THE TEXAS PROSECUTOR

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

Texas prosecutors' first use of the Continuous Family Violence law

Montgomery County becomes the first to try a man under the new Continuous Family Violence statute. A prior pen trip plus chilling recorded jail conversations netted Bobby Joe Duke, Jr. 15 years in prison.

"I don't like to be mean to you. I hate to be mean to you."

By Adrienne E. Frazior
Assistant District Attorney in Montgomery County

Those were the threatening words of Bobby Joe Duke, Jr. to his girlfriend, Mary Cox, in a recorded jail conversation. They had the implication of guilt I was looking for when I first heard them in my office days before Duke's trial for Continuous Family Violence. They also sent shivers down my spine when I showed photos of Mary's battered face as I played that same conversation to a jury in the January 10 trial.

Duke and his girlfriend, Mary, had known each other for 16 years and had been in a romantic relationship for the year preceding the May 2010 assault during which Duke beat Mary so badly she fled their Cleveland, Texas, home on foot. A passing motorist saw Mary's beaten face as she tried to flag down help on the side of SH 105 and drove her to a nearby gas station. Mary pleaded with the Good Samaritan not to call 911 because Duke would kill Mary, but the driver replied that she was not afraid of Duke and called 911 to get Mary the medical attention she needed.

When paramedics arrived, they saw that Mary had a broken nose that had previously been put back into place, two black eyes, and bruises all up and down her left arm. She was transported to Conroe Regional Medical Center and released to the Montgomery County Women's Shelter. She stayed at the shelter for nine days before she called Duke to come get her.

Less than 10 days later, another 911 call was placed by someone who had just met Mary. She had been staying at the Conroe Motel 6 with Duke when Charity Wesley saw her many bruises and struck up a conversation with her. When Duke began beating Mary the night of June 16 and threatened to kill her again, Mary snuck out and asked Wesley if she could stay in her room. Wesley told Mary to move her car around to the side of the building while Duke slept so that he would think she had left the motel. As Mary was driving the car with Wesley in the passenger seat,

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Introducing additions to the TDCAF Advisory Committee

In the last issue we introduced our new Foundation Board members, and now we are pleased to announce the additions to our existing TDCAF Advisory Committee:

The Honorable Jim Chapman
A. Troy Cotton
Ashton Cumberbatch, Jr.
Norma Davenport
Jack C. Frels
Frank Harmon, III
Bill Hill
Kim Ogg
G. Dwayne Pruitt
Daniel Ronan
Charles Rosenthal, Jr.
Joe Shannon, Jr.
Johnny Sutton

Please join us in welcoming our newest members! We thank them for their leadership of and support to the Foundation. For a complete listing of TDCAF Board Members and TDCAF Advisory Committee Members, please see the masthead on the opposite page.

By Jennifer Vitera
TDCAF Development Director in Austin

Investigators' victory

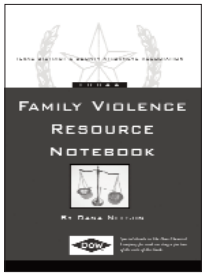
Congratulations again to the Investigator Section on winning our 2010 Annual Campaign fundraising challenge. The section's board was presented with an award at the Investigator School in San Antonio in February 8 (see the photos at right) and also enjoyed a happy hour—courtesy of the Foundation—in their honor.

Thanks again to all of our membership groups for participating in last year's campaign. Our Investigator Board has challenged the Key Personnel and Victim Assistance Coordinators to another fundraising competition in 2011, so watch this column and our website, www.tdcaf.org, for details.

Many thanks

Thank you to Calhoun County District Attorney **Dan Heard** for setting up TDCAF introduction meetings in Port Lavaca. We would also like to thank **Bert Graham,** TDCAF Board member, for attending Foundation introduction meetings throughout the month of January.

We are excited to report that **The Dow Chemical Company** will sponsor TDCAA's new *Family Violence Training Manual*. Dow's contribution will fund the printing and mailing of at least one book per prosecutor's office. Thank you, Dow, for this generous support! Watch the mail over the next few weeks for your office's copy.



Latest fundraising efforts

TDCAA will host a three-day seminar targeting the unique role of prosecutors' office personnel in combating domestic violence. Domestic violence crimes affect all prosecutors—misdemeanor- and felony-level, rural and urban. Information in this seminar is aimed at prosecutors, investigators, and victim assistance coordinators to help them effectively investigate and prosecute domestic violence crimes as well as more compassionately and effectively provide assistance and information to domestic violence victims. TDCAF is reaching out to individuals, corporations, and foundations to support the **Domestic Violence Training Program**. If you know of anyone who might be interested in sponsoring this seminar, please contact me at 512/474-2436 or vitera@tdcaa.com.

Also, our **Intoxication Manslaughter Course** will take place June 13–17 in Corpus Christi. We are looking to partner with sponsors on this year's training. Sponsor levels are Platinum, $10,000; Gold, $5,000; Silver, $2,500 and Bronze, $1,000. Sponsorships will benefit the Annual Campaign Fund.

And last but definitely not least, we will officially kick off our **2011 Annual Campaign** in April. Three of our membership groups (investigators, key personnel, and victim assistance coordinators) have stepped up to challenge each other in their fundraising efforts again this year. We will track results based on dollars

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raised compared to percentage of membership in each of these groups. Stay tuned for more information on how you can give.

Miscellany

In an effort to keep Foundation expenses down, we have been including Tax ID and IRS information on donor thank-you letters. In the past we mailed out an additional receipt with this tax information around this time of year, but from now on, your thank-you letter will serve as your receipt for donations made to the Foundation. If you would like another receipt, please feel free to call me at 512/474-2436 or email me at vitera@tdcaa.com.

I have been selected to participate in a program called Leadership Texas. Through it I will expand my professional associations while investigating major issues affecting the state and nation. During this program I will be traveling to Dallas, the Permian Basin, Corpus Christi, and San Antonio, looking at each city's challenges and opportunities regarding business, economy, education, government, and technology. I plan on visiting our members and offices in these areas along the way. ❇

Please see page 34 for a list of recent gifts.

EXECUTIVE DIRECTOR'S REPORT

And you think *your* cases are tough

A prosecutor's job can be difficult, and I am amazed at how well y'all keep up good spirits in the face of some pretty horrible things that you deal with daily. I think part of that is knowing you are on the right side of them—seeking justice for those who were wronged and accountability for the culprits—and knowing that your work makes a difference. But if your docket gets you down now and again, just remember you don't have the crime problems that they have in, say, Uganda.

By Rob Kepple
TDCAA Executive Director in Austin

Last month I got a message from the Honorable **Ken Anderson**, a district judge in Williamson County and a former DA and president of TDCAA. Judge Anderson had returned from a library-building trip in Uganda, and during the trip had a chance to spend some time with the No. 3 guy in the Uganda Justice Department. The official allowed Ken to review Uganda's annual crime statistics report. The report looked in many ways like one from the United States—the usual tally of murders, robberies, rapes, and other violent crimes.

But the No. 1 problem for prosecutors was a bit of a surprise: human sacrifice cases. The defendants are uniformly wealthy and influential, and the witnesses are too terrified to speak. So even though the incidents of human sacrifice are increasing, prosecutors just can't seem to get a conviction.

I have heard of Texas referred to as "prosecutor Disneyland" before, but this story puts it in perspective for us!

Innocence and a money grab?

More than one prosecutor expressed concern that when the state bumped up compensation for folks who are released from prison with a finding of actual innocence to $80,000 per year of wrongful incarceration, it would create a new industry with an economic incentive—for lawyers.

I don't think anyone begrudges payments to those who spent years wrongfully imprisoned, but at what point does offering them a million bucks begin to distort the legal process? I have recently had calls from prosecutors who worked to free guys from prison because of a messed-up investigation and/or prosecution, only to get a hard sell from a lawyer to change the finding on the record to one of "actual innocence."

And now, the Associated Press is

reporting that the State Bar of Texas has filed a suit against a Texas attorney for misconduct over legal fees into the millions of dollars charged to former inmates. This suit is in addition to suits filed by some of the former inmates themselves.

There are plenty of good folks doing this work—prosecutors and defense attorneys alike—who are fairly compensated and doing it for all the right reasons. The last thing we need is for a financial incentive to invade this truth-finding process.

The journalist privilege and life's little ironies

Many of you followed the events of the 2009 Legislative Session relating to the journalist shield bill. For years prosecutors had steadfastly argued against applying a journalist shield to criminal cases, opining that finding the truth in a criminal court trumped a journalist's prerogative to conceal valuable information that might inculpate or exculpate in the most important of matters, that of a person's liberty. But as you all know, our legislators sided with the guys who own the newspapers and TV stations, and the shield law was passed in the last session.

It is amusing, however, to see how this plays out in real life. Not long ago **Julian Assange**, the founder of Wikileaks, loudly criticized *The Guardian* newspaper for leaking details from confidential police reports concerning his alleged sexual assault of two women in Sweden. Assange accused the paper of leaking the details to undermine his then-pending bail application. (Is anyone else thinking about the goose and the gander?) It's safe to say that prosecutors continue to believe there is a time and a place for everything—pre-trial confidentiality is a key to a fair proceeding, and complete access to the facts, even those held by a reporter, can get the best result when finding the truth really matters.

Batson and DeLay

Many prosecutors watched with interest as the *State of Texas v. Tom DeLay* played out in an Austin courtroom in December. Most political observers wrote that it was a tough case for the State to make: state money laundering charges against the former U.S. House majority leader. But forget the politics. Courthouse observers, like sports enthusiasts, were interested in the match-up between the lawyers. The case pitted legendary defense attorney **Dick DeGuerin** and the crack staff of DeGuerin and Dickson against the seasoned Travis County DA team of **Gary Cobb, Beverly Mathews, Steven Brand**, and **Holly Taylor**.

The most memorable and instructive moment may have come early in the trial. In a move that stunned many courtroom observers, and perhaps the defense team as well, prosecutors challenged the defense team's use of its preemptory strikes under *Batson* and its progeny. The defense struck all six African-American veniremen, and the State was not going to allow it to go unchallenged. In the dust-up that ensued, the court re-seated one of the prospective jurors.

I mention it because for years, prosecutors have talked about the inappropriate use of preemptory challenges by the defense but have shied away from addressing the issue in trial. Perhaps in the interest of justice we should take another look at this and get a little guidance from Gary, Beverly, Steven, and Holly on how they successfully argued it. And from my view in the cheap seats (to close my sports analogy), it seemed like the State offered an early punch in the nose that put the defense on notice that it was going to have a serious fight on its hands.

… and the horse you rode in on!

If there was ever a night to be on Sixth Street in Austin, it would have been the first Friday in January. That's when two cowboys, astride a noble steed and a mule, rode in from the dusty plains to have themselves a night on the town … only to be arrested for DWI. What a picture in your mind's eye, huh? (No word on the precise moving violations alleged in the offense report.) Our two cowpokes ended up in jail, and their trusty mounts spent the night at an Austin animal shelter.

From a prosecution perspective, the case ground to a halt. As the Travis County Attorney **David Escamilla** observed, "We were surprised there is more caselaw on drunken cowboys in Ohio and Pennsylvania than we found in Texas." And not to burst your mental image of our two cowboys, but it turns out they copped to drinking too many cranberry-vodkas and came to town with a plan to lure folks out of the bars to take pictures with the animals. Not exactly the Gus McCrea and Captain McCall of our *Lonesome Dove* image, but, it fits

A morning in the life of a rural prosecutor

I have often wondered how my life both personally and professionally would differ if I lived and worked in an urban setting, although I am not curious enough that I would give even momentary consideration to living in said setting. I have serious doubts that city folk would find my rustic charm appealing. But perhaps some of my cosmopolitan friends have passing interest in life and work in the country? So I take this opportunity to introduce you to my typical morning.

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

I reside and work in a rural district. I actually grew up in Rule, Texas, and to this day, when asked where I am from, people think I say *rural* Texas, not Rule, Texas. I represent a four-county district of Kent, Stonewall, Haskell, and Throckmorton Counties, along highway 380 kinda between Lubbock and Fort Worth. When I say rural, I mean rural. Haskell is the big county with a population just over 4,000. Kent County is the smallest one with a population of 702 good God-fearing citizens and six scumbags. The district is about 120 miles across from east to west, and if you get the urge for a venti decaf soy latte, you will need to allow for at least an hour's drive to Abilene, Wichita Falls, or Lubbock, depending on your current location. But trust me, you would never get the urge or admit to getting the urge for a venti decaf soy latte in this district. No sir, we drink Folgers and we drink it black.

I was born and raised in this district and have lived most of my life here. I can admit that my heritage alone makes the job remarkable: Some would argue that in my formative years, I was a bit of a rascal. I would describe my youth as spirited and well-rounded. I have on occasion heard a defendant or defense counsel point out the old "kids will be kids" argument and suggest that their intimate familiarity with my own youth suggests, perhaps, that when I was a kid, I was *really* a kid. It always helps in this instance to fall back upon the line Val Kilmer uttered as Doc Holliday in *Tombstone*: "You're right about that, but 'it appears my hypocrisy knows no bounds.'"

It would not come as a surprise that defense counsel might touch on a minor transgression some 30 years hence, when I am known by virtually every member of a jury panel. On one occasion a venire person, when asked how well she knew me, responded, "I have changed his diapers." After the trial I thanked her for not saying, "I have seen him naked." You see, that's how rumors get started.

A typical morning

6:00 a.m. The alarm goes off, and I awake to another joyous day. Fifteen minutes later, our middle child, who has just returned from feeding his 4-H pigs, tells me his little Duroc is sick. While I am a licensed attorney, my real skill set and calling is an amateur yet practicing veterinarian. So I am off to the pig pen to inoculate the swine. I return to the house to be advised by my wonderful wife that I smell like "pig poop," and I am making the whole house stink like that again. In complete candor she doesn't state verbatim that I smell like "pig *poop,*" but I am attempting here to portray her as the genteel woman that she is not. Even though I will shower before work, perhaps the first unique aspect of a rural prosecutor is that there is a small yet not insignificant chance you will go to work smelling like the excrement of some species of livestock. Fortunately for you though, you would just smell like a local.

8:00 a.m. As I drop the kids at school, I notice my daughter is walking into the building and talking to a youngster, whom I recognize as the child of a man I sent to the pen last week. In a community this small, almost daily you come into contact with your criminal defendants, victims, and their families. I stress to my kids that they should always be courteous to all, that the vast majority of the people I prosecute are decent people who did not comply with the law, and that they have been punished for their wrong. I have always made an effort to treat people with respect and dignity while doing my job. I don't believe there is any place for a prosecutor to be smug, condescending, or mean-spirited. While I think I have been a hard-nosed prosecutor, I am almost always given

respect and decency when I have an encounter with a defendant or their loved ones in the community.

After completing the carpool, I head over to Cecil's Country Market. Cecil's is a convenience store, meat market, and deli that is a gathering place for coffee drinkers and loafers. I walk in to a chorus of, "Look here! Perry Mason just showed up," and "Are you running for re-election this year?" This is pretty much the same routine three times a week, and I point out I am always running for re-election. One of the patrons informs me that two days ago he went to his barn and someone stole four of his module tarps. I asked him, "Did you call the sheriff?" and he says no. I say, well, call the sheriff, and he responds, "Can't you tell him? I've got to haul some calves to Hollis this morning." I tell him I don't even know where his barn is, and he says, "Yeah, you do—it is on that old place of Herbert's that David used to farm." Oh, OK, I know where that is, but I tell him the sheriff is going to need more information than I can give him, and he replies, "Well, you tell him and if needs anything he can call me on my pickup phone." I agree and don't even find it slightly unusual that the sheriff would automatically have his cell number.

8:30 a.m.–Noon. I arrive at the office, and good Lord it is cold, at least in my office. Our offices were formerly the jury room. When I was elected, the county converted the space into three offices—for me, my investigator, and my secretary. You see, that is the problem. There was only one gas outlet, which is coincidentally in my secretary's office, so the good old Dearborn space heater resides near her. Thus, if you get her office to a Swedish-sauna, life-threateningly-hot temperature, my office is cool but comfy. However, if you maintain her office temperature for her personal safety in the 95- to 105-degree range, my office and my investigator's office are like a home playoff game for the Packers. So I button my coat and get to work.

I call the sheriff before I forget. "Morning, Sheriff. I was at Cecil's this morning and Jimmy had four module tarps stolen two days ago at his barn." The sheriff replied, "Well, I know who did it. I saw Tommy Lloyd yesterday with a cement mixer and some tarps so I stopped him and asked him, 'Who did you steal that stuff from?' He said he didn't steal it but I knew he did. I'll see about it."

Perhaps some of you did not know that carrying tarps was probable cause. Well, according to my sheriff, it is. Second, you city boys can have all that stuff you see on "CSI," but I will take the gut of my sheriff any day for solving crimes—that is, unless my sheriff's gut has recently been coated with a couple of fried burritos from a certain chain of convenience stores common throughout West Texas and New Mexico. Trust me, and I mean trust me on this, I implore you in the name of a properly functioning gastrointestinal system, a man can't rely on his gut for anything after tackling those burritos. How do I know this? I know this because oftentimes that is all there is to eat. If you get a jury out in Throckmorton or Stonewall County past noon and you need something to eat, that is all there is. And "that is all there is" is better than "nuthin'," which is what there is to eat in Kent County. If you have an aversion to fried burritos or are personally repulsed by Vienna sausages, you probably don't need to be a rural prosecutor. All the healthy food choices throughout my district are undoubtedly the foundation for my slight build.

After calling the sheriff I head out to Throckmorton for a docket call. It's after lunch and I've got a drive ahead of me, so you'll have to wait until the next issue to hear how docket and the rest of my afternoon go. Stay tuned! ❇

Great news as we go to press!

The Texas Attorney General is prioritizing funding for coordinator and liaison grants and has posted application information on its website at www.oag.state.tx.us/victims/grants.shtml. Eligible applicants who complete the registration and application process may be awarded up to $42,000 per year for the next biennium, which is September 1, 2011, through August 31, 2013. The Victim Coordinator Liaison Grant program's purpose is to fund mandated positions described in the Texas Code of Criminal Procedure, Articles 56.02 and 56.04, specifically Victim Assistance Coordinators in prosecutor offices and Crime Victim Liaisons in law enforcement agencies. The intent of these grant funds is to encourage victims to cooperate with law enforcement and prosecution by providing essential information about the criminal justice system, social service referrals, and post-adjudication processes. The funds are also used to promote and educate the community and other professionals about victim rights and services to identify crime victims and provide the needed services.

By Suzanne McDaniel
TDCAA Victim Services Director

There are two important deadlines to remember. Applicants must register at www.oag.state.tx.us/victims/grants.shtml before 5:00 p.m. CST, on Monday, March 14, 2011. After completing registration, you may download the application and submit it in the approved manner and format by 5:00 p.m. CST, Friday, April 1, 2011.

For more information, please visit the Office of the Attorney General website at www.oag.state.tx.us/victims/grants.shtml, or call Jennifer McShane Ferguson at 512/936-1278. You can also contact me at mcdaniel@tdcaa.com

Timely articles in this issue

The weather outside may have been frightful the first weeks of February, but it is finally clearing. What *isn't* clearing is the criminal justice caseload and what is expected of crime victim assistance coordinators. Shrinking budgets and resources have piled on the duties for coordinators. This issue of the journal contains two articles that highlight some of those duties. Stacy Miles-Thorpe in the Travis County DA's Office offers the background behind the passage of Senate Bill 560 which provides for juror counseling via the coordinator. As she notes, the measure was enacted without funding. Travis County and Dallas County have developed inexpensive measures to proactively address this mandate.

Kudos to Adrienne Frazior for her cover article on Continuous Family Violence prosecution, where she notes that the prosecutor and coordinator should work as a team. The coordinator usually has earlier and more consistent contact with the victim and can provide important information including current contact data. I also believe that this kind of contact establishes trust in prosecution and can prevent dropped charges. The article is also timely as we received two calls about going forward without a victim on the day I reviewed it. Also please remember that if the victim does refuse to cooperate, you can contact the Office of the Attorney General's Crime Victims' Compensation Division, and that office will end benefit payments.

Teen dating violence resources

There is a growing understanding that violence within relationships often begins during adolescence. Each year, about one in four teens report being the victim of verbal, physical, emotional, or sexual violence. Abusive relationships can impact adolescent development, and teens who experience dating violence may suffer long-term negative behavioral and health consequences. (This information is from *Teen Dating Violence: A Closer Look at Adolescent Romantic Relationships*, National Institute of Justice, 2008).

To help bring greater awareness to the dangers and consequences of teen dating violence, the National Criminal Justice Reference Services has created an online compilation of publications and resources on the topic at www.ncjrs.gov/teendatingviolence.

2011 National Crime Victim Rights Week

We have begun meeting with representatives of statewide organizations

to start planning the annual observance of Crime Victim Rights Week in Austin the week of April 10–16. These meetings always provide a chance to catch up on current policies and share problems and solutions. I'm sure your experience is much the same as you get together with law enforcement, advocacy centers, and social service agencies to prepare for your community event.

To help you plan your local observance, the Office for Victims of Crime has posted its online resource guide at ovc.ncjrs.gov/ncvrw2011/index.html. The guide contains everything you need to issue a press release, request a proclamation, or host an event. It even contains sample speeches, quotes, and camera-ready art, all in a user-friendly format. Please let us know about your plans for Crime Victim Rights Week and send in your photos so that we can share them in future issues.

Visionaries wanted

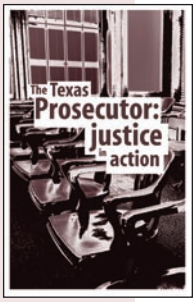
First there was the President's Task Force on Victims of Crime Recommendations in 1982. The Department of Justice hosted seven national hearings to assess the need for victim services. We hosted one of the hearings in Houston with testimony from then-Judge Ted Poe. These recommendations led to the establishment of the Office for Victims of Crime, the Victims of Crime Act, and VOCA funding. It should also be noted that the judge is now Congressman Judge Poe and co-founder of the U.S. Congressional Crime Victim Caucus. The 1980s brought an update on the recommendations, "New Directions for the Field." Several Texans contributed to this effort and helped established guidelines and standards for victim services.

Now the Department of Justice's Office for Victims of Crime is launching "Vision 21" to "expand the vision and impact of the crime victim services field." In simple language, authorities want to make sure that our resources are used in the best way. Four national programs have been awarded grants to conduct a comprehensive analysis of the current state of the field. A fifth grantee will synthesize the report and recommendations, including a blueprint for a demonstration project to implement those recommendations for OVC and the broader crime victims field.

Your input is invaluable and much-needed. Texas has a lot of experience with making lemonade from lemons for crime victims, and it's easy to share that experience. You can learn more about the project and email your comments at ovc.ncjrs.org/vision21/index.html. As always, please give me a call at 512/474-2436 if you have any questions about Vision 21 or any other topic. I really enjoy hearing from you. ❇

News Worthy

Prosecutor booklets available for members



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

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

Photos from our Prosecutor Trial Skills Course in Austin

Photos from our Investigator School in San Antonio

Award winners from Investigator School

Top photo: Marletta Scribner, CDA investigator in Collin County (middle), was honored with the Chuck Dennis Award. She is pictured with Charlie Vela, CDA investigator in Hidalgo County and Investigator Board Chair, and Maria Hinojosa, CDA investigator in Denton County.

Middle photo: Brent Robbins, CDA investigator in Denton County (left), was awarded with a PCI by Bob Bianchi, CDA investigator in Victoria County and Investigator Board member.

Bottom photo: Past winners of the Chuck Dennis Award. Congratulations to everyone!

July 1 deadline for PCI & Oscar Sherell noms, scholarship apps

Applications for the TDCAA Professional Criminal Investigator Certificate (PCI) are now accepted. The deadline for the certificates, which will be awarded at the TDCAA Annual Criminal and Civil Law Update in September, is July 1. The application and Standards for the certificate can be found at www.tdcaa.com; search for "PCI."

We are also currently accepting nominations for the Investigator Section Oscar Sherell Award, which goes to an investigator with outstanding service to the association. Nomination forms can be found at www.tdcaa.com. Search for "Oscar Sherell." Questions about the PCI or Oscar Sherell Awards can be directed to Charlie Vela at charlie.vela@da.co.hidalgo.tx.us.

Applications for the Investigator Section scholarship are now accepted. The deadline is July 1. At least one $750 scholarship will be awarded annually; children age 25 and younger under the legal guardianship of a current TDCAA member are eligible. See all guidelines and download the application form at www.tdcaa.com (search for "scholarship"). If you have questions, email Eloy Garcia at garciaeloym@yahoo.com. ❊

Who is your mentor?

Donna Hawkins
Assistant District Attorney in Harris County

My mentor would probably surprise many but not the people who know him well. Bill Hawkins has prosecuted criminals for over 25 years, and I am constantly amazed at his total dedication and excitement for a job that has never diminished. Truth be told, Bill is my husband, and I consider him one of the finest attorneys (and men) I have ever met.

A few years back, Bill had to prosecute a 10-year-old boy charged with murdering his father. It was a particularly senseless crime and occurred when the boy shot his dad (who had just picked him up) through the back of the driver's seat of the car. The victim was a local doctor, fairly prominent, and along with outrage over his murder, there were as many detractors that felt the child should not be punished. Many felt that a boy of 10 could not really be responsible for his actions. Throughout the lengthy investigation and trial, Bill truly attempted to get to the heart of the matter and determine why and how a young boy could commit such a horrific crime. He also met extensively with the boy's brother and grandparents. In fact, they became so close that Bill actually made a point of taking them all out to a car show once a year after the trial to catch up. This made worlds of difference in the life of that young boy.

Bill has prosecuted many people who have committed truly egregious crimes. One young couple broke into an elderly woman's home, beat her to death with a baseball bat, and stole her car—before setting her house on fire in an attempt to cover up the crime. Bill's passionate argument resulted in maximum sentences for the dangerous pair.

Bill prepares for trial like a first-time pilot inspecting an airplane—extremely thoroughly and intensely. He spends hours meeting with every witness that will be called to testify to prepare them for the interrogation ahead. I have watched him argue with police officers and tenderly hold parents who lost a child. He believes that each case he tries deserves his total dedication and attention.

He has sent 13 people to death row. Every case—every victim—has taken a toll on him. But what truly amazes me is that he still really sees the good in the world and the people around him. Many times as we are driving along the Houston roadways, he will point out an amazing sunrise or particularly beautiful city view. He faces troubled times and road bumps in life as temporary problems. Bill has the extraordinary ability to see what is really important in life—family, love, doing good deeds, and appreciating the journey. For that, I proudly call him my mentor.

Sara Spector
Assistant County & District Attorney in Ellis County

My mentor, Leona "Lonie" Jaquette, passed away several years ago; however, she continues to inspire me to this day.

Several years ago, while I was an assistant district attorney in Bastrop County representing TDPRS, Lonie was the regional attorney who covered our area. She was a tireless advocate for the abused and neglected children of Texas. Not only did she advocate for these voiceless victims in the courtroom, but she was also an adoptive mother herself.

Whenever I was frustrated with the system or needed a shoulder to lean on, Lonie was always there for me. I watched her fight for these lost children with a quiet tenaciousness that was inspirational to me. Lonie never rested on her laurels. Once a victory was had, she moved on to the next good fight.

When she was diagnosed with terminal cancer, she never let it faze her. She never complained through the chemotherapy and treatments. Although her body was failing her, she continued to work from her home, for the cancer never robbed her of her intelligence and integrity. I remember the last time I spoke to Lonie, I asked her opinion on a termination case I was about to try. She shared with me her wisdom and encouragement. She told me she was feeling fine. Two days later I received an e-mail stating she had passed away.

To this day, I still prosecute child abuse cases, and yes, I have gone through my share of burnout. But whenever I start thinking it is too much for me to handle, I recall Lonie's tireless dedication to the children of Texas and somehow I manage to persevere.

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Kevin Yeary
Assistant Criminal District Attorney in Bexar County

Who is my mentor? Well, it isn't one single person for sure. I have been blessed by so many good mentors that I could never hope to list them all here. But I can tell you about some of those who've led me to and through this career so far.

The first lawyer I ever knew was Mr. Horace Hall of Laredo. He's the father of one of my childhood best friends. I might not have gone to law school but for his example.

Probably the biggest influence on my choice of career was the late Judge Bill M. White. He hired me out of law school in 1991 to serve as his briefing attorney at the Texas Court of Criminal Appeals. He planted me in the soil of criminal appellate work, watered me, and let me grow. Even when I left his chambers to work in civil litigation, he encouraged and inspired me.

I spent the next three years of my career working with two of the best civil lawyers I know, Mike Hedges and Bob Walsh of San Antonio. They shared with me their experiences and taught me how to practice law. I'll never forget them.

In 1995, I joined the Dallas DA's office and became an appellate prosecutor. My career as a prosecutor has been filed with mentors. Besides having worked as a law student intern for two great elected DAs, Jose Rubio and Fred Rodriguez, I've now also worked as an assistant prosecutor under lots of other great elected DAs, including the late John Vance, John Holmes, Steve Hilbig, and Susan Reed. Each one of these electeds has had one thing in common: courage. It's easy to be a good assistant when you have a courageous leader, and they have all been that for me.

Several other people have mentored me as well, both toward and through this career. Beth Taylor, who hired me as an intern at the Bexar County DAs office; Sue Korioth, my former appellate section chief in Dallas County; and Ed Shaughnessy, my first appellate section chief in Bexar County, taught me to have a passion for prosecution. Sr. Ann Semel, one of my undergraduate professors at St. Mary's University; Lori Ordiway, a coworker from my days in Dallas County; and Roe Wilson, the chief of writs in Harris County, taught me to strive to write well. Alan Curry, my supervisor in Harris County, and Alan Battaglia, my second chief of appeals in Bexar County, taught me the importance of a good work ethic. And my late good friends Matthew Paul, former State Prosecuting Attorney, and Dan Thornberry, a former coworker in Bexar County, taught me to love the law.

I have had many more mentors in my life than I have mentioned here, and I'm sure I will have many more. I've been blessed to be surrounded by so many talented and generous teachers and sources of inspiration. I am grateful to them all.

David C. Newell
Assistant District Attorney in Harris County

It always makes me nervous to single out one person for their impact upon my life because I've been influenced and inspired by so many different people and I wouldn't want to insult someone by omission. Indeed, I could simply list them all, but then I'd run out of my 500-word limit without telling you why I think they are awesome or da' bomb.

But if there is one person who got in on the ground floor and set the foundation for the lawyer I have become, I'd have to pick John J. Harrity, III, Chief of the Appellate Division in Fort Bend County. John is one of the smartest and most meticulous lawyers I have ever met—indeed, he borders on paranoid, but in a good, appellate sort of way. He chases down every theory and leaves no questions unanswered. And when I met him as a new prosecutor, he quickly impressed upon me the value of that level of preparation. But more than that, he was also patient and humble. (Well, he's still those things. It's not like he's dead, but you know where I'm coming from.) He always included me in discussions about the toughest legal issues that he and the office were facing. When he disagreed with my analysis, he always took the time to explain why I was mistaken and what I might have overlooked. And when he agreed, he was always very quick to back me up before more experienced prosecutors. Kind of like Al Pacino did for Johnny Depp in *Donnie Brasco* except without all the death and curse words. He gave me confidence when I didn't have it and taught me to be humble when expressing my opinions.

I've changed offices since working with him, but I still call him to run ideas by him, and I am always extremely flattered when he calls me up to ask for my opinion about an

issue he's facing. As I have told him before, I would not be the attorney I am today if not for the care he took to guide me. And as he often responds, "You are not my fault."

Carolyn Olson
Assistant County & District Attorney in Colorado County

I started working as a criminal prosecutor in Colorado County in late 1997. Ken Sparks's predecessor actually gave me the job in the Colorado County and District Attorney's Office, but when Ken took office in 2001 he was kind enough to keep me on. What a gift that has been! I have now been in the office for 13½ years, and I owe so much to Ken. Not just for letting me keep my job, but for mentoring me to become the best prosecutor and attorney I could be.

Ken Sparks is an inspiration. He is a workhorse and the ultimate manager—organized, driven, ethical, dedicated, compassionate, and of course, extremely smart. When there is a problem, he solves it, right then and there. When there is a project, he works diligently and tirelessly until the project is not only complete, but also as perfect as it can be. He does nothing halfway. He always makes time to get any job done. He is involved, both in our local community and the prosecutors' community, giving hours of his time and talent. He is always accessible and there for me when I have a question, a problem, or when I just want to pick his brain.

Many people who work in criminal law in the Houston area seem to know and respect Ken, either from when he worked in the Harris County DA's office or in private practice. Robert Scardino Jr., came to Colorado County representing a misdemeanor defendant just last week. He asked if he could tell me "a Ken Sparks story." (How many criminal defense attorneys have I heard say that over the last 10 years?) Mr. Scardino said when Ken was a new prosecutor in Harris County, he went up against him in a criminal jury trial. Mr. Scardino, having a reputation for being a pretty good trial attorney at the time, thought to himself he would have no trouble beating this skinny, young, unknown prosecutor with round eyeglasses. "Well," Scardino told me, "Ken Sparks kicked my a** up one side of the courtroom and down the other." He had never seen anyone who knew the law and evidence so well or was so thoroughly prepared and organized. After that experience, Mr. Scardino said, if he knew Ken would be trying a case against him, he would immediately assign it to another attorney.

Ken has taken an unknown rural prosecutor's office and turned it into a professional prosecutor's office. He has written the *Offense Report Manual for Patrol Officers*, published by TDCAA; has been and continues to be involved in TDCAA's activities, whether working on a committee, giving speeches, or sharing his extensive knowledge; has created and gotten state legislation passed; and has done numerous other activities and projects too lengthy to mention here. In each he always includes and encourages my opinion and participation, which has been invaluable.

One of Ken's greatest attributes is that he never takes full credit for anything he does, always praising his staff—the other assistant attorney in the office, Jay Johannes, and me—for our dedicated work. But, truth be known, any successes are due to the brilliance, hard work, and leadership of Ken Sparks. ❇

Continued from the front cover

Texas prosecutors' first use of the Continuous Family Violence law (cont'd)

Duke jumped head first through the passenger-side window and began punching Mary in the chest. Wesley managed to get out of the car and call 911.

When Officer Garrett Wolfhagen of the Conroe Police Department arrived on the scene, he recognized Mary from a call he responded to at the women's shelter just days after the first assault. There, he had seen her battered face and had asked one of the shelter employees what her story was. He learned that her boyfriend was responsible for the injuries. When he saw her again at the Motel 6, he noticed fresh bruising on her right arm, and she confirmed that Duke assaulted her both times. Duke was then arrested and charged with Continuous Family Violence.

Challenges ahead

In preparing for trial, we faced multiple obstacles, most of which were completely unrelated to the fact that this was what we believe to be the first Continuous Family Violence case to be tried in Texas. First, our victim, Mary Cox, was MIA. I met with her for the first time when she came to the DA's office to file her affidavit of non-prosecution on December 3. When it was clear that she did not want to speak to me as the prosecutor on the case, victim assistance coordinator Pam Traylor stepped in. We had noticed that Mary's cell phone was ringing constantly during the meeting, and Traylor casually asked who was calling. Mary told her, "It's him. He wants me to get this done." Traylor got Mary's cell number, and we quickly made a request for all recorded jail calls to that number.

In those jail conversations, Duke could be heard pressuring Mary into signing the affidavit, even ordering her to miss work and hitchhike to the DA's office. He threatened that he would "sign up for 10 years" if she didn't get it done and that she would never see his face again. Mary delayed for several months but finally signed the affidavit a month before the trial date. Through those same jail conversations I learned that on January 3, just one day before docket call, Mary checked herself into a treatment center for depression. Duke's response to hearing her tearful confession was, "Who's going to put money on my books?" followed by a demand that she walk out of the center and get herself to the courthouse to testify that he never touched her.

In the preliminary stages of trial preparation, with the mounting problems surrounding our victim, we extended a minimum two-year offer to Duke. I was actually relieved when he rejected it because I knew then that I could be satisfied with whatever result we received in court.

As we got closer to trial, we were preparing to go forward without Mary. I was pretty certain her testimony would not be helpful to the State anyway because she had been so hostile during our meeting. In addition, I knew that she had been visiting Duke every week while he was incarcerated in the Montgomery County Jail as I had run into her once when I was leaving the facility. On the first day of trial, January 10, we made a last-ditch effort and reached out to the Waller County DA's office because Mary's last known address was in Waller County. An investigator went to the address, and there was a car on the front lawn with a For Sale sign on it. He called the number, and the property owner gave him the name of the treatment center Mary had checked into. A call to the treatment center revealed that Mary had been transferred to a lockdown facility in Houston because of a nervous breakdown that very day.

The trial

As expected, this was the main theme of the defense case: Where was Mary Cox? We faced numerous *Crawford* challenges and were unable to get in many of Mary's statements to law enforcement at the scene of either assault. Ultimately we presented our case through other evidence, including the observations of officers who responded to each assault, 911 tapes, EMS records, and shelter workers who witnessed Mary's injuries and behavior. Officer Wolfhagen gave us the best testimony because he had actually observed injuries from each assault and was the key in linking the assaults together.

We coupled this evidence with expert testimony about the cycle of violence. Gale Walker from the Montgomery County Women's Center testified to the signs of domestic violence such as fear, minimizing of injuries, and lack of cooperation with prosecution. When jurors finally saw photos of Mary's bruised, swollen face and heard her abuser dominate and control her on the recorded jail conversations, they understood why Mary Cox wasn't in court to testify.

Probably the biggest challenge in any domestic violence case is getting the jury to care about your victim, particularly when it seems like the victim herself doesn't care. This was my first assault case and also my first case with a victim. As a new prosecutor I started in a specialized unit and then transferred to the felony division. Having never prosecuted in a misdemeanor court, I never had the opportunity to try Class A assaults. Because of that, I listened to numerous other prosecutors' war stories involving jurors who acquit because the victim isn't sympathetic. This was certainly a challenge for us because Mary Cox had a drinking problem, and I knew that evidence would come out that she had been drinking each time she was assaulted. I knew the defense would use it to insinuate that she was either not credible or was somehow at fault for the assaults.

To combat this attack, we took a two-part approach. First, I voir dired heavily on the specific issues in our case: an unsympathetic victim and the public's perceived apathy towards domestic violence. We did this through the "one courthouse for everyone" example: If jurors could agree that even someone with a long criminal history and a checkered past deserved the protection of our laws, then they could overlook the problems our victim had. To get our jury thinking about domestic violence as a community problem, I asked them about their experiences with domestic violence in their own lives. I gave examples to get them to consider, for example, the child who bullies their son or daughter at school and where this behavior is learned, or the neighbor who runs to their house in the middle of the night to call 911. They agreed that domestic violence is a community problem.

Second, we again relied on expert testimony on domestic violence to create a background for discussing the specific issues in our case. Gale Walker from the local women's shelter testified that it is not uncommon to see victims of domestic abuse self-medicating with drugs or alcohol to cope with abuse. This gave our jury some context with which to understand Mary's drinking. Our expert also gave us a great theme for punishment: On average it takes seven times before a victim of domestic violence leaves her abuser—or is killed.

The statute

Enacted in September 2009 pursuant to the passage of House Bill 2240 by Rep. Tryon Lewis (a former state district judge), the Continuous Family Violence statute helps prosecutors overcome some of the obstacles in the typical Class A assault family violence case. For example, jurors are able to hear evidence of multiple assaults so they can understand that domestic violence doesn't happen in a vacuum of a solitary instance. By making two or more assaults on a family member in a 12-month period a third-degree felony, prosecutors can get lengthy sentences to send a message to their communities that domestic violence is taken seriously.

Modeled after the Continuous Sexual Abuse statute, Continuous Family Violence requires the State to prove every element of §22.01(a)(1) for each assault and that at least two assaults occurred within a 12-month span. However, jurors are not required to agree unanimously on the exact date each assault occurred, nor on what parts of the defendant's conduct constituted the assault. Essentially, the statute gives latitude to jurors to disagree as to some of the evidence yet still convict.

In our case, we did not have the same type of evidence in the second assault at the Motel 6 as we did in the first assault at home. Because Mary had been transported to the hospital after the first assault, we had EMS and medical records to support her injuries; authorities at the womens' shelter also took photos of her as part of their intake procedures the morning after the first assault. However, for the second assault, the 911 caller had—thankfully—called police before the assault became as brutal as the first. Therefore, we did not have visible injuries or any type of records for medical treatment.

The good work of Officer Wolfhagen coupled with the broad language of the statute saved the day! At the scene of the second assault, Wolfhagen noted in his report and on video that he saw fresh bruising on her right arm and he asked Mary if Duke had caused it. In trial we

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directed the jury back to the EMS records indicating that her *left* arm was bruised in the first assault. Because of the statute's wording, we were able to argue to the jury that even if they didn't believe Duke had assaulted Mary in front of Charity Wesley that night at the motel, they could believe that he caused the bruising on her right arm in the days before Wesley called 911.

Some defense attorneys have expressed concern that the statute allows the State to introduce evidence of extraneous unadjudicated offenses, but this just demonstrates a misunderstanding of the law. (Defense counsel in our case did not even mention it, but I've heard others discuss it.) The introduction of evidence of multiple assaults is likened to evidence of multiple sexual acts under the Continuous Sexual Abuse statute and must be proved beyond a reasonable doubt. However, one significant difference in the statutes is the time restriction placed on each. Under the Continuous Family Violence statute, the State has to prove that the two assaults occurred within a 12-month period; there is no need to show that the two assaults occurred more than 30 days apart as there is under the Continuous Sexual Abuse statute.

In Duke's case, jurors deliberated for two hours and returned a guilty verdict.

Punishment

Duke elected to go to the judge, the Honorable Lisa Michalk of the 221st District Court, for sentencing. I was satisfied that the evidence elicited at trial alone would support a lengthy sentence, but Duke had a prior felony conviction and 10-year sentence for robbery that enhanced the punishment range to a second-degree felony—a significantly higher enhancement than the 90-day minimum jail sentence that the robbery conviction would have provided for a mere Class A misdemeanor assault.

To get us into that upper range between 10 and 20 years, I asked the judge to consider the testimony of our witnesses who were affected by Duke's violent behavior. I pointed her to the Montgomery County Women's Shelter employee who testified that she was so traumatized by Mary Cox's injuries that she contacted her supervisor for emotional support after finishing up Mary's intake paperwork. I also pointed to the two independent and completely unbiased women who called 911. These were all people who demonstrated once again that domestic abuse is a community problem. Finally, I told the judge we know that it takes seven times before a victim leaves her batterer. I asked her "to decide how long it is before Bobby Joe Duke, Jr. assaults Mary Cox again or kills her." The defense presented no evidence and argued again that Mary Cox wasn't there to support the State's case. The judge sentenced him to 15 years.

What we've learned

As prosecutors we are exposed to the seedy underbelly of society on a day-to-day basis, and we sometimes become immune to it. The average juror's threshold for the pain and mistreatment of others is lower than the average prosecutor's. While many people encouraged me to plead out this case because of our victim's history of substance abuse and refusal to cooperate, the jury seemed to ignore these issues completely. It is important to remember that our jurors won't always react to cases the way we do.

In a domestic violence case, victim assistance coordinators and prosecutors must work as a team. No one cares more about domestic violence than the victim assistance coordinators who meet with victims and accept the affidavits of non-prosecution every single day. It's good practice for victim coordinators to take photos of victims when they come in to sign the affidavit. Often we do this only when we notice fresh bruising on a victim, but if the defendant is currently in jail (or actually adhering to an emergency protective order or conditions of bond) you may have a compelling picture to demonstrate to your jury what the victim looks like without the abuser in her life. When Mary Cox came in to sign her affidavit, she was almost unrecognizable from the photos after her assaults. Photos of a healed victim are just another way to show your jury the effects of domestic violence.

Also, ask victim coordinators to get current contact information from victims including a cell phone number, if possible. Victim coordinators are able to develop a close relationship with victims of domestic violence that can be difficult for the prosecutors on a case. Once you have the victim's current phone number, request all the recorded jail calls to that number. If you are still relatively close to the date of the arrest, you may get great conversations where the defendant is apologizing to the victim. But even calls months after the arrest can be helpful if you set the stage for them with expert testimony about the control

an abuser exercises over his victim. And, of course, calls pressuring the victim to sign the affidavit are worth their weight in gold.

When life returned to normal after the trial was concluded, Pam Traylor, our victim assistance coordinator, was returning voicemails when she discovered that Mary Cox had contacted her the day we finished punishment to see what the result was. I never doubted that she was subjected to terrible assaults at the defendant's hands, but I did wonder why she didn't support him at trial the way she had said she would in the jail conversations. This voicemail, plus the timing of her entrance into a treatment center, really shed light on what she was going through. It was clear to me at this point that Mary hadn't really wanted this case to go away—she just couldn't face it.

As prosecutors we want to present the cleanest, simplest case to a jury, but domestic violence is ugly and complicated. With the Continuous Family Violence statute, the legislature has given us a remarkable tool to break through the perceptions about family violence and show jurors that it doesn't happen just once. The new law allows us to present the whole ugly picture because victims don't call 911 the first time they get hit; they call only when their life is in danger. If we take these cases seriously, as the legislature has demonstrated we should, we can get tougher sentences to ensure that it doesn't take seven times before a batterer is held accountable for his abuse. ❇

What is the State Prosecuting Attorney's Office?

Why, we're glad you asked! The State Prosecuting Attorney represents the State before the Court of Criminal Appeals, either individually or with the assistance of the district or county attorney. SPA attorneys are happy to help local prosecutors with PDRs, briefs, and oral argument in the CCA, and answer your questions about trial or appellate issues. Following Jeff Van Horn's retirement in December, the CCA appointed Lisa McMinn, formerly Mr. Van Horn's first assistant, to be the next State Prosecuting Attorney. Two new assistant SPAs have since joined the office: John Messinger, from the McLennan County DA's Office, best known for *Brooks v. State*, where he convinced the CCA to do away with the *Clewis* factual sufficiency standard, and Michael Mark, from the Liberty County DA's Office, who has been a prosecutor for over 15 years, with both trial and appellate experience. He has also served as a city council member and an associate municipal judge. To learn more about the office, visit www.spa.state.tx.us. ❇

Lisa McMinn, State Prosecuting Attorney, is in the middle, with assistant SPAs Michael Mark on the left and John Messinger on the right.

A missing tool in DWI trials

Behold, the ubiquitousness of PowerPoint. If you have a fifth grader, he will present his important reports in school with PowerPoint.[1] If you attend a civic group luncheon, the presentations are probably in PowerPoint. If you go to a CLE seminar, there will be PowerPoint. Anywhere you find education, training, or group communication, you will see this tool. Well, except for the stuff that doesn't matter, like criminal trials. This important means of presenting a case is sorely missing from courtrooms, and I am writing in the hopes of changing that.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

The message we send to juries when we make presentations in trial without up-to-date methods is that the subject of the trials is not worthy of good presentation. When we lose any chance to communicate with juries, the result benefits the defense.

Objections to PowerPoint

I know the objections are already forming. Let's look at them, I will refute them, then let me provide some tips on how to use PowerPoint.

1 **PowerPoint and computer equipment can break or malfunction.** Any trial attorney knows that the more complicated we make a presentation, the more that can go wrong. But the worst that can happen, if we are honest with ourselves, is that we will have to do a trial just like we do now, without PowerPoint. Secondly, in using something new, attorneys will have to leave their comfort zones and actually touch technology. Your fifth grader can do it; it's time you learned too. Practice and planning are essential to doing something new. You practice your close and you practice with your witnesses—you will have to practice using PowerPoint. (Speaking of witnesses: If we eliminate things that go wrong and don't work right, we should get rid of witnesses long before we get rid of PowerPoint.)

2 **New things are hard and judges don't like new things.** Sure, new things are hard. Get over it. Sure, new things scare judges. Get them over it. The defense will object that "PowerPoint is more prejudicial than probative." Take a careful look at Rule 403. Does PowerPoint create unfair prejudice or confusion or mislead the jury? No—as long as you make sure that everything that goes into your presentation is not objectionable to talk about. Most of what goes into your presentation will be shown to the jury, just not as well. And while it will have an impact of prejudice, it is not an unfair impact; PowerPoint actually clarifies points and does not obfuscate (that's what talking lawyers do).

Secondly, does it create "needless presentation of cumulative evidence?" At first blush PowerPoint seems cumulative, but actually it allows simultaneous presentation of lots of different facts and massively speeds things up. My experience in Lubbock County was that once one judge used it, the remainder demanded it within months.

Prepare the court for the shock. Ask the bailiff to work with you in setting it up in the courtroom; call on his expertise and then implicit ratification. Consult with your judge and make sure she can see your presentation from the bench. Make handouts for the court reporter, the bench, and defense counsel. Make it smooth, and you'll overcome any objections (official or otherwise).

3 **I am a good enough speaker that I don't need PowerPoint.** Vanity, thy name is Old Prosecutor. Oh, I know, the greats didn't use PowerPoint. That is not what made them great. It was an obstacle they overcame, not a obstacle they avoided. If they practiced now, they would have both PowerPoint and laptops with Wi-Fi in the courtroom. They would also no longer smoke cigars in front of the jury. Things change. Great speakers are aided by the subtle and minimal use of visual prompts. The media uses it, politicians use it, entertainers use it, even preachers use it. Bad speakers *overuse* it, and that's because they are bad speakers.

4 **It is a flash-in-the pan gimmick that reduces my credibility.** Nope, PowerPoint is not going away. Many members of any given venire panel are regularly exposed to it and have even used it in school. Several see it every Sunday in church. Older jurors have helped their kids with it. Secondly, when you count only on your jury's ears and abandon their eyes to pick up what you're trying to convey at trial, you lose the attention of all jurors to a degree and some jurors entirely.

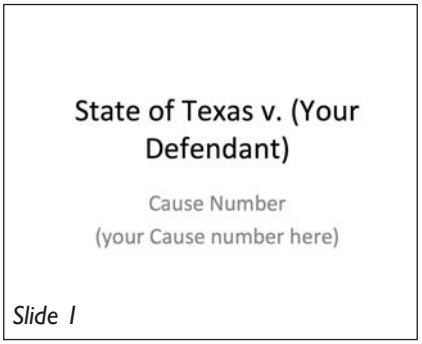
5 If I use it, so will the defense. Communicating clearly and accurately is the realm of prosecution. If, during trial, a jury is lost, inattentive, or confused, it rarely if ever helps the State. Clear communication helps the side relying on truth and facts, not misunderstanding, conjecture, or doubt. If a tool "clears things up," it is not for the defense—if they beat you with PowerPoint, they were beating you anyway. Never plan your trial around what the defense will do.

Finally, my experience has been that defense counsel adapts more slowly than we do.

Tips

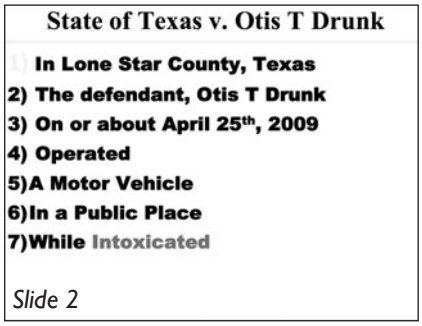
Far brighter folks than I have discussed the "how tos" of creating visual trial presentations. The one thing they all agree on, and I do to, is that less is better. The first time you use PowerPoint in trial, shoot for just three or four slides—and make them count. My old trial partner, George Leal, was a fanatic for visual presentations long before PowerPoint. Every trial he prepared for he made sure he had flip charts for voir dire, maps and charts for direct, and posters for close. He rarely had more than four or five. Like every trial tactic and every new thing, follow the K.I.S.S. rule: Keep it simple, stupid. In addition to simplicity:

1 Use cover slides to keep track of your presentations. Your document will automatically be named what you put on a cover slide, so put the case name and cause number on the cover slide of your PowerPoint. (see slide 1). Make a brand new presentation for every trial. I'm telling y'all this as someone who once introduced photos of the wrong burglary in trial. Create it new every time; don't work off of an old file. Now this does not mean you can't carefully cut and paste. Just remember the "carefully" part. It is also never a bad idea to keep a copy of everything you do in a trial.



Slide 1

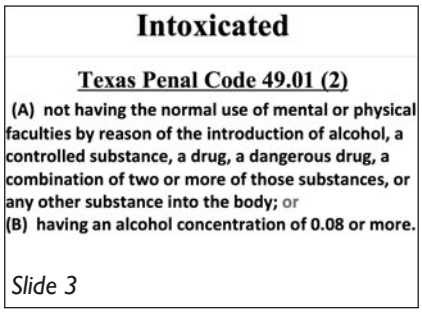
2 Element charts were made for PowerPoint. The element chart is a basic staple of the State's voir dire. Covering the elements says we are thorough, prepared, fair, and knowledgeable. Showing it as well as talking about it demonstrates that we care that the jury understands it. An example of a DWI element chart is below. When the jury sees *and* hears what the issues are in trial, these issues are set in stone in their memories. Never pass up the chance to reinforce such parts verbally and visually.



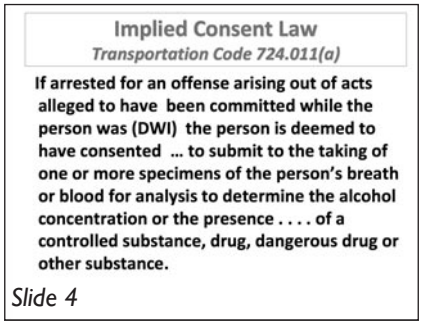
Slide 2

Use this slide to emphasize elements that will be in contest. In slide 2, above, the word "intoxicated" is set out in red (I know it's gray in the photo, but trust me that in real life it is fire-engine red). The bright color helps me explain that this element will likely be an issue in trial. Reveal each element one at a time with a "text animation." I suggest simply using "appear" rather than anything fancier—remember that less is more.

3 Don't read a statute without letting the jury read along. Remember I told my DWI jury the issue was intoxication? Well, now I better tell them what intoxication means under the law in Texas. They need to read the law. And while it is good to hear it, it is much better to hear and see it at the same time. In DWIs we have to explain the unexplainable: implied consent. Read them the law, but more importantly let them read along in PowerPoint (see slides 3 and 4). As you become more comfortable in PowerPoint, animate the text as you go to help your explanation. Almost every trial will include a legal definition or explanation, so let the jury read



Slide 3



Slide 4

Continued on page 22

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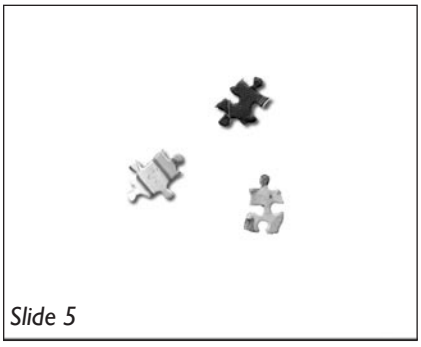
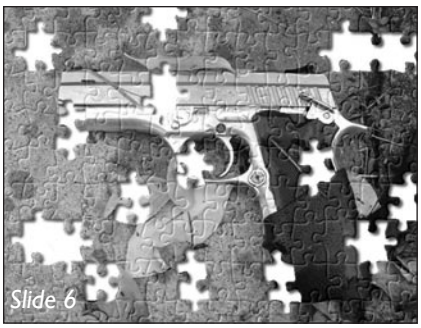
along. Creating this slide is easy. Find the statute online here: www .statutes.legis.state.tx.us. Select the part you want, copy it, and then paste it on your slide. Couldn't be easier.

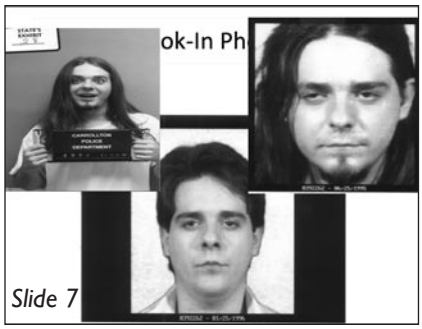
4 When you have a great story, the book should have pictures. Imagine this from a State's attorney at trial: "Ladies and gentlemen, 'beyond a reasonable doubt' is not beyond all doubt. When you work a jigsaw puzzle, at first you don't know what the picture looks like. But as you go, it becomes clearer, and sometime before you put that last piece in, you know what the picture is. You know beyond a reasonable doubt. Sure, a couple of pieces fell on the floor or were hidden by the family jokester, but you know. Trials are like that too. Sure, some minor pieces may be left out, and some small details may be unclear—that's unavoidable. But you know without a doubt what the picture is."



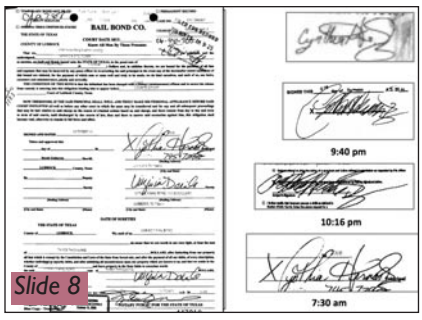


This is a great voir dire story. But it works better with pictures. (See slides 5 and 6.) Every great analogy or bit you do on voir dire or on close works better with pictures. Think about it: Even adults will gather up for a reading of *The Cat in the Hat,* but you lose even the most dedicated book clubbers while reading *Atlas Shrugged* out loud for more than a minute or two. Ayn Rand may be more literary than Dr. Suess, but his pictures help tell a story. (Special thanks to Todd Smith, a CDA investigator in Lubbock County, for these great pictures.)

5 Comparisons, maps, and timelines work better in PowerPoint. If you want the jury to see something, PowerPoint is your tool. Want

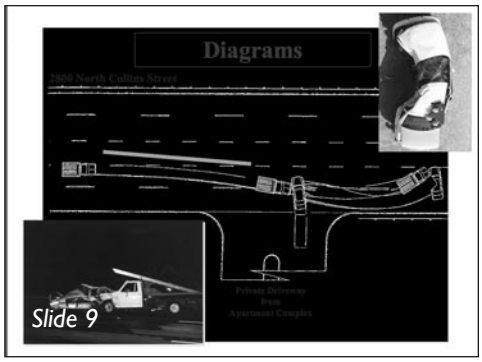


them to see and compare the book-in photos (slide 7, above)? How about signatures on the DL (sober),



booking in (intoxicated), and booking out (hungover but not intoxicated), all shown above on slide 8?

Maps work far better and easier on PowerPoint that on chalkboards or flip charts. Are you tired of offi-



cers not knowing scale or that "north is always up?" Well, PowerPoint is your answer. Timelines of your crime or punishment priors are easy and visually persuasive (see slide 9, above). All of these demonstrative exhibits are easier, faster, and cleaner when they are created and displayed on the computer.

6 A visual trial, like all other parts of trial work, is a work in progress. Start simple and work up. Drop stuff that doesn't work. Steal great ideas from other prosecutors. Refine your presentation. One of the nice things about being a prosecutor is that we are a team. Scared of animation? Do it the first time without and then add a little slowly. Soon you will find dozens more applications than I have discussed here. When you do, share them with the rest of us!

While we are talking about sharing, if you have a great slide (or four) for DWI trials, send them to me, one slide at a time, at abbott@tdcaa.com. I will start compiling them and adding them to the slides in this article on the DWI Resource page at www.tdcaa.com.

7 Just because you *can* do something doesn't mean you should.

OK, here we are again. As my friend Todd Smith says at our Train the Trainer program, "Power corrupts and PowerPoint corrupts absolutely." Avoid fancy animations, colors, fonts, and clip art. Avoid like a contagious disease *sounds* in your animations. Keep it simple, keep it short, and keep the number of words on a screen to an absolute minimum. Show your PowerPoint around and be ready to take advice.

In closing, each lawyer is charged with being competent in a matter they undertake for a client. Prosecutors are no different. The need to make our trials visual is profound. The ease of doing so using modern presentation software is astounding. The fact we are not using this technology in criminal trials, the most important communications taking place in our communities, is unacceptable. Take a cue from the country's fifth graders and give PowerPoint a whirl. ❇

Endnote

1 PowerPoint® is a registered trademark of Microsoft Corporation. It is not the only presentation software out there (Macintosh fans use Keynote, for example), nor is it even the best, but it does have the largest market share. For that reason and for our own ease in this article, we will use the term PowerPoint throughout to refer to presentation software.

New board certification in criminal appellate law

The Supreme Court of Texas has approved Standards of Certification in the new specialty area of Criminal Appellate Law. Certification in this area will be available through the Texas Board of Legal Specialization beginning this year. The court's order concerning the standards is available at www.tbls.org.

This is the first new specialty area recognized by the court since Workers Compensation Law in 2004; it reflects the increasing significance of appellate processes in criminal matters. Certification will be available for Texas attorneys who have handled a sufficient number of post-conviction writs and appeals in criminal cases. While the current standards in Criminal Law continue to include trials and appeals as qualifying activities, attorneys with an emphasis on the appellate aspects of criminal law may find this new area a better reflection of their practices. Requirements for certification in this area are similar to those in other specialty areas: Applicants must have been licensed for at least five years, have 60 hours of CLE with at least 25 percent of practice time during the preceding years in the area, receive favorable peer review, and pass a written examination.

For the first three years only of certification in this area (through 2013), attorneys who are currently certified by TBLS in Criminal Law, who have been licensed at least 10 years, and who meet the required number of cases *may* be eligible to qualify without written examination. This provision was designed to allow those who have already taken and passed a certification exam for Criminal Law the possibility of becoming certified in the new area without further examination. According to TBLS records, approximately 800 attorneys currently certified in Criminal Law are potentially eligible to qualify under this provision. Again, this alternative will be available only during the first three years of certification in this area.

Please visit the Get Certified section of www.tbls.org to learn more about certification and to review the Criminal Appellate Standards of Certification. ❇

Playing chicken with a snake in the grass

How Ector County investigators and prosecutors overcame many obstacles and won a stiff sentence against a longtime domestic abuser

On April 3, 2010, Odessa Police Department officers responded to a 911 call. The victim, Sandy Galindo Flores, stated that her boyfriend, Zackariah Jones, was beating her. When officers arrived, Jones was in their house, claiming that there were no problems and that he was the only one inside. However, as officers did a sweep of the house, they found Sandy in a back bedroom lying on a bed with the covers over her head.

By Justin Cunningham
Assistant District Attorney (at right), pictured with Kacey Gross, Legal Assistant, and Joe Commander, Chief Investigator, all in Ector County

Once her boyfriend was arrested and on his way to jail—Jones had outstanding warrants—Sandy told officers what had happened. Jones had been drinking and accused her of "messing around" with other men. When Sandy told him that she was not messing around, the defendant began to punch her in the face, leaving her with a knot on her head, a swollen black eye, and a busted lip. In addition to the outstanding warrant, the defendant was also charged with assault-family violence because at the time, Sandy lived with Jones in his house. She had no permanent address, though; she drifted among friends, relatives, hotels, and Jones' place. After his arrest, Sandy told officers that she was likely going to her sister's house.

Once the defendant was booked into jail, the magistrate, at the police officers' direction, issued an emergency protective order[1] (EPO) on the court's own motion. The defendant spent his 72-hour "cool off" period in jail and was personally served with a copy of the EPO, which he signed. It was also read to him in open court.

The EPO was good for 31 days and prohibited Jones from going within 150 feet of wherever Sandy was, including her residence. The address listed as her residence in the protective order was her sister Becky Quiroz's house, but Sandy had no real residence; she was (and is) a transient who drifts from place to place. It's important to note that Sandy did not file the EPO herself or give Becky's address as her own; the magistrate, on its own motion, entered the protective order on her behalf. This detail would become important later at trial.

After the defendant was released from jail, EPO in hand, there was no contact between him and Sandy, at least initially. Within two weeks of beating Sandy and being served with the EPO, though, he called her. He apologized for hurting her and invited her over to his place. Soon thereafter, Sandy packed up her clothes and drifted to Jones' house—in her mind, to stay. Sandy loved the defendant, but a week into her new living arrangement that love would change.

A second beating

During the evening hours of April 27, just a few weeks after Jones had beaten her, the defendant made a disturbing command to Sandy. He instructed her to have sex with his uncle and a friend that she did not even know. Jones made her take off her clothes, and when she protested, the beating, yet again, began. At first it was with his fists, but he soon switched to biting her on the arm and forehead. He bit her so hard on the forehead, in fact, that he left a bleeding imprint of his teeth. Dressed only in a shirt, Sandy ran out the door to the neighbors' and frantically called 911. Officers arrived soon thereafter.

Before officers could even talk to Jones, he yelled into the darkness, "Babe, I love you! Don't—!" But before he could finish his plea to Sandy, officers detained him and put him in the back of a patrol unit. They found Sandy down the street, standing outside without pants, bleeding and crying uncontrollably. Paramedics were called to treat the bite on her head, but she refused treatment and responded reluctantly to officers' questions about what happened. She declined to put anything in writing and refused to press charges. As one officer was speaking to Sandy, another was taking pictures of the bite marks, which would prove valuable in trial.

At this point, officers were unaware of the active EPO in place to protect Sandy from the defendant. It was not until the officer who initiated the EPO after Jones' first arrest for beating Sandy arrived that they were made aware of the EPO's existence. Had he not recognized Jones and remembered the active EPO, officers would have likely charged the defendant with another misdemeanor assault family violence; after all, though Sandy was bleeding from the head, the wound did not rise to the level of serious bodily injury. Once the active EPO was confirmed through dispatch, the defendant was charged with the third-degree felony of violation of a protective order by assault.[2]


Jones' mugshot

After hearing from an officer that he was to be charged with a felony violation of a protective order, the defendant began yelling and screaming, "But she came to my house! How's that on me?" He didn't understand that although Sandy had come willingly to his house, he was prohibited from being within 150 feet of *wherever* she may be.

Tracking down a transient victim

When we initially received the case, it was clear in my mind that Sandy needed to be protected because she either couldn't or wouldn't protect herself. Additionally, we really wanted her to testify against the defendant. Although we had pictures of her injuries and a reluctant partial statement, Sandy's own testimony would eliminate any *Crawford* objections. Plus, we wanted her in court to humanize the photos, appeal to the jury, and fill in the gaps of her reluctant statement the night of the assault. That said, I would have gone forward even if she didn't want to be part of the trial. I was not going to sell out just because it would've been hard—Jones had had many breaks over his criminal history and didn't deserve another.

Our strong desire for Sandy to testify was also apparent to the defendant; he made several claims that we would be unable to find her and would be forced to dismiss his case. To further his claims, Jones, who was represented by a skilled and competent attorney, began a short-lived *pro se* writing campaign motioning the court for a speedy trial. He wanted a dismissal; in his mind, if the court granted his speedy trial motion, the case would be set for trial and we would be forced to dismiss it if we couldn't find Sandy or if she refused to testify. Once the court set his case for trial (independent of and not as a result of the defendant's motions, I might add), the defendant ceased his *pro se* writing campaign and deferred to his attorney for trial.

I took a look into his criminal history, which includes 13 misdemeanors (multiple PO violation convictions as well as assault family violence convictions) and two prior sequential non-state jail felony (SJF) felony convictions (for possession of controlled substances). I knew that if I offered a reduced plea to assault-family violence, he would jump on it. He had pled guilty on assault cases in the past and typically received minimal punishment—a fine or a day or two in jail. But what he did to Sandy was different than what he had done to other women; he bit her in the face like an animal. Jones did not deserve a slap on the wrist, and Sandy deserved much better. I figured the only way to stop him from beating Sandy again, or any other woman for that matter, was to habitualize him to 25–99 years or life, which is what I did.[3] Even facing habitual offender status, the defendant still seemed quite positive that we would be unable to find Sandy for trial and that we would be forced to dismiss his case.

I should note that we did consider charging Jones with Continuous Family Violence under the new statute, but the defendant had already pled to the first assault-family violence case (wherein the EPO was put into place), so I had only one assault where jeopardy hadn't attached. And by the time we tracked Sandy down and she told us of other assaults, we were a week from trial. She was also very fuzzy with time frames and remembering when the assaults happened, which would present a problem with a CFV case whose language requires proving assaults within a 12-month period.

We desperately needed to track down Sandy; I challenged investigator Joe Commander to find her. Over the years, Commander has become quite skilled in locating people, especially people who do not want to be found. I gave him the little bit of contact information I had for Sandy and told him I needed her before trial. It took approximately four weeks for Commander to track her down. Sandy was a drifter who never stayed in one place too long. She would overstay her welcome with friends or relatives—not

Continued on page 26

Continued from page 25

because of any fault of her own, but because she had no other place to go. When not staying with friends or relatives, Sandy would float from cheap motel to cheap motel until she ran out of money. She has no address, telephone number, cell phone number, Facebook page, etc. Even Sandy's sister Becky, her only relative we have on file, could not provide Commander with any contact information. He went door to door and cheap motel to cheap motel looking for her and ended up back at Sandy's sister's house.

Commander, being the investigator he is, questioned whether the Becky was covering for or hiding Sandy. Becky told him that Sandy comes and goes, that she never stays in one place too long, and that she doesn't check in with relatives. Commander left a business card and told her to give it to Sandy if she saw her in the near future. Commander then returned to Becky's house everyday, on the chance that Becky was not being truthful, until Sandy finally called our office after showing up at her sister's house.

But getting Sandy to come and talk with *me* was another challenge. Sandy thought we were luring her to our office so we could arrest her. She had run-ins with law enforcement in the past and seemed somewhat distrustful of coming in to the district attorney's office. We assured her that we were not going to arrest her and that she didn't have any warrants, and we set a time for her to come and meet with me in my office.

Sandy made it clear to me that she did not want to testify against Jones. It was apparent to me that she loved him as much as she feared him. But at the same time, she did not want him to get away with what he did to her. I explained to Sandy that the defendant needed to be held accountable for what he did, and one way to hold him accountable would be a trial—a trial that was scheduled the very next week. Because I could see her hesitation with having to testify, I told her that we would strive toward him pleading guilty in exchange for a plea offer. However, the likelihood of a plea seemed doubtful at the time: At our last pretrial, Jones popped off in court that she wouldn't show up to testify.

At the conclusion of our meeting and after serving her with a subpoena, we asked for her telephone number and where she was living. She told me that she would call me the next day but refused to give us any contact information. Before she left, I stressed to her that what Jones did to her was not right and that I wanted him held accountable for his actions. I wanted her to know that someone cared about what happened to her and that Jones's behavior was not normal or acceptable in our society. She seemed somewhat surprised that someone from our office cared and even more surprised when she left my office without being arrested. I had a feeling deep down that I would never see her again and that I would be forced to dismiss the case against Jones.

Much to my surprise, Sandy called me the next day to inquire what was happening with her case. I informed her that it was likely heading toward trial but that she could call me the next day and we could update her as to what was going on. I told her that if the defendant insisted on a trial that she would have to testify against him. She promised me that she would do what was needed but that she hoped he would plead guilty. I asked her where she was living and once again she refused to tell. However, my office's caller ID showed that she was calling from one of the local motels.

The next day, she called again from that same motel. It was at this time, the Friday before the Tuesday trial date, when I told her that I needed her to be at the courthouse on Tuesday, ready to testify against Jones. She became incensed that he would not plead guilty for beating her, and she promised she would show up for the trial. After hanging up the phone with Sandy, I had a gut feeling that she would show up for trial, but I still worried up until the minute I stated, "Your Honor, the State calls Sandy Galindo Flores."

The trial

My biggest fear going into the trial, aside from Sandy not showing up, was the fact that Sandy went to the defendant's house on her own—I thought that somehow a jury would punish her for making a poor decision that night. Even though Sandy did not initiate the EPO, she knew about it before going over to Jones' house. Our focus from voir dire through closing was that society and the criminal justice system must protect those who are unable to protect themselves.

During voir dire, I spent quite a bit of time discussing how an EPO works and how the victim and her aggressor cannot agree to ignore the EPO and reconcile. I stressed how EPOs are set up to protect vulnerable victims, victims who are unable or unwilling to protect themselves. A few venire members made statements that if a victim goes back to her aggressor than she was partly or wholly to blame for any injuries he

might inflict. Although they agreed they could follow the law, I doubted their ability to be a strong punishment juror, which both Sandy and I needed, so I used my peremptory strikes on those panelists.

Much to our relief, Sandy showed up the day of trial and testified. The evidence was clear, regardless of the fact that Sandy went to Jones's house knowing about the active EPO, that the defendant was prohibited from being within 150 feet of her. Sandy's testimony, along with that of the officer, demonstrated that the defendant apologetically invited Sandy over to his house, and when she refused his sexual commands, he bit her. The pictures admitted into evidence clearly showed Jones' upper and lower teeth imprints on Sandy's forehead and arm. She testified that but for the defendant's invitation, she would not have been at his house that night, some 20 days after the EPO was entered.

The defense's case, as expected, was based on the fact that Sandy went to Jones' house of her own volition. Jones also tried to establish that Sandy was living at the address in the EPO (that is, her sister Becky's house) and that the defendant stayed away from *that* address. But in reality, Sandy did not initiate the EPO and was never given the opportunituy to tell the court where she had been living or where she was going to be living. Prior to the EPO, she had been living with the defendant at his house. The defense also attempted during cross examination of the officers to set up a self-defense claim, but that failed utterly when the officers testified there was no evidence of self-defense.

The defendant chose not to testify, nor was his uncle (who was present at the second assault) willing to testify for him at trial.

The jury was out two hours determining guilt or innocence. They sent out several notes that led us to believe that at least some of the jurors were having a hard time finding the defendant guilty because Sandy voluntarily went to his house. However, after being read back testimony of one of the officers, to whom the defendant admitted biting Sandy, they quickly found him guilty, and we shifted to the punishment phase.

Punishment

We introduced Jones' 13 prior convictions spanning 20 years. At the time of trial, Jones was 40 years old. The majority of his adult life was spent serving time behind bars or committing crimes. Out of 13 prior convictions, only two were felonies; both were drug-related and provided the habitual enhancements paragraphs we proved up at during punishment. His misdemeanor convictions included assault-family violence, violations of protective orders, and criminal mischiefs targeted toward the protected persons in the protective orders he violated in the past. His misdemeanor convictions exhibited a pattern of violence against women and a disrespect for the law, a point we stressed to the jury.

When the time came for recommending a sentence, I gave no number but told them to do what was in their hearts. I did not want to insult a jury that had just spent two hours in deliberations in the guilt or innocence phase of the trial. The defense asked for the minimum 25 years.

After some 20 minutes, the jury returned a sentence of 80 years. In my opinion, Jones earned the hard sentence not because of his felony convictions but for the misdemeanor violation of a protective order and assault-family violence convictions. (After trial, several jurors stated they had no problem giving him 80 years when they saw it was not his first offense against women.)

Once the trial was over, I gave Sandy a hug and told her that the jury sentenced Jones to 80 years. She smiled with disbelief and asked if she could leave. After I told her to call me if she ever needed anything, she walked out of the courthouse. We, including her own sister, have not seen or heard from Sandy since the trial.

In conclusion, Zackariah Jones was a prolific abuser who thumbed his nose at a court order and beat a woman he claimed to love—all culminating in an 80-year prison sentence. As a prosecutor, it would have been easy to blame Sandy for her injuries because she went to his house knowing his history of violence toward her, or even to reduce Jones's case to a misdemeanor. But, at the end of the day, we as prosecutors must seek justice. We must protect those who are unable to protect themselves. That day, justice was served on Zackariah Jones. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 17.292.

2 Tex. Penal Code §25.07(g).

3 Tex. Penal Code §12.42(d).

Half a jury panel biased against the law

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

It's a common enough voir dire question: "Can you consider the minimum punishment for the offense the defendant is accused of?" But in *Cardenas v. State*,[1] a variation on this question rendered half the panel—52 out of nearly 100 potential jurors—challengeable for cause. All it took was the defense attorney's single question to render so many jurors biased against the law, and, in the end, to warrant a retrial of the case, too. The difficulty in *Cardenas* was recognizing that the defense attorney's question was a proper one, and it was all that was necessary to make the jurors subject to a challenge for cause.

What the law requires of jurors

A potential juror must be able to consider the entire range of punishment for the offense, from the maximum to the minimum, and must be able to consider both a situation when the maximum would be appropriate and a situation when the minimum would be appropriate. If a juror, after learning of the punishment range set by law, could not consider both the maximum and the minimum (in an appropriate case), that juror is deemed to have a bias against the law. Because it is the legislature's job, not the juror's job, to set the appropriate punishment range for a given offense, a juror who refuses to consider the low or high ends of that range is, in effect, setting his own punishment range and refusing to apply the law.

That said, jurors are still permitted to reject the minimum or maximum ends of the punishment spectrum based on the particular evidentiary facts of the case. After all, jurors are supposed to use the facts of the case to tailor the punishment to the crime as the defendant has committed it.[2] So a juror who could not consider probation at all for aggravated robbery would be challengeable for cause, because the legislature has made probation an option for aggravated robbery, if given by a jury.[3] On the other hand, a juror who could not consider probation for aggravated robbery where a child was involved (or where the victim was a nun or any other non-statutory circumstance) would not be challengeable for cause because the legislature has not designated the punishment range under those particular facts.

The trouble in *Cardenas* was in recognizing that the defense attorney's question properly identified those jurors who were challengeable for cause.

The question in *Cardenas*

In *Cardenas*, many on the panel would have been instinctively opposed to the minimum punishment. Cardenas was on trial for the aggravated sexual assault of a 4-year-old girl, and at the time he committed the offense in 2005, aggravated sexual assault of a child was still an offense for which a jury could give probation. Perhaps because the 2007 legislature harbored the same instinctive opposition to the idea that a sex offender who victimizes children might be freed on probation, aggravated sexual assault of a child was removed from the list of offenses for which a jury may grant probation.[4] In fact, now, if a defendant commits an aggravated sexual assault against a child under 6, he faces a minimum of 25 years.[5]

But for Cardenas, probation was still the bottom end of the punishment range, and the jury panel knew this. After the panel was told several times that the range of punishment included a five-year minimum prison sentence or probation, the defense attorney asked this question:

> I want you to assume that you have found somebody guilty of … aggravated sexual assault of a child. They intentionally or knowingly caused the penetration of the [victim's] sexual organ … by … means of [their] sexual organ or … finger or with touching genital to genital. … Could you honestly ever fairly consider … as little as five years in prison [or] probation as an appropriate punishment?

Half the panel said they could not. The defense did not ask any follow-up questions, and neither did the prosecutor. When the defense challenged these jurors at the close of voir dire, the trial judge denied the challenges for cause. The defense exhausted its peremptory strikes, was denied additional strikes, and identified objectionable jurors on the jury. On appeal, both the court of appeals and the Court of Criminal Appeals found that the case had to be retried

because the trial judge had denied the challenges for cause. The jurors who answered "no" to the defense attorney's question were biased against the law.

The court rejected the State's argument that the question included too many facts to make the jurors challengeable for cause. The court pointed out that the hypothetical facts in the question were taken straight from the Penal Code statute. Consequently, the question asked whether jurors could consider probation under the very conditions that the legislature determined were appropriate for probation: the elements of aggravated sexual assault of a child. Yes, the question included hypothetical facts, but none beyond the statutory elements setting out the offense.

Prosecutors familiar with the aggravated sexual assault statute no doubt realize that the defense attorney's question committed the jurors to consider probation under only one or two of the many possible statutory definitions of aggravated sexual assault. The Penal Code offense encompasses assault against non-consenting adults as well as children and further defines the offense based on the particular body parts involved.[6] Given the number of ways aggravated sexual assault can be committed, some of the jurors in *Cardenas* likely could have considered the minimum for some aggravated sexual assaults—such as if the victim were an adult,[7] or if the assault involved only contact and not penetration.[8] It might appear that for the offense of aggravated sexual assault, these jurors could envision a situation where they would give the minimum and where they would give the maximum. But under *Cardenas*, this is clearly not enough. The jurors must envision a situation where they could give the minimum and maximum *under the particular statutory variation* of aggravated sexual assault. So, for example, under the 2007 revisions to the statute, a juror would have to remain open to a five-year prison term for the intentional or knowing penetration of a 6- to 14-year-old's sexual organ. Although this seems like a lot of extra facts beyond being open to the minimum for "the offense," this kind of detail is precisely what is permitted under *Cardenas* because all the facts are statutory. In short, if the legislature has established by statute that five years in prison is an appropriate minimum punishment for a defendant who penetrates a 6- to 14-year-old child's sexual organ, so, too, must the juror keep five years on the table under those circumstances established by statute. A juror who cannot is biased against the law.[9]

The burden shifts to the prosecutor to attempt to rehabilitate the jurors

The party making a challenge based on bias against the law has the burden of establishing that the challenge is proper. Before a prospective juror can be excused for bias against the law, the party making the challenge must show that the veniremember understood the law's requirement and could not overcome his prejudice well enough to follow it.[10] In *Cardenas*, the State argued that the defense was required to ask more than, "Can you ever consider probation to be an appropriate punishment?" to confirm that all of these jurors really had a bias against the law. But the court found otherwise because the venire was repeatedly told that probation was the minimum punishment available and that to sit on the jury, jurors had to be able to consider the full range of punishment. The court held that a juror, knowing all of this, who nevertheless "unequivocally says 'no' when asked if he can consider the minimum sentence, has stated in the most concrete terms that he cannot follow the law."[11]

Other caselaw from the court appears to require that a prospective juror be asked, "Can you follow the law regardless of your personal views?" before he could be challengeable for bias against the law.[12] It would seem that some of the 52 jurors, despite being told that they had to consider the full punishment range, may not have appreciated that they were expressing an inability to follow the law. A lawyer interprets their failure to consider the minimum as altering the punishment range that the legislature has set. To the non-lawyer, rejecting slap-on-the-wrist punishments for heinous crimes just seems like part of the normative decision-making that jurors are supposed to do in sentencing—especially where they are asked if they could consider the minimum "as an *appropriate* punishment."

Regardless, the court in *Cardenas* determined that it is up to the prosecutor or the trial judge to ensure that the jurors fully appreciate the positions they are taking.[13] Once told of their obligation to consider the full range of punishment, jurors who say they cannot consider

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the minimum to be an appropriate punishment have admitted a bias against the law—even if this means half the panel is biased against the law. The burden is then on us to clarify whether the jurors are expressing their personal views or knowingly flouting the law. Admittedly, this may be hard to do when you want the judge to let you ask more questions of half the panel. The better practice is to raise the issue during your own voir dire before the defense attorney's tough question has the chance to disqualify jurors in huge swaths. Help the panel envision sympathetic situations where the minimum might be appropriate, under the particular statutory version of the offense in your case.[14]

And if you do have a chance at rehabilitation, you might try phrasing it this way: "You have said you cannot consider probation (or a five-year prison sentence, etc.), and some of you may be saying, 'Hey, if it were up to me, probation would just not be an option.' And that's OK to feel that way. But the law actually provides that the range of punishment for this crime is probation for five years all the way up to life in prison. That's the law. It's the same whether you are a juror in Dallas, El Paso, or Nacogdoches. And every defendant accused of this crime is entitled to a jury that can follow that same punishment range and not arbitrarily exclude the minimum or maximum set by law. If you are selected as a juror, you'll be required to take an oath to follow the law—including the law that makes the range of punishment probation for five years up to life. Even though you might raise the minimum punishment if it were up to you, can you set aside your personal feelings and remain open to the full range set by law?"

Obviously you won't be able to rehabilitate all the jurors; some will insist on their own range of punishment. But if you don't attempt rehabilitation, the jurors who could not "honestly ever fairly consider" the minimum to be "an appropriate punishment" have established their bias already, and under *Cardenas*, all these jurors are subject to a challenge for cause. ❇

Endnotes

1 *Cardenas v. State*, 325 S.W.3d 179 (Tex. Crim. App. 2010).

2 *Sadler v. State*, 977 S.W.2d 140, 143 (Tex. Crim. App. 1998).

3 Tex. Code Crim. Proc. art. 42.12, §§3g(a)(1)(F) & (4).

4 Tex. Code Crim. Proc. art. 42.12, §4(d)(5) (passed as part of Tex. H.B. 8, 80th Leg., R.S. (2007), also known as "Jessica's Law")).

5 Tex. Penal Code §22.021(f) (also passed as part of "Jessica's Law").

6 Tex. Penal Code §22.021.

7 Tex. Penal Code §22.021(a)(1)(A).

8 Tex. Penal Code §22.021(a)(1)(B)(iv) & (v).

9 It would seem that a juror has to remain open to the full punishment range only for the particular statutory variation with which the defendant is actually charged. A juror who could not consider the full range of punishment for a different statutory variation may have a bias against the law, but it is not against a law "applicable to the case." See Tex. Code Crim. Proc. art. 35.16(c)(2). Further, a bias against a law other than that relevant to the case would not seem to substantially impair the juror's ability to carry out his oath and instructions. See *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009).

10 *Feldman v. State*, 71 S.W.3d 738, 747 (Tex. Crim. App. 2002), overruled by statute on other grounds.

11 *Cardenas*, 325 S.W.3d at 187.

12 *Feldman*, 71 S.W.3d at 744.

13 *Cardenas*, 325 S.W.3d at 185 & 187.

14 For more practical advice on fortifying good State's jurors on the probation issue in aggravated sexual assault cases committed before 2007, see Terese M. Buess & Michael E. Trent's TDCAA manual on *Investigation & Prosecution of Child Sexual Abuse* at 134-36 (2d ed.2007). A third edition by Terese M. Buess and R. Darin Darby will be published in summer 2011.

Leaving the jury box with a heavy burden

The Code of Criminal Procedure now allows victim coordinators to provide counseling for jurors post-trial, but the legislature set aside no money. Here's how Travis County helps jurors who endure graphic testimony and evidence in court.

"The first day of the trial, I came home exhausted. The second day, I was so overwhelmed I couldn't even speak to my friends or my husband. By the third day, my husband confronted me by asking me what was wrong. I bit his head off, 'What do you *think* is wrong?!'"

By Stacy Miles-Thorpe, LCSW
Victim Witness Counselor in the Travis County District Attorney's Office

That's what a juror from a recent punishment retrial told me after I ran into her in public. It was two months after the Laura Hall punishment trial in the summer of 2010. The defendant had been accused and found guilty of tampering with physical evidence in 2007 after she helped to dismember the body of a young woman, Jennifer Cave, who had been murdered. Upon appeal, her conviction was upheld, but the punishment was thrown out, resulting in a retrial of the punishment phase.

After some brief small talk, I asked how the juror was, and she told me about her reaction to the trial. It took three counseling sessions before she could tell her therapist about the images and the testimony she had been carrying with her since the trial. She said she kept it in because she didn't want to traumatize anyone else.

I had been in the courtroom for Hall's retrial too, and as I sat with Jennifer Cave's family, I also watched the jury, wondering about the emotional impact on them as they viewed graphic photos, heard gruesome testimony, and witnessed the pain of the family in the front row. I was interested in hearing about this juror's experience, and she was eager to share it.

Plenty of trauma to go around

Serving as a juror on a criminal trial is unlike any experience most jurors have had. As we all know, television's portrayal of crimes, investigations, and trials can be quite different from reality. Jurors are required to sit passively but remain attentive for up to eight hours a day over the course of a few or even many days. They may hear distressing or horrific information, be exposed to images that provoke strong emotional reactions, and are sworn to not discuss the case with anyone for the duration of the trial. They see the raw emotions of the victim or the victim's family, and they recognize the weight of their verdict and punishment decisions for both parties.

In Hall's trial, experienced Travis County prosecutors understood that bombarding the jury with multiple, repetitive images could be overwhelming and counter-productive. They included enough images and expert testimony to convey the full picture to the jury but were respectful in not leaving graphic images lingering on the monitor or showing a barrage of photos for shock value. Still, even the limited number of photos of this crime scene were horrific, and the agony of the parents' testimony about the night they found their child left indelible images in the minds of the jurors.

Juror counseling legislation

The mother of Jennifer Cave, Sharon Cave Sedwick, herself recognized the impact to jurors as she participated in the trials involving her daughter's murder. Ms. Sedwick felt tremendous gratitude for the jurors' service but also recognized that there was a gap in the system to serve them. Following the murder trial of defendant Colton Pitonyak in 2007, she worked with her local state representative to amend Code of Criminal Procedure Article 56.04 to allow the crime victim liaison or victim assistance coordinator to offer up to 10 hours of post-trial counseling for jurors in trials involving certain offenses. The legislation is a step in the right direction, as it acknowledges the valuable contribution jurors make to the criminal justice

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system by establishing an avenue of support after difficult trials.

Why is this support necessary? According to a 1998 study of jurors and alternates from a wide range of civil and criminal cases, one-third of the 401 responding jurors experienced stress as a result of their jury duty.[1] The sources of stress were varied, and stress levels were influenced by the type and length of trial. In another study conducted with jurors from three murder trials submitted to the Yukon Department of Justice, 89.5 percent of responding jurors said they felt stress as a result of their jury service, and up to 90 percent found some aspects of the trial moderately to extremely stressful.[2]

Sources and symptoms of stress

Multiple surveys have been conducted with jurors in the U.S. and Canada to determine what aspects of their service induced the most stress. One obvious source is the nature of the evidence presented, particularly in trials involving violent crimes. While the photos and testimony were cited by jurors in these types of trials, more often jurors said that the weight of the decision around guilt-innocence and punishment most impacted them. In the Yukon Department of Justice study, researchers found the top three most stressful aspects of the murder trials (ranked by the jurors) were: 1) fear of making a mistake, 2) deciding on a verdict, and 3) the deliberations themselves.

Jeanne Robinson (not her real name), a juror who served on a Travis County jury, agrees with this assessment. She and other jurors heard a case involving assault-family violence, in which the defendant was found guilty and sentenced to prison. Jeanne found the testimony unsettling. "It was hard hearing about the conflict in the family directly from the family members," she says. "That kind of violence is outside my experience and is more removed when I read about it in the paper than when it's right there in front of me." She remembers feeling the weight of deciding the defendant's fate and continued to wonder weeks later if they made the right decision. Jeanne also recognized this stress in other jurors, manifested in the jury room as bickering and fear of making a final decision.

While the vast majority of jurors experience minimal stress symptoms, it is not uncommon for some to have lingering symptoms such as recurring thoughts about the crime, headaches, and fatigue. You could expect to find elevated symptoms after longer trials involving more violent crimes. Though uncommon, researchers found that jurors occasionally reported symptoms of moderate to severe distress such as nightmares, intrusive images, anxiety, and depression that interfered with their daily life.

Why should we care?

Prosecutors are public servants, and when a citizen serves on a jury, it is one of the only times members of the public witness and participate in our criminal justice system. We are asking them to do their civic duty, and we bear some responsibility in helping them integrate back into their professional and private lives after their service. Their experience as jurors can foster trust and confidence in our system—or it can contribute to their reluctance to serve, or worse, erode public confidence in our system.

Christopher Baugh, an assistant district attorney in Travis County, considers the emotional impact of a trial's evidence and testimony and factors it into his trial strategy. Mr. Baugh prepares jurors during voir dire for the fact that they will be presented with images of violence, then alerts them again before showing an image: "You want jurors paying attention to the testimony, so you can't throw a [graphic] picture at them and expect them to attend to your witness, because they get transfixed. They shut down and then can't do their job as a juror." The volume of evidence presented is also something he considers, and concedes that this awareness comes with years of practical experience. Jurors will reach a point of being overwhelmed seeing photo after photo depicting the same injury or scene and at that point may struggle to remain attentive.

Travis County's approach

Good jury management can alleviate sources of stress from the first contact with the jury panel, from limiting delays and wait time, to educating jurors on the voir dire and trial process. Travis County district judges take the time necessary to orient jurors, explain procedures and delays, and express a great deal of appreciation for their time and service, as advised in the American Bar Association's Standards Relating to Juror Use and Management.[3]

Post-trial debriefing with the

judge also helps jurors process their trial experience. Our district court judges may spend a considerable amount of time visiting with jurors once they are released, allowing them the opportunity to ask questions about the trial or about the criminal justice system. Both prosecutors and defense attorneys routinely visit with jurors as well. The impact of this time is immediately evident. Jurors often exit the courtroom after a trial visibly tense or exhausted. In the 147th District Court, now-retired Judge Wilford Flowers used to proceed to the jury room and spend up to 45 minutes talking with the panel. During that time, jurors would ask questions about the defendant's background, the law, and the judge's legal philosophy. More often than not, jurors eventually left the courthouse relaxed and smiling.

Within a week after the conclusion of the trial, the DA's office sends a follow-up letter to jurors. In this letter, we acknowledge that during their trial experience, they may have seen or heard disturbing information that may be affecting them. We offer our office's support if they need to talk with someone about their experience and provide the Victim Witness Division's phone number.

In a county our size, we regularly conduct trials that will impact jurors emotionally, including cases where a jury must decide whether to impose the death penalty. In these and other difficult trials when we can clearly see the distress in our jurors, our counselors will prepare a letter and information sheet on stress management to be handed to jurors immediately following the trial. In our experience, normalizing possible stress symptoms, encouraging self-care by providing specific ideas on stress management, and providing a resource for further support if needed can help them re-engage their support system and coping skills.

It is rare that we get calls from jurors needing to talk further, but it happens occasionally (four to six times a year on average). We have 10 counselors on staff who are prepared to debrief the jurors themselves and then to provide information and referrals if ongoing counseling is indicated. We're fortunate in Travis County to have many counseling centers that provide counseling on a sliding-fee scale if cost is prohibitive.

Suggestions for other counties

Unfortunately, Senate Bill 560, which provided for juror counseling, did not set aside funding for it. That is the next step for Sharon Cave Sedwick in her drive to support jurors in difficult cases. Without a system in place to pay for counseling or debriefing, counties are left to decide on their own how, or whether, to offer this support.

If your judges aren't currently following the ABA's Standards Relating to Juror Use and Management, particularly Standard 16 on juror orientation and instructions, doing so is a good place to start. It sets a tone of respect and inclusion in the process that helps put jurors at ease. Multiple articles on juror stress also recommend informal post-trial debriefing by the trial judge, as is conducted in Travis County.

Prosecutors' offices are also encouraged to develop a follow-up letter to jurors that specifically addresses stressors that may have impacted the panelists, along with information on stress management and a resource if further help is needed. Whether this is prepared for every trial or for particularly difficult ones, it's important to give your jurors an avenue for support.

If you practice in an area with limited resources, you may need to get creative in finding support for jurors. You don't necessarily need to think in terms of providing therapy to a juror who is distressed; often when people are traumatized on a secondary level, and a debriefing session can help normalize, process, and re-engage their coping skills. You may be able to partner with another victim service agency or non-profit that can provide formal debriefing. There may be a local therapist who could offer one free session or a series of sessions on a sliding-scale basis to jurors referred by your office. Some therapists may offer a phone consultation if the juror has transportation concerns. Lastly, there may be a local member of the clergy who could provide support or counseling.

For counties with access to trauma-debriefing specialists, some courts in the United States and Canada have successfully implemented formal critical incident stress debriefing (also known as CISD), offered to the jury panel as a group after traumatic trials.[4] While participation in the King County study of the debriefing program was voluntary, most jurors chose to participate and rated the value of the debriefing very high.

If you are interested in seeing a copy of the letter and information

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on stress management that our Victim Witness Division provides jurors, please visit www.tdcaa.com in the journal archive. Both are available as attachments.

As for the juror in Laura Hall's punishment retrial, she carried the heavy emotional burden of the trial for several weeks. I asked her what eventually helped, and she said that she worked through her feelings with her therapist, who encouraged her to use her talent as an artist to help her heal. She used a large artist sketch pad to draw a particular image that remained with her from the trial and wrote out the lines of testimony that continued to haunt her. "Then I tore it to pieces, put it in an old coffee can, took a hammer and just beat the hell out of the coffee can. I threw it in the trash and even watched as the garbage truck hauled it off," she said with a laugh. She said that talking to her counselor, along with this symbolic act, had unburdened her and allowed her to move forward. ❇

Endnotes

1 Casey, Pamela. (1998) *Through the Eyes of the Juror: A Manual for Addressing Juror Stress.* Williamsburg, VA: National Center for State Courts. Available online at: www.ncsonline.org/WE/Publications/Res_Juries_JurorStressIndexPub.pdf.

2 Bertrand, L.D., Paetsch, J.J. & Anand, S. (2008). *Juror Stress Debriefing: A Review of the Literature and an Evaluation of a Yukon Program.* Whitehorse, YK: Yukon Department of Justice.

3 Committee on Jury Standards, American Bar Association, Standards Relating to Juror Use and Management, vii (1993).

4 Rubio, D., Ventis, W.L., & Hannaford, P. (2000) *King County Superior Court Evaluation of the Jury Debriefing Program: Final Report.* Denver, CO: National Center for State Courts.

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Search and seizure revisited and tweaked

A clutch of recent cases in the field of search and seizure favor law enforcement. The Court of Criminal Appeals has twice revisited the standard of reasonable suspicion and also issued opinions on the plain view doctrine and checkpoints. In addition, two out-of-state cases have discussed cell phone searches that are sure to influence our state law.

By John Stride
TDCAA Senior Appellate Attorney

The threshold for reasonable suspicion

Of course, in determining whether an officer possessed reasonable suspicion to detain a person, the courts employ the "totality of the circumstances." On its face, that prescription appears fairly clear: Courts must consider all facts that could bear on the inquiry. But within that penumbra of circumstances are these questions: 1) what is the threshold for finding reasonable suspicion, 2) which actors' information is considered, and 3) must an officer articulate a specific crime?

In *Foster*, the Court of Criminal Appeals reminded us of the guidance provided by the Supreme Court of the United States on the subject of reasonable suspicion.[1] The high court required that, in conducting a stop or temporary detention, an officer "articulate something more than an inchoate and unparticularized suspicion or hunch."[2] Fundamentally, an officer must have "some minimal level of objective justification for making a stop." This means that an officer must be able to "point to specific and articulable facts, which taken together with the rational inferences from those facts, reasonably warrant the intrusion."

OK, so if an officer can sufficiently explain the basis for the stop or detention and that explanation is reasonable, the officer's action should be upheld. And that is what the Court of Criminal Appeals reaffirmed in *Foster*.

An Austin officer, in an unmarked car, noticed Foster at about 1:30 a.m. a few blocks from the Sixth Street bar district. While the officer waited at a red light, Foster's truck lurched to a stop closely behind his car. The officer thought Foster might have wanted to change lanes but had left insufficient space to do so. Meanwhile, a second officer pulled his marked car into the lane alongside Foster. The first officer, with experience of detecting intoxicated drivers around Sixth Street, believing that Foster's driving was unsafe due to the location and time of night and concerned that the driver might be impaired, approached Foster. The officers smelled alcohol on him, removed him from his truck, and a third officer performed field sobriety tests. They arrested Foster for DWI.

Although the trial court ruled that the officer had reasonable suspicion Foster was intoxicated, the Third Court of Appeals disagreed. The intermediate court held that the time of night; the location, alone or together, with the other facts; and the lurching movements were insufficient to support a reasonable suspicion of DWI.

The Court of Criminal Appeals—also questioning the Third Court's ruling that the mere location of the officers' cars at the red light constituted a detention—reversed and endorsed the trial court. Specifically, Judge Hervey for the unanimous court wrote: "In light of the time of night, the location, [the officer's] training and experience, and Foster's aggressive driving, it was rational for [the officer] to have inferred that [Foster] may have been intoxicated." Thus, the officer related sufficient facts that reasonably supported a stop.

This opinion is an excellent example of the threshold for finding reasonable suspicion in a DWI case. It is not a demanding standard at all, but it is one that is satisfied only with an explanation of the facts giving rise to the invasion of privacy and a rational employment of those facts.

Reasonable suspicion does not require articulation of a specific crime

Foster should be read with *Derichsweiler*.[3] Together, these two cases, although not referencing one another, provide a really good picture of just what reasonable suspicion is all about. In *Derichsweiler*, the defendant was also arrested for DWI.

After dark one New Year's Eve, a man pulled his car alongside a couple's car while they waited in a McDonald's drive-through. He lingered for over 30 seconds while look-

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ing right at the couple and grinning. The wife did not think this conduct was normal. When the couple pulled forward, the man drove in front of them, grinning and staring for another 15 to 20 seconds. Next, he circled around the restaurant and pulled up behind their car to the left side, all but blocking them in. Again, he stared and grinned at them. The couple, feeling threatened and intimidated, feared a robbery was in progress or that the man was stalking or sizing them up. The husband called 911 as the man drove off to the adjacent Wal-Mart parking lot and pulled alongside two parked cars. The husband relayed what he and his wife had seen and told the dispatcher that the man's behavior was suspicious. As instructed, the couple provided contact information and remained at the scene.

The dispatched officer knew only the description of the vehicle, that it was circling Wal-Mart, and that a citizen had reported it as a suspicious vehicle. When the officer approached the car and the driver opened the window, he noticed a strong smell of alcoholic beverage and, ultimately, arrested Derichsweiler for DWI.

The trial court denied Derichsweiler's motion to suppress, but the majority of the Second Court of Appeals, limiting its review to those facts known by the arresting officer alone, held that the officer lacked reasonable suspicion to detain Derichsweiler because his conduct did not suggest criminal conduct per se. Alternatively, the majority continued, if all the information known to the police were considered, it still didn't provide reasonable suspicion. In contrast, the dissent asserted that an officer is not required to include some specific observation of a crime.

The Court of Criminal Appeals returned two important holdings. First, in determining whether an officer has reasonable suspicion to detain a person, the totality of the circumstances includes the cumulative information known to the cooperating officers at the time of the stop and is not restricted to the information known by the detaining officer personally. Moreover, ordinarily, a police dispatcher is considered a cooperating officer.

Second, to conduct a temporary detention, an officer is not required to have facts demonstrating that the detainee has committed, is committing, or is about to commit a particular and distinctively identifiable penal offense. It is enough to satisfy reasonable suspicion if "the information is sufficiently detailed and reliable . . . to suggest that *something* of an apparently criminal nature is afoot."

The court opined that, although a close call, Derichsweiler's repetitive bizarre behavior—behavior continued with other vehicles—suggested a potential criminal motive beyond the couple alone. It was "enough that the totality of the circumstances, viewed objectively and in aggregate, suggest[ed] the realistic possibility of a criminal motive, however amorphous, that was about to be acted upon."

Facially, *Derichsweiler* would appear to define the outer limits of what can be considered reasonable suspicion, but it is rewarding to read the footnotes wherein the court observed that the case arguably presents more compelling facts to support reasonable suspicion than a case it decided two decades previously.[4] This comment provides a valuable comeback if others, as surely they will, assert *Derichsweiler* goes too far.

A checkpoint's validity

Checkpoints are a topic of frustration to many in law enforcement and prosecution. Their use is limited by our federal and state appellate courts to a narrow category of instances: custom duties' violations; illegal aliens; driver's licenses, insurance, and registration checks; weights and equipment checks; and, with proper safeguards in place, DWI.[5] But while restating their principle limitation—that they cannot be used for investigation of "ordinary criminal wrongdoing"—the Court of Criminal Appeals in *Lujan* upheld a checkpoint for the purposes stated by officers—license and insurance compliance—that, to at least the intermediate court, indicated a checkpoint for the purposes of investigating plain ol' general criminal activity.[6]

Targeting uninsured and unlicensed motorists, the officers in *Lujan* stopped all vehicles traveling in both directions at a stationary checkpoint. They also enforced any other observed violations. An entire interdiction unit of a supervisor, about six officers, and a K-9 attended. If drivers displayed their license and insurance, the officers waved them through, but if the drivers could not comply, they were directed to pull over to the side.

Lujan, unable to provide a license, was pulled over. Before completing his citation, however, the

officer had Lujan climb out of the car and learned that the passenger had an outstanding warrant. The officers arrested the passenger and, for safety reasons, conducted a pat-down of Lujan. He carried large bundles of cash but consented to a search of his vehicle. When the K-9 investigated, it alerted, and the officers found a white, powdery substance in the passenger door. The stop had lasted about six or seven minutes.

Lujan challenged the checkpoint on grounds that it was established to discover general criminal activity and he persuaded the intermediate court of that. The Court of Criminal Appeals reminding that: "A checkpoint to verify drivers' licenses and vehicle registration is permissible, but a checkpoint whose primary purpose is to detect evidence of ordinary criminal wrongdoing is not," disagreed. The primary purpose for the checkpoint in this case, the court held, was not general crime control but, as the trial court implicitly found, a license and insurance check. The presence of the K-9 alone did not render the checkpoint unconstitutional, and officers are not required to ignore other violations outside the scope of the checkpoint's purpose so long as the primary purpose is valid.

These frank officers were rewarded for their truthful testimony, but this opinion serves to illustrate the value of findings of fact. Here, an explicit finding of fact on the primary purpose for the checkpoint would have been best, but the testimony of the officers and the trial court's conclusion ultimately prevailed.

State and federal plain view doctrines reconciled

For nearly a quarter century, Texas law enforcement and prosecutors have been laboring under a state interpretation of the plain view doctrine that has been at odds with the federal doctrine. In *White*, the Court of Criminal Appeals decided that officers could not search items in plain view if they lacked reason—right there and then—to believe that they were evidence, fruits of, or instrumentalities of a crime.[7] Simply, if it was not "immediately apparent" to the officers that the property was evidence of a crime, they could not search further to determine its provenance. Thus, officers who responded to an altercation in an apartment and who entered to ascertain damage, saw a backpack, obtained a name and address from the backpack (without disturbing the pack), and, after departing, learned from a call to the stationhouse that a burglary complaint had been lodged by the person on the pack's label, could not lawfully return to seize or search the backpack and other stolen items.

Sweepingly, the *White* court painted beyond the perimeter of the federal precedent on which it purported to rely. In *Hicks*, the Supreme Court had used its paintbrush more circumspectly. It drew the line at officers moving items that were outside the scope of their original justification for the search, thereby creating a new invasion of privacy.[8] Accordingly, police searching an apartment for a shooter, victims, and weapons could not lawfully move stereo equipment in plain view to ascertain the serial numbers so that they could determine if the equipment was stolen.

After nearly a quarter century of reflection, the Court of Criminal Appeals has retreated from the nonsensical position adopted in *White*. The judges realized that their predecessors spoke in terms excessively broad. In *Dobbs*, they were faced with officers who had executed a narcotics warrant and discovered two sets of brand-new looking golf clubs on a bedroom floor and a mound of new golf shirts with a county club's logo embroidered on them on a closet self.[9] While still in the residence, the officers learned from communicating with their dispatch that the country-club property had been stolen. Determining that they had acquired probable cause, the officers seized the items. As the court now interprets the plain view doctrine, officers can obtain further probable cause when they are legitimately on premises and see something in plain view so long as any additional investigation does not involve a greater intrusion –whether by scope of the search or time taken—than that already underway.

Despite its faulty reasoning in *White*, though, the court maintains that it nevertheless reached the right result in that case because the officers had exceeded their original justification by entering the apartment for an exploratory search and left the apartment before obtaining probable cause about the stolen items.

Dobbs is an important correction to the state law on the plain view doctrine and, employed within the scope of the limitations of *Hicks* and *White*, is a step in the right direction. Now, how about the Texas

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adopting the doctrine of inevitable discovery?

Cell phone searches in other states

While we await any dispositive word on cell-phone searches from the Supreme Court of the United States and the Texas Court of Criminal Appeals, two states' high courts have addressed them, and they have reached inconsistent results. In the meantime, many in Texas have advocated the cautious approach: If an officer can get consent or a search warrant before accessing the contents of a cell phone, the officer should do so. But others have sought to access cell-phone contents relying on the exceptions to the search warrant requirement. Perhaps the most commonly relied on exception is that for a search incident to arrest. These two cases consider the search-incident-to-arrest exception to the search warrant requirement.

The most recent out-of-state decision on cell-phone searches is from the California high court and, at each of the three state-court levels, the result favored law enforcement. Usefully, months previously the Ohio high court had reached the opposite result. Because the California opinion was written with full knowledge of the other decision, however, let's look at how that court reached its decision.

A sheriff's deputy arrested Diaz after he drove a vehicle in which a drug seller sold Ecstasy to an informant during a controlled buy.[10] At the stationhouse, the deputy seized Diaz's cell phone and, during an interview, Diaz denied knowledge of the drug transaction. Later—90 minutes after Diaz's arrest—the deputy manipulated the cell phone through several screens to find the text message folder where he discovered a message stating "6 4 80." In the deputy's training and experience, the message meant six pills of Ecstasy for $80. When he showed the message to Diaz, the suspect confessed.

Finding that the search of the phone had been valid as a search incident to arrest, the trial court denied a motion to suppress. The intermediate court agreed with the ruling and so did the Supreme Court of California.

The state high court reviewed the three governing cases from the Supreme Court of the United States and gleaned from them that the critical question was whether the cell phone was "personal property immediately associated with the defendant's person" or "possessions within an arrestee's immediate control." If the former, the cell phone could be searched incident to arrest despite the elapsed time, but if the latter the search was invalid as conducted too remote in time from the arrest.[11]

The California justices held, 5–1, that the cell phone was immediately associated with Diaz's person, thus, the delay in searching the phone was not significant, and the search was valid as incident to arrest. In a footnote, the court explained that it disagreed with the opinion of the Supreme Court of Ohio on the same question because that court's focus on the arrestee's expectation of privacy is "inconsistent with the [Supreme Court]'s decisions." The Ohio court had improperly elevated a person's privacy expectations in a cell phone's contents. Principally, that a cell phone may be kept near to, rather than on, a person and that a cell phone stores personal data in varying quantities does not alter its character so as to take it out of the Supreme Court's precedent. Moreover, it observed that the Ohio court was divided 4–3.[12]

What the Washington D.C. or Austin courts will eventually decide remains speculation, but at least these two conflicting opinions set up the issues for other courts to study. Until then, the safest practice is to encourage officers to obtain consent to search or to obtain a search warrant. ❇

Endnotes

1 *Foster v. State*, 326 S.W.3d 609 (Tex. Crim. App. 2010).

2 *Terry v. Ohio*, 392 U.S. 1 (1968).

3 *Derichsweiler v. State*, No. PD-0176-10, 2011 Tex. Crim. App. LEXIS 112 (Tex. Crim. App. Jan. 26, 2011).

4 See *Bobo v. State*, 843 S.W.2d 572 (Tex. Crim. App. 1992).

5 See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (temporary city drug-smuggling checkpoints); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (temporary sobriety checkpoint); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (permanent airport border check); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permanent border check); *Delaware v. Prouse*, 440 U.S. 648 (1979) (spot check for license, registration, drugs); *United States v. Ortiz*, 422 U.S. 891 (1975) (temporary border roadblock); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving border patrol); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (roving border patrol); *Scheneckl v. State*, 30 S.W.3d 412 (2000) (game warden routine water safety check); *State v. Skiles*, 938 S.W.2d 447 (Tex. Crim. App. 1997) (temporary sobriety checkpoint); *Webb v. State*, 739 S.W.2d 802 (Tex. Crim. App. 1987) (temporary sobriety checkpoint); *State v. Holt*, 887 S.W.2d 16 (Tex. Crim. App. 1994) (temporary sobriety checkpoint); *State v. Sanchez*, 856 S.W.2d 166 (Tex. Crim. App. 1993) (plurality op.) (tempo-

rary checkpoint for license, registration, and equipment).

6 *Lujan v. State*, No. PD-0303-10, 2011 Tex. Crim. App. LEXIS 2 (Tex. Crim. App. Jan. 12, 2011).

7 *White v. State*, 729 S.W.2d 737 (Tex. Crim. App. 1987), overruled by *Dobbs v. State*, 323 S.W.3d 184 (Tex. Crim. App. 2010).

8 *Arizona v. Hicks*, 480 U.S. 321 (1987).

9 *Dobbs*, 323 S.W.3d 184.

10 *People v. Diaz*, No. S16660, 20011 Cal. LEXIS 1 (Cal. Jan. 3, 2011).

11 See *United States v. Chadwick*, 433 U.S. 1 (1977) (invalid search incident to arrest of double-locked footlocker searched 90 minutes after arrest); *United States v. Edwards*, 415 U.S. 800 (1974) (valid search incident to arrest of arrestee's clothes seized 10 hours after his arrest); *United States v. Robinson*, 414 U.S. 218 (1973) (valid search incident to arrest of a cigarette packet seized during pat-down at time of arrest).

12 In *Ohio v. Smith*, the state high court held that the search of a cell phone's contents at the time of arrest was improper because a cell phone was not a closed container under the Fourth Amendment and an individual's expectation of privacy in the contents of a cell phone surpassed the privacy interest in an address book or pager. 920 N.E.2d 949 (Ohio 2009).

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