THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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

Also in this issue:

Human remains prosecution

The discovery of human remains in Bastrop County led prosecutors through the heartbreaking minefield of missing persons and unidentified remains. Read on to learn about the "mass disaster" of unidentified human remains.

By Greg Gilleland
First Assistant Criminal District Attorney in Bastrop County

A few years ago, as I was relocating from Houston to Bastrop, a murder occurred that occupied the next year and a half of my life and opened my eyes to a nationwide epidemic of missing persons and unidentified human remains.


Greg Gilleland

On July 4, 2005, human remains were found at a rural illegal dumping area close to the Travis County line. The remains had been scattered by scavengers, but investigators were fortunate to recover a large portion. We had no idea whose body it was, although its condition suggested that it had not been exposed to the elements for very long.

Bastrop County Sheriff's Detective Clarence "Dexter" Yarborough was assigned to handle the investigation, his first murder. The remains were transported to the Travis County Medical Examiner, and, in a crucial move, Assistant Medical Examiner Dr. Elizabeth Peacock called in noted forensic anthropologist Dr. Harrell Gill-King of the University of North Texas Health Science Center's Center for Human

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Ten dollars from every member

By Rob Kepple
TDCAA Executive Director in Austin

I want to start this message by thanking our former development director, **Emily Kleine**, who has moved on to new challenges, but in her time here she has gotten the foundation humming like a well-oiled machine. I appreciate her hard work.

Our 2009 Annual campaign is now underway! You will hear more about it as the year progresses, but our goal is simple: to fill in the Texas map so that every county has donated. How can assistants, investigators, and key personnel help? We are asking for your donations in the most modest of amounts: $10. Such a show of support from the people who will benefit from the training and programs offered through the foundation will make all the difference as we seek enduring money from corporate contributors. And our members' small contributions will make a real difference as we build the future of our profession.

During this year, we will give you plenty of opportunities to show your support at conferences, meetings, and through the website at www.tdcaf.org.

Recognitions

I want to thank those who have elected to give to the foundation in honor or in memory of a special person. Many of you have found that a memorial gift to our cause is a good way of expressing deep appreciation to a special person as well as supporting our cause of making Texas a safer place for all.

Such gifts can take many forms. I would like to mention a special gift from folks at the Tarrant County CDA's Office that was given in memory of **Marga Stephens**, the sister of prosecutor **Letty Martinez**. A group of folks at the office, led by **Tanya Dohoney** and **Jane Scribner**, made that donation happen.

Another special gift was made by **G. Dwayne Pruitt**, former County and District Attorney in Brownfield and former TDCAA President. Pruitt made a gift to the foundation in memory of his wife, **Carol**, a professional educator. My sons' first reading lessons came from Carol many years ago at some TDCAA dinners. It was wonderful to look up during the festivities and see Carol sitting off to the side reading to my boys. Thanks, Dwayne, for a donation with a lot of love in it.

Tom Hanna made a donation in honor of a former Jefferson County Criminal District Attorney, **W.C. Lindsey**, on the occasion of his retirement. According to Tom, Mr. Lindsey was the right man for the job back in some rough-and-tumble political days in the late 1960s and showed great judgment—with the possible exception of hiring Tom!

Another trend has been for some offices to throw in together and send in a group donation. The **Ellis County and District Attorney's Office** has been a big across-the-board contributor when we first got up and running. Recently, the **Walker County CDA's Office** and the **Potter County DA's Office** have been running neck and neck with shows of support from across the office.

Thanks to you all. Your show of support is gratifying and important as the foundation grows.

For a list of recent gifts to the foundation, turn to the back cover.

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Texas District & County Attorneys Foundation

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My friend Charlye Farris

As a boy growing up in Wichita Falls, Atticus Finch in *To Kill a Mockingbird* inspired me to become a lawyer. After doing so and returning home to practice law, I have been inspired by my friend, Charlye Farris.

By Barry Macha
Criminal District Attorney in Wichita County

Charlye Farris is an African-American woman who was born June 30, 1929, in Wichita Falls. She was born in her maternal grandparents' home and delivered by a doctor who lived next door (at that time, African-American mothers could not go to the hospital to give birth). Charlye is named after her great uncle, Charlie Booth. Charlye's parents were married in the Booth home and Uncle Charlie exacted a promise from them that they would name their first child after him. Charlye's mother, Roberta, decided to spell Charlye's name with "y-e" thinking that would indicate that Charlye was a girl.

Charlye's parents were educators. Mr. Farris was the first African-American school superintendent in Texas (Woodland Consolidated School District in Limestone County) and Mrs. Farris was an elementary schoolteacher for 49 years.

In 1945, Charlye graduated at age 15 as valedictorian of Booker T. Washington High School (our Wichita Falls public schools did not integrate until required by federal courts in 1969). She was 18 when she graduated with a Bachelor of Arts degree in political science from Prairie View A&M College (our university in Wichita Falls did not integrate until required by federal courts in 1954). To appease her parents, Charlye took a job teaching third and fourth graders in Stamford but gave it up after a year to pursue her interest in the law.

Against all odds, Charlye became an attorney. When she applied for admission to law school, law was a man's profession. There were very few female attorneys. There were no African-American women licensed to practice law in Texas. And it was very difficult to gain entry into the only law school in Texas that admitted African-Americans: the newly created law school at the Texas State University for Negroes in Houston (renamed Texas Southern University in 1951). Undeterred, Charyle entered law school at the University of Denver. She transferred to Howard University in Washington D.C. after her first year.

Charlye Farris

During Charlye's last year in law school at Howard, her civil rights class helped work on *Brown v. Board of Education;* Thurgood Marshall (later a U.S. Supreme Court Justice), George E. C. Hayes, and James M. Nabrit Jr., practiced their Supreme Court arguments ("dry runs") in front of Charlye's class.

In 1953, Charlye graduated from Howard University with a law degree and returned to Texas to take the Bar exam in October. She got her results in November (she first read that she had passed in the local newspaper) and her father drove her to Austin where she was sworn in on November 12, 1953. She became the first African-American woman to be licensed to practice law in Texas.

Charlye came back home to Wichita Falls and was the first woman to actively practice law in Wichita County. She endured the indignity of practicing law in the county courthouse which until 1962 had separate restrooms and drinking fountains for white and "colored" people. And Charlye was unable to attend the local bar association's luncheon meetings because they were held at the Marchman Hotel which excluded African-Americans.

On July 7, 1954, members of the Wichita County Bar Association unanimously elected Charlye to serve as Special Wichita County Judge (County Judge Pro-Tem). She became the first African-American to serve as a judge in any capacity in the South since Reconstruction. The local newspaper ran articles about Charlye's accomplishment but refused to include her picture because of the paper's policy at the time against publishing photos of African-Americans.

Such incidents were just one more reminder of the second-class citizenship that African-Americans experienced during the Jim Crow era. Black folks faced discrimination in buying or renting a home or office and were often denied admission to public places. In Wichita Falls, for example, the Woman's Forum and the Marchman and Holt hotels would not admit African-Americans.

In February 1955, Charlye

opened a law office near the railroad tracks on the city's east side (202 Park). Passing trains sounded like they were coming right through the office. After the passage of the 1964 Civil Rights Act, Charlye was able to lease an office downtown by the county courthouse (where she has officed now for over 40 years). Despite the indignities that she endured, especially during her early career, Charlye persevered, worked hard, and established a reputation for honesty and fairness.

On September 10, 1963, Charlye filed a suit for a mandatory injunction in *Billouin v. City of Wichita Falls et al.*, #73,122-A in Wichita County 30th District Court. Before being held unconstitutional by our courts, restrictive covenants in deeds of residential property were often utilized so that the property could not be used or occupied by anyone who wasn't Caucasian. Charlye turned the tables on the establishment in this case and used a restrictive covenant to obtain injunctive relief for a married couple in Charlye's neighborhood to prevent a city police officer, who also lived in the neighborhood, from keeping a police dog and from erecting housing for the animal.

Charlye's work on this case is among the most gratifying of all she has handled. Police dogs had been used in the South against African-Americans, and Charlye resented their inhumane use and what they symbolized. She paid for the costs of the suit out of her own pocket.

In 1973 Charlye became a mother. She had a son, Troy K. Farris, through the single-parent adoption plan when he was all of five days old. Like his grandparents, Troy became an educator and is currently a vice-principal at a local public high school.

Charlye was selected as acting District Judge of the 78th District Court in Wichita County during the summer of 1973. She has served on the board of directors of the Wichita County Bar Association and as chairperson of the District 14-A Grievance Committee of the State Bar of Texas. Despite an active solo private practice that by the 1970s concentrated on family law, real estate, and probate matters, Charlye has long been involved in community and civic issues, and she serves as a director on the boards of several organizations. She is also a member and former trustee of the Gilbert C.M.E. Church of Wichita Falls.

Ten years ago the Wichita County Bar Association established a scholarship in Charlye's honor to help students interested in law to attend college and law school. The scholarship helps students attend colleges and law schools that she could not have attended as a young woman because of her race. In 2006, Charlye was appointed and serves on the Board of Regents of Midwestern State University (my alma mater) in Wichita Falls, which she could not have attended as a young student. And recently the local public school district, whose schools Charlye was barred from attending, named an elementary school after Charlye and her mother, Roberta (who turns 104 this July 19).

Charlye has received several very prestigious state and national bar association awards honoring outstanding women lawyers who have achieved professional excellence and paved the way for success for other women lawyers. In 2004 she received the Texas Bar Foundation's Outstanding Fifty-Year Lawyer Award, recognizing attorneys whose practice spanned 50 years or more and who adhere to the highest principles and tradition of the legal profession and service to the public.

The essence of Charlye's story is eloquently stated by Betsy Whitaker, 2003 State Bar President, in her column in the September 2003 issue of the *Texas Bar Journal*:

> Charlye is a lawyer, a Texan, and a woman whose dignity and strength helped her overcome the adversity that could have obliterated her dream of being a lawyer. Many have benefited from her persistence and patience. All Texas lawyers, especially women and minority lawyers, have individuals like Charlye to thank for leading the way, for standing tall, and for making it a little easier for those of us who have come later.

Charlye's story is a testament to the "power of one"—the difference one person can make in a community, in a profession, and even in our history.

Charlye Farris represents all that is good and honorable about the legal profession. Her courage and integrity make her the female equivalent of Atticus Finch. Charlye will turn 80 on June 30 and she still puts in a full workday Monday through Friday. The years have not diminished Charlye's elegance, and the prejudice she has endured has not made her bitter or resentful. She remains soft-spoken and humble and a very private person who shuns any publicity. She is a hero to me and a role model to emulate. Charlye makes me proud to be a lawyer, and I am honored to be her friend.

Welcome to the newly elected!

An official "Welcome!" to the newly elected district and county attorneys who took office on January first. Normally I'd list our new folks in this column, but by my count we have a record number of newly elected prosecutors who are too numerous to list here—74 out of a total of 330 elected positions. The full list of new prosecutors can be found on page 9.

By Rob Kepple
TDCAA Executive Director in Austin

If you run through the list and see someone in your area whom you haven't met, I hope you take the time to call and introduce yourself. If there is one thing we have learned, we are better off as a profession if we share our experience and accumulated knowledge.

College Cost Reduction and Access Act of 2007

By now you have probably read about a student loan forgiveness program making its way through Congress. One bill that has passed is the John R. Justice Act, which offers flat-out student loan forgiveness of at least some debt to prosecutors with federal loans. However, that bill has not yet been funded. The National District Attorneys Association (NDAA) is working on the money, so stay tuned.

However, another bill, the College Cost Reduction and Access Act of 2007, passed too and can help new prosecutors starting as early as this July. Here are the two parts of that plan, as described by the Equal Justice Works (which you can access in full at www.equaljusticeworks.org):

Income-Based Repayment (IBR). This program is designed to significantly reduce monthly payments for borrowers with "partial financial hardship" (high debt and low income). Annual educational debts under IBR are capped at 15 percent of discretionary income (defined as adjusted gross income minus 150 percent of the poverty level for the borrower's family size). The following example uses the 2007 Federal Poverty Guideline for a single-person household of $10,210: Jane Justice owes $100,000 in qualifying debt at 6.8-percent interest and takes a job in prosecution paying $40,000. She elects the IBR plan, which means that in her first year, Jane's monthly loan payments are $309 (as opposed to $1,151 under a standard 10-year repayment).

What loans are eligible? All federal direct loans (FDLP) and federally guaranteed loans (FFELP) are eligible, including subsidized and unsubsidized Federal Stafford Loans, Federal Grad PLUS Loans, and Federal Direct Consolidation Loans.

What loans are not eligible? Loans made by a state or private lender and are not guaranteed by the federal government are never eligible, nor are Parent PLUS Loans. Finally, Perkins Loans are eligible only when part of a Federal Direct Consolidation Loan. Borrowers should seek advice before consolidating a Perkins Loan because those loans include cancellation provisions.

When can you elect IBR? IBR goes into effect July 1, 2009. The best way to join the IBR program is to register at www.ibrinfo.org to get the updated information and materials as it becomes available this spring.

Loan forgiveness for public service employees. While it is good to cut down the size of loan repayments, it still leaves new prosecutors with a chunk of debt. That is where the loan forgiveness part of this 2007 act comes in. Congress created loan forgiveness for public service employees if the employee makes 120 payments on one of the qualifying loans. If the employee makes the proper payments, then the balance of the loan is cancelled. For example, Jane Justice started out owing $100,000 in qualifying debt at 6.8-percent interest and took a prosecutor job at $40,000 a year, with annual cost-of-living increases of 5 percent. Jane stayed in public service for 10 years and made the proper IBR payments of $49,132. Under this plan, the government then cancels the $118,868 remaining principal and interest.

When can you begin counting your time? Beginning October 1, 2007, borrowers who have the qualifying loans may begin counting their time for purposes of the 10 years (120 payments).

The "prosecutor combine"

In the last edition of the *Texas Prosecutor*, I discussed our initiative

to connect prospective prosecutors with offices that are hiring. Our first step was to interview law students at the state-wide public service job consortium at the UT School of Law February 5 and 6. I want to thank the prosecutors who came to interview third-year law students from all law schools in Texas who are seeking positions as assistant prosecutors when they graduate: **Matt Powell** (CDA in Lubbock), **David Weeks** (CDA in Huntsville); **Gary Cobb** (ADA in Austin); **Jack Choate** (ACDA in Huntsville); **Efrain De La Fuente** (ADA in Austin); **Jarvis Parsons** (ADA in Bryan); and **Julian Ramirez** (ADA in Houston).

We interviewed about 30 students who are looking for a job in a prosecutors' office, and we met some folks who we believe you will want to meet and probably hire. We have told every one of those students with interest in prosecution once they graduate and pass the bar to keep an eye out on the TDCAA website's job bank. If they see a job that interests them, we have encouraged them to apply and to let us know when they do. We will follow up with the respective prosecutors' office to offer our input on that particular applicant. We will also keep tabs on our top prospects, so if you have a job opening for a new lawyer come November, you might give us a call and see who is on the top of our "must hire" list.

In the future, the TDCAA leadership plans to educate more law students about the opportunities that exist in our profession. We know this is a great job, and it's time to share that information in a regular way.

Biker assistance for victims

Steve Reis, District Attorney in Matagorda County, recently told us about a sexual assault and solicitation of capital murder trial he and his staff recently finished. What stood out for Steve was not the life sentences, the ugly facts, or the 8- and 12-year-old victims; it was a gang of bikers who attended the trial to offer their quiet support to the children.

Bikers Against Child Abuse (or BACA for short) provide physical and emotional support for children in court. You can check them out and find the chapter nearest you by visiting www.bacausa.com. At this website you can read about their mission, activities, and code of conduct. (This journal has also featured BACA awhile back; see the November-December 2004 issue for a feature article on these bikers.)

Steve Reis wrote a letter to the BACA Brazos Valley Chapter President, Dave "Seven Up" Bennet, which is reprinted in part here:

> Your members were very professional, courteous and helpful during the trial. At no time did I hear any criticism or suggestion that BACA in any way unduly influenced or impeded the proceedings. In fact, just the opposite—I think that the courteous and supportive presence of your members helped maintain decorum and certainly helped the child victims as they testified.
>
> Few people have ever had to undergo the rigors and frightening experience of testifying during a criminal trial. The fear of uncertainty and of the unexpected can reduce even the most assured adult to a stuttering and nervous wreck. How much more so when that witness is a young child surrounded by adults who, at times, seem to get into arguments with one another as the attorneys make objections? The courtroom can be an intimidating place for those who don't work there on an ongoing basis. When a child enters that arena, he or she is suddenly immersed in what seems to be an *Alice in Wonderland* experience where even words don't seem to mean the same thing they do in real life. And yet, we require that this child speak of the most embarrassing and horrible experiences with an audience of strangers. The rules of court generally require that even the relatives of the victim cannot be in the courtroom because they, themselves, may be called upon to testify. Somewhere, in that sea of faces, we can only hope that the child finds a face which brings comfort. We, as prosecutors, try to prepare the child for this and try to develop a relationship which allows us to be a friendly face for that child to see. Your organization goes a step farther and seems to effectively calm the child and empower him to tell of the horrors committed. You give the child a confidence to do what must be done to secure a proper verdict: to speak candidly and truthfully about how the defendant criminally assaulted the child. The confidence you give this child allows the jury to weigh the necessary evidence and hold the defendant responsible for his crime. By helping one child, I believe you keep the defendant from victimizing other children.
>
> Thank you for having been here, and thank you for the work you and your brothers and sisters do on behalf of children who have been abused.

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New categories of offenses

This tidbit comes from the desk of a former Texas DA and TDCAA Board member, **Judge John Miller Jr.**, out of Texarkana.

It seems the judge recently got a written request from a guy doing time in Arkansas to run that time concurrent with some Texas cases. The request was simple and polite: "I have Mister Minors in Texas that I would like to have ran Con Current with my ADC. Can you take care of this for me or let me no what I need to do to get this taken care of? Thank you for considering."

I will never be one to criticize spelling mistakes, and as you can see this paragraph would sail right through spellcheck. But before you laugh and say, "Sounds like someone from Arkansas, all right," remember that this guy was probably trying to phonetically spell the words of a Texas county clerk or sheriff when he wrote this letter—and he may have nailed it!

Shameless self-promotion?

Many of you were prosecutors a few years back when we invited **Vincent Bugliosi** to be the keynote speaker at our annual conference. As you know, Bugliosi is best known for prosecuting Charles Manson for the Tate-Labianca murders. He later co-authored *Helter-Skelter*, a popular book about the crimes.

We had a huge audience for his talk, but many of you remarked that he didn't really have much to offer a Texas trial prosecutor. After all, he recommended that you write out your opening—which should be at least 30 minutes long—word for word on a yellow pad. Some marveled at how he had managed to parlay the prosecution of a "whale in a barrel" case into a speaking career.

But Mr. Bugliosi may have the chance to prove himself here in Texas after all. Indeed, he has been sending out a copy of his latest book, *The Prosecution of George W. Bush for Murder* to prosecutors around the nation with a personalized letter asking the local DA to prosecute former President Bush for the murder of 4,000 American soldiers. And he offers to come and act as a special prosecutor in the case!

We are wondering if he has some special venue arguments lined up for Texas prosecutors, or if this letter has gone out to prosecutors in every state in the union. If you take him up on his offer, please let us know. That should be some opening argument!

The kings of pong

Every office finds its way to blow off a little steam. Pressure is the order of the day in many offices, and a healthy way to vent is always appreciated.

When our Senior Staff Attorney, **Diane Beckham**, offered to donate her ping-pong table to TDCAA, I snapped at the chance: It could be a great way for staff to relieve stress, do a little bonding, and have fun. Being an Ohio boy who grew up with a ping-pong table in the basement—our sole source of entertainment in those long winter months—I figured I would easily dominate all these outdoorsy Texas types.

The championship trophy

The first part has proven correct. A quick visit to the ground-floor ping-pong palace—and, uh, book storage room—can wash away a lot of the day's problems. The second part has been a bust; my rusty skill has proven to be no match for good old-fashioned Texas top-spin. TDCAA, as it turns out, has some talent.

We have naturally taken this to the next level: competition. Our appetites whetted by an intraoffice tournament, we set our sites elsewhere. Our first match-up took place the evening before the rescheduled Annual Criminal & Civil Law Update when the visiting team—the Lubbock County Criminal District Attorney's Office, led by CDA Matt Powell—lost a close and spirited contest to the TDCAA crew.

So where does this end? We hope that it doesn't, and we are practicing regularly in hopes that others will be inspired to begin a regular lunch-time training regimen. We are ready—any time, any place. In fact, if any of y'all want a piece of this well-oiled table tennis machine, let us know and we'll bring the table to the Annual Conference in Corpus this September!

List of newly elected prosecutors

Jeffrey Wayne Actkinson, Parmer County Attorney
Robert D. Adams, Kinney County Attorney
Isidro R. Alaniz, District Attorney in Webb County
Bernard W. Ammerman, County & District Attorney in Willacy County
Rodney W. Anderson, Brazos County Attorney
Jeanine Backus, Bailey County Attorney
Armando Barrera, District Attorney in Jim Wells and Brooks Counties
Amos Louis Barton, District Attorney in Kerr, Kimble, Mason, McCulloch, and Menard Counties
Richard P. Bianchi, Aransas County Attorney
Jason C. Cashon, District Attorney in Erath County
John Mark Cobern, Titus County Attorney
Kenda Culpepper, Criminal District Attorney in Rockwall County
Clinton J. Davis, Henderson County Attorney
James Kevin Dutton, District Attorney in San Augustine and Sabine Counties
John Fleming, Nacogdoches County Attorney
John M. Fowlkes, Presidio County Attorney
John Stuart Fryer, Lavaca County Attorney
Jesse Gonzales, Jr., District Attorney in Pecos, Brewster, Jeff Davis, and Presidio Counties
Brenda Seale Gray, District Attorney in Young and Stephens Counties
Kathryn H. Gurley, District Attorney in Parmer and Bailey Counties
Joshua Hamby, Howard County Attorney
Angela L. Hammonds, Camp County Attorney
Kimberly Ann Pepper Havel, Medina County Attorney
Heath Alan Hemphill, District Attorney in Coleman County
Mark Henkes, Hamilton County Attorney
Wesley Hinch, Liberty County Attorney
Heather Hollub, District Attorney in Guadalupe, Gonzales, and Lavaca Counties
Wesley Edward Hoyt, San Augustine County Attorney
Tim Inman, San Saba County Attorney
Donna Gordon Kaspar, District Attorney in Houston County
Cpt. Daniel Johnson Kindred, District Attorney in Medina, Real, and Uvalde Counties
Brian L. Kingston, District Attorney in Dawson, Gaines, Garza, and Lynn Counties
Natalie Cobb Koehler, Bosque County Attorney
Rosemary Lehmberg, District Attorney in Travis County
Cheryl Swope Lieck, District Attorney in Chambers County
Brett W. Ligon, District Attorney in Montgomery County
Nicole D. Lostracco, District Attorney in Nacogdoches County
Gregory Preston Lowery, District Attorney in Wise and Jack Counties
Susan Michelle Loyless, Crane County Attorney
Judge Patricia Rae Lykos, District Attorney in Harris County
Christopher E. Martin, County & District Attorney in Freestone County
Lee Melaine Martin, McMullen County Attorney
Robert Scott McKee, District Attorney in Henderson County
Louis Dayne Miller, Young County Attorney
Melissa C. Morgan, Stonewall County Attorney
Michael Munk, Garza County Attorney
Andrew Stevenson Murr, Kimble County Attorney
Joe H. Nagy, Jr., Gaines County Attorney
William E. Parham, District Attorney in Washington and Burleson Counties
John D. Payne, Bandera County Attorney
Scott Ray Peal, Chambers County Attorney
Lisa Pence, Erath County Attorney
Martin Placke, County & District Attorney in Lee County
Anna Cavazos Ramirez, Webb County Attorney
Will Ramsey, Franklin County Attorney
Ann Reed, District Attorney in Nolan, Fisher, and Mitchell Counties
Delma Rios-Salazar, Kleberg County Attorney
Joe Lee Rose, Coleman County Attorney
Vincent R. Ryan Jr., Harris County Attorney
David T. Scott, County & District Attorney in Ochiltree County
Daphne Lynette Session, Houston County Attorney
David A. Sheffield, District Attorney in Hardin County
Mark W. Snider, District Attorney in Hutchinson and Hansford Counties
James Stainton, Wise County Attorney
Megan Suarez, Knox County Attorney
Scott M. Tidwell, Winkler County Attorney
Hal R. Upchurch, Ward County Attorney
Lucinda A. Vickers, Atascosa County Attorney
Noble D. Walker Jr., District Attorney in Hunt County
Ronald G. Walker, Montague County Attorney
Rebecca Walton, Hardin County Attorney
Janice L. Warder, District Attorney in Cooke County
Paul Watkins, Gonzales County Attorney
Cindy Renea Weir-Nutter, Ector County Attorney
Ori White, Pecos County Attorney
Ty Wood, Mitchell County Attorney

Save the date for our Advanced Appellate Advocacy Seminar this August

Coming this August to the Baylor Law School: TDCAA's Advanced Appellate Advocacy Seminar. This intensive course (August 10–13) will include excellent instructors advising on both oral and written appellate advocacy, sample arguments, brief writing, and seasoned faculty advisors for unsurpassed one-on-one critiques, advice, and counseling. Plus, the unbelievable facilities at Baylor Law School have four courtrooms complete with audio and video recording.

And the best part: It's totally free! TDCAA reimburses every attendee for travel, pays $30 per diem for meals, and requires no registration fee. Class size is limited to 32, and registration will be open only to appellate advocates with three years' experience.

Watch TDCAA.com and upcoming issues of this journal for further updates, and mark your calendar for mid-August in Waco with TDCAA.

Applications for investigator scholarship, PCI, Oscar Sherrell award now online

Applications for the Investigator Section scholarship, PCI award, and Oscar Sherrell award are now online. Look in the newsletter archive under this issue (March-April 2009) on www.tdcaa.com. The submission deadline for all three applications is July 1.

Award winners at the Annual Update

Todd Smith is the C. Chris Marshall Award winner

Todd Smith, chief investigator in the Lubbock County Criminal District Attorney's Office, was named the C. Chris Marshall Award winner at the Annual Criminal & Civil Law Update. He is pictured at right with Erik Nielson, TDCAA's Training Director, and Matt Powell, Lubbock County Criminal District Attorney.

Smith is the first non-lawyer to win this award, which is given to the most distinguished faculty member and teacher. He was honored for his training in Lubbock, across the state on behalf of TDCAA, and nationwide through the National Advocacy Center (NAC) and National District Attorneys Association (NDAA).

"Todd dedicates himself to training every prosecutor, investigator, and any other staff member who wants to learn," Nielsen says. "His students consistently evaluate his presentations as stellar, and he has always responded superbly in whatever training situation we have thrown him."

"I am very honored by this award," Smith says, "but I am more honored each and every time I am able to speak to Texas prosecutors and staffs. To be recognized for that is just icing on the cake."

The C. Chris Marshall Award winner is nominated by TDCAA's nominations committee, approved by TDCAA's board of directors, and presented by tradition at the prosecutors' annual conference every September. The award is named after C. Chris Marshall, a Tarrant County assistant criminal district attorney who was a statewide leader in appellate law and shared his talents with anyone who needed it. He was killed in court in 1992.

Judge John D. Roach named Lone Star Prosecutor

Judge John R. Roach, Criminal District Attorney in Collin County, received the 2008 Lone Star Prosecutor Award at the Annual Criminal & Civil Law Update. He is pictured at right with Barry Macha, Criminal District Attorney in Wichita County and TDCAA Board President.

Judge Roach was honored for his courage and discretion in prosecuting—or choosing not to prosecute—several cases over the past year. For example, he steadfastly refused to take on cases contaminated by the "To Catch a Predator" television show. The cases were mired in controversy because the investigations were conducted under the supervision of television producers, not law enforcement, and would not have held up in court.

"John Roach showed the true backbone of a Texas prosecutor in standing up to a national television network and this show by refusing to prosecute cases tainted by an entertainment-driven 'investigation,'" Macha says.

Roach also agreed to prosecute

another elected prosecutor, Ray Sumrow, for abuse of office, resulting in a 15-year prison term, and he dismissed charges against the man convicted of murdering young Ashlee Estelle after doubt was cast on the evidence used to convict him. "The public may not have liked that decision," Macha notes, "but Roach followed the law in this case. That is his job as the elected prosecutor, to be sure that justice is done. It is this type of work that exemplifies the best in Texas prosecution."

"Recognition by my fellow Texas prosecutors as Lone Star Prosecutor of the Year is a great honor—and doubly so because of our shared dedication to truth, justice, and the rule of law," Judge Roach says.

Each year the Board of Directors of the Texas District and County Attorneys Association names a Lone Star Prosecutor who demonstrates professionalism and dedication to the highest standards of prosecution. The award is traditionally presented at the prosecutors' annual conference every September.

Jim Kuvobiak is State Bar Prosecutor of the Year

Jim Kuboviak, recently retired Brazos County Attorney, was named the State Bar of Texas Prosecutor of the Year. (He is pictured below with Barry Macha, Criminal District Attorney in Wichita County and TDCAA Board President.

Kuboviak was honored for his longtime service (he was the Brazos County Attorney for 24 years before retiring in 2008) and pioneering the use of video cameras in police cars, which changed the way law enforcement conducts traffic and other investigations across the state.

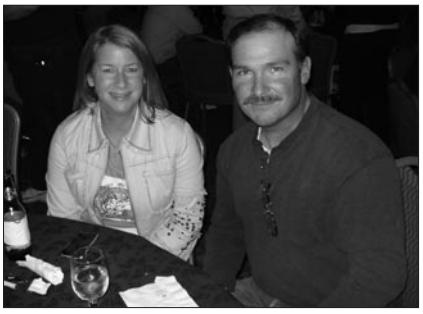
"Videotaping criminal suspects during the actual commission of crimes has made the greatest impact ever on prosecuting such offenses," says Rod Anderson, current Brazos County Attorney and former First Assistant County Attorney under Kuboviak. "It places the judge or jury right there at the scene of the crime as it's being committed. Much like DNA in homicides and sexual-related offenses, in-car videos serve to convict the guilty and exonerate the innocent." Such videos are especially helpful in driving while intoxicated (DWI) arrests and as a training tool for other police officers.

Additionally, Kuboviak is an enthusiastic speaker for TDCAA, traveling the state to deliver impassioned training in his trademark deep voice. "Jim tirelessly trains law enforcement and prosecutors on the effective use of in-car video and other techniques for catching intoxicated drivers," says Rob Kepple, TDCAA's Executive Director. "That's true leadership."

"Very few people get to live their dreams," Kuboviak says, "but I was one of the lucky ones because I was able to be a prosecutor my entire legal career. I am both honored and humbled to receive recognition and appreciation by my peer group."

Each year the Criminal Justice Section of the State Bar selects its jurist, criminal defense attorney, and prosecutor of the year. The prosecutor of the year is nominated by TDCAA's nominations committee, approved by TDCAA's board of directors, and presented by tradition at the prosecutors' annual conference every September.

Photos from the rescheduled Annual



Photos from Investigator School

Tell us about a crime victim you remember

Karla Hackett
Assistant Criminal District Attorney in Grayson County

Her name was Lily. She was tiny, probably not even 5 feet tall. While walking one morning, she was abducted by two young men, both of whom raped her repeatedly. In the end she was lucky (if you could call it that) because they dumped her in a field outside of town. She was naked with her hair hacked off—but alive. It was the kind of crime that outrages prosecutors and makes us salivate with the thought of putting such animals in prison for a long time.

My officers were worried about Lily. She hadn't cried. Not when the stranger gave her a ride home, not when the police came to her house, not during the SANE exam, and not during our preliminary meetings with her in the DA's office. We were all worried about her.

When the first trial was set, she sat in my office with me. I looked at her and my heart hurt. She was only 15. Her parents were of Asian descent and didn't speak English. They refused to acknowledge what had happened to their daughter, and they did not come with her for any part of the case or trial. Instead, she had someone drop her off at our office, even refusing our offer to pick her up and take her home.

When I started to prep her for trial, she had no problem telling me what had happened. She sat across the desk from me with no expression on her face. She hadn't forgotten any of it and told it to me as if it had happened to someone else. I explained to her what would happen in the courtroom, made sure she knew that one of the defendants would be in the room when she testified, and outlined how I would ask her my questions.

I asked her if she had any questions of me, and she said no. Then, finally, a single tear spilled down her cheek. She looked at me and said she didn't want to testify and that I must think she was a coward. I told her she was the bravest person I had ever met. Then I cried. (No one cries alone in my office!) I promised her that I would try to get guilty pleas from the defendants, but if they demanded a trial, there was nothing I could do about it. She thanked me and said that if I weren't able to get them to plead guilty, to let her know when to come to court for the trial. I cried some more, but she didn't.

I pushed hard for those guilty pleas. All I could see was her little face and that one tear. If we had gone to trial, I feel sure the jury would have maxed them out, and our office would have gotten a lot of good press. I worried about Lily. Her brother supported her, but other than him and our staff, she seemed so alone. I have never seen anyone try so hard to hold her fear and anger inside, and I was afraid of what would happen to her if she ever let go of her self-control.

In the plea deal, the perpetrators got 35 and 40 years in prison, respectively, on 3g offenses. No trial and no appeal. When it was over, Lily declined the opportunity to address the defendants; she turned down our offer to find her a counselor or just to sit and talk with us. She just thanked us politely and left.

She was willing to do whatever we needed. The hardest thing seemed to be admitting that she was afraid to testify. She would have testified, though. She would have done whatever we asked, but I am so glad we were able to spare her the trauma of reliving what those men had done to her. I still think Lily is the bravest young woman I have ever met.

In the next issue, tell us about a previous job (not in law enforcement) that helps you as a prosecutor. Email your anecdote to the editor at wolf@tdcaa.com and write "The Way We See It" in the subject line.

Stella Stevens
Assistant District Attorney in Montgomery County

I will never forget Rafael Gil. He is a simple, hardworking immigrant, a janitor at the Church of Christ in the Woodlands. He is also a man of tremendous faith, not only in God, but in the American justice system and in me.

One of his daughters, Priscilla, was molested by his nephew, Omar, in 1994. She told him about the crime in 1998. He decided to "handle it in the family" (he has a huge family network in the Montgomery County area) so his nephew could "get help." Shortly after Priscilla's outcry, his other daughter, Cindy, was also raped by Omar. She never told anyone and suffered in silence.

She couldn't even bring herself to celebrate her quincinera (her 15th birthday party) because she "wasn't pretty anymore" and told her father to spend the money on a mission trip. She finally told her father what happened in 2004. He became furious and finally went to the police. (He later asked me, "Do you know how hard that was for me? When I could kill him myself for what he did to my beautiful daughter?") The defendant confessed to molesting Priscilla but denied raping Cindy and promptly left for Mexico.

That is when I met Rafael. My chief, who would normally handle this type of case, was out sick when Rafael stopped by (read: bulldozed his way into) our office. He begged me to do everything in my power to bring the defendant to justice. I was sitting in my office thinking, "Dude, this is a 10-year-old crime."

But Rafael was determined. He called everyone he could think of to help him, including the FBI, to bring the defendant back to the U.S.; he even went to Mexico himself, trying to get local authorities to find and arrest Omar. Long story short, the defendant came back on his own, Rafael called me, and we had him arrested.

Then we found out that the crime in Priscilla's case, the one for which the defendant had confessed, occurred when Omar was a juvenile, and we couldn't certify him. I didn't know how to tell Rafael that we weren't going forward with the case. I tried to explain, but he told me that he had faith in the court system, that he had faith in me, and that he knew I could do something. When someone tells you that they believe in you, that they have faith in you, and they do it with the sincerity and goodness of Rafael Gil, that really gets to you. So I thought, "What the hell? Let's try the case with Cindy as the victim." We had no evidence. It was her word versus his, and by now the case was 10 years old. But I believed my victim. My mother is Hispanic, and I was raised in San Antonio and I know about quincineras. I believed her for that reason alone—no Hispanic girl on the cusp of her quincinera was going to skip it without a traumatic reason.

The jury believed her too. They deliberated for seven hours but came back with a guilty verdict. We agreed on seven years in TDCJ because I was afraid the jury would assess probation due to their lengthy deliberations. If it weren't for Rafael's persistence and faith, I am not sure if this case would have been prosecuted.

Clarissa Kay Bauer
Assistant County Attorney in Harris County

I serve as legal counsel to the Harris County Toll Road Authority. My job is far removed from the criminal arena, and I don't work with crime victims. However, years ago, I handled the animal cruelty cases for the County Attorney's Office. These were not criminal prosecutions but rather civil seizures of abused animals pursuant to Chapter 821 of the Texas Health & Safety Code. I would go to court for an order taking the animals from their owners and turning them over to local animal rescue organizations.

These animals made an unforgettable impression on me. I remember one starving dog that was kept on a short chain in a dirt backyard: no food, no water, no shade in the 95-degree Houston summer. His collar was so tight it had become embedded in his neck. Cats in filthy living conditions, covered in feces. Horses left to die of starvation. The animals were victims in every sense: horribly abused or neglected, innocent, and helpless. Fortunately, with the help of the legal system, I was able to get them away from their owners and into loving hands.

Helping animals was truly the most gratifying legal work I have ever done. It inspired me to co-found (along with my friend Belinda Smith, who handles animal cruelty prosecutions at the Harris County District Attorney's Office) the Animal Law Section of the Houston Bar Association in 2007. I agree with the sentiments of St. Francis of Assisi: "If you have men who will exclude any of God's creatures from the shelter of compassion and pity, you will have men who will deal likewise with their fellow men."

Greg Gilleland
First Assistant Criminal District Attorney in Bastrop County

I have been priviledged to know many fine people who were crime victims over my career, but the crowning accomplishment of my career is a little girl we'll call Jane (not her real name).

Jane lived with her mom and mom's boyfriend in a trailer on her maternal grandma's property out in the country. One morning, when her mother left for work at the crack

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of dawn, the boyfriend used the opportunity to commit indecency with a child to then-8-year-old Jane. The child fought like a tiger and ultimately ran from the trailer to her nearby aunt's place.

Mom brought Jane to the children's advocacy center (CAC) and was appropriately protective of her. I happened to be at the CAC when Jane was interviewed and developed the opinion that Jane was perhaps one of the smartest and most mature 8-year-olds that I had ever met. I didn't think Jane's mom, aunt, or grandmother were very smart, and I told the folks at the CAC that this child was obviously the braintrust of her family. Not only did I totally believe the kid's outcry, but the physical evidence—serious, fresh bruises on her legs where the defendant attempted to pry them apart—corroborated her outcry immensely. The defendant was also a cokehead, and evidence suggested that he was the mother's drug connection.

Several months later, I appeared in the county court-at-law to help a new prosecutor obtain a fi-nal protective order for Jane and her mother against the offender. Halfway through the hearing, the child's mother, aunt, and grandmother announced that they no longer believed Jane's allegations and claimed that the child was a liar. I knew otherwise.

About a year after the crime occurred, we interviewed Jane in preparation for trial. She told the same version of events that she had told initially and further allowed how her family kept asking her if she was sure she didn't imagine it.

At trial, Jane's mother testified her child was a liar. At a break, the defendant was seen shaking the mother in the hallway and telling her, "Your child is telling the truth. You need to believe your child." Fortunately, the jury didn't see this, but we were allowed to introduce it during trial. The defendant got 18 years in prison.

During the trial I met Jane's paternal grandmother, an educated and elegant lady. Her son (Jane's father) had basically dropped out of his daughter's life shortly after her birth, but Jane's paternal grandparents and an aunt were constantly sending money to Jane's mom so they could have some access to the child and to help out the family financially. The grandparents, who live in an upscale neighborhood in a large city, filed a guardianship action, and Jane's mother agreed to appoint them as guardians some time later. They eventually adopted her.

I'm happy to report that today, brilliant little Jane is attending a highly advanced school. At age 12, she received an invitation to attend a two-week Yale University pre-college program for gifted and talented students. For the first time in her life, she has adoring adoptive parents who love to spend time with her. Her aunt and uncle have started a college fund for her, realizing that she will likely pursue a post-graduate degree. She plays viola in the school orchestra and gets to participate in many forms of extracurricular activities that she was never exposed to with she lived with her birth mother.

Because Jane's grandmother (adoptive mother) is the president and CEO of a large private social service agency, Jane has been able to travel to New York and Washington D.C. on multiple occasions and to Europe and Norway for seperate two-week periods. I get cards, letters, and pictures from Jane's family every few months, keeping me apprised of her latest accomplishments and adventures.

I like to think that I helped not only get a child predator off the street for a few years, but that I also have made Jane's life immensely better. She has an immensely mature understanding of her birth mother's issues, and although she still loves her, Jane is very happy and well-adjusted in her new life. She constantly writes to thank me and our victim witness coordinator for our efforts to help her. It always brings a huge smile to my face when I get a card or letter from the family, and the entire office gathers around to see her latest pictures.

I call this case my one true victory as a prosecutor. I urge everyone out there to believe the children.

Donna Hawkins
Assistant District Attorney in Harris County

The case was one of hundreds pending in our very busy court. I hadn't tried many sexual assault cases, and this one appeared to be a loser. In fact, my court chief recommended a face-to-face meeting with the parents and the 9-year-old complainant and then a dismissal of the charges. You see, the accused was a decorated military vet, a young, good-looking man with no criminal history. He didn't look like a child molester. And the defense attorney was damn good

and very hard to beat at trial. The DNA test showed only the *victim's* saliva on the swab from her panties. It was alleged to be a one-time touching, late at night, a rubbing of the little girl's vagina as she lay in her bed. The suspect was a family friend, almost considered a relative, who was visiting for a single night. Outcry was not immediate but the day after the assault occurred.

I arranged a meeting and met with the parents and the little girl, Jennifer. As they filed into my office, they stopped in shock. Her parents asked why I had a framed picture of their daughter on my desk. I told them that that was *my* daughter, then looked up amazed to see that Jennifer could have been a twin for my daughter, Brittany. As a colleague watched Jennifer, her parents and I spoke about the difficulty in prosecuting the case. They understood and asked several probing questions about trial and testimony. The mother pulled me aside after we spoke and asked me, "Would you spend just five minutes meeting with Jennifer so she won't feel that a dismissal is her fault?" Of course, I readily agreed.

An hour later, I knew that this case was going to trial. Jennifer was an intelligent, compelling little girl with an inquisitive mind and a ready wit. She was also utterly believable about the sexual touching. I couldn't explain why her saliva was found on the panties, and she couldn't either, but I knew that the touching *had* happened and that I was going to prosecute the offender.

Trial was difficult. I saved Jennifer to be my last witness, and she waltzed right up to the stand, comfortable as can be. She also looked right at the defendant as she identified him. They locked eyes until *he* looked away. She told the jury what had happened. Interestingly, before trial I discovered that the defendant had been accused of giving another young girl in a different state a piggyback ride, and she had accused him of rubbing her bottom. The victim's family in that case was not cooperating with authorities, and I could not secure that testimony. But as Jennifer testified, she mentioned an uncomfortable piggyback ride—something she had never mentioned before in all of our pretrial meetings. In fact, neither Jennifer nor her parents knew of the other victim's allegations.

The jury found the defendant guilty as charged and eventually sentenced him to 20 years in prison. I still get chills as I recall the verdict and that beautiful little girl. As the jury deliberated their punishment verdict, Jennifer sauntered up to me and shyly slipped something into my hand. It was a note to the jury that I still have framed on my office wall:

To the Jury: Thank you so much for believing in ME! Love, Jennifer

Jane Starnes
Assistant District Attorney in Williamson County

I put on a jacket the other day that I hadn't worn in a while, and I felt something in the front pocket. I pulled it out and found it was a cheap little metal cross. Now, I don't usually go around with religious artifacts in my pockets, especially ones that look like they came out of a gumball machine, but this little cross means a lot because of who gave it to me.

I got Roxanne's case in January 2000. She had collapsed at school the first day back from Christmas break. She was 8 years old and weighed 38 pounds. She had red, swollen feet, her ears stuck out so that she looked like a little elf, and her belly was protruding like a starving child in Africa. Her parents were starving and abusing her in some really bizarre, cruel ways.

Roxanne was placed with a foster family where she immediately gained weight and morphed into a beautiful, healthy little girl. What really struck me about this child was that everyone who ever met her absolutely fell in love with her. Her teachers adored her—they marveled at how enthusiastic she was about school. (She testified at her parents' trial that she loved school "because I get to eat and people are nice to me there.") Paramedics who transported her to the hospital fell for her and attended the trial. The CPS caseworkers loved her. All the doctors who treated her were so taken by her that they were unusually cooperative with our trial preparation and schedule, and we got none of the usual "I'm a busy doctor" lip from them. Her foster family fell in love with her instantly.

I knew early on that the case was headed for court—her parents were too narcissistic and crazy to take responsibility for their actions. I knew that for such a traumatized child to make it through a trial, Roxanne had to get to know and trust me, so she and I met with her CPS worker. The first time I met Roxanne, she grabbed my hand and held it while we crossed the street. I

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was struck by how open and honest this little girl was, how trusting she was with me, a stranger. We went to the park and fed the ducks. We had lunch. I met with her at her therapist's office. She came to my office. Finally, after a year-long delay and arranging for the change of venue (because of all the publicity), the day arrived when she had to testify against her parents. The jury had already heard testimony and seen photographs of her horrible malnourished condition by the time Roxanne showed up for trial in a pretty dress and matching purse, looking confident, healthy, and happy. She took my hand as we walked down the hall to the courtroom, and just before we went in, she pulled something out of her purse. It was a small metal cross that said, "Jesus loves you" on it. Roxanne looked at me and said, "Here, put this in your pocket so you won't be scared." It was all I could do to hold it together. This child had gone through hell and back and was getting ready to testify against her own parents, and she was worried that *I* might be scared.

The jury convicted her parents of criminally negligent injury to a child, which was just a state jail felony. At punishment, they realized their mistake (they forgot what "lesser-included" meant!) and gave them both two years within 20 minutes of deliberating. Then the jury terminated parental rights, and eventually Roxanne and her baby sister were adopted by their foster family and are doing great now. That's why, eight years later, I still have that cheap metal cross in my pocket.

Timothy Salley
Assistant District Attorney in Moore, Dallam, Hartley, and Sherman Counties

The first sexual assault of a child case I tried involved two child victims: A.H., age 6, and her sister S.H., who was 10. Their father had taken in his 19-year-old nephew who had been thrown out of his own home. The nephew, who performed various acts of perversion upon the two girls, was charged with six counts of aggravated sexual assault of a child.

As a fairly new prosecutor, I sat second chair with the DA and helped prepare these two beautiful girls for the courtroom. I will never forget the 6-year-old; she was full of life—until she had to talk about her cousin, at which point her beautiful smile would turn into the saddest face one could imagine. The jury returned several life sentences for the nephew. After trial we let the girls put their handprints on the wall of our victims room. (Such has become a tradition for our victims.) I still see this family around town occasionally. They were very grateful and donated a PlayStation for our victims room.

My proudest moment as a prosecutor came about six months after trial. I was shopping at the grocery store when I suddenly felt a big squeeze on my leg. I looked down and saw A.H. with a big smile giving me the biggest hug she had. (I am 6-foot-3, and this child was very small for her age.) At that moment I realized who I am and what I do.

Today the smallest of all the handprints on our wall belongs to A.H., but she had the biggest impact on me. Partly because of that special hug in the middle of the grocery store, any child victim that I encounter will get the best that this prosecutor can deliver.

Mike Little
District Attorney in Liberty County

It's been several years since I received that midnight phone call from a veteran detective. He needed help with a search warrant in a child abuse case. "Mike, it's a bad one," he said. I knew that he didn't often exaggerate, and he certainly hadn't this time.

Several children had been horribly abused. The defendant went way too far that evening and one child died. The sick and disgusting actions finally came to light. Having been involved with the case from the beginning, I chose to prosecute it personally. That's how I met Linda (a pseudonym), one of the children who survived. I met with the surviving children many times, and Linda was the only one who was able to testify because of her age and the other children's mental and physical limitations. Although the trial was years ago, I still vividly recall her testimony. There wasn't a dry eye in the courtroom—mine certainly weren't. The closest thing to justice that could be achieved by the criminal justice system was accomplished in that courtroom. And it was all because of Linda, the most courageous child I've ever met.

Linda is still in CPS custody. Her foster parents are wonderful people—I spent many hours in their home during my trial preparation. I regularly receive letters from her. The first few were truly heartbreaking:

She described nightmares during which she relived the abuse of her and her siblings. Gradually, the tone of the letters became happier. Each letter praised me for "saving her," and she often referred to me as her "hero." I often see Linda at the annual CPS foster children Christmas party, and I always get a big hug. The latest three of Linda's school photos are prominently displayed in my office among family photos, and she calls me each year on my birthday.

I think of Linda often. Of course, she comes to mind each time that I deal with a child abuse matter, but I also think of her when I think of my own two sons and other children who are well cared for. I often wonder why some kids are born to decent parents and some kids are born into a living hell.

Linda's physical wounds have healed as well as they can. Mentally, she seems to be doing very well, and I thank God for that. I'll be getting her high school graduation invitation soon. Although I don't attend many graduation ceremonies anymore, I wouldn't miss hers for the world. There won't be any dry eyes there either.

It's largely because of Linda and those like her that I do what I do.

Karen Larose
Assistant District Attorney in El Paso County

In the late 1980s an aggravated robbery case came across my desk where the victim was an elderly gentleman, Eduardo Martinez. He and his wife ran a small neighborhood grocery store. One night Mr. Martinez was taking some trash to the side of the building when he surprised a robber, Raul Rodriguez, who was putting on a mask to rob the store. Mr. Martinez recognized Rodriguez because he had given him a job cleaning around the store the week before. Mr. Martinez tried to run back to the store's entrance, but Rodriguez pointed a gun at him and demanded money. Mr. Martinez took out his wallet, and the robber fired the gun in his direction but missed him. Eduardo ran toward the store's door, believing he would be killed, and Rodriguez picked up the wallet and ran away.

As the case progressed through court I learned that Eduardo had been so traumatized by the incident that he would close his store early, before dark. His life and his business suffered, and he was very nervous about proceeding to trial. I wondered if I should plead the case to the 20 years the defendant was willing to take and spare Eduardo any further hurt that might occur by testifying in court. He appeared very fragile.

Finally I told Mr. Martinez that I was taking the case to trial. I told him that he would simply tell 12 people what had happened to him just as he had told me and that I knew he could do it. He testified, and the jury sentenced the defendant to 45 years.

I was in the hallway after sentencing when I saw Mr. Martinez in the hallway hugging his wife and telling a friend, "All I did was tell those 12 people what happened to me!" There was a spring in his step as though a burden had been lifted and he had taken charge of his life again. Allowing him to testify was a life-changing experience for him and I knew that the decision to go to trial had a positive and restorative impact on him.

Mr. and Mrs. Martinez came to see me several months later before the Christmas holidays. They both said things were back to normal and their business (now on the same hours as before the incident) was thriving. I don't think they would have felt as confident and strong had the case pled and had Eduardo not testified. The trial process changed their lives, and they forever made an impression on me.

Traffic stops without bad driving

Recently I received a great e-mail from Corporal IV Mike Scheffler of Georgetown West DPS/Texas Highway Patrol. He wrote, "This defense question has come up several times in court, and I wonder how you would answer it: 'Officer, did you observe any bad driving by my client?'"

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Folks ask quite often what to do about a case without a "drunk car." The worry is legitimate because judges and juries expect to hear: that the defendant's driving was so bad that his intoxication was obvious. A lack of impaired driving in a DWI case is certainly a weakness but not an insurmountable one.

Corporal Scheffler notes that the vast majority of the DWI arrests he and his colleagues make start with stops for "low grade" speeding, malfunctioning equipment, and smaller violations of the Transportation Code. "In court, I have testified numerous times that the vast majority of DWI arrests are made with such probable cause for the initial stop and that the classic TV drunk car that we see on 'COPS,' 'Real Stories,' and all the other 'entertainment' cop shows are actually few and far between," he says. "I further testify that waiting for bad driving behavior is the same as waiting for the vehicle to strike someone before we take action.

Corporal Scheffler often uses the analogy of a driver hitting a deer (because it is so common in his area). "In most such cases, the driver, who was totally sober at the time of the crash, *never* saw the deer coming—yet struck it anyway. With this in mind, I paint the picture of the defendant driving down a street and a small child running out to chase a ball and, guess what, the defendant's impairment slows his reaction time and he too, never saw the kid coming. I have found that juries buy into this scenario nearly every time."

Richard Alpert, the misdemeanor chief of the Tarrant County Criminal District Attorney's Office, admits that the "no bad driving" cases are hard and therefore more likely to go to trial, but "the goal of a trained officer is to stop a car before the driving gets too out of hand."

A stop without bad driving is problematic and will raise the aforementioned defense question every single time. Numerous prosecutors have lamented officers making stops "too early" and having "no bad driving" evidence, while officers appropriately ask, "Why can't we just make a regular traffic stop?" and "Do we need to follow such drivers until they hurt someone?" While I can't make this issue go away, my knowledgable colleagues and I have suggestions for voir dire, direct examination of the officer, and arguments that direct the focus on the defendant's intoxication and danger on the road.

Questions for voir dire

"No bad driving" cases, like all DWIs, are won or lost during jury selection. Help the panel members see how a lack of bad driving does not hurt the case against the defendant. Warren Diepraam, an assistant DA at the Harris County District Attorney's Office, suggests telling the jury, "'Traffic stops are like lottery tickets: Every now and then you hit the jackpot with an impaired driver, a kilo of cocaine, a stolen vehicle, or, heaven forbid, a dead body in the car.' Make sure the jury understands the importance of these types of stops in crime prevention."

These questions will prompt the jury to think about DWI investigations with common sense and remove unrealistic, TV-created expectations:

- "As the State's attorney, I must prove that the defendant operated the vehicle while intoxicated. Is there anyone here who would make me prove the police officer knew the defendant was intoxicated when he stopped the car for a traffic violation and before he had even begun his DWI investigation?"
- "How long do you think an officer needs to wait to pull someone over after he sees a traffic offense? How long do you think it should be between when an officer sees a traffic violation and the driver has come to a stop?"
- "What percentage of drivers are intoxicated at [whatever day and time this defendant was stopped]?" (This question obviously works best with late weekend nights and is excellent for holidays.)
- "How many impaired drivers do

you think go undetected?"

- "Do you think it is important that drivers not be allowed to [do what the defendant did to catch the officer's attention]? Why do you think that behavior is dangerous to other drivers?" (This line of questioning is especially effective with equipment violations.)
- "Who thinks officers should ignore [what the defendant did]?"
- "Does anyone think it is unfair that an impaired driver is caught and detected by a common traffic stop rather than observation of the bad driving behavior you might see on 'COPS' or reality TV police shows?"
- "Do you think impaired drivers who are stopped for [what the defendant did] should be released if the officer did not see him drive poorly?"
- If the stop was for speeding, not using turn signals, running a stop sign, not turning on headlights, or not using seatbelts, ask this question: "Alcohol lowers inhibitions; can anyone tell me why that might make an impaired driver more dangerous?"
- *(Warning: This one is bold!)* "Who here has been stopped for a traffic violation? Did you get a warning or a ticket? Did you get arrested?"

Direct examination of the officer

Deal with the lack of bad driving during direct examination—never leave it for the defense to note for the first time during cross. Prosecutors know the defense is going to bring up this issue, so don't be shy or apologetic. The officer made a perfectly legitimate and common stop, and he got lucky to take an intoxicated driver off the road. Embrace it, and that will take all of the sting out.

Here are some questions to present through the arresting officer on direct:

- Carefully describe the very short amount of driving time the officer observed the defendant, which makes it clear the defendant did not visibly drive poorly in the 30 seconds the officer watched the defen-

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dant, noted the violation, and pulled him over.

- Detail all the other things the officer did as he pulled over the vehicle. Because it was not a DWI investigation yet, the officer may have missed something, and that is OK. Have the officer describe what he did such as activating lights, contacting dispatch by radio, making a U-turn, and observing other traffic.
- Explain what the officer typically does during a shift. For example: He might observe 100 vehicles, make 20 traffic stops, assist one or two drivers in distress, chase a cow off the road, pick up street debris, perform one or two DWI investigations, and make one DWI arrest. Put the whole case in context.
- Discuss why broken headlights, outdated registration, and similar violations are a safety issue and why the officer stopped the driver for one. Make sure the jury knows the officer makes many such stops and gives citations or warnings for these infractions. Let them know DWI investigation is just one of the many responsibilities the officer has while on patrol.
- Go over in great detail how the mundane traffic stop turned into a DWI investigation. This discussion helps explain why the officer didn't follow the violator before pulling him over to gather DWI evidence. Put special time into having the officer explain his first contact with the driver. Ask what he saw, heard, and smelled.
- Remember that speeding is always bad driving. It may very well indicate a loss of normal, safe inhibitions. Recognize, too, that alcohol reduces inhibitions. Drinking makes a driver brave, and bravery makes drivers speed. (Stupidity also makes a driver brave and speedy, so the defendant may be alcohol-induced brave or just plain stupid. Either way, he is a danger on the road.) This axiom applies not only to speeding but also to the use of signals, headlights, and even seatbelts.

Suggested arguments

Remember that good closing arguments must be seeded during jury selection and nurtured during direct. Use the closing argument to dare the defense to criticize the officer for doing his job and for raising the burden beyond the elements required by law. Stress that while there is evidence we might like, it is not up to the officer to make it up or report the case in any way except how it actually happened. Come back on close and remind the jury that defense counsel's standards are purely hypothetical and don't match the elements in the charge.

Touch on these points too:

- Discuss the fact that sometimes the public and the police get lucky by pulling over a driver with a busted brake light and discovering an intoxicated driver. This is a good thing! We want lots of cops on the road when it is most dangerous, and we want them to find impaired drivers.
- Stress that the officer's testimony is credible and that he did not make up any "bad driving." Rather he brought you, the prosecutor, the case as is.
- Stress that just because the officer did not witness the defendant's bad driving (during a brief window of less-than-totally-focused observation) does not mean that the defendant was driving safely before his encounter with police or that he was OK to drive had the officer let him continue on his way.
- Emphasize that during that particular shift, the officer made lots of traffic stops and only a few DWI arrests—that means that the defendant's impairment stood out.
- Where appropriate, remind the jury that certain violations, while not classic "COPS" material, are evidence of the defendant's lowered inhibitions. If the defendant testifies, remember to cross him on whether he commits this type of violation every single time he drives. Most will say that breaking the law is not their normal driving behavior.

In conclusion, the "drunk car" is great evidence when we have it, but when we don't, nothing can be done to keep the defense from harping on the issue. Just don't forget that weaknesses in our cases hurt much less when we address them confidently, unapologetically, and with common sense. Don't let the defense increase the State's burden of proof or impose silly requirements on an officer in the field who is doing all he can to keep our roads safe. Prepare officers to address the issue during direct examination, and make sure they know to concede the issue on cross without fighting or getting into counterproductive spats with defense counsel. Like most DWI defenses, the lack of bad driving evaporates with a well-prepared jury, effective presentation on direct, and a confident, fair argument on close.

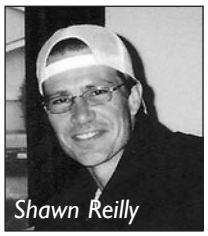
Continued from the front cover

Human remains prosecution (cont'd)

Identification (UNTCHI) to examine them. Dr. Peacock was familiar with Dr. Gill-King's expertise and called him because a knowledgeable forensic examination of the remains would greatly assist the investigation.

Giving a voice to those without one

Dr. Gill-King and his collegue, Mark Ingraham, conducted a thorough forensic examination of these remains. The most significant finding was that two ribs had been broken, and it was Dr. Gill-King's opinion that the damage occurred prior to death, that the fractures were not due to postmortem handling of the body or of scavenger activity. (This small piece of information became essential during later prosecution.)


Shawn Reilly

Dr. Gill-King also removed a section of bone from the femur for DNA identification comparison.[1] This portion of bone then had DNA extracted from it by Dr. Jerry Planz, PhD., a medical examiner, and his staff at the University of North Texas and was ultimately entered in CODIS. In most cases, of course, the DNA results are entered into CODIS where they await finding a match with the samples submitted by family members.

At about the same time as the discovery of the human remains, three sisters from California and Kansas were searching for their brother, Shawn Reilly. The sisters had last heard from him after he was released from jail in Junction, and he told them he would be moving to Bastrop and going to work at an auto-repair business. It was the last the Reilly sisters ever heard from their brother.

California man

Shawn Patrick Reilly was a California man born in the Midwest but raised in central California. His father's death when Shawn was in his late teens seemed to spur a lifetime of substance abuse and drifting. He had a minor criminal history related to drugs.

In 2004, Shawn was arrested for DWI in Junction. He pled guilty and sat out his time in jail, where his cellmate was a man from Bastrop named Bill Reily.[2] They instantly became friends due to the similarity in their last names. Bill owned several highly successful car repair shops in Bastrop and Austin but had been busted moving 40 pounds of marijuana through Junction. Bill liked Shawn's strong personality and offered him a job in his drug-dealing operation. Soon Bill bonded out and returned to Bastrop; when Shawn was released from jail, Bill helped him move to Bastrop as well.

A crumbled world

Bill Reily's early addiction to heroin landed him in prison for much of the 1980s where he kicked his heroin and alcohol habits; upon being discharged, he stayed clean and sober for many years. He married and raised a family, and he prospered as the owner of two car repair shops.

In 2004, Bill's nephew James was released from state jail after serving a crack possession sentence. Bill offered to give his errant nephew a job and a chance at getting sober, but soon, Bill and his nephew were getting high together. At some point, Bill began dealing large amounts of cocaine, meth, and marijuana to afford his habit. By May 2005, Bill's world had crumbled: His wife had left him and filed for divorce; his house and Smithville ranch were in foreclosure. The car repair business had slowed dramatically due to his problems, but the dope-dealing business at the shop was going strong.

Harold Maurice "Mo" Hunter and James Bonee also "worked" at Bill Reily's garage. Hunter had no criminal history but was something of a drifter. James Bonee was from El Paso and had one prior trip to prison. Bonee was something of a mystery, though we later learned that he was related to the man in El Paso who supplied Bill's dope.

A fateful move

When Shawn was released from jail in Junction, he told his sisters where he would be, omitting the details of the drug operation. Shawn and James Reily clashed immediately over several women who attended a party celebrating Bill's divorce. Shawn had already become a troublemaker in Bill's eyes, and after dispatching James to whip Shawn to teach him

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some respect, Bill was further angered that Shawn had instead gotten the best of James in their altercation.

The day after the party, Bill assembled Mo Hunter, James Reily, and James Bonee at the business, telling them Shawn had become trouble and that he wanted Shawn to "disappear." Bill distributed large folding knives to each man and told them the plan he had formulated.

The next day, Shawn, Hunter, James Reily, and Bonee loaded into Bill's huge truck and went to the ranch near Smithville under the guise of collecting temporary horse fencing to move back to the auto shop. Shawn was breaking down one of the panels when James Reily snuck up behind him with a knife. Just as Reily was about to strike, Shawn turned around and began grappling with his attacker.

The three men fought with Shawn, finally knocking him to the ground. To subdue him, Bonee kicked him in the ribs twice. After that, all the fight had gone out of Shawn, and it was easy for Hunter to straddle him and slit his throat. Bonee supervised the clean-up and wrapped Shawn's body in a blue tarp, securing it with duct tape, all the while wearing gloves to prevent fingerprints. Shawn's body was then loaded into the truck and driven across the county to the illegal dumping area, stopping only to get a 12-pack of beer.

About a month after the remains had been found, in August 2005, a Crime Stoppers tip was received through the Austin Police Department Homicide division. The unidentified caller possessed a wealth of knowledge about the murder, which all proved to be true.[3] Detective Yarbrough quickly realized that the missing person reported by Shawn's family and the recovered remains were one and the same; the Crime Stoppers tip was so detailed, particularly as to where the remains were found and about the body being wrapped in a blue tarp with duct tape, that Yarbrough immediately recognized the two cases' similarities. Obtaining DNA samples from two of Shawn's sisters, Dr. John Planz and his staff at University of North Texas quickly analyzed the mitochondrial DNA and affirmed Shawn's identity. DNA analyst Lisa told me that there was a great deal of excitement at the UNT Center for Human Identification when CODIS found a match between Shawn Reilly's remains and the DNA samples of his sister, as such speedy matches are uncommon.

Detective Yarborough quickly obtained arrest warrants for all four men named in the tip. James Reily was the first person apprehended, after a high-speed pursuit and an ill-fated attempt to fight the black-belt detective who arrested him. Once in custody, James sang like a canary for two days straight, stopping only to sleep. James's version matched the Crime Stopper tip verbatim. Soon after his arrest came the arrests of Mo Hunter and Bill Reily, each of whom gave full and complete confessions that were both written and recorded on DVD. James Bonee refused to give a statement of any kind when he was arrested.

After reviewing the case files and the DVD confessions, I concluded that a murder charge against James Bonee would be difficult without a confession but still possible. Texas laws requires that testimony from co-defendants be corroborated sufficiently to show the guilt of the non-confessing defendant.[4] Our corroboration was that Shawn had suffered extensive rib injuries. Not only had defendants Hunter and James Reily confessed to seeing Bonee strike Shawn in the ribs, but also after the murder Bonee had bragged to Bill Reily about his actions.

Divide and conquer

After obtaining indictments of the four murderers, my trial partner, Kathy Holton, and I analyzed the evidence and decided that Bill Reily, the mastermind, and Mo Hunter, the actual stabber, were the most culpable. We knew that one or more of the defendants had to testify against Bonee, and we knew we didn't want to work with Mo Hunter if at all possible. We felt he was the most culpable out of the four because he actually stabbed Shawn.

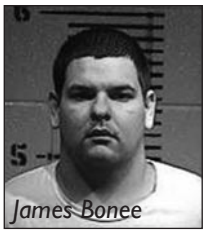
As the spring of 2006 approached and I was preparing for James Reily's trial, his attorney indicated a willingness to accept a plea offer. After some negotiation, we agreed on 30 years, contingent upon his cooperation and testimony in the trials of Bill Reily and James Bonee. When Reily's plea day came in March 2006, with one of Shawn's sisters present, we took his allocution and then put off sentencing for several months.

Mo Hunter had never been arrested in his life and was thus eligible for probation. Because we knew he actually stabbed Shawn, my offer was 50 years. (As readers know, first

parole eligibility in a non-capital murder occurs at 30 years; thus, for plea purposes, 60 years is generally considered the equivalent of a life sentence. By offering 50, I knew that the defendant's first parole eligibility becomes 25, and that five-year break was all I was willing to offer.) Hunter refused, telling others in the jail that because he was 50 years old, he was going to roll the dice with the jury.

Hunter had given a very detailed, well-taken confession, and abundant physical and circumstantial evidence corroborated it. Two of Shawn's sisters attended the entire trial, and of course, the mere presence of an advocate for the victim is at once both inspiring to the State and noticed by the jury. In four days, Mo Hunter was convicted and sentenced to 99 years in prison. Shawn's sisters were pleased in the verdict and sentence and—being from California—shocked that a murder trial could last just four days from start to finish.

A few days after that trial, Bill Reily's attorney contacted me to say his client was ready to take my previous offer of 45 years and testify against Bonee. Kathy and I had a chilling meeting with Bill Reily and his attorney at the jail to prepare for his testimony. He spoke of the murder with the same detached demeanor that you might expect a person to describe how they crossed the street to get to work. Whereas James Reily showed a high degree of remorse and total willingness to accept whatever punishment was offered him, his uncle was absolutely matter-of-fact about the murder and the surrounding events. If Bill Reily were affected emotionally by his part in taking Shawn's life, it didn't show. After telling him I couldn't promise where he would serve his sentence (he wanted to be near his family in north Central Texas at a non-maximum security unit) and that we would go no lower than our 45-year offer, he described how the group lived in the months preceeding and following Shawn's murder. (After all of the trials were over, his attorney told me that Bill had noted that it would have been easy for him to "take us" with items in an antique weapons display near the conference room where we met. Of course, I had concerns about Reily's state of mind at the time we met and had extra security nearby for his entrance and exit from the conference room.)


James Bonee

Our elected DA, Bryan Goertz, Chief Investigator David Lewis, Kathy, and I poured over jail records, checking disciplinary histories, visitors, and phone logs. During this preparation we were approached by a child molester who had witnessed a threatening verbal episode between Bonee and Bill Reily. All the defendants had remained jailed since their arrest. Although they were were separated in jail, there was a moment where Bill Reily and Bonee crossed paths, and Bonee threatened Reily—and I had a witness to this verbal assault. Of course, my witness was not a law enforcement employee but a fellow inmate charged with aggravated sexual assault of a child for orally assaulting his under-10 nephew. After consulting with victims in both cases and law enforcement, I decided to use his testimony and offer him probation; his case had a strong possibility for probation anyway because of the defendant's sad history.

In August 2006 we began the trial of James Bonee with all of Shawn's sisters present. As they had done in the trial of Mo Hunter, Forensic Anthropologist Dr. Harrell Gill-King and DNA guru Dr. John Planz, both of the University of North Texas Health Science Center's Center for Human Identification, testified as to their respective findings, but Dr. Gill-King's testimony took on new importance as his expertise now focused upon the manner and means of this defendant's actions.

The child molester witness testified, as did Bill Reily. After two days of testimony, the case went to the jury at about 2 p.m. on a Thursday. After many painful hours of waiting, in the wee morning hours of Friday we received a guilty verdict. The defendant's attorney immediately revisited plea negotiations, and the next morning Bonee pleaded to 30 years and waived appeal.

One victim, four murderers, three confessions, two trials, four convictions of 99, 45, 30, and 30 years in 18 months of investigations and trials. While commenting to *Austin American-Statesman* reporter Miguel Lisano about the trials, I was aware that this case was the exception to the rule: Most unidentified human decedent and missing persons cases are not matched, and most are not solved.

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University of North Texas Health Science Center for Human Identification (UNTCHI)

In 2006, about six months after competing the last of the trials, I was contacted by Austin documentary producer Mat Hames, who co-owns Alpheus Productions. He wanted to film a segment called "Skeletons in the Closet" for the PBS series *State of Tomorrow*, which deals with the importance of science in many aspects of our lives. The show would feature a segment on UNTCHI and Shawn Reilly's case to illustrate what the lab could do forensically.

There are three divisions in the Center for Human Identification. The Forensic Anthropology division, headed by Dr. Harrell Gill-King, one of the few board certified Forensic Anthropologists in the world; the DNA Human Identity division, headed up by forensic DNA pioneer Dr. Arthur Eisenberg; and the Parentage/Relationship Division, which has been providing this form of DNA testing for over 15 years. The last division often provides analysis in criminal investigations. (There are also forensic odontologists affiliated with UNTCHI who are available to examine dental remains and records.)

Before handling Shawn Reilly's murder case, I was woefully unaware of the vast services UNTCHI offers, and I wanted to share what I learned with other prosecutors and investigators. After preparing with Dr. Gill-King, Dr. Planz, and their staffs for the Reilly trials, I discovered what a large number of unidentified remains exists in America. Although I've worked as a peace officer and a prosecutor for over 25 years, I could not believe the nationwide numbers of missing children and adults.

One major repository for both found remains and missing persons cases has long been the National Crime Information Center (NCIC). New Jersey State Police figures based upon NCIC reports indicate that in mid-2008, there were 105,372 active NCIC missing persons cases, of which 7,048 are unidentified human remains cases. Additionally:

- 22,490 were juvenile boys,
- 31,761 were juvenile girls,
- 27,553 were adult men, and
- 23,568 were adult women.

Some of these unidentified remains and missing persons cases result from Alzheimer's and other mental and physical diseases, suicide, homelessness, drug abuse and alcoholism, catastrophes and accidents, or a person's desire to disappear. But many are the result of criminal activity. As I sat in a lecture during a UNTCHI conference and watched the endless parade of faces and stories of the missing persons and the found remains cases, both solved and unsolved, I was truly overwhelmed by the gravity of the problem. Likewise, I have been struck by the number of cases solved with UNTCHI's investigative efforts. It seems like nearly every week I read of the center's involvement in criminal cases and in natural disasters.

I was asked to lecture at UNTCHI's 2008 Human Remains Identification seminars for homicide investigators, crime scene technicians, and medical examiners in Fort Worth and Baltimore, and in preparation I developed the opinion that there are a large number of unapprehended and indeed unknown serial killers in this nation flying well under the radar of public and law enforcement attention. Consider the numbers: At any given time in America, there are roughly 100,000 missing persons. Medical examiners, coroners' offices, and even police evidence rooms hold untold hundreds of human remains from which DNA has never been extracted and for which a meaningful forensic or criminal investigation has not been performed. The details of some of these deaths will never be known, but forensic examination of many show signs of violent deaths caused by other people. The first step in solving these homicides is finding out who the victim was in life, then working back to investigate his life circumstances. Without some link between missing persons cases and the actual remains of human decedents, most of these cases will remain unsolved. Identifying the remains is the essential step in investigating these homicides.

Beginning in 2003, The President's DNA Initiative was launched to address the longstanding and related problems of missing persons cases and unidentified human remains. The National Institute of Justice has funded efforts to maximize the use of DNA technology in law enforcement, especially in these co-existent areas of missing persons and unidentified decedents cases. UNT is a partner in this initiative, along with the FBI and the California Department of Justice. Together, these three agencies, under NIJ guidance, are working together to educate law enforcement as to the assistance available

from their agencies. These DNA labs also actively work to solve cases on a nationwide basis. The National Institute of Justice refers to missing persons and unidentified human remains cases as "the nation's silent mass disaster." Along with funding the investigatory and educational efforts, it is also encouraging legislation to improve investigations in adult missing persons cases.

New websites have been launched and old websites reinvigorated to use all available resources on this issue. For example, the Department of Homeland Security has millions of immigrants' fingerprints that are searchable in its database. To access the the Department of Homeland Security database you must contact a member of the Homeland Security Information Network, which is comprised of many members of the federal, state and local law enforcement communities. The Armed Forces DNA Identification Laboratory (AFDIL) accumulated hundreds of thousands of searchable DNA profiles in its database (www.afip.org/index.html). All of these records are available for human remains investigations. Other helpful organizations include:

ViCAP. ViCAP stands for Violent Criminal Apprehension Network.is an FBI-administered database and website (www.fbi.gov/wanted/vicap/vicap.htm) that allows law enforcement to enter the facts, details, and evidence related to unsolved violent crimes. Crimes and evidence are then compared. What started over 10 years ago as FBI-supplied software for law enforcement agencies has become a nationwide data information center designed to collect, collate, and analyze crimes of violence, specifically murder.[5]

ViCAP was instrumental during the investigation into Texas Serial killer Rafael Resendez-Ramirez. The FBI's website says: "When Texas authorities first learned that two Texas cases were possibly linked by a common offender, ViCAP was contacted. Based on certain behaviors and methodology of the offender in their two cases, ViCAP was able to tell them of a similar case in Kentucky that had occurred two years before. Investigators followed up with a DNA analysis which matched the cases, and this became the catalyst for authorities to realize they had a national serial offender on the loose. ViCAP assisted the investigation by providing the Texas authorities with other possibly related cases occurring elsewhere in the United States."[6]

Sue Stiltner, a longtime FBI analyst, has been working with the development and implementation of the ViCAP program for most of her career. She told me of some of their successes, and her enthusiasm for ViCAP is contagious. All of our law enforcement agencies need to be entering eligible cases to this database.

National Missing and Unidentified Persons System. NamUs is another creation of the NIJ, serving as the first nationwide online repository at www.namus.gov. Launched in 2007, it is composed of two databases of unidentified decedents and missing persons reports. The unidentified decedents database is available and searchable by medical examiners and coroners to enter case data, but the search capability of the missing persons database is currently under development, with the goal that by the end of 2009 both databases will be linked and allow searches by law enforcement, families, medical examiners and coroners, victims advocates, and even the public to search for links between missing persons and unidentified decedent files.

The Texas Rangers. Suzanne Birdwell, a forensic artist for the Rangers, assists in cases where drawings of missing persons are aged or where human remains are given a face. I have seen a lot of her work and it is very impressive. Of course, the Texas Rangers also operate a cold case squad which assists departments throughout the state in investigating cold cases.

The National Center for Missing and Exploited Children. NCMEC also assists law enforcement in the recovery and identification of missing persons with its large databases and ability to publicize cases and coordinate law enforcement response. (www.missingkids.com)

The importance of prosecutor involvement

I encourage prosecutors to make sure your law enforcement agencies are aware of the many resources available in missing person and unidentified human remains cases. For example, while participating in the Baltimore UNTCHI seminar (for investigators and medical examiners/coroners' offices from locations throughout the United States east of the Mississippi River), I leaned that many departments have unidentified human remains for which no forensic or DNA investigation has been conducted. Because it is so easy and *free* to send these remains to

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UNTCHI for examination and DNA extraction, there is no excuse for any jurisdiction in our country not to submit remains to get that data entered into CODIS.

I have also learned of the interstate nature of many murders that result in unidentified human remains cases and missing persons cases. Our mobile society sometimes means that people go missing in one state and their remains are found in another state where they had no prior connection. That's the beauty of these private and governmental agencies working together to solve these cases. Through the use of labs such as UNTCHI, FBI and CalDoj, along with the databases such as ViCap and NamUs, and organizations including The National Center for Missing and Exploited Children, we can solve many of these cases to lock away dangerous offenders and to give the survivors of these crimes answers and perhaps closure.

I will always remember the moving comments given by keynote speaker and victims advocate Jan Smolinski at the Baltimore UNTCHI seminar last August. Jan is the mother of a missing son, and she and her detective husband are outspoken advocates not only in their search for their son Billy, but also for reform and increased law enforcement efforts in these cases. The Smolinskis' son went missing as an adult, and there is perhaps a pervasive attitude in law enforcement that many adults who go missing do so to "fall off of the grid" or voluntarily disappear. Absent criminal charges against the missing person, they are likely to be categorized someone who wanted to disappear. I spoke at length with the Smolinski family about their Herculean efforts to locate their missing son and the many stumbling blocks that had been placed in their way by various governmental agencies to get their son's disappearance adequately investigated. It was simply heartbreaking.

Conclusion

Since I met the folks at UNTCHI, I have been nothing but impressed with the work they do and their dedication with which they do it. Although their plates are full to the brim, they are actively seeking more forensic and DNA analysis of human remains and samples from their families. Every time I read in the news about bodies being identified, I know it is either my friends from UNTCHI or their like-minded collegues from the FBI or the California Department of Justice.

The National Institute of Justice has put in place massive funding to attack this problem, but the solution to the problems of missing persons and unidentified human remains begins at the local level, with law enforcement agencies and medical examiner's offices submitting samples of the remains (both newly found remains and remains that have been kept in evidence rooms) and DNA samples from family members of missing persons.

I feel like I have been living in *The Matrix* all of my law enforcement years and just awoke to find the truth: People, both adults and children, go missing at a staggering rate every day, and very little is done to solve these disappearances. Likewise, many remains of human beings have not been connected with these missing persons cases, thus depriving their survivors of the chance to lay those remains to rest and find closure. After my work on these murder cases with UNTCHI and teaching at and attending its recent seminars, I am convinced that there are killers (and in come cases, serial killers) roaming our land looking to kill again. We as prosecutors can urge our local agencies to get involved with this nationwide referendum on missing persons and of course assist them in the prosecution of these killers once some of these crimes are solved.

Endnotes

1 As an aside, UNT prefers to receive an agreed-upon remains sample and extract the DNA or bone window themselves in a very controlled and sterile environment to prevent contamination. They ask that cuttings or samples not be taken by outside agencies and that the entire section of remains to be sampled be submitted to them.

2 The Reilly sisters have asked that I point out that they are not related to Bill Reily or his nephew James; indeed, their names are spelled differently.

3 Because the identity of Crime Stoppers tipsters protected by law, I do not know who the tipster was, but reasonable deduction would conclude that it was someone very close to this group, maybe a female companion of one of the killers.

4 Tex. Code Crim. Proc., Art. 38.14.

5 Cases examined by ViCAP include: solved or unsolved homicides or attempts, especially those that involve an abduction; are apparently random, motiveless, or sexually oriented; or are known or suspected to be part of a series; missing persons where the circumstances indicate a strong possibility of foul play and the victim is still missing; unidentified dead bodies, where the manner of death is known or suspected to be homicide; and sexual assault cases.

6 From www.fbi.gov/hq/isd/cirg/ncavc.htm.

What to do with evidence when you're done with it

The second article in a series discussing how to dispose of unneeded evidence in the police department's evidence room

This article might have been really short because there are only three real options for evidence once a prosecutor is finished with it:

- return it to the rightful owner (when allowed),
- forfeit it for use by the law enforcement agency, or
- destroy it.

By Jana K. McCown
First Assistant District Attorney in Williamson County

Of course, it's not that easy in practice. Prosecutors must decide what it means to be "done" with evidence, and we must recognize that this point can be reached at different times during a criminal prosecution. Finally, prosecutors must know whether a court order is required to dispose of the evidence in any particular manner. Frankly, the legislature would have had to work at it to make the applicable statutes any more difficult to understand and more inconsistent with one another, but in lieu of a complete rewrite of the evidence laws, this article will provide a few tips for your consideration.

When a criminal case is over and there is no further use for evidence collected in the case, law enforcement agencies frequently get left holding the bag (pun intended). It is more than likely that everyone involved—officers, investigators, and prosecutors—will quickly move on to the next case and never give the previous one another thought. Unless the law enforcement agency has an employee whose sole responsibility is to keep the evidence room cleaned out, it runs the risk of becoming a semi-permanent storage facility for items that nobody expects to ever need or use again. While it may be a packrat's dream to keep every item ever collected "just in case" it might be needed, the evidence room instead can become a health or fire hazard. By purging and destroying the drugs, guns, and other illegal contraband that have been removed from the streets, law enforcement can make sure that these items are never a threat to our citizens again.

Setting the standards

It is important to let law enforcement know prosecutors' expectations concerning evidence retention. Set guidelines for local law enforcement agencies to use in drawing up their policy so there are uniform standards across the jurisdiction. By educating evidence room technicians about retention laws and destruction requirements, we can take away any guesswork and prevent the untimely destruction of evidence that might damage a prosecution.

The first step should be to meet with the different agency evidence technicians and talk about the issues that arise with evidence retention and destruction. If your office doesn't already have a procedure in place, discuss a method by which their agency will be notified when a case has been completed. Establish an agreed-upon timeframe during which the agency will hold evidence in most cases. In the September–October 2008 issue of *The Texas Prosecutor*, the statutes that mandate the time periods for retaining certain types of evidence were discussed. This article will cover the remaining kinds of evidence where there is not a statutorily mandated retention period.

There are a couple of simple checklists that may prevent disposing of evidence too soon. The Williamson County District Attorney's Office has requested that our agencies check with us before disposing of evidence related to most felony cases in the county. After the criminal case is finished and the appropriate time period has passed, the law enforcement agency fills out a destruction authorization form and forwards it to our office. A prosecutor then reviews the information

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available about the case (by computer) to determine any need to continue holding the evidence. The prosecutor assigned does not have to be the same one who handled the case, as long as she understands the rules for evidence retention and the situations in which she should consult with the case prosecutor. Especially in a larger jurisdiction, the volume involved would make it logistically impossible to distribute destruction requests to a large number of prosecutors and get them back on a timely basis. There is no reason that an investigator or other support staff could not assist as well. The goal is for a consistent response based upon the reasons we preserve evidence. As a general rule, *most* evidence is requested to be held until sometime after the felony case has been disposed. There are exceptions, of course, including the rules for excess quantities of drugs and explosives or chemicals, which were discussed in the previous article.

Other prosecutor-imposed rules for retention in Williamson County include:

- all co-defendant cases must be disposed of before the evidence is disposed;
- any direct appeals should be completed and the mandate issued; and
- the evidence should not contain biological material. This rule may involve a more in-depth review, but it is initiated by looking at the list of property included in the authorization for disposition request. Training the law enforcement agency is critical here.

By examining closely the reasons evidence *should* be held and carefully considering when it is appropriate to release or dispose of evidence, we can remove the hesitation to act that comes from not having thought through these issues.

Releasing evidence

During many criminal investigations, items that ultimately have no evidentiary value are collected. For instance, when computers are seized and a forensic exam performed, if nothing illegal is discovered, then it may be appropriate to authorize the computer's return prior to the completion of the case. The same is true for business records, household items, or any other category of evidence that was collected "just in case" something helpful might be found. Of course, someone who is familiar with the case must decide about the early release. Preferably, that person will be the prosecutor or at the very least the case investigator who has checked with the prosecutor. No court order is required under these circumstances.

Another category of evidence that law enforcement frequently releases early is automobiles. Once the vehicle has been processed by crime scene personnel, there is rarely a reason to keep an entire vehicle. If photographs and the "black box" aren't enough, consider keeping the damaged bumper or some smaller portion of the vehicle to use in court. The high cost of impounding an automobile when the vehicle itself shouldn't be required for introduction into evidence is a consideration. As long as there is not an articulable reason (i.e., further testing could be performed or the vehicle is the subject of a forfeiture), then there is no reason not to release the vehicle after all real evidence has been gathered.

Returning items to their owner

Not every item in an evidence room should be destroyed at the end of the case. Many times, items that are completely legal to possess can and should be returned to the rightful owner at some point. There are a few categories of items where the legislature has designated the procedure to follow and made it dependant upon the disposition reached in the case, a timely request from a party, or other relevant factors.

Seized weapons. Weapons seized in connection with an offense involving the use of a weapon or under Chapter 46 of the Penal Code (except prohibited weapons and stolen weapons) must be disposed of as directed in Article 18.19 of the Code of Criminal Procedure. Although the statute anticipates that an inventory of weapons seized (other than those seized pursuant to a search or arrest warrant) will be delivered to a magistrate, the reality is that few agencies comply with this requirement, probably because most magistrates don't have a system in place for filing this sort of document.[1]

Weapons seized in this manner shall be held by the law enforcement agency making the seizure. It may surprise some prosecutors to learn that certain of these weapons could end up being returned to the person found in possession of the weapon under certain circumstances. For instance, if there is a prosecution

and if the person found in possession of the weapon is convicted or placed on deferred adjudication for an offense *under Penal Code Chapter 46*, the defendant may request the court in which the case was handled to return the weapon. The law actually states that the person convicted or receiving deferred adjudication under Chapter 46 is entitled to the weapon upon request *unless the circumstances set out below exist*. (This statute does not apply to prohibited weapons, which are governed by Article 18.18 of the Code of Criminal Procedure and discussed separately below.) The request by the defendant must occur before the 61st day after the date of the judgment.

The weapon *shall not be returned* but ordered destroyed or forfeited to the state for law enforcement or county forensic lab use by the court entering the judgment *if*:

- no request for return has been made before the 61st day;
- the person has a previous conviction under Penal Code chapter 46;
- the weapon is a prohibited weapon;[2]
- the offense was committed in or on the premises of a playground, school, video arcade facility, or youth center; or
- based on the defendant's prior criminal history or based on the circumstances surrounding the commission of the offense, the court determines that possession of the seized weapon would pose a threat to the community or one or more individuals.

If the person found in possession of a weapon is convicted of *an offense involving the use of a weapon* (presumably other than under Chapter 46), the court entering judgment shall order the destruction of the weapon or forfeiture to the state for use by the law enforcement agency or county forensic lab within 61 days of the date of the conviction. If no order is made within the applicable time period, the law enforcement agency may request an order of destruction or forfeiture from any magistrate.

In any case, if the prosecutor does not want a weapon returned to the defendant, the best practice is to have the defendant agree to forfeit the weapon as a part of the plea agreement. Language can then be included in the judgment ordering forfeiture to the state for destruction to avoid the inefficiency of the court having to create a separate order, have another hearing at a later date, and having to make findings based upon little or no evidence related to whether the weapon should be returned.

If there is no prosecution or conviction for an offense involving the weapon, the magistrate to whom the seizure was reported shall, within 61 days after determining there will be no prosecution, notify in writing the person found in possession of the weapon that the person is entitled to the weapon upon written request to the magistrate. If the person does not make a timely written request, before the 121st day after the date of notification the magistrate shall order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon or by a county forensic laboratory designated by the magistrate. The law enforcement agency holding the weapon may request an order of destruction or forfeiture from the magistrate if no order has been made within 121 days from the date of notification.

There are no other exceptions specifically designated if there is no prosecution; however, prohibited weapons are treated differently.

Prohibited weapons. When a prohibited weapon has been seized, Article 18.18 of the Code of Criminal Procedure establishes the procedure for disposition. Prohibited weapons as defined in the Penal Code are *never* returned to the owner or person found in possession. When there is a final conviction for an offense involving a prohibited weapon, not later than the 30th day after the conviction, the court entering the judgment of conviction shall order that the prohibited weapon be destroyed or forfeited to the law enforcement agency that initiated the complaint.[3] Because the court can take this action on its own motion or on the motion of the prosecutor or law enforcement, language ordering the destruction or forfeiture should be included in the judgment of conviction.

When there is no prosecution or conviction following the seizure, the magistrate to whom the return was (theoretically) made is charged with notifying the person found in possession to show cause why the prohibited weapon should not be destroyed.[4] Any person interested in the prohibited weapon must timely appear before the magistrate and, if there is such an appearance, the magistrate must conduct a hearing. Unless the person proves by a pre-

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ponderance of the evidence that the property is *not* a prohibited weapon and that he is entitled to possession, that magistrate shall order the destruction or forfeiture to law enforcement.[5]

Stolen weapons. Occasionally prosecutors may come across a case where a seized weapon was originally stolen from someone we will call the "true owner." What should we do when the true owner wants the weapon returned? Assuming that the weapon is not prohibited and not per se illegal to possess, Chapter 47 of the Code of Criminal Procedure governing the disposition of stolen property are the only statutes that gives any guidance, and then, only without any specific reference to stolen weapons.

Most prosecutors would prefer to have the weapon remain in an evidence room until the case is completed, particularly if the weapon was used during the commission of the offense. This stance is perfectly acceptable and, in some cases, may even result in the evidence being held until all appeals are disposed. The statute sets out a procedure, if appropriate and *only* upon the State's motion (if the case has not been disposed), to restore the property to the true owner subject to the condition that the property shall be made available to the State for evidentiary purposes.[6] Clearly, the prosecutor's decision to allow the early return of a seized weapon to the true owner will be different when the offense is theft of a firearm than it would be for an aggravated robbery or murder.

Forfeiture of evidence

A few evidence disposition statutes in the Code of Criminal Procedure and the Health and Safety Code authorize the forfeiture of certain kinds of evidence for use by a law enforcement agency or by a county forensic lab. Health and Safety Code §481.159 (controlled substance property or plants) and Article 18.19 of the Code of Criminal Procedure (seized weapons) are the two primary statutes that authorize evidence to be forfeited for law enforcement's use. Others include Article 18.18 governing the disposition of gambling paraphernalia, prohibited weapons, criminal instruments, and other contraband, the abandoned and unclaimed property statute in Code of Criminal Procedure Article 18.17, and the general asset forfeiture provisions of Chapter 59 of the Code of Criminal Procedure (the latter being too broad to discuss in this article).

Controlled substance property or plants. §481.159 of the Health and Safety Code authorizes a district court to order a law enforcement agency to retain the (controlled substance) property or plant for official purposes, including use in the investigation of offenses under the Health and Safety Code.[7] This same statute anticipates that the forfeiture to the agency may be for other purposes as well,[8] such as use of the forfeited drugs for canine training. But remember, while a county, justice, or municipal court may order the forfeiture and destruction of controlled substance property or plants, only a district court has the authority to order the forfeiture and *retention* of these items.

Law enforcement agencies other than the Department of Public Safety may not require DPS to take, hold, or analyze the controlled substances used for investigative purposes.[9] Instead, the statute designates the minimum specific requirements for the storage, accounting for, and analysis of the retained controlled substance property or plants. While an agency may contract with another law enforcement agency to provide security for the controlled substance property or plants, the requirement that the agency employ a qualified individual to conduct qualitative and quantitative analyses of the property and plant before and after use in an investigation most likely limits the use of forfeited property and plants for investigative purposes to larger, more comprehensive law enforcement agencies.

Seized weapons. While Article 18.19 of the Code of Criminal Procedure authorizes the forfeiture of seized weapons to law enforcement, it has been my experience that many agencies prefer to destroy all seized weapons, though I know of a few agencies that have converted weapons for use by a ballistics examiner for reference samples or to use as examples in courtroom testimony. Theoretically an agency could convert a specific type of weapon for use by an officer, but it could be difficult to find the right kinds of weapons and guarantee that they were in good working order and would not subject the officer to risks not associated with a new weapon.

Gambling paraphernalia, prohibited weapons, criminal instruments, and other contraband. Gambling devices and equipment, criminal

instruments, obscene devices or materials, child pornography, dog fighting equipment, and scanning devices or re-encoders are all lumped into a single statute under Article 18.18 of the Code of Criminal Procedure, the same statute that dictates the disposition of prohibited weapons discussed above. The court entering a judgment involving a final conviction for the following offenses "shall order that the machine, device, gambling equipment or gambling paraphernalia, instrument, obscene device or material, child pornography, or scanning device or re-encoder be destroyed or forfeited to the state":[10]

- possession of a gambling device or equipment, altered gambling equipment or paraphernalia,
- offenses involving a criminal instrument,
- offenses involving an obscene device or material,
- offenses involving child pornography, and
- offenses involving a scanning device or re-encoder.

For offenses involving a prohibited weapon, the order for destruction or forfeiture must be made not later than the 30th day after the final conviction. There is no such time limit for the other offenses and evidence in this article. Dog-fighting equipment is treated similarly but talked about separately due to the issues related to the destruction of dogs.

If there is no prosecution or conviction, all of these categories of evidence are treated the same as prohibited weapons, which were discussed previously in this article, with one exception. In 2006, House Bill 2462 authorized the Texas Building and Procurement Commission to sell gambling equipment that has been transferred to it by a commissioner's court. The commission may sell it only to a person that the commission determines is licensed or authorized to sell, lease, or otherwise provide gambling equipment to others or to operate gambling equipment issued by an agency in another state or foreign jurisdiction where it is not against the law. This bill became effective June 15, 2007, as Government Code §2175.904. You may ask, how did the commissioner's court get involved in this issue? Local Government Code §263.152 authorizes the commissioner's court to transfer gambling equipment "in the possession of the county following its forfeiture to the state" to the Texas Building and Procurement Commission. Apparently, it would be a waste to destroy perfectly good gambling equipment when some other state might use it! There aren't really any safeguards that would prevent the "legally sold somewhere else" gambling equipment from being brought back to Texas, however, so I recommend that the court order destruction.

Abandoned or unclaimed property. Article 18.17 of the Code of Criminal Procedure allows property not held as evidence (i.e., property unrelated to a charge that has been filed or a case under investigation) to be converted to agency use or sold after all applicable requirements are met. Evidence rooms are full of property that has been placed in the evidence locker to secure it while attempts are made to locate an owner. Some of the other evidence in the evidence room may eventually fall into the category of unclaimed property as well. If a particular item in the evidence room does not fall into another category with a specific statutory provision dictating its disposition, then it may fall into the category of abandoned or unclaimed property. Bicycles, found property, and stolen property where the true owner has not been located are just a few examples. Specifically excluded is whiskey, wine and beer, and contraband subject to forfeiture under Chapter 59. Chapter 47 governing the disposition of stolen property also specifically provides for the disposition according to Article 18.17 of stolen property not claimed within 30 days from the conviction date.[11]

Conclusion

It can be difficult to categorize the different items in an evidence room with any degree of certainty because the categories frequently overlap. In addition, the evidence from a single case may qualify for disposition under more than one statute, making it more complicated to dispose of the items with a single action. While larger law enforcement agencies do just fine with their evidence dispositions, many smaller agencies look to their prosecutors' office for help. If we take time to become familiar with the statutes that dictate the procedures, we all should be able to teach them the method that will fit best with prosecutions.

Endnotes

1 It looks like the legislature theoretically intended for there to be some sort of accounting system for seized weapons. Code of Criminal Procedure Article 18.19(c) gives the responsibility

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to notify the person found in possession of the weapon to the same magistrate to whom the seizure was reported when there will be no prosecution or conviction.

2 Prohibited weapons are also addressed in Code of Criminal Procedure Article 18.18, but the timeframe during which the court entering the judgment of conviction is supposed to order the destruction or forfeiture under that statute is not later than the 30th day after the final conviction of a person for an offense involving a prohibited weapon.

3 Tex. Code Crim. Proc. art. 18.18(a).

4 Tex. Code Crim. Proc. art. 18.18(b).

5 Tex. Code Crim. Proc. art. 18.18(f).

6 Tex. Code Crim. Proc. art. 47.04.

7 Tex. Health & Safety Code §481.159(a).

8 Tex. Health & Safety Code §481.159(i).

9 Tex. Health & Safety Code §481.159(b).

10 Tex. Code Crim. Proc. art. 18.18(a).

11 Tex. Code Crim. Proc. art. 47.06.

Editor's note: The last of this series of articles will discuss the need for a court order of destruction.

A DWI Court's success in a small county

DWI Courts can offer alternatives for dealing with repeat DWI offenders, even in a small jurisdiction.

Bodie Wright went from being an alcoholic who drank 30 beers a day to a recovering addict who has been sober for nine months. His transition away from alcoholism started in the Brown County DWI Court, and he now wants to become a counselor for other alcohol addicts.

By Elisha Nix
Assistant County Attorney in Brown County

Bodie began drinking when he was 14 years old. Now, at age 36, he looks back on the last 20 years with regret. After driving while intoxicated for years, Bodie was finally arrested for his second DWI and agreed to enter the DWI Court. The program proved to be a rough road for him. He was the first participant, and he was still struggling with whether he truly wanted to be sober. However, through in-patient treatment and the DWI Court program, Bodie has begun living without dependence on alcohol, and he's no longer a danger on our community's streets.

After his graduation from the DWI Court in December, there are eight participants left in the program, many with years of alcohol addiction still to overcome. But they—and those of us who work with them to stay with the program—are hopeful.

A bit of background

Bodie's situation and similar ones prompted Brown County officials to start a DWI Court. However, as a small county (our population is just under 40,000), we had to explore what resources we could put into a DWI Court and whether such an undertaking could be successful.

Our office has five prosecutors, with one covering the misdemeanor docket. In 2008, about 1,000 misdemeanor cases were filed in the county court at law. Of those misdemeanors, we had 125 DWIs of which 22 were DWI seconds. Even though our county and office are small, drinking and driving is as much a challenge for us as for larger counties. As in bigger jurisdictions, Brown County has traffic crashes, injuries, and fatalities caused by intoxicated drivers. We also face the universal community problems caused by alcohol abuse, such as violence and job loss.

In response to the danger intoxicated drivers present to the community at large, Brown County founded a DWI Court about a year ago. Ours is similar to DWI Courts in large cities throughout Texas; however, living in a small county allows us

to focus on each defendant in unique ways and see tangible results from the program.

What is a DWI Court?

Our DWI Court is structured not just to punish defendants but also to help them overcome their alcohol problems and become a contributing part of society. We recognize that probation will pose unique problems for alcoholics, so we developed specific probation requirements, sanctions, and incentives that address those problems.

Rehabilitation is our goal. While defendants must comply with all of the traditional probation requirements, they also have numerous additional rules that they must follow. The requirements are initially set high and then scaled back as each participant successfully completes phases of the program.

In phase one, participants must attend alcohol-related counseling twice a week, meet with a probation officer weekly, and attend a DWI Court meeting each Friday. After successful completion of phase one, participants move on to phase two, whose structure is basically the same but requires only bi-weekly meetings. In phase three, meetings are scaled back based on individual needs; defendants will still have counseling and probation appointments bi-weekly but may be allowed, in the absence of any problems, to reduce their court appearances to once a month.

The DWI Court is staffed by the county court at law judge and court coordinator, a probation officer, a counselor, and two representatives from the county attorney's office. One local defense attorney is appointed on all cases identified as appropriate for DWI Court; having one appointed defense attorney, a probation officer, and a counselor on staff helps the court focus on rehabilitation, while the prosecutors ensure that community safety is maintained. Each member of the staff is present for each court session.

The court has a unique ability to impose sanctions on participants. The sanctions are designed to adapt to specific situations. We expect that in a program for recovering alcoholics, not every participant will complete the program without any violations. However, the increased oversight allows us to impose sanctions quickly that will both punish infractions and encourage future compliance through incentives. For participants who comply, a portion of their fines are waived as they complete different phases of the program. Additionally, the probation officer assists participants in looking for work, settling housing problems, and resolving many other issues created or exacerbated by their alcoholism. These incentives encourage participants to maintain their sobriety.

Bodie's story demonstrates how important a focus on rehabilitation can be with repeat DWI offenders. Bodie had a severe drinking problem, yet he had been caught driving while intoxicated only twice. Through a year of struggles, the DWI Court was able to teach Bodie that he could stay sober and drive without drinking.

How do defendants get involved in DWI Court?

Bodie, and other defendants like him, are identified by the county attorney's office as potential candidates for the program. During intake, prosecutors flag cases where a DWI defendant has a history of charges for driving while intoxicated, public intoxication, driving under the influence, or other alcohol-related offenses.

Once a defendant has been chosen as a potential candidate, our office presents him to the DWI Court staff for consideration. The staff looks at a defendant's age, county of residence, previous criminal history (including whether the defendant has committed violent crimes), reputation within the community for alcohol abuse, whether the defendant has a drug problem, and pending cases in Brown and other counties.

Once the DWI Court staff has agreed that a defendant would make a good participant in the program, the defendant is scheduled for a special arraignment date where he is arraigned as usual but is also asked to stay and observe one DWI Court session. After the observation, the defendant is offered a chance to discuss the specific DWI Court requirements with the defense attorney and prosecutor.

Working out a plea agreement for DWI Court can be tricky. Although the DWI Court staff sees that this particular defendant has an alcohol addiction, the defendant may not recognize the problem yet; he may be unwilling to accept the rigors that would be imposed in the

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program. To ensure voluntary participation, we always offer an alternative plea offer that does not include DWI Court to potential candidates; doing so ensures that everyone who enters the program is committed to a year of intensive supervision. (Generally, the court is set up to require one year's probation, but for some defendants who have unique problems, that recommendation is extended to two years.)

Once a participant enters and successfully completes the DWI Court program, we have a special ceremony to mark his graduation. As our first graduate, Bodie was not only able to celebrate with us, but he also addressed the other participants to tell them how different he was after one short year. He expressed his appreciation to the DWI Court for the help it provided during that time.

Not all of the DWI Court participants have successfully completed the program. Two defendants have already dropped out, and we filed motions to revoke their probation. When dropouts are caught and returned, we do not reinstate them in the program.

What happens during DWI Court sessions?

Before the twice-weekly open court session, the DWI Court staff meets behind closed doors to receive detailed information from the probation officer and counselor. The staff discusses potential candidates for the program, sanctions and rewards for current participants, and any practical problems or issues that have come up. A large portion of my duties as a prosecutor arise during the DWI Court staff meeting, where my role is to offer suggestions. As our program expands and we encounter new development issues, I generally provide suggestions for improving the program and suggest potential sanctions for defendants who violate their conditions. For a county our size, these meetings generally take no more than 45 minutes.

The DWI Court staff meetings are led by Judge Frank Griffin, who has served in criminal law since 1981. He feels that DWI Court is the best of many worlds: It provides a third option—other than jail or regular probation—for repeat DWI offenders; it allows defendants to support their families and work on recovery; and it monitors them more closely than traditional probation, thus ensuring that the community remains safe.

In the open court sessions, the judge receives reports from probation and counselors about the participants and interacts individually with each one. All participants are required to attend to provide a measure of public accountability. Sanctions and incentives may be announced at this meeting. If a participant has successfully completed a week of sobriety, all of the court staff, other participants, and visitors publicly applaud. However, if the court has deemed sanctions appropriate, the sanctions are announced and the participant receives no applause. For a DWI Court of our size, this session usually takes about 30 minutes.

As a prosecutor in the DWI Court, my goals are to ensure community safety and help the program develop. I propose sanctions as needed, recommend that defendants with an alcohol problem have a chance to participate, make recommendations to the court about the administrative questions, serve as a liaison between the court and law enforcement, and promote the DWI Court to the public. I also make sure that defense attorneys clearly understand the requirements of the DWI Court and the benefits of participating.

Why should a small county start DWI Court?

At this point, I don't know if Brown County will have fewer DWIs in the future as a result of its DWI Court—those types of results will take years to measure. What I do know is that the program made a difference in Bodie's life. I can also see that the DWI Court is helping eight other people become better, safer, law-abiding members of society. I personally knew that the work was worth every minute when I saw Bodie stand in front of his peers, with tears in his eyes, and ask to be allowed to remain involved in the DWI Court after his graduation.

DWI Court also helps keep intoxicated drivers off of the road for at least a year through constant supervision. One of our participants was involved in two alcohol-related wrecks within two months prior to entering the program. Since then, we have placed him on a SCRAM device, a high-tech ankle monitor that screens for alcohol consumption, so we can ensure he is not drinking. So far, his device has reported that he has been in compliance with the probation require-

ments, and he has been collision-free for the four months he has been in the program.

As far as the workload goes, a small prosecutors' office can definitely handle the additional work of a DWI Court. The most important question is whether key players in the legal community will support it. Finding a judge willing to oversee the DWI Court is critical, as is participation from a probation officer. The support of at least one defense attorney is helpful; we have discovered that most defense attorneys, although resistant at first, will support the program when they learn more about its purposes and goals.

Even with just one prosecutor on the misdemeanor docket, adding a DWI Court was still a manageable task. Once the program is up and running, the average time commitment each week for a small program is usually no more than an hour and a half. Setting up the court does require time to become familiar with other DWI Courts. For us, Williamson County's program has been extremely generous in sharing information and tips; folks there even invited us to observe their court sessions. The National Highway and Traffic Safety Administration (NHTSA) provides additional training and technical assistance in starting a DWI Court, and funding may be available through a Criminal Justice Division Grant from the Office of the Governor. (And of course, our county's court has its doors open to help other prosecutors and judges who are interested in starting new DWI Court programs.) Despite the work on the front end, the rewards of such a program are so significant that the time is well-invested for a prosecutor's office.

A DWI Court in a small town may not have an enrollment as large as such a court in one of the major cities, but the impact in a small town is easier to see. We have only eight defendants in our program right now, but those eight people are part of our community with whom we interact and see every day. We hope to hear that there are many more stories like Bodie's in the future.

News-worthy

Criminal Appeals conference April 29–May 1

TDCAA and the University of Texas School of Law have teamed up to offer the Robert O. Dawson Conference on Criminal Appeals from April 29 to May 1 in Austin. Attendees can earn 15.00 hours of CLE, including 1.75 hours of ethics. It will be held at the Radisson Hotel and Suites on Town Lake, and room rates are $85 for government employees (the rate is good until March 29 or until sold out). Call 512/478-9611 to make reservations.

Go to www.tdcaa.com and search for "conference on criminal appeals" to see the agenda and find out more information.

The longest sentence in Texas history

Prosecutors in Parker County thought that no case could shock them anymore—until they tried a defendant who sexually assaulted his three daughters over two years. Here's how they won a conviction and got 40 stacked life sentences.

Like many of you, I've become jaded. The past nine years as a felony prosecutor has convinced me that an unending supply of humanity is willing to lie, cheat, steal, maim, or kill for the smallest reasons or for no reason at all. I had begun to think that my conscience could no longer be shocked, regardless of the facts and circumstances of any case I prosecuted.

I was wrong.

By Robert S. DuBoise and Kathleen Catania
Assistant District Attorneys in Parker County

Phone call from CPS

On February 15, 2008, Investigator Robert Pawley of the Parker County Sheriff's Department received a phone call from Child Protective Services regarding allegations of inappropriate sexual conduct by James Kevin Smith with his three teenage daughters. The allegations revolved around inappropriate sexual comments and Smith's habit of "walking in" on the girls while they were showering. The CPS investigator invited Investigator Pawley to a local high school to interview the girls with her.

The investigators interviewed the girls separately, starting with the two 18-year-old twins, Jane and Joan, then their 16-year-old sister, Kate.[1] Investigator Lapori conducted the interviews while Investigator Pawley observed, and in a stroke of wisdom, they taped the interviews using two separate recorders.[2]

Interview with Jane Smith

From the moment the interview with Jane Smith began, Investigator Pawley knew that this was not an ordinary case. Jane acknowledged almost immediately that she knew she was there because of her father. She said that he had been having her and Joan take naked pictures of each other on a digital camera and provide them to him as a form of punishment. The girls had initially refused his request, which began when the family lived in Iowa in 2005 and 2006, but Smith continued to ask until they finally relented.

From then on each time that she or her sister wanted permission to do something or got into trouble, Smith requested nude photographs, even after the family (minus their mother, Shelley, who was serving time in a federal penitentiary in Iowa) moved to Parker County in the spring of 2006, when the twins were 16. That summer, she and her sister violated Smith's rules by having male friends over to the house while he wasn't home. This time, the punishment escalated. Instead of naked pictures, Smith told the twins that they would have to perform oral sex on him as their punishment. Jane refused, but Joan gave in. (Later, as we met with the girls in preparation for trial, it became apparent to us that, as with most twins, the two had distinctive personalities. Jane had an independent rebellious streak, while Joan gave in to her father's request because he was an authority figure and to gain acceptance from him.)

Throughout the summer Smith asked her to perform oral sex on him, and Jane continued to refuse but finally agreed to masturbate Smith to stop his repeated requests for oral sex. Smith made these requests each time Jane broke a house rule or whenever she wanted permission to go to a friend's house or see a movie. These masturbatory incidents occurred off and on for weeks, during which Smith would digitally penetrate his daughter. By the end of summer she had begun performing oral sex on him, and he had begun doing the same to her.

Her sexual acts with Smith continued until February 2007 when her mother returned from prison. The sexual activity between Jane and Smith subsided for a short time, but it quickly resumed and occurred even when her mother was at home. In December 2007, Jane finally told her mother about the abuse, at which point Shelley Smith moved the girls to a relative's house. Investigators were stunned to hear that the following day, Jane's mother retrieved all three girls and moved them back into the house with

Smith. Jane's mother later told investigators that she returned the girls to the home only after Smith promised that he would never touch his daughters again. From that time forward, Smith left her alone, but he continued to abuse her sisters.

Interview with Joan

Investigators next interviewed Joan Smith, Jane's twin sister. Joan corroborated her sister's account of how the abuse began and confirmed that she too had engaged in inappropriate sexual contact with her father and had taken naked pictures of herself for him. However, the nature and extent of Joan's sexual contact with Smith caught the investigators off guard.

Joan told investigators that, like her sister, her father made her engage in mutual oral sex with him. However, Smith also engaged her in vaginal and anal sex. As a further bombshell, beginning in August or September 2007, on several occasions, she and one of her sisters had engaged in a "threesome" with their own father, and on at least one occasion she and *both* sisters participated in a "four-way" sexual act with Smith. He had even been so bold as to engage in sexual contact with them while they visited his mother's house in Amarillo over Christmas. Joan said that the most recent incident of sexual abuse occurred the Friday before the interview.

Interview with Kate

Kate, like her sisters, immediately knew that she was being interviewed regarding her father. She told investigators that when she was 13 and the family lived in Iowa, Smith asked her to perform oral sex on him as punishment. She refused but eventually agreed to manually masturbate him as a way of getting out of trouble. This abuse quickly progressed and Kate began performing oral sex on Smith and providing him with naked pictures of herself, just as her twin sisters had done.

After the family moved to Parker County, Kate and her father continued engaging in sexual acts, but they never had actual intercourse. Kate repeated what Joan had said, though, that on multiple occasions threesomes and foursomes had occurred.

In late 2007, Kate confided in Smith that she was no longer a virgin (she had had sex with a boyfriend her age), which prompted her father to ask Kate to have sex with him. Around this time, Kate told her mother about Smith's abuse, and her mother immediately questioned the twins about whether Smith had abused them too. After learning that Smith had been abusing all three girls, Shelly Smith removed them from the home for one night—before allowing them to return and live with Smith.

Interview with the mother

After concluding the interview with all three girls, Investigators Pawley and Lapori interviewed Shelly Smith. She informed investigators that she was aware of the sexual abuse but that Smith had promised to stop, so she allowed him to remain in the home until February 12, 2008, when she discovered the abuse had continued.

With Shelly's written consent to search the home, investigators removed her husband's digital camera and two desktop computers for later forensic examination. During the search, Shelly claimed not to know where her husband was but that he might be staying with an aunt in Wylie.

That afternoon, Investigator Pawley contacted me and my trial partner, Kathleen Catania. We decided to seek an arrest warrant for Smith based on one count of sexual assault and to conduct a second round of more detailed interviews with the victims the following week to pinpoint the dates and details of each sexual offense.

Second interviews

On February 19, Investigator Anne Hollis of the Parker County Sheriff's Department interviewed all three victims to determine, as closely as possible, the approximate dates of each of the different types of sexual acts. During these separate, 90-minute interviews, we discovered that 1) Smith repeatedly told his daughters not to tell anyone and that if they did, he would kill himself or he would go to prison where other prisoners would hurt him; 2) Smith told his daughters that what he was doing to them was their secret and that no one should know about it; 3) Smith promised he would stop the abuse when their mother was released from prison and moved to Parker County with the rest of the family; and 4) the girls agreed to take turns engaging in sexual acts with their father so that none of them would have to bear the full brunt of the sexual abuse.

Investigator Hollis put together

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a spreadsheet of the information from all three girls with regard to the type, frequency, and approximate dates of the sexual acts, a document that proved invaluable later in drafting the original indictments.

While Investigator Hollis was interviewing the girls, Investigator Pawley was obtaining an arrest warrant and setting up surveillance in Wylie. Having no luck locating Smith, Investigator Pawley returned to Parker County and interviewed Smith's friend, who had made the original CPS report. At that interview, Investigator Pawley was stunned to hear that Shelly and the three girls had been at the friend's house a day or two earlier to retrieve Smith's work tools. Smith had come by the house to say goodbye to her and the girls and to tell them he was heading to his mother's house in Amarillo. Investigator Pawley obtained written statements from both the friend and his girlfriend who had been present during Smith's conversation with Shelly.

Shortly thereafter, CPS removed the three victims from their mother due to her continued failure to protect them from their abusive father. On that same day, Shelley told investigators that her husband was in an Amarillo hospital after an unsuccessful suicide attempt, so Investigator Pawley sent a teletype to the Amarillo Police Department to place a hold on Smith; once he was released, he was taken to jail, then transferred to Parker County. The APD also got consent from Smith's mother to remove his laptop and numerous CD-Roms from her home.

Loose lips sink ships

An initial review of the digital camera's memory card from Smith's home contained several naked pictures of each of the three victims. These photos corroborated a portion of each girl's account, but no photographs depicted Smith and his daughters engaged in any type of sexual contact. We sent the desktop computers seized from Smith's home and the laptop from his mother's house to the U.S. Secret Service for forensic analysis, which would take months. Little did we know that the best evidence in the entire case was about to come from Smith himself.

The Parker County Jail, like many other facilities, is equipped with a telephone monitoring system which records all inmate calls. At the beginning of each call, an announcement tells the inmate that "this call may be monitored and recorded." One February day, Smith called his mother, Peggy, who asked why he had been arrested for sexually assaulting his daughter. Shockingly, Smith did not deny the abuse and answered, "I'm an idiot." In a phone call later that same day with his brother, Smith stated that he was looking at spending the rest of his life in prison but notably never denied the conduct he was charged with. The following day, Smith again spoke to his mother, who stated that "Shelley knew about it back in December and did not report it—she may have blown the whistle on everything," thus demonstrating some previous knowledge of his abuse toward her own granddaughters.

In addition to monitoring phone calls, the jail also keeps visitation logs. After seeing that Peggy had visited in early March, Investigator Pawley reviewed Smith's phone calls in that time frame. In a call the day after the visit, Smith's mother told him, "What you told me yesterday will never leave my lips." Smith responded by saying that there was one thing he had forgotten to tell her in person: "They were never forced. I treated them like adults. We sat down and talked about it, and the decision was made. They were never forced."

Shortly thereafter, Peggy talked to her son by phone and told him she had spoken to Richard Alley from Fort Worth, the court-appointed attorney, and told Alley that her understanding was that the "sexual acts had been going on for the past couple of years." In that same phone call, she informed Smith that she had been served with a grand jury summons for later that month to testify "as to what I know."

In a final phone call, taped at the end of March after he was indicted, Smith accurately summed up his situation to his mother in stating that "I've already screwed myself. If they want me to incriminate myself, I've already done that. I hope they're recording this now. That's how the system works. The system works to [expletive] me."

Charging the defendant

Once Investigator Pawley officially filed his case report with our office, I sat down with Kathleen and our appellate attorney, Eddy Lewallen, to discuss the charges. Given the number of acts, we debated charging Smith with one count of sexual assault and one count of sexual per-

formance by a child with respect to each victim to assure a lengthy sentence and simplify the proof at trial. After reviewing the entire file and the spreadsheet of sexual crimes, however, the tide began to turn. Determined not to give Smith any freebies for his crimes, we decided to charge him with each and every sexual assault supported by the evidence. For purposes of clarity, we further decided to prepare separate indictments for each of the three victims and to not charge lesser-included offenses, such as indecency by contact, that the indictment would typically contain. With that decision, we began the painstaking task of reviewing every interview, photograph, and statement to determine exactly what charges would be presented to the grand jury.

As an added kicker, on each of the sexual assault counts we decided to charge Smith using §22.011(f) of the Texas Penal Code, which makes sexual assault of a child a first-degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under §25.01 [Bigamy]."[3] Our legal research turned up no reported cases on this subsection, so we called Alana Minton and the rest of the legal gurus in neighboring Tarrant County. We decided that the extreme facts of this case justified charging Smith in this fashion, thus committing ourselves to proving Smith's inability to marry any of his victims in the following respects: 1) he was already legally married; 2) they were his descendents by blood; 3) with respect to Kate, she was under 16 years of age in Texas; and 4) with respect to Jane and Joan, neither of them had received parental consent or permission from a court to marry Smith.[4]

We believed we had sufficient evidence to indict Smith for 15 counts of sexual assault of a child and one count of sexual performance by a child with respect to Jane Smith. With regard to her twin sister, Joan, an indictment with 16 counts of sexual assault of a child and one count of sexual performance by a child was prepared. As to the youngest daughter, Kate, we charged Smith with 11 counts of sexual assault of a child and one count of sexual performance by a child. We initially limited ourselves to one count of sexual performance of a child because we had not yet received the computer forensics report. We figured that if the case took a turn where we would require additional charges, we could always indict for the multiple child pornograph images that were ultimately found later.

After receiving the blessing of our elected district attorney, Don Schnebly, on our charging method, the case was presented to the grand jury on March 21, at which time Smith was indicted on all 45 counts.

Pretrial issues

Following indictment, our office immediately provided Smith's attorney, Rick Alley, with discovery, but we made no plea offer before meeting with the victims.

That meeting with all three girls occurred in mid-April. We explained in detail each of the charges that Smith faced and interpreted the legalese into common language the girls understood. We purposefully did not discuss the details of the case but instead focused on building a relationship with the victims and making sure they knew Smith's charges and range of punishment. At the conclusion of the meeting, we asked the victims what kind of punishment they wanted, and all three wanted Smith spent the rest of his life in prison. It became clear to Kathleen and me that all three girls, now removed from the abusive environment, had become angry at their father and had begun to realize the magnitude of what they had been through. We told the girls that we would do everything in our power to make sure that Smith spent the rest of his life in prison.

From that time forward, Kathleen and I prepared for an expeditious trial date. We filed a series of motions prior to arraignment, expecting that this case would be tried quickly. They included: 1) an unopposed motion to consolidate the cases for trial; 2) a notice of intent to request cumulative sentences; 3) a demand for discovery of expert witnesses; 4) motions in limine; 5) an order setting bond conditions for sex offenders; and 6) a motion to take expert witnesses on voir dire.

We made our first written plea offer to Mr. Alley in early May, requiring Smith to plead guilty to three counts of sexual assault of a child on Joan and two counts each of sexual assault of a child on Jane and Kate, with an agreement that a jury would assess punishment. In exchange, the State agreed to waive

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the remaining 38 counts spread among the three cases. The sticking point was Smith's insistence that the State waive the right to ask the trial court to stack the sentences, which we steadfastly refused to do. Smith's arraignment followed a few days later, at which both Mr. Alley and our office requested an expeditious special setting for this case. The court obliged with a June 23 trial date.

Pretrial discovery

We followed up on information that Smith had been investigated by Iowa CPS when the family lived there, and we learned that Smith had been under investigation for inappropriately touching his daughters by giving them "titty twisters."[5] Amazingly, Iowa CPS had taken no action after Smith promised to quit his behavior. We also subpoenaed all Texas CPS records relating to this case and any others, but this was the first time Texas CPS had investigated Smith.

Additional subpoenas were sent to the medical providers in Amarillo who treated Smith after his failed suicide attempt. We thought it may become necessary at trial to show that Smith's guilt from sexually molesting his daughters was what prompted his suicide attempt.

About 30 days before trial, our office had still not received the forensic report from the Secret Service, so we set up an appointment to meet with the forensic examiner and invited defense counsel to attend. Special Agent John Day of the Secret Service demonstrated the process used to examine Smith's computers and provided an initial report generated by Encase (a forensic computer examination program) confirming that the memory card from the digital camera and the desktop computer removed from the home contained pornographic images of each of our three victims. Special Agent Day also informed us that the laptop computer recovered in Amarillo contained hundreds of images of scantily clad female children. Again, a copy of the materials and the report, excluding the actual images of child porn, were provided to Mr. Alley, and we issued a standing invitation to him (or his experts) to view the balance of the images in our offices at any time. Kathleen and I spent much of the next week visiting and cataloging images from the various websites that Smith visited and listing them in the forensic report.

On June 2, we prepared and sent out our final written discovery in this case. It contained a list of fact and expert witnesses and notice of prior bad acts and extraneous offenses. Even though Smith had no prior run-ins with law enforcement, the notice went on for 24 single-spaced pages. This time, instead of neglecting lesser-included offenses to those contained in the indictment, we took pains to ensure that each and every sexual assault, indecency by contact, indecency by exposure, possession of child pornography and sexual performance by a child that was not expressly pled in the indictment was listed as an extraneous bad act. In addition, we designated 28 fact witnesses, including Smith's mother and brother, and expert witnesses on the topics of computer forensics and sex offender treatment.

Preparing victims for trial

Kathleen and I had been struggling to find a suitable method to present all of the charges in the indictment and the evidence supporting each charge to the jury. Ultimately, we purchased a 4x6-foot display board printed with a 12-month calendar. Over these boards, we placed three transparent plastic overlays, one for each victim. Our plan was that as each witness testified, we would summarize the testimony on the appropriate overlay, using a different color marker for each girl. After all three had testified, the three overlays would be taped to the calendar board and admitted as a demonstrative aid.

Two weeks before trial, we invited Jane, Joan, and Kate into our offices to prepare for trial. This time, instead of coming in together, each girl came by herself. Kathleen handled the bulk of each interview as we figured the girls would be more comfortable discussing intimate details with a woman—plus, Kathleen is a remarkably talented prosecutor who bonds easily with victims of sexual abuse. Perhaps the most difficult portion of these meetings was that, for the first time, we asked the girls to view the pictures Smith had taken and to identify which pictures were of which girl (faces were not visible in all of them). At times, each of the girls became emotional, but they never quit on us.

All three girls were nervous about appearing in court and we spent extensive time discussing the mechanics of testifying. We took each girl into the courtroom to sit on the witness stand and answer

questions. We showed them the large calendars so that they would not see them for the first time at trial. At the end of these three emotionally draining meetings, Kathleen and I knew that not only would these girls be able to testify, but that they would be the stars of trial.

Each fact witness was either interviewed by phone or brought into our office. Two identical sets of trial notebooks were prepared; they contained every pleading, letter, interview summary, witness note, and every other document for this case. In fact, we worried that we had overdone it when a coworker remarked, "You look like you're getting ready for a civil trial."

Voir dire

Typically, in Parker County, the district clerk summons 150 people for a felony venire panel, and 60 to 70 actually appear. In this case, the parties requested a summons for 300 people. As Kathleen and I sat waiting, I had butterflies in my stomach for the first time in a long while. I had never conducted voir dire on a panel this size, and we knew picking this jury hinged on one issue: Could we qualify this panel on the entire range of punishment, from probation to life in prison, on a man charged with 45 counts of sexual abuse of a minor?

On the first day, I spent about five hours conducting my voir dire, about half of which was spent on the enhancement when the defendant cannot marry his victim. The jurors did not question the origins of the enhancement language and seemed to accept the fact that punishment was greater in these situtaitons. I threw out hypothetical after hypothetical of scenarios fitting the elements of first-degree sexual assault of a child, everything from the high-school senior boy who takes his freshman girlfriend to prom and has sex with her, to the pedophile who lures an endless string of children off the streets by the local middle school—but which differed in terms of the punishment that might be assessed. Around my sixth hypothetical, Smith's attorney objected and the court instructed me to move on, but I felt that I laid the foundation for the questions to follow. Several jurors still answered that that they could not under any circumstances consider probation for sexual assault of a child, and we struck them for cause. However, the majority who spoke said that given one of the fact situations discussed earlier, they could fairly consider the full range of punishment. In total, only about 10 percent of the panelists were excused for cause. Notably, not a single juror had a problem with the higher range of punishment.

The following day, Mr. Alley and his co-counsel, James Wilson, began their voir dire. They quickly re-examined the range of punishment issue, approaching the subject in every conceivable way. Many on the panel referenced the hypotheticals from the prior day and stated there were fact scenarios where they could consider the full range of punishment. In total, another 10 percent of the panel gave responses disqualifying them for cause on this issue. A jury was quickly chosen from the remaining panel, and trial began on Wednesday, June 25.

The trial

Kathleen began the State's case with an opening statement discussing bedtime routines for children, how they might go to their parents or their parents might come to them to say goodnight and give a kiss. In a way that only a talented prosecutor can do, she wove that innocent routine into the facts of this case.

She laid out for the jury that the nightly routine in the Smith house was a little different. It centered on which daughter Smith would "tap on the shoulder" to come to his bedroom to be sexually assaulted. After describing an instance of "four-way sex" between Smith and all of his daughters, Kathleen summed it all up with this:

> "So what does this all have to do with the defendant? This defendant is the biological father of Jane, Joan, and Kate Smith. The act that I just described was neither the first nor last act of sexual abuse committed by this *father* against his daughters. By indictment, the State has charged this *father* with 45 counts of sexual assault and sexual performance of a child with his daughters. Throughout the next week, the State of Texas will prove each and every count to you beyond a reasonable doubt."

As she finished and returned to her seat, several jurors were visibly shaken while others glared at Smith. Defense counsel Rick Alley, perhaps sensing that now would not be the optimum moment to present his client's story, wisely reserved making his opening statement.

We began calling our witnesses and laying out the case for the jury. Having experienced both the highs and lows of calling officers as wit-

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nesses, I cannot even begin to speak highly enough of the job Investigator Pawley did on the stand. While describing Smith's sexual abuse of the girls, Pawley teared up. He immediately apologized to the jury for the display of emotion, stating this was difficult for him because he had a teenage daughter. Over the next several days, CPS investigators, Smith's friends, Smith's wife, counselors, and others took the stand.

The next witness of note was Peggy, Smith's mother, through whom we introduced the jail phone calls. Smith's mother maintained she knew her son had done something wrong, but she did not know, and he never told her, exactly *what* he had done. In fact, she went as far as to state that she wasn't even sure that these allegations involved her granddaughters. Eventually, I let her leave the stand, convinced that the phone conversations adequately spoke volumes about what Smith had truly done to his daughters and that she was not being wholly honest about what she knew.

Kathleen and I both knew that regardless of what witnesses we presented, the jury really wanted to hear from only three people: Jane, Joan and Kate. Having tried several of these cases in the past, I am always amazed at the bravery and fortitude exhibited by victims of sexual abuse when called to testify. These three were no different.

As each of the girls was called to the witness stand, what struck me first was that they refused to look in their father's direction. As one might expect, each of the girls became emotional from time to time during their testimony. Sometimes it occurred during direct examination and sometimes during Mr. Alley's cross-examinations, but always when they had to identify exhibits containing pictures they took of themselves for their father. Perhaps most importantly, at least to me, was that none of them ever lost their temper with Mr. Alley or treated him any differently than they treated Kathleen and me.

During the girls' direct examinations, as one of us questioned the witness, the other prosecutor summarized her testimony on the proper clear overlay on the calendar, making sure we used a different color marker for each girl. At the end of each girl's testimony, we would have them examine the summary and state whether it was accurate, then the summary would be admitted into evidence. Individually, each overlay was little more than a chart with colored writing. However, when all three were put together it became the most powerful exhibit in the trial—with one or more of the three colors covering virtually every week from July 2006 until January 2008.

We finally rested our case on June 30. At that time, defense counsel asked that the State elect which evidence we were relying on to support each specific allegation. Fortunately, we had expected such a request and had spent prior evenings reviewing the testimony and charts and matching them to the indictment. At the end of our review, we determined that for appeal purposes we would waive two counts alleging mutual oral sex between Kate and Joan. At trial, Joan stated that these acts had occurred; however, Kate, for reasons unknown to us, could not admit that she had engaged in sexual acts with her sister.

In closing, Kathleen and I spoke about the evidence that had been presented and the bravery of the girls in coming forward to testify against their own father. We harped on the fact that Smith admitted sexually abusing his daughters to his wife and his mother in those jail phone calls. In the end, we asked the jury to convict him of 40 counts of sexual assault of a child and three counts of sexual performance by a child.

Verdict and punishment

Several hours later, the jury returned with their verdicts: guilty on all 43 counts. The court immediately began a punishment hearing, and we called two witnesses: the U.S. Secret Service agent to talk about the child erotica on Smith's computers, and the maternal grandfather of the girls, with whom they now live, to talk about the effect of Smith's abuse. After Mr. Alley presented several character witnesses for his client, both sides rested and closed. Following a brief closing argument in which Kathleen and I urged the jury to assess the maximum punishment on each of the 43 counts, the jury was again given the case.

After deliberating for two hours, the jury returned. The magnitude of what was occurring first struck us as the judge began to read the jury's verdicts: The jury returned life sentences on each of the 40 counts of sexual assault of a child and the maximum of 20 years on the three counts of sexual performance by a child. In addition, to drive home the point, the jury fined Smith the max-

imum $10,000 on all 43 counts. Pursuant to the notice that we had filed earlier, we asked the judge to stack all of the sentences, and he did so without hesitation. Forty life sentences plus 60 years. We believe it's the longest sentence in Texas history.

I have had verdicts where I've gotten a call from the local news affiliate or newspaper for a quote or summary, but I'd never experienced anything like the day after this trial. I did a series of television and radio interviews the rest of that day (Kathleen won't talk to the media to save her life). High school and college friends from around the country called to say they saw me on CNN. To be honest, it was exciting. However, if anyone were to ask me my favorite part of that day, it would be the moment that Kathleen and I called Jane, Joan, and Kate and told them that not only did the jury believe what they had to say, but that Smith would be in prison for the rest of his life. I felt like Kathleen and I had kept our promise to the girls that we would do everything within our power to bring justice on their behalf.

At the end of the day, Kathleen and I were the ones in the spotlight, but we truly are only standing upon the excellent work done by law enforcement and the CPS investigators in this case. I'd love to claim all of the legal strategy in this case was our own, but it belongs to the prosecutors, both in our office and throughout the State, that took the time to speak to us and answer our multitude of questions.

As for Jane, Joan and Kate: The twins graduated from high school in the summer of 2008 and have taken a year off before starting college. Kate is on track to graduate on time. All still currently reside with their grandfather.

Endnotes

1 To protect the anonymity of the three victims of this case, the names of the defendant and victims have been changed.

2 In preparing for trial, we noticed that each recording included some inaudible portions, so both recordings were necessary to prepare accurate summaries of the interviews.

3 This enhancement was created in 2005 to address the alleged practices of polygamists who had recently relocated to Eldorado, the same group whose compound was raided in 2008 by CPS and other state and federal agencies.

4 Although the last three factors in this list are unrelated to bigamy, which is concerned only with multiple marriages, we raised these factors during trial to pre-emptively bolster the sentences against future attack on appeal.

5 A "titty twister" is when someone grabs another's nipple and twists it.

Helping victims in DNA exoneration cases

After several DNA exonerations, the Dallas County Criminal DA's Office has written guidelines for notifying and helping the original victims of these crimes.

By Chris Jenkins
Victim Assistance Coordinator in the Dallas County Criminal District Attorney's Office

Striving for justice and putting the correct offender in prison is unquestionably the goal of any prosecutors' office. Using DNA to release a wrongly convicted person from prison is an important job that must be vigorously pursued. Thank goodness for DNA! However, in exonerated DNA cases, we also must never forget the original crime victim, the person who was sexually assaulted or murdered. As far as the victims or their families are concerned, the correct offender was convicted and imprisoned at trial. When we in the DA's office tell them, years later, that the wrong individual was identified and convicted, it can trigger disbelief, guilt, anger, confusion, and most of all, revictimization. (As one sexual assault victim wrote in a letter to the local police department that handled her case decades ago, "Being the victim in an exoneration is a foreign, difficult, scary, horrible, confusing thing that only a tiny percentage of people will ever have to face in their lifetime. I was violated in 1984, but now, years later, the media ends up violating me again.")

Due the large number of DNA exonerations in Dallas County, the Victim Witness Division found it necessary to develop new methods of providing assistance to its victims. These include informing victims of rights they may not have had when the crime happened more than 20 years ago and providing referrals for counseling, which may be necessary after reopening a wound they had worked so long and hard to close.

Working with the victims in DNA-exoneration cases is a tricky and not altogether rewarding experience. Our office's first contact with them will, in most cases, turn their world completely upside-down. Many of these exoneration cases are more than 20 years old, and most of the sexual assault victims have put the assault behind them. Some have married and started families, never telling their friends and loved ones of their victimization. That phone call from us will most certainly disrupt their entire lives. Preconceived notions of truth and justice will go to the wayside because a person convicted and imprisoned by a jury of 12 citizens (or who pled guilty to the crime) turns out to be innocent of those charges. Victims' sense of safety is lost when the true offender cannot be identified, and any feeling of closure disappears when the facts of their case are brought to the fore once again. Don't expect the victim or their family to thank you for making that call.

When working with victims or their families in DNA cases, several things must be considered. First, decide at what point the DA's office will contact the victim: when the offender first requests testing, when the State agrees to the testing, when a testing date has been set, after DNA testing, or not at all (when tests affirm the offender's guilt or testing is denied). When making your decision, remember that many of these victims are registered with the Texas Department of Criminal Justice to receive information regarding their offender's parole hearings as well as movement of that offender on a bench warrant. The victim may be notified before you are ready to do so.

Second, be prepared to answer their numerous questions. "How can he do this when he was found guilty or pled guilty?" "Do I have to provide a buccal swab?" "How long will it take to get the test results?" "What do the results mean?" "If the results come back negative, will you identify and convict the true offender?" The Dallas County District Attorney's Office has prepared a brochure to answer these questions, provide referrals for counseling, and offer a contact within the office. This brochure is mailed to the victim or their family after the initial contact has been made (a copy is available on www.tdcaa.com; search for "DNA brochure"). It is helpful for them to have something to refer to when more questions come up.

A third consideration is the date of the actual crime. If the case is more than 23 years old, chances are good the victim was never told of her rights and available services because legislation mandating notification of victims was not put in place until September 1985. These victims should be informed of their right to

protest parole and be kept informed of parole hearing dates. This point is important when deciding whether to notify the victim at all when testing affirms the offender's guilt. The victims should be told that they have the right to write a letter of protest to the Board of Pardons and Paroles when the offender requests testing knowing that he actually committed the crime. The victim should be notified when testing is denied due to the possibility that the offender will appeal.

In Dallas County, we aid this process by sending protest letters of our own. We send letters when testing affirms an offender's guilt *and* when testing reveals that another offender committed the crime. Doing so can be helpful whether the offender is still in prison or out on parole.

Lastly, be aware that not all victims are going to react in the same manner or have the same needs. Some victims want to be kept informed of every legal proceeding that takes place; others want no further contact with the prosecutor's office whatsoever. Be sensitive to their need for anonymity or confidentiality. For those victims who have moved on, never telling their loved ones of their assaults, we have learned to be creative in contacting them and obtaining buccal swabs. For example, one victim who was sexually assaulted 20 years ago had moved away from Dallas and never told her family about the crime. The man convicted of the assault requested DNA testing, which prompted us to ask for her buccal swab. To maintain her privacy, our investigator flew to her local airport, met her during her lunch hour at the airport security office, and took her swab—all without her employer or family knowing.

In another case, our office provided the sexual assault victim with past and present pictures of the released (exonerated) defendant after he had threatened to kill her during the trial. The victim was terrified of his retaliation, so we gave her those photos to share with her children and the local police department just in case he approached one of them (as he threatened to do years before). We have also allowed the victim to hear audiotaped confessions to assure her the correct offender was found. We must accept that some victims will never believe the wrong person was convicted, no matter what we do to help them understand otherwise. Here in Dallas, we have even formed a support group for victims whose offender was released due to DNA testing. No one understands what they are experiencing better than those going through it.

Remember, the victims relive the crime every time we call, write, or email with new information. Be prepared for their confusion with the legal system, guilt over the wrong person being imprisoned, disbelief that the test results are accurate, or anger that the true offender cannot be prosecuted due to the statute of limitations. I try to empower our victims by suggesting they advocate for legislative changes that would allow an offender to be tried for past crimes and changes that would provide sanctions against an offender whose DNA results affirm his guilt. As the law is now written, he is legally allowed to retraumatize the victim emotionally, all the while knowing that he committed the crime. Victims and their families are the best advocates for change, having experienced the full spectrum of emotions from the actual crime to the results of the DNA testing. Our job is to help them understand that their rights have not been ignored or forgotten.

Anyone who is dealing with a DNA exoneration case is welcome to contact me with questions; I can be reached at 214/653-3838 or cjenkins@dallascounty.org.

Court of Criminal Appeals update

By Tanya S. Dohoney
Assistant Criminal District Attorney in Tarrant County

Questions

1 After Anderson County's dispatch received a call about an assault, a deputy was sent to a nearby convenience store to meet with Arthur Schneider, the victim. Arthur told the deputy that he, Michael Harvey Sheppard, and a gal named Elizabeth Miley had been relaxing in the comfort of Sheppard's trailer home enjoying some speed until Sheppard threatened Arthur with a knife. After learning of these details, the deputy followed Arthur to Sheppard's trailer home where the officer was welcomed at the door not only by Sheppard, but also by a strong chemical odor. The deputy frisked Sheppard and found a large folding knife in his pants pocket. The deputy handcuffed Sheppard and informed him that he was just being detained while the officer secured the scene and made sure that no one else was inside. The deputy described his use of handcuffs as a safety precaution while he accounted for the presence of Miley.

While briefly sweeping the trailer's interior, the deputy saw a purse with some needles, an open orange box with a powdery substance, and a plastic baggie in plain view on a small dining table. Miley had apparently skedaddled, so the deputy returned to the trailer entrance, stepped outside, and uncuffed Sheppard. Next, Sheppard consented to a search and the drug task force was called to search what appeared to be a meth lab.

At a suppression hearing focused on these events, the trial judge ruled that the deputy did not have specific articulable reasons to justify the pat-down search or to handcuff Sheppard; the trial judge further found that, by handcuffing Sheppard, an illegal warrantless arrest occurred. Assuming the propriety of the pat-down and protective sweep, is a person "arrested" under the Fourth Amendment if he is temporarily handcuffed and detained, but then released?

2 Returning to Michael Harvey Sheppard's meth-infused facts, recall that the trial judge suppressed the evidence based upon several factors which, according to the court, resulted in an illegal arrest. The State appealed the adverse pretrial ruling after the judge entered written findings of fact. While no express finding specifically stated that the deputy's testimony was credible, the court's fact-findings dovetailed with the officer's factual assertions and nothing in the record suggested that the judge doubted the witness's credibility. Although the court of appeals recognized that the facts supporting the pat-down were objectively reasonable, the Tyler court decided that the trial judge must not have believed the deputy. Hence, they found the arrest illegal. Did the intermediate appellate court utilize the proper standard of review?

3 This "cold case" prosecution involved the 1986 rape and murder of 11-year-old Vanessa Villa. Law enforcement officials never suspected Juan Ramon Segundo until 2005 when, during a routine CODIS computer run, his DNA profile matched that from sperm found in Vanessa's vagina.

To prove Segundo's prior rape/murder conviction during his capital trial, the State relied on Segundo's certificate of parole revocation as proof and admitted over a *Crawford* objection. The Board-of-Pardons-and-Parole-generated document contained boilerplate, preprinted language with a sterile fact recitation explaining that Segundo violated his parole and was subject to re-arrest and re-incarceration. Was Segundo's *Crawford* objection correct?

4 Kaufman County indicted Beverly Kirkpatrick for various crimes including tampering with a governmental record. Depending upon the facts alleged, tampering is either a felony or a misdemeanor crime. The wording of Kirkpatrick's tampering indictment alleged a misdemeanor because it lacked an additional element necessary to bump the charges up to felony status. However, it appeared that the prosecution had intended to file felony charges because the heading on the indictment form stated "3rd Degree Felony" and referenced Texas Penal Code §27.10(a).

Kirkpatrick raised a subject-matter jurisdiction complaint for the first time on appeal. She alleged that the trial court never possessed juris-

diction because the indictment had alleged only a misdemeanor; the Dallas Court of Appeals agreed. Does district court jurisdiction lie when an indictment filed in that court alleges only a misdemeanor?

5 Multiple perpetrators carried out a midnight home invasion of a Dallas apartment occupied by seven people. Shots flew and, of the three dead adults, Virginia Ramirez had been in the early stages of pregnancy. The State obtained two separate capital indictments against Sheldon Roberts for the killing spree, waived the death penalty in each, and obtained two convictions. One of the capital cases alleged multiple murder as the aggravating component of the charge; the named victims were Ramirez and the embryo that she had carried. Hence, this indictment alleged that Roberts intentionally and knowingly caused the death of both Ramirez and her unborn child.

Trial evidence indicated Ramirez' pregnancy was not apparent in general, nor to Roberts when he busted in shooting and shot her through the door. Does proof that Roberts killed a pregnant woman and her embryo in the same transaction establish the specific intent to kill each victim in a multiple, capital murder scenario when there was no knowledge of the pregnancy? Stated differently, does the doctrine of transferred intent transform a shooter's intent to kill an embryo's mother into support for an intentional killing of the embryo as well?

6 Two men accosted and robbed three men who were hanging out at a Houston apartment complex. The perpetrators asked for money, then shot the victims when they complied. One of the victims died soon thereafter.

Later, Raul Martinez was arrested for this capital crime and taken into custody. Houston officers failed to *Mirandize* him immediately upon his arrest. The officers questioned Martinez about the robbery/murder at the police station without any prophylactic warnings. Martinez was taken for several hours to a police polygrapher but was still not warned. The officers told Martinez that he failed the polygraph, then finally took him before a magistrate who read Martinez his constitutional and statutory warnings. Upon returning to the central holding station after the magistration, the officers conducted another interrogation about the robbery/murder and repeated the *Miranda* warnings. Martinez gave a videotaped statement regarding the capital crime. During the statement, Martinez mentioned that he had become aware of some facts during his polygraph examination.

Did the officers' failure to *Mirandize* Martinez before the initial interrogation and the polygraph examination lead to constitutional error in the admission of the videotaped statement at trial?

7 A Montgomery County DPS trooper saw Justin Amador traveling on I-45 at an unspecified, yet excessive, rate of speed during the wee hours of the morning. After she stopped him, she observed Amador's slow response to her requests and his fumbling to find his license. The trooper described Amador's speech as mumbling under his breath and, when he stepped out of his vehicle, she smelled alcohol on him. She conducted three standard field sobriety tests (SFSTs) and, on the basis of his performance, she arrested him for DWI.

Fast-forward to Amador's motion-to-suppress hearing: Amador complained that probable cause did not support Trooper Fountain's arrest of him. Fountain, the only witness (and called by Amador), testified to the above facts, some of which were also admitted via showing the road-side video. Curiously, at the hearing, the State did not question Fountain regarding any of the details she observed when administering the SFSTs, including how Amador performed, the scores of the tests, or even whether Amador failed them. The video did not include Amador performing the SFSTs, but it did show Amador denying having anything to drink when responding to the officer's assertion that he smelled of alcohol. At the close of the hearing, Amador's counsel pointed out that the burden to prove a valid arrest fell on the State; he contended that the State failed to adduce the details of the SFSTs including the outcome of those tests controlled. The State argued that Trooper Fountain relied upon the conduct she observed during the traffic stop combined with the (unstated) results of the SFSTs and, therefore, arrested Amador for DWI. The trial judge denied the suppression motion but did not enter fact findings.

On appeal, the Beaumont appellate court found that the sup-

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pression evidence failed to demonstrate that Trooper Fountain had reasonable facts to support her arrest decision, primarily due to the skimpy SFST evidence. The State argued that the trial court was authorized to infer that Amador failed the SFSTs. Who is correct?

8 Audrey Linton, a young deaf woman who attended a local junior college, committed DWI. When Linton rear-ended another car on a misty November morning in Montgomery County, she reeked of alcohol, failed field sobriety testing and, at the station, registered more than two times the legal limit.

During every turn of her ensuing prosecution, Linton raised issues relating to her deafness. Showing great foresight, the trial judge ordered that the entire criminal proceeding be videotaped, providing the appellate courts with much more than the proverbial cold record.

In general, the testimony revealed that Linton's deafness occurred prior to her learning to speak, rendering her prelingually deaf. Expert testimony also categorized her as semi-lingual and linguistically incompetent since she was neither proficient in English, nor straight ASL (American Sign Language). Further evidence showed that the defendant read at a fourth-grade level and, accordingly, the defense pointed out that *Miranda* warnings are written for eighth-grade comprehension and the DIC-24 corresponds to a 12th grader's capability. Nevertheless, Linton had obtained a driver's license and was enrolled in junior college after graduating from high school. Still, her limited vocabulary undermined her ability to converse via finger-spelling, a common form of deaf communication. Testimony suggested that "deaf-relay" interpretation services are considered the best type of interpretative assistance; although requested, the trial judge did not employ this type of service.

Defense counsel raised specific legal issues germane to her disability throughout. In a motion to suppress, Linton argued that she had not understood her right to refuse the breath test. After denial of her suppression arguments, the trial judge appointed two interpreters; throughout the entire proceedings, the judge repeatedly stopped the proceedings to inquire about her ability to understand the events, to provide additional time for attorney consultation, and to provide additional resources. In fact, after a mid-trial motion for mistrial, the trial court brought yet another interpreter on board to sit at counsel table with the defendant. The jury ultimately found her guilty. After the judge denied a motion for new trial where the defense expert explained that Linton could not comprehend 20 to 25 percent of the courtroom discussions, the case proceeded to appeal.

In light of the deficiencies in Linton's communication and understanding, the question on appeal became whether the interpretive services that were actually employed were constitutionally adequate such that the defendant could understand and participate in the proceedings, sufficient to convey due process. Did the trial court take adequate steps to ensure that this deaf defendant sufficiently understood the proceedings against her thereby affording her due process?

9 While under arrest for a parole violation and an unrelated assault, Austin homicide detectives (Scanlon and Burgh) sought to question Milton Gobert. At the beginning of their interview, they advised Gobert of his constitutional and statutory rights. When asked if he understood the warnings conveyed, the following exchange took place:

> Gobert: "I don't want to give up any right, though, if I don't got no lawyer."
> Scanlon: "You don't want to talk?"
> Burgh: "You don't want to talk?"
> Gobert : "I mean, I'll talk to y'all. I mean, I know, you know, what she had said about it, you know. I'll speak with y'all, but (inaudible), man. I mean, I'll speak with y'all, you know."
> Scanlon: "Okay, signing this—signing this is not giving up your right. Signing this is acknowledging that this was read to you. … Okay? Your choice to talk to us is different. This—all this is, is acknowledging that you were warned."

After additional conversation, the interrogation continued for several hours and Gobert confessed to committing murder.

The trial judge ruled Gobert's initial statement constituted an unequivocal invocation of his Fifth Amendment right to counsel and suppressed the confession. In fact, the trial judge said he couldn't imagine a more unequivocal statement. The Austin Court of Appeals denied relief after the State appealed the suppression ruling. In later plead-

ings, the State argued that review of the DVD of the interrogation versus review of a written transcript was more accurate and indicated that the specific statements were actually somewhat unintelligible. The interim court reversed its own ruling, this time characterizing Gobert's statements as equivocal. Did Gobert invoke his Fifth Amendment rights?

10 Daniel Layton's DWI charges arose after a Houston officer discovered Layton's vehicle at 4 in the morning, straddling a crosswalk, and protruding into an intersection.

The officer's in-car camera recorded the scene-of-the arrest events and conversations, and the jury saw the tape. On that recording, Layton told the officer that, although he'd had four to six drinks, he was merely buzzed. In response to questions, Layton admitted having taken Xanax and Valium within the past day, purportedly for high blood pressure. The arresting officer opined that these prescriptions typically treated other conditions, and he questioned Layton about having read the prescription inserts. The officer ultimately suggested to Layton that he had exercised poor judgment by drinking "on top" of these medications.

Harris County charged Layton with driving while intoxicated and the pre-*Barbernell* information solely alleged alcohol as the only intoxicant. See *State v. Barbernell*, 257 S.W.3d 248 (Tex. Crim. App. 2008) (holding that the State need not allege the form of intoxicant). Pretrial, Layton argued relevancy thwarted admission of the drug-related conversation captured on video. Other than the statements contained on the in-car video, no other evidence related to how the Xanax and Valium, apparently taken at least 12 hours pre-arrest, had any effect on the appellant's intoxication. Should the trial judge have allowed the jury to hear the evidence of the appellant's Xanax and Valium use under these circumstances?

Answers

1 No, these facts constituted only a temporary detention—precisely what *Terry* permits. *Sheppard v. State*, 271 S.W.3d 281 (Tex.Crim. App. December 10, 2008) (Cochran) (7:1:1). While handcuffing a person results in that person being "seized" under the Fourth Amendment, it does not automatically convert a detention into a Fourth Amendment "arrest." While the practice of handcuffing a detainee should be the exception, not the rule, special circumstances may necessitate an officer's using handcuffs during a detention to thwart the suspect's attempt to frustrate the inquiry. No bright-line rule applies to this analysis, but factors to consider include the amount of force displayed, duration of the detention, efficiency of the investigative process, the location of investigation, and officer's expressed intent.

Here, temporarily handcuffing Sheppard, a man who had just threatened one person with a knife while using methamphetamine, was reasonable while the officer made a brief sweep of the trailer to locate Miley who could have been either a victim or a potential danger to the officer. The officer did not handcuff Sheppard any longer than was necessary to conduct the brief sweep, and he informed Sheppard that he was not under arrest. Given the totality of these circumstances, a reasonable person would believe the seizure was sufficiently nonintrusive to be an investigative detention.

Judge Cochran described the definition of "arrest" found in article 15.22 of the Code of Criminal Procedure as legislatively obsolete because the statute pre-dates *Terry v. Ohio* and does not distinguish between custodial arrests and temporary detentions. Compare *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968) with Tex. Code Crim. Proc. art. 15.22 (arrest occurs when person actually placed under restraint).

2 No. *Sheppard v. State*, 271 S.W.3d 281 (Tex. Crim. App. December 10, 2008) (Cochran) (7:1:1). The Tyler Court of Appeals mistakenly speculated about unexpressed trial court fact-findings and credibility assessments. When a trial judge enters explicit findings of fact, those historical findings must be granted deference. Appellate courts should not conjure up new and different factual or credibility findings.

Judge Cochran expounds that fact-findings explore the who, what, when, where, how, or why of a scenario; they also include credibility determinations. In this case, one of the judge's fact-findings specified that the deputy did not have specific articulable facts to support a reasonable suspicion justifying the trailer doorstep pat-down which led to further intrusion. Judge Cochran opined that this purported fact-finding mixes the apples of explicit factual findings with the oranges of

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conclusions of law and is not a true fact-finding warranting deference. In this case, the trial court's written findings and conclusions revealed that the judge believed the deputy's testimony but did not agree that the conduct was reasonable under the Fourth Amendment.

Appellate courts review the legal determination of detention, reasonable suspicion, and probable cause under the Fourth Amendment *de novo* while granting great deference to a trial court's factual findings. Applying this standard and utilizing the facts nailed down in the judge's express findings, the court overturned the trial judge's ruling and upheld the officer's actions. A reasonable and prudent officer investigating a recent residential assault involving a knife where the alleged attacker and victim were using methamphetamine would conduct a brief frisk to see if the person found at the home still possessed a weapon. The lower court's reversal, based upon its erroneous determination that the trial judge must not have believed the officer, was reversed.

3 No. Documents reciting such boilerplate statements that routinely and unambiguously catalogue a factual matter are non-testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). They include no subjective incident report created by law enforcement, nor do they graphically document detailed testimonial observations, both of which would be inadmissable. Such objective public records and business records documenting prior convictions or other similar official findings are non-testimony and beyond *Crawford*'s prohibition. *Segundo v. State*, AP-75,604, ___ S.W.3d ___, 2009 WL _____ (Tex.Crim.App. 2008) (op. on reh'g) (Cochran) (9:0).

4 Yes. Texas Constitution article V, §12(b) states that the presentment of an indictment or information to a court invests the court with jurisdiction. Additionally, under the watershed *Studer* case, a defendant waives or forfeits the right to object to a defect in the form or substance of an indictment by failing to raise the claim before the date the trial on the merits commences. See *Studer v. State*, 799 S.W.2d 263 (Tex.Crim. App. 1990); Tex. Code Crim. Pro. art. 1.14(b). Even though the indictment properly charged a misdemeanor and failed to allege the element necessary to charge a felony, the indictment's return in felony court put Kirkpatrick on notice that a felony was intended. Hence, the court of appeals erred by finding subject-matter jurisdiction lacking. *Kirkpatrick v. State*, PD-0873-07,0874-07, ___ S.W.3d ___, 2008 WL 5234248 (Tex. Crim. App. December 17, 2008) (Johnson) (9:0).

5 No and no. Murder is a result-of-conduct crime, and capital murder arising out of the murder of multiple victims requires a specific intent to kill each victim. Transferred intent applies when a person other than the intended victim is harmed. Transferred intent does not apply where both the intended victim and another person die. Culpability-wise, the intent to kill attaches only to one death (transferred or not). Thus, transferred intent may be used to support a second capital death (multiple victims in the same transaction) only if there is proof of intent to kill the same number of persons who actually died. *Roberts v. State*, PD-1054-07, ___ S.W.3d ___, 2008 WL 5234254 (Tex.Crim. App. December 17, 2008) (Johnson) (4:2:3), overruling *Norris v. State*, 902 S.W.2d 428 (Tex. Crim.App 1995). In this case, Roberts lacked knowledge of the embryo's existence and, as such, he could not form a separate specific intent to kill the embryo.

6 Yes. When officers use a two-step interrogation strategy, postwarning statements related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Based upon these question-first-and-warn-later facts, the court opined that the absence of *Miranda* warnings at the beginning of the interrogation process was no mistake but, instead, a conscious choice. Hence, the officers' failure to apply any curative measures to ameliorate the initial harm caused by the *Miranda* violation rendered the videotaped statement inadmissible. The court remanded the case for a harm analysis. *Martinez v. State*, PD-1917-06, ___ S.W.3d ___, 2008 WL 5234268 (Tex. Crim. App. 2008) (Johnson) (4:1:4). This case attempts to apply the divided opinion in *Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601 (2004).

7The State. Given the trooper's suppression testimony, the trial judge could reasonably infer that Amador failed the field sobriety tests on the morning in question. *Amador v. State*, PD-0144-08, ___ S.W.3d ___, 2009 WL 80204 (Tex. Crim. App. January 14, 2009) (Holcomb) (8:1). Applying the totality of the circumstances test, Trooper Fountain possessed sufficient probable cause to arrest Amador even without the FST evidence. As the finder of fact, a trial judge may make reasonable inferences from evidence presented. In addition to the direct evidence presented, the trial court could infer myriad additional facts including that Amador: 1) consumed alcohol on the night of his arrest which led to impaired mental faculties and driving at an unsafe rate of speed; 2) experienced impaired physical faculties as illustrated by his slow speech and conduct; 3) lied about drinking when responding to Officer Fountain; and 4) performed in less-than-ideal fashion on the SFSTs. Applying the proper standard, that is, consideration of the totality of the evidence and its attendant inferences, and keeping in mind that the United States Supreme Court has never specified what degree of probability is required for probable cause to arrest, the Court of Criminal Appeals concluded that the trial judge did not abuse its discretion when overruling Amador's motion to suppress.

The court distinguished the specific facts and inferences shown in this record with the conclusory statements that led to the prosecution's defeat in *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005) (where the only evidence supporting the

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detention's reasonableness was the officer's conclusory statement that the driver committed the traffic violation of following too closely).

8 Yes. *Linton v. State*, PD-0413-08 ___ S.W.3d ___, 2009 WL 80205 (Tex. Crim. App. January 14, 2009) (Cochran) (8:1:0). Trial courts are granted wide discretion in determining the adequacy of interpretive services because it is the judge who is present to observe the defendant's level of comprehension during the proceedings. Due process does not require a judge to employ the "best" means of interpretive services but that constitutionally adequate interpretation occur in ensure understanding and participation. In Linton's case, evidence at the various phases revealed that, from the beginning, the defendant communicated effectively and comprehended the proceedings. For instance, at the crash site, she adequately exchanged information with the woman she rear-ended. She also communicated in writing with her arresting officer at the station. During trial, Linton communicated with her interpreters; in fact, they ultimately chose to use a combination of languages that she had successfully used to communicate with them. She understood the proceedings well enough to aid her counsel. She also responded coherently and cogently to courtroom inquiries, sometimes even before the translation occurred.

The Court of Criminal Appeals determined that, based upon the record before it, the defendant understood the proceedings well enough to assist in her own defense. In fact, no communication difficulties between her and her attorney were apparent in the record, in spite of her repeated claims. Indeed, review of a colloquy between Linton and the prosecutor during the suppression hearing contradicted the linguistically-incompetent designation since it showed her cogently contending that she did not understand her *Miranda* rights or the breath test procedures. Whatever the difficulties, the court reasoned that the appellate question was not whether perfect communication or translation occurred but whether due process was achieved. The very best form of interpretive service is not constitutionally required unless the defendant shows that, without it, she cannot assist in her own defense. Also, the court considered that this was a simple DWI trial without complex legal questions. All in all, nothing in the record showed that the trial court abused its discretion because Linton received constitutionally adequate interpretive services throughout the proceedings.

9 Yes. *Gobert v. State*, PD-0202-08, ___ S.W.3d ___, 2009 WL 187828 (Tex. Crim. App. January 28, 2009) (Price) (8:1:0). While not every mention of a lawyer suffices to invoke the Fifth Amendment right to presence of counsel during questioning and an ambiguous/equivocal reference does not even require clarification by officers, a clear invocation requires a cessation of questioning. Based upon the totality of the circumstances, Judge Price writes that, although Gobert did not make a straightforward request for counsel, he adequately communicated his desire to deal with his police interrogators only through, or at least in the presence of, a lawyer. By saying that he did not want to "give up any right" in the absence of an attorney, Gobert made his desire abundantly clear. The court construes Gobert's words as an indirect expression of a possible willingness to waive, among other things, his right to silence, but only on the unqualified condition that he first be afforded his right to counsel. Price concludes that the conditional nature of a statement does not render it equivocal or ambiguous. This holding is consistent with the Supreme Court's treatment of a defendant's refusal to give a written statement without counsel being present. See *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828 (1987). And, unlike the Sixth Amendment right to counsel which is offense-specific, the Fifth Amendment right applies to any offense about which the police might wish to question a suspect. Once a defendant invokes his right to have counsel present during any police-initiated interrogation, police must cease interrogation until counsel has been provided or the suspect himself reinitiates a dialogue.

10 No. *Layton v. State*, No. PD-0408-07, ___ S.W.3d ___, 2009 WL 250080 (Tex. Crim. App. February 4, 2009) (Meyers) (8:1). The appellant's use of these medications should not have been admitted without the State establishing its relevance to his intoxication by alcohol, the theory alleged. Considering the length of time between medication ingestion and the arrest (at least 12 hours) and because nothing showed the reliability of the officer's

knowledge regarding the uses of Xanax, Valium, or the synergistic effects of medication-alcohol combinations, the trial court abused its discretion by admitting the drug-use evidence and the officer's drug-related statements. (There was apparently no synergistic-effect charge submitted).

This eight-vote opinion's loose language could make mischief. Note that a differently-charged DWI (under *Barbernell*) should render a different result; here, the evidence needed to relate solely to intoxication by alcohol. Also, recognize what the court does *not* hold: Although the appellate court quotes the defense attorney's trial-level arguments and they mention extrapolation evidence, the decision does not require extrapolation. Unfortunately, simply because the word was breathed in the opinion, some will suggest this. Both the majority and Womack's rather brief dissent seem to focus on the propriety of the officer's opinions regarding the prescription drugs, with the majority requiring more—in the form of expert testimony—than the officer's bare assertions about the synergistic impact of taking the meds when

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