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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

The dawn of new discovery rules

Governor Rick Perry signed into law the Michael Morton Act (SB 1611) late this spring, ushering in a new era in discovery for Texas prosecutors. Here is a general overview of this law, which is effective January 1, 2014.

By Randall Sims
47th Judicial District Attorney in Potter and Armstrong Counties

Each prosecutor is charged under Texas Code of Criminal Procedure art. 2.01 "not to convict, but to see that justice is done." What you rarely hear quoted is the next sentence: "They shall not suppress evidence or secrete witnesses capable of establishing the innocence of the accused." This duty to seek justice rather than convictions includes setting the innocent free—and it has been this way for decades.

Since its inception in 1965, art. 39.14 of the Code of Criminal Procedure of Texas has regulated discovery in criminal cases. Until now, the Legislature had not made major changes to criminal disocvery, and in the opinion of many, including myself, it was still working very well for all concerned. But recently, a few old cases have come to light that demonstrate that not everyone within our profession took this requirement to seek justice and hand over evidence seriously. These prominent cases from the past involve prosecutors who were not forthcoming with exculpatory evidence, and after many years, innocent defendants were freed from prison. Michael Morton is the most prominent example, and the criminal discovery reform bill, SB 1611, which amends this portion of the Code of Criminal Procedure, was named in his honor.

There were several absolutes throughout the process of amending this statute. First, art. 39.14 would be amended with or without prosecutor participation. Realizing it was better for those who know what we do daily to help make the rules than for us to allow those who have no clue do so, prosecutors wisely chose to participate. This enabled us to keep some of the more draconian provisions out of the final bill. Second, the bill was going to include mandatory discovery of offense reports, witness statements, and all material evidence.

Here is a synopsis of the Michael Morton Act's substantive changes under §2, listed by subsection. Please note that our efforts to prevent caselaw from becoming statutory due to the obvious problem of caselaw being more fluid than codified law (which could result in a statute not complying with current caselaw) were not successful.

Subsection (a)

Texas Family Code §264.408 and CCP art. 39.15 are specifically excluded from this act. That Family Code section includes files, records, communications, and working papers used or developed in providing services to children by Child-

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Protective Services (CPS) or Court-Appointed Special Advocates (CASA) as well as any videotaped interview of a child made at a children's advocacy center, while art. 39.15 of the CCP (regarding child pornography) provides that such evidence must remain in the care, custody, or control of the court or the State. In both statutes, the State must make the property or material reasonably available to the defendant.

Also, the State *shall* produce and permit the inspection and the electronic duplication, copying of, and photographing of listed evidence *as soon as practicable after receiving a timely request* from the defendant.

These items are discoverable:

1) any *offense reports*,

2) any documents, papers, and written or recorded *statements* of the defendant or a witness, including witness statements of law enforcement officers, and

3) any books, accounts, letters, photographs, objects, or other tangible things *not otherwise privileged* that constitute or contain *evidence material* to any matter involved in the action and that are in the possession, custody, or control of the State or any person under contract with the State.

The State may accomplish discovery by providing to the defendant electronic duplicates of any documents or other information described by this article.

Excluded from this discovery are written communications between the State and an agent of the State. It also does *not* authorize the removal of the documents, items, or information from the State's possession, and any inspection shall be in the presence of a representative of the State.

Subsection (c)

(Please note that subsection (b) is not changed by the bill.) Subsection (c) allows the State to withhold discovery. When a portion of the requested document or thing is subject to discovery and a portion is not, the State must give the defense the discoverable parts and inform the defense that a portion is not discoverable. The defendant may then request a hearing for the court to determine whether the withholding is justified.

Subsection (d)

Pro se defendants may *inspect* the documents and items listed in Subsection 2(a), but they are *not* entitled to electronically duplicate those documents in any way.

Subsection (e)

This subsection prohibits disclosure of provided discovery to *any* third party. However, two exceptions allow such disclosure if: 1) a court orders the disclosure upon a showing of good cause after notice and a hearing considering the security and privacy interests of any victim or witness, or 2) the materials have already been publicly disclosed.

Subsection (f)

These are additional exceptions to the non-disclosure to any third parties provided by (e). The "entrusted circle" includes the attorney representing the defendant or an investigator, expert, consulting legal counsel, or agent for the attorney representing the defendant. The "expanded circle" includes the defendant, witness, or prospective witness.

A member of the entrusted circle *may* allow a member of the expanded circle to view the information provided but may not allow that person to have copies of the information, other than a copy of the witness's own statement. Before allowing that person to view a document or the witness statement of another, the person possessing the information shall redact the address, telephone number, driver's license number, Social Security number, date of birth, and any other identifying numbers contained in the document.

The defendant may not be the agent for the attorney representing the defendant. This prevents the defendant from gaining a copy of anything other than his own statement unless one of the exceptions applies from (e).

Subsection (g)

The Texas Rules of Professional Conduct apply regarding any received discovery, particularly regarding the attorney's use of identifying information in received discovery.

Subsection (h)

The state *shall* disclose to the defendant any exculpatory, impeaching, or mitigating document, item, or information in the possession, custody, or control of the State that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged. This portion of the statute is derived from *Brady v. Maryland*[1] and its progeny.

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Subsection (i)

The State shall electronically record or otherwise document any document, item, or other information provided to the defendant under this article. If your office is paperless, the software system should track this documentation for you. For those who are not so fortunate, I suggest preparing a checklist good for all types of cases and mark what discovery items were given, when, and to whom. Have the person providing the discovery and the defense attorney receiving it sign the list and date it. I also suggest you keep what was not disclosed separated from the discovery provided with an explanation as to why it was withheld.

All of these suggestions will come in handy 20 years from now if you ever find yourself being asked about an old case's discovery.

Subsection (j)

Before accepting a plea of guilty or nolo contendere, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article. Use the list created under subsection (i) to orally recite into the record what was disclosed, or introduce a copy of the signed and dated list into the record.

Subsection (k)

If at any time *before, during, or after* trial, the State discovers any additional document, item, or information required to be disclosed under Subsection (h), the State shall promptly disclose the existence of the document, item, or information to the defendant or the court.

Subsection (l)

The court may order the defendant to pay costs related to discovery.

Subsection (m)

This article prevails over Chapter 552, Government Code, the Public Information Act.

Subsection (n)

This article allows the parties to agree to discovery *equal to or greater than* those required under this article.

Working through the changes

We would be naïve to believe there will not be some problems with the new rules. After all, most anything new has a few kinks to work out. Several questions and concerns have already been raised about this new law. I will not address these concerns now, as those involved are working on compiling answers to provide a uniform implementation for prosecutors. TDCAA is hosting a meeting at its Austin headquarters at the end of June (after the deadline for this article) to discuss how the Michael Morton Act will function in practice.

A more detailed article on suggestions will be forthcoming to guide prosecutors and office staff on how to handle the new law's requirements. Additionally, be sure to attend one of the TDCAA Legislative Updates this summer to get more information on this statute. (You can sign up online at www.tdcaa.com/training/tdcaas-2013-legislative-update-texas-tour.) Information on suggested procedures and other issues will be discussed then.

Additional information

This act becomes effective *January 1, 2014*, and will apply only to offenses taking place *on or after* that date.

All of these provisions already exist in some form in 48 other states, and they have made such laws work. We will also. I am convinced the loyal opposition will do their best to comply with the law, as will we. Remember: Doing the right thing is a moral and ethical obligation. Thus, no matter where we set the bar, those who will break the rules will, and those who will not, won't.

Also, keep in mind the Texas Legislature will open the 84th Session January 1, 2015. Each of you is more than welcome, as you were this year, to come to Austin to participate in the process that shapes what we do daily. ❇

Endnote

1 373 U.S. 83 (1963).

A devastating disease rampant among attorneys

This past year I celebrated my 30th anniversary as a licensed attorney. And by the time you read this article, I'll be completing my 28th year with the Travis County Attorney's Office. It's been a remarkable experience. I've been so fortunate to witness the highs of working in a prosecutor's office while suffering very few of the lows. But sadly, there have indeed been lows during that time.

By David Escamilla
County Attorney in Travis County

I think most long-termers would agree that a highlight of our job is the relationships that we form with fellow prosecutors, office workers, judges, law enforcement officers, and even defense lawyers. They become good friends, trusted associates, and sometimes even family. Because we become emotionally tied to these people, their joys and sorrows are often shared among us. And too often, those sorrows relate to alcohol or substance abuse.

I've personally witnessed the devastating impact of this disease among members of our profession. Several have managed to regain control while others are still struggling; some that I cared very much about have lost the battle, tragically, with the loss of their lives. With most, I was involved in the varied efforts to assist them. I've counseled with many, and even employed one with the purpose of helping her on the road to recovery. I've also had to accept failure and allow an employment relationship to end, all the time fearing that my friend and colleague's options were few. That person, a witty and very able prosecutor, eventually lost her personal battle with alcoholism and the depression that too often accompanies the disease.

I've often reflected back on our relationship, both as friend and employer, especially rethinking the actions and strategies we had undertaken to turn the situation around during those last few years. I don't know if I could have done much of anything differently. But I now recognize that the situation was not unique in our profession and, more importantly, that considerable research and assistance is available.

The American Medical Society determination that alcoholism is a disease dates back to 1957. The National Council on Alcoholism and Drug Dependency and the American Society of Addiction Medicine has since provided this definition: "Alcoholism is a primary disease with genetic, psychosocial, and environmental factors influencing its development and manifestation. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with the drug alcohol despite adverse consequences, and distortions in thinking, the most notable being denial of a problem."

The American Bar Association estimates that 15 to 20 percent of attorneys suffer from addiction or mental illness, compared to 9 percent of the general population. Consistent with these findings, the National Institute on Alcohol Abuse and Alcoholism estimates that while 10 percent of the U.S. population is alcoholic or chemically dependent, the abuse may be as high as 20 percent among lawyers. And research data from SAMHSA (Substance Abuse and Mental Health Service Administration) support findings that addiction rates among lawyers can approach twice that of the general population. Interestingly, these risks don't appear to dissipate with age. While 18 percent of attorneys with two to 20 years of experience reported drinking problems, this statistic increased to 25 percent for attorneys who had practiced more than 20 years. Alcoholism is a contributing factor in approximately 30 percent of all suicides. Alarmingly, attorneys as a profession can now lay claim to the highest suicide rate of any profession.

Substance abuse includes the misuse of prescription drugs and/or dependence on illegal drugs, including heroin and cocaine. Some studies even go so far as to suggest that attorneys abuse cocaine at twice the rate of non-lawyers. Substance abusers are typically functional in the workplace. Almost three out of four are employed.

Some might assume that these rates are lower among prosecutors and other government lawyers, given that we are spared the additional stress of maintaining a private practice, paying the bills, and generating clients. But studies show that public-service attorneys experience greater stress and burnout when compared to the general population. And still

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other studies confirm a connection between work-related burnout and substance and alcohol abuse in other professions.

In fact, prosecutors may have more to worry than many of those in private practice. Two separate studies published in 2003 found that attorneys practicing criminal and family law (prosecutors included) run a higher risk of suffering from compassion fatigue. Compassion fatigue, also called secondary traumatic stress, is defined as "the cumulative physical, emotional, and psychological effects of continual exposure to traumatic stories or events when working in a helping capacity." Does this sound anywhere similar to our job description? What portion of our workweek is spent reading offense reports and victim/witness statements, listening to victims, and viewing photos, much of which detail violent and traumatic occurrences?

These statistics highlight not only the debilitating effects sustained among impaired lawyers but also raise questions regarding the level that their clients also suffer. Bar organizations estimate that 50 percent of lawyer discipline cases involve chemical dependency.

These ominous findings have not gone unnoticed in our profession. Assistance programs began developing throughout the country as early as 35 years ago to help legal professionals impaired by substance abuse. State bar associations, many spurred on by members who had struggled and overcome their own addictions, recognized the threat to the profession and implemented these programs to provide much-needed resources and to support lawyers in crisis.

According to the U.S. Office of Personnel Management, there are many signs that an employee might exhibit that may indicate a problem. They include: excessive use of sick leave, frequent unexplained or unauthorized absences from work, missed deadlines, careless or sloppy work, and belligerent, argumentative, or short-tempered behavior.

The CAGE Questionnaire was developed in 1970 by Dr. John A. Ewing and is used for screening patients for alcoholism. CAGE is an acronym made up of its four questions:

1. **C**ut Back? Have you ever felt the need to reduce the level of your consumption?
2. **A**nnoyed? Have people ever annoyed you with their criticism of your drinking or using habits?
3. **G**uilty? Have you ever felt guilty while you were drinking or using?
4. **E**ye-opener? Have you ever started the day with a drink or drug, either to wake yourself up, relax, or cure a hangover?

According to Dr. Ewing, two or more "yes" answers indicate a positive history of alcoholism.

Additionally, the website www.alcoholscreening.org provides individual assessment of alcohol consumption patterns to determine if drinking is likely to be harming someone's health or increasing his risk for future harm. Through education and referral, the site urges people whose drinking is harmful to take positive action and informs all who consume alcohol about guidelines for lower-risk drinking.

The Texas Lawyers Assistance Program (TLAP) "provides confidential help for lawyers, law students, and judges who have problems with substance abuse and/or mental health issues." Its confidential hotline can be reached any time of day or night at 800/343-8527, or at www.texasbar.com/tlap.

Whether you are the employer, employee, judge, law partner, law firm associate, friend, or colleague of a person struggling with alcoholism or substance abuse, your recognition and understanding of the nature of the problem can be vital in helping that individual. Maybe, just maybe, if I had understood that our profession was particularly at risk to alcoholism and substance abuse, and had I been more aware of the wealth of resources available to us within our profession, I might have persevered and not accepted defeat when I did. Just maybe, we would have another exceptional prosecutor among us today. ❇

How to host a Tree of Angels in your community

By Verna Lee Carr
Victim Advocate Specialist at People Against Violent Crime in Austin

The Tree of Angels is a meaningful Christmas program specifically held in memory and support of victims of violent crime. The Tree of Angels allows a community to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime.

This special event honors and supports surviving victims and victims' families by making it possible for loved ones to bring an angel ornament to place on a Christmas tree. The first program was implemented in December 1991 by People Against Violent Crime (PAVC) in Austin. Over the past 22 years the Tree of Angels has become a memorable tradition observed in many communities, providing comfort, hope, support, and healing.

A how-to guide is available electronically on how to establish a Tree of Angels ceremony in your community. The Tree of Angels is a registered trademark of PAVC and we are extremely sensitive to ensuring that the original meaning and purpose of the Tree of Angels continues and is not distorted in any way. For this reason, PAVC asks that if your city or county is interested in receiving a copy of the how-to guide, please complete a basic informational form on the website http://treeofangels.org/index.html. After the form is completed electronically and submitted back to PAVC, you will receive instructions on how to download the how-to guide. Once you receive confirmation and are provided with the instructions, you will be able to download the guide.

Please do not share it to avoid unauthorized use or distribution of the material. If you have any questions regarding the how-to guide, contact Carol Tompkins at PAVC at 512/837-7282, or e-mail her at carol @peopleagainstviolentcrime.org. ❇

Welcome to Flora Jean Herzing!

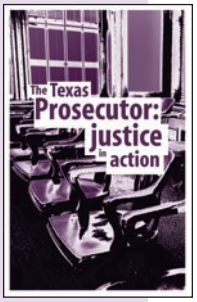
On May 14, our meeting planner, Manda Herzing, and her husband, Bradley, welcomed little Flora Jean into the world. She weighed in at 7 pounds, 13 ounces, and everyone is happy and healthy.

Congratulations to the Herzings, and welcome to baby Flora! ❇

Prosecutor booklets available for members

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

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



TDCAA e-books are available!

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

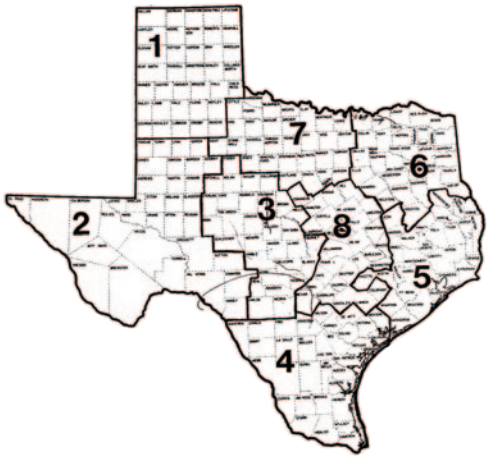
New editions of these e-books will be available this fall after the 2013 legislative session. ❇

TDCAA Annual Business Meeting and Regional Board Elections are coming in September

The Annual Business Meeting of the Texas District and County Attorneys Association will take place on Wednesday, September 18, at 5:00 p.m. at the Galveston Island Convention Center. (It coincides with our Annual Criminal & Civil Law Update.) This will be your chance to vote in the TDCAA leadership elections, which include the Executive Committee positions and the Regional Directors. This year, members will vote in regional caucuses for directors in Regions 3, 5, 6, and 8. You can find a map of these TDCAA regions below. The Regional Director term is two years and begins January 1. If you have any questions, just give me a call.

By Rob Kepple
TDCAA Executive Director in Austin

Texas Regional Map



Thanks to Erik Nielsen

I want to say thank you to **Erik Nielsen**, who is leaving his position as the TDCAA Training Director after almost eight years of hard work to return to courtroom prosecution. Erik started at TDCAA as the research attorney after clerking at the Court of Criminal Appeals. He went to the Travis County District Attorney's Office but couldn't resist the opportunity to return to TDCAA and serve y'all as our training director. After an excellent run, he felt the pull to get back into the courtroom.

Erik's energy and enthusiasm for our profession and his day-to-day work is unsurpassed. He will be missed here. Well, him and his manhugs.

Welcome to our new Training Director

I would like to introduce to you to our new TDCAA Training Director, **Jack Choate**. Jack comes to us from Walker County, where he had recently concluded a 15-year run as the first assistant for CDA **David Weeks**. Jack has been an active member of TDCAA, working on the training committee and later serving as the chair of that committee, teaching at our Train the Trainers course, and acting as a frequent speaker on search and seizure and other topics. He brings a wealth of prosecution and training experience to the job.

That is all good, but you should know that we probably hired him more for his creativity than anything else. After all, don't *you* want to learn how to lie down in front of the jury box and deliver a closing argument using your hands as talking puppets? Yes, he really did that, and we can all benefit by learning that type of advanced trial skill—I think. Welcome, Jack!

Mr. Garza goes to Washington

Congratulations are in order for **Henry Garza**, the Bell County DA, who takes over the reins as president of the National District Attorneys Association (NDAA) at its summer conference in July in San Diego. In the past, Henry has served the NDAA as a state representative, vice president, and member of the executive committee. He will be the third Texan to take the helm of the NDAA, following in the footsteps of **Carol Vance** (former DA in Harris County), and his mentor, the late **Arthur C. "Cappy" Eads** (former DA in Bell County). Henry will also be the first Hispanic president. He will do a great job with the national outfit.

A prosecutor summit on domestic violence

In April the Texas Council on Family

Violence (TCFV) and TDCAA co-hosted a prosecutor summit on domestic violence. The purpose of the two-day retreat was to gather prosecutor policy-makers from a diverse cross-section of state jurisdictions and discuss the progress Texas has made when it comes to combating domestic violence. Although the final report has yet to be written, this energetic group of prosecutors identified a number of trends and issues that deserve our attention in the years to come. What we hope will emerge is a blueprint for how we as a profession, working with allied professionals such as the TCFV, can make significant progress in the future to end domestic violence.

For me, one of the best parts of the meeting was the sense of how far our profession has come in the recognition that the problem of domestic violence is a pervasive one that demands a lot of energy and creative solutions. When I first started prosecuting in the '80s, I can't say that I understood the dynamics of domestic violence or the need for intervention by the criminal justice system. I was fine with that affidavit to drop the charges—and I don't think I was alone in that. What is great about today's prosecutors is that we have an appreciation that these cases are different than most other crimes and demand a new approach.

The group that worked hard for two days made a number of important observations about the state of our work in domestic violence. First and foremost, gone are the days when the affidavit of non-prosecution is accepted, no questions asked. Participants seemed committed to finding ways to help victims of domestic violence find ways to end ongoing abuse. It is about securing a consequence for a crime, but we have come to recognize that when a victim asks to drop charges, she still wants the violence to stop but she may fear that her life will be upended entirely with a conviction. Can we find ways to hold offenders accountable, and at the same time make victims safer in the future? The challenge is to work with victims and find that right consequence, whether it be jail or prison, a suspended sentence, drug or alcohol treatment, Batterers Intervention and Prevention Programs (BIPP), or other alternatives.

We recognized that the *Crawford* decision limiting the use of out-of-court statements concerning the crime had put a kink in our ability to prosecute domestic violence cases without the active participation of the victim. The good news is that prosecutors are developing a track record with the use of the "forfeiture by wrongdoing" exception to *Crawford*. (See the March-April 2013 edition of *The Texas Prosecutor* for a primer on the doctrine.) TDCAA will be studying this promising development.

The group also resisted the temptation to just fob off any problems in the prosecution of domestic violence cases on poor police work or uninterested judges. Many prosecutors at the summit noted that when they developed policies regarding the handling of DV cases and otherwise made such cases a priority, their leadership was rewarded with more attention and interest from other criminal justice professionals. In other words, taking a leading role on the issue has paid off with more successful prosecutions.

Even with the positives, the group recognized that challenges still exist in helping law enforcement get the training and resources necessary to efficiently and thoroughly investigate domestic violence cases in a timely manner. And the issue of resources is exacerbated in the more rural jurisdictions—places where quick referral of cases to the prosecutor may not happen and the needed counseling and intervention services just may not exist.

Look for more details on the work that the participants did at the summit in the future. And thanks to the Texas Council on Family Violence for developing the summit and hosting it. It has been a great partnership.

Do you need an intern to help with victim services?

Funding victim services is always a challenge, and as grants get harder to come by, manpower can be an issue. We recently connected with the folks at Sam Houston State University, which actually offers a degree in Victim Studies. This course of study prepares people for work in the field as victim assistance coordinators.

The degree curriculum includes a very active internship program. The university has placed many interns in prosecutor offices all over the state, so geography has not been a problem. If you would like to inquire about getting a victim services intern for your office, email or call Professor Raymond Teske at rteske @suddenlink.net or 936/295-6274.

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Our sincere thanks for your support

In the wake of the tragedies in Kaufman County came support from so many within Texas and outside our boundaries. I want to take a moment to thank those who have shown their support through donations to the Kaufman County Crime Stoppers and memorial contributions to the Texas District and County Attorneys Foundation. And I'd like to thank those who wore black ribbons to honor the fallen. The support was widespread, including letters of support and donations from the Oklahoma District Attorneys Association, the Prosecuting Attorneys Association of Michigan, the National District Attorneys Association, the National Association of Prosecutor Coordinators, and countless individual district attorneys from Connecticut to Hawaii. Thanks, y'all! ❇

All is not lost after *McNeely*

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

First of all I would like to thank all the folks that made TDCAA's statewide discussion of *Missouri v. McNeely*[1] a big success. We had attendees from as far north as Lubbock, as far east as Tyler, as far south as Galveston, and as far west as El Paso. More than 180 prosecutors and police gathered, shared, learned, and commiserated about an opinion that, as U.S. Supreme Court Chief Justice John Roberts accurately noted, would be very confusing. He wrote, "A police officer reading this court's opinion would have no idea—no idea—what the Fourth Amendment requires of him once he decides to obtain a blood sample from a drunk driving suspect." But we at TDCAA tried to help.

Special thanks is also due to the Comal County Criminal District Attorney's Office, which played host to our one-day training in New Braunfels. Special thanks to elected district attorney Jennifer Tharp, who proved that there *is* such a thing as a free lunch (she treated us to barbecue at our midday break and cold drinks throughout the day) and assistant CDA Mel Koehler, who coordinated all the logistics. We're so grateful for your generosity!

From the meeting, two things that had not been mentioned in my earlier missive on *McNeely* emerged. First, we must defend our mandatory blood-draw law[2] arguing not only "exigent circumstances" but also consent under our implied consent laws. We refer to these statutes as a mandatory blood-draw law, while in fact what they actually create is "irrevocable consent" in certain limited circumstances. That's how we should refer to them.

Secondly, we began to compile a treasure trove of resources from across the state to help offices that are dealing with this difficult opinion. They can be found under the attachment heading of the DWI Resources page at www.tdcaa.com. *McNeely* items are found with that header, followed by the county that produced them and a word or two describing the content. This is just a start so nobody has to reinvent the wheel—take a look at the website first. If you come up with things you would be willing to share, send them to me at clay.abbott@tdcaa.com.

Calling all medical personnel!

A never-before-attempted three-day training, called Forensic Blood Draws: Faculty Development for Medical Professionals, is designed for medical personnel who draw blood for law enforcement in impaired

driving or DWI cases. Around here, we're affectionately calling it Train The Trainer for Medical Pros.

During the last 10 years there has been an explosion in how much blood evidence is gathered in Texas DWI cases. And while TDCAA has conducted numerous courses for prosecutors and peace officers on this topic, there has been an absence of communication and training to the medical personnel who procure this important evidence and then must often testify in court. You may have noticed this in trying to get them to court and in having them testify. If public speaking is America's No. 1 fear, testifying in court is its No. 1 terror.

Our solution (or the start of one) is simple. We will train medical professionals on how to train themselves on the issues they face in assisting us. (It is *not* for forensic chemists working in laboratories who testify to testing results as experts in courts.) This free, three-day program will be held at the Baylor Law School August 12–14, just for medical professionals on forensic blood draws. This "train the trainer"-style program will allow attendees to learn the law, procedures, rules, and science they need to quell their fears, but more importantly will provide them the instruction, materials, and skills to return to their own offices and peers and provide them with the same information.

The format will include lecture, discussion, demonstration, and hands-on practice. It will also include education in adult learning principals to use in peer-to-peer training. The final day will allow all participants to be questioned on the stand by experienced prosecutors; that testimony will be videotaped and a copy sent home with the attendees, who can use it in their own teaching.

But we need your help getting the information to our target audience in your jurisdiction. Up to 30 medical professionals will be accepted to the program based on answers to an application, regional representation across the state, and recommendation by prosecutors in the applicant's area. TDCAA will pay for attendees' hotel rooms, and the course and materials are free. Only travel and meals will not be covered. Most importantly, prompt application is required; all applications must be received by July 12.

The flyer and application are now online at www.tdcaa.com in the TDCAA News section on the first page. Go download the brochure and send it to the folks who train your local medical witnesses. As with TDCAA training for prosecutors, investigators, key personnel, and victim assistance coordinators, we believe that training by your peers is the most effective. Help us help you by making sure the right folks learn about this opportunity and can attend.

DWI regional training for 2014

Finally, in late September (just after our Annual Criminal & Civil Law Update in Galveston), I will be planning regional DWI training for next year. The plan is to present information on everything new: legislation, caselaw (obviously *McNeely* qualifies), technology, and prosecution and investigation techniques. We will also use this training to discuss *Brady* issues with both police and prosecutors.

If that sounds like something you could use locally, catch me at the Annual—I plan on carrying applications for these local seminars with me so I can hand them out as people approach me. Or watch our website, www.tdcaa.com, right after the Annual for information on how to apply for local free DWI training.

I hope to see you where you live in 2014! ❇

Endnotes

1 *Missouri v. McNeely,* 133 S. Ct. 832 (2013).

2 Tex. Trans. Code, art. 724.012.

Photos from our Civil Law Seminar

Gerald Summerford Award winner

Grant Brenna (at far right), now an assistant city attorney in Dallas, was honored with the Gerald Summerford

Celebrations of Crime Victims' Rights Week from across the

Mary Duncan

Victim Assistance Coordinator in the Lubbock County Criminal District Attorney's Office

I start my campaign in March to inform everyone about upcoming Child Abuse Prevention Month and National Crime Victims' Week. I did this by appearing on FoxTalk for an interview in March (media is a must). This interview was also televised.

As soon as they are available, I obtain Child Abuse Prevention blue ribbons and pass them out to as many people as I can. I then do another FoxTalk interview around middle of April. The District Attorney's Office teams up with the Childrens' Advocacy Center and Rape Crisis Center and supports and attends their specific events. This year I even had a table set up at the Stand Up For Kidz Event. I hand out all kinds of literature regarding child abuse, sexual assault, bullying, Crime Victims' Clearinghouse, victim rights, human trafficking, etc. You name it, I hand it out.

Lastly, a victim coalition has been started between many local organizations, including Lubbock County Criminal District Attorney's Office, Mothers Against Drunk Driving, the Children's Advocacy Center, Rape Crisis Center, Department of Public Safety, Children's Connections, Women's Protective Services, and Child Protective Services. We then all get together and nominate those who have gone above and beyond to help our victims. I'm very proud to announce that five people from our office were nominated and received this award during our Awards Ceremony on Thursday, April 25. (They are pictured below.) I also worked this year with the League of Women Voters who asked me to do a presentation on human trafficking. I have been asked to return every year and speak about any topic regarding victims.

Bottom line: We as VACs have a duty to reach out to as many people as we can and assist them to the best of our ability.

I sincerely hope and pray everyone has the support I have regarding the rights of victims from other advocate groups that are mentioned above, and I hope the Lubbock County Criminal District Attorney's can be a good example for other counties!

Award winners from the Lubbock County Criminal District Attorney's Office are (left to right): Robert Withers, ACDA; Sharon Bush, legal assistant and receptionist; Jennifer Bassett, ACDA, Mary Duncan, Victim Assistance Coordinator and Region I Representative accepting the award for nominee Larry Burelsmith, DA's investigator; and Jaret Greaser, ACDA.

Cyndi Jahn

Victim Services Director in the Bexar County Criminal District Attorney's Office

Our office was privileged to collaborate with 40 different agencies this year to plan and participate in National Crime Victims' Rights Week (NCVRW)! We celebrated a little earlier than most cities and counties because during the nationally scheduled dates (April 21–27) our community was hosting the annual Fiesta activities. Therefore we planned our NCVRW events for April 8–13, which was officially proclaimed by Commissioners Court on March 26. During the week organizations that assist and serve crime victims in Bexar County joined together to honor victims of crime and promote greater public aware-

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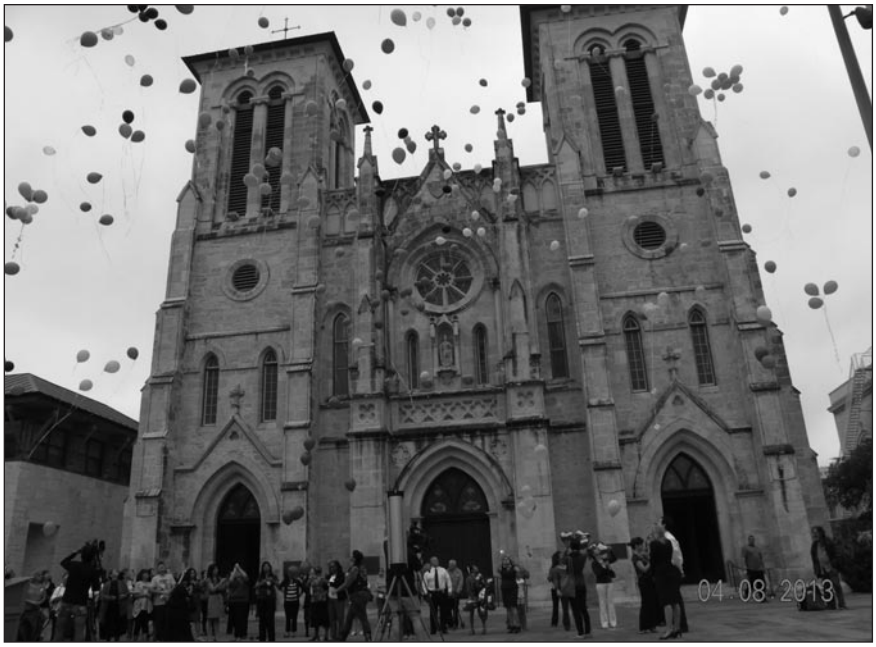
ness about the rights and needs of crime victims.

On Monday, we hosted a kick-off balloon release. In Main Plaza, in front of the historic San Fernando Cathedral, nearly 300 balloons floated upwards as the song "I'll Stand By You" played in the background. (See the photo of the balloons in the sky below.) Agency members gathered



together in a united community seeking to bring awareness about crime and its aftermath, to advocate for victims rights, and to 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, Assistant Criminal District Attorney Catherine Babbitt commented, "Our balloons will lift upward today with hope for awareness of the impact that crime has on our community, the hope that we meet the future needs of victims of crime, and that we will confront the changing face of crime." The balloon release 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 NBC affiliate, News 4 WOAI. The public was given an opportunity to call in for information concerning the criminal justice system and referrals for victim services.

On Tuesday, we had a great time at the open house sponsored by one of our victim service agencies, Becoming Apparent.

Wednesday 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 at the San Antonio Police Department's Training Academy. Thirty-nine individual wreaths were laid at the memorial of fallen officers as our San Antonio Police Department and Bexar County Sheriff's Office Honor Guards stood at attention (see the wreaths in the photo below). The

release of four white doves was a beautiful moment. Each dove was released by someone who represented a portion of the criminal justice system: a victim; prosecution and law enforcement; an individual from social services; and the medical community. The event concluded with a moment of silence, a special 21-bike salute from Bikers Against Child Abuse (BACA), and a peaceful adjournment as a bagpiper played "Amazing Graze." This was an extremely solemn but uplifting event.

On Thursday, the Rape Crisis Center hosted its annual Take Back The Night Rally. This year it was held in HemisFair Plaza with speakers, an art project, and a powerful candle-lighting ceremony. Mothers Against Drunk Driving hosted a health fair and Celebration of Life ceremony at Our Lady of the Lake University. The Bexar County Family Justice Center celebrated its new offices with an open house as well.

My favorite event of the week was held on Friday. A special picnic held annually 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 hotdogs, chicken fajitas, sausage, snow cones, popcorn, and cotton candy. A visit from McGruff the Crime Dog, the Child Protective Services (CPS) Blue Bear, and several other mascots gave the kids lots of excitement. A deejay, clowns Daisy Bee and Ollie, a magician, face painters, hair painters, petting zoo (shown below), various crafts and

game booths, and even the San Antonio Fire Department complete with a full-service fire engine entertained everyone for hours. Nearly 1,200 children and adults were able to enjoy it all. I had a great time, and I know everyone else did as well.

Even though the date didn't fall during our special week, on Wednesday April 24 we all made a statement by observing Denim Day 2013. In case you've never heard of Denim Day, the story is as follows. In Italy in the 1990s, 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. Threatened with death if she told anyone, he made her drive the car home. She reported the crime, and the perpetrator was arrested and prosecuted. He was convicted of rape and sentenced to jail.

He appealed the sentence, and the case made its way to the Italian Supreme Court. Within a matter of days the case against the driving instructor was overturned and dismissed and the perpetrator released. In a statement by the chief judge, he argued, "Because the victim wore very, very tight jeans, she had to help him remove them, and by removing the jeans it was no longer rape but consensual sex."

Enraged by the verdict, within a matter of hours the women in the Italian Parliament launched into immediate action and 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 was born in Los Angeles. 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!

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 also the planning and events really succeed 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, 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.

Rachel Leal

Victim Assistance Coordinator in the Galveston County Criminal District Attorney's Office

Here are a few photos and captions from our celebration of Crime Victims' Rights Week in Galveston.

This picture (above) is from the Candlelight Vigil held on Sunday, May 21 at the Texas City Police Department. Later, family members were able to write a message on the balloons, and then we released them.

Members of Bikers Against Child Abuse (BACA, above) were in attendance to help out with the vigil.

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Above, law enforcement officers, Judge Lonnie Cox, and Criminal District Attorney Jack Roady lit the unity candle.

Our last event of the week was a 5K run/walk, above, which was held in Friendswood starting at the Friendswood Police Department. Families of crime victims made posters with photos of their lost loved ones and held them during the walk (see the photo at right).

Tracy Viladevall

Victim Assistance Coordinator in the McLennan County Criminal District Attorney's Office

Our office hosted the Third Annual National Crime Victim Rights Awareness Week Kick-Off event. We placed 987 pinwheels in the courthouse lawn to represent the number of victims of violent crime served in 2012 (see the photo below). This year's event was even more meaningful considering the West explosion happened just four days earlier. West is in McLennan County, just 20 miles north of Waco. We shared a moment of silence to honor our friends and family who were affected by this tragic event and the first responders who so bravely lost their lives. ❇

A busy month for victim assistance coordinators

April is host to Crime Victims' Rights Week and myriad other events in Texas prosecutors' offices. Here's how one VAC spent this very hectic month.

As most victim assistance coordinators know, April is a very busy month for us. I've been asked to share with everyone what activities I held or participated in on behalf of the Lubbock County District Attorney's Office.

By Mary Duncan
Region 1 Board Representative and Victim Assistance Coordinator in the Lubbock County Criminal District Attorney's Office

First and foremost, I always start by reminding the media how important the month of April is to all of us in the prosecutor's office. I sincerely believe media is a must. I start getting the media's attention in March. I was fortunate this year to have two radio interviews (which were also televised) on FoxTalk, wherein I was able to speak about the upcoming Child Abuse Prevention Month and National Crime Victims' Rights Week.

On April 13, we teamed up with the Children's Advocacy Center and had a booth at its Stand Up For Kidz Event, which was a huge success. I was able to hand out goodie bags provided by our office that contained the literature I hand out on a daily basis.

Around this time, I received a call from a representative of the League of Women Voters. This group asked if I would obtain some information on human trafficking and speak on this subject at a forum on April 18. I immediately agreed as I think it is very important that the public is educated in what all human trafficking entails. Fortunately, Jennifer Bassett, one of our assistant district attorneys who handles crimes against children, and I were meeting with a victim on the very day that I received the call from the League of Women Voters. I told her about the invitation to speak and asked her, "From a prosecutor's perspective, what would you like the public to be educated on regarding human trafficking?" Her response: "That it is not all about illegal aliens—it's about child prostitution." I very much agreed with her as so many individuals out there don't even know that human trafficking and/or child prostitution exist. We discussed how human trafficking is real and it's in everyone's county. Our office, in conjunction with the local federal prosecutors, has prosecuted multiple cases involving child prostitution and human trafficking. As Chapter 20A of the Penal Code was amended in 2011, it is a great hammer against child sex crimes.

I then contacted State Representative John Frullo's office requesting any updates on two bills dealing with human trafficking. His office immediately sent me the bill analysis on both so that I could read them to the League of Women Voters on the lawmaker's behalf. (One of the two, HB 2268, passed.)

The forum on Public Awareness of Human Trafficking was very informative for not only the attendees but for me as well. I was able to observe firsthand what we, in the prosecutor's office, need to focus on educating individuals outside of the prosecutor's office. They were very interested in what all our office does on a daily basis and how my employment as a victim assistance coordinator is crucial in every case that comes through our office. One of their main questions was, "Is there counseling for victims of human trafficking?" I went on to explain how our office works closely with Voice of Hope (formerly Rape Crisis Center), Women's Protective Services (WPS), Child Protective Services (CPS), and the Children's Advocacy Center. The attendees were elated to hear that we had that many entities ready to assist victims. The League of Women Voters asked other questions regarding a task force designated just for human trafficking. I was proud to say that

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Lubbock County has a designated task force for this particular crime.

On April 25, the Crime Victim Coalition, of which I am a member, had our awards ceremony to honor those who have gone above and beyond to assist victims of crime. I am honored to announce that five people from our office alone were nominated and received this award. (See the photo on page 13.) Since my employment with the Lubbock County Criminal District Attorney's Office, these individuals have worked with me to assist our victims to the best of our ability. Their teamwork is to be commended.

Once again, on April 27, I was contacted and was invited by the League of Women Voters to attend a fundraiser called An Evening of Hope with Chong Kim as our speaker. Chong Kim is a survivor of human trafficking, and that evening a movie based on her life, called *Eden*, was screened. Before the event, we attended a meet-and-greet with Chong Kim at the residence of Mr. and Mrs. Kent Hance. Mr. Hance is the chancellor for Texas Tech University, and State Representative John Frullo was a special guest. Meeting Chong Kim was a very memorable and informative. We continue to communicate via email.

Lastly, as you can see from all of the above, I encourage all victim assistance coordinators to be proactive in attending events in your jurisdiction. There has not been an event that I have attended that I have not learned something. Victim assistance coordinators, our job is sometimes difficult, stressful, and very unpredictable. However, in my office I have a sign from a victim that reads as follows: "God has anointed you to comfort the broken." I couldn't have said it better myself. Our job can be rewarding as well when we comfort the broken! Please feel free to contact me with any questions and or comments at mduncan@lubbockcda.com or 806/ 775-1153. ❇

From left to right: Isabel Gutierrez with League of Women Voters, human-trafficking survivor Chong Kim, and Lubbock County VAC Mary Duncan.

Texas-style sausage-making: gleaning legislative history and legislative intent[1]

If you've ever read TDCAA's *Legislative Update* book or our *Annotated Criminal Laws of Texas*, you've probably noticed the authors' personal notations on many pages. Although some statutes can stand on their own words without explanatory notes, many demand clarification. Notes call attention to how a new statute contradicts an existing one, muddies the waters over how to implement it, or simply doesn't make sense. It's all part of a legislative sausage-making process that can be the subject of ridicule, but prosecutors are still charged with enforcing those laws that can confound us.

By John A. Stride
TDCAA Senior Appellate Attorney

And prosecutors aren't the only ones struggling to ascertain what lawmakers mean when they write certain laws—the lawmakers themselves even wrangle with their own creations. In 2012, the Texas House of Representatives' Committee on the Judiciary and Civil Jurisprudence revealed with alarming defeatism that the legislature itself remains frozen in its inability to further assist in determining legislative intent: "While members of the committee may individually have a desire for additional legislation to help define legislative intent, there was no consensus for such. … The committee makes no specific recommendations for defining or clarifying 'legislative intent.'"[2]

If legislative committee members have abandoned the project in disagreement, what should those who must implement the legislature's handiwork do? Somehow we who live and breathe the law everyday must interpret legislation and, occasionally, discern legislative intent. Besides the host of sometimes poorly drafted statutes we must construe, we must also attempt to reconcile provisions where the legislature passes multiple bills on the same topic, as happened last session with the offense of evading arrest and with the expansion of protective orders to victims of human trafficking and stalking.

Notwithstanding the recent legislative committee admitting defeat, we do have some tools to ply our trade. When trying to ascertain the meaning of legislation, conscientious readers will always check the initial provisions of a particular code and the introductory provisions for each chapter. Directions on methods of construction, interpretation, and definitions are sometimes listed. The Penal Code illustrates this admirably: Early sections provide instructions on how to construe the code and definitions of terms used generally.[3] Further enlightenment on a statute's meaning may sometimes be obtained by looking at issue-specific provisions in the same chapter or code. For example, we learn that "a single criminal transaction" is something different from a "criminal episode."[4]

If those methods come up short, we are fortunate to have a few other tools at our disposal: 1) the Code Construction Act, 2) the state constitution and civil statutes, 3) publications from the Texas Legislative Council, and 4) the appellate courts. Now let's examine in greater detail how these resources help to divine the meaning of a confusing statute.

Code Construction Act (CCA)

The following list is a summary, without all the statutory clutter, of some of the CCA's most important provisions.[5] The code sweeps broadly but is not exhaustive. It applies to all codes enacted since 1967 and to any subsequent amendments, repeals, revisions, and re-enactments. It also covers rules adopted under those codes.[6] While the rules under the CCA are not exclusive, they are intended to "describe and clarify common situations in order to guide the preparation and construction of codes."[7]

Overarching provisions

Here are the basic rules for statutory construction. Statutes are presumed:

- to be in compliance with the state and federal constitutions;
- to be effective in their entirety;
- to afford a just and reasonable result;
- to have a result feasible of execution;
- to favor public over private interests;[8] and

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- to be prospective unless expressly retroactive.[9]

Headings of titles, subtitles, chapters, subchapters, and sections do not restrict or expand the statutory meaning.[10] For example, while the heading of Code of Criminal Procedure Article 38.141 refers to "Testimony of Undercover Peace Officer or Special Investigator," the text of the article requires corroboration of only confidential informants who are *not* peace officers or special investigators—the exact opposite of what one might expect from the heading. Similarly, the legislature will sometimes use the same language in statutory headings to describe different things. A "mechanical security device" under Penal Code §16.01, for example, is something used to improperly open locks, e.g., lock picks, but under Occupations Code §1702.234 it is, far more logically, a device that also includes locks or deadbolts.

Words and phrases shall be "read in context" and understood according to "the rules of grammar and common usage." But those words and phrases that have acquired a "technical or particular meaning"—by "legislative definition or otherwise"—are understood in their technical or particular sense.[11] Thus, the term "possess" as employed in TPC §25.07 creates a potential problem in cases involving violations of a protective order relating to a protected pet. The term has a particular meaning as defined by Penal Code §1.07(39) and so may prevent application of §25.07 to an intended victim who has already vacated the premises and left behind any pets to flee the offender, even though that was the stated intent of the provision.[12]

A short list of universal definitions is given, including of the terms "oath," "person," "property," "rule," "State," "written," and "year." Of note, "includes" and "including" are terms of enlargement, not limitation, and they create no presumption that components not expressed are excluded. In other words, "including" always means "including but not limited to"—which is a question we at TDCAA get all the time. But remember that for all these listed words, another definition may apply if another statute, or the context in which a word or phrase is used, requires one.[13]

A code's internal references

References to "titles," "chapters," and "sections" refer to those in the code, and references to their subparts—with all their various labels—are a reference to "a unit of the next larger unit" of the same code.[14]

Words in the present tense include the future tense, words of one gender include the other gender, and the singular and plural include each other.[15] This is illustrated by the Penal Code's use of the masculine singular pronoun "he" and "him" when the provision applies to people of both genders.[16]

When computing a period of days, the first day is included but the last day excluded; if the last day of a period falls on a weekend or legal holiday, the period is extended to the next day that is not on the weekend or a legal holiday. So, if a trial court happens to order pre-trial disclosure of *Brady* material in 10 days and the 10th day falls on a Sunday followed by a legal holiday on Monday, the material must be disclosed no later than the Tuesday immediately following the holiday. When counting months, the period starts and ends on the same numerical day of the different months—but if the concluding month is not long enough, the last day of that month.[17]

Verbs are of particular significance in statutes, so much so that various helping verbs and verb phrases are defined:

- "may" creates a discretionary authority or grants permission or a power;
- "shall" imposes a duty;
- "must" imposes a duty that creates or recognizes a condition precedent. The difference between "must" and "shall" is demonstrated in CCP art. 6.09(c) (as created by SB 407, 82nd R.S., 2011), where a county court handling a minor's sexting case "must" take the minor's plea but "shall" issue a summons for the defendant's parent;
- "may not" imposes a prohibition and is synonymous with "shall not" (even though "may" and "shall" are *not* synonymous!);
- "is entitled to" creates or recognizes a right;
- "is not entitled to" negates a right; and
- "is not required to" negates a duty or condition precedent.[18]

Multiple bills that change the same statute

Unfortunately, even with all of these rules at one's disposal, the legislature still manages to pass multiple, sometimes confusing acts of legislation that cannot be easily deciphered.

When amendments to the same

statute are enacted in the same legislative session without reference to each other, the amendments shall be harmonized so that effect can be given to each. The most recent example of such harmonizing came during the 82nd Regular Session in 2011, where three different bills changed the evading statute in §38.04 of the Penal Code. Though the three bills did not conflict, there was enough confusion that we at TDCAA (by "we" I really mean Shannon Edmonds and Clay Abbott) were called upon to untangle the mess.

Until September 1, 2011, §38.04 contained four subsections:

(a) laying out the elements of the offense of evading from peace officers;

(b) classifying the punishment as Class A misdemeanor, state jail felony, third degree felony, or second degree felony;

(c) instructing on the meaning of a vehicle; and

(d) permitting prosecution under this and/or other provisions.

But during the biennial legislative session earlier that year, three bills were passed:

- House Bill 3423 added *federal special investigators* to subsection (a), subsection (b)(2)(B), and subsection (b)(3).
- Senate Bill 496 added *watercraft* to subsection (b) and instructed on the meaning of the term in subsection (c)(2).
- Senate Bill 1416 created liability for using *tire deflation devices* by adding subsection (b)(2)(C) and (b)(3)(B) and instructed on the meaning of the term in subsection (c)(2). This bill also deleted subsection (b)(1)(B) and the "previous conviction" language from subsection (b)(2)(A).

Adding federal special investigators and watercraft to the evading statute allowed for no interpretative problem—it just created additional exposure (post-September 1, 2011) for evading involving either tire deflation devices or watercraft—so these provisions are easily harmonized.

One legislative oversight, however, was the failure to include federal special investigators within SB 1416's version of subsection (b)(2)(C). Thus, there is no offense under §38.04 for using tire deflation devices—often known as caltrops—against federal investigators. So as you knew, the legislature is far from perfect.

But the principal problem with the amendments arose because under the pre-September 1, 2011, statute, evading using a motor vehicle when not previously convicted was a state jail felony. But along came SB 1416 that made all cases of evading while using a vehicle a third-degree felony. (And by virtue of SB 496, evading while using a watercraft is also now a third-degree felony.) This change created no conflict; the bill simply replaced the former law and took some application to comb our way through the fur-ball. Crisis averted!

However, various publishers of the Penal Code—including the state's own website[19]—decline to apply the CCA to these multiple changes. As a result, lawyers and judges who do not have TDCAA publications are left adrift to reconcile these bills for themselves, oftentimes without success. Short of mandating that all lawyers purchase TDCAA publications (now wouldn't that be some good lobbying!), the legislature is left with the option of re-enacting the changes wrought by these three bills in a more digestible manner—which was the goal of HB 2130 (83rd R.S.).[20] However, the vagaries of the legislative process resulted in this bill not passing, so prosecutors will continue to have to educate those around them on the proper interpretation of §38.04 with the help of the Code Construction Act.

Irreconcilable conflicts

If conflicts exist between provisions, the reader is to apply the provision enacted last.[21] The date of enactment is the date the last legislative vote is taken on the bill enacting the statute.[22] Determine these dates by tracking down a bill's legislative history at the Capitol's website, www.capitol.state.tx.us. (A note: Legislative *history* differs from legislative *intent* in that the former is an objective, quantitative analysis of what happened when, while the latter is a sometimes subjective, more qualitative analysis of *why* the legislature did what it did. People often confuse these terms or use them interchangeably, but they are quite different.)

One example of such a conflict was with HB 290 and HB 2014, both passed during the 82nd Regular Session in 2011. The former bill made the first offense of employment harmful to children a Class A, the second a state jail felony, and third and subsequent offenses a third degree, while the latter bill increased the penalty for all offenses to a sec-

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ond-degree felony (first-degree where victims are under age 14). Because these two punishment schemes are irreconcilable, we turn to the date of the last legislative vote to determine our winner: HB 290 was passed on May 27, while HB 2014 on May 19. Therefore, HB 290, with its less-harsh penalties, controls.[23]

When the latest date of enactment of two conflicting bills is not clear from legislative records, the date of enactment is determined by, respectively:

- first, the date the last presiding officer signed the bill;
- second, the date the governor signed the bill; and
- third, the date when by operation of law the bill became law.[24]

When general and specific/local provisions conflict, effect shall be given both if possible. But if they are irreconcilable, the special/local provision prevails—unless the general provision was later enacted and the manifest intent of the general provision is that it shall prevail.[25] As an example, in the rather bizarre case of *Azeez v. State*, the defendant received a citation for speeding and failed to appear in municipal court.[26] He was charged with failing to appear. At his trial on the latter offense, however, the city prosecutor argued that he was proceeding with a charge under a City of Houston ordinance, the trial court thought the charge was grounded in the Penal Code, and the defendant asserted the proper charge was one under the Transportation Code!

Judge Holcomb, writing for the unanimous court (Judge Meyers not participating), held that the offense was under the Penal Code, but the court also held that the special Transportation Code provision relating to sentencing—and applied by the court of appeals—was in "irreconcilable conflict" with the general Penal Code sentencing provision. Under the doctrine of *in pari materia*, the special statute controls over the general statute, and as the defendant had been tried under the general statute, he suffered a due process violation from his greater exposure under the Penal Code than he should have suffered under the Transportation Code.[27] To limit such gnarly legal dilemmas in the future, the legislature is increasingly placing "anti-*in para materia*" clauses in various new or amended offenses, as when it provided in new Penal Code §32.53(d) that "a person subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections."[28]

Ambiguity

If statutes are ambiguous, prosecutors and courts can consider such things as:[29]

- the object sought to be obtained;
- circumstances of enactment;
- legislative history;
- common law or former statutory provisions, including laws on the same or similar subjects;
- consequences of a particular construction;
- administrative construction of statute; and
- title (caption), preamble, and emergency provision.[30]

If a provision of a statute or its application to a person or circumstances is held invalid, other provisions or applications of the statute remain unaffected so long as they can be given effect without the invalid provision. Thus, the provisions of a statute are severable, but the courts can determine the legislative intent regarding the severability of a statute.[31]

Severability and non-severability provisions included in statutes prevail in construing the statutes. But there is severability for statutes without such provisions: If a provision or its application to a person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that *can* be given affect.[32] This severability was temporarily demonstrated when the Second Court of Appeals held a portion of the harassment statute—Penal Code §42.07(a)(7), relating to telephonic harassment—unconstitutional.[33]

Constitution and civil statutes

One place that may not be immediately thought of for assistance with legislative interpretation is the Texas Constitution. It tells us, for instance, that weak titles do not invalidate laws: A law may not be held void for an insufficient title.[34]

But if something becomes offensive enough, the legislature has amended the Constitution. We saw this with preserving indictment and information error.[35]

Also, be aware that a number of other provisions not covered here apply specifically to the construction of civil statutes.[36] Some of the sections, however, are similar to those above.

Texas Legislative Council books

Further enlightenment on what particular legislation means may be obtained by reviewing two publications of the Texas Legislative Council.[37] The council issues a guide on *Reading Statutes and Bills*[38] and a *Drafting Manual*.[39] The former might be a little basic for most lawyers but serves as a refresher to a distant law school legal-writing class. It contains some tips to get around the sheaves of paper quickly. The latter is lengthy and highly detailed—at times even reminiscent of the all-too-pedantic *BlueBook*—but it explains the conventions and preferred language in drafting legislation. Most helpful is the chapter "Style and Usage" and its subchapters "Rules of Style" and "Drafting Rules." If the reader understands these tools for creating legislation, they should also assist with interpreting it.

The courts' contribution

When all of these guides fail to provide clarity, the courts must step in. And really, the courts have demonstrated considerable self-restraint. Statutory construction is a question of law, not fact.[40]

The courts presume that the legislature intended for the entire statutory scheme to be effective.[41] They also "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible."[42]

When interpreting statutes, courts must "seek to effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." They focus their "attention on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment."[43]

Absent any ambiguity in statutory language, a court must construe the language as written unless doing so would lead to an absurd result.[44] Ambiguity exists when a statute may be understood by reasonably well-informed persons in two or more different senses; conversely, a statute is unambiguous where it reasonably permits no more than one understanding.[45] Increasingly, the legislature—with some helpful prompting—is including language in statutes prescribing conduct that allow prosecution under other applicable laws. So the massive confusion/ambiguity generated by the advent of the sexting statute, Penal Code §43.261, in the 2011 regular session may be avoided altogether thanks to subsection (g) of that offense, and the courts may never have to decipher the mess.

Where application of a statute's plain language would lead to absurd consequences or where "the language is not plain but rather ambiguous," a court may consider such extra-textual factors as those listed in the Code Construction Act,[46] which we discussed above. But the courts resort to these sources only "out of absolute necessity" and only insofar as they do not "add [to] or subtract from [the] statute." When searching beyond the text to find meaning, the court must take care not to substitute its judgment for that of the legislature in giving effect to a statutory provision.[47]

Conclusion

As this article is written, the 83rd Legislature is in a Special Session. And many of the conflicts discussed in this article were resolved by the legislature this session. Like the product or not, as prosecutors and their staff, we must work with it. To assist you, this summer—by way of a publication and numerous regional updates—the legislative team at TDCAA will be diligently dissecting and actively disseminating its gourmet review of the new batch of sausage. *Bon appétit!* ❇

Endnotes

1 This article would not have been completed without the significant contributions of my TDCAA colleagues Shannon Edmonds and Sarah Wolf. I extend my gratitude to them.

2 Interim Report to the 83rd Texas Legislature, at 17. The entire report can be accessed at http://www.house.state.tx.us/_media/pdf/committees/reports/82interim/House-Committee-on-Judiciary-and-Civil-Jurisprudence-Interim-Report-2012.pdf.

3 See Tex. Pen. Code §§1.05, 1.07, and 3.01.

4 See Tex. Pen. Code §3.02.

5 Readers should turn to the statutory provisions themselves for the precise language. I have simply attempted to convey their meaning as succinctly as possible. Unless otherwise noted, all statutory references are to the Texas Government Code.

6 Tex. Gov't Code §311.002.

7 Id. at §311.003.

8 Id. at §311.021.

9 Id. at §311.022.

10 Id. at §311.024.

11 Id. at §311.011.

12 SB 555 (83rd R.S., 2013), signed by the governor as this article went to print, remedies this con-

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NEWS WORTHY

A note about death notices

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

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fusion by specifiying that such "possession" of a pet can be actual or constructive.

13 Tex. Gov't Code §311.005.

14 Tex. Gov't Code §311.006.

15 Tex. Gov't Code §311.012.

16 Tex. Penal Code §1.04 is one example. But this usage is decreasing because the Texas Legislative Council will frequently make non-substantive gender-neutral substitutions of "person" for "his," etc., in bills making other substantive changes.

17 Tex. Gov't Code §311.014.

18 Tex. Gov't Code §311.016.

19 www.statutes.legis.state.tx.us/Index.aspx.

20 www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB2130.

21 Tex. Gov't Code §§311.025(b) and 312.014(b).

22 Tex. Gov't Code §312.014(d).

23 Which simply won't do, of course, so HB 8 (83rd R.S.) has been sent to the governor to, among other things, restore the harsher penalty range that was passed last session as HB 2014 but trumped by lesser punishments of HB 290 (82nd R.S.).

24 Tex. Gov't Code §312.014(e).

25 Tex. Gov't Code §311.026.

26 *Azeez*, 248 S.W.3d at 182.

27 In the interest of relating the story so it could be easily understood (I hope), I may have oversimplified. But this case is quite the tangled web that would otherwise take up more space than deserved in this general article.

28 SB 688 (82nd R.S., 2011).

29 Visit the Texas Legislative Reference Library's website at www.lrl.state.tx.us/legis/legintent/typicalMaterials.cfm for more information on legislative intent.

30 Tex. Gov't Code §311.023.

31 Tex. Gov't Code §312.013.

32 Tex. Gov't Code §311.032.

33 *Karenev v. State*, 258 S.W.3d 210 (Tex. App.—Fort Worth 2008), rev'd, 281 S.W.3d 428 (Tex. Crim. App. 2009).

34 Tex. Const. art. III, §35(c).

35 See Tex. Const. art. V, §12, implemented by Tex. Code Crim. Proc. art 1.14(b).

36 Tex. Gov't Code §§312.001–008.

37 The council states that its mission is "to provide professional, nonpartisan service and support to the Texas Legislature and legislative agencies. In every area of responsibility, we strive for quality and efficiency."

38 Available at www.tlc.state.tx.us/pubslegref/readingabill.pdf.

39 Available at www.tlc.state.tx.us/legal/dm/draftingmanual.pdf.

40 See *Mahaffey v. State*, 364 S.W.3d 908, 912 (Tex. Crim. App. 2012).

41 *Id.*, at 913.

42 *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997).

43 *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

44 *Garrett v. State*, 377 S.W.3d 697, 703 (Tex. Crim. App. 2012).

45 *State v. Neesley*, 239 S.W.3d 780, 783 (Tex. Crim. App. 2007).

46 *Boykin*, 818 S.W.2d at 785.

47 *Cornet v. State*, 359 S.W.3d 217, 221 (Tex. Crim. App. 2012).

DNA databases get a powerful boost from the Supreme Court of the United States

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

If you thought the United States Supreme Court seldom decides cases in the interest of prosecutors or law enforcement, here's a case for you!

In 2009, Maryland police arrested Alonzo Jay King for what would have been aggravated assault under Texas law.[1] He had threatened a group of people with a shotgun. At the station, the officers identified King by his name (and likely his I.D.) and had him fingerprinted. At that point, King was masquerading as a man with a clean record, without any darker past to hide. And police did not know any different.

As it happened, Maryland had just started requiring DNA samples from arrestees accused of violent crimes. The state's highest appellate court, like ours in Texas and many others throughout the country, had already permitted collection of DNA samples from convicted felons.[2] But the Maryland legislature extended the program in a bold, new direction—to include the merely *accused*.[3]

As part of the routine booking process for arrestees of violent crimes, officers in the Maryland jail had King open his mouth, and they swabbed the inside of both cheeks to collect a DNA sample. This is commonly called a "buccal swab." "Buccal" is pronounced like "buckle" and means relating to the cheek or mouth. King's case proceeded through the initial phases of the criminal justice system. He was arraigned before a judge and a decision was made whether to release King on bail.

Then, four months after his arrest, police learned that King was not who they thought he was. Scientists had isolated King's DNA profile and uploaded it to Maryland's DNA database, which returned a "hit" on his profile to an unsolved 2003 rape. Police now had strong evidence that the man they had arrested for brandishing a gun was actually a violent rapist.

Six years earlier, an unidentified man had broken into the home of a 53-year-old woman and raped her at gunpoint. The case had remained unsolved until DNA from the rape kit was matched to the sample Maryland officers had taken from King at booking. King was charged in the 2003 rape. And the change in the Maryland law, allowing officers to collect samples not just from convicted felons but from *arrestees* of violent crimes, had made all the difference. If officers had waited on a conviction, they would never have been permitted to collect a DNA sample, as King pled the case to simple assault, a misdemeanor,[4] which did not qualify for mandatory DNA collection upon conviction.[5]

So when King was indicted for the 2003 rape, he challenged Maryland's DNA Collection Act that allowed police to collect DNA samples from arrestees. The trial judge ruled against King, but Maryland's highest appellate court held that requiring a DNA sample from those who had not yet been convicted violated the Fourth Amendment and was unconstitutional.[6] In a 5–4 decision, the Supreme Court of the United States reversed, upholding the constitutionality of the act.

Now, because of *Maryland v. King*, when police arrest anyone for a "serious offense," they can require the arrested person to submit to a buccal swab for DNA—at least as far as the Fourth Amendment is concerned. Such a search for DNA might violate other laws, but it does not violate the Fourth Amendment. This holding alone is a tremendous victory for criminal justice. During oral argument, Justice Alito called *Maryland v. King* "perhaps the most important criminal procedure case" that the Supreme Court has heard in decades.[7] It is significant because it now paves the way for states to expand DNA collection and unleashes a very powerful and very accurate law enforcement tool—a tool that can both "exonerate the wrongly convicted and … identify the guilty."[8]

Maryland v. King is also likely to be significant for students of the law because it falls outside of the usual categories of Fourth Amendment cases. The Fourth Amendment provides a right of the people to be "secure in their persons" against unreasonable searches. Unsurprisingly, the court held that a buccal swab

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for DNA was a "search."[9] This would ordinarily require the police to have a warrant (or meet one of the exceptions to the warrant requirement) and develop probable cause or reasonable suspicion to believe the person they are searching is linked to criminal activity. In King's case, there was neither a warrant nor anything particular about King to suggest he had committed another crime. But the court in *King* held that neither was required by the Fourth Amendment in these circumstances. There have been a handful of Supreme Court cases that required neither a warrant nor individualized suspicion, but the circumstances and rationales for these decisions have not been uniform. Some searches have been upheld because they were "designed to serve 'special needs, beyond the normal need for law enforcement,'"[10] others because of a diminished expectation of privacy or minimal intrusions,[11] and still others because the requirement of a warrant would serve little purpose.[12] Without claiming to be on all fours with any of the prior cases, the majority decision borrowed selectively from their rationales, ultimately adding *Maryland v. King* to a growing list of suspicionless—yet still reasonable—searches.

Having dispensed with the need for a warrant or individualized suspicion, the court then balanced law enforcement interests against privacy concerns. In the end, the needs of law enforcement won out. But it was not because of DNA's importance in ferreting out crime and solving cold cases, as you might expect. Instead, the court said that it was DNA's critical role in identifying, in a broad sense, the person taken into custody that justified a warrantless, suspicionless search. Like fingerprinting and other routine administrative procedures incident to booking, DNA's ability to uncover an arrestee's other crimes was a crucial part of law enforcement's interest in knowing just whom they were handling, exposing to jail staff and other inmates, and potentially releasing on bail. Even though the DNA results in King's case were not available for many months after his arrest, the court was aware that this may not always be the case. In the future, police agencies will likely have a hands-free instrument capable of producing a DNA profile within hours and able "to search unsolved crimes while an arrestee is in police custody during the booking process."[13] Ultimately, the court upheld the Maryland DNA collection law because a buccal swab is a minimal intrusion, people who are arrested on probable cause for a dangerous offense have a diminished expectation of privacy, and Maryland's law provides inherent privacy protections (such as including in the profile only DNA material that would identify a person, not reveal genetic traits).

So what does the case mean for Texas?

Right now, Texas law does not allow DNA collection for a person in King's situation: an arrestee with no prior convictions. If King had been in Texas when he committed his rape and was later arrested for brandishing a shotgun, the rape would have remained unsolved.

Under our DNA database law (Government Code §411.1471), to compel a DNA sample of an arrestee at the time of booking, the person must have a prior conviction or deferred adjudication, and only certain prior offenses (for the most part, sex offenses) count.[14] Now that *Maryland v. King* has authorized DNA collection for persons arrested for (and not yet convicted of) serious crimes, our legislature may decide to follow suit and expand DNA collection to include arrestees with no known criminal history.

While Texas does not authorize DNA collection at the time of arrest, DNA can be compelled at the time of indictment for one of the enumerated sex offenses (which are likely to be considered "serious" under *King*).[15] A prior conviction is not required once a person has been indicted for one of these offenses. And after *King*, the legislature may decide to expand the list of offenses to include "serious" offenses such as murder and aggravated assault, which do not currently qualify for DNA collection.

Strictly speaking, compelling a sample at the time of indictment differs from booking, which is when King's sample was taken. One could argue that the timing of DNA collection at booking was a vital part of justifying the search in *King* because booking was the time of other administrative identification procedures incident to the arrest. But the court upheld the search in *King* even though under the Maryland statute, officers had to wait until after arraignment before they could begin processing a DNA sample.[16] Given the majority's tolerance for this delay

(as well as the four-month lag in identifying King as the rapist he was), it is likely that collecting DNA at the time of indictment (and perhaps even later) will also be found constitutional. In any case, many of the individuals who would have had their DNA collected at the time of indictment will have already provided a DNA sample because the Code of Criminal Procedure requires such a sample as a condition of bond for these same accused offenders.[17]

Because the Texas statute, generally speaking, is more limited than Maryland's, the court's decision in *King* is unlikely to have any immediately effect on when officers can compel a suspect to provide a DNA sample in Texas. But by approving other states' expansion of the pool of known offenders entered into DNA databases such as CODIS, *Maryland v. King* may already begin to have some impact on Texas cases. A larger pool will aid in solving cold cases, capturing escapees, and collecting evidence that could later identify perpetrators of crimes yet to be committed. Who knows? The DNA of these arrestees, those who are *presumed* innocent, may one day help exonerate those who are *actually* innocent. ❇

Endnotes

1 *Maryland v. King*, No. 12-207, 133 S.Ct. 1958 (2013).

2 *State v. Raines*, 857 A.2d 19 (Md. 2004); *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008); *United States v. Mitchell*, 652 F.3d 387, 402 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 1741, 182 L. Ed. 2d 558 (U.S. 2012).

3 Md. Code, Public Safety §2-504(a)(3).

4 Md. Code, Crim. Law §3-203.

5 *King v. State*, 42 A.3d 549, 555 n.2 (Md. 2012); Md. Code, Public Safety, §2-504(a)(1) (allowing collection of DNA samples for those convicted of a felony, misdemeanor burglary of a building or vehicle).

6 *King*, 42 A.3d at 580.

7 *Maryland v. King* oral argument transcript, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-207-lp23.pdf. A recording of oral arguments is also available at http://www.supremecourt.gov/oral_arguments/argument_audio.aspx

8 *King*, 133 S. Ct. at 1966.

9 *Id.* at 1968-69.

10 See *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S. Ct. 733, 748, 83 L.Ed.2d 720 (1985) (Blackmun, J., concurring in judgment); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (upholding drug testing of student athletes); *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (striking down state hospital's reporting pregnant women's drug test results to law enforcement).

11 *Samson v. California*, 126 S. Ct. 2193, 2197-2202 (2006) (permitting warrantless searches of parolees without cause); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (upholding suspicionless drug testing of railroad employees).

12 *Treasury Employees v. Von Raab*, 489 U.S. 656, 680 (1989) (permitting susicionless drug testing of government employees).

13 CODIS and NDIS Fact Sheet, available at http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet.

14 Tex. Gov't Code §411.1471(a)(2). Please note that Texas does require DNA sample following conviction for a felony (see Tex. Gov. Code §411.148) or placement on probation (see Tex. Code Crim. Pro. art. 42.12, §11(e)(2)).

15 Tex. Gov't Code §411.1471(a)(1).

16 Md. Code, Public Safety, §2-504(d)(1).

17 Tex. Code Crim. Proc. art. 17.47(b).

News Worthy

San Antonio Young Lawyers Association recognizes the late Chip Rich

The San Antonio Young Lawyers Association (SAYLA) honored the late Chip Rich, an assistant criminal district attorney in Bexar County, with the Outstanding Mentor Award. This award recognizes one attorney who has consistently demonstrated a commitment to mentoring young lawyers in his or her legal community.

This year's Outstanding Mentor Award was posthumously bestowed upon Charles "Chip" Henry Rich, III, who passed away November 5, 2012. His wife, Deb, and daughters Ellie and Kate (pictured below with Barrett Shipp, formerly of the Bexar County Criminal District Attorney's Office and now in private practice), received the award in his stead. Chip took great satisfaction in his work as a prosecutor and spent 10 years in various divisions of the DA's office, most recently as chief of the DWI Task Force. Chip served as a formal and informal mentor to many young lawyers as they started their careers at the DA's office, and he was well respected by both prosecutors and members of the criminal

Right on target

How the newly created Domestic Assault Response Team (DART) in Williamson County hit the bullseye with its first free conference on domestic violence

By Jackie Borcherding
Assistant District Attorney in Williamson County

Preventing and prosecuting domestic violence is the mission of the Williamson County Domestic Assault Response Team (DART). DART is a collaborative team of prosecutors, victims' assistance personnel, law enforcement, and health professionals that formed in August 2012 under the leadership of District Attorney Jana Duty and County Attorney Dee Hobbs, to reduce the incidence of domestic violence and improve the effectiveness of advocacy for victims. DART aims to be to domestic violence what MADD has been to driving while intoxicated: an effective means of education, public awareness, and prevention of crime in our community.

Because we believe that collaboration and education are necessary to end the cycle of violence, the DART team conceived the idea to host a free, three-day conference for those who are committed to thorough investigations and just prosecution of domestic violence cases. Within nine months of that initial idea, we hosted our first conference in mid-May, with over 200 registrants, including judges, other elected officials, prosecutors, law enforcement officers, nurses, doctors, probation officers, mental health professionals, social workers, and community leaders. That's 100 more attendees than expected!

We wanted to host our first conference for free, so we simply asked who wanted to partner with DART to end the cycle of violence; we received an overwhelmingly favorable response from our local community. Our facilities and food were donated, due to the generosity of Commissioner Lisa Birkman in securing the Williamson County Jester Annex Building in Round Rock for no cost, as well as charitable donations from our nine sponsors:

Conference attendees


The DART team

the Williamson County Sheriff's Association, Round Rock Officer's Association, Cedar Park Police Association, Taco Cabana, Chipotle, Chick-Fil-A, the Center for Cognitive Education, Panda Express, and Schlotzksy's.

Our 21 speakers graciously donated their time and talent to talk on myriad important topics related to the investigation and prosecution of domestic violence cases. For example, Michelle Garcia and Rebecca Dreke from the Stalking Resource Center in Washington D.C. presented on investigating stalking cases and applying Texas stalking laws. Then, Rev. Dr. Chrys Parker, author of *I Always Sit with My Back to the Wall*, shared her 40 years' experience of working with victims with post-traumatic stress disorder from sexual and physical violence. Round Rock Police Department Detective John Combs spoke on family violence forensic investigative techniques. Jan Langbein, director of the Genesis Women's Shelter in Dallas, spoke on what child abuse professionals need to know about domestic violence.

We believe our first conference is only the beginning of what DART seeks to achieve in educating the community and eradicating domestic violence in Williamson County. Lastly, a special thanks to all of the people who have committed to partnering with DART to promote education and collaboration to end the cycle of violence in our community. ❇

Responding to requests for clemency

How the State should respond to an inmate's clemency application with the Texas Board of Pardons and Paroles

By Shelly Yeatts
Assistant Criminal District Attorney in Dallas County

After years of post-conviction litigation in a death penalty case, the trial court finally sets an execution date. Likely, the death row inmate's petition for certiorari in his federal writ of habeas corpus is either pending or was recently denied. What's next?

The application

In most cases, federal habeas counsel[1] files a clemency application with the Texas Board of Pardons and Paroles, seeking a recommendation to the governor for a delay of execution (a reprieve) or a commutation of the offender's death sentence to a sentence of life in prison.[2] The clemency application to the board must be filed not later than 21 days prior to the offender's execution date.[3] To calendar the offender's deadline to submit his clemency request, start with the day before the execution date and count back 21 days. If the 21st day falls on a weekend or state holiday, the deadline extends to the next business day. An offender may supplement or amend his application not later than the 15th calendar day before the scheduled execution.

The clemency section of the board notifies the district attorney, presiding judge of the court of conviction, county sheriff, and relevant police chief when an offender files a clemency application, specifying the particular relief sought. The notice offers the officials an opportunity to provide a statement of their views regarding the offender's clemency request. The board currently allows trial officials to respond to a clemency application not later than the 15th calendar day prior to the scheduled execution.[4]

Preparing to respond

A district attorney who wishes to respond to a clemency request may contact the board's clemency administrator prior to the offender's deadline and advise that the DA intends to respond to the clemency application if one is filed. The clemency administrator will inform the caller whether it has received notice yet that a clemency application will be filed.

Much of the preparation for responding to a clemency application can be done prior to receipt of the notice; this work overlaps with preparation for any last-minute litigation in the case. Preparation may include review of the trial transcript (if the assigned attorney has not previously worked on the case); prepa-

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ration of a chronology of all state and federal court proceedings and a summary of the issues raised and addressed by the courts; review of the prosecution's trial and post-conviction files; Internet search for any websites, blogs, publications, or media outlets associated with the offender; review of the inmate's Texas Department of Criminal Justice classification and medical and mental health files; and contact with the victim's family.

Information obtained and maintained by the board for an inmate's executive clemency file is confidential and privileged.[5] The prosecuting attorney, however, may obtain a copy of an offender's clemency application from the board's general counsel under the provisions of §508.313 of the Government Code.

The Administrative Code sets out what an offender must include in an application for a reprieve, including a statement of the offense, appellate history of the case, legal issues raised in the courts, the grounds upon which a reprieve is requested, and, surprisingly, "a brief statement of the effect of the prisoner's crime upon the family of the victim."[6] The grounds specified in the application may not call upon the board to decide technical questions of law properly presented to a court.[7]

Be creative!

A clemency response should be written in the form of a letter, not a legal pleading. Although the board members are cognizant of current issues in death penalty litigation, the board may have non-attorney members.[8] Draft your arguments accordingly. The gist of the response to a clemency application is that the district attorney opposes executive clemency to the offender in any form, albeit a delay of execution or reduction of his sentence. A clemency response should also briefly describe the offense and respond to the offender's primary grounds for relief. The whole of the response should reassure the board that carrying out this execution serves to further justice in the case.

For the assistant district attorney assigned to the case, preparing the clemency response is one of the few prosecutorial tasks that allows for something akin to creative writing. It is the prosecutor's opportunity—hopefully for the last time—to tell the victim's story, to tell that story free of the usual legal formalities, and to seek fulfillment of the jury's verdict.

A clemency response should include a description of the facts of the case—but keep it brief. This should not be the rendition of the facts set out in the appellate brief. Tell the story as you would to a lay audience, in a less formal manner than in a court filing. There is no need to include record or case citations. A responder is not constrained by the trial judge's rulings on admissibility or the evidence the parties chose to present at trial and may incorporate reliable facts from sources other than the trial record, such as those contained in investigative reports and witness statements not admitted at trial or information a surviving victim or witness has personally given the DA's office. The clemency response is an opportunity to do what the prosecution does not always get to do: provide the State's unadulterated view of the case, with a little flair where desired. In addition to the facts of the offense, the background portion of the clemency response should include the procedural history of the case and a description of any pending litigation. Again, case citations are not necessary.

When possible, develop themes in response to the offender's grounds for relief. Common themes in clemency responses might be: the offender's lack of remorse or refusal to accept responsibility; the offender is not deserving of mercy; the impact of the offender's heinous acts on family, witnesses, or surviving victims; the offender's continuing future dangerousness; or the victim's family's position on the scheduled execution. Go beyond the trial record and incorporate information developed or obtained post-trial if available. A post-conviction development representative of the extensive impact of the defendant's acts might be, for example, that a child survivor, who witnessed his mother being stabbed to death and was injured in the assault, required multiple psychiatric hospitalizations as a teen.

Frequently an offender will present a legal issue to the board that was argued at trial or raised on appeal or in a writ. If so, advise the board that this legal issue has been addressed and rejected by the courts and does not warrant relief. If the offender presents a legal issue that is currently pending, advise the board of this.

A common tactic is for the offender to present his alleged mitigating issue, such as a history of severe drug addiction or childhood abuse, and ask for mercy on this

basis. If he merely duplicates an issue presented to the jury, explain to the board that the jury heard this evidence but did not find the circumstances sufficiently mitigating to warrant a life sentence; ask the board not to supplant the jury's verdict and to refuse relief on this basis. If the offender was subject to re-trial for any reason, remind the board that not just one but multiple juries heard this evidence and rejected it. For fabricated or baseless eleventh-hour issues never before raised, emphasize to the board that the offender, in his (for example) 15 years of post-conviction filings, never saw fit to raise this issue.

The clemency response is an opportunity to include fascinating facts or nuances about the case or the offender that you or your predecessors have encountered over the years. The offender may have made statements about the offense or himself in correspondence, to the media, or on the Internet. A surviving victim may have provided insightful information about the offense or trial that is not included in the formal record of the case. If this information is relevant to the issues being discussed, share them with the board.

Executive Clemency Case Report

As with all writing tasks, it is important to be cognizant of information the audience already possesses about the subject matter. To accomplish this, the DA may obtain the Executive Clemency Case Report, or ECCR, which an institutional parole officer prepares for the board for every offender scheduled for execution. Like a clemency application, the ECCR is confidential pursuant to §508.313 of the Government Code but may be obtained by the prosecuting attorney via a written request to the Board's General Counsel.[9] An institutional parole officer prepares the ECCR for the board, summarizing the case. The sources of information in compiling the ECCR are listed within and include items and information obtained from the prosecution, court records, TDCJ records and contacts, and—one thing the prosecution does not have access to—a recent interview with the offender. ECCRs are extensive and summarize the offender's personal information; criminal and incarceration history; the capital murder; the offender's substance abuse history; physical and mental history; social, marital, and family history; the offender's visitation list; his institutional adjustment; disciplinary violations; the interview and observations by the parole officer; statements by the victim's family members from the victim information sheet; the offender's statement regarding the capital murder; and any verbatim statement by the offender addressed to the board and the governor. The ECCR is an invaluable tool in preparing a clemency response. From it, the responder can glean what the board already knows about the offender, what to emphasize, and what gaps to fill, if any.

The information the offender reveals in the interview may be particularly useful. The clemency response is an opportunity to shed light on statements the defendant makes in his interview and to refute any last-minute misrepresentations or lies. In those instances in which the offender was silent in the pre-trial phase, never testified, has never discussed his case in jail correspondence, and does not currently trumpet his story on the World Wide Web, this may be the first time the DA has ever heard his version of the facts or perhaps his outright denials. If the offender's description of the offense is false, demonstrates his lack of insight into his actions, or proves his lack of remorse, point this out to the board.

The responder can develop the presentation of the case or determine the information to emphasize in light of the ECCR's content. For example, there is no need to provide a detailed recounting of the offender's criminal history or disciplinary incidents while on death row in the clemency response. Certainly the responder can answer any questions the ECCR poses. Or if the resources relied upon to compile the ECCR do not explain why the offender's extraneous charges or separate indictments related to the capital murder were dismissed, the responder might explain and reassure the board the dismissals were not related to the offender's culpability for those additional crimes.

In addition to the interview conducted by the institutional parole officer, an offender may request an in-person interview with a board member in his clemency application.[10] Only the offender, board member, board staff, and Texas Department of Criminal Justice staff may be present.[11] If such an interview occurs, it is documented in an ECCR addendum, which, like the

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original ECCR, is available to the prosecuting attorney pursuant to written request to the board. During the interview, the offender may provide additional materials to the board to be considered in conjunction with the application.

The victim's family members may submit letters to the board opposing the offender's clemency request. Although the Clemency Section and Victim Services Division of the Texas Department of Criminal Justice coordinate submission of letters by the victims' families, due to the short turnaround required, the prosecutor may want to inform the family ahead of time of the opportunity to respond. Do not share a copy of the application with the family, however, due to its confidential nature.

Board members usually vote on an offender's clemency application at 1:00 p.m. two days before the scheduled execution.[12] In response to a request for commutation, the board may only:

1) recommend to the governor the commutation of the death sentence to a lesser penalty;

2) not recommend commutation; or

3) set the matter for a hearing pursuant to title 37, §143.43 of the Administrative Code.[13]

In response to a request for a reprieve, the board may only:

1) recommend to the governor a reprieve from execution;

2) not recommend a reprieve; or

3) recess the proceedings without a decision if the governor has granted a reprieve or a court has granted a stay of execution.[14]

After the vote occurs, the board will provide the DA, presiding judge, sheriff, and police chief with a notice indicating the result of the vote. The board will include a summary listing the voting members by name and how each member voted.[15]

Possibility of reprieve without a recommendation

Even absent a recommendation from the board for a delay or commutation of sentence, the offender may seek a 30-day reprieve directly from the governor.[16] To be available to answer any questions the governor or his staff has about the case, contact the Governor's Office of the General Counsel and inquire which assistant general counsel is assigned to the case. Ask the assistant general counsel to notify the DA's office if the offender requests a reprieve, and offer to answer any questions that arise.

Conclusion

A reprieve of execution or commutation of sentence is an act of clemency, or grace, which the governor may grant upon recommendation of the Board of Pardons and Paroles. Without such a recommendation, the governor may still grant an inmate scheduled for execution one 30-day reprieve. Although there is no requirement for a district attorney to respond to an inmate's request for clemency, a response provides the prosecutor with an opportunity to advise the board why the offender is not deserving of grace and to honor the victim(s) and the jury's verdict. A DA's participation in the clemency process is furthermore an informative vehicle through which to learn about the offender's latest strategies or interpretation of his case—which may foreshadow or outright reveal the claims the offender plans to file in last-minute litigation, including potentially a subsequent writ of habeas corpus. In such an instance, the prosecutor's work on the clemency response can be applied to the upcoming task of opposing last-minute litigation. Conversely, a clemency application lacking new issues or claims may indicate the offender and his counsel have simply run out of maneuvers. ❇

Endnotes

1 Texas has no state law provision for appointment and payment of clemency counsel. When certain conditions are met, federal habeas counsel is required to represent a state inmate (who is under a sentence of death) in clemency proceedings unless counsel has been released from the case by the federal court. See 18 U.S.C. §3599(e) (2008); *Harbison v. Bell*, 556 U.S. 180, 183-86 (2009); *Gary v. Georgia Diagnostic Prison*, 686 F.3d 1261, 1262-63 (11th Cir. 2012). The federal court provides the attorney's compensation for representation in the clemency proceedings, and counsel may request funding for expert, investigative, or other services reasonably necessary for the representation of the inmate. 18 U.S.C. §3599(f), (g).

2 See Tex. Const. art. IV, §11(b) (granting the governor the power in criminal cases except treason and impeachment, on the written recommendation of a majority of the Board of Pardons and Paroles, to grant reprieves and commutations of punishment); Tex. Crim. Proc. Code art. 48.01(a) (same); 37 Tex. Admin. Code §§143.41(b) (Tex. Bd. of Pardons & Paroles, Governor's Reprieve) (granting the governor the power, upon the written recommendation of a majority of the Board, to grant a reprieve in any capital case), 143.43 (Tex. Bd. of Pardons & Paroles, Procedure in Capital Reprieve Cases), 143.51 (Tex. Bd. of Pardons & Paroles, Commutation of Sentence) (granting the governor the power, upon recommendation of the Board, to grant a commutation of sentence), 143.57 (Tex. Bd. of Pardons & Paroles, Commutation of Death Sentence to a Lesser Penalty).

3 37 Tex. Admin. Code §§143.43(a), 143.57(b).

4 Telephone interview with Thanh Nguyen, Clemency Administrator, Board of Pardons & Paroles, General Counsel's Office (May 2, 2013).

5 See Tex. Gov't Code §508.313(a)(1).

6 37 Tex. Admin. Code §143.42 (Tex. Bd. of Pardons & Paroles, Reprieve Recommended by the Board).

7 Id.

8 There is no requirement for board members to be licensed attorneys. See Tex. Gov't Code §508.032 (listing the requirements for board membership, which do not include a license to practice law).

9 See Tex. Att'y Gen. OR2004-7699, OR2004-7006 (concluding that ECCRs are confidential and not subject to disclosure to the general public under public information statutes).

10 37 Tex. Admin. Code §§143.43(d), (e), 143.57(e), (f).

11 Id. §§143.43(e), 143.57(f).

12 Board Directive 143.300, Tex. Bd. of Pardons & Paroles (Sept. 15, 2009).

13 37 Tex. Admin. Code §143.57(g).

14 Id. §143.43(j).

15 The board consists of seven members. Tex. Gov't Code §508.031(a).

16 Tex. Const. art. IV, §11(b) (stating the "governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days"); Tex. Crim. Proc. Code art. 48.01(a); 37 Tex. Admin. Code §143.41(a).

A story of domestic violence unlike any you've ever heard

Prosecutors say that when they read this offense report (it involved plastic wrap, zip ties, and a billy club), they couldn't wait to tell the story to a jury.

By Anna Lee McNelis and Brandon Grunewald
Assistant District Attorneys in Travis County

Jason Witt and Andria Stanley met through an online dating service in August 2005. Jason was a Connecticut native who attended graduate school at the University of Texas at Austin and was working in the information technology (IT) field. Andria was a single mother to an elementary-school-age daughter. She was working as a respiratory technician in a neo-natal intensive care unit in a hospital in Palestine, Texas.

Early on, Andria shared with Jason that her daughter was the product of a rape and that the rapist was in prison. Andria presented as a devoted single mother, determined to persevere despite her own traumatic background of rape and child abuse.

In early 2007, Jason and Andria decided to get married and settle in Austin, and later that year their first son was born. After giving birth, she began a blog detailing the day-to-day trials and joys of motherhood. She wrote in a witty, engaging, self-deprecating style that cultivated a regular readership. By the fall of 2009, after the birth of their second son, their relationship became strained, if not unglued. Andria blogged that Jason physically and emotionally abused her and her daughter. She even went as far to post pictures on Facebook of bruises she claimed Jason inflicted on her. Arguments ensued between the couple. Andria would break things and the police would be called, though no arrests were ever made. Jason filed for divorce in September 2009, and Andria took their two boys and moved to Elkhart, a town very near to where her parents live in Anderson County.

Around this time Jason learned that many of the things Andria had told him were lies. During a conversation with Andria's mother, Tina, Jason made reference to Andria's rape when she was a teenager. Tina seemed confused and told Jason that Andria's daughter, Alaine, was not the product of a rape but that Andria had been married to the little girl's father for a short time when the two were teenagers. (Jason confronted Andria about this, and she admitted

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she had lied to him.) Also, Andria had claimed that her own father had been physically abusive. Tina said that while her husband was not a perfect father, he was never physically abusive. In addition to these lies, Andria blogged that Jason hit her, went on cocaine binges, abused her daughter, was cruel to her during her pregnancies, would leave home for days or a week at a time, and on and on. She admitted to him in e-mails and in therapy that she was wrong to spread these lies about him.

What was more, between September 2009 and January 2012, Andria initiated six investigations with Child Protective Services (CPS) and three with police, and she applied for three protective orders against Jason. She alleged that he abused her and the children, burglarized her home, and even planted recording devices in the house. Jason was put under a microscope and questioned by CPS investigators and police officers. Each and every time, he had to prove his innocence through witnesses, such as parenting coaches, or through photographs. In the end, all of the CPS cases were ruled out and all of the cases with law enforcement were closed as unsubstantiated, but going through these interviews was always incredibly stressful for him.

Andria, on the other hand, began violating court orders by denying him visitation with the children. The breaking point for Jason was when Andria drove the boys into Austin from Elkhart for Thanksgiving, then refused to turn them over to him when he declined to give them back to her a day early. In all, Andria denied Jason 24 days of possession in a two-month period. Finally, on January 4, 2012, Judge John McMaster held Andria in contempt and ordered her to turn over the two boys immediately. The following week, the same judge learned that Andria once again violated the court's orders: She left with the boys, did not turn them over to Jason that day, and drove them back to East Texas. On January 9, Andria filed a report with CPS claiming that Jason had molested the oldest boy—an outright lie.

Two days later, Andria and Jason were back in front of Judge McMaster. He read Andria the riot act and told her that on February 13, he would decide who would get custody of the two boys and whether Andria went to county jail for contempt. It was clear that the family court proceedings were not going her way and that she was backed into a corner.

When the parties did return to court on February 13, the landscape had changed radically: Jason had a bullet hole in his face, the three children were in foster care, and Andria was in custody for trying to murder her ex-husband.

What happened next

The few weeks between January 11 and February 5 were eerily quiet, with almost no communication between Jason and Andria. Jason was hopeful that his ex-wife finally realized the severity of her actions in defying the court's orders, but little did he know that Andria's ultimate act of defiance had yet to come.

On February 5, about a week before the family-court date, the boys were supposed to be with Jason, but he agreed to extend Andria's weekend visitation. February 5th was Super Bowl Sunday, and Jason watched the big game with friends at a bar. He admittedly become intoxicated at the party, drove home, and went to bed, accidentally leaving the front door unlocked.

At 2:39 a.m., he received a work-related phone call from India that lasted only one or two minutes. He heard a faint rustling on the side of the house but assumed it was the neighbor's cat. Before he could fall back asleep, the sound of footsteps in his bedroom roused him. Within moments, he experienced a blinding pain across the front of his head. It was pitch dark and Jason had no idea who was attacking him. He stood up to defend himself as blood ran down his face. Terror and confusion took hold and the searing pain set in. POW! A blast ignited the room. He flipped on his bedside lamp and saw his ex-wife, Andria Stanley, standing in his bedroom, holding a revolver. She was wearing all black and her long, dark hair was pulled back.

Jason lunged for his cell phone. Andria screamed, "Don't even think about it!" and ordered him to lay face-down on his bed and put his hands behind him. She bound his hands and ankles together with long zip ties. When he struggled, she bashed him over the head with a wooden police baton. She ordered, "Give me your password!" She then laid out her plan to e-mail Jason's attorney to tell him that Jason was giving up the custody battle. Jason went along with it, just to appease her. Andria then wrapped his body, head to toe, by rolling Jason in his mattress cover and comforter. She then took industrial plastic wrap and

began sealing Jason up head first. Jason struggled to breathe and told her, "You'll never get away with this." She taunted him in a sweet voice, saying, "I'm not going to kill you, Jason—I love you," as Jason slowly began to suffocate. Jason screamed at her, "Think about the children!" but Andria continued her work unfazed.

His oxygen diminishing rapidly and feeling death approach, Jason unleashed a surge of adrenaline. He managed to loosen the zip ties and launched himself off the bed. He clawed a hole in the plastic wrap and gasped for a breath of air. Andria, momentarily stunned, began to beat Jason with the baton. As Jason rose to his feet, she pulled out the revolver, and the fight for the gun was on. Before Jason could get it, he was shot point-blank in the face. The bullet entered his cheek, traveled through his jaw, and exited below his ear. Jason heard the gun go off and saw the flash but did not know he had been hit. His ear felt numb, and he thought that maybe the bullet grazed him. He managed to overpower Andria and seize the gun. Jason beat Andria over the head with the butt of the gun, cutting her, and bending the cheap .22 Magnum revolver. He shoved her out of his bedroom, but she grabbed a nearby broom and wedged it in the bedroom door. Jason finally got his bedroom door locked and located his cell phone. He tried to escape out the window but couldn't, so he retreated into the bathroom and called 911 at around 3:40 a.m.

During the 911 call, Jason's panic and terror were palpable. He described what just happened to him as well as what his injuries were. He was too afraid to leave his bathroom and told the 911 call-taker to have police break down his door. The Austin Police Department arrived, entered through the unlocked front door, and found Jason bleeding and terrified in his bathroom. Andria was nowhere to be found. Hours later, she appeared at the Palestine Regional Medical Center, claiming that her ex-husband had beaten her. Her mother, Tina, who had cared for the children that night, had driven her to the hospital.

Investigating the case

I am currently assigned to the Intake Unit in the Travis County District Attorney's Office, so I don't try very many cases anymore, but for the 15 years prior, I had tried many felony jury trials involving family violence. I was also in charge of preparing and presenting to the grand jury all of the office's cases involving aggravated assault (family violence). I can say that never in my time reviewing or prosecuting cases had I seen anything quite like this.

When this case came to me, it was charged as an aggravated assault (family violence) with serious bodily injury and a deadly weapon. I decided to add aggravated kidnapping and burglary of a habitation with the commission of a felony because I did not feel the aggravated assault charges encompassed what Andria Stanley did to Jason Witt.

My co-counsel, Brandon Grunewald, and I met with Jason a few months after the attack. Jason appeared to be mild-mannered, articulate, analytical, and very open. He showed us his small scars from the entry and exit wounds of the bullet; he told us that his left ear had sustained nerve damage and that he had lingering pain to the back of his head from where Andria beat him with a baton. He answered any question we asked and pointed us toward finding additional information. He absolutely denied that he had ever laid hands on Andria or the children, and he told us that Andria lies without compunction. He also told us that she would become irrationally angry at the slightest provocation or perceived slight and would damage property in her outbursts. He said that he would turn over to us everything he and his attorney had acquired during the course of the divorce case: her blogs, their e-mail correspondence, and court filings. He also suggested that we talk to two therapists, one of whom had provided couples' counseling and one who conducted psychological evaluations on both Andria and Jason. He told us that Andria had admitted to lying about her allegations of domestic violence during couples' counseling and in e-mails and that the psychological evaluation said that she was a pathological liar. He also told us about her former boyfriend, Jeff Cantu, and that he had suffered similar treatment from Andria.

Andria had also accused Jason of horrific abuse, but Jason had denied it and said he had proof that her allegations were false. We knew we needed to get to the bottom of these conflicting stories. As a result, I began a lengthy process of gathering any and all information possible to find out the truth about the CPS cases and police investigations.

CPS sent me about 2,000 pages

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of records from investigations that were launched against Jason by the defendant in Travis, Williamson, and Anderson Counties. The narratives and reports corroborated the ac-count that Jason gave us. The only report that was substantiated was one that Jason called in on Andria. In the summer of 2011, the Georgetown Police Department arrived at Andria's home on a call for a welfare check. When they arrived, the house was littered with old food, dog feces, dirty diapers, and dirty laundry. They also found a very overwhelmed Alaine, who had been left to care for her infant brother Clark all day long while her mother partied on a boat at Lake Travis. As a result, law enforcement contacted CPS, which conducted an investigation. As part of the investigation, the CPS supervisor spoke with Andria and found her to be utterly unconcerned with the child neglect CPS was alleging and to be completely focused on her anger against Jason. CPS issued a ruling of "reason to believe" for engaging in neglectful supervision. The case was referred to the Family Based Safety Services Unit and the entire family was court-ordered to engage in remedial services. For the next two years, that CPS supervisor kept Andria Stanley's casework folder on the desktop of her computer at work. She told me that she knew that even if the CPS case was closed at some later date, she had not heard the last of Andria Stanley.

While going through the paperwork, any time I saw the name of a doctor or a hospital, I subpoenaed those records as well. They were important because, far from substantiating Andria's claims that Jason was committing child abuse, they showed an absolute lack of physical abuse. When I received the nearly 2,000 pages of Andria's blogs and e-mails between Jason and her, I saw that she had admitted to lying, and I saw the way her mind worked, how she had no hesitation about slandering her husband. I also found a blog entry from 2007 in which she said that she couldn't spend the rest of her life tied to Jason and that she was having horrible thoughts that she was trying to banish.

I contacted Jason's family-law attorney and obtained all pleadings, including transcripts from various proceedings and information surrounding protective orders filed by the defendant. I spent months reading this material and talking with anyone who had significant contact with Jason and his ex-wife in the three years leading up to the attack on February 6. After hours on the phone and poring over papers and files, a consistent pattern emerged: The defendant, Andria Stanley, was unhinged and absolutely obsessed with destroying Jason Witt. She was a pathological liar.

This case was becoming stranger the more I learned about it. This was a shocking act of premeditated violence, and it was committed by a woman with no criminal history and with no diagnosis of mental illness. To the contrary, she was attractive, had a soft Southern accent, and seemed to be very charming and well-educated. She was petite, about 5-foot-5 and 120 pounds, and her ex-husband is a pretty big guy, over 6 feet tall and probably 200 pounds. What's more, she was claiming a pattern of mental, physical, and emotional abuse against her and the kids. She even took her children for forensic interviews.

In my own experience, I have only rarely reviewed and prosecuted cases for domestic violence where the woman is the perpetrator. It certainly happens, but the overwhelming majority of cases I have seen involve a male perpetrator. And I have certainly never seen a case where a woman launched such a concerted campaign of slander and personal destruction against her former husband and then ambushed and assaulted him in such dramatic fashion.

There's still more to this story

I knew from the police that hours after the attack, the defendant sought medical treatment at the Palestine Regional Medical Center, which is 180 miles east of Austin. Sgt. Joe Rodriguez (we call him Joe Rod), my court investigator, suggested we drive out to Palestine and take a stab at getting statements from the defendant's parents and boyfriend. We had no notion if we would be able to locate them or whether they would even talk to us. Undaunted, in the early morning of December 27, Sgt. Rodriguez, Brandon Grunewald, and I piled into Sgt. Rodriguez's county Buick and ventured off to the pine curtain with low expectations and high spirits.

We rolled into Palestine and stopped by the Anderson County Sheriff's Office to ask for help locating the defendant's mother, Tina Stanley, and Rick Farris, who was dating the defendant at the time of

the attack. We met with Sgt. Ronnie Foster and told him we were on the Andria Stanley case and asked him if he heard about that crime. At that point, he stunned us when he told us that not only had he heard of it, but that he and another deputy had executed the Austin Police Department's arrest warrant for her attack on Jason months before. They had found her at the hospital in Palestine; photographed her injuries; collected her clothing as evidence; and located, searched, photographed, and processed her car, a Nissan Armada. All of this information came tripping off his tongue as if it had all happened yesterday. When I asked how he had such a clear memory, he said that this had been big news in their small town and that everyone knew Andria's boyfriend, Rick. Rick was the son of a longtime reserve deputy sheriff in Anderson County, and he owned a café on Main Street.

We came expecting nothing and left the Anderson County Sheriff's Office with a bag of the defendant's bloody clothing, a disk of photos, and DNA swabs. There had been only a notation in our offense report that a trooper from the Department of Public Safety had located Andria's Nissan Armada on February 6 but that no further action was taken. The photos of the Armada showed something significant: All the blood was on the driver's seat and on the center console, indicating that she had acted alone.

Sgt. Foster then told us where we could find the defendant's boyfriend, Rick Farris. Apparently Farris is always at the Old Magnolia Café at "sandwich time." As Sgt. Foster predicted, Rick was there having lunch with some friends. We approached him, told him our names and where we were from, and asked if we could talk. After he got over his initial shock at our arrival, Rick explained to us that he was at a Super Bowl party with Andria Stanley the night of February 5. Andria acted completely normal and never mentioned that she was going to be driving to Austin that night. He and Andria had been dating only a few months at the time of the attack and that they had a good relationship. He seemed to buy into Andria's lies about Jason's abuse of her and the kids, so he was very confused about what to believe once we told him why we were in town. However, he was very polite and said he would come to court if subpoenaed and that he would tell what he knew.

Next, we set out to find the home of the defendant's parents. It was in an unincorporated area on the county line between Angelina and Anderson Counties. We put the address into our GPS and promptly lost our way. Sgt. Foster, expecting our imminent predicament, led us to the property. We caught the Stanleys a little off-guard. We sat outside on lawn chairs, surrounded by roosters, chickens, and a herd of Pomeranian puppies, and took recorded statements over the occasional ear-piercing ca-caw of the birds. Mr. Stanley told us the gun the defendant used was his and that his daughter knew where he kept it. Mrs. Stanley told us her daughter arrived at her home a little before 7 o'clock on the morning of February 6. Mrs. Stanley was feeding breakfast to Jason and Andria's children when her daughter appeared at the door, looking like a bloody mess. Andria told her mother that she had been in a confrontation with Jason. Tina Stanley did not ask many follow-up questions because the children were present. She put the two boys in the car and drove Andria to the hospital. On the way, she urged Andria to turn herself in to the police. Mrs. Stanley told us that it was a surprise to her that the defendant had driven to Austin the previous night.

We arrived back in Austin with a huge puzzle piece: Andria's actions, statements, and movements in the hours preceding and following the crime. We had learned how Andria got to the hospital, what she had done the night before, who owned the gun, and that she had acted alone and in secret. We also had a bag of bloody clothes, swabs, and photographs of Andria and her car.

In December 2012, as trial was approaching, I made an offer on the record of 40 years. She rejected it and made no counter-offer. In the letters she wrote from jail to friends and family, she was confident that she would be acquitted and was making plans to get the boys back from Jason and pursue a career in marketing.

In preparing for trial, Brandon and I tried to figure out what possible legal justification for her actions she might propose. Andria's attorney, Joe James Sawyer, had defended other women who had killed their men and then claimed Battered Woman's Syndrome as a defense. Because we possessed hard evidence that she was lying about the abuse, I didn't see how she could make that stick, not

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to mention that she and Jason had been divorced for two years and that she had driven 180 miles in the middle of the night to ambush her ex-husband in his sleep. Similarly, we did not see how a self-defense claim could fly. She could not get the benefit of a self-defense claim when she broke into Jason's house with a firearm and assaulted him. Further, Jason did not have a duty to retreat inside his own home.

Finally, we considered defense of others, that she might claim she was acting to protect the children from his abuse—after all, she had only recently alleged he was molesting one of their children. That defense also broke down because there was no evidence that her use of force was immediately necessary to protect the children from Jason's unlawful use of deadly force.

Voir dire

Brandon and I realized that we needed to address the defendant's appearance and gender, first and foremost. We asked jurors if they thought that petite, attractive women were capable of committing violent crimes. One young man actually approached the bench and said that the defendant was so attractive that he could not be fair to the State.

We also asked if a woman could commit a violent crime even when there was no evidence she had ever been the victim of domestic violence. We asked if women and men should be treated equally in punishment. By discussing these issues, we aimed to inoculate our jury from giving the defendant more favorable treatment because she was an attractive, young woman. We asked whether anyone on the panel knew someone who had been falsely accused of a crime or of child abuse and about the situations where people will make false allegations. Like in the movie *Inception*, we planted the false allegation seed in case Andria Stanley was allowed to air the accusations of child and domestic abuse she had launched against her ex-husband in front of the jury—that way, they would already have a skeptical frame of mind. Finally, we asked if anyone on the panel had experience with child or domestic abuse. We did not want anyone on the jury who might believe the defendant's false portrayal of herself as a victim.

We were hoping for a glimpse of the defense's strategy during voir dire, but unfortunately for us, Mr. Sawyer did not offer even a glimmer of it. Instead he conducted a voir dire that explored general issues that might come up in any criminal case.

The trial

In our opening statement, we tailored the defendant's motive narrowly: Our evidence would show the defendant and Jason were involved in a custody dispute and that Andria Stanley stood to lose that battle at their court date on February 13. She took matters into her own hands to ensure her victory in court and set out to ambush and murder Jason Witt one week before, on February 6.

The defense's opening statement contained quite a surprise. The defense theory was that Jason voluntarily opened the door to his ex-wife, they argued, Jason took the gun from her, and he beat her with it. The gun discharged, striking him in the face. He then staged the crime scene, injured himself, and called the police. The centerpiece of the defense team's opening was that the roll of plastic wrap—which Andria had used to bind and nearly suffocate her ex-husband—actually belonged to Jason, that the contractor who had recently built his deck had left it behind after the job. (We knew we had to find that contractor, but Jason had only his first name and a disconnected phone number for him. We asked our new investigator, Joe Nichols, for a miracle in tracking down this man.)

We started the trial by laying out the motive. We called Jason's family-law attorney to tell the jury that the defendant stood to lose custody of her children on February 13. The jury heard from Andria's boyfriend, Rick, to establish that her trip to Austin was made in secret and that the defendant's behavior appeared to be totally normal the night before the attack. Next, we called the responding officers and introduced all photographs and physical evidence, which included the gun (whose handle was broken), zip ties, plastic wrap, and the shattered billy club. All of these items had blood on them. DNA evidence revealed a mixture of the defendant's and Jason's DNA on almost every piece of physical evidence, including the clothing collected from Andria at the hospital in Palestine.

We called Jason as our last witness on the first day of trial. He did well on the stand on both cross and direct. Keeping to our strategy of narrowing the focus of the trial, we did not ask him about any of

Andria's past allegations. We asked him brief details about his marriage to Andria, such as when they got married, how many kids they had, the kids' birthdates, when they got divorced, whether there was an ongoing custody dispute, and whether he felt the litigation was going his way. We then turned to the crime. The defense attacked his version of events but never tried to paint him as an abusive husband. Brandon and I felt sure that the character attack on Jason would be attempted later in the trial through Andria's testimony.

Somehow, Investigator Joe Nichols found the contractor who built the deck at Jason's house. We showed the contractor the roll of plastic wrap, and he testified that the plastic wrap did not belong to him, that he was the only worker on that job, and that he does not use such plastic in his construction work. That testimony established that Andria had in fact brought the plastic wrap with her to suffocate Jason and to wrap up his body. It also established that the defense's theory, argued to the jury in opening statement, in which Jason had staged the crime scene by using plastic wrap already present at his home, was pure fiction.

Now, we were ready for the defendant's testimony, sure that she had to take the stand to tell her side of the story. I had a binder that contained information on all of her prior allegations of abuse. I even had a transcript in which she admitted to being a "proficient liar." It was all arranged chronologically and tabbed. Imagine our utter disappointment when the defense rested without calling her or any other witness to the stand.

The jury found the defendant guilty on all counts in a little over two hours.

The punishment case

Andria Stanley had no prior criminal history, so we relied on information we discovered through reading the CPS records and locating people from her past. By far the most important person we located was Jeff Cantu.

Mr. Cantu dated the defendant in 2005. Even though he now lived out of state, he eagerly cooperated with us. When Jason had told us about Cantu at our first meeting, we thought he could be helpful, but until we talked to him, we had no idea how eerily similar his story was to Jason's: He related that the defendant had a violent temper and made false allegations against him to both the police department and to his friends and coworkers. To protect himself, he started recording their phone calls.

In one particularly chilling call, the defendant threatened to claim that Jeff Cantu had sexually abused her daughter. Andria could be heard toying with Jeff, telling him that she would be happy to see him in jail with a record. Not long after that phone call, the defendant drove from her home in Palestine to Jeff's home in Abilene in the middle of the night and tried to break into his house. The Abilene Police Department responded to his 911 call and found her there with a screwdriver and a hammer. What had she planned to do that night? When the Abilene Police Department asked Cantu if he wanted to press charges for criminal trespass, he said no and simply requested that they issue Andria a warning—hence, why she had no criminal record. Cantu helped us track down the original officer who had issued that warning; he had since retired from the force, but he corroborated Cantu's account.

Finally, we called Dr. Matthew Ferrara, an Austin psychologist. Dr. Ferrara had administered a psychological examination of Andria Stanley in October 2011 on the order of the family court judge overseeing the CPS case. Dr. Ferrara reviewed voluminous amounts of material on her before conducting the evaluation; he also graciously remained in the courtroom during our punishment case and used what he heard to further support his ultimate opinion, which rang the death knell for the defense's punishment case: The defendant was a very poor candidate for therapeutic treatment or rehabilitation because of her lack of self-insight and her pathological tendency to lie.

The defense called witnesses to testify that the defendant could follow court-ordered probation requirements. To counter these claims, we admitted a certified copy of a court order finding the defendant in contempt of family court orders just one month before the attack.

The jury deliberated for about three hours before assessing the defendant's punishment at 50 years in prison. Brandon and I were elated by the verdict. Since then, Andria and Jason's two boys are living with their dad, and Alaine, Andria's daughter by her first marriage, is liv-

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ing with her paternal grandparents. All the kids are doing very well.

Just do it

We learned so much in preparing and trying this case. For one thing, if you have a hunch that there is more to the story, keep digging. We had so many unanswered questions when we began our work on this case. Because it was so unusual for a woman to claim such a pattern of abuse and then strike out in a calculated, violent attack, we wanted to get every piece of hard evidence we could to get at the truth. That is why we pored over reams of CPS records, medical records, blogs, transcripts, and pleadings.

We also knew we were missing a huge part of the story of how this crime happened and its aftermath, which is why we took a chance and drove to Palestine to see what we could find there. We learned that if the local police department does not have the resources to keep digging, we don't have to accept the unanswered questions but could find the answers ourselves. Don't take "no" for an answer, in other words.

Brandon, Joe Rod, Joe Nichols, and I didn't let "no" stop us, and as a result, Andria Stanley will be behind bars for a very long time. When the punishment verdict came down, Jason looked like a huge weight had been lifted off of his shoulders. He said that his overriding emotion was one of relief that his nightmare with Andria was over. He can now focus on arranging play dates, baking birthday cakes, and planning for kindergarten. He can now just be a dad to those two precious little boys. His time of looking over his shoulder is over. ❇