal can be taken from the trial court's refusal to issue a writ or grant a hearing, even after a hearing.[54] The appellant must have a written ruling from the trial court. If the trial court states something orally but does not reduce it to writing so "that [it] memorializes the judge's intent to authenticate the action taken," it is likely that the purported appeal will be dismissed because there has been no ruling on the merits.[55]

If a defendant is unable to appeal, remedies may include seeking either a petition for another writ before a different judge with jurisdiction or, in the proper circumstances, a writ of mandamus against the initial judge.[56]

The State, as well as the defense, can appeal from a ruling adverse to its position.[57] The State, however, may be limited to appealing only those issues laid out under its general right to appeal.[58] Accordingly, the State would be foreclosed from appealing some of the issues the defendant may raise. When an appeal is permitted and after the court of appeals has issued its opinion, a petition for discretionary

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review may also be sought by the losing party in the Court of Criminal Appeals.[59]

Just as for the defense, when an appeal will not lie, the State should contemplate a writ of mandamus.[60] The burden is tough but, with the proper circumstances, not always insurmountable.[61] By the way, the remedy from an adverse ruling on a writ of mandamus in the intermediate courts is to seek a writ of mandamus—not a petition for discretionary review—in the Court of Criminal Appeals.[62] Both writ filings are original proceedings.

One last but critical matter on appeals: A trial court's decision on a writ will not be disturbed on appeal unless the trial court acted without reference to any guiding principles.[63]

Conclusion

Pretrial writs are not especially common and, when preparing for trial, they can certainly throw a wrench in the works. Knowing how to handle them quickly and efficiently affords prosecutors more time and confidence when under pressure. Of course, if the appellate process is engaged, trial will be delayed but, otherwise, prompt action on our part may dispose of some writs and claims with alacrity allowing us to declare all the sooner, "The State is ready, Your Honor." ❇

Endnotes

1 See, e.g., *Green v. State*, 999 S.W.2d 474, 477 (Tex. App.—Fort Worth 1999, pet. ref'd).

2 See *Greenwell v. Court of Appeals for the Thirteenth Judicial District*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005) (orig. proceeding).

3 *Ex parte Hopkins*, 610 S.W.2d 479 (Tex. Crim. App. 1980); *Ex parte Lamar,* 184 S.W.3d 322, 324 (Tex. App.—Fort Worth 2005, pet. ref'd) (direct appeal available for speedy trial claim).

4 *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

5 *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex Crim. App. 2010). Indeed, this placed habeas writs in the same category as mandamus writs.

6 *Id.*

7 See *Ex parte Caldwell*, 58 S.W.3d 127, 130 (Tex. Crim. App. 2000); *In re Baugh*, No. 12-09-00121-CR, 2009 Tex. App. Lexis 4525 (Tex. App.—Tyler, June 17, 2009, no pet.) (not designated for publication).

8 See, e.g., *Ex parte Ahmad*, No. 02-05-338-CR, 2007 Tex. App. LEXIS 209 (Tex. App.—Fort Worth, Jan. 11, 2007, pet. ref'd) (not designated for publication).

9 See *Ex parte Weise*, 55 S.W.3d at 619-20.

10 See *Ex parte Smith*, 185 S.W.3d 887, 892 (Tex. Crim. App. 2006).

11 *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005), op. withdrawn May 2, 2011.

12 *Ex parte Martin*, 6 S.W.3d 524 (Tex. Crim. App. 1999).

13 *Ex parte Brooks*, 312 S.W.3d 30, 32 (Tex. Crim. App. 2010).

14 *Ex parte Ellis*, 309 S.W.3d at 79.

15 *Ex parte Chapman*, 601 S.W.2d 380, 382-83 (Tex. Crim. App. 1980);

16 See Tex. Code. Crim. Proc. arts. 11.24, 11.64; Tex. R. App. P. 31.1 through 31.7; *Ex parte Castellano*, 321 S.W.3d 760, 763 (Tex. App—Fort Worth 2010, no pet.).

17 See, e.g., *Ex parte Amador*, 326 S.W.3d 202 (Tex. Crim. App. 2010) ("claim preclusion").

18 *Ex parte Watkins*, 73 S.W.3d 264, 272 (Tex. Crim. App. 2002) ("issue preclusion").

19 *Ex parte Quintana,* No. 08-08-00227-CR, 2009 Tex. App. LEXIS 7883 (Tex. App.—El Paso Oct. 8, 2009, pet. ref'd) (not designated for publication) (although the validity of using the writ process was not addressed).

20 Tex. Code Crim. Proc. art. 11.46; *Ex parte Smith*, 178 S.W.3d at 801, referencing 43B George E. Dix & Robert O. Dawson, *Texas Practice*; Criminal Practice and Procedure §47.01, at 197 (2d ed. 2001).

21 See Tex. Code Crim. Proc. art. 11.25.

22 *Ex parte Doster*, 303 S.W.3d 720, 721 (Tex. Crim. App. 2010).

23 *Ex parte Weise*, 55 S.W.3d at 619 (pretrial habeas cannot be used to assert constitutional right to a speedy trial); *Ex parte Delbert*, 582 S.W.2d 145, 145-46 (Tex. Crim. App. 1979) (no interlocutory review, by mandamus or habeas, of ruling on statutory right to speedy trial).

24 *Ex parte Weise*, 55 S.W.3d at 620-21.

25 *Ex parte Tamez*, 38 S.W.3d 159, 160 (Tex. Crim. App. 2001), and cases cited therein.

26 *Ex parte Smith*, 178 S.W.3d at 799.

27 *Ex parte Smith*, 185 S.W.3d at 893.

28 *Miller v. State*, No. 11-07-00369-CR, 2008 Tex. App. LEXIS 1698 (Tex. App.—Eastland, March 3, 2008, no pet.) (not designated for publication). Judge Onion provide a useful discussion of the *in pari materia* doctrine in *Ex parte Wilkinson*, 641 S.W.2d 927 (Tex. Crim. App. 1982).

29 See *Ex parte Conger*, No. 05-10-00938-CR, 2010 Tex. App. LEXIS 6440 (Tex. App.—Dallas, Aug. 9, 2010, no pet.) (not designated for publication).

30 *Ex parte Lizcano*, No. 05-07-00720-CR, 2007 Tex. App. LEXIS 6893 (Tex. App.—Dallas, Aug. 28, 2007, pet. ref'd) (not designated for publication).

31 *Ex parte Conner*, 439 S.W.2d 350 (Tex. Crim. App. 1969).

32 *Kelson v. State*, 167 S.W.3d 587, 591 (Tex. App.—Beaumont 2009, no pet).

33 See Tex. Code Crim. Proc. art. 11.64.

34 See Tex. R. App. P. 73.1.

35 See Tex. Code Crim. Proc. art. 11.14.

36 See *Ex parte Golden*, 991 S.W.2d 859, 861-62 (Tex. Crim. App. 1999); *Ex parte Skinner,* No. 13-08-00282-CR, 2009 Tex. App. LEXIS 6340 (Tex. App.—Corpus Christi Aug 13, 2009, no pet.) (not designated for publication).

37 See *Dodson v. State*, 988 S.W.2d 833, 835 (Tex. App.—San Antonio 1999, no pet.); *Ex parte Hawkins*, 885 S.W.2d 586, 588 (Tex. App.—El Paso 1994, no pet).

38 See Tex. Code Crim. Proc. arts. 11.27, 11.28, 11.29, 11.30 & 11.37.

39 See Tex. Code Crim. Proc. art. 11.59.

40 See Tex. Code Crim. Proc. art. 11.32; *Saucedo v. State*, 795 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

41 See Tex. Code Crim. Proc. arts. 11.39 & 11.44 (anticipating action by the State).

42 See, e.g., *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990) (suppression rulings).

43 See Tex R. App. P. 33.1.

44 Tex. Code Crim. Proc. art. 2.01.

45 See *Ex parte Countryman*, 226 S.W.3d 435 (Tex. Crim. App. 2007); but see *Ex parte Martin*, 6 S.W.3d 524 (dismissal with prejudice).

46 See Tex. Code Crim. Proc. art. 11.15.

47 See Tex. Code Crim. Proc. arts. 11.17, 11.34, 11.35 & 11.36.

48 See Tex. Code Crim. Proc. arts. 11.10 & 11.11; *Ex parte Werne*, 118 S.W.3d 833, 836 n.1 (Tex. App.—Texarkana 2003, no pet.).

49 In considering the options, a trial court might seek guidance from art. 11.07, §3(d).

50 See *Manzi v. State*, 88 S.W.3d 240, 251-53 (Tex. Crim. App. 2001) (Cochran, J., concurring).

51 See Tex. Code Crim. Proc. art. 11.44.

52 *Id.*

53 *Ex parte Alt*, 958 S.W.2d 948, 950 (Tex. App.—Austin 1998, no pet.).

54 *Ex parte Hargett*, 819 S.W.2d 866, 868 (Tex. Crim. App. 1991).

55 See *Ex parte Lewis*, 196 S.W.3d. 404, 405 (Tex. App.—Fort Worth 2006, no pet.).

56 *Id.*

57 See, e.g., *Ex parte Rhodes*, 974 S.W.2d 735 (Tex. Crim. App. 1998) (State appealed grant of habeas relief on grounds of double jeopardy).

58 See Tex. Code Crim. Proc. art. 42.01; *State v. Fowler*, 97 S.W.3d 721 (Tex. App.—Waco 2003, no pet.) (dismissing State's appeal from pretrial habeas ruling grating relief on grounds of no probable cause).

59 See, e.g., *Ex parte Ellis*, 309 S.W3d at 71; *Ex parte Rhodes*, 974 S.W.2d at 866.

60 TDCAA's *State's Appellate Manual* includes a very useful chapter on writs of mandamus written by Tarrant County Appellate Chief Chuck Mallin. It is available at www.tdcaa.com/publications.

61 See, e.g., *State ex rel Vance v. Routt*, 571 S.W.2d 903, 907-908 (Tex Crim. App. 1978) (requiring that no other adequate remedy at law be available and the act that the realtor seeks to compel be ministerial, rather than discretionary, in nature).

62 *Padilla v. McDaniel*, 122 S.W.3d 805, 808 (Tex Crim. App. 2003).

63 *Ex parte Alt*, 958 S.W.2d at 950.

News Worthy

TDCAA's seminar schedule for 2011

Prosecutor Trial Skills Course, July 17–22, Austin (Radisson Town Lake).

Advanced Advocacy, August 8–12, Waco (Baylor Law School).

Annual Criminal & Civil Law Update, Sep. 21–23, Corpus Christi (Omni Bayfront and Marina).

Key Personnel & Victim Assistance Coordinator Seminar, November 2–4, Houston (Westin Galleria).

Elected Prosecutor Conference, Nov. 30–Dec. 2, Dallas (Sheraton Dallas).

Plus:
Updated DWI Regional Trainings with W. Clay Abbott throughout the year and Legislative Updates starting July 22 in Austin. See www.tdcaa.com/training for more information on these seminars and more. ❇

Crime Victims' Rights Week recap

By Suzanne McDaniel
TDCAA Victim Services Director

Crime Victims' Rights Week provides an opportunity to honor victims and survivors of crime. It also offers a major avenue to improve public perception of the criminal justice system by offering information about victim rights, services, and resources from the prosecutor's office. Spreading the word about services and the prosecution's involvement also encourages increased cooperation among law enforcement agencies, criminal justice professionals, medical associations, and social service agencies—all integral partners in ensuring that victims receive all available assistance.

Special thanks go to Bexar County VAC Cyndi Jahn, who is also our Victim Services Board Chair, who produced multiple events during San Antonio's Crime Victims' Rights Week and then volunteered to write an article about it for this publication. (See page 30 for her inspiring summary of her office's CVRW events.) Thank you also to DeAnna Browning of the Henderson County District Attorney's Office who sent information about their activities.

Next year's observance is April 22–28, 2012. It's not too early to contact your partners and start planning a press release and conference, a memorial, a walk or run, public service announcements, brochures, or multiple events. Cyndi will tell you that it is much easier to get emergency help for a victim from another agency when you have established a relationship with that agency. Crime Victims' Rights Week is an opportunity to do just that. The Office for Victims of Crime has sample press releases, suggested activities, speeches, and more available for you to download at http://ovc.ncjrs.gov/ncvrw2010/themedvd.html. You can also contact me and I'll be glad to connect you with our visionary VACs.

Does your office handle protective orders?

Ann Landeros, Domestic Violence Resource Attorney at the Office of Court Administration, wants to let you know about two OCA projects that are relevant to TDCAA members who handle protective order cases.

One is the Texas Remote Interpreter Project (TRIP), which is in a pilot phase in the Third Administrative Judicial Region. TRIP provides free licensed Spanish court interpretation for county and district courts handling civil cases involving intimate partner violence. The court can enroll in the TRIP program and schedule interpreter services by visiting OCA's webpage at www.courts.state.tx.us/oca/DVRA/trip.asp. OCA wants prosecutors handling protective order applications in the third region (Austin, Bell, Blanco, Bosque, Burnet, Caldwell, Colorado, Comal, Comanche, Coryell, Falls, Fayette, Gonzales, Guadalupe, Hamilton, Hays, Hill, Lampasas, Lavaca, Llano, McLennan, Milam, Navarro, San Saba, Travis, and Williamson Counties) to be aware that this service is now available for court hearings with Spanish-speaking participants. The service cannot be used to supplant existing licensed court interpretation (if the service is provided at no charge to the parties) but can be used to replace court-paid interpreters who are not licensed. Once the program is rolled out statewide, it will offer interpretation in languages other than Spanish through the commercial Language Line service.

The second is the Protective Order Reporting Project. The percentage of protective orders (POs) that are entered into the DPS database (TCIC), and subsequently forwarded to the federal criminal database, is quite low; DPS estimates that less than 30 percent of the protective orders issued actually are entered into TCIC. In large part, the problem is due to the failure of the applicant or the applicant's attorney to submit the identifying information required by Tex. Fam. Code §85.042 and Tex. Gov't Code §411.042(b)(6) (the respondent's name, sex, race, date of birth, height, weight, eye color, and hair color) to the court clerk. This information should be submitted on the DPS Protective Order Data Entry Form and provided to law enforcement along with the signed protective order. Without that identifying information on the data entry form, the TCIC system will not accept any information about the protective order. As the protective order usually lacks the required identifiers, the PO alone is (almost always) ineffective for pur-

poses of TCIC. Among the many ramifications of this situation, failure to report POs to the federal criminal information database may result in reduction of Texas' Byrne Justice Assistance Grant funding. The OCA is trying to bring this problem to the attention of the judiciary, court clerks, and prosecutors in hopes that we can reduce all the adverse consequences of the problem and avoid the Byrne Grant funding penalty.

Ann feels that prosecutors' cooperation is essential to the success of both these projects and looks forward to working with you. Please contact her at ann.landeros@txcourts.gov or 512/936-6390 for more information.

Help is on the way

Each week I get interesting questions from the membership. This week I received an inquiry from someone who just started her job; I also got one from a seasoned prosecutor who was stumped and curious what others in the same spot would do. Good news for both newbies and veterans: There's a new resource for all experience levels that's available at your convenience. The Office for Victims of Crime has just published "Gaining Insight, Taking Action," a great compilation of three training DVDs and a companion guide to enhance victim assistance skills. You can download the guide at www.ovc.gov/publications/infores/pdftxt/GainingInsight.pdf, and information about ordering the three companion DVDs (free with a $5 shipping and handling charge) is available at www.ncjrs.gov/App/shoppingcart/ShopCart.aspx?item=NCJ .

Here's the content outline of the training, originally offered at the National Victim Assistance Academy:

Communicating With Victims of Crime

- Helping Victims Regain Control
- Listening With Compassion
- Understanding the Impact of Trauma
- Building Trust
- Becoming Aware of Communication Barriers

Meeting the Needs of Underserved Victims

- Creating Services for the Deaf and Hard-of-Hearing Community
- Providing Services to Isolated Crime Victims
- Bringing Hope to Urban Communities
- Empowering Immigrant Women To Speak Out
- Reaching Out to Crime Victims With Disabilities
- Providing Services to Victims of Hate and Bias Crimes
- Reaching Out to Victims of Financial Crimes

Substance Abuse and Victimization

- Relationship Between Substance Abuse and Victimization
- Techniques for Assisting Victims Who Abuse Drugs or Alcohol
- Importance of Collaboration in Assisting Victims With Substance Abuse Issues

I know I've gotten questions about all these issues, and this is a great primer or refresher course, and I hope you take advantage of it. Please let me know your thoughts and suggestions for our developing Web page on victim services, and have a wonderful summer.

U-Visa questions

We've recently fielded some queries about U-Visas, documents for U.S. immigrants who are victims of serious crimes. Someone granted a U-Visa is given legal status to reside and work in the United States for up to four years.

Because federal guidelines for these visas are broad, state prosecutors' offices have a lot of leeway in granting or denying them (though there is a yearly limit of 10,000 U-Visas nationwide). We want to know how various jurisdictions deal with U-Visas, so please email me at mcdaniel@tdcaa.com with answers to these questions:

- Does your office handle U-Visa applications, or does another local victims services agency do it?
- Has your office established policies and procedures on U-Visas? Or is each application treated on a case-by-case basis?
- Who is responsible for them in your office, an attorney or a VAC?
- How do you deal with older cases?
- How many such visas does your office process in a week or a month?
- Do you have any exemplary cases that you would share?
- What are your major concerns with processing U-Visas?

We hope to publish an article on this topic in the near future but need your help and input, so please drop me a line soon. ❇

A new test in *Michigan v. Bryant* for what statements to law enforcement are testimonial

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

It has now been seven years since *Crawford v. Washington*[1] sketched the broad outlines of a new approach to confrontation. This spring, in a case called *Michigan v. Bryant*,[2] the finer details are beginning to emerge, and not everyone is happy about it. The case is both significant and surprising. It is significant because it sets out the test that courts must now use to determine whether the Confrontation Clause bars admission of an out-of-court statement to law enforcement, and it is surprising because it resurrects the rationale for confrontation that most readers thought *Crawford* made irrelevant.

The starting point for *Bryant*

Bryant, like *Crawford* and *Davis/Hammon*[3] before it, deals with statements made to law enforcement, so it begins with those precedents. Because the text of the Sixth Amendment's right to confrontation applies to "witnesses against" the accused, *Crawford* reasoned that those who function as witnesses (i.e., those whose out-of-court statements at trial are "testimonial") must be in the position of a witness—on the witness stand, subject to cross-examination.[4] Statements made during police interrogations, such as the recorded, *Miranda*ized, stationhouse interview at issue in *Crawford*, qualified as "testimonial," requiring confrontation or the witness's unavailability and a prior opportunity for cross-examination.[5] But *Crawford* left unanswered what types of statements made to law enforcement would be testimonial and thus subject to confrontation.[6]

Then in *Davis*, the court offered a circumstance where statements to law enforcement would *not* be testimonial: when the primary purpose of the interrogation was to enable police to respond to an ongoing emergency.[7] There, the court agreed the statements of a domestic violence victim were nontestimonial when they came in a 911 call reporting an ongoing assault. But in the companion case *Hammon*, the court found another domestic violence victim's statements testimonial when they were made to a responding officer after the immediate threat from her husband had been neutralized.[8] When the judges considering *Bryant* attempted to apply these two precedents, they were in sharp disagreement, even about whether there was an ongoing emergency.

The facts in *Bryant*

Around 3 a.m., police were dispatched to a gas station on a report of a shooting. As officers arrived, they went directly to Anthony Covington, who had been shot in the abdomen and who was lying next to his car in the parking lot. He was in a lot of pain and had difficulty breathing. Each officer asked Covington, "what happened," "when," "who shot you" and "where?" Covington told them that Richard Perry Bryant had shot him about 25 minutes earlier at Bryant's house. He said he had been talking to Bryant through the back door of the house and when he turned to leave, he had been shot through the door. He then drove himself to the gas station. This conversation took about five or 10 minutes and ended when paramedics arrived. Covington died at the hospital a few hours later. His statements to police were admitted at Bryant's trial for murder over objection that they violated his right to confront Covington.[9]

The new test

A five-judge majority on the Supreme Court, led by Justice Sonia Sotomayor, held that Covington's statements were nontestimonial.[10] The majority adopted a test for future cases to distinguish which statements to law enforcement are testimonial. Under the test, courts must consider the circumstances of

the encounter, the questions and statements of the participants, and their actions and ultimately determine the primary purpose of the interrogation, as viewed by reasonable participants at the time (favoring neither the perspective of the declarant nor the interrogator).[11] The circumstances of the encounter include whether there is an ongoing emergency (which should heavily influence the "primary purpose" question)[12] and the level of formality to the conversation. The court observed that while formality makes it more likely that both the questioner and declarant knew the statements were produced for a later trial, informality will not by itself render a statement nontestimonial.[13]

The majority's approach is significant because it clarifies that resolving an ongoing emergency, while an important factor, is not the only purpose of a conversation with law enforcement that will render such statements nontestimonial.[14] As long as the purpose of the conversation is something other than making or procuring an out-of-court substitute for trial testimony, the statement will be nontestimonial.[15] Surprisingly, the court added that the hearsay exceptions (think present sense impression, excited utterance, statement for medical diagnosis or treatment, and statement against interest) may provide such "other" purposes,[16] resulting in a statement that is admissible despite the lack of confrontation. This idea incited venom from Justice Antonin Scalia, who dissented in *Bryant* and authored both *Crawford* and *Davis*.[17] Undoubtedly, the idea is reminiscent of the very scheme rejected in *Crawford*, where confrontation could be dispensed with if a statement fell within a "firmly rooted" hearsay exception or had "particularized guarantees of trustworthiness."[18] Scalia was disturbed still further by the majority's references to reliability—a concept he may have thought *Crawford* banished from the court's vocabulary.[19] The majority reasoned that because the right of confrontation exists to thwart fabrication, it is logical that confrontation (much like the hearsay rules) should give way when the circumstances make the chances of fabrication significantly less likely.[20] Because the utility of confrontation is quite low in such circumstances (as when everyone's focus is on the emergency), it makes sense that the Confrontation Clause would not bar admission of the statement.

How *Bryant* differs from *Roberts*

This may very well be a shift away from C*rawford*'s focus on confrontation for its own sake, but it also reflects a concern that two of the justices expressed during oral argument in *Bryant*, a concern that there should be a rationale to undergird why certain statements are testimonial and others are not.[21] In *Bryant*, reliability justifies why nontestimonial statements are exempt from confrontation. Despite Scalia's cries to the contrary, this is entirely consistent with *Crawford*. Even *Crawford* recognizes that the Confrontation Clause's "ultimate goal is to ensure reliability of evidence."[22] And each time *Crawford* appears to make reliability irrelevant, it does so with the limitation "[w]here testimonial statements are involved."[23] Unlike *Ohio v. Roberts*, the *Bryant* test is more than simply replacing confrontation with reliability or trustworthiness. Under *Bryant*, the judge is to determine the overriding purpose of the conversation with law enforcement. If the primary purpose is something other than creating an out-of-court substitute for trial testimony, then the person making the statement is not being a witness against the accused, and thus the statement is outside the scope of the confrontation right, as *Crawford* and *Davis* indicate. The primary purpose of the interrogation—not vague notions of reliability as Scalia contends[24]—is what determines if a statement is an out-of-court substitute for trial testimony. At the same time, if the primary purpose of the interrogation is something like resolving an emergency (rather than creating evidence for trial), it makes sense that such nontestimonial statements would be beyond the reach of the Confrontation Clause because the purpose of confrontation (to ensure reliable evidence) has already been satisfied.

Regardless if the majority view can be fully harmonized with *Crawford*, it is the view that ultimately prevailed, along with the suggestion that the hearsay exceptions might provide a primary purpose that would render a statement nontestimonial. Prosecutors would do well to consider this angle, especially as we have to meet a hearsay exception for admission of most out-of-court statements anyhow. But given that *Bryant* applies only to statements to law enforcement,[25] the expansion of

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the "primary purpose" test into hearsay-exception purposes is unlikely to open the floodgates to admission of out-of-court statements. In the right case, however, a domestic violence victim and a responding police officer might engage in part of their conversation for the purpose of medical treatment. Another reason that looking to the hearsay exceptions is unlikely to make more statements admissible is because the "primary purpose" test is determined not from the perspective of the declarant or the interrogator but from a "combined approach."[26] So it will not be sufficient for a reasonable declarant to lack a testimonial purpose (such as when the declarant is still under the stress of a startling event) if a reasonable officer would have had the primary purpose of producing a substitute for trial testimony.

Finally, prosecutors should think broadly about a possible ongoing emergency and ask whether all potential threats to potential victims have been neutralized at the time of the declarant's statements to the police. Even in the context of domestic violence cases, the court in *Bryant* holds the door open to the possibility of an ongoing emergency after the defendant has stopped assaulting the victim and has left the premises. It might make a difference if the defendant knew police were called or if there were a significant risk that he might return to assault the victim again. In *Bryant*, although the officers did not act as if they were worried about a possible gunman at the gas station, the majority held that there was still an ongoing emergency. And, in case of doubt (such as whether the dying victim would have had the primary purpose of creating a substitute for trial testimony), the court seemed to err on the side of the witness having a nontestimonial purpose.

Although *Bryant* has filled in more of the details and readjusted the course that *Crawford* originally set, how the majority's test will work in application still remains to be seen. What is clear is that Justice Scalia is no longer firmly at the helm, and that is likely to be good news for prosecutors. ❇

Endnotes

1 *Crawford v. Washington*, 541 U.S. 36 (2004).

2 *Michigan v. Bryant*, 131 S. Ct. 1143 (2011).

3 *Davis v. Washington*, 547 U.S. 813 (2006) (decided jointly with *Hammon v. Indiana*).

4 *Crawford*, 541 U.S. at 51.

5 *Crawford*, 541 U.S. at 68-69.

6 *Id.*

7 *Davis*, 547 U.S. at 822.

8 *Davis*, 547 U.S. at 829-30.

9 *Bryant*, 131 S. Ct. at 1150-51.

10 *Bryant*, 131 S. Ct. at 1150.

11 *Id.* at 1162.

12 *Id.* at 1162.

13 *Id.* at 1160.

14 Id. at 1155 ("But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony.) Many had read *Davis* as setting out a dichotomy of possible purposes: either enabling police to meet an ongoing emergency (which would make the statements nontestimonial) or creating a record for trial (which would make them testimonial). See *Davis*, 547 U.S. at 822.

15 *Bryant*, 131 S. Ct. at 1155 ("Where no such primary purpose [of creating a substitute for trial testimony] exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.").

16 Actually, the court states that the hearsay rules "will be relevant" in making the primary purpose determination. *Id.* at 1155.

17 *Bryant*, 131 S. Ct. at 1174 (Scalia, J., dissenting) (calling majority opinion "a gross distortion of the law" that provides an "illogical roadmap" and arrives at an "incoherent" result by employing "a thousand unprincipled distinctions.")

18 *Ohio v. Roberts,* 448 U.S. 56, 66 (1980).

19 Justice Scalia wrote in *Crawford* that the right of confrontation "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

20 The court writes, "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Bryant*, 131 S. Ct. at 1157.

21 Oral argument in *Michigan v. Bryant,* 2010 WL 3907894, at *27 (Justice Kennedy), *34-35 (Justice Breyer), *37-38 (Justice Kennedy), also available at www.oyez.org/cases/20102019/2010/2009_09_150/argument.

22 *Crawford*, 541 U.S. at 61.

23 *Id.*, 541 U.S. at 61, 68.

24 *Bryant*, 131 S. Ct. at 1175 (Scalia, J., dissenting).

25 See *Bryant*, 131 S. Ct. at 1155 n.3.

26 *Bryant*, 131 S. Ct. at 1160-61.

What's the best advice you've ever gotten?

Patrick M. Wilson
County & District Attorney in Ellis County

Over the course of my last two years in law school, I was employed as a clerk in the appellate division of the Lubbock County Criminal District Attorney's Office. I simultaneously spent one summer interning in the trial division, and I got to know the staff well. Frank Webb was the homicide prosecutor at the time, and to say that Frank had a droll sense of humor would be an understatement. On my desk, holding my pens and pencils, still sits his gift of a coffee mug that reads: "Lubbock County Homicide: Our Day Begins When Yours Ends."

I have never forgotten Frank's three words of advice for an aspiring prosecutor: Document, document, document! He might have been kidding when he said them, but time and again during my career those words have proven to be the best advice I ever received.

Kaylynn Williford
Assistant District Attorney in Harris County

These are two pieces of advice I live with. One, find the weakest link in your case and figure out how to present a "worse case scenario" in voir dire. When you present this evidence in your case in chief, the jury will have already heard facts worse than the evidence you have, they will be prepared for it, and they won't see it as a problem. And two, always tell "the good, the bad, and the ugly" when presenting a case. You want to bring this information out first to your jury. It will establish credibility with jurors, and they will believe and trust you.

For the next issue, tell us about the scariest criminal you've ever encountered. Email your story (500 words or less) to the editor at wolf@tdcaa.com.

Lisa L. Peterson
County Attorney in Nolan County

Decades ago, Tom Bridges, the former DA in Aransas and Seguin Counties, was speaking at a seminar, and he made a comment that an effective county attorney listens to and tries to accomodate county commissioners. Each of them represents one-fourth of the county, and they are generally more in tune with the needs of the county than an official representing all of it (such as the county attorney). If they think that their precinct really needs something, it probably does and the best that the county attorney can do for the public is to help make it happen.

Geoffrey Puryear
Assistant District Attorney in Travis County

The best advice I ever received was from Williamson County Court-at-Law Judge Suzanne Brooks, a former Harris and Williamson County Assistant DA. She was the first judge I tried a case in front of as a misdemeanor prosecutor. After my first trial, a theft case, she advised me to make a trial notebook and update it after every trial. This notebook, she explained, should of course contain the facts of the case and the outcome. Most important, though, was to include a mistake you made during the trial and what you learned from it. This forces you as an advocate to examine your trial performance critically and improve those skills. I took her advice and still update my notebook after every trial. I won't say it has entirely eliminated repeat mistakes, but it certainly has been valuable in helping me become a better trial attorney.

Mikhal Gongora Abou-Sayed
Assistant District Attorney in Harris County

My aunt taught me at a very young age that it is better to admit your mistakes early, ask for help to clean up messes, and to ask questions rather than to guess. She worked as the office manager of her husband's law firm. They had me start out my summers in high school as a receptionist and moved me over the years through all of the different positions in the office. I was able to see that not heeding her advice could lead to bigger complications, especially in a law firm. While it is hard to admit when we are wrong, it is better to clean up a small mess rather than a mudslide, and it is always more efficient to ask how to do something rather than to do it wrong. I have appreciated her advice, both professionally and personally.

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Willie Mae Williams, PL
Office Manager and Professional Victim Assistance Coordinator in Colorado County

I could not just choose one piece of advice because so many shaped my life. My mother, Hertha Lee Katherine Perrino Axel, told me, "God made only one puzzle piece like you, so seek your place to fit into His puzzle, and the rewards granted will be unimaginable. Remember, my dear diamond in the rough, to always do what is right, even if you have to stand alone, because when you do God will fight your battle. Then that is when you will realize you were never alone, that God was always there."

My first grade teacher, Ethel Taylor, recited this poem to us daily:

Good, better, best
Never let it rest,
Until your good is better
And your better is best!

God should not receive
Anything less, than your
Good when it's better
And your better is your best!

My grandmother, Florence Axel, told me to never marry a man with children *unless* I love those children as much as I loved that man. Don't ask him to choose between them or you, she said, because ultimately you lose.

And my daddy, Willie James Axel, told me, "You can do and be anything you prepare yourself for. Believe in the abilities God has blessed you with."

Barry Saucier
Investigator in the Harris County District Attorney's Office

I had a field training officer when I first started who told me, "Temper your justice with mercy." I didn't really understand that quote until later in my career. I learned that oftentimes a police officer can have a much more positive interaction with a citizen when he's given the benefit of the doubt every once in a while and when appropriate.

Ted Hake
Assistant Criminal District Attorney in Hidalgo County

The best advice I ever received was given to me by a more experienced prosecutor when I began my career over 30 years ago.

When I, like a lot of other young attorneys, talked about wins and losses in cases, he told me that one of the most difficult things about being an prosecutor was that you cannot judge your performance by wins and losses, as there are many things that can affect the outcome which are simply out of your control. Examples of such matters include the facts of the case, how the indictment is drafted, the missing or unavailable witness, the witness who does not testify as expected, the way the case was indicted, the jury panel assigned to that case, the attorney on the other side, what that attorney does or does not do, the particular court to which the case is assigned, the particular judge who tries the case, rulings made by that judge, and changes in the law. As that experienced attorney then explained, the inability to control these and other factors which might affect the result of the case require a prosecutor to have enough self-confidence to realize that he had done his best in handling the case, regardless of the outcome.

Like other prosecutors, I have experienced the unpredictability of the outcome of cases at both the trial and the appellate level many times. Thus, over the years, I have seen many examples of the wisdom of the advice I received when I was beginning my career as a prosecutor.

Brody Burks
Assistant District Attorney in Limestone County

Professor Bob Destro was a polarizing figure for my ConLaw class in law school, partly because his politics were a mismatch for the student body. His lessons made no sense at the time but struck you later when you were trying to break through some thorny issue. He was prone to speaking in unintentionally profound and cryptic phrases, such as the only real advice that he gave for his assignments: "Work the facts." To a first-year law student neck-deep in hornbooks, this did not seem particularly useful. He also gave me the best advice I've ever been given.

"Is that what you want to do? Then do it."

You could easily dismiss that as nothing more than mere trope, and for two years, I did. It was the corny saying of someone who had worked a career full of exciting jobs and now had tenure. It was difficult to see how it applied to a struggling law

student looking at a disintegrating legal job market. I had gone to law school in Washington D.C. and knew that I wanted to come back to Texas and work as a prosecutor. I wanted to be in court, represent the State, and contribute my skills to a side of the legal profession that does more work and gets less glory than anyone else. I logged onto the TDCAA job bank, sent out résumés, and spoke with every professor. Once again, Professor Destro gave the same advice. "Is that what you want to do? Then do it."

I put that thought aside and interviewed, and interviewed, and interviewed. I interviewed at Hood County, Potter County, Hunt County, El Paso County, Houston County, the City of Bryan, Midland County, Guadalupe County, and Wichita County. After each interview and call back, a thin reject letter came in the mail and I was ready to give up. I had decided to stop interviewing and just hang my shingle to do defense work, but I was not at all happy about it.

The day I reached that decision, Delma Rios-Salazar in Kleberg County called to offer me a job as an assistant county attorney. The job was nine hours from my home and I would be the only assistant—yet it was exactly what I wanted to do. (Professor Destro's advice came floating back to me.) So I did it. And I haven't regretted a moment of it since. ❇

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He 'sinned against God and man' (cont'd)

been asleep when she was attacked, which is why it's possible she might not have known what had happened to her.)

Her ability to speak destroyed, Natalie nonetheless got up from the couch and started moving about the apartment, ignoring her son's pleas to remain still. She went into the bathroom first, taking tissues and wiping her nose and lips, smearing blood around the room in the process. Then she walked to the stairs and started up. Johnny went with her, staying right by her side, until Natalie reached her bedroom. There, she sat on the bed, quiet for a minute before reaching out and opening one of her drawers. She took out a purple nightgown, then stood and went into her bathroom. Johnny tried to stop her but Natalie wanted to change and closed the door on him, seemingly oblivious to her wounds and to the trail of blood she was leaving, knowing only that she didn't want her son to watch her change clothes. Johnny, terrified and confused, didn't want to push on the door to fight his battered mother, so instead he ran downstairs and told Susan to go up and be with her while he waited outside for the ambulance.

At some point during this confusion, Susan called Dennis Davis, whom she would later describe to police as a mutual friend. In fact, Susan worked for him at his recording studio, Studio D, and Natalie and Davis had recently ended a romantic relationship. Importantly, Susan did not include in her statement where he was when she called—at his studio a mile away or at his home in Onion Creek, more than 10 miles away. It was a detail she would forget forever.

Outside, as Johnny waited for the ambulance, a neighbor named Donn Chelli approached him, asked what was happening, invited him into his apartment, and offered Johnny a soda, which seemed bizarre to Johnny even amidst the insanity around him. Around the time the ambulance arrived, roughly 10 minutes after Susan's call and after Johnny had left Chelli's apartment, Chelli himself called 911 and reported seeing a 6-foot-tall, burly man looking in people's windows. The man, he told police, was carrying a child's baseball bat and was wearing a T-shirt bearing the name of a local band, The Lotions. Around this time, too, Dennis Davis showed up but by all accounts never went inside the apartment where Natalie was treated, instead staying outside until after she was loaded into the ambulance.

Johnny rode with her to the hospital, but the only thing she managed to say was something about her feet, which Johnny took to mean that the straps on the gurney were too tight. At the hospital, just before she was wheeled into the emergency room,

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Johnny asked his mother for a kiss. She seemed to understand, and they kissed for the very last time.

Natalie lapsed into a coma moments after they arrived at Brackenridge Hospital and remained in that state for two weeks before life support was removed. Her sisters were by her side, but Johnny was unable to bear that last moment and wasn't in the room.

The initial investigation

Detective Eddie Balagia was put in charge of the case. With no signs of a break-in, nothing stolen, and no evidence of sexual assault, the crime scene pointed to someone with a grudge, but there were no obvious candidates. Dennis Davis, Natalie's former boyfriend, gave a statement but appeared to have been eliminated early on because of his eagerness to help the investigation and, more importantly, because he didn't match the description of the man Chelli saw. Put simply, Natalie did not seem to have a single enemy in the world and was adored by everyone who ever met her. Complicating matters, Balagia and the other five homicide detectives that were in the unit back then were pulled every which way that weekend as the city suffered four murders in as many days.

They thought they had a break when, a month later, the neighbor, Donn Chelli, again dialed 911. He said he'd just seen the man wearing the Lotions shirt from the night of Natalie's assault, so police rushed to Barton Hills and found Gerald Kruz. A transient and drunk, Kruz was never a serious suspect in Natalie's death and was soon eliminated from the investigation.

In early 1986 police latched onto their first real suspect. John Martin "Marty" Odem had been caught after breaking into a girl's apartment and raping her. Odem lived in the same apartment complex as Natalie, and when detectives probed his personal life they found out that maybe he'd encountered her once, that most certainly he had a temper, and that he even owned a small baseball bat. When shown his photo, Chelli said Odem "looked like" his mystery Lotions man, but he couldn't be sure.

Detectives pushed Odem hard, and while he confessed immediately to the rape of the other woman in Natalie's apartment complex, he consistently denied hurting Natalie. And police were never able to link him either to the crime scene or, definitively, to Natalie herself. In 1986, Odem was sent to prison for the rape, and four years later, in November 1990, Detective Balagia succumbed to cancer. The case went cold.

The cold case heats up

In 2006, the Austin Homicide tip line received an anonymous call. The caller, a woman, directed police to look into the case again and to look specifically at Dennis Davis, Natalie's ex-boyfriend. The woman said she'd been burdened by something that Davis had said to her, crying and sobbing, in March of 1991: that he'd "sinned against God and man."

Cold Case Detective Tom Walsh had been assigned to Natalie's case and he picked up the reins. He began from scratch, interviewing as many of the original witnesses as possible. He also called the tipster back and discovered that she was Davis's own wife, Becky. Estranged when she'd made the call, she was now back with Davis and pretty quickly stopped cooperating with the investigation.

Walsh looked into Davis's initial statement given the day after the attack. In it, Davis accounted for his whereabouts on Friday night and also Saturday night: He was with a new girlfriend, Amparo Garcia-Crow. He'd spent the night with her at his place and had gotten up to rush over to Natalie's when Susan called, leaving Amparo to find her own way home. Walsh realized that this alibi was never checked back in 1985.

So Walsh called and then met with Garcia-Crow and found her to be eloquent and articulate and a very active writer, musician, and busy member of Austin's arts community. Not surprisingly, she didn't remember that night. But, she said, back then she kept detailed diaries and would have had one for that time period—should she see if she could find it?

Sure enough, in her attic, she found the diary covering that month, and a quick perusal showed that Davis wasn't with her. Not only was he not mentioned (in fact there were no entries for that weekend), but she also had written on October 14, in a rather distracted way, that Davis's friend Natalie had been assaulted. She even remembered the call from Davis telling her about it, but in her diary she didn't tie it to any event such as Davis getting up early and leaving her stranded at his house. That would have been a huge deal, she told Walsh, both the attack and being left like that, and

absolutely would have made it into her journal. And, just as importantly, looking back at the diary, she remembered spending that weekend with an ex-boyfriend, a "honeymoon" period rekindling their relationship. She did not see Davis, let alone spend the night with him. Of that she was 100-percent sure.

Walsh talked to other witnesses, too, including Davis's best friend, Jimmy Rose. Rose said he'd seen Davis have a screaming fight with Natalie on Sixth Street, just hours before she was assaulted, an argument that never made it into Davis's own statement. And the detective talked another former girlfriend of Davis's, Gelinda Squires (now Mudgett). Gelinda had dated Davis for several years in the late 1980s, and she dropped a bombshell on Walsh: Davis had flat-out admitted to her that he'd killed Natalie. Just as he'd broken down in tears with his now-wife, Becky Davis, he'd done the same with Gelinda, but this time expressly naming Natalie Antonetti. As if that weren't enough, Gelinda said he'd also assaulted her after their break-up, with a bat, as she lay sleeping. The similarity with Natalie's attack was obvious and chilling.

Eventually Walsh went to interview Davis himself. With prosecutor Darla Davis (no relation to Dennis) and fellow cold case detective Steve Meaux, he traveled to Pennsylvania where Davis was serving a short sentence for DWI. The meeting was recorded and lasted almost six hours. Walsh began by making sure there was plenty of food and drinks, bringing in pizza and sodas while they chatted about music and books. They wanted to take his temperature at the start of the interview, make him comfortable, and lower his guard.

When they got down to business, Davis said a number of things that would damage him at trial. First, he denied ever owning a small baseball bat, acting like the question was ridiculous. He was equally adamant about being with Garcia-Crow that night, sticking to that purported alibi throughout. He wavered on his argument with Natalie, first denying it had happened, then finally admitting it may have happened on the day she was killed. He also acknowledged writing a note and leaving it at her door, a note that said: "Natalie—you can go to hell and take Doug [her male friend] with you. … If you don't have the brains & the self-respect to see thru [sic] his bullshit then 'fuck you.'" It was signed "D. D." He agreed, too, that he used to go into "rages" when he was younger.

Tellingly, while Davis never admitted to Walsh that he'd killed Natalie, at the end of the interview he said, "You have everything you need: the jealous boyfriend, the rages, the note, the busted alibi …" We did have all of that, he was right, but we had a lot more as he'd find out at the trial.

Davis was indicted by a grand jury for murder on June 30, 2009. Darla Davis presented the case, and Gelinda Mudgett, Davis's ex-girlfriend, testified.

My involvement

I went looking for this case. Not this *actual* case, but any cold case. They have always fascinated me and as a fairly new prosecutor (about one year on the job), I wanted to help out on one, so I let it be known I was available for hire, so to speak.

My bosses seemed happy to let me run with it, which I took as a sign of great trust, until I looked at the evidence and wondered (for a moment!) if I'd been horn-swoggled. A 25-year-old case with no biological evidence or eyewitnesses was never going to be easy, but despite my concerns, those further up the chain were immensely helpful and supportive from start to finish.

One of the first things I did was meet Johnny Goudie, the victim's son. A musician in several local bands, he looks the part: tousled hair, shades, and a laidback attitude befitting Austin. He was also one of the most cooperative, intelligent, and active victims I've worked with. His family, too—Natalie's sisters from Houston and Johnny's cousins—showed up to hearings. The support he had was tremendous, and while it might have put more pressure to win the case, it really didn't—Natalie's family trusted that we were doing the right thing, the right way, and that justice would follow. And even though the case took almost two years to get to trial, Johnny never showed his frustration, partly because I did my best to explain why the case was taking so long.

Two tricky witnesses

The main reason for the delay was Donn Chelli, Natalie's neighbor way back when.

Neither the defense nor the Austin Police Department (APD) detectives were able to contact him. They tracked him to Nevada and

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then to Los Angeles, but his physical address was a P.O. box in a strip mall. We even asked the L.A. district attorney's office to help find him but they, too, drew a blank. He became known as "the Chelli problem."

Our position was that he was unreliable as a witness and probably made up the story about seeing a peeping Tom the night of Natalie's attack. We came to this conclusion based on the fact that he'd supposedly seen the mystery peeper in the Lotions shirt at about 4:30 a.m. but had not called 911 for over an hour. And during that time, he'd collared Johnny and no doubt gotten details about what happened to Natalie from him. It was my first thought, and Walsh agreed, that Chelli had made up the story of the burly man looking into people's windows to get himself into the investigation. Certain things about Chelli's past (instances of delusional behavior and false reports over a period of 30 years) made that approach perfectly reasonable. But the real problem was that the defense was desperate to get his testimony into evidence because the man he had described simply didn't fit Davis's description.

Eventually, the defense asked Judge Mike Lynch to allow the statement itself to be read into evidence, based on both parties' inability to bring Chelli to court and on simple fairness grounds. Judge Lynch did so, acknowledging the unusual nature of the ruling and with the understanding that he was open to our concerns about rebutting Chelli's testimony.

Interestingly, a few months prior to trial, Chelli sent me a fax. In it, he reiterated his original statement and mentioned several health concerns that prevented him from coming to Austin. While the fax didn't contain a physical address, it did include his phone number. Over the next few weeks my second chair and court chief, Efrain De La Fuente, and I had numerous phone conversations with him. During those talks Chelli changed several parts of his statement, saying he'd never seen Johnny, let alone spoken to him, and telling us that the mystery Lotions man wasn't 6 feet tall, as his statement said, but 6-foot-3. Our pleas were not enough to convince him to come to trial, however, and he never revealed his actual whereabouts so that we could subpoena him.

Other than the Chelli problem, the main pretrial issue was Becky Davis's assertion of the spousal privilege. Despite making the call that started the reinvestigation, Ms. Davis was now back with her husband and supporting him fully. Importantly, she never retracted her statement that Dennis had said he'd "sinned against God and man," but rather she was now claiming they were common-law married at the time the statement was made back in 1991.

In March of this year, Judge Lynch presided over a hearing on this issue. Becky Davis confirmed that her husband had made that statement in March of 1991, a few months after they met. They'd traveled together and represented they were married, she said, and furthermore she'd been to the hospital earlier that year and told the doctors they were married. On cross-examination I asked how many times she'd been to the hospital in 1991, and she said once. She also assured the court that if we could somehow go back in time and find her admittance paperwork, it would show she was married and that Dennis Davis was listed as her emergency contact.

At that point, I pulled out a copy of the document (business records affidavit attached) and asked her to read those relevant details to the court: that she'd said she was single and listed her father in Arizona as the emergency contact. A couple of weeks later the judge ruled that she could not invoke the spousal privilege to avoid testifying.

The trial

The trial began on Monday, April 11. We picked the jury in the afternoon, and the focus of voir dire was simple: This was a cold case, so I wanted to know if anyone would hold the State to a standard higher than beyond a reasonable doubt. I'd expected DNA to come up, of course, but a couple of people said DNA was an absolute must for a conviction in any cold case—even if the victim and killer knew each other and even if we could show a video of the actual killing! When even the judge was unable to rehabilitate them, these folks were struck for cause.

On Tuesday we began with opening statements. I wanted to tell the story to the jurors, to let them see that Dennis Davis was the only possible killer and that he'd made a series of mistakes (I called them "breadcrumbs" he'd left behind) that led police to his door: the false alibi, lies in his interview, and admissions to two women. As French author Albert Camus put it, "A guilty conscience needs to confess."

We then started the evidence by setting the scene. Johnny testified first, talking about his close relationship with his mother, Natalie, and what it was like finding her battered and bloody. We admitted 60 photos of the crime scene through Johnny, an ordeal he managed brilliantly. Susan Otten, Natalie's roommate, testified next, reinforcing the horror of that scene. We ran into a problem with Susan, though, one we'd come across throughout this case: She couldn't remember a thing. Her memory was so poor it triggered Texas Rule of Evidence 803(5), the recorded recollection exception to the hearsay rule, which allowed her to read her statement into evidence. Through her we also played the 911 tape from 1985; crackly and hard to hear, it was nevertheless an effective way to take jurors back in time.

We then put on the crime scene artist to show a sketch of the apartment and a blood spatter expert to explain how the killer might not be covered in blood. His testimony was that because of the likely implement (a small baseball bat) and where Natalie was hit, any spatter would have been *away* from the assailant. We also called Dr. Robert Bayardo, the original medical examiner, who testified that a baseball bat could have been the murder weapon.

Our intention the next day was to connect Davis to the crime scene. We began with Detective Tom Walsh, who explained how the cold case unit works, how cases are assigned, and how detectives go about looking into such old cases. We then admitted a redacted copy of his videotaped interview with Davis. We'd worked with the judge and defense counsel to edit it, and the hour-long video contained clips from both the State and the defense. The jurors were glued to the big television, and I paused the tape occasionally to emphasize with Walsh certain of Davis's admissions: that he never owned a bat, he used to go into rages, he left the note, and he was jealous of Natalie's friendship with another man.

We then put on Jimmy Rose, Davis's best friend from the 1980s, who told jurors he'd seen Davis arguing with Natalie the night of the assault. On the stand he wavered, saying he now couldn't recall whether it was Friday or Saturday night. But he didn't waver when he confirmed that Davis had owned a small baseball bat.

Amparo Garcia-Crowe came next, and I entered her diary into evidence using (for the first and last time, I expect!) the "ancient documents" exception to the hearsay rule. She was a powerful witness as she was positive Davis wasn't with her that night—absolutely 100-percent sure.

The last witness of the day lived in the same apartment complex and suffered the same memory problems as Susan but managed to testify that she'd seen an old Chevrolet Malibu parked diagonally in the lot outside the building where Natalie was attacked about an hour before the assault. She never got a license plate number and couldn't remember the car's color or the year, but in the interview with Walsh, Davis had admitted owning a Malibu in the mid-'80s.

Thursday was the big day. We began with Becky Davis, who confirmed again the statement her husband had once made, though she tried to link it somehow to the death of his mother. She also told a story about Davis getting angry in their yard at home and swinging an axe-type implement over his head—in her words, not trying to hit her with it, just "aiming" at her. This reaffirmed one element of our theme: that when he didn't get his way, Davis flew into violent rages. Becky Davis couldn't provide any rational alternative explanation for her husband's statement, and she had, after all, initially linked it to Natalie's death. It was powerful evidence.

Next was our "star" witness, Davis's former fiancée, Gelinda Mudgett. Now married to a police officer in Arkansas, Mudgett is a successful realtor and member of the chamber of commerce, and she looked like a professional woman who was not excited about testifying and still pretty angry at some of the things Davis had done to her in the late 1980s. Most of those things, such as assaulting her at a party and threatening to blow her up with a hand grenade, were inadmissible, of course. Even so, mostly in response to the defense lawyer's questions, bits and pieces came out, and she was always adamant that yes, Dennis Davis had lain on the front porch of their house, sobbing and confessing to her that he'd killed Natalie Antonetti.

As the trial progressed, our hopes for a guilty verdict rose: The witnesses were doing great and a coherent picture of a violent and dangerous Dennis Davis was emerging.

The defense

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The defense began with a couple of witnesses who testified that in their opinions, Gelinda was not a truthful person. None of the defense's character witnesses had seen her for 20 years and all were friends of Davis, so we didn't dwell too long on cross-examining them.

Next defense counsel read into evidence Donn Chelli's statement. They also read in a stipulation regarding some of the changes he'd made to his statement in his conversations with us. Hearsay testimony all of it, but done to ensure that Davis received the fairest trial possible. The defense also put on its investigator, who produced title records for the Chevy Malibu Davis had owned, showing he'd registered it in 1987, two years after the assault.

Dennis Davis did not testify.

Rebuttal witnesses

We called three witnesses in rebuttal. One was possibly a first for prosecutors, at least in our office: a professor of neurology, Chuck Weaver, who testified about issues relating to eyewitness identification. Because the judge had decided to allow Chelli's statement in, Efrain and I thought we should address his testimony. It was clear Chelli was all over the place on some specifics, but he'd always been clear that the perpetrator was carrying a bat and wore a Lotions t-shirt. We realized, in something of a eureka moment, that Chelli probably *had* seen someone lurking around the apartment that morning: Dennis Davis.

This line of thinking crystallized when I decided to check on the details of Gerald Kruz, arrested back in 1985, the homeless man Chelli had said was a match for the mystery Lotions man. Sure enough, when I got his booking records I saw he was 5-foot-8 inches tall, the same height as the defendant. Weaver testified that in high-stress situations, in the dark, and where a person sees someone with a bat and a T-shirt they recognize, peripheral descriptors, such as height, weight, hair color, and hair length, are going to be less than reliable.

We then put on the police officer who'd arrested Kruz to prove up the details of his height and weight. And finally, I called a smartly dressed tech executive, Dale Hopkins, who, 25 years before, had been the founding member of one of the first-ever Christian heavy metal bands, a group who dressed like the members of KISS and had songs called, for example, "Crush the Head of Satan." He was a powerful witness, too, in negating the 1987 car registration document: He said he'd traded his Chevy Malibu to Davis in exchange for studio time on an EP. I introduced the EP, dated 1986, into evidence. My witness explained that if the EP had come out in March of that year, which he'd double checked, then they would have been recording throughout the latter half of 1985, putting the car in Davis's possession in about May of 1985, months before the assault. This contradicted Davis's assertion that he'd not owned the car before 1987, even though that was when he registered it.

Closing

In closing arguments, Efrain took the jurors back to the crime scene: no burglary, he said, no signs of a break-in, and no evidence of any sexual assault. Not even any defensive wounds on Natalie's hands or arms and no injuries other than to her head. Whoever had done this knew Natalie and was powerfully angry with her. In a rage.

The defense, quite properly, reminded jurors how old the case was and how memories can't be trusted over so many years. They emphasized the high burden of guilt and reminded jurors of the lack of physical evidence tying Davis to the scene.

When I stood to speak, I had one aim: to have the jurors convict Davis on his own words. I went through his statement, pointing out the lies and the omissions. I reminded them of his videotaped interview and urged them to look at it again, to take in his admissions of jealousy, rages, and the nasty note he left for Natalie. And then I, too, took them back to the crime scene and argued that no one in the world had a reason to hurt Natalie. No one except Dennis Davis. "This case is about jealousy. It's about rage, and it's about holding Dennis Davis accountable for the murder of Natalie Antonetti. And," I finished, "it's about time."

The jury was out for about three and a half hours before returning a verdict of guilty late on Friday afternoon.

We held the punishment hearing the following Monday, and I put on just two witnesses: Johnny and his aunt, Natalie's sister, Olga. They talked about her life, what she'd meant to them, and how much they missed her. Because 1985 parole law

applied (one-third, as opposed to one-half) I asked for a high sentence, 60 years. The defense had asked that he be given a glimmer of hope that he might get out and see his family again, though I reminded the judge he'd just had 25 years of freedom that he didn't deserve, 25 years of being with family that he'd denied Natalie. Davis stood impassive as Judge Lynch sentenced him to 36 years in prison.

Afterthoughts

This was, without doubt, the most challenging case I'd ever taken on, and I suspect it will remain at the top of the list. For that reason alone I was delighted with the result but even more important was the reaction of Natalie's family. This tight-knit group had come to all the hearings, stayed in constant contact, and sat through every moment of trial. Johnny, who'd remained stolid during his testimony, hugged me tearfully at the end.

He told me a story a week later that showed how much healing had occurred since the trial. After Natalie's death, her father (Johnny's grandfather) had stopped wearing colorful ties, instead opting for somber black ties in honor of his lost daughter every day for 25 years. But at a family gathering after the conviction, one of his other daughters gasped: The old man had put on a tie that was a soft shade of red. ❇

Preventing claims of ineffective assistance of counsel

What prosecutors can do during trial to ensure that justice is done

The assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. … The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"[1]

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

As prosecutors, we are charged that our duty is not to simply convict, but to see that justice is done. With that in mind, we take classes and read articles ensuring that we understand every last in and out of the Fourth Amendment's protections on searches and seizures, the Fifth Amendment's restrictions of interrogations, and the Eighth Amendment safeguard against cruel and unusual punishment. But we can sometimes forget that the Sixth Amendment is also an essential component in seeing that justice is done.

When I was asked to write an article on ineffective assistance of counsel, my first thought was that it seemed out of place for a *prosecutor* magazine. But if we take seriously our obligation to see that justice is done, then we must guard a defendant's Sixth Amendment rights as closely as any other. And more personally, nothing is more frustrating than winning a hard-fought case only to have it reversed for an error the State did not commit. Prosecutors have our own role to play, and the majority of defense attorneys do more than well enough on their own, but only when both sides of our adversarial system are playing their parts fully can we reach "the ultimate objective that the guilty be convicted and the innocent go free."[2]

So what follows are some tips to get prosecutors through situations that might otherwise result in a claim of ineffective assistance, taken from both caselaw and anecdotes. While it is far from an exhaustive list, I hope that it will provide a starting point in difficult situations.

1 Be proactive in providing discovery. A frequent ineffective assistance complaint is that the defense attorney did not obtain pretrial discovery. This is an easy issue for the prosecutor to help avoid simply by providing discovery as part of the case's preparation, regardless of whether a motion has been filed. If a discovery has not been picked up and trial is nearing, remind them to pick it up or simply mail it to the defense. Also, many offices have now switched to an open-file policy, not requiring formal discovery motions before providing access. This is very

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helpful in avoiding later complaints, but it needs to be documented to be useful. Note on the file when the defense attorney has viewed it, and put that on the record at the start of trial. "Your Honor, just for the record, we had an open-file policy on this case, and Mr. Defense Attorney viewed the file on March 1, April 10, April 30, and May 10."

2 **Give notice early and often.** Another common complaint is that the defense attorney did not know about prior convictions or extraneous offenses that the State used in trial. While notice is required only if the defense requests it, it pays to be proactive here. Provide the defense attorney with ample notice of priors and extraneous offenses even if he has not filed a formal request. If the defense attorney seems to have forgotten or simply mixed up his cases, provide a supplemental notice or simply remind him in person. There's no reason hide this kind of evidence, especially because it can often encourage a defendant to plead, and there are many reasons for making sure it's disclosed.

3 **Make offers on the record.** Another frequent complaint of ineffectiveness is that the attorney did not convey plea offers or other information to the defendant. Making a record of this information is an easy way to both ensure that the defendant's rights are safeguarded and protect cases against baseless claims. An easy way to do this is simply to repeat any plea bargain offers during a pretrial hearing or at the beginning of trial. That way, the defendant is undeniably aware of the State's offer.

4 **Know what is admissible.** Do not fall into the trap of thinking, "If they don't object, it's admissible." While the State's evidence will likely be admitted if there is no objection, prosecutors can still run into trouble later. Appellate courts have started to find defense attorneys ineffective where they do not object to clearly inadmissible evidence, even reversing on direct appeal because there could be no strategy not to object.[3] And prosecutors should never rely on a defense attorney to decide if evidence is admissible. Always have a plan for what evidence—exhibits and testimony—the State needs to offer. Know if it is admissible and what conditions there may be, such as evidence that is admissible to rebut certain defensive theories. Resist the urge to offer "just one more" bit of evidence than should be offered, even if our opponent is not objecting.

5 **Predicates matter.** Dovetailing along with knowing what is admissible is *proving* what is admissible. Predicates can be dull and are often shortened in a bench trial or for basic matters, but for more contentious or significant pieces of evidence, predicate can be very important. To prevent a later claim that an attorney was ineffective for not objecting to evidence that did not have the proper predicate, be sure to lay a foundation for all significant pieces of evidence. Even if the defense attorney would not object otherwise, it can only make your case stronger.

6 **Offer a chance to explain strategy.** Sometimes the defense will offer evidence useful to the State that we could not otherwise get admitted, such as a police report or forensic interview. Instead of just thanking your lucky stars that it came in, take a moment to consider how this action could look to a court reviewing it years down the line. Sometimes the strategic value of the evidence for the defense is obvious, but sometimes it is not clear just why the evidence was offered. Prevent a later court from concluding that the attorney offered the evidence without knowing about the part beneficial to the prosecution by simply noting it on the record.

In one excellent example, the prosecutor prevented the case from being reversed for ineffective assistance after the defense attorney offered the police report.[4] She requested a sidebar conference on the record and said, "Your Honor, I have no objection to him admitting this, but he needs to be fully aware that the [first] paragraph states that [the defendant] is a well known member of the Bloods gang and a drug dealer." The defense attorney affirmed that he was aware and had other reasons for admitting the police report. With that, the appellate court was able to conclude that the defense attorney was not ineffective.

A polite warning can do no harm and will ensure either that an attorney who *was* unaware will be able to withdraw the exhibit or that an attorney's strategic decision will be clear on the record. Any warnings should, of course, take place out of the presence of the jury, either while the jury is out of the courtroom or in a recorded sidebar conversation.

7 **Anticipate defensive strategies.** Defensive issues, such as lesser-

included offenses or self-defense, are not required to be in the jury charge unless the defense requests them. But a careful prosecutor should be aware of potential charge issues and consider bringing them to the court's attention if the defense attorney does not. If the entire defense is centered on self-defense or that the defendant was reckless rather than intentional but the defense attorney does not request a charge on that issue, that could be a strong basis for an ineffective assistance claim down the road. Avoid the issue by raising it yourself during the charge conference: "Your Honor, the State has no objections, but I assume Mr. Defense Attorney wants a self-defense charge."

8 **Continuances are not the enemy.** It is very frustrating to have thoroughly prepared a case, assembled witnesses, gotten evidence in order, and be ready to go with a devastating opening statement … only to have the case continued. But sometimes a short continuance can be the difference between an affirmed conviction and a summary reversal. Continuances may be a few hours, if a defense attorney simply needs time to review a piece of evidence he was unaware of, or a few days, if he needs to prepare for prior convictions or extraneous evidence he did not realize the State was offering. Certainly a prosecutor does not need to agree *every* time a defense attorney claims surprise, but it can be an effective way of avoiding a problem.

And in the rare circumstances that a defense attorney comes to trial obviously unable to effectively proceed, such as being clearly sick or intoxicated, be proactive and make sure the case is continued until he is recovered. Likewise, it may be preferable to allow the defense to reopen the case if they forgot to call a witness or omitted some crucial evidence, such as proving probation eligibility.

9 **Gently point out mis-steps.** No one likes to make a mistake, and we all *really* hate to have them pointed out. Still, that temporary discomfort is far better than a case being reversed for ineffective assistance. Most cases of ineffective assistance are a result of simple negligence, not intent, and the defense attorney will quickly correct the mistake if she realizes it in time. If prosecutors recognize a mistake that can be corrected—such as the failure to file an application for probation or going to the judge on a case where he cannot grant probation—then we are doing everyone a favor by politely (and privately) pointing it out. Everyone has made stupid mistakes at some point in a career, and playing "gotcha" after the fact is not in keeping with a prosecutor's oath to see that justice is done.

10 **Countering intentional ineffectiveness.** This situation is thankfully rare, but some attorneys occasionally choose a strategy of ineffectiveness. They intentionally refuse to do anything to represent their client to ensure a reversal for ineffective assistance. The Court of Criminal Appeals has handled two such cases in just the past few years, one a death penalty case. In *Medina v. State*, the defense attorney refused to proceed after a continuance meant one defense witness was unable to attend.[5] And in *Cannon v. State*, the defense attorney refused to do anything in the trial after being denied a continuance.[6] In *Medina*, the case was upheld, largely because the defendant did not present enough evidence on appeal, but *Cannon* was reversed for ineffective assistance.

For a prosecutor unfortunate enough to encounter one of these cases, what can you do to save your case? There is not a clear answer at this point. In *Medina*, the trial court tried ordering the attorney to proceed and held her in contempt when she refused.[7] The *Cannon* court suggested that the trial court can admonish the defendant and ask if he is waiving his right to effective counsel.[8] If the defendant does not agree with his attorney's strategy of ineffectiveness, then the trial court can appoint a new attorney to proceed. In that situation, a continuance would be necessary to allow the new attorney to get up to speed, but it may be a better solution than having to retry the entire case.

The *Cannon* court was confident that the attorney disciplinary rules and the threat of civil malpractice suits will restrain lawyers from engaging in a strategy of ineffective assistance,[9] and I hope that few lawyers will have to face this situation. If you are one of the unfortunate forced to proceed, simply try the cleanest case possible in hopes of showing that there was no prejudice to the defendant from his attorney's antics.

Conclusion

Most of the advice here boils down to two simple words: Restrain yourself. Our justice system is an adversarial one, and it is easy to get caught

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up in our own concerns and wanting to win, but prosecutors have an obligation to seek justice, not just win a case. By ensuring that the adversarial system is working and the defense receives zealous representation, we also ensure that justice is done. ❇

Endnotes

1 *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

2 *Herring v. New York*, 422 U.S. 853, 862 (1975).

3 *Lopez v. State*, 315 S.W.3d 90, 100-102 (Tex. App.—Houston [1st Dist.] 2010, pet. granted).

4 *State v. Provost*, 205 S.W.3d 561, 564 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

5 *Medina v. State*, No. AP-76,036, 2011 WL 378785, at *14-15 (Tex. Crim. App. Jan. 12, 2011).

6 *Cannon v. State*, 252 S.W.3d 342 (Tex. Crim. App. 2008). See also Mary Alice Robbins, The Quiet Man: Counsel Who Didn't Participate In Trial Says He Was Protecting Client, *Texas Lawyer*, Oct. 29, 2007.

7 *Id.* at *14.

8 *Cannon*, 252 S.W.3d at 352.

9 *Id.* at 353.

Texas counties celebrate National Crime Victims' Rights Week 2011

Photos and stories from Bexar and Henderson Counties' commemoration to honor crime victims

By Cyndi Jahn
Victim Assistance Coordinator in the Bexar County Criminal District Attorney' Office

The Bexar County Criminal District Attorney's Office was privileged enough to collaborate with 36 different agencies this year to plan and participate in National Crime Victims' Rights Week (NCVRW)! We celebrated a little later than most cities and counties because during the nationally scheduled dates (April 10–16) our community was hosting its annual Fiesta activities. Therefore we planned our NCVRW events for April 25–30. During the week organizations that assist and serve crime victims throughout the county joined together to honor victims of crime and promote greater public awareness about the rights and needs of crime victims. We had at least one event each day!

On Monday, we hosted a kick-off balloon release, a first for Bexar County. Nearly 300 balloons floated upwards as singer Patsy Torres sang the song "Breakaway" made famous by Kelly Clarkson. Agency members gathered in a united community seeking to bring awareness about crime and its aftermath, advocate for victims' rights, and educate the public concerning the services available to survivors of crime. Our police chief and sheriff spoke, and as the balloons made their way skyward, Criminal District Attorney Susan Reed commented, "The balloons lift upward with hope for awareness of the impact that crime has on our community and hope that we meet the needs of the future and confront the changing face of crime." It was a great way to start our busy week!

Later that day, members of the coalition participated in a call-in victim hotline sponsored by our local ABC affiliate, KSAT-TV. The public was given an opportunity to call in for information concerning the criminal justice system and for referrals for victim services. Volunteers took approximately 250 calls from noon to 7:00 p.m.

On Tuesday, the Rape Crisis Center hosted a continuing education unit (CEU) titled, "Immigration Remedies for Survivors of Domestic Violence, Sexual Assault, and Stalking." It was packed full of great information and was a good source of inexpensive CEUs for therapists and social workers. We also had a great time at the open house sponsored by one of our victim service agencies, Becoming Apparent.

On Wednesday we all made a statement by observing Denim Day

TOP PHOTO: More than 36 different agencies collaborated for the week's activities, including a picnic with food, music, and crafts. AT LEFT: Judge Susan Reed, the Criminal District Attorney in Bexar County, speaks to the crowd at the balloon release. ABOVE: Forty-one wreaths were laid at the memorial of fallen officers in Bexar County.

2011. In case you've never heard of Denim Day (I had not heard of it before this year), it comes from a terrible case of sexual assault that occurred in Italy in the 1990s. Then, an 18-year old girl was picked up by her married 45-year-old driving instructor for her very first lesson. He took her to an isolated road, pulled her out of the car, wrestled her out of one leg of her jeans, and forcefully raped her. She reported the crime, and the perpetrator was arrested, prosecuted, convicted of rape, and sentenced to jail.

On appeal at the Italian Supreme Court, the conviction was overturned, the case dismissed, and the rapist released because, the chief justice argued, the victim wore jeans so tight that she had to help the rapist remove them, and by removing the jeans it was no longer rape but consensual sex. Enraged by the verdict, women in the Italian Parliament protested by wearing jeans to work. This call to action motivated and emboldened the California Senate and Assembly to do the same, and Denim Day in Los Angeles was born. Over the years, this awareness movement has spread across the United States. If you have never participated, I suggest you do so next year—speak out about sexual assault awareness and get a chance to wear jeans to work!

Wednesday evening the Rape Crisis Center hosted a screening of the movie *Hip Hop: Beyond Beats & Rhymes*. The film examines the representation of manhood in hip-hop culture and challenges the rap music industry to take responsibility for perpetuating and glamorizing sexism, violence, and homophobia.

Thursday was a busy day for us as more than 40 community agencies gathered for our annual Victims' Tribute. This is a very special service dedicated to victims of crime and includes a memorial wreath-laying ceremony and the lighting of our victims' flame. The event was held again this year at the San Antonio Police Department's Training Academy. Forty-one individual wreaths were laid at the memorial of fallen officers as the police department and Bexar County Sheriff's Office honor guards stood at attention. The event was concluded with a moment of

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silence, a special 21-bike salute from Bikers Against Child Abuse, and a peaceful adjournment as the bagpiper played "Amazing Graze." This is an extremely solemn but uplifting event.

Thursday evening our Victims Advocacy Council hosted a town hall meeting entitled, "Dating, Sexting, and Violence: Not My Kid!" The program was directed toward parents focusing on relationships between children and parents and children and their peers. The panel of speakers provided some great information, insights, and statistics to the more than 50 attendees.

My favorite annual event of the week was held on Friday. A special picnic honoring children who have been exposed to or have become a victim of crime was held in one of our beautiful downtown parks. Delicious barbecue was served along with hot dogs, chicken fajitas, sausages, snow cones, popcorn, and cotton candy. A visit from the San Antonio Spurs Coyote, McGruff the Crime-Fighting Dog, the HEB Buddy Bag, and several other mascots gave the kids lots of excitement. A deejay, Daisy Bee and Ollie the clowns, a magician, face painters, hair painters, pony rides, petting zoo, various crafts and game booths, and even the San Antonio Fire Department complete with a full-service fire engine entertained everyone for hours. Over 700 children and adults were able to enjoy it all. I had a great time and I know everyone else did as well.

And finally, those of us that weren't too tired from the picnic attended the movie screening of *Playground* hosted by the South Texas Coalition Against Human Trafficking. There was a great panel discussion of human trafficking issues following the film.

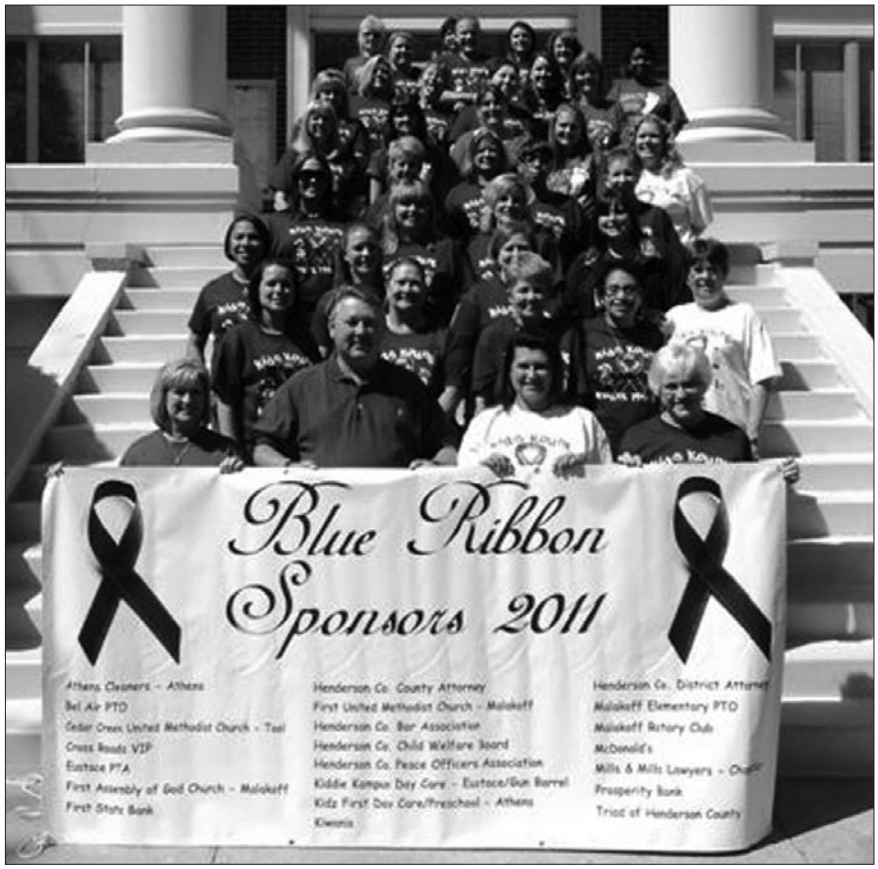
Although all this activity can be exhausting, I know it was worth all of the effort. Not only is it such a special time to honor victims, but the planning and events really succeeded in bringing all the participating service providers together, allowing us to work as a cohesive unit. Is it hard work coordinating and planning NCVRW? You bet—but at the same time we know that this week has truly made a positive impact on our community! So don't sit by next year and watch National Crime Victims' Rights Week pass you by; reach out and make a statement, honor victims, and say thank you to your community's service providers! Don't hesitate to contact me if I can ever be of assistance with ideas or planning tips for NCVRW. ❇

DeAnna Browning
Victim Assistance Coordinator in the Henderson County District Attorney's Office

We were busy in this spring! In April we had three proclamations: Child Abuse, National Crime Victims' Rights Week, and Sexual Assault Awareness. During Crime Victims Week, we put on a health fair at Trinity Valley Community College, held a blood drive at the sheriff's department, celebrated Go Blue Day (where we provided T-shirts to every elementary teacher in the county—that was about 800 shirts!), and sponsored a poster contest for fourth graders. The week ended with Kids Day and the CASA 5K Run. ❇

Henderson County District Attorney, R. Scott McKee, addresses a crowd at the National Crime Victims' Week Proclamation in the background is Henderson County Judge Richard Sanders.

More photos from Henderson County



TOP PHOTO: Clint Davis, County Attorney in Henderson County, presents awards to the winners of the fourth grade Child Abuse Awareness Poster Contest at Athens Independent School District. ABOVE: Employees in the County Attorney's Office, District Attorney's Office, and Henderson County pose on the courthouse steps to celebrate Go Blue Day for Child Abuse Awareness Month. This year's theme was Kids Kount, Kount Me In.

ABOVE: DeAnna Browning, victim assistance coordinator, and Betty Herriage, administrative assistant, both of the district attorney's office, pass out victim service information during the 2nd Annual Kids Day. ❇

Let the Tweeter beware

The onslaught of online social media—Facebook, Twitter, blogs, et al.—has caught some indiscreet folks off-guard when they post something vulgar, inappropriate, or just plain stupid to their profiles. Don't let it happen to you!

By Sarah Wolf
TDCAA Communications Director in Austin

The newspaper stories are cringe-worthy. A New Mexico police officer shot and killed a gang suspect earlier this year and described his job on Facebook as a "human waste disposal." In Massachusetts, a veteran firefighter was fired for Facebook posts that were critical of a supervisor and town officials and contained foul language and anti-gay slurs. And do we even need to mention a certain Congressional representative who sent sexy-time photos of himself via Twitter to various female admirers, all the while claiming someone had hacked his account?

Given the sometimes dire consequences of such indiscretion, it would do us all good to be reminded that social media, as fun, enlightening, and helpful as it can sometimes be, is also fraught with traps for the unwary. We know how incriminating these sites can be—what prosecutor doesn't check defendants' online profiles for signs of drug use, weapons possession, or gang affiliation to sweeten the State's arsenal of evidence in court?—yet we ourselves still sometimes post things that are inappropriate at best or, at worst, worthy of termination.

We at TDCAA talked to several prosecutors across the state, in offices large and small, to find out what these supervisors say about their employees' online presence and how it can affect a person's reputation and livelihood. Not every office has a policy on using such social media, but everyone noted that those who work in a prosecutor's office must be especially careful with what information they put out there for public consumption. What might be a normal work-related gripe for someone in another profession can result in big trouble—even legal trouble—for those in a prosecutor's office. Rules 5.02 and 5.03 of the Disciplinary Rules of Professional Conduct, as well as the criminal offense provisions of the Public Information Act, state that disclosing any information concerning a legal matter being handled by the office is grounds for immediate discipline, up to and including discharge, and potential criminal prosecution. This rule applies during the workday as well as after hours.

"Employees of prosecutors' offices do not have the luxury of leaving work at the office," says Jay Johannes, an assistant county and district attorney in Colorado County. "We need a certain moral authority to do our jobs effectively, and imprudent use of social media undercuts that moral authority."

Some bosses check their employees' Facebook or Twitter accounts for a wide array of purposes: what time of day people are posting (i.e., during the workday and/or on county computers); whether any legal matters are discussed; if excessive drinking, drug use, or criminal activity is mentioned; or if anything reflecting poorly on the office is posted. Even stating one's professional position is forbidden in at least one jurisdiction, the Harris County DA's office, as it may imply an official statement of the office as a whole.

Lest you think that such strictness is an overreaction, consider the permanence of online information and lightning-fast speed with which that information spreads. What you write today is immediately available

A British juror and a defendant who discussed a drug and corruption trial on Facebook were found guilty of contempt of court and, at press time, are awaiting sentencing.

to countless people, including the defense bar, victims' families, and journalists, within moments.

"I've been an attorney for 16 years and a prosecutor for 11—it's hard to surprise me," Johannes says. "While I do not have a Facebook account, my wife does and I am amazed by the web of connections through our county. There truly are fewer than three degrees of separation, and news travels fast."

The rule of thumb that almost every prosecutor mentioned is to never post anything on the Internet that you would not want to see on the front page of tomorrow's newspaper—along with your name, title, office, and county. If you must gripe about something work-related, pick up the phone rather than dashing off a hasty tweet. "Electronic is forever; a phone call isn't," says C. Scott Brumley, county attorney in Potter County. "Always remember that distinction."

Note, too, that inappropriate or unprofessional online commentary can follow a person even after she leaves a job and seeks a new one. Several prosecutors mentioned that they check potential employees' Facebook profiles before extending job offers to see "whether representations of responsibility made during the interview are consistent with the image they broadcast to their friends and the public," Brumley explains, "and whether the applicant is dumb enough to publish their salacious or sophomoric behavior to the world. Also, it is not unheard of to find disparaging remarks about the office after a job interview. It's better to know whether you're poisoning the well [by hiring such an employee] before you actually do it."

Lee Hon, the district attorney in Polk County, also does a little Facebook reconnaissance when he's interviewing people for open positions. "Just looking for potential red flags, i.e., pictures or comments indicating the applicant may not exercise good judgment in their personal affairs or conduct themselves in a way consistent with the image of my office," he says. Bosses may be surprised by what they find.

In the United Kingdom, a juror was disciplined for conducting a Facebook poll on how she should vote during a trial that was ongoing.

Folks at TDCAA went through just such a situation a few years ago. After a solid in-person interview with an applicant, we offered the job, which was accepted. Meanwhile, we hunted around on MySpace (remember MySpace?) for this person's profile page and were shocked to discover ugly words about the job at TDCAA and even uglier words about a crumbling home life. The job offer was subsequently withdrawn.

"Review of her comments made it clear that the applicant was not someone who truly held herself to the standards required of those earnestly engaged in prosecution," Brumley explains.

Those who work in prosecutor's offices are wise to remember that their bosses are elected officials—politicians—who are public figures as much as they are prosecutors. What they and their staffs put out there for the world (wide web) to see reflects on them as public servants and as professional attorneys for the State. "Social media can be an effective networking tool," Hon says. "I use mine mainly for friend, family, professional, and political networking. As a public figure and representative of an elected public office, you just have to be extra sensitive to the things you post." And so do those who call these public figures "boss." ❇

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Photos from our Civil Law Seminar

Gerald Summerford Award winner

Congratulations to Eric Shepperd, now a judge and formerly of the County Attorney's Office in Travis County, who received the Gerald Summerford Award at May's Civil Law Seminar. He is pictured with Ray Rike, an assistant criminal district attorney in Tarrant County who is also the chair of the Civil Law Committee.