THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 44, Number 4 • July–August 2014 • www.tdcaa.com

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

Picking the best possible jury

How Bexar County prosecutors used data analytics during jury selection to secure a stiff prison sentence for a first-time offender in a double intoxication manslaughter trial

Taylor Rosenbusch was a 19-year-old culinary student when her late night of partying resulted in a deadly head-on collision in the early morning hours of Mother's Day 2011. As Rosenbusch, in her silver Jeep SUV, began driving the wrong way down IH-35, Keith Hernandez, age 23, and Tony Morin, 45, were carpooling to work at the Wal-Mart Distribution Center in New Braunfels. At approximately 4:00 a.m., Rosenbusch was traveling southbound in the northbound lanes, directly in their path. The two vehicles crashed head-on at full speed. There was no time to react; neither car braked. Keith and Tony were both pronounced dead at the scene. Rosenbusch's blood alcohol concentration one hour after the crash was 0.26.

By Eric J. Fuchs
Assistant Criminal District Attorney in Bexar County

Her guilt was not at issue.

After the crash, Rosenbusch was immediately remorseful. One police detective who made the scene testified that her remorse was more sincere than the other defendants he had seen in similar situations. He even stayed in touch with her over the 2½ years the case was pending and testified that she was a troubled young person who just needed help. Rosenbusch tried to commit suicide while awaiting trial, an event she graphically described to jurors as a response to the grief and remorse she felt.

Young, pretty, and sympathetic, she had no criminal history. She hired experienced, skillful attorneys. The defense put on evidence that Rosenbusch had been sexually abused as a child, was an alcoholic, and had been attending counseling. She showed the jury the deep scarring on her arms from her suicide attempt. She was asking the jury for probation.

But we did not feel that was appropriate, and the victims' families wanted a stiff prison sentence.

With the history of Bexar County juries' willingness to give probation on similar cases, fellow prosecutor Clayton Haden and I knew that the outcome of the punishment trial would likely be decided by the makeup of the jury. So we wanted as favorable a jury as possible. When it came time to make our peremptory strikes, we wanted specific, calculable information on *every* juror—we did not want strike decisions left to educated guesses based on singular comments, body language, and gut feel. To achieve that, we needed more information than a typical jury selection could provide.

Adding an analytical element to jury selection solved this problem. Using the strategy outlined below, we generated comparative data and information for

Continued on page 20

The 2014 Annual Campaign

This month the Texas District and County Attorneys Foundation kicks off its 2014 Annual Campaign. You will find an envelope stapled into this edition of *The Texas Prosecutor*, and we hope that you may take a moment to show your support for the advancement of our profession by sending in a donation. There are lots of different contributions people and organizations make: in honor of someone, in memory of someone, or a gift targeted to a specific purpose. A gift in response to the Annual Campaign is an important show of support and goes a long way toward our goal of strengthening our profession well into the future.

By Rob Kepple
TDCAA Executive Director in Austin

We know that folks reading this are government workers without deep pockets. But with the Annual Campaign, we think of the old saw "a mile wide and an inch deep." We have over 5,800 members now and a modest contribution—even $25—from a majority of our membership would be a significant show of support. So please consider a contribution!

Randalls and Tom Thumb partner with TDCAF

Recently Randalls and Tom Thumb grocery stores agreed to include the Texas District and County Attorneys Foundation in their Good Neighbor programs. It is one way they give back to non-profits like the TDCAF, and it is a way you can support the Foundation without pulling out your checkbook.

Those who shop at Randalls need only stop by Customer Service with your Randalls card (the store's loyalty program card), and give them the Texas District and County Attorneys Foundation Good Neighbor Number, which is **13232**. Customer Service will connect this number to your Randalls/Tom Thumb card, and from then on, the stores will donate 1 percent of your purchases to the Foundation. It is just that simple. So next time you are in your grocery store, think of the Foundation and take a minute at the Customer Service desk.

If this process sounds familiar, that's because it is: For a short stretch in the last year, we had partnered with the Giving Tree Network to send a percentage of your online purchases at certain retailers to the Foundation. While it was a promising partnership at first, it unfortunately did not pan out, and we have terminated the partnership. But we look forward to offering our members more opportunities to give to the Foundation by their everyday purchases.

The *Brady* webinar

By now everyone knows of a prosecutor's duty to take a one-hour mandatory course on our duty to disclose exculpatory and mitigating evidence (*Brady* training). TDCAA is developing a webinar that will be available on our website, www.tdcaa.com, toward the end of this summer to provide that training. With grant funding already dedicated to other worthy projects, the Foundation is supporting the production of that webinar and is actively working to bring in support from others in the community.

Stay tuned! ❇

*Recent gifts to the Foundation**

Richard Alpert
Art Bauereiss
Robert Newton Bland, IV
William Jewell Davis, M.D.
Anton Hackebeil
Jay Karahan
Doug Lowe
John Neal
A. Ross Rommel Jr.
Stephen Smith

* gifts received between April 4 and June 6, 2014

Table of Contents

COVER STORY: Picking the best possible jury
By Eric J. Fuchs, Assistant Criminal District Attorney in Bexar County

2 TDCAF News: The 2014 Annual Campaign and recent gifts
By Rob Kepple, TDCAA Executive Director in Austin
4 Executive Director's Report: *Brady* training FAQs
By Rob Kepple, TDCAA Executive Director in Austin

6 Newsworthy: Application for the Chuck Dennis Award now online; Electronic versions of the CCP and PC available

7 The President's Column: Insight from three elected prosecutors on fighting domestic violence
By Rene Pena, District Attorney in Atascosa, Frio, Karnes, La Salle, and Wilson Counties
10 Victim Services: Four-legged friends can be victim-witness assistants too
By Jalayne Robinson, TDCAA Victim Services Director
14 As The Judges Saw It: Stopping drunk drivers on the excited report of just about anyone
By Emily Johnson-Liu, Assistant Criminal District Attorney in Collin County
17 Newsworthy: Photos from our Intoxication Manslaughter School in Galveston

18 Newsworthy: Photos from filming TDCAA's upcoming *Brady* webinar

25 Community Outreach: Those in the legal field can be powerful advocates for children
By Callie Langford, Marketing & Communications Manager at CASA of Travis County
27 Newsworthy: TDCAA's Annual Criminal & Civil Law Update is back in South Padre this year

28 Criminal Law: Uncovering the truth
By Lee Hon, Criminal District Attorney, and Brian Foley, Assistant Criminal District Attorney, in Polk County
33 Criminal Law: Taking care with the charging instrument
By Zack Wavrusa, Assistant District Attorney in Rusk County
37 Criminal Law: Making full use of the Continuous Trafficking of Persons law
By Brian Erskine, Assistant Criminal District Attorney in Hays County

Texas District & County Attorneys Association

505 W. 12th St., Ste. 100, Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcaa.com

2014 Officers

President Rene Peña, Floresville
Chair of the Board David Escamilla, Austin
President-Elect Staley Heatly, Vernon
Sec'y/Treasurer Bernard Ammerman, Raymondville

Regional Directors

Region 1: Randall Sims, Amarillo
Region 2: Randy Reynolds, Pecos
Region 3: Katherine McAnally, Burnet
Region 4: Mark Skurka, Corpus Christi
Region 5: Art Bauereiss, Lufkin
Region 6: Danny Buck Davidson, Carthage
Region 7: Maureen Shelton, Wichita Falls
Region 8: Jennifer Tharp, New Braunfels

Board Representatives

District Attorney Henry Garza
Criminal District Attorney Joe Shannon, Jr.
County Attorney Daphne Session
Assistant Prosecutor Dan Joiner
Training Committee Chair Kathy Braddock
Civil Committee Chair Sherine Thomas
Legislative Committee Chair Judge Susan Reed
TAC Representative Laurie English
Federal Liaison Rep. Rene Guerra
Investigator Board Chair Kim Elliott
Key Personnel Board Chair Amenda Henderson
Victim Services Board Chair Tracy Viladevall

Staff

Robert Kepple, Executive Director • W. Clay Abbott, DWI Resource Prosecutor • Diane Burch Beckham, Senior Staff Counsel • Quinell Blake, Receptionist • Kaylene Braden, Membership Director and Assistant Database Manager • William Calem, Director of Operations and Chief Financial Officer • Jack Choate, Training Director • Shannon Edmonds, Staff Attorney • Jon English, Research Attorney • Tammy Hall, Financial Officer • Manda Herzing, Meeting Planner • Jordan Kazmann, Sales Manager • Jalayne Robinson • Victim Services Director • Dayatra Rogers, Database Manager and Registrar • Sarah Wolf, Communications Director

Sarah Wolf, Editor • Diane Beckham, Senior Staff Counsel

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, investigators, prosecutor office personnel, and other TDCAA members. Articles not otherwise copyrighted may be reprinted with attribution as follows: "Reprinted from *The Texas Prosecutor* with permission of the Texas District and County Attorneys Association." Views expressed are solely those of the authors. We retain the right to edit material.

Texas District & County Attorneys Foundation

505 W. 12th St., Ste. 100 Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcaf.org

Foundation Board of Trustees

Robert Newton Bland, IV
Dan M. Boulware
Kathleen A. Braddock
Thomas L. Bridges
Kenda Culpepper
Yolanda de Leon
David A. Escamilla
Tony Fidelie
Knox Fitzpatrick
H.E. Bert Graham
Russell Hardin, Jr.
Michael J. Hinton
Helen Jackson
Tom Krampitz
Barry L. Macha
Mindy Montford
Mark Yarbrough

Foundation Advisory Committee

D. August Boto
The Honorable James L. Chapman
Troy Cotton
Ashton Cumberbatch, Jr.
Norma Davenport
Dean Robert S. Fertitta
Gerald R. Flatten
Jack C. Frels
The Honorable Larry Gist
The Honorable Gerald Goodwin
Michael J. Guarino
Tom Hanna
Bill Hill
The Honorable W.C. "Bud" Kirkendall
The Honorable Oliver Kitzman
The Honorable James E. "Pete" Laney
The Honorable Michael J. McCormick
The Honorable John T. Montford
Kimbra Kathryn Ogg
Charles A. Rosenthal, Jr.
Joe Shannon, Jr.
Johnny Keane Sutton
Carol S. Vance

Brady training FAQs

By the time you read this column, we will be well into our round of summer *Brady* training. These three-hour courses include the one hour of training mandated in Government Code §41.111 relating to a prosecutor's duty to disclose exculpatory and mitigating evidence and information. Apart from our in-demand Legislative Update regionals, which we provide every other year (when the legislature is in session), these *Brady* courses appear to be the most popular regionals we have ever offered, as five of the seven courses are filled to capacity. Perhaps it has to do with "ethics" and "free" and "mandatory."

By Rob Kepple
TDCAA Executive Director in Austin

But if you didn't get a chance to sign up for one of these courses, never fear! We've been fielding lots of questions from frantic prosecutors across the state, and I'm here to reassure you that we're making it easy to get this mandatory hour. Some FAQs and their answers:

- **When do I have to complete the course?** If you were a prosecutor as of January 1, 2014, you have until December 31, 2014. If you started as a prosecutor after that date, you need to take the course within 180 days of starting your employment as a criminal prosecutor.
- **Are any prosecutors exempted?** Yes—lawyers who do strictly civil work and lawyers who prosecute *only* Class C misdemeanors. But everyone else must take the course.
- **Who offers the course?** TDCAA is offering it at every conference this year (other than our DWI regionals and our Key Personnel & Victim Assistance Coordinator Seminar in November) and at the aforementioned series of free *Brady* regionals (see a list of all of them at right). Because of the high demand, we plan to add more cities to our roster for later in the summer, so keep an eye on our website, www.tdcaa.com, for when and where those might be.

  Other CLE providers may offer the training too, but we don't know if any will do so.
- **Will the course be available online?** Yes! TDCAA recently filmed material for our free *Brady* webinar, and we plan to make the finished product available for online viewing in August of this year. Again, watch our website for details.
- **Why does the State Bar have no record that I took the course?** While the State Bar keeps most CLE records, including general ethics information, it has no duty to keep records of compliance with this new law. Instead, the CLE provider who offers the course must yearly submit attendance records to the Court of Criminal Appeals (CCA). If you take the TDCAA course, we will make sure the CCA gets proof of that compliance. If you need to verify our attendance records, contact our database manager, **Dayatra Rogers**, at Dayatra.Rogers@tdcaa.com.
- **Where can I find the new requirements?** The new law is Government Code §41.111. The Court of Criminal Appeals' requirements governing compliance with that law are found in Rule 12 of the Rules of Judicial Education, posted online at www.cca.courts.state.tx.us/jcptfund/pdf/RulesOfJudEdu112513.pdf.

TDCAA seminars with Brady *training*

Prosecutor Trial Skills Course, July 13–18, at the Radisson Town Lake in Austin.
***Brady* & Ethics regional course**, July 18, at the Radisson Town Lake in Austin.
***Brady* & Ethics regional course**, August 27, at 916 Main St., in the 2nd floor auditorium (connected to the courthouse), in Lubbock.
Annual Criminal & Civil Law Update, September 17–19, at the Convention Centre in South Padre.
Elected Prosecutor Conference, December 3–5, at the Westin Domain in Austin.

Registration for all TDCAA seminars is online only at www.tdcaa.com/training.

TDCAA and the Twittersphere

In an effort to keep you informed about current events of importance to Texas prosecutors, TDCAA has two Twitter accounts. The first is our newsfeed, **@TDCAANews**, which keeps you up-to-date on what is going on in courthouses and in our profession. The second, **@TDCAA**, is devoted to governmental affairs,

including up-to-the-minute reports on legislative activities from **Shannon Edmonds** here at TDCAA. Both accounts are retweet-worthy, so get online and follow them today.

If you give the Legislature a cookie …

Recently **Brian Erskine** (ACDA in Hays County) obtained a life sentence for defendant Robert Ritz, who was convicted under the relatively new offense of Continuous Trafficking of Persons. (See page 37 of this issue for a more in-depth story from the prosecutor's point of view.) The 43-year-old Ritz was a TDCJ prison guard who had a sexual relationship with a 14-year-old girl he met online—a crime we might normally try as a sexual assault. But Ritz's particular offenses also fell under the human trafficking statute because, among other elements, the defendant moved the victim around to various locations to commit multiple sexual crimes. There was a little consternation in some corners about the charge and the sentence, primarily because these facts aren't what some people (including a state representative) view as the crime of "human trafficking." And the jury had some lesser options when it came to the charge, but they convicted of the most serious offense of Continuous Trafficking of Persons, which in this circumstance carried a life sentence.

Although some folks have bristled a little at the State seeking the most serious available charge for a crime, the facts sure seem to have justified it, and the jury validated it. So for those who think the prosecutor just shouldn't have used a charge even though it was supported by the evidence, this case may be more of a lesson in criminal law legislation. First, the statute itself illustrates the challenge of trying to target in the Penal Code what is a factual subset of a broader crime. In this case no one disagrees that human trafficking is a serious thing, but much of the targeted conduct is and has been covered in existing sexual assault, kidnapping, and prostitution statutes. The beauty of the Texas Penal Code is in its simplicity as a "model penal code": It describes broad categories of conduct with broad punishment ranges. Simply put, almost everything is already against the law in Texas if it is done with bad intent.

Time and time again, we see that it can be a challenge for the legislature to carve out a specific set of facts for special treatment that fits the legislature's notion of the crime (for instance, human trafficking). Legislators might have an idea of a certain crime in their heads—now try to write a new law criminalizing it. It can be very tough to get the words to match the vision.

Which leads to Lesson No. 2: Prosecutors will seek to use the statutes given by the legislature to achieve justice as we see it. In the pressure cooker of a legislative session, it is pretty tough to predict exactly how a statute will be used in the courthouse—there are just too many factual scenarios out there to anticipate all of them—but count on us to use the statute when the facts fit and justice demands. And it may not be as the Legislature originally predicted.

Lesson No. 3: Like giving a mouse a cookie, enact a new policy and it is likely to lead to demand for more, and the legislature may replicate that law again and again. Life without parole is the classic example. Whatever your opinion of the merits of life without parole as an alternative to the death penalty, once the legislature got comfortable with the concept, it began to expand LWOP to all sorts of other crimes.

It shouldn't be surprising, then, that prosecutors will actually use it.

Drew Smith's Lonely Choir plays on!

For the last six years when you have ordered a book from TDCAA, you have had the good fortune of working with our Sales Manager, **Andrew Smith**. Many of you also know that Drew is an accomplished musician as the principal of The Lonely Choir. I am happy to tell you that Drew has landed a great new daytime gig as the office manager for an up-and-coming advertising and marketing company. This is a real step up for him, and he will do well. Congratulations Drew—we will miss you during the day! And we will still come to listen to you play at night.

Welcome, Jordan Kazmann

The good news is that we have landed **Jordan Kazmann** as our new Sales Manager. Jordan is an experienced hand at member services and fulfillment, so we won't be missing a beat on getting you the books and materials that you need. Please welcome Jordan next time you call in with an order!

Continued on page 6

News Worthy

Application for Investigator award now online

The application for the Chuck Dennis Award is now online. Just look for this issue on our website, www.tdcaa.com, and click on this story to download the forms.

The Chuck Dennis Investigator of the Year Award is given annually to that prosecutor's investigator who exemplifies the commitment of the law enforcement community to serving others, serving his office, and remaining active with TDCAA. The deadline for nominations is December 1, and the award is given at February's Investigator School. ❇

Electronic versions of the CCP and PC available

Two of TDCAA's code books, the 2013–15 Code of Criminal Procedure and Penal Code, are now available for purchase from Apple, Amazon, and Barnes & Noble (for iPads, Kindles, and Nooks, respectively). 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 and Code of Criminal Procedure—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. ❇

Continued from page 5

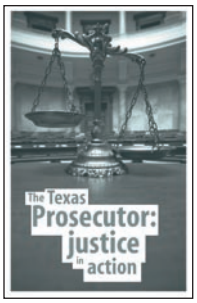
Prosecutor leaders

Congratulations to a pair of prosecutors who have taken the helm of a couple state entities. First, congratulations to **Christy Jack** (ACDA in Tarrant County) on her appointment by **Governor Rick Perry** as the Chair of the Board of the Office of Violent Sex Offender Management. The mission of the agency is to enhance public safety by developing and implementing strategic management policies regarding the monitoring of sexually violent predators and sex offenders who have been through the civil commitment process. Tough and important work.

Also, congratulations to **C. Barrett Thomas** (ADA in Nolan County) on becoming the President-Elect of Texas Young Lawyers Association. We look forward to working with Barrett as he focuses on training and services for young lawyers, including prosecutors!

The profession of prosecution in a booklet

TDCAA has published the second edition of its booklet "The Texas Prosecutor: Justice in Action." This 12-page booklet is available to all prosecutors to use as a resource and a handout when talking about the profession of prosecution. It has a great discussion of what it means to be a prosecutor by **Jaime Esparza** (DA in El Paso County), **Timothy Salley** (ADA in Moore County), **Dana Nelson** (ADA in Travis County), **Rocky Jones** (ACDA in Dallas County), **Ted Wilson** (former ADA in Harris County), and **Jim Skinner** (former ACDA in Collin County). It includes salary ranges for a sampling of different-sized offices and various levels of experience, and it lists offices that have internship programs. Thanks to **Sarah Wolf** for putting the original booklet together and producing our second edition. Need some copies for law school interviews, a high-school civics class, or an animal club luncheon? Just contact Sarah at Sarah.Wolf@tdcaa .com.



A prosecutor challenge

Below you will see a photograph of **Bernard Ammerman**, the C&DA in Willacy County and the current TDCAA Secretary-Treasurer. He is atop Guadalupe Peak, which at 8,571 feet is the highest point in Texas—a good hike. You might also notice that he appears to have claimed the peak for Texas Tech. Y'all going to let that stand? If someone claims it for another school, send a photo! ❇

Insight from three elected prosecutors on fighting domestic violence

In the last issue of this journal I got the chance to tell you a little about some work I have been fortunate to take part in with TDCAA and our state's family violence coalition, the Texas Council on Family Violence (TCFV). (If you have a moment, take a look at the May-June edition of *The Prosecutor* at www.tdcaa.com/journal/next-jury-box, for more on the directions and recommendations we have worked on as a result of the project.) Called *Next to the Jury Box*, this project brings together these great statewide organizations and elected district and county attorneys from all over Texas to develop our philosophies and practices informed by victim safety and offender accountability.

By Rene Peña
District Attorney in Atascosa, Frio, Karnes, La Salle, and Wilson Counties

Through a series of summits aimed at both small and large jurisdictions and practical, CLE-eligible webinars, a leadership core of prosecutors steer the overall work. We have made some real progress in prioritizing family violence prosecution in our state.

Frankly, I have been excited and gratified to participate in *Next to the Jury Box*. I knew that during my time as TDCAA President, I wanted to highlight a few priorities, and border security and family violence (two overlapping subjects) ranked high on my list. I have to say, though, that I have also wanted to use this position to shine a light on innovative and promising practices from all over the state, not just within my five-county jurisdiction.

So with this motivation, I turned to three other prosecutors from different parts of Texas to help tell the *Next to the Jury Box* story. I purposefully turned to small and medium-size jurisdictions to offer a slightly different perspective than we might otherwise hear about. At the summit for elected prosecutors in small towns and rural jurisdictions, we learned that this segment of prosecutors certainly encounters challenges but also may have built-in advantages to holding offenders accountable and fostering safety for victims. I asked three of my colleagues (Jennifer Tharp, Criminal District Attorney in Comal County; James Stainton, County Attorney in Wise County; and Henry Garza, District Attorney in Bell County) to share a little about their jurisdictions and what they've learned and implemented from these summits.

I expected solid pieces, but what I received were cutting-edge responses to how we handle family violence prosecution. Read on for more in their own words.

Jennifer Tharp
Criminal District Attorney in Comal County

Last fall, I was stumped when TDCAA Executive Director Rob Kepple asked a group of prosecutors, "What is your definition of success with regards to the state of domestic violence prosecution within your office?" We took turns stating what we felt success would be or what success for us had become. However, even after my turn to answer, the issue kept lingering in my mind. I'd like to say I have always prioritized domestic violence prosecution, starting as an assistant district attorney and now as the elected. However, do I truly consider my office "successful," and what exactly does this mean to me?

Over the next several months, I participated in TDCAA's and TCFV's Prosecutor Leadership Core and Summits, and the fire inside me was ignited. This was my opportunity to evaluate my office. I was learning from some of the most talented prosecutors about making a positive change. While I could probably write a book on all the things I learned, let me highlight my key takeaways.

First, quit blaming your office's actions or inactions on a lack of resources. All too often I attend conferences where I hear of great things accomplished in other counties, but I quickly think, "That could never happen in my area," or "I don't have enough [fill in the blank] to do that." I have challenged myself to figure out what I *can* do with my resources, big or small. Moreover, my jurisdiction's size has several advantages. Having only 15 attorneys, I can easi-

Continued on page 8

Continued from page 7

ly and quickly implement new changes and ensure they are carried out. Plus, I know most of the law enforcement officers on a first-name basis.

Which brings me to my second point: Have a conversation with law enforcement and your staff on what together you hope to accomplish on domestic violence cases. Recently I did just that. Together law enforcement and my office committed to take these cases more seriously and prioritize them. We hope to best serve victims and protect them from future harm but also protect our officers, as these calls are often volatile and dangerous for them.

Third, don't shy away from the difficult case—embrace the victim and evidence (or lack thereof). I have yet to meet a prosecutor who gets excited about giving 100 percent on a plain-vanilla assault case where the victim wants the police to butt out. What I learned best from Harris County is that our mindset for these cases is half the battle. Prosecutors and law enforcement should attack these cases with the assumption that the victim will recant. Changing my mindset to expect recantation from the get-go saves me from frustration when my victim actually does recant and forces me to better prepare my case for prosecution.

One other change I implemented, inspired by El Paso and Brazos Counties, is to initiate contact with the victim quickly before she is pressured to drop charges. Our office now follows up with victims within 10 days of the arrest. This locks in her statement and allows us to assist with protective orders and referrals for services in our community. Additionally, we can get follow-up photos of the victim's injuries, which is helpful to show aging of injuries. Currently, I am working toward getting my officers to take video statements from victims at the scene. Having seen other jurisdictions' videos, I am convinced that they are priceless. Frankly, it's the best documentation of the victim's words and a visual collection of her demeanor.

So if you have not asked yourself Rob's difficult question about what success in domestic violence prosecution looks like for you, please do. And be ready to challenge yourself, your office, and your community.

James Stainton
County Attorney
in Wise County

At TDCAA's and TCFV's recent rural prosecutor forum, the most common issues we identified related to our relationship with law enforcement. As we went around the room, I noticed that most of the attendees "wanted" something from their officers. The "want" list included statements by all victims and witnesses, preferably in front of a video camera, better reports, and more investigation into frequent abusers. Several prosecutors wanted officers to do something about those victims who continue to go back to their abusers. My question for all of us to consider was this: What are we doing to empower our officers and deputies to give us what we want?

Although we continue to look for opportunities to improve on this, in Wise County we made use of Code of Criminal Procedure Art. 17.292, which covers a Magistrate's Order for Emergency Protection (MOEP). First, I took the myriad forms used by the different agencies and updated them into one form that every agency now uses. Simple changes, like extra lines for the narrative and citing the statute sections in the order, made them easier for all parties (victims, officers, and judges) to complete. Second, I involved the Justices of the Peace and got their input on the new forms. After making changes and getting the forms in place, I started the process of getting the forms out and in use by officers. (Fortunately, David Walker, the Sheriff who covers my jurisdiction, and his deputies work very hard on domestic violence cases and have welcomed the new forms.) The final part of this process included empowering the officers to use the forms, even if the victim did not cooperate, and assuring them that there was not going to be any blowback on them if victims recanted.

The benefits of updating the MOEP form and involving the judges and law enforcement have been very impressive. For victims, we give them more time away from their abuser and time to meet with our domestic violence advocates, a first step in preventing future abuse. As an unexpected benefit, our face-to-face contact with victims dramatically increased. As a policy, my JPs will not agree to drop a MOEP, and they direct all victims desiring such to my office. I personally meet with almost every victim who comes into the office wanting to drop a protective order, which gives me a chance to discuss her situation and, in too many cases, see her still-fresh bruises. (I am happy to share my new and

improved form by the way—just contact my office.)

Since I took office in 2009, I have taken the stance that I do not drop an MOEP for any reason. For many victims, it is almost a wave of relief when I tell them "no" because now the pressure is off them and on the prosecutor. We have taken away a little power from the abusers by letting them know that it is not the victim's fault that the MOEP is still in place. Having more victims in our office earlier in the process also lets us direct them to our local domestic violence advocates, Wise Hope Shelter and Crisis Center. Having a group of advocates that work with victims and encourage them to get safe is a real blessing.

I am very lucky to work in a county where the sheriff and local police chiefs all work very hard to prosecute those who think it is acceptable to abuse a spouse or family member. And as a small town, rural prosecutor in a small office—I'm the entire prosecutor staff in my office!—I appreciate getting the chance to talk about this issue at the statewide level with TDCAA and TCFV. I call on both of them to keep the emphasis going.

Henry Garza
District Attorney
in Bell County

In my office, we have long understood family violence as a serious threat to our families and communities; my personal participation in *Next to the Jury Box* has supported our longstanding approach and yielded tangible results.

First, a little about my jurisdiction: Bell County, with a population of approximately 300,000 people located on the IH-35 corridor between Waco and Austin, includes Fort Hood, one of the largest military installations in the world, and a Level One trauma center, Baylor Scott and White Health/Hospital. Several police agencies file misdemeanor family violence cases at the county attorney's office and felonies at the district attorney's office. My office handles the more serious offenses such as assault by strangulation, enhanced family violence, continuous violence against the family, aggravated assault, and murder.

The presence of rural, growing communities and relatively large concentrations of people has affected how my office addresses family violence. With *Next to the Jury Box*, I have interacted with other prosecutors in discussing how best to succeed in these cases. Three aspects of my office's response include community coordination, innovative law enforcement practices, and strategies to address victims and offenders in and leaving the military.

Starting in earnest in 2009, when a social worker at Scott and White Hospital brought together several community stakeholders, we founded the Central Texas Family Violence Task Force (CTFVTF). This task force created a network of allied partners and provides community-wide training. Victim advocates, Families in Crisis [a family violence center] staff, licensed professional counselors, social workers, forensic nurses, probation officers, police officers, Battering Intervention and Prevention Program (BIPP) facilitators, non-profit organizations (including Aware Central Texas, the Children's Advocacy Center and Starry Counseling), and a variety of people from Fort Hood, including prosecutors and representatives from the Army's Family Advocacy Program and Social Work Departments all attend meetings) all attend meetings. The task force has also increased communication between civilian and military jurisdictions, especially when military members are accused of committing family violence outside of military installations. CTFVTF recognized the importance of engaging the entire military community in supporting survivors *and* holding perpetrators accountable.

Second, I have seen increased success as a result of innovative law enforcement approaches, such as the Harker Heights Healthy Homes Program initiated by Police Chief Mike Gentry. The Harker Heights Police Department has employed a licensed social worker, Kerry Anne Frazier, since 2012 who focuses on outreach to homes where police have been called out previously, either by neighbors or family members, but where no crime has yet occurred. This social worker meets with families to offer services aimed at addressing toxic cycles prior to actual crimes occurring; counseling, legal aid, involvement with landlords, and referrals to family violence shelters and resource centers represent only a few of the voluntary options she provides. Ms. Frazier handles more than 350 referred cases a year, and 60 percent involve some kind of family violence.

And finally, we focus on responsible approaches to family violence

Continued on page 10

Continued from page 9

by and against the large military community in Bell County. For instance, when family violence perpetrators go on community supervision, they must successfully complete a Battering Intervention and Prevention Program (BIPP), as opposed to anger management. Moreover, we handle family violence cases involving active-duty soldiers within well-established relationships between Fort Hood and Bell County prosecutors. For instance, a standing Memorandum of Understanding between our office and the Fort Hood Chief of Military Justice establishes protocols for jurisdiction in cases involving soldiers. The Bell County Attorney's Office hosts a yearly class where trial counsel from Fort Hood learn how to access the Bell County database for information on soldiers accused of family violence (and other offenses) and to meet Bell County prosecutors.

When I think about our continued drive to work toward safety for victims and accountability for offenders, I am reminded of our witness waiting room. This special place includes a wall full of pictures entitled "The Lives that Have Touched Our Hearts"—it displays photos of crime victims in our community, many of whom have lost their lives because of family violence. It reminds us of the lives we have touched in cases we have prosecuted. It is also a hard reality that many times, these family assaults can escalate into greater injuries and even death. These victims are worth fighting for. ❇

Four-legged friends can be victim-witness assistants too

As victim assistance coordinators, most (if not all) of us have witnessed how frightening and intimidating interaction with the criminal justice system can be for victims of crime. Imagine being able to offer additional advocacy for victims with the use of a highly trained service dog.

By Jalayne Robinson
TDCAA Victim Services Director

Our collection of submissions from prosecutor-based service dog programs reveals that our canine companions are invaluable during the criminal justice process. Crime victims and witnesses truly open up and feel more comfortable while accompanied by—or merely in the presence of—a loving dog.

In the last issue of this journal, we asked for your submissions and photos of service dogs in your communities, and VACs in Bexar, Dallas, Montgomery, Nacogdoches, Smith, and Travis Counties responded. If you are considering a service dog program, the following programs may be of interest to you.

Cyndi Jahn
Director of Victims Services in the Bexar County Criminal District Attorney's Office

The Bexar County District Attorney's Office has utilized therapy or victim assistance dogs in the office for the past seven years. It began with a beautiful golden retriever named Chance. Chance's human "mom," Becky Snodgrass, is a member of the legal support unit with Child Protective Services.

Chance began his career in victim services by attending the adoption ceremonies of many of the foster children who had been removed from abusive homes by CPS. His role then grew into visiting the DA's office and spending time with the children who were being interviewed by prosecutors in preparation for trial. We found that kids who spent time with Chance appeared to be calmer and felt safe with him around. Our child victims were more willing to share their story with the dog

Chance in San Antonio

Sampson (L) and Bailey (R) in San Antonio

because they felt no judgment, only unconditional love and wet kisses. Fortunately, the prosecutors were also able to benefit, as this helped them gain the trust of the child.

Chance became such an integral part of the DA's office that Becky had to bring us all "diet" treats for Chance because he was gaining too much weight. Turns out, he was visiting people from office to office and getting something yummy from everyone! Sadly, in 2011 we all grieved the loss of Chance. We missed seeing our big, beautiful, furry friend.

Fortunately for us and for our child victims, we began our relationship with WAGS Across Texas, and Becky adopted Sampson, another gorgeous golden retriever. Once again all was right with our world! We use Sampson and other therapy dogs from WAGS Across Texas for various events in the office. On any given day Sampson will be visiting with children who are in the office for pre-trial conferences or waiting to testify in trial. He and other dogs are also team members of our Kids/Teens-in-Court program, and they also spend the day with us at our annual Children's Picnic during National Crime Victims' Rights Week. We have not yet taken any of our dogs directly into the courtroom for trial, but we know that day is coming. We are looking for just the right case to take this step and set a precedent in Bexar County for the use of therapy dogs in the courtroom.

For more information about WAGS Across Texas, please visit www.wagsacrosstexas.com.

Thad LaBarre
Investigator in the Dallas County Criminal District Attorney's Office

Roper came to our office in July 2010 from Patriot Paws of Rockwall, an organization that trains service dogs for disabled veterans. The folks at Patriot Paws quickly realized that Roper was more of a lover than a worker, so it was determined that he would be the perfect four-legged companion for the kids in the Child Abuse Division of our office.

Due to the successful use of therapy dogs by the Dallas Children's Advocacy Center, those of us in the Child Abuse Division understood the need for a dog that could help child witnesses in court. These children have been victims of either physical or sexual abuse and are very vulnerable. Roper comes to work every day with me, his handler.

The Child Abuse Division in Dallas with Roper (at left too)

Roper can sit with the kids during trial prep, walk with them to the courtroom, and comfort them when they have finished giving testimony about the horrible things that have been done to them. Roper seems to know when they are hurting and will lie down and cuddle with them or just stay by their side and allow them to pet him. Roper has been able to sit with the victims only during hearings, not at jury trials due to defense objections, but just knowing that he is waiting for them provides many children great comfort and helps put them at ease. The division was very lucky to get a dog as sweet and helpful as Roper.

For more information about Patriot Paws of Rockwall, visit www.patriotpaws.org

Pam Traylor
Victim Assistance Coordinator in the Montgomery County District Attorney's Office

Ranger the DA Dog is our courthouse facility dog, which means that he is an expertly trained service dog partnered with a criminal justice professional and assigned to an institution rather than an individual. It will be two years this July that we acquired Ranger from Service Dogs, Inc., where he received extensive

Continued on page 12

Continued from page 11

training and I, as his handler, received some basic training. Ranger is an employee of the MCDA's office, and he comes to work with me each day and goes home with me every evening. Ranger attends court dockets, participates in victim interviews, and if needed, will accompany

"Ranger the DA Dog" in Conroe

victims, especially children, when they testify in court. We have found that with Ranger present, our victims feel more comfortable about completely opening up about the abuse that has been perpetrated against them.

For more information about Service Dogs, Inc. visit www.service-dogs.org.

Nicole LoStracco
District Attorney
in Nacogdoches County

Helper is a 2-year-old Labrador-golden retriever mix owned by Canine Companions for Independence. We learned about the program after speaking with the Smith County DA's Office in Tyler. They have a dog from the same company (more about Smith County's dog below).

Helper is classified as a facility dog. Her main job is to love on all of our victims and witnesses when they are in the office and help to reduce their stress when faced with the task of testifying in court. Her presence has the added bonus of providing a bit of "puppy therapy" to our employees when the day gets stressful. She spends 40 hours a week in our office and goes home with me during her off-hours. We were partnered with her in February 2014 and have already seen her sweet nature relieve the stress suffered by many who pass through our office.

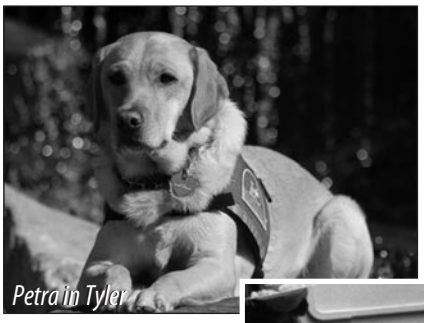
For more information about Canine Companions for Independence, visit www.cci.org.

Helper with District Attorney (and handler Nicole LoStracco in Nacogdoches

Sherry L. Magness
Victim Services Director in the
Smith County District
Attorney's Office

My professional life was forever changed on February 14, 2011, when I received my first facility dog named Macy. Macy worked by my side for a short 10 months before she was diagnosed with bone cancer.

We received our successor dog, Petra, on May 6, 2012. Petra, a Golden Retriever-Labrador mix, underwent extensive training with Canine Companions for Independence. It is estimated that the cost of training is around $50,000 per dog, but Canine Companions places all of its dogs for free to accepted applicants. Facility dogs placed by Canine Companions have the same training as service dogs; because of this training, Petra is allowed to go to the witness stand with child victims.



Petra in Tyler

Petra at a "tea party"

I am so glad that our Criminal District Attorney, D. Matt Bingham, was willing to step out to utilize a facility dog! The use of facility dogs in the courthouse setting has brought about a major change in how we meet the emotional needs of all involved in the criminal justice system. Petra's calming presence promotes justice with compassion. As a facility dog, she comes to work everyday and makes the criminal justice system more bearable for the most vulnerable of people. She is naturally drawn to children and they are drawn to her. Children come to my office and are forced to talk about the most unspeakable things. Yet when they leave, they are excited to return, if only to see Petra again.

Although we got Petra with the child victims in mind, we have discovered that she has a calming effect on the courthouse staff, prosecutors, legal assistants, and everyone who comes in contact with her.

But Petra's days are not all work

and no play. We have tea parties and Hot Wheel parties for our little victims, and Petra always enjoys participating. This helps the long hours waiting for trial to conclude seem a little more bearable. Sometimes it is time for a good game of fetch. Whatever the victim needs, Petra is always there to help. At the end of a long day she is always ready to snuggle with her favorite toy.

Two great resources for finding out more about the use of courthouse dogs are www.cci.org and www.courthousedogs.com.

Stacy Miles-Thorpe, LCSW, in the Travis County District Attorney's Office

Here in Travis County we are fortunate to have a therapy dog named Sidney. Her handler is a therapist at the Center for Child Protection and is available to meet with us and to attend court. There are times when we've had child abuse trials set and we weren't sure if the child would be able to speak a word on the stand, much less tell the account of their abuse while facing the abuser. Sidney

Sidney in Austin

has worked miracles in some of those cases. For example, we had one child who was so terrified that she hid under the table in our first meeting. After visits with Sidney, she could whisper what happened in Sidney's ear. Eventually she was able to sit on the stand with Sidney at her side and let a courtroom full of strangers know what had happened to her.

For more information about Delta Society Pet Partners, visit www.petpartners.org.

In-office victim services visits

In recent weeks, my TDCAA travels have taken me to Milam and Mason Counties. It was such a pleasure to visit with Milam County and District Attorney Bill Torrey and his staff in Cameron, and it was equally refreshing to speak with newly appointed Mason County Attorney Rebekah Whitworth and her assistant in Mason. It was great to brainstorm ways to offer assistance to crime victims in accordance with Chapter 56 of the Code of Criminal Procedure.

Additionally, in April I visited an innovative victim services program in the Harris County Family Criminal Law Division (FCLD) in Houston. Shadowing their program was so enlightening. I was very touched by how the numerous social workers employed by this division assist each and every crime victim who approaches the office, even though the victims may be reluctant and uncooperative. The social workers, directed by Jennifer Varela, LCSW, work one-on-one with crime victims in a very organized and professional manner, demonstrating compassion while collecting pertinent data helpful in the prosecution process.

Thanks to each of these offices for allowing me to shadow or offer support to your victim services programs!

Please e-mail me at Jalayne.Robinson@tdcaa.com for inquiries or support or to schedule an in-office consultation. And stay tuned for more information and the results of our recent TDCAA Victim Assistance Coordinator Needs Assessment Survey in the next issue of *The Texas Prosecutor* journal.

A note about the KP and VAC Boards

In early May the TDCAA Key Personnel & Victim Services Boards joined together to plan workshops for the TDCAA Annual Criminal & Civil Law Update (in South Padre September 17–19) and the Key Personnel & Victim Assistance Coordinator Seminar (in San Antonio November 5–7). We snapped the photo below to commemorate the meeting. Many thanks to each of you for your time, effort, and dedicated service to our TDCAA service boards.

Also note that elections for the 2015 TDCAA Victim Services Board (Regions 1, 3, 5, and 7) will be September 18 at the Annual Update in South Padre Island. The Victim Services Board assists in preparing and developing operational procedures, standards, train-

Continued on page 14

Continued from page 13

ing, and educational programs, and regional representatives serve as a point of contact for each region. To be eligible, candidates must have the permission of their elected prosecutors, attend the elections at the annual conference, and have paid membership dues prior to the meeting. The bylaws for the board and a map of the regions are posted at www.tdcaa.com/victim-services.

Please mark your calendars for TDCAA's upcoming seminars. For more information, call 512/474-2436 or go to www.tdcaa.com/training. ❇

Stopping drunk drivers on the excited report of just about anyone

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

The trouble with people who phone in tips to the police without leaving a name is that the information they provide may be suspect. Because they remain anonymous, they are largely unaccountable for the claims they make. So as a general rule, an anonymous tip to police will not by itself be enough for an officer to stop a citizen who is going about his or her business. But in *Navarette v. California*, the United States Supreme Court ruled on a set of facts that would be enough: when a person calls into 911 and describes particular and then-occurring (or very recent) driving suggesting DWI.[1] The court did not create a *per se* exception for anonymous tips reporting DWI; each tip must be analyzed on a case-by-case basis. But if the report is of the right kind of driving and the caller relates it in the right way, the tip will be sufficient to justify a stop for DWI.

The particular facts in *Navarette*

California Highway Patrol Officers were alerted around 3:45 one afternoon after a woman called 911 to report that a pickup truck had run her off the road.[2] The caller relayed the truck's color, make, model, and license plate number and her location, which was a two-lane undivided highway in northern California near a particular mile marker. She reported that she had last seen the truck about five minutes earlier. The officers found the truck in a location consistent with the woman's tip, and although they observed no erratic driving for themselves, they pulled the truck over and ultimately found 30 pounds of marijuana. Both the driver and passenger were charged with the drug offense, and in court, they argued that the woman's anonymous tip did not give the officers reasonable suspicion to pull them over.

The case made its way to the Supreme Court, which considered two questions: whether the tip itself could be considered reliable and, if so, whether the content of the tip was sufficient to justify stopping a citizen. By a 5–4 vote, the court held that the 911 caller's tip was enough to give the officers reasonable suspicion to believe Navarette was driving while intoxicated.

Analyzing the tip's reliability

The majority opinion by Justice Thomas followed precedent in assessing the tip's reliability by con-

sidering the informant's basis of knowledge and veracity. Points scored in one column (such as her basis of knowledge) could make up for a lack of points in another (such as veracity). The majority also detailed the facts of two other anonymous tip cases: *Alabama v. White*[3] and *Florida v. J.L.*[4] In *J.L.*, where the tip was found not to be reliable, the anonymous tipster reported that a young black male in a plaid shirt standing at a particular bus stop was carrying a gun—but the gun was not visible. In *J.L.*'s column for basis of knowledge, the tip gave no indication of how the tipster knew the teen would be carrying a gun, and in the column for veracity, the tipster's information provided very little means to test the tipster's knowledge or credibility because anyone observing the teens at the bus stop could provide a description of what one of them was wearing.[5]

The tip in *White*, on the other hand, was held reliable, although the decision was a close one.[6] The tipster reported that a woman in a Plymouth station wagon with a broken tail light would be driving from a particular apartment to a particular motel and would be transporting cocaine. Officers corroborated the tipster's prediction of the woman's route, which the court found gave the tip added veracity and demonstrated a special familiarity with the driver's affairs. This, in turn, suggested the informant had access to reliable information about the driver's illegal activities.[7]

The majority in *Navarette* acknowledged that the facts before it also made the case a close one. But the court ultimately found factors suggesting the tip had both a firm basis of knowledge and credibility. The caller's ability to specifically describe the vehicle and her allegation that the driver had run her off the road necessarily meant she was claiming to be an eyewitness, which gave significant support to the tip.[8]

A lot may depend on the particular wording of the tip. For instance, the tip "there is a drunk driver on Main Street heading east toward the railroad tracks" may not be deemed as reliable as the tip "*I just saw* a really drunk driver on Main Street heading east toward the railroad tracks." The second tip would likely get good marks in the column for basis of knowledge (although the conclusory allegation of drunk driving may arguably not rise to the level of reasonable suspicion for a stop). As a result, it will be helpful for prosecutors to elicit the particular words that the caller used.

The court also found that the tip in *Navarette* scored points for veracity. One of these points came solely because the informant dialed 911. The court found the 911 emergency system's ability to trace calls provides some assurance against false reports, even without any proof that the caller knew she could be identified.[9] Consequently, all unnamed 911 callers will have an edge in terms of reliability over other anonymous tips.

The fact that the tip claimed to be reporting recently occurring activity also enhanced its reliability. The court likened the tip to a present sense impression or excited utterance, reasoning that because those exceptions to the hearsay rule are generally considered to have enhanced reliability in evidence law, they should have enhanced reliability in this context, too.[10]

As a result, future anonymous 911 calls that suggest they are coming from an eyewitness and that fall within a hearsay exception for a present sense impression or an excited utterance are likely to be found reliable. Of course, none of this analysis is necessary where the 911 caller can be identified, which, as it happened, may have been the case in *Navarette*.[11]

Not every 911 call will justify a stop

After finding that the tip was reliable, the majority went on to consider whether the tip justified a *Terry* stop. Importantly, the majority upheld the officer's actions as a stop to investigate an ongoing DWI, not to investigate a completed traffic violation such as failure to maintain a single lane. The court stated that a report of someone driving without a seat belt or speeding slightly over the limit would not justify a stop.[12] Of course, if an officer personally observed the seat belt violation or speeding, he would be entirely justified in pulling the vehicle over, because personal observation gives the officer probable cause for a stop. But a stop based on an unconfirmed report of a completed traffic offense would be "constitutionally suspect."[13] Consequently, a caller complaining of a particular car cutting him off in traffic will not justify a stop.

Prosecutors sometimes argue that reasonable suspicion justifies a *Terry* stop for past, present, and

Continued on page 16

Continued from page 15

future crimes of all degrees of offenses, including traffic offenses. But *Navarette* reflects continuing uncertainty about *Terry* stops for already completed minor offenses.[14] And this potential issue is not just limited to anonymous tips. An officer's own observations may give rise to reasonable suspicion, but not probable cause, of a past minor offense. But whether he may still perform a *Terry* stop to investigate that past minor offense is not certain. Despite language in Supreme Court decisions that officers can perform a *Terry* stop when the officer has reasonable suspicion that the person "*has been*, is, or is about to be engaged in criminal activity,"[15] it is still an open question whether officers who lack probable cause can stop citizens to investigate *past* minor offenses.[16]

Because the stop in *Navarette* involved not just a report of a one-time traffic offense that occurred in the past but also a report of an *ongoing* DWI, the court did not have to reach the potentially trickier issue. The court concluded that running someone off the road would generally provide reasonable suspicion for DWI. Still more useful, the court suggested other driving facts that would provide reasonable suspicion for DWI. These include:

- weaving all over the roadway,
- crossing over the centerline and almost causing a head-on crash,
- driving all over the road and weaving back and forth, and
- driving in the median.

But there may be more. By citing to a study by the National Highway Traffic Safety Administration (NHTSA) called "The Visual Detection of DWI Motorists" to support its analysis that running another vehicle off the road was a significant indicator of drunk driving, the Supreme Court almost implicitly gave its stamp of approval to the findings in the study.[17] Consequently, in any case challenging a *Terry* stop for DWI, prosecutors would do well to compare the driving behavior in their case with the list of driving characteristics that NHTSA found to correlate with DWI.

Five minutes of good driving in an officer's presence

In one final issue, the court addressed Navarette's complaint that after learning of the 911 tip and catching up to him, officers observed his exemplary driving for up to five minutes without seeing any additional suspicious conduct. The court stated that while "extended observation" of unremarkable driving might eventually erode reasonable suspicion of DWI, the five-minute period in *Navarette* did not do so, particularly since "the appearance of a marked police car would inspire more careful driving for a time."[18]

So while *Navarette* sets out another way anonymous tips may be reliable—particularly for unidentified, excited 911 callers who can spell out what they saw—it also provides other hidden gems for DWI prosecutors, too. But DWI prosecutors should take pains to identify *and find* 911 callers so that these anonymous tipsters turn into credible, sympathetic, citizen eyewitnesses. They will never even have to testify in court because such cases will quickly plead out. ❇

Endnotes

1 *Navarette v. California*, 134 S. Ct. 1683 (2014).

2 *Id.* at 1687.

3 496 U.S. 325 (1990).

4 529 U.S. 266 (2000).

5 *Id.* at 271-72.

6 496 U.S. at 325.

7 *Id.* at 331-32.

8 134 S. Ct. at 1689.

9 *Id.* at 1689-90.

10 *Id.* at 1689.

11 The caller in *Navarette* likely identified herself by name, but no court determined whether this was sufficient to make the call no longer anonymous. Because the prosecutor and California appellate court treated the case as involving an anonymous tip, the Supreme Court also assumed the tip was anonymous. *Id.* at 1687-88 & n.1.

12 *Id.* at 1691.

13 *Id.*

14 The Supreme Court has permitted *Terry* stops to investigate past felonies. *United States v. Hensley*, 469 U.S. 221, 229 (1985) (upholding a *Terry* stop where the person was wanted for a felony offense). But *Hensley* left open whether *Terry* stops were permissible to investigate lesser crimes that were not ongoing or likely to occur in the future.

15 See *United States v. Place*, 462 U.S. 696, 702 (1983).

16 See 134 S. Ct. at 1690 n.2.

17 You may already be familiar with this document because it has been available through a link on Warren Diepraam's online article "Field Sobriety Test Review" on the DWI Resources Tab on TDCAA's website. The NHTSA study can be accessed directly at http://nhtsa.gov/staticfiles/nti/pdf/808677.pdf.

18 134 S. Ct. at 1691.

Photos from our Intoxication Manslaughter School in Galveston

Photos from filming TDCAA's upcoming *Brady* webinar

Elected prosecutors from across Texas gathered in Austin to shoot our *Brady* webinar, which will be online and available for members to view (for mandatory *Brady* credit) by the end of August. Here are some behind-the-scenes photos.

On the first day of filming, which was in the Court of Criminal Appeals courtroom in Austin, only W. Clay Abbott, TDCAA DWI Resource Prosecutor (at right), appeared on camera. Rob Kepple, TDCAA Executive Director (at left), asked Clay questions from behind the camera to give the presentation a natural rhythm.

For the second day of filming, the production team set up a round table, cameras, and lighting in a classroom at the University of Texas School of Law. While waiting for set-up to finish, (from left) W. Clay Abbott; Jarvis Parsons, DA in Brazos County; Rob Kepple; Steve Reis, DA in Matagorda County; and Jack Choate, TDCAA Training Director, help Parsons pick a tie to wear on camera.

On the second day of filming, elected prosecutors gathered in Austin for roundtable discussions on Brady, which were filmed and will be incorporated into the webinar. From left, Jarvis Parsons, DA in Brazos County; Steve Reis (facing away from the camera), DA in Matagorda County; Jaime Esparza, DA in El Paso, Hudspeth, and Culberson Counties; and Devon Anderson, DA in Harris County, settled in at the table, where their discussion on Brady *material was filmed by three different cameras.*

TOP PHOTO: As they say in Hollywood, "Hurry up and wait." While waiting for their turn in make-up before the afternoon session of filming started, Heath Harris, First Assistant CDA in Dallas County; Jennifer Tharp, CDA in Comal County; Laurie English, DA in Pecos, Crockett, Reagan, Sutton, and Upton Counties; and Henry Garza, DA in Bell County, smile for a photo. MIDDLE PHOTO: From left, Jaime Esparza; Devon Anderson; Jack Roady, CDA in Galveston County; and Steve Reis chat around the table before filming begins. BOTTOM PHOTO: From left, Rob Kepple; Michael Fouts, DA in Haskell, Kent, Stonewall, and Throckmorton Counties; Laurie English; and C. Scott Brumley, County Attorney in Potter County, await instructions from the director. Keep an eye on our website, www.tdcaa.com, for information on the Brady *webinar. We plan to post it by late August.*

Continued from the front cover

Picking the best possible jury (cont'd)

every juror on the panel, which enabled us to evaluate individual jurors against the rest of the panel in a balanced, impartial way. Armed with this information, we could eliminate the least favorable jurors from the panel and thus maximize the possibility of a stiff prison sentence.

Generating usable data

To make analytical decisions, we needed data to analyze. To accomplish this in the course of a criminal trial, we used a series of "scaled" questions—questions that sought to identify where on a pre-determined scale a juror falls on a specific topic.

The most difficult part in using scaled questions is in crafting solid questions. We wanted probative questions that addressed the central issues in the case. Because Rosenbusch's case boiled down to punishment,[1] the questions needed to provide information on the broad spectrum of punishment considerations that might arise. I also wanted to confront issues the defense would likely raise, such as the defendant's lack of intent, lack of criminal history, and youth. And I wanted to lay the foundation for some of our punishment arguments—deterrence and the impact on the victim's families—and make it clear we would be seeking prison time.

We also had to be careful not to phrase any scaled question as an improper commitment question.[2] Texas courts have held a question is proper if it seeks to discover a juror's views on an issue applicable to the case,[3] and litigants are given "[broad] latitude" to "inquire into a prospective juror's general philosophical outlook on the justice system."[4] So our scaled questions were not crafted to challenge any prospective juror for cause; rather, they were merely about gathering information.

We whittled down and refined our questions until we settled on six of them (I'll walk through them below). Taking the information from the six questions as a whole gave us a fairly good understanding of each juror's philosophical outlook on punishment. Knowing this information was critical to making intelligent strikes and ending up with as favorable a jury for the State as possible.

You will notice that the answers to each of the questions are calculated to place each juror on our predetermined scale. For all of the six questions, Answer No. 1 is least favorable to the State. Answers No. 2 and 3 are incrementally more favorable to the prosecution, and Answer No. 4 is the most favorable. Each answer was worth the same number of points as its corresponding numerical value (answer No. 2 was worth two points, etc.), which was crucial for generating numerical data we could analyze.

The scaled questions

Question 1

A jury's punishment verdict in an intoxication manslaughter case can change behavior in the community.

1. Strongly disagree. It will have no effect on the community.

2. Disagree. Punishment is only about the defendant on trial.

3. Agree. When the public sees the punishment, they might make different decisions.

4. Strongly agree. Strong verdicts deter future crime.

The first scaled question addressed deterrence. One of our strongest arguments that Rosenbusch should be sent to prison, despite her lack of criminal history, was deterrence. We wanted to plant the seed with jurors that they could change future behavior (and thus save lives) by sentencing someone to prison for intoxication manslaughter, even if the defendant had no prior criminal history. Not everyone will agree with this premise, but those who do would be more favorable to the State and more likely be persuaded when we later made that argument in court. Most importantly, we wanted to know up-front which jurors did not agree with this proposition so we could strike them.

Question 2

The main purpose of sentencing for intoxication manslaughter is:

1. Rehabilitation. Everyone makes mistakes; the defendant will change.

2. Restitution. Helping the victim recover.

3. Deterrence. We want people to know they can't do this in Bexar County.

4. **Punishment.** The defendant harmed someone so she must be punished.

The second question gauged jurors' general philosophical outlook on punishment in intoxication manslaughter cases. It was drafted with an eye toward identifying those jurors who might, in general, take a softer position on punishment. For this case, jurors who leaned toward rehabilitation were less favorable to the outcome we felt appropriate than those who believed deterrence and punishment were the primary purposes of sentencing.

Question 3

How do you feel about assessing a lengthy prison sentence to a first-time offender?

1. Very uncomfortable. Everyone deserves a second chance.

2. Uncomfortable. If it was a one-time mistake, we can rehabilitate.

3. Comfortable. If the facts of the case support it.

4. Very comfortable. Do the crime, do the time.

The third scaled question dealt with the prospect of sending a first-time offender to prison. This question clarified to the panel early on that we would be seeking a lengthy prison sentence so that no juror would be surprised later. And, by discussing it early, we hoped to see how comfortable or uncomfortable jurors were with the principle generally. We thought that the more we talked about prison in the context of a first-time offender, the more comfortable the jurors would be assessing a prison sentence. And by talking about a *lengthy* prison sentence, rather than just a prison sentence generally, we hoped to establish that probation was not appropriate in this case, thus confining future deliberations to purely a discussion of *how much* prison time was appropriate.

Question 4

The most important factor in determining the appropriate punishment is:

1. The defendant's age and actions since the crime.

2. The defendant's criminal history.

3. The seriousness of the crime.

4. The injury the crime caused.

The fourth scaled question was similar to the second (just framed a little differently) in that it sought to explore jurors' general philosophical outlooks regarding punishment. This time we used examples we expected the defense to raise from Rosenbusch's own situation (her age, actions since the crime, and lack of criminal history) as the answers less favorable to our desired outcome. Jurors who thought her youth and lack of criminal history were most important were less favorable to us than jurors who focused on the crime itself.

Question 5

A defendant who is remorseful should be punished less severely.

1. Strongly agree. Pain of guilt is punishment enough.

2. Agree. Remorse should be considered more than the crime committed.

3. Disagree. Remorse is good, but it doesn't change what happened.

4. Strongly disagree. Everyone is sorry afterward.

The fifth scaled question dealt with remorse head-on. We knew the defense would likely point out Rosenbusch's remorse to win sympathy from the jury and have jurors relate to her situation. Because defendants in intoxication manslaughter cases do not set out and *intend* to kill someone, they are frequently remorseful after the fact. To confront this reality, we asked jurors about the compelling role that remorse sometimes plays in criminal trials. Rather than waiting for this sympathy to play the role it naturally would in jurors' later deliberations, we gathered information about the jurors' views up-front.

Question 6

The importance of victims when assessing punishment is:

1. Not important. Only the defendant's actions and past matter.

2. Slightly important. Victims matter, but defendants matter more.

3. Important. Victims matter more than defendants.

4. Very important. The harm caused is the main consideration.

The last question addressed the role that victims play in punishment. Two people were killed. Two families were destroyed. The effect on these victims was going to be a big part of our punishment case and argument for a lengthy prison sentence. We wanted to know up-front what role the jurors generally felt this type of evidence would play.

Analyze the data before trial

Once the questions were drafted, I devoted some time well before trial to developing and pre-analyzing the scoring system we would use. In Bexar County, most district courts will generally give each side less than 15 minutes to make strikes, so we needed the ability to make effective use of the analytics quickly and easily.

Essentially, I set a minimum "score" (18 in this case) that a favor-

Continued on page 22

Continued from page 21

able State's juror would reach after answering all six questions—these jurors would be marked green. Jurors who scored 15 or less were considered defense-leaning and were marked red. I then defined what responses and combination of responses would indicate jurors who were less favorable to us, regardless of total score—these jurors would also be marked red. (There were a number of additional layers of analysis that went into generating this scoring key that are too lengthy to discuss here; they are discussed at length in an extended version of this article now available on the TDCAA website. Just look for this issue, July–August 2014, and find this story within it.) With the "thinking" already done, the score sheet would just need to be added up and the answers color-coded for quick later use.

There are two ways to efficiently analyze the jury selection sheet in trial: 1) have a trial partner or a third party handle the scoring and analytics manually, or 2) have a spreadsheet ready to go and let Excel do the computing for you.[5] Both operate off the same principles; the only difference is whether the computing and analytics is done by hand or automatically. Recording the information by computer allows you to have the information instantly and makes it easy to add additional layers of analysis. But hand-computation works as well. Regardless of which you choose, you will want help. Someone else should do the input while you devote attention to the jury pool.

In Rosenbusch's case, we had a very skilled intern (and now full-fledged prosecutor in our office), Fidel Rodriguez, enter the numbers into a laptop as the jurors called out their responses. Clayton recorded the responses by hand. I have found through experience that it is best to have two people recording the responses in case either one misses a response.

Practical considerations at trial

We were given one hour to conduct general voir dire. We do not generally do juror questionnaires in Bexar County, but if you are in a jurisdiction that does, consider using scaled questions there. I displayed the scaled questions on PowerPoint slides, scattered within the context of the rest of my jury selection.

Before we started, the defense, having done their homework and knowing what was coming, asked the judge to see and be provided a copy of our PowerPoint slides. I had no problem showing them the slides so they could make objections,[6] but I did not want to provide a copy. The court agreed that I did not have to provide a copy of the slides. The defense objected to many of the slides for varying reasons—and the court granted a few objections to some images I had planned to use—but all of the scaled questions remained.

As I conducted my voir dire, I explained to the panelists that because there were 60 of them, I had only one minute to talk to each person. I did not want people to feel compartmentalized or reduced to a number, but that was simply not enough time to know much about them. In that context, when I got to the first scaled question, I explained that I would be asking some general questions to the group and getting quick individual responses from every person. I told them to answer each question as honestly as possible, giving me only the number (1, 2, 3, or 4) of their answer choice.[7] As I worked through the panel on the first scaled question, I asked Juror No. 15 what answer Juror No. 9 had provided. Like the rest of the panel, Juror No. 15 had no clue. It was a simple and effective way to point out that no one was paying attention to other jurors' answers, so they should answer honestly, even if they chose a less common choice. By doing this, I hoped to ensure the reliability of the data. It took two to three minutes per question to get through the jurors' responses, leaving plenty of time for the rest of my voir dire.

Although asking these types of questions may feel awkward at first, remember that it is not awkward to the jurors—most of them have never sat through a jury selection so they don't know what to expect. At the very least, it gets them thinking and encourages participation. In Rosenbusch's trial, only two jurors had a problem definitively answering any of the questions—this was actually atypical.[8] Those two jurors felt that they could not decide between answer choices 2 and 3 on one of the questions. I politely asked them to pick which was best, and both did. But with vacillating panelists like that, we at least knew a different and also valuable piece of information: that those particular jurors had difficulty making a decision on a pretty easy subject. These were not jurors I

wanted, and neither made the jury.

After I conducted general voir dire, Fidel went to work behind the scenes. Because we had put in all the analysis work before trial, it was easy for him to print color copies of the spreadsheet for us. In prior trials before we graduated to the spreadsheet, Fidel would spend this time adding the responses and color-coding the sheet himself based on each trial's pre-determined score sheet. This process would normally take him 15 to 20 minutes.

Whichever way you do it, the important thing is to have the analyzed sheets at your disposal before the defense finishes its general voir dire. Once the computing is complete, you can quickly identify which jurors are more favorable and which are less. We did not waste our time during specific voir dire talking to favorable jurors; we used that time to target unfavorable jurors to see if there was anything about their views that was challengeable for cause. With this approach, we eliminated several jurors through challenges for cause that we otherwise would have had to use peremptory strikes on.

In reviewing the final jury sheet in Rosenbusch's case, that particular jury panel as a whole was less favorable to the State than other intoxication manslaughter panels I have had, meaning that the final jury likely would not be as favorable as previous juries. But the goal and purpose of the analytics is to help eliminate the least favorable jurors *relative* to a particular panel, so we focused on that.

When it was time to make our peremptory strikes, we trusted the data. We struck the least favorable of those who remained based on their answers to the scaled questions. Because there were no glaring gaps in our knowledge of the jurors, we were confident we had eliminated the least favorable jurors of the panel.

The defense had four lawyers for jury selection on this case. They made intelligent strikes as well. (There were no double strikes.) Afterwards, in reviewing the data for the panel as a whole, I observed that all of the jurors with relatively strong views in either direction were eliminated, which certainly isn't a bad place to be.

We were confident that we had eliminated the jurors with philosophical punishment beliefs most contrary to the lengthy prison sentence we would be asking for. For instance, not a single juror who answered "1" to any scaled question made the jury. Only one of the 12 jurors had said he was uncomfortable at the outset assessing a lengthy prison sentence to a first-time offender. Eight of the 12 final jurors believed that their verdict could change behavior in the community. Only one juror felt that a remorseful defendant should be punished less severely. And all but one of the jurors thought that victims mattered more than defendants when deciding punishment.

Moreover, when we looked at each juror's answers as a whole, none of them leaned unfavorably on more than two scaled questions, meaning they each gave favorable answers on at least four of the questions. Six of them reached our pre-defined metric to indicate they would be strong State's jurors based on their responses. We knew we had a chance.

Analysis of the analysis

As expected, Rosenbusch pleaded guilty at the onset of trial, and we proceeded immediately into the punishment phase. After four days in court, the jury sentenced her to 12 years in the penitentiary on each case and made an affirmative finding of a deadly weapon. The court then stacked the sentences at our request.

The jury left without talking to either side, so I mailed each of them some follow-up questions with return envelopes. I received only three responses, but those responses seemed to validate the data we had on each of those jurors from jury selection. Two jurors said that when deliberations first started, they had a sentence of 20 years on each case in mind; the jury selection data had indicated they were both strong State jurors. The third juror told us she first had a sentence of six years on each case in mind; the data had indicated she was a middle-of-the-road juror and had been the last juror we left on.

Was the use of data analytics the difference in this case? It's hard to tell, as there is no way to truly know what ultimately decides any trial—and I would like to think we did some other things effectively in the trial as well. Or maybe it was just the facts. But what I do know is that we eliminated the least favorable jurors relative to the rest of that particular panel, which minimized the risk of an outcome unfavorable to the State. We relied on targeted, comprehensive, and objective data to make our strikes. And ultimately, jurors assessed a stiff prison sentence on a defendant with no criminal history.

Continued on page 24

Continued from page 23

For the victims, Keith and Tony, and their families, this was justice.

Broad application

Though this system was used on an intoxication manslaughter punishment case in this instance, data analytics can be a valuable addition to jury selection in any type of case. When crafting your trial strategy, evaluate the problem areas in the case and define your goals well before the start of the trial. You can then use scaled questions during jury selection to target those goals. Is it a case where a real issue exists with guilt or innocence? Or are you just attempting to maximize punishment? Either way, you can then draft questions accordingly to address the weaknesses and central issues in a particular case.

Asking scaled questions will feel different at first, but utilizing them in jury selection provides a multitude of benefits. You will generate cognitive data about the jurors sitting before you. Based on that data, you can run simple analytics to identify the most favorable and least favorable jurors to your position. You can then attempt to eliminate as many of the less favorable jurors as possible through challenges for cause. You will then exercise peremptory strikes in an objective, effective way. Finally, you can analyze the final jury as a whole to help shape and define the arguments in your case.[9] By consistently eliminating the least favorable jurors to the prosecution, and thus minimizing risk, you will inevitably enjoy more favorable trial results.

More information

Considerably more thought went into the analysis and presentation of our scaled questions than could be explained in this article. For a more comprehensive guide on how to incorporate scaled questions into future jury selections, please see the extended version of this article on TDCAA's website; just look for this article in the July–August 2014 issue. I hope it helps. ❇

Endnotes

1 We expected Taylor Rosenbusch to plead guilty based on the evidence and defense counsel's pretrial representations. But even if she had not, we were comfortable enough with proving guilt that we planned to spend the majority of voir dire on punishment considerations either way.

2 See *Standefer v. State*, 59 S.W.3d 177, 179-184 (Tex. Crim. App. 2001).

3 *Sells v. State*, 121 S.W.3d 748, 756 (Tex. Crim. App. 2003) citing *Barajas v. State*, 93 S.W.3d 36, 2002 Tex. Crim. App. LEXIS 140, No. 415-99, slip op. at 3 (Tex. Crim. App. 2002).

4 *Sells*, 121 S.W.3d at 756 n.22.

5 I am not an expert on Excel, but setting up a basic spreadsheet to do the level of computing required for the analytics utilized here is relatively easy. For those unfamiliar with Excel, there are many websites available to walk through how to set up certain formulas and conditional formatting.

6 I figure it is better to let the defense object upfront and obtain rulings then (so you can know how to adapt) than have your rhythm interrupted later.

7 If you want to stay on the good side of your court reporter, give her a heads-up beforehand that you are going to employ this tactic. All of the answers are challenging for them to take down, and if you want a clean record, I have found that different court reporters have different preferences for how you call out the numbers. Usually, I say, "Juror 1" and then let the juror say his answer number. Then "Juror 2," "Juror 3," and so on so that I have identified them for the record. You can also control the speed of the incoming answers somewhat by operating this way. Developing a clear record will also provide supporting evidence should any challenges arise to your peremptory strikes.

8 If jurors truly cannot decide between two answer choices, I will split the difference, such as 2.5 for a juror who cannot decide between answer No. 2 and answer No. 3.

9 This was not addressed in this article, but it is covered in the fuller version available on the TDCAA website.

Those in the legal field can be powerful advocates for children

People who work in law—both attorneys and non-lawyers—make mighty good CASAs (court-appointed special advocates), a volunteer position meant to watch out for the best interest of children who have been abused or neglected.

CASA speaks up for children who've been abused or neglected by empowering our community to volunteer as advocates for them in the court system. When the State steps in to protect a child's safety, a judge appoints a trained CASA (which stands for court-appointed special advocate) volunteer to make independent and informed recommendations in the child's best interest. CASA volunteers come from every walk of life and bring a variety of skills and life experiences to each case they work on. We recently interviewed three current CASA of Travis County volunteers with jobs in the legal field about their experiences working with children and how their legal background helps them be powerful advocates for children in our community.

By Callie Langford
Marketing & Communications Manager at CASA of Travis County

Mandeep Chatha is an attorney working in civil litigation for Stack and Davis, LLP. She's been a CASA volunteer for a year and has worked with two children.

Michelle Iglesias is a board-certified paralegal working in family law. She's been a CASA volunteer for a year and has worked with one teenager.

Tanya Johns is the general counsel for P180 Investments. She's volunteered with CASA for three years and worked with five children.

Why did you decide to volunteer with CASA of Travis County?

Mandeep: I have always had an affinity toward volunteering with kids. I decided to volunteer at CASA because I was looking for something long-term, something more tangible than just volunteering for a few hours. It's been really nice to see a child go through this whole process, work with them for a year, see them grow up and then give them a healthy goodbye and know they're in a good situation.

Michelle: CASA gives me a more direct way to work with the community that I'm already involved with. Child advocacy is high on a lot of people's lists. It's something everyone would want to be passionate about, but it's difficult for people to find ways to put action to those words. CASA is a great way for people to do that.

Tanya: In law school, I worked with the Children's Rights Clinics as a student attorney ad litem for several children going through the system. One of the things that I took out of it was how much better my kids who had CASA volunteers fared during their involvement with the department than the kids who didn't. As attorney ad litem, I had to do what my kids wanted, and it was usually not a very good decision that they wanted to make. When I had a CASA on a case, it was so much easier to advocate for my kid and to know that I had somebody involved with the kid on a weekly basis who took the time to understand what the child needed *and* wanted.

What do you do as a CASA volunteer?

Tanya: For me it's getting to know as best I can the kid in my care. I have an obligation to that child to understand who they are, what they need, and what needs to happen to either reunify their family or make a transition to a different family if possible. So what I do generally is read case files, get to know the other advocates on the case, and interact with parents to find out what they're doing and what they might need that they're not getting to be as successful


Tanya Johns

Continued on page 26

Continued from page 25

as possible in the program. My primary duty is to build a relationship with the child I've been entrusted with so I can make a good [recommendation to the judge] about what is going to be best for that kid going forward.


Michelle Iglesias

Michelle: Most importantly the work is about listening. The families and children involved with CASA, they're being talked to a lot, and not everyone has the time or even the ability to listen to these families. As a CASA volunteer you're able to hear or see things others may overlook, mishear, or misrepresent. That might really be the key to helping the family become whole again.

How has being in the legal field helped you on your CASA cases?

Michelle: It has given me a huge advantage. I found a lot of volunteers in training felt intimidated by the court process and the courtroom in general. With my experience in cases and court presentations, I didn't have to spend time getting through that stage; I was able to just jump in and start talking to attorneys and caseworkers. It's helped me to understand where those other players may be coming from in a case. I understand what [an attorney's] caseload looks like.

Mandeep: I think it helps me analyze issues a bit harder than I would if I weren't an attorney. I don't take a lot of things at face value. When someone tells me something, I ask for documentation. Being able to read something and analyze it and ask the appropriate questions going forward—being an attorney I know what info is critical to making a decision. I have those questions in my head. I think one of the most important things that we learn as lawyers is that often the resolution won't be perfect. It's about being able to compromise and find something both sides can live with. I draw on that a lot when going through a case, when I'm frustrated by CPS not returning my phone call, not being able to get enough information, or feeling like I should do more and I just can't.

Tanya: I know when things can be accomplished more quickly than they're being done. I understand the statutes that can help back me up when I request that the department do something. I'm trained to analyze a situation. Those skills help me keep in context the procedural process that has to happen in court and advocate for my kids so that process happens as quickly as possible. In the long run, having a kid whose status is unsettled is not good—they really need to be with a permanent caregiver as quickly as possible.

What kind of impact do CASA volunteers have on kids?

Mandeep: It's just about being there. You can go and visit kids and sometimes they won't have much to share with you, but it's just about building that consistency with them. They know you're going to see them and you're going to follow up—that is the presence that CASA volunteers bring: "I'm here and watching everybody." Just because you see an environment that looks great, it doesn't mean you stop asking questions. As a CASA volunteer you don't ever just assume everything's great.


Mandeep Chatha

Michelle: For my teen, there didn't seem to be a history of having an adult in a position to follow through with what they were telling him. He had become jaded. Early on in my case he didn't return calls or talk to me much, but he understood over the course of a year that when I said I was going to call, I did, and that I would always try to pick up the phone, and I did.

Tanya: CASA volunteers make recommendations about these children's lives that are going to impact them forever. A kid may not realize it, but that CASA volunteer can change that child's life for the better if they're on top of what's happening in the case and understand the needs of the child economically, socially, and emotionally. They can help keep families intact.

What have you learned about yourself through volunteering with CASA?

Michelle: I don't think anybody can go through this process and not learn things about themselves. That's a great thing CASA offers. As strong as my legal background was, I'm continually learning about team approaches and wrap-around services. I'm learning about my community and what is and isn't available for kids here. Until more people become aware of gaps in the system meant

to care for these children, they're not going to advocate for things to be different.

Tanya: I have learned that I can make a difference. I've learned that I have the capacity to be a role model, to be a friend. It's a difficult thing when the relationship with your kids comes to an end because they've become so much a part of your everyday thinking and care and consideration. Being able to put their needs ahead of yours, that's a really big deal.

Anything else you want to share about CASA?

Tanya: I just think that the CASA program is so important. There's not enough time in the day to do everything but the fact that [CASA volunteers] continue to try says a lot of good things about our community and people in general.

Mandeep: If CASA volunteers weren't on cases, there would be huge cracks in an already complicated child welfare system. I think about how difficult life already is for these kids. They could be lost in the system if CASA wasn't there.

How to volunteer

If you're interested in volunteering with or supporting CASA, you can learn more online. The volunteers interviewed here come from CASA of Travis County in Austin (www.casatravis.org). Across Texas there are 71 local CASA programs with more than 7,600 volunteers advocating for nearly 24,000 children in 207 counties. Find your local program at www.becomeacasa.org.

You must be at least 21 years of age and able to pass extensive reference, Child Protective Services, and criminal background checks before becoming a CASA volunteer. You may not be a current foster parent or be in the process of adopting a child from Child Protective Services. Attorneys or staff working in district or county attorney's offices should consult with leadership in their offices to determine whether serving as a CASA volunteer would create any real or perceived conflict of interest. ❇

News Worthy

TDCAA's Annual Criminal & Civil Law Update is back in South Padre this year

TDCAA is proud to announce that our Annual Criminal & Civil Law Update is now available for online registration at www.tdcaa.com/training/annual-criminal-civil-law-update. It's in South Padre September 17-19 and is chock-full of information for trial attorneys, civil practitioners, managers, investigators, key personnel, and victim assistance coordinators.

In addition to six specialty tracks covering electronic evidence, experts, and other issues du jour, there's also a rural prosecutor's forum, three hours of ethics, and one hour of mandatory Brady training (and everything in between). As with every Annual Update TDCAA puts on, the evening receptions are can't-miss opportunities to enjoy gorgeous South Padre Island while networking with your colleagues from around the state.

See our website for a list of hotels and to register online. We hope to see you in South Padre! ❇

Uncovering the truth

Investigators and prosecutors in Polk County were faced with a tangled story when a Polk County man shot a 16-year-old boy on his property. Here's how they unraveled the defendant's lies and presented the whole truth to a jury.

By William Lee Hon
Criminal District Attorney, and
Brian Foley
Assistant Criminal District Attorney, both in Polk County

The 911 dispatcher answered the phone: "Polk County 911."

"Uh, yes ma'am, my friend's been shot and I'm at the hospital—where can we find the emergency room?"

"The entrance is in the back. Where was he shot?"

"In the head!"

This was the terrified 911 call that John Doe (not his real name, as he is a minor) made after nearly 10 minutes of racing to the hospital from the Livingston home of Timothy and Rachel Leggett, where 16-year-old Rhett Lathan, John's best friend, had been shot in the head.

Timothy Leggett, the shooter, also made a 911 call that night—22 minutes after firing the shot that ended Rhett's life. In a cold and emotionless cadence, he told the dispatcher, "Um, yes ma'am, uh, we had somebody come in our yard and causing a big disturbance and we fired shots at 'em. … They were driving back and forth by here all night cussing and everything else, then they pulled in here, spun out in our yard, I mean cussing us and everything else, and the wife got scared and started shooting."

"The wife got scared? Did she shoot?"

"Yes ma'am."

Time, patience, and a DPS scene reconstruction later showed that John Doe and Rhett Lathan, the two boys in the truck on the Leggetts' property, never cussed, spun out, or made any aggressive move toward Timothy, Rachel, or their property. It took even more time and patience—plus an interrogation by the Polk County Sheriff's Office and the Texas Rangers—to figure out that it wasn't "the wife" who shot Rhett that night. It was Timothy Leggett.

This case was complicated from the start because Rachel Leggett falsely confessed to the crime on the night of the murder. The case seemed open and shut, that Rachel had shot and killed Rhett Lathan in his truck because he had driven aggressively on the Leggett property. And we figured that at some point she would blame her husband, Timothy, but we didn't expect that that claim would be the truth.

With so much confusion in this case, we wondered how we would explain it all to a jury. We ended up employing several helpful visual aids, some as simple as Microsoft Excel charts and one as complicated as a computer-animated video reconstruction of the events as they unfolded that night. Unraveling all of the lies had been tough work, but we needed to make it easy for the jury to follow.

A little history

Timothy Leggett had been twice convicted of DWI and was by all accounts a heavy drinker. He was married to Rachel Leggett and lived in Livingston on property that included a house, stables, and a fenced pasture for donkeys in the back. Rachel had a son, Jimmy, from a prior marriage who was attending Livingston High School with the victim, Rhett.

The Leggett residence was known for Jimmy's parties involving underage drinking—Timothy Leggett didn't like them because party-goers left beer cans and trash in the yard. Rhett and John had attended one such party two weeks before Rhett was killed. Again on October 12, 2012, the two heard at the high school football game that there was a party at the Leggett property. They had heard wrong.

What happened that night

The only people at the residence on that night were Rachel and an intoxicated Timothy. Rachel's son Jimmy

had left to see friends in another part of the county. Rhett and John pulled up into the 80-yard dirt driveway and saw the Leggetts standing near a concrete patio in front of the house. Realizing there was no party that night, Rhett pulled to the left, backed up, and started to leave, his tires losing grip on the dirt and spinning for a brief moment.

That sent Timothy into an angry fit, and he picked up a .22 rifle and fired five shots. He hit the truck twice, missed twice, and fired a single shot through the truck's open window—into the left side of Rhett's head. Its driver incapacitated, the vehicle veered sharply, and John jumped out of the passenger door, ran around the still-moving vehicle, and took control from the driver's seat, having to push his friend's immobilized body across the center console. The vehicle had taken a sharp left into the yard from the driveway, exited through a ditch, and crossed the county road before John could direct it toward the hospital.

Timothy saw the truck swerve out of control after the shots and knew the driver was injured because John had gotten out and shouted at him to stop. (Timothy later admitted that he saw the driver slumped over the center console.) And he knew he had no real justification for shooting. He didn't call 911 for 22 minutes; he used this time to come up with a story to tell police.

He remembered his neighbor saying something earlier that day about someone on another neighborhood road making loud noises. He looked at a ricochet mark on a camper in his yard in the path of one of the missed shots. He followed the exit tire tracks that tore up the yard (all in directions away from the house), and he plotted. First he convinced Rachel to take the blame by telling her the first lie: "I can't possess a firearm because of my DWI probation." Then came another: "I know that nobody got hurt—I just fired in the air."

Rachel went along with the lies. Knowing the truck likely belonged to a local teenager, she called her son to see if he knew who it was. Phone records showed that when she found out a child had been shot, Timothy was already on the phone telling 911 dispatch that Rachel was the shooter. It was too late to go back now. She adopted a phony story about the teens' unruly behavior spinning donuts in the yard.

All parties involved were interviewed that night, and gun residue samples were taken from both Timothy and Rachel. Detectives saw the inconsistencies between their stories. For example, Timothy said he was out in the pasture feeding the donkeys, but Rachel said he was right by the door. Both of them repeated the same words over and over without going into any detail, claiming the boys were "hootin' and hollerin'"—a favorite phrase. Rachel also claimed that she fired without thinking "and might have even hit one of those trailers over there. I don't know." Detectives could tell Rachel was making up the story to justify the shooting, but they didn't realize she was lying to protect her husband. She was told that the boy, Rhett, was in critical condition at the hospital, and she broke down crying. Timothy remained calm and composed throughout.

Rhett was flown to Herman Memorial Hospital in Houston for emergency surgery. At trial his doctors testified that Rhett had died instantaneously from the gunshot. The only reason they made such extraordinary efforts was because he was so young.

More lies

Two days later Timothy went to the sheriff's office unannounced and "wanted to make a statement"—but really, he was hoping to take the temperature of the investigation and see if it had begun to turn toward him. At that meeting he told officers for the first time that he had shot a rabbit earlier in the day. Why would he bring that up? Rachel and Timothy had been tested for gunshot residue and he knew the results would come back soon: clean for Rachel and dirty for Timothy.

When Timothy drank, the odor of alcohol wasn't the only thing that came out of his mouth. First, he told Rachel's son Jimmy that he did the shooting and that he would wait to see if Rachel got probation before turning himself in. Later, while drinking at a campfire with his oilfield buddies, he told them, "Let's just say Rachel *didn't* shoot." In another instance, he admitted his involvement in the shooting to a young man who knew Rachel's son, and later, he told a coworker from Oklahoma. Leggett told everyone but the police about his guilt, and by that time Rachel had been arrested and indicted for murder. Timothy knew she wouldn't last long in a jail cell and quickly came up with $1,000 a week to bond her out. He hoped that she wouldn't turn on

Continued on page 30

Continued from page 29

him. Rachel's mother had figured out the truth and was starting to spread the news. In a recorded jail conversation with Rachel before she made bond, Timothy asked her, "Do you want me to go ahead and tell 'em or what?"

The multiple admissions continued when Rachel's son Jimmy and Timothy were alone in his travel trailer near an oil field job site. Jimmy was worried about his mother going to jail and decided to use his phone to record Leggett's confession. He recorded Timothy saying he would tell the police "everything" if Rachel weren't offered probation: "I won't let her go to jail."

Armed with this latest confession, Texas Rangers and Polk County Sheriff's investigators arranged a recorded phone call between Timothy and Jimmy on May 13, 2013. Timothy answered but realized it was a trap and hung up. The Rangers and sheriff's deputies decided to call him in for questioning when Timothy reported for his DWI probation on May 20, 2013. He was questioned for half an hour before finally confessing. On the winding way to the truth, Timothy told police that when they boys pulled up the driveway, he was in the pasture—then his story changed that he was by the house. He told police he was able to cover 100 yards in only a few seconds (running from the property's back fence to the front porch) while Rachel was firing the gun. One moment he told police that the doors to the truck were open—and then that they were never open.

Officers told Timothy that they had recordings of him admitting that he was the shooter and that he was waiting to see if Rachel got probation. Timothy asked if he could hear those recordings. Finally Timothy was told, "We know you are the one who shot; we just need to know why." He responded, "No, I just fired shots … I wasn't aiming, but it was me."

Timothy admitted he fired at the vehicle to scare the boys off—that he fired five shots (three hits and one of them fatal) to "scare" them. Timothy stuck with his story that the truck had raced in the yard and spun around in donuts. But the DPS reconstruction was already complete, and Leggett couldn't explain his actions when confronted with the results, that the detailed outline of the tires showed they were moving very slowly when the truck backed up to leave the property and proceed down the driveway—there were never any aggressive movements toward the house or where Timothy or Rachel were standing. And the bullet trajectories into the truck showed that it was shot while it was driving away. "Why did you shoot if they were driving away?" investigators asked. Timothy had no answer. He could not justify what he had done.

Telling the story at trial

After a few meetings we agreed that it was critical for the jury to understand exactly what Timothy would have seen that night. We decided that a video based on the DPS reconstruction of the tire tracks would help jurors feel like they were on the scene. We reached out to Century Legal Technologies in Houston and asked the graphics people there to create a three-dimensional video rendering of the truck's movements that night. It took about four weeks to complete the rendering at a cost of about $4,000. (See some screen shots of the video below.) This was the third most powerful piece of evi-

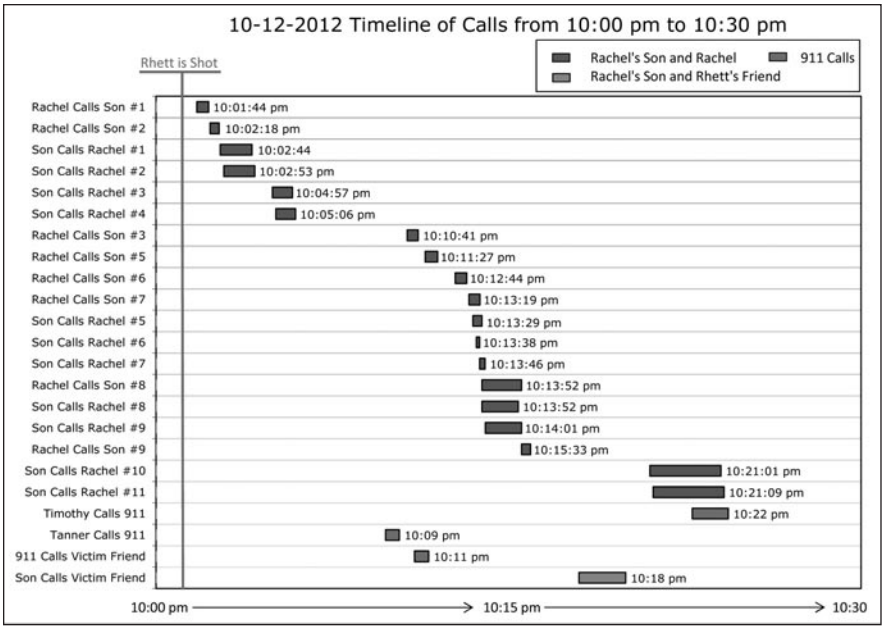
dence (behind the testimony of Rhett's parents). Using actual photographs from the scene and aerial photographs obtained by police, Century Legal Technologies inserted a moving truck (that looked exactly like Rhett's Ford F-150) into those photographic settings and were even able to make it look like nighttime. This 90-second video proved that if a picture is worth a thousand words, a video is worth a thousand witnesses.

After jurors watched the events of that night unfold, they understood that what happened was not the result of a man scared for his life or his property. It was the result of heavy drinking and a short temper. And it took the life of a child.

Proving the cover-up helped show Timothy's guilty mind and that he knew there was no justification for the shooting. Timing became an important issue—which meant that timelines were essential. We needed the jury to understand how long it took for the truth to come out and how long it took for Leggett to call 911. Visual aids made the point without muddying the waters. We created two different timelines. The first was of the general investigation and was created with a Microsoft Excel template that is readily available online. The second timeline detailed the phone calls made by Rachel, her son Jimmy, Timothy, and Rhett's friend John between 10:00 p.m. (the time of the shooting) and 10:22 p.m. (Timothy's 911 call). We had to create it on our own by modifying a Microsoft Excel chart. (See it below.) We used the general investigation timeline in opening statement to show how many months Timothy allowed Rachel to stand accused of a crime he committed; it also helped show when Timothy started an affair with another woman.

The phone call timeline showed that Rachel and her son called each other the night of the shooting in two flurries. Each calling spree had a five-minute gap between the other. This allowed time for Rachel and Timothy to come up with the story that Timothy would tell the 911 dispatcher. The timeline also showed the 911 calls that Rhett's friend John made when he arrived at the hospital and the call where he spoke to Rachel's son Jimmy and told him Rhett had been shot. The final calls on the timeline showed when Rachel spoke to Jimmy and heard the tragic news. Before she could get off the phone, Timothy dialed 911. Perhaps most importantly, this timeline proved that he waited more than 22 minutes to call authorities. To show the jury just how long 22 minutes can be, we showed a graphic of a static-screened TV and told them that when commercials are edited out, 22 minutes is the length of an entire TV sitcom.

During closing arguments we wanted to remind jurors of all the lies that Leggett had told about how things happened that night. But replaying hours of his multiple recorded statements wasn't possible, and simply reminding jurors of what he said wouldn't have had the same impact as playing the videos of his statements. So we spliced clips of the videos together so that his various lies played one after another. One moment in the video, Timothy was saying the truck doors were open, and in the next, that they were closed; that he never saw anyone in the truck, then that he saw the driver slumped over. We ended up with five short clips that could have appeared on an episode of "America's Stupidest Criminals." The videos relayed an



Continued on page 32

Continued from page 31

important concept, that Timothy was a liar. He knew he was the shooter, and he knew he had no justification.

The jury returned a guilty verdict in eight minutes.

Punishment

When punishment came around, we expected the defense to offer respect for the jury's verdict but to call the situation a misunderstanding or a mistake in judgment; after all, Timothy's criminal history of only two DWI convictions wouldn't necessarily mean a strong punishment verdict, if only he showed some remorse for his crime. What we were not expecting was all the ammunition Leggett provided us through his recorded jail phone calls.

He showed his true colors by berating his father for not bonding him out of jail, calling him a "prick" and a "retard." He showed no remorse as he joked around with his new mistress from the oil fields about how he would get back to her even if "I may have dogs hanging off my a$$." Timothy showed that he didn't care about Rachel taking the fall for him when jail calls revealed he was planning his next wedding and said about Rachel, "That b**** will have her day in H***." Leggett blamed everyone but himself. He claimed, "I ain't done nothing wrong to deserve this." He called the jury "chicken-s*** sons of b******" when speaking about how much time they might give him. His callousness included a statement that he and (Criminal District Attorney) "Lee Hon are fixing to go 12 rounds."

The calls were the knockout blow. We sent the jury off to deliberate after a replay of the video recreation of the truck's movements, this time overlaid with the frantic 911 call of Rhett Lathan's best friend, John. As the video ended, a photograph of Rhett appeared, then slowly faded to black as audio from a Polk County Sheriff's Office investigator asked Timothy, "Do you think you ought to pay for what you did?"

"Yes," came his answer.

"What's the price of that?" the investigator asked.

The jury returned the punishment verdict, and Timothy was sentenced to the maximum of 99 years and a $10,000 fine. ❇

Taking care with the charging instrument

Some problems prosecutors might face with this crucial portion of the criminal process and how to solve them

As prosecutors our jobs are hard enough. So many aspects of our job are out of our control, especially when we step in front of a jury. There is only so much we can do to anticipate and prepare for surprises, such as a domestic violence victim changing her story or the defense ambushing us with a previously unknown alibi witness or testifying expert.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

One of the few things within our control is the charging instrument, a crucial part of the criminal process we can often take for granted when dealing with a run-of-the-mill case. But overlooking the finer details of an indictment or an information can be recipe for disaster.

Our office has had our fair share of charge-related issues recently. Dealing with these issues is mentally exhausting, especially when on the eve of trial (or in the middle of one). Nobody wants to deal with the failure to allege a culpable mental state when we should be considering what trial strategy and what theme is going to convince the jury that the defendant committed the crime alleged.

This article isn't an exhaustive list of charging related issues, and it isn't a prosecutor's ultimate guide to dealing with errors in the charging instrument. It is simply a summary of some of the problems our office has faced and how we dealt with those problems.

Fixing mistakes early

Huge caseloads and limited resources can result in some tasks not getting the time and attention they need. In our office, it seems we are always stretched a little thin around grand jury time. Every attorney is trying to corral officers and witnesses around the office on top of managing our court dockets. Errors in indictments around this time are more common than they should be.

Mistakes in the charging instrument are easier to fix the earlier we catch them. I try to catch errors in the charging instrument by working on my jury charge as soon as possible. I've been fortunate enough to catch most charging errors early enough to keep myself from having an "oh you-know-what" moment with a jury in the box. Sitting down and putting the jury charge together forces a prosecutor to examine the indictment or information and helps put the elements of the offense in the forefront of one's mind. Errors seem to stand out to me much clearer this way.

If you catch the mistake in the indictment early, the easiest way to fix it is to file a motion to amend indictment. Texas Code of Criminal Procedure Art. 28.10 governs the process for amending indictments or informations. This article attempts to promote judicial efficiency by allowing prosecutors to amend indictments and informations without infringing on the defendant's rights.

There is quite a bit of caselaw out there on this issue. Old (now overruled) caselaw exemplified needless rigidity in a way that only lawyers are capable of. Originally, the Court of Criminal Appeals required the amendments to be physically written on the actual indictment or information, regardless of how clear the record was that both parties and the court were aware of changes to the charging instrument.[1] Eventually, the CCA allowed for amendments to be made by substituting the original indictment/information with a copy reflecting the requested changes.[2] In *Riney*, the court's original copy of the indictment was never interlineated. Instead, amendments to the indictment were written by the State on a photocopy of the original, which was accepted by the court into its file. The CCA affirmed the defendant's subsequent conviction because the interlineated photocopy was accepted into the court clerk's file with the defendant's knowledge and approval.

Most recently, the court decided *Perez v. State*, which evaluates the defendant's knowledge of and objections to the charging instrument. In *Perez*, the State made a motion to amend the indictment by eliminating six of 11 counts and re-ordering

Continued on page 34

Continued from page 33

the remaining five in order of severity. It was clear from the record that the defendant had no objection to the amendments and waived his right to 10 days' notice of the amendments. But on appeal, he argued that his conviction should be overturned because the indictment was not interlineated, nor was an amended photocopy of the indictment added to the trial court's file.[3] The CCA affirmed his conviction because the defendant had actual notice and the record was clear that he had no objections to the amendments.

Post-*Perez*, the safer practice is still to interlineate and/or substitute a photocopy of the amended indictment in the court's file, but if that doesn't happen, there is authority to uphold the conviction if the record is clear that the defendant was aware of and had no objections to the amendment.

Curing defects

Not too long ago, I tried an assault against a public servant case. The case went from not on our radar to No. 1 on the trial docket in a hurry. Late on a Saturday night, before jury selection Monday morning, I was prepping it, and as I read over the indictment, my heart sank. The indictment did not list the required culpable mental state.

The case was the only one lined up for the upcoming jury selection. All of the others had pled out or defense attorneys had gotten continuances. I had to figure out how to try the case without it blowing up on me. I was not hopeful the law would be able to bail me out on that one, but amazingly it did.

Failing to allege an essential element of the offense in an indictment is a substantive defect.[4] Examples of essential elements of offenses include failing to allege that a defendant possessed marijuana (rather than saying he possessed a "usable quantity"). Similarly, failure to describe the manner and means in which a defendant assaulted a family member would fall under this rule.

Normally, when there is a defect in substance, the indictment is defective for failure to charge a purported offense.[5] Game over, right? Not entirely. The Court of Criminal Appeals has said that an indictment doesn't cease to be an indictment if it fails to allege a necessary element of the offense.[6] The indictment must satisfy the defendant's due process rights only in that it has to sufficiently provide him with notice of the allegations against him.

Texas Code of Criminal Procedure Art. 1.14(b) requires the defendant to object to the charge's inadequacies via motion to quash *prior* to the date the trial on the merits commences. Filing the motion to quash by itself is not enough. The motion must be "presented" to the court. Presentment means that the movant must make the trial judge aware of the motion by calling the judge's attention to it in open court and requesting a ruling.[7] Trial courts are free to require that an objection to an indictment or information be made at an earlier time in compliance with Art. 28.01 of the CCP. If the defendant does not meet the deadline for filing a motion to quash, he cannot raise the issue on appeal or in any other post-conviction proceeding.

If the defendant does not object to errors in the indictment, then those errors can be "cured" in the jury charge. So long as the application paragraph of the jury charge includes the missing element and otherwise tracks the indictment, the conviction will be affirmed.

In my particular case, the defendant did not make his motion to quash until the charging conference was held, after both the State and the defense had concluded their presentation of evidence. Because the motion wasn't filed prior to trial, the defect was essentially cured when the application paragraph of the jury charge properly included the *mens rea* element.

Similarly, in *Flores v. State*,[8] the indictment charging the defendant with felony murder failed to allege the culpable mental state of the underlying offense of injury to a child. Prior to the trial on the merits, Flores moved to quash the indictment on the basis that the culpable mental state was not alleged in the indictment, which the trial court denied. The defendant was subsequently convicted of felony murder and sentenced to 40 years' confinement. The appellate court found that it was error to have denied the defendant's motion to quash the indictment. However, failure to grant the motion to quash was subject to a harm analysis because it was not a fundamental defect under the *Bailey* and *Easter* cases.[9] In this case, the Eastland court found the error harmless because it "could not be said that it did not appear from the indictment that an offense against the law was committed by defendant."

Trimming the fat

A few years ago, when I was newly licensed, I was set to try a possession of marijuana in a drug-free zone case to a jury. I had literally been licensed the week before, and another attorney had prepped the case for trial and handled voir dire. That attorney left the office abruptly and I ended up trying the case by myself. As I prepared, I saw that it was charged very aggressively. The defendant had been in a drug-free zone, but the facts didn't indicate possession at a school, playground, or arcade. She had been driving to work and happened to be close to a school when her vehicle was pulled over for speeding. I discussed that fact with the other attorneys in the office, and the consensus was that we would abandon the drug-free zone allegation so as not to risk upsetting the jury panel.

The abandonment of allegations in an indictment or information is appropriate when it: 1) abandons one or more alternative means of committing the offense; 2) reduces the charged offense to a lesser-included offense; or 3) eliminates surplusage.[10]

Abandonment

Deleting an alternate means of committing a charged offense is an "abandonment," not an "amendment" of the charging instrument.[11] When a statute provides multiple means for commission of an offense and those means are subject to the same punishment, the State may plead them conjunctively. However, the State is required to prove only one of the alleged means to support the conviction.[12] Therefore, the State may abandon one or more of the alleged means. Abandonment of an alternate means does not change the alleged offense, it merely limits the State to the remaining means. Because defendants are already on notice of all of the alleged means of committing the offense, deletion of one does not affect the defendant's notice or his ability to prepare his defense. Thus, the defendants' due process rights are not violated.

Reduced charge

I see this most often in drug-free-zone cases (like the one I mentioned before) and DWIs. On more than one occasion I've had to abandon enhancement language that dropped a Class A DWI to a Class B when the certified judgment came back without a fingerprint or some other information used to identify the defendant.

Surplusage

Surplusage is defined as unnecessary words or allegations in an indictment that are not descriptive of what is legally essential to constitute the offense.[13] The deletion of "surplusage" is not considered an amendment of the indictment and does not implicate Art. 28.10.[14]

There used to be an exception to this rule of surplusage that said when an unnecessary allegation "is descriptive of that which is legally essential to charge a crime, the State must prove it as alleged though needlessly pleaded."[15] Thus, the Court of Criminal Appeals considered that "when an indictment describes a necessary person, place, or thing with unnecessary particularity, the State must prove all circumstances of the description." The focus of this exception was whether the allegation at issue described an element of the offense with more particularity than necessary.[16] This was called the *Burrell* exception. The Court of Criminal Appeals overruled the *Burrell* exception in *Gollihar v. State*.[17] In *Gollihar*, the CCA said that the applicable test was one of materiality.

Material variance

A variance occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial. In a variance situation, the State has proven the defendant guilty of a crime but has proven its commission in a manner that varies from the allegations in the charging instrument.[18] The widely accepted rule is that a variance that is not prejudicial to a defendant's "substantial rights" is immaterial.[19]

We had such a case crop up recently. The defendant's name was Roy Edward Smith, and Roy Edward Smith was a scary guy. While incarcerated in the Bradshaw State Jail Facility, he developed a sexual obsession with a member of the jail staff. He never engaged her directly there, but he terrorized her and people he wrongly assumed were her family members. At trial we would refer to her as the "Real McCoy" and the assumed family the "Wrong McCoys."

From inside the confines of his jail cell, Smith managed to make false police reports, turn off utilities, charge huge amounts of money to services like DirecTV, and eventually get himself charged with retaliation and tampering with a witness. The

Continued on page 36

Continued from page 35

two offenses were tried together, and he was convicted of both and sentenced to 20 years' confinement.

On appeal, he took issue with the language of the tampering with a witness indictment. That indictment listed our victim (the Real McCoy) as the "complaining witness" in the retaliation case (as opposed to referring to her as a witness or prospective witness like in the statute). However, the victim listed in the indictment of the retaliation case was a Wrong McCoy. Because of this difference, Smith sought to have his conviction for tampering with a witness overturned because of insufficient evidence. We argued that there was no difference between "witness or prospective witness" and "complaining witness" because all of the facts pointed to Smith's obsession with the Real McCoy—she was at the center of all of his criminal conduct. In the alternative, we argued that if there was a difference between the terms, any variance was immaterial, and the Court of Appeals in Texarkana recently agreed.[20]

In determining whether a defendant's substantial rights have been prejudiced, apply a two-prong analysis: 1) whether the indictment as written informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and 2) whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime.[21] Allegations giving rise to immaterial variances may be disregarded in the hypothetically correct charge, but allegations giving rise to material variances must be included.[22]

Conclusion

When my boss first hired me, he told me I would learn more from losses than I would from victories. I've also found out that it is as easy to learn from other people's mistakes as it is to learn from your own, so please take away this lesson from me: Don't neglect the charging instrument. All it takes is a few extra minutes now, before trial, to save you hours later on appeal. ❇

Endnotes

1 *Ward v. State*, 829 S.W.2d 787 (Tex. Crim. App. 1992).

2 *Riney v. State*, 28 S.W.3d 561, 563 (Tex. Crim. App. 2000).

3 *Perez v. State*, 2014 WL 1909500, No. PD-1380-13, — S.W.3d —- (Tex. Crim. App. May 14, 2014).

4 *Pomier v. State*, 326 S.W.3d 373 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

5 See *Jackson v. State*, 718 S.W.2d 724, 725 n. 1 (Tex. Crim. App. 1986).

6 *Studer v. State*, 799 S.W.2d 263, 271 (Tex. Crim. App. 1990).

7 *Guevara v. State*, 985 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

8 102 S.W.3d 328 (Tex. App.—Eastland 2003, pet. ref'd)

9 *Bailey v. State*, 600 S.W.2d 331 (Tex. Crim. App. 1980); *Ex parte Easter*, 615 S.W.2d 719 (Tex. Crim. App. 1981).

10 *Eastep v. State*, 941 S.W.2d 130, 135 (Tex. Crim. App. 1997), *overruled on other grounds by Riney v. State*, 28 S.W.3d 561 (Tex. Crim. App. 2000).

11 *Id.* at 133.

12 See *id.* (citing *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991)).

13 See *Brown v. State*, 843 S.W.2d 709, 713–14 (Tex. App.—Dallas 1992, pet. ref'd).

14 *Hall v. State*, 62 S.W.3d 918, 919 (Tex. App.—Dallas 2001, pet. ref'd).

15 See *Eastep*, 941 S.W.2d at 134 n. 7.

16 See *Curry v. State*, 30 S.W.3d 394, 399 (Tex. Crim. App. 2000).

17 *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001).

18 *Id.*

19 *Id.* at 247-48 (referencing *United States v. Sprick*, 233 F.3d 845 (5th Cir. 2000).

20 *Smith v. State*, 06-13-0188CR (Tex. App.—Texarkana 2014, not designated for publication).

21 *United States v. Sprick*, 233 F.3d 845 (5th Cir. 2000).

22 *Gollihar*, 46 S.W.3d at 257.

Making full use of the Continuous Trafficking of Persons law

Prosecutors in Hays County recently tried a man under this statute for transporting an underage girl for sex and obtained a life sentence. Here's how they did it.

By Brian Erskine
Assistant Criminal District Attorney in Hays County

Robert Francis Ritz is not the poster boy for human smuggling or modern-day slavery that many would associate with the terms "human trafficking" or "sex trafficking." His actions are better characterized as the continued transportation and harboring of a minor to commit sexual abuse, seemingly similar to many sex offenders we have heard of before. But the new law that created the offense of Continuous Trafficking of Persons makes continuously transporting and harboring a minor for the purpose of committing sexual abuse a trafficking offense.

In May 2014, Robert Ritz received a life sentence for trafficking, which is no longer confined to the stereotypical sex trafficking depicted in movies (like Liam Neeson's 2008 thriller *Taken*). This article outlines our strategy that made it possible for the jury to assess the maximum punishment, life in prison.

The facts

Marianne[1] was a 13-year-old girl who lived in Hays County with her mom. Her biological parents are divorced and each are on their fourth marriages. Dad had been stationed in Virginia for the past several years, only visiting on summer break and at Christmas, and Mom had a newborn and a new husband. Marianne was an outsider with an equally mischievous best friend, and together they sought the attention of older men on social networking sites and met them in person. For Marianne, these "dates" were mostly in-person meetings (away from her house) to talk in the men's cars or driving to the nearby middle school to talk—which led to make-out sessions and eventually sex.

Robert Ritz, 43, was one of those men. For the past 17 years he worked as a corrections officer for the Texas Department of Criminal Justice (TDCJ). At 6-foot-1 and 220 pounds, Ritz boasted in letters to Marianne that "Papi has a six-pack" and that he was doing "3 to 4 thousand (yes thousand! ha ha!) crunches, planks, and sit-ups every day."[2] Ritz's roommate described him as a gym rat. He was proud of his fitness and the remnants of his boasts can still be found online on his MySpace page.[3]

Ritz created an online account in February 2012 with Badoo, a social networking site. Badoo is "designed to connect you with people nearby whom you don't yet know, for whatever purpose you like." "Think of it like a night club. … People come for a quick chat, a quick meet, a quick … whatever."[4] The account is akin to many dating sites and includes a person's profile pictures, age, and location. Thirteen-year-old Marianne listed her age as 18. This was not the first time she had created online accounts to meet grown men. She also had an eHarmony account, where she met another defendant, Mathias Hieserich. Hieserich, a high-school teacher in San Antonio, met Marianne and her 12-year-old best friend, Susan,[5] at the middle-school football field on two separate occasions. He admitted to detectives that he intended to have sex with Marianne; Marianne told detectives that she had wanted to have sex with Hieserich too but that Susan had threatened to call the cops. (Hieserich would eventually guilty to online solicitation of a minor.)

Ritz met Marianne through Badoo, where they exchanged phone numbers and then decided to meet in person after communicating via text messages. When Ritz arrived at the agreed meeting place, Marianne was there with Susan. The girls got in the backseat of Ritz's car, and they drove to a deserted neighborhood under construction. Ritz had sex

Continued on page 38

Continued from page 37

with Marianne in the front seat while Susan looked on. Ritz would occasionally reach into the back seat to rub Susan's leg. Susan was upset with how the encounter escalated and told Marianne not to see him again. Both girls continued to meet other men online and in person, but Susan distanced herself from Marianne after the meetings with Hieserich went similarly awry. (They didn't speak again until after Ritz's trial.) What Susan did not know is that Marianne continued her relationship with Ritz; he would drive to her house in Hays County at night and transport her to his home in adjacent Travis County for sex. This relationship lasted for a year.

Ritz's arrest

Ritz was arrested on January 18, 2013, after law enforcement investigated a tip that he and Marianne had been engaging in a continued sexual relationship. The tip came when Susan, Marianne's best friend, was having her own trouble online. Susan had been receiving several solicitations through online chat rooms where someone had imposed Susan's face on sexually explicit images that offered sex. After Susan's stepmother found these materials online, Susan told her stepmother about Marianne going on dates with older men. The stepmother then called police.

Detectives made contact with Marianne, who handed over her cell phone and iPod for examination. She was forensically interviewed and outcried that she interacted online, in person, and eventually in sexual relationships with adult men, including Ritz. She further explained that her best friend, Susan, was present for some of the interactions, but details were scarce and she was considerably reserved. She stated that her age was made clear to Ritz many times (that is, she and Ritz talked about her being bullied at school, about her middle-school teachers, about her school friends, etc.—and truly, she looked 12 or younger).[6] He knew where she went to school, her class schedule, and her extracurricular activities.

Knowing that crimes perpetuated against our youth often entail the use of technology, we always appreciate when law enforcement officers examine victims' and defendants' cell phones and other electronic wares, as they did with Marianne and Ritz. My experience confirms that many perpetrators and the occasional politician have deemed cellphones a proper place for the narcissistic proclivity to catalogue certain, shall we say, accomplishments. It's a compulsion! Along with Ritz's collection of selfies with ladies at the fine Twin Peaks eatery,[7] there were also the professional headshots modeled after WWE wrestlers and "the most interesting man in the world" commercials for Dos Equis beer. The collection also included an impressive assortment of ball caps, a variety of impending sex acts with unidentified females in various stages of undress on his bed or peeking around the bathroom door, and the obligatory photograph of his penis. (Some things can never be unseen.)

Our youth are no better. Following the forensic interview, Marianne obtained another iPod and resumed talks with Ritz.[8] Messages from him included: "It's early, are your parents in bed?"; "How's Biology…;)"; and "At gym … motivate daddy when ur on bus..;)."[9] Marianne told Ritz about the criminal investigation into his activities, but he continued to contact her. He expressed his obsession with her, hoping to influence her testimony, and even managed to pick her up for one last sexual encounter the night before his arrest: "I feel like I'm dying inside …"; "I wonder why they interviewed you, was it at the courthouse? Did you do exactly what we talked about?"; "I'm sure they're not telling u a lot. … I love u Marianne. … No matter what happens … I'll always love u"; "I love u so so so very much baby … I can feel u …"; "I must admit being with u is a hell of a roller coaster … geez … ;-)"; "Craziness … god I love u … daddies craving u!!!.."; "I would sacrifice my life for our love … that's crazy.."; and "There in 10..be ready, wear a hoodie."[10] After placing Ritz in custody, detectives found a multitude of other sexually explicit communications between him and Marianne, including an offer to run away with her: "I want at least 3 days with u … I must plant my seed..;)" and "Have your bags packed right..it will be a quick decision..or up from school…;)."[11] You can read the more explicit ones in the following endnote—but be warned, they are graphic![12]

The challenge

Discrepancies concerning whether the conduct took place before or after Marianne turned 14 had a large impact on our case. We met with her on three separate occasions leading up to trial to identify landmark events, dates, and acts and to uncov-

er any other corroborating evidence. Unfortunately, between suicide attempts, hospitalization, and custody issues with her parents, Marianne was significantly withdrawn during our interviews.

Continued sexual conduct is punishable under Penal Code §21.02 (Continuous Sexual Abuse of Young Child or Children) only for victims who are 13 or younger, which means establishing dates of conduct is very important. In other words, Ritz would be facing 25–99 years or life with no parole for multiple sex acts *before* Marianne's 14th birthday, but that suddenly shrank to a range of 2–20 years with the possibility of parole—or even probation, as Ritz had no priors—*after* she turned 14.[13]

The trafficking statute

This is where the trafficking offenses came into play, because when facts substantiate trafficking of victims younger than 18 (instead of 14), it opens up much tougher punishment ranges. Specifically, offenses otherwise relegated to lower punishment ranges that are subsumed in the trafficking offenses can be enhanced in some cases from third-degree to first-degree felonies, or as in our case, to 25–99 years or life for victims of continuous trafficking who are younger than 18 years old.

This is so because among its many different manners and means, Penal Code §20A.02(a)(7) (Trafficking of Persons) allows for a conviction if a person knowingly trafficks a child and by any means causes the trafficked child to engage in or become the victim of conduct prohibited by §21.11 (Indecency with a Child) or §22.011 (Sexual Assault). In plain English, transporting or enticing a child under 17 who is then sexually abused is prosecutable as a first-degree felony trafficking offense. But it gets better.

Much like its Continuous Sexual Abuse of a Young Child counterpart, the Continuous Trafficking of Persons offense has analogous durational requirements of 30 or more days in which the two or more acts of trafficking must occur.[14] Proving up continuous trafficking results in the same punishment range as continuous sexual abuse of a child: 25–99 years or life.[15] That sounded like a much more appropriate punishment range for Ritz's conduct in light of the similarities to the continuous sexual abuse crime that he likely committed but which we were unsure we could prove beyond a reasonable doubt due to Marianne's circumstances.

It might sound strange to treat this conduct as human trafficking because these acts don't fit the stereotypical example of trafficking, but when the trafficking statutes are broken down into their individual elements, it makes sense. The prerequisite element for Trafficking of Persons is the manner in which an individual is trafficked. "Traffic" means to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means.[16] That language is very broad. The statute then delineates eight distinct acts of prohibited conduct with a trafficked person. Many of the acts track closely with the common perceptions of trafficking, such as forced labor or prostitution-related conduct, with the first four subsections applying to adult victims and the latter four subsections covering child victims under 18. The key difference is that sex trafficking cases involving adult victims are limited to commercial sex offenses (prostitution, etc.) and require proof that the defendant used "force, fraud, or coercion," but sex trafficking cases involving children require proof of neither.

Of the eight subsections available, §20A.02(a)(7) fit Ritz's conduct perfectly. This provision states that a person commits an offense if the person "[traffics] a child and *by any means* causes the trafficked child to engage in, or become the victim of, conduct prohibited by:

(A) §21.02 (Continuous Sexual Abuse of Young Child or Children);

(B) §21.11 (Indecency with a Child);

(C) §22.011 (Sexual Assault);

(D) §22.021 (Aggravated Sexual Assault);

(E) §43.02 (Prostitution);

(F) §43.03 (Promotion of Prostitution);

(G) §43.04 (Aggravated Promotion of Prostitution);

(H) §43.05 (Compelling Prostitution);

(I) §43.25 (Sexual Performance by a Child);

(J) §43.251 (Employment Harmful to Children); or

(K) §43.26 (Possession or Promotion of Child Pornography)."

The proscribed conduct in subsections (A), (B), (C), (D), (I), and (K) may not resound with the well-known ideas of trafficking, but the Legislature clearly included those offenses within trafficking when the victim is under 18. The applicable provisions for which Ritz was con-

Continued on page 40

Continued from page 39

victed under §20A.02(a)(7) were added by SB 24 and HB 7 in the 82nd Legislature (2011), authored by State Senator Leticia Van De Putte (D–San Antonio) and Representative Senfronia Thompson (D-Houston), respectively.[17] At the same time HB 3000, authored by Representative Thompson, created the new crime of Continuous Trafficking of Persons, allowing for the harsher life sentence.[18] In a press conference with Governor Rick Perry and Attorney General Greg Abbott, all four gave speeches in a call to action to denounce what they termed human trafficking and modern-day slavery—as defined by the Legislature in these new provisions of the Penal Code.[19]

Charging decisions

In our case, we believed Ritz took his 13-year-old victim from her home and transported her to several locations where they engaged in a multitude of sexual acts. He accomplished the acts by preying on her vulnerabilities and filling a void in her life. In his mind (and as he wrote to her), he was the one "to comfort you and reassure you … to protect you"; "I feel I helped you get away …"; "I know you were having such a hard time at home, that's why you were so eager to run away"; "You are one of those special people … the reason people hate on you at home is because you are beautiful and confident, they hate that and will do anything to tear you down."[20] His transportation and enticement of this underage girl met the broad definition of "traffic" and allowed us to pursue that option.

I have been using this statute in its broader "traffic" terms for the last 2½ years—the Ritz case just happened to be the first to go to trial. I charged cases substantially similar to this one when I worked in Cameron County and brought the practice with me to Hays, and most have pled to the lesser-included charges without need for trial. In practice, having this option as a charge has put the State in a great bargaining position—and when the statutory language lets a prosecutor waylay a dangerous sex offender, I'm gonna take the biggest swing I can.

After we presented this information to a grand jury, it indicted Ritz on one count of Continuous Sexual Abuse of a Young Child and a second count of Continuous Trafficking of Persons. Each count listed underlying offenses of Sexual Assault of a Child and Indecency with a Child. As time passed, it became harder to narrow down the dates of the criminal conduct due to Marianne's circumstances. Prior to trial, the continuous sexual abuse count was abandoned and interlineated as a single count of Aggravated Sexual Assault of a Child. At trial, and with less confidence regarding our proof of Marianne's age at the time of the offense, we abandoned the Aggravated Sexual Assault of a Child count and proceeded with Continuous Trafficking of Persons. Thankfully, having the same penalty range associated with Continuous Sexual Abuse of a Young Child alleviated our concerns that the jury might not otherwise have the ability to punish the defendant using the higher penalty range if it chose to.

Preparing for trial

The word "trafficking" has a polarizing effect. Jury selection was a necessary and educational tool for the community and for us to understand what perceptions are out there concerning trafficking. We spent a great deal of time discussing common views of that term, such as forced labor and prostitution, and comparing those views to the language of the statute itself. The focus of this dialogue was on the plain reading of §20A.02(a)(7), how this crime could be accomplished, and whether anyone on the panel would require the State to prove additional elements, such as the common perceptions or stereotypes not otherwise mentioned in the statute.

On the eve of jury selection we met with Marianne again, and she asked us a curious question: Why were we not going to call her best friend, Susan, to testify as to what she witnessed? The question shocked us but ultimately helped us figure out Susan's involvement. We had previously disposed of Hieserich's Online Solicitation of a Minor case where he met with both Marianne and Susan, but it had not occurred to us that Susan would have been present when Ritz had sex with Marianne in his car. Granted, it was in the forensic interview, right there in front of us—we had just missed it because that disclosure was discussed in a way that we all interpreted as relating to Hieserich (not Ritz). And in our earlier meetings with Marianne, she never discussed Susan being present for the sex in Ritz's car.

We emailed defense counsel that night and told them we intended to call Susan as a witness, and we

appeared before the judge to discuss how to proceed. (Defense counsel had missed the connection too.) Though the same evidence was previously provided to them, the defense requested and was granted a 30-day continuance.

When the trial resumed a month later, both children testified: Susan provided background details on her friendship with Marianne and their online activities, including watching Marianne and Ritz have sex. And Marianne presented compelling specifics regarding the layout of Ritz's home and provided graphic details of their sexual relationship. Both girls were believable and sympathetic.

Throughout the proceedings, the defensive theory was that Ritz was engaged in fantasy online role-play and had never met with anyone, ever, even with 12-year-old Susan as a witness. Further, the defense insisted that Ritz never had women over to his home.

Ritz's roommate, Joseph Smith, testified that he met Ritz on Craigslist and leased out the upstairs bedroom to him from 2009 to 2013. Smith, who worked from home, testified that he *always* heard what was going on in his house. He testified that Ritz was *always* busy and *never* had anyone over, certainly not without his knowledge. He further sketched a layout of his home that was, as we presumed, very similar to Marianne's drawing of the same. After laying the predicate for photos of his own home, Smith was unsettled when we had him identify several provocative photographs depicting females in various stages of undress in Ritz's upstairs bedroom during times that Smith established he was present.[21]

Upon conclusion of the evidence, the jury charge incorporated lesser-included offenses of Sexual Assault of a Child and Indecency with a Child, should the jury feel that the trafficking portion wasn't applicable. The jury took less than 30 minutes to deliberate and determined that the evidence established Ritz's guilt for the Continuous Trafficking charge.

Punishment

During the punishment phase, the program director of our local Children's Advocacy Center spoke about the long-term effects of child sexual abuse. We also called Marianne's father, Don.[22] One of the most difficult issues in the relationship with Marianne and her father was the word "Daddy." This term had become a trigger for Marianne, as Ritz constantly referred to himself as "Daddy" and "Papi." Don just didn't understand. He had helped her move forward with counseling and re-focus her life, but he felt robbed of an important title. It is truly special for a father to hear that word, but Ritz had stolen that from him.

There's always pressure to ask for a number of years in punishment proceedings. We often relate to the jury what our community has done with cases that are similar, but the number thing is complicated. Not really having a baseline for this charge, we made no request for a term of years and left that up to the jury. The life sentence was decided in less than an hour. Based on our conversations with them after the trial, the jurors' reasoning included the continuous conduct, Ritz's age, and his knowledge of the criminal justice system. His continuous attempts to contact the victim, even in the face of such serious charges, was indicative that he would never stop, so the jury was not going to give him the chance.

"Plain meaning" rule

We spent some time talking to our jurors about the trafficking charge after the trial. Many emailed us afterwards and expressed concern regarding criticism in the press as to the offense being misapplied.[23] They asked, "Would you have to go to trial all over again?"

How might an appellate court reconcile the application of Ritz's case to a statute some believe to have been misapplied? The plain-meaning rule is the likely answer. If the meaning of the statutory text should have been plain to the legislators who voted on it, appellate courts ordinarily give effect to that plain meaning.[24] The text of the statute is the law in the sense that it is the only thing actually adopted by the legislators, through compromise, and is the only definitive evidence of what the legislators had in mind when the statute was enacted.[25] When attempting to discern the collective legislative intent or purpose, appellate courts have focused on the literal text of the statute and attempted to discern the fair, objective meaning of that text at the time of its enactment.[26] There really is no other certain method for determining the collective legislative intent or purpose at some point in the past, even assuming a single intent or purpose was dominant at the time of enactment.[27] Also note

Continued on page 42

Continued from page 41

the very recent opinion from the Court of Criminal Appeals, *Ex Parte Jones*, finding that a statute's plain meaning trumped a legislator's letter to the court saying otherwise.[28]

There seems to be no dispute that the trafficking law harshly punishes a person who forces a child into prostitution. But is sex for money really that much worse than what Ritz did to a troubled middle-school student? The stereotypical trafficking situations concerning domestic victims are remarkably similar to other exploitations that lack the forced labor or compelled prostitution component. In particular, children who are removed from their homes or run away and who are groomed or otherwise deceived and exploited for the sexual gratification of the perpetrator alone seems only to lack the ostensible monetary gain component of stereotypical trafficking situations.

These common themes persist whether the exploitation is accomplished for a commercial purpose or by deception for personal depravities. The commercial distinction is noticeably absent for child victims under §20A.02(a)(7), and the dangers exist either way. We as prosecutors have seen the roadside where children were stabbed, left for dead, naked and beaten, and forced to crawl in the brambles to the roadway for help.[29] We've helped with the search warrants for motel rooms and vehicles, read SANE report after SANE report regarding ostracized children and drug facilitation, and secured closed-circuit TV footage from our schools where the perp picks up kids from class. We've read the text messages, corroborated travel with receipts, and subpoenaed records from social media sites. And we've seen first-hand the physical wreckage and psychological damage that takes place in the aftermath.

After Ritz's sentencing, we learned that his victim, Marianne, was in contact with yet another adult man. While investigating the abduction and rape of a young girl in our area, Marianne's name appeared on the suspect's phone, along with a number of text messages between the two of them.[30] He was apprehended and confessed to a continued sexual relationship with Marianne. In her forensic interview, she appeared very flat and matter-of-fact, and it is clear she is still struggling. She continues to minimize this conduct, lacks boundaries, has a low sense of self-worth, and gets much of her validation from others. She doesn't see herself as a victim and is resistant to counseling. Her father has helped by making counseling available and giving her support in making better decisions and being more active in school functions, but it doesn't seem like much has changed for her. But we are grateful that a Hays County jury made sure that it won't be Robert Ritz who does it to her or any other children in our community.

Final thoughts

This type of charge should be used in a manner consistent with our mandate: not to convict, but to see that justice is done. We believe the legal application of the plain meaning of the trafficking statute to the facts of this case was substantiated at trial. We also believe justice was done in this case, and we will continue to be advocates for our children who are exploited, using each and every tool available to see that justice continues to be done. Prosecutors are given a great measure of discretion and tasked with an extraordinary duty, and every case contains a cautionary tale. To those who have picked me up and dared me to walk with them in that duty, thank you. Special thanks to my partners-in-crime-fighting Laura Garcia, Gerard Perches, our Family Justice Division, and all prosecutors and advocates tasked with protecting children. ❇

Endnotes

1 Not her real name.

2 Excerpts from a 10-page letter Ritz sent from jail stuffed into a holiday card.

3 Roberto Ritz's Myspace page, https://myspace.com/biggpapi1/photos (last visited June 6, 2014).

4 Linsey Fryatt, "It's Not Just About Sex": Badoo founder Andrey Andreev Brings His Billion-dollar Social Network to Berlin, *Venture Village* (Dec. 9, 2006); http://venturevillage.eu/badoo.

5 Also not her real name.

6 In his letters he relayed a story to her about when he was her age and recounted seeing eight reindeer and Santa Claus himself.

7 A "breastaurant" with 21 Texas locations, one coming soon to the Waco area!

8 Even though she didn't have a phone, the iPod allowed Marianne to send text messages through a wi-fi connection.

9 Excerpts from text messages exchanged with Ritz that were retrieved from Marianne's iPod.

10 *Id.*

11 Excerpts from text messages exchanged with Ritz that were retrieved from Ritz's phone.

12 "Ok its time to tell daddy things…bout to shower and head to gym..;-)…Plllzzzz"; "Your touch is amazing…I absolutely love you touching daddy…so loving…ugh..I need it!!!"; "I want u as

mine and mine only…I want every thought to be of me…";"I'm about to explode thinking of u…literally…"; "My love for u overwhelms my every thought…your in all my thoughts…";"Is your kitty taking a bath?...Soaked I bet…"; "Tell daddy what you miss..details"; "Ugh…its an amazing feeling..holding your naked body…omg"; "How much do u really think of daddy?..what goes through your mind" [Marianne's response was:"All the time and all the times I've spent in your bed with my head on your chest"];"Baby!!!...its amazing how u feel touching and holding daddy"; When we first jumped in bed..and I touched u…omfg…felt sooo good..mmmm"; "Tell daddy things"; "I want to eat ur sweet ass"; "Spread ur ass cheeks and say" [Marianne's response was: "Eat my ass daddy"];"Omfg!!! I want to eat it bad!!! U taste so sweet..Mmmmm tongue fuck ur ass…";"U like it"; "How does it feel when daddy eats ur sweet ass"; "Daddy wants to fuck ur tight ass again…cum deep inside it..";"Stretch ur tight asshole…Mmmmm….I want it!!";"I want it bad..Idk why..but right now I want to gap ur ass…stick ur ass up ass I fuck it…Mmmmm..stretching it..mmmm.open that ass for daddy…";"I want to be deep inside u";Mmhhmmm…when your horny u have no problem obeying…hmmmmm…;-)"; "I think someone needs a spank"; "I wanna suck your toes"; "As I fuck u…mmmm omg"; and on and on.

13 Tex. Penal Code §21.11 (Indecency with a Child) or §22.011 (Sexual Assault [of a Child]). Stacking sentences is a possibility, but it is applied sparsely in our county.

14 Tex. Penal Code §20A.02.

15 We originally thought this offense was ineligible for parole like the Continuous Sexual Abuse of a Young Child statute; however, we later learned that it is treated like a 3g offense for purposes of computing parole eligibility. Tex. Gov't Code §508.145(d)(1).

16 Tex. Penal Code §20A.01(4).

17 See Tex. S.B. 24, 82nd Leg., R.S. (2011), available at www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB24; see also Tex. H.B. 7, 82nd Leg., R.S. (2011), available at www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB7.

18 See Tex. H.B. 3000, 82nd Leg., R.S. (2011), available at www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB3000.

19 Press Release, Office of the Governor Rick Perry, Gov. Perry: Human Trafficking Legislation Speaks for the Voiceless Signs Bills Creating Stricter Penalties for Human Trafficking in Texas (May 25, 2011), available at www.governor.state.tx.us/news/press-release/16172/.

20 Excerpts from a 10-page letter Ritz sent Marianne from jail stuffed into a holiday card.

21 The photos were retrieved from Ritz's cellphone.

22 Not his real name.

23 Shortly after the trial, Representative Thompson, author of HB 3000, told the *Austin American Statesman* that prosecutors misapplied her bill in the Ritz case. She specified that the intended purpose was to "target criminals who were selling people into prostitution or holding them against their will for commercial purposes." Esther Robards-Forbes, "Under Texas Trafficking Law, Sex with Minor can Mean Life in Prison," *Austin American Statesman*, May 15, 2014, at A1, available at www.mystatesman.com/news/news/local/under-texas-trafficking-law-sex-with-minor-can-mea/nfxqP/?icmp=statesman_internallink_textlink_apr2013_statesmanstubtomystatesman_launch#a28b0d2e.3554830.735369.

24 *Smith v. State*, 789 S.W.2d 590, 592 (Tex. Crim. App. 1990).

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

26 *Id.*

27 *Id.*

28 www.cca.courts.state.tx.us/OPINIONS/PDFOPINIONINFO2.ASP?OPINIONID=25591.

29 Another case we tried this year: Angie Beavin, "Man convicted of rape and attempted murder gets life in prison," KXAN-TV, January 27, 2014, available at http://kxan.com/2014/01/27/accused-rapist-kidnapper-found-guilty-on-all-counts/.

30 Investigation still pending. Marianne's father had handed over his daughter's phones to detectives, who made contact with this other man via text messages. The suspect was wanting to meet and told Marianne he couldn't wait to hook up and have sex again. Instead, detectives met him outside her house and arrested him, and he gave a full confession.

Texas District & County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701

PRSRT STD
US POSTAGE PAID
PERMIT NO. 1718
AUSTIN, TEXAS

RETURN SERVICE REQUESTED