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

Mental illness vs. malingering

How Tarrant County prosecutors overcame the challenge of two competency trials and an insanity defense to secure a murder conviction and 45-year sentence for a wife who killed her estranged husband

Arthur and Colette Reyes were married for more than 20 years. They had two daughters, Naomi and Gabby. In October 2009, Arthur and Gabby moved out of the house in anticipation of an impending divorce. (Naomi was off at college). On Sunday November 22, 2009, Arthur came over to the house to collect some of his more valuable belongings because Colette was going to be served with divorce papers the following week.

By Michelle Dobson (left) and Sean Colston (middle)
Assistant Criminal District Attorneys, pictured with DA Investigator Mia Moore (right), all in Tarrant County

Arthur dropped Gabby off at her best friend's house nearby and then went to the house to gather items in the garage. After working for about an hour, Arthur called Gabby to come and help him. She arrived minutes later to find her father lying in a pool of blood in the garage. Gabby called 911 while she ran back to her friend's house and told the 911 call-taker that she believed her mother shot her dad.

When police arrived on scene, Arthur was dead from an apparent gunshot wound to the head. Colette entered the garage and calmly approached Arthur's body. When police asked her who shot the victim, she told them, "I did." When they asked her where the gun was, she said, "I left it next to him." Colette's sister and her family were in town visiting from California. They told police that they were inside the house and Colette was in the garage with Arthur when they heard the gunshot.

Once Colette was taken into custody, she began behaving bizarrely. She mumbled to herself about not knowing what happened. When Detective Ben Lopez tried to go over her *Miranda* rights with her, she told him she didn't have any rights, and she wouldn't answer questions about whether she understood her rights. She also told Detective Lopez her name was Ann Brown (the name of a woman Arthur had met online and whom Colette believed was his girlfriend).

Colette was taken to the City of Arlington Jail, where she began stripping off her clothes and chanting. She spent a little over a week in jail before her defense attorney requested a bond reduction hearing and her bond was lowered. Once she

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Your 2014 Foundation Board

The Texas District and County Attorneys Foundation has enjoyed great leadership since its launch in 2006, and the 2014 Board has brought an enthusiastic start to the new year. I want to welcome the newest members of the Board: **Kenda Culpepper** (CDA in Rockwall County), **Tony Fidelie** (former ACDA in Wichita County), **Helen Jackson** (former ADA in Harris County), and **Mark Yarbrough** (former CA in Lamb County). We are off to a great start.

By Rob Kepple
TDCAA Executive Director in Austin

The 2014 Executive Committee includes **Bert Graham** (Chair and ADA in Harris County); **Barry Macha** (President, General Counsel at Midwestern State and former CDA in Wichita County); and **Kathy Braddock** (President-Elect and ADA in Harris County).

Priorities for 2014

The Foundation was created as a way to connect our profession with folks in the community who share our vision of a safer Texas. Since the support of prosecution became a state priority in 1970 with the passage of the Professional Prosecutors Act, the professional home of Texas prosecutors, TDCAA, has worked to constantly improve your ability to serve your community as a minister of justice. But in this day and age we can't rely on the state or the county alone—it takes help from the community you serve. The Foundation is here to help you connect you with that community.

In this next year, the Foundation will support a number of trainings and assistance programs. Thanks to enduring funding made possible by the **Harris County District Attorney's Office**, the Advanced Trial Advocacy Course at the Baylor School of Law is again on track to be a great event. We will also educate additional TDCAA faculty with the Foundation's support of our Train the Trainer conference. Another priority this year is filling the Victim Services Director position left vacant with the untimely passing of our friend and colleague, **Suzanne McDaniel**. This Foundation-supported staffer will be a great boost to your work assisting the victims of crime in your jurisdictions.

Finally, stay tuned as publications, seminars, and support come your way thanks to the work of the Foundation Board and Advisory Committee. ❇

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An update on the new discovery law

By the time you read this column, SB 1611, the Michael Morton Act, will have been in effect for a couple months. We are hearing from many prosecutors about the challenges they are facing implementing the new discovery law. We have tried not to jump to conclusions too quickly, but instead to let the procedures shake out a bit before we get into serious discussions with other courthouse professionals about how the process should work and what may need to be changed in the next legislative session.

By Rob Kepple
TDCAA Executive Director in Austin

From what we are hearing, the only people who seem to be less thrilled with some of the clunky language of the bill and the paperwork load would be … the defense bar. You will find some pretty good writing on their view of the law in the November–December edition of *The Voice*, found at the Texas Criminal Defense Lawyers Association web site, www.TCDLA.com. I was gratified to read that their President, **Mark Daniel**, shares our concern that a defense lawyer may violate the law's redaction provisions and a victim or witness may be hurt or threatened as a result.

TDCAA leadership is planning on getting together with the defense bar this spring and talk about how the new discovery process is going. My guess is that there will be many areas where there is mutual agreement on changes that need to be made, and we will be asking for your input (and participation!) when the time comes. Stay tuned.

The bobblehead

You may have noticed that my photo (at left) is a little different this time. I want to take a moment to thank the staff here at TDCAA, one of the most awesome groups of individuals ever assembled. Mostly because of their "members first" attitude, but also because they gave me the most wonderful Christmas gift a boss could ever get: my own bobblehead! After all, a bobblehead is the sign that you have really made it in this world. And it makes decisions easier: Just hit the head and see if it nods "yes" or "no." How easy is that?!

The legislature gets this one right

If you have been to any one of our Legislative Updates in the last—well, any of them ever—you hear us have a laugh at the legislature's expense over some of the laws that pass. Of course, you know that it can be an ugly process, but it can also work pretty well and the folks at the capitol really do work hard to get it right.

I want to take a moment to thank all of those who worked to pass SB 275, the bill that changed the punishment for Failure to Stop and Render Aid from a third-degree felony to match the punishment of Intoxication Manslaughter, a second-degree felony. This happened in the wake of the crime committed by a capitol staffer, who in the afterglow of a big night at the bars struck and killed a young woman in West Austin—and kept on driving.

It was gratifying because in December here in Austin, a guy who had allegedly been loading up on alcohol all day drove his truck right through a Prius, which was occupied by a beloved schoolteacher and her son, killing them both. The intoxicated driver kept on going, I can imagine only because he thought he could get far enough away that the alcohol wouldn't be a factor in the case. Wrong, Bubba. It might turn out to be a solid intoxication manslaughter case, but it is good to know that if worse comes to worst, the spectre of alcohol will at least be an aggravating factor in the FSRA punishment hearing. Nice work, Texas Legislature.

Judge Reed goes nationwide

Judge Susan Reed, the Criminal District Attorney in Bexar County, has been appointed to the Council of State Governments' Justice Center Board of Directors. The Council of State Governments is a bipartisan group of about 20 legislative leaders, court officials, and law enforcement officers who guide the Justice Center's projects. And these projects are important to what prosecutors do: They research all sorts of criminal justice issues ranging from mental health and justice reinvestment to diversion programs, and make recommendations to policymakers

around the country. This group is not afraid to have a prosecutor with a tough-on-crime reputation on its board, and that is a good thing. If you want to see what the Council of State Governments is up to, go to www.csgjusticecenter.org.

Another Texan goes national

And congratulations to Court of Criminal Appeals **Judge Barbara Hervey**, who has been appointed to the U.S. Justice and Commerce Department's National Commission on Forensic Science. As you know, Judge Hervey created the Criminal Justice Integrity Unit at the Court of Criminal Appeals, which has taken a lead role in the investigation of the root cause of wrongful convictions in Texas. The commission was recently created by the U.S. Department of Justice and the U.S. Department of Commerce's Institute of Standards and Technology. Its mission is to improve the practice of forensic science by developing guidance concerning the intersections between forensic science and the criminal justice system. The commission also will work to develop policy recommendations for the U.S. Attorney General, including uniform codes for professional responsibility and requirements for formal training and certification. Good luck, Judge!

2013 Groesbeck Citizen of the Year

It is award season, so it is only fitting that stars in every walk of life get the recognition they deserve. This year, we are proud to announce that our own **Roy DeFriend**, Limestone County Attorney, took home the trophy as Groesbeck's Citizen of the Year. Roy has had a track record of leading the pack, from high school valedictorian to president of his law school class at Baylor to head dishwasher at the First United Methodist Church Sunday Breakfast Club to, well, County Attorney in Groesbeck. Congratulations, Roy.

Hugo Marston and *The Bookseller*

This falls into the category of a "busman's holiday," but I can't resist a good crime novel. If you are like me, then you might take a look at the Hugo Marston crime series, which begins with *The Bookseller*. And you will like the protagonist, a down-to-earth Texan who serves as the chief of U.S. Embassy security in Paris—who solves crime on the side. It's one of those page-turners where you can follow the leads and trails and will enjoy the ending.

What's fun about the book, beside the grip the character takes on you, is that Marston is the creation of **Mark Pryor**, an assistant district attorney in Travis County. I am not entirely sure how an Englishman prosecuting crime in Austin creates a crime-fighter in Paris, but it works.

Welcome new prosecutors

Welcome to our newest Texas prosecutors, who bring a wealth of experience to their new jobs. **Cory Crenshaw** has been appointed as the Jefferson County Criminal District Attorney. Cory served as an assistant district attorney in Brazos County and as an Assistant United States Attorney. And **Kollin Shadle** is the new Stonewall County Attorney. Kollin is a former Lubbock Assistant Criminal District Attorney who moved home to Aspermont. Welcome to your new roles in the top spot!

The National Computer Forensics Institute

The recent computer-hacking scandal involving discount retailer Target was a rude reminder that a new type of crime and a new type of criminal are out there in front of a computer keyboard. It is going to take knowledgeable prosecutors and investigators skilled at computer forensics to stay ahead of this crime wave. Fortunately, our friends in Alabama have built and funded the National Computer Forensic Science Institute. This is a federally funded center dedicated to training prosecutors and investigators from around the country to detect and prosecute those engaged in the black art of computer crime. Many Texans have already been to this state-of-the-art center. An application is required, and once accepted the whole thing is free, including transportation and lodging. Interested? Check it out at www.ncfi.usss.gov/ncfi.

Exonerations and allegations of prosecutorial misconduct

It seems that lots of different organizations have chimed in on issues surrounding exonerations, eyewitness identification, post-conviction DNA testing, and allegations of prosecutorial misconduct. For instance, you probably read recently that the Uni-

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versity of Michigan started what it calls the National Registry of Exonerations, and the school recently reported a record year for exonerations. Texas had 13 in 2013, half of which appear to be cases in which the defendant pled guilty before lab results on the drugs in question came back negative. In any event, that is some good information and it didn't seem like folks went off the rails when this report was released. You can check it out and actually review the Texas cases included on their list at www.law.umich.edu/special/exoneration/Pages/about.aspx.

But you may also read some pretty odd stuff out there. Many of you have emailed me about a group that calls itself the Center for Prosecutor Integrity (CPI) out of Rockwall, Maryland. With as much fanfare as it could muster by email, it announced the creation of its "Registry of Prosecutorial Misconduct." You can check it out at www.prosecutorintegrity.org. On the website, it claims to be "the nation's only organization with a sole focus on enhancing prosecutorial ethics. The goals of the Center are to preserve the presumption of innocence, assure equal treatment under the law, and end wrongful convictions." Although the center has released some "reports," you will quickly discover that its missives are basically regurgitations of things already published in someone else's report or in the newspaper.

So who is this group really? Great question. I did a little digging and found a couple articles about the principles involved in this group. Some interesting reading. It turns out that the CPI is an offshoot of a program called SAVE, "Stop Abusive and Violent Environments, Inc." SAVE advocates against "misandry," which is perceived to be a war on men through sexual assault and domestic violence laws. If you read some articles about the folks who started the SAVE group, you will find that one of them appeared to run a Russian mail-order bride business. Check out the article at www.washingtonspectator.org/index.php/Robert-OHara.html. One of the creators of SAVE and this new center has a blog that may give some insight into this newest effort focused on prosecutors. You can take a look at www.avoiceformen.com/author/bobohara. There is a backstory here somewhere.

The lesson is that the Internet can give a lot of people the ability to claim they are "x" or "y", but I am having a hard time believing that this "center" is going to add anything constructive to the issue of wrongful convictions.

Thanks, Lara Brumen Skidmore!

I want to thank **Lara Brumen Skidmore**, our former database manager, for her longtime and loyal service to TDCAA and its members. Lara had been our database manager since we created the electronic database system in the late 1990s. She truly loved her job, and we joked around here that about half of our database was really stored in her brain—she knew you all that well. Lara has moved to Houston with her family (her husband's job transferred him there), so thankfully we will get to see her every now and again!

We are fortunate that we have folks like **Dayatra Rogers**, who will ably fill the role as our new database manager, and **Kaylene Braden**, who has been promoted to membership director and assistant database manager.

Introducing Quinell Blake

When you call our office, you will have the good fortune to speak to our new receptionist, **Quinell Blake**. Quinell comes to us after a long career in customer support for Bell Atlantic/Verizon. It is safe to say that when it comes to customer service and support over a telephone, there is no one with greater expertise! Please welcome her when you call in. ❇

Trends in Texas gang activity

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

One of the most important responsibilities of any prosecutor is to keep a community safe. Texas is a growing state with changing demographics. Nowhere is this more evident than in the expansion and convergence of gangs and complex criminal enterprises across the state. In addition to changes in the composition and activities of street and prison gangs, the influence of complex criminal enterprises and Mexican cartels now extends throughout Texas. That expansion, along with advances in technology and social media, requires prosecutors to change the way we have traditionally done business.

According to the 2010 census, Texas's population continues to grow at a much faster rate than the rest of the country. Numerically, much of the growth is in the large urban counties of Harris, Dallas, Tarrant, Bexar, and Travis. However, the fastest growing counties are suburban ones surrounding the large urban areas. The top 10 counties projected to have the fastest growth are Hays, Williamson, Fort Bend, Collin, Kaufman, Rockwall, Montgomery, Denton, Bastrop, and Waller. It follows that as these areas continue to grow, the influence of street and prison gangs, as well as transnational gangs and other complex criminal enterprises, will grow in these areas too.

Gang activity has evolved over the past several years. Not only have the characteristics of street and prison gangs changed but also the increased cooperation between gangs and Mexican cartels has led to more transnational organized crime across Texas. As prosecutors, we need to be aware of these emerging trends and be increasingly proactive with law enforcement to combat the changing face of organized crime in Texas.

The Texas Fusion Center classifies gangs by their overall threat level. The most significant gangs are classified as Tier 1, and other significant gangs are classified as Tier 2 and Tier 3. These classifications can change from year to year as their overall threat to the state changes. Tango Blast, Texas Syndicate, Barrio Azteca, and the Texas Mexican Mafia are currently classified as Tier 1 gangs due to their relationship with Mexican cartels, transnational activity, large number of members, and high level of criminal activity.

Similarly in the prison system, the Texas Department of Criminal Justice's Security Threat Group Management Office classifies gangs (known as Security Threat Groups) including traditional prison gangs as well as street gangs or "cliques." The traditional gangs such as Bloods, Crips, Mexican Mafia, Texas Syndicate, and Aryan Brotherhood have a highly organized rank structure and constitution, whereas street gangs such as Tango Blast and Black Gangster Disciples have a much looser-knit organizational structure and their members tend to be defined by city and geographic region.

Tango Blast increasing

According to the Security Threat Group Management Office, the number of offenders who are members of traditional prison gangs is holding steady or trending downward, whereas the number of Tango Blast members is increasing rapidly. Five years ago, there were no Tango Blast members in TDCJ; today, they number between 4,500 and 5,000. There are approximately 13,000 gang members in TDCJ, and another 6,500 are either in federal custody or have been paroled or discharged to their community.

One reason for the growth of Tango Blast is because TDCJ does not house Tango Blast members in Administrative Segregation as it does other offenders classified in certain threat groups. Being housed in Administrative Segregation makes it difficult to carry out the gang's criminal activity; therefore more offenders identify as Tango Blast to remain in the general population. Another reason for this growth is because Tango Blast offenders identify with others from their particular hometown, making it easier to engage in the gang's criminal enterprises from prison.

Due to their large numbers, Tango Blast members often extort, threaten, and assault offenders who are affiliated with other Security Threat Groups. This gives Tango

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Blast a great deal of control inside TDCJ. Offenders initially join Tango Blast to identify with others from their hometown—being able to live in the general population is an added bonus.

Hybrid gangs

Gang trends in our local communities are also changing and we need to adapt our model accordingly. For years, gang membership was for life. Gang members wore certain colors and sported tattoos that identified them as a member of a particular gang. As seen with the rise of Tango Blast in prison, members of different street gangs in a city may end up belonging to the same prison gang. However, there is a growing tendency for individuals to have various gang affiliations in our communities as well. This phenomenon, known as "hybrid gangs," is characterized by combinations of street gangs into a bigger umbrella organization. A person may be a member of a street-level gang but may also be under the umbrella of a larger organization consisting of many street gangs. This enables the umbrella organization to have access to various criminal enterprises and money sources. One part of the organization may have access to a money source such as prostitution or theft proceeds, whereas another group has access to drugs.

We have long known that prison gangs continue to conduct their criminal enterprises inside prison as well as coordinate criminal activity with their members in the free world. However in recent years, the nexus between criminal activity inside and outside the prison has expanded to include complex criminal enterprises with Mexican cartels and other transnational gang activity. Because Tier 1 gangs are increasingly active with Mexican cartels and are engaging in more transnational criminal activity, we need to change our model and become more proactive in the investigation and prosecution of these criminal enterprises.

In recent years, Tiers 1 and 2 gangs have increasingly partnered with Mexican cartels on both sides of the border, becoming much more involved in transnational criminal activities such as human trafficking (especially trafficking of children), sex trafficking, and drug smuggling. The cartels have battled the Mexican government for control of lucrative drug and smuggling routes since 2006. They have since expanded their criminal activity in Mexico in recent years to include extortion, kidnapping for ransom, and robbery.

Mexican cartels constitute the greatest threat to the security of Texas. They have expanded their presence in the United States by teaming up with transnational gangs and other criminal enterprises to engage in a wide range of criminal activities from murder, kidnapping, assault, drug trafficking, human trafficking (including the trafficking and exploitation of children), weapon smuggling, and money laundering.

Child trafficking

The most heinous of these crimes is the exploitation and trafficking of children. These crimes are enabled by prostitution rings that are often controlled by gangs, as well as by manufacturers and viewers of child pornography. Some human trafficking organizations operate prostitution rings, including the trafficking of children. They may operate on the street or are fronted as legitimate businesses. In addition to prostitution, the exploitation and trafficking of children subjects them to violence, extortion, forced labor, and sexual assault.

Much of the sex trafficking trade in Texas involves Central American girls as young as 9 or 10 years of age. Some girls are brought into the U.S. by unsuspecting truckers who are forced by either cartel members or gang members under contract with a cartel to bring the girls to a specified destination. Other girls are smuggled into the United States and brought to various places in the burgeoning Eagle Ford Shale region to engage in sex with men employed in the oil fields. After a period of time, these girls may be set free, but many are forced into labor.

These girls lurk in the shadows of society and are afraid to talk to authorities for fear of deportation or fear that family members may be killed back home. This poses a challenge to the investigation and prosecution of sex traffickers. We need to encourage our law enforcement officials to aggressively detect and investigate these cases. In some instances, that may require asking DPS or the Attorney General's Office for assistance in conducting sting operations to discover the identity of the local individuals involved. The sting operations can involve undercover officers working in hotel parking lots that have been installed with pole cameras. If the officer is approached for sex, he can get a phone number to call the woman back. The phone

number can later be traced to determine if there are ties to known sex traffickers. In addition, law enforcement can talk to counselors and students in local schools to see if they are aware of any young people who are victims of this activity.

I realize this is difficult and requires a new way of thinking. I also realize that law enforcement may be resistant to trying new things or bringing in outside partners. However, we know this activity is going on and we must utilize both new technology as well as old-fashioned investigative techniques to thoroughly detect and investigate these crimes in our communities. It is equally important for us to work closely with law enforcement early in their investigations of child pornography and prostitution cases involving children to determine if there is a link to cartels, transnational gangs, or other organized criminal enterprises that involve the sex trafficking of children.

Human smuggling

Mexican cartels are also a threat because they control the lucrative smuggling networks and trafficking routes in Texas. Six of the eight major Mexican cartels currently operate in Texas in areas from El Paso to Texarkana and from Brownsville to Gainesville. Nearly every interstate in Texas is part of this elaborate network of human trafficking and drug smuggling.

Most undocumented aliens in the U.S. make use of human smugglers. Over 4,000 human smugglers have been apprehended by the Border Patrol in Texas since 2010. This number does not include the number of smugglers who are U.S. citizens or in the country legally. In FY 2012, 2,737 human smuggling cases in the Rio Grande Valley involved 32,138 aliens, up from 2,204 cases involving 12,473 aliens in FY 2011. This dramatic increase is partially due to enhanced law enforcement and prosecution efforts along the border.

Once in the U.S., smugglers routinely hold undocumented aliens in stash houses. Stash houses are not confined to the border counties; they have been discovered in San Antonio, Austin, Odessa, Houston, and elsewhere. In the Rio Grande Valley sector alone, law enforcement responded to 237 stash houses where they apprehended 4,752 illegal aliens in FY 2012, up from 178 stash houses with 1,945 illegal aliens in FY 2011. Again, this increase is due in large part to increased law enforcement efforts aimed at identifying these houses.

It is easy to spout statistics, but it is hard to see the actual human toll and cost of the victims of the cartels and transnational gangs in our communities. Human smuggling and trafficking are secret crimes that happen in plain view all across the state. For practical purposes, the "border" is no longer just the counties in the Rio Grande Valley. In reality, the "border region" extends up to Highway 90 from Del Rio to Victoria and Houston. From there, human smuggling and trafficking continue up Interstate 35 to Austin and Dallas, Interstate 37 to San Antonio, and Highway 59 to Houston.

There are numerous sweatshops in the Houston area that are tied to human smuggling and trafficking. They are often controlled by local prison and street gangs as well as by other organized criminal enterprises who pay the prison and local gangs $2.00 per slave-labor hour. The women and children who work in these sweatshops usually live in deplorable conditions in stash houses. Like the young girls who are trafficked for sex in the Eagle Ford region, these women and children are also invisible to society. Law enforcement usually learns about specific sweatshops and stash houses only if a girl manages to escape and comes forward to authorities.

One tactic the cartels have used as part of their human trafficking and drug smuggling in the United States involves the use of cloned vehicles. Such vehicles are painted to look like company vehicles, official government vehicles, or even school buses. We must encourage law enforcement to think outside the box when conducting drug interdiction on the interstates.

What we can do

As prosecutors, we have to change our model so we can proactively respond to increasing criminal activity in our communities, whether it involves "hybrid gangs," prison gangs, or transnational gangs. We have to get involved with law enforcement agencies early to make sure they are aware of these changing trends and investigate crimes accordingly.

When law enforcement arrests an individual for a crime (especially a property or drug crime in an area known for gang activity), they must

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Photos from our Prosecutor Trial Skills Course

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do a thorough investigation and look at all aspects of the offense to see if it may be gang-related. We need to be proactive in ensuring that law enforcement does not prematurely conclude its investigation merely because a suspect has been arrested. Many times, a person may be arrested for a particular offense, and additional investigation leads to information not only that the suspect was a gang member but also that the offense was part of an organized criminal enterprise.

Gang members constantly use technology and social media. An individual's Facebook, Instagram, SnapChat or Twitter account can offer treasure troves of information showing that the individual is a gang member. Social media accounts are just one tool that law enforcement needs to utilize as they investigate if the suspect is indeed a gang member and that the crime is gang-related. This evidence is extremely helpful, especially in open pleas or jury trials.

If the investigation reveals that the case could be gang-related, law enforcement needs to notify us as early in the investigation as possible. They also need to relay that information in their offense reports so the case can be assigned to a gang prosecutor or the gang unit of a large office.

In turn, we need to be vigilant in looking for possible gang connections. We must routinely ask agencies if an individual is in a gang. Just because a person isn't listed in a gang database does not mean the person is not in a gang. The Dallas County Criminal District Attorney's Office has a "gang affiliation" box on its Case Intake Checklist that the filing agency attaches to its case filing. Being aware of possible gang connections early helps us formulate our trial strategy and develop punishment evidence and is extremely helpful in plea negotiations.

We need to be especially proactive with law enforcement when confronted with evidence of human trafficking and drug smuggling. Because these cases usually involve Mexican cartels or other transnational gangs, they often take a long time to develop. Law enforcement must utilize traditional investigative tools, such as developing confidential informants and placing cameras around suspected stash houses. Human intelligence (such as the use of wires) is often very important in these cases, and we need to work closely with law enforcement to ensure that the investigation is conducted properly. We need to educate law enforcement on the Penal Code statutes concerning conspiracy, money laundering, and engaging in organized criminal activity so their investigation is focused on the entire criminal enterprise rather than on individual suspects or offenses.

As Texas prosecutors, we face greater challenges that ever before from street gangs, prison gangs, transnational gangs, and the Mexican cartels. We must change our model to confront these 21st-Century challenges diligently and successfully. The citizens of our communities look to the men and women in public service for a safe, secure, and prosperous community. They deserve nothing less. ❇

Ex parte Coty and the fallout from an unethical lab tech

The jobs we do in prosecuting cases depend heavily on the integrity of the evidence we present in court. When we offer lab results, call an expert to the stand, or even plead a defendant to a charge, we expect those results to be reliable, accurate, and true. And when they are not, the public's confidence is shaken, and the criminal justice system struggles with how to right those wrongs.

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

Just that issue was present in a recent case before the Court of Criminal Appeals, *Ex parte Coty*.[1] In that decision, the court grappled with the fallout from one laboratory technician's unethical conduct and how far the taint of his behavior should reach.

In January 2012, a lab technician at the Department of Public Safety (DPS) crime lab in Houston discovered that his coworker, Jonathan Salvador,[2] had used the alprazolam (Xanax) from one case to generate the data supporting his identification of alprazolam in another case.[3] As a result, the lab report indicating that alprazolam was present in the sample was not based on data from the sample Salvador was supposed to test. The results were based on false or fictionalized data, a practice commonly called "dry-labbing."

DPS quickly suspended Salvador and retested all the evidence he had handled in the three months leading up to his suspension. Other errors surfaced, and DPS drew up a comprehensive list of all the cases Salvador had handled over his entire tenure at the lab—six years' worth of cases. The list included 4,944 cases (9,462 separate pieces of evidence) in 36 different counties in the Gulf Coast region.[4] In April 2012, DPS disseminated the list among the various affected DA's offices, and word spread to the defense bar and some individual defendants. DPS offered to re-test any of the evidence on request, if it had not already been destroyed, and DA's offices began making choices about how to proceed on the pending cases (which likely involved Salvador's recent and perhaps more suspect work) as well as those cases that had already been disposed.

Some of the convicted defendants in the "Salvador cases," as they came to be called, began filing petitions for habeas corpus relief. The Galveston County CDA's Office entered agreed findings in several of these cases, recommending that these convictions be overturned.[5] In some cases, the drug evidence had already been destroyed and so could not be re-tested. Without the ability to re-test the evidence, no one could be certain that the evidence actually was what Salvador had represented it to be in his report. When these cases reached the Court of Criminal Appeals, the high court verified that Salvador alone had prepared the report in each defendant's case and that the evidence was no longer available for re-testing. The court then set aside the convictions.[6] This was not an outright acquittal, but without the drug evidence, it would be impossible in most of the cases for a prosecution to proceed, so these defendants would likely be released and their cases dismissed.

Around the same time, the Court of Criminal Appeals overturned the conviction in another Salvador case. But this time, it did so even though the drug evidence still existed and could be re-tested by someone other than Salvador. And the decision was published, which meant it would be precedent and thus govern the law in other cases. The decision, *Ex parte Hobbs*, reasoned that because the evidence had been in Salvador's custody and his actions were not reliable, the "custody [of the drug evidence] was compromised, resulting in a due process violation."[7] Other Salvador cases had their convictions summarily set aside in the wake of *Hobbs*, even where re-testing showed Salvador's original report had been accurate.[8]

Although the court was treating all the convictions in the Salvador cases the same, the State stood a better chance at being able to retry those cases where evidence still existed—these defendants were not necessarily

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going to be immediately freed. But there was another concern. This very short published case, *Ex parte Hobbs*, seemed to indicate that any time a lab technician committed misconduct of any kind at any time, that discovery would summarily invalidate all of the cases on which that lab tech had worked throughout his career.

None of the convictions being overturned involved the 2012 alprazolam cases where Salvador actually committed misconduct by taking evidence from one case and using it to generate data for another. Instead, Salvador's misconduct was being imputed to the remainder of his body of work, a precedent that could have far-reaching implications on future lab tech errors, potentially invalidating convictions where the role of the lab report was not as central as in a drug possession case.

A few weeks after issuing another decision in lock-step with *Hobbs*, the Court of Criminal Appeals took the unusual step of granting rehearing on its own motion. That case was *Ex parte Coty*, a case from Harris County.[9] The court asked the parties to address this unresolved question: Under what circumstances, if any, should the court presume a due-process violation in a case handled by a forensic scientist who has been found to have committed misconduct in another case?[10] The defense argued that the presumption that a due process violation occurred should continue in all the Salvador cases because it was too onerous a burden to prove that Salvador had actually committed misconduct in the defendant's particular case.[11] The State argued that Salvador's misconduct was not severe enough for the court to presume a due process violation and that in every case, the court should consider the importance of the evidence to the rest of the case.[12]

When the court issued its opinion on rehearing in *Ex parte Coty*, however, instead of analyzing the issue as a question of due process as it asked the parties to do, the court analogized the Salvador cases to convictions based on false evidence.[13] To prove a false-evidence claim, it is the defendant who must show first, that the evidence in his case was false, and second, that it was material to his conviction or punishment. In a unanimous opinion authored by Judge Hervey, the court held that for cases involving misconduct by a lab technician, the second requirement is the same as for false evidence: The defendant must shoulder the burden of showing that the evidence is material to his conviction. But the court modified the first requirement. Instead of having to prove false evidence by the lab tech in his own case, the defendant can rely on an inference of false evidence if he shows five things:

1) the lab tech is a state actor;
2) the tech committed more than one act of intentional misconduct;
3) the tech worked on the defendant's case;
4) the misconduct is the type of misconduct that would have "affected the evidence" in the defendant's case; and
5) the tech handled the evidence "within roughly the same period of time as the other misconduct."

If the defendant establishes those five elements, he is entitled to the inference that misconduct tainted his own case. But that inference is still rebuttable; the State can rebut the inference if it has evidence that the tech in fact committed no misconduct in the defendant's *particular* case.

After setting out this framework for use in the Salvador cases, the court remanded *Coty* to the habeas judge to sort out how it would apply. The court also left other issues unsettled. For instance, in repeatedly discussing "evidence" and "false evidence" throughout this test, Judge Hervey never sets out whether "evidence" refers to the physical exhibit (the white, powdery substance) submitted for testing, Salvador's lab report, or perhaps both. In his concurring opinion, Judge Price states that the "false evidence" is Salvador's lab report itself.[14] For him, the potential problem with the convictions in the Salvador cases is that they may rest upon a lab report in which Salvador falsely claimed to have tested the evidence. And retesting or other evidence that shows that Salvador's results were probably reliable still does not speak to whether the lab report was falsified.

Others on the court may be concerned with the danger that Salvador may have tampered with the physical exhibits in any given case; thus, it is the physical substance submitted for testing that could be "false." This was the concern voiced in *Hobbs*, and in *Coty*, it appears again, in tandem with the inference that the evidence is false. Judge Hervey's opinion seems to indicate that by showing the five factors for the inference of falsity, the defendant will thereby also establish that a lab tech's sole possession of a substance and testing results derived from that possession are unreliable.[15] Under this type of false-evidence claim, the State may

be able to argue that Salvador's particular form of dry-labbing would not likely have affected or tainted the sample in the defendant's case. As unethical as Salvador's conduct was in creating his lab report in the alprazolam case, if there was never any indication that he tampered with or co-mingled any of the substances submitted for testing, then there is arguably no basis to conclude that any physical evidence has been compromised, and thus it cannot be "false." There is some indication that this was how the Forensic Science Commission may have viewed Salvador's misconduct given its statement that "there was no evidence to suggest that there were property control issues of a systemic nature that might preclude future re-testing of evidence."[16]

There is also support for this argument in the court's opinion. In footnote 11, Judge Hervey wrote that "the scope of the inference of falsity" that Coty showed in his habeas writ "does not appear to extend to a categorical inference of falsity in all respects," adding that "the inference of falsity should be limited to the pattern of intentional misconduct proven."[17] It may be, for example, that the evidence of Salvador's misconduct shows that he resorted to pulling a different sample from the drawer only to shore up his documentation when the sample he was faced with analyzing was particularly tricky.[18] If so, the State should argue for a narrow inference that goes only as far as that pattern of conduct—e.g., cases where the chemistry was tricky. Cases that did not involve a tricky or difficult analysis might then present a chance for the State to rebut an inference narrowed to Salvador's particular pattern of misconduct.

If the inference ends up being that Salvador used data from a different case to support his report in the defendant's case, the State might still be able to rebut that inference with circumstantial facts, as in *Coty*, where Salvador did not access any other cocaine samples during the time he was working on Coty's case. Much will depend on what evidence is presented in the various district courts handling the Salvador cases, and that evidence will likely vary from case to case, at least until the Court of Criminal Appeals considers one of these cases again. So there is potentially still a lot left unresolved.

But even if many of the Salvador cases end up with their convictions set aside just as they would have under the *Hobbs* one-size-fits-all approach, the decision in *Coty* is still a step in the right direction. The decision has laid the groundwork for how courts can approach the next incident of lab misconduct that may be on the horizon. And this time, the approach will be tailored to the timing and scope of the misconduct and will take into account the importance of the lab work to the overall case. Further, now that we know that the fallout of a lab tech's misconduct will depend on the depth and breadth of his misdeeds, laboratories will have all the more incentive to discover and disclose misconduct at its earliest stages. And that will serve us all. ❇

Endnotes

1 *Ex parte Coty*, No. WR-79318-02, 2014 WL 128002, at *1 (Tex. Crim. App. Jan. 15, 2014).

2 The opinion of the Court of Criminal Appeals in *Coty* states that Salvador worked at the "Houston Police Department's Crime Lab Division," but every other resource indicates Salvador worked for the DPS Crime Lab in Houston, and in fact, elsewhere in the opinion the court states Salvador worked for DPS. *Ex parte Coty*, No. WR-79318-02, 2014 WL 128002, at *1 (Tex. Crim. App. Jan. 15, 2014).

3 Report of the Texas Forensic Science Commission (TFSC), hereinafter "TFSC Report," dated April 5, 2013, on the Texas Department of Public Safety Houston Regional Crime Laboratory Self-Disclosure, available on the TFSC website, www.fsc.state.tx.us.

4 *Id.* at 9-11.

5 See, e.g., *Ex parte Artmore*, No. AP-79,982, 2013 WL 831178 (Tex. Crim. App. Mar. 6, 2013) (not designated for publication); *Ex parte Eagleton*, No. AP-76,986, 2013 WL 831237 (Tex. Crim. App. Mar. 6, 2013) (not designated for publication).

6 See, e.g., *Ex parte Turner*, 394 S.W.3d 513 (Tex. Crim. App. Feb. 27, 2013).

7 *Ex parte Hobbs*, 393 S.W.3d 780 (Tex. Crim. App. Mar. 6, 2013).

8 See, e.g., *Ex parte Smith*, No. AP-76,988, 2013 WL 831359 (Tex. Crim. App. Mar. 6, 2013) (not designated for publication).

9 *Ex parte Coty*, No. WR-79,318-02, 2013 WL 3250776 (Tex. Crim. App. June 26, 2013).

10 *Id.*

11 See Applicant's Brief in *Ex parte Coty*, 2013 WL 4778514.

12 See Respondent's Brief in *Ex parte Coty*, 2013 WL 4013574, authored by Harris County Assistant District Attorney Joshua Reiss.

13 *Ex parte Coty*, No. WR-79,318-02, 2014 WL 128002, at *6 (Tex. Crim. App. 2014).

14 *Id.* at *9 (Price, concurring).

15 *Id.* at *7.

16 TFSC Report, at 24 (also cited in *Ex parte Coty*, 2014 WL 128002, at *1).

17 *Coty*, 2014 WL 128002, at n.11.

18 See TFSC Report, at 6-7, indicating the January 2012 incident of misconduct occurred when Salvador was struggling with analyzing what appeared to be a slow-release alprazolam tablet.

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Mental illness vs. malingering (cont'd)

bonded out, she and her defense lawyer immediately gave an interview with the local news. They claimed Colette had been abused by Arthur throughout their marriage.

Our first work on the case

While preparing the case for presentation to the grand jury, we considered possible self-defense claims. Arthur had received a Class C assault by contact ticket in 2007 for slapping Colette. He and Gabby also received assault by contact tickets from an incident on October 17, 2009. But when we spoke to Naomi and Gabby, they told us that their mother had been the abusive one. They said that Colette had fits of rage and became verbally and physically abusive. Gabby explained that October 17, the date she and Arthur got those tickets, was when they moved out of the house. Colette was upset about Arthur's supposed girlfriend, and she had come into Gabby's bedroom, pulled out her breasts, and started saying things about Jesus. Gabby and Arthur tried to escort Colette out of the room and Colette started hitting her daughter with a brush.

The girls told us that they had been told that Colette had been diagnosed with paranoid schizophrenia when they were living in California in the early '90s. We subpoenaed Colette's medical records from various doctors in Arlington and found that she was treated for numerous physical ailments, but there was no diagnosis or treatment for paranoid schizophrenia.

We were continuing to prepare our case when Arlington police made a dramatic discovery. Crime scene officers had collected a cassette recorder containing a cassette tape on the night of the murder. When Detective Lopez listened to the tape, we were all shocked at what he discovered: The murder was captured on tape. Most of the recording contained a conversation between Arthur, Colette, and Colette's sister. After more than 30 minutes, you could hear Arthur call Gabby and tell her to come to the house and help him. Just a few minutes later, while Arthur was mid-sentence, there came a gunshot followed by items falling. Moments later, Colette's sister asked her if she dropped something, to which Colette replied, "I just killed him." Then she said, "He had a gun." The tape revealed that there was no fight and no self-defense—it was simply a conversation and then a murder.

We sent the tape to Barry Dickey, a forensic audio-video analyst. He was able to enhance the audio and improve the quality of the tape. He was also able to differentiate the voices, create a transcript, and tell us that based on the sounds and movement on the tape, it appeared that Colette was carrying the tape recorder on her person.

Competency questions

Colette was indicted for the murder of her husband on March 1, 2010. The case went through the normal court process and was finally set for trial. As we approached a trial setting in September 2011, the defense voiced concerns to us about Colette's competency to stand trial. Because the defense was raising the issue of incompetency, they had the burden to prove it by a preponderance of the evidence. A person is incompetent to stand trial if she does not have sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding or does not have a rational as well as factual understanding of the proceedings against the person.[1] Colette's defense attorney said that he had sent her to a couple of doctors who doubted her competency, and Dr. Barry Norman, a court-appointed psychologist, had conducted a formal evaluation and found her to be incompetent. At that point we did not contest the finding of incompetency but in retrospect, we should have contested it because a competency evaluation is generally a routine exam. But as with all things involving Colette, nothing about this case was routine.

Dr. Norman conducted a basic competency exam, which consisted of an interview with Colette and a review of some records. Based on his examination, Dr. Norman found Colette incompetent, and she was taken into custody to await transport to the North Texas State Hospital in Vernon. As soon as she was told that she was going into custody, Colette collapsed in the courtroom. She kept her eyes clenched shut and pretended to be unconscious. Medical staff evaluated her, but they did not find anything wrong with her. Colette was transferred to Vernon in November 2011, where she was treated with

medication and went through court competency education, stress and anger management, a vocational skills workshop, mental health education, and wellness skills training; she was returned to Tarrant County as competent to stand trial in February 2012. Although released lucid and ready for trial, three hours later at the Tarrant County Jail, Colette was exhibiting signs of the behavior that had landed her in the state hospital to begin with. She was released from custody upon her return to Tarrant County.

In August 2012, we were ready for trial. About 10 days beforehand the defense, for the first time, stated that it would raise an insanity defense.[2] Although this was not timely notice, we felt that the court in its discretion would grant us a continuance and let the defense proceed. Additionally, the defense had Colette examined again and claimed she was once again incompetent. The defense expert, Dr. Emily Fallis, stated that she could not examine Colette for sanity because she felt that the defendant was incompetent.

This time we weren't willing to agree. By this point we had subpoenaed a number of Colette's records, including medical, student, probation (as a condition of bond Colette was required to report to the probation department), and Tarrant County Mental Health and Mental Retardation (MHMR) records. Upon review of them all, we saw a pattern of malingering (feigning or exaggerating symptoms of illness for secondary gain). We believed Colette was trying to abuse the system and continue to avoid trial. We asked the court to appoint an independent doctor to evaluate her, and Dr. Antoinette McGarrahan, a clinical psychologist with specialties in forensic psychology and neuro-psychology, was appointed. Dr. McGarrahan reviewed voluminous records; interviewed family, friends, and neighbors; met with Colette; and conducted objective testing. In her report, she stated that in her opinion, Colette Reyes was malingering to improve her legal situation.

While Colette was at Vernon, we obtained records from the University of Texas at Arlington where she had been a nursing student until 2008 when she was kicked out. While in the program, several students filed complaints against her because they were afraid of her (though their reasons for feeling that way were not addressed in the records). Records showed that when Colette struggled with a particular class, she would delay taking exams and consistently miss classes due to claimed physical ailments, though she never provided any written documentation of disability to the university.

First competency trial

Our first competency trial was set for jury trial in January 2013. To prepare, we met with Dr. McGarrahan to discuss her findings. Although we had our own expert, given Dr. McGarrahan's finding, we did not feel the need to use ours at this point. We also spoke to people in contact with Colette in the community. One friend of the family received shopping tips from Colette at the grocery store. Another saw her at the mall, and Colette gave her a discount coupon and invited her to church. Neighbors saw Colette regularly taking out and bringing in her trash and recycle bins. We also spoke to Colette's bond supervision officer. She was attending meetings, rescheduling meetings, and had even been granted requests to fly out of state to visit family and attend a church camp. None of these people noticed any out-of-the-ordinary behavior. We were ready to call them as witnesses if needed.

The defense called Dr. Fallis, who testified that in her opinion Colette was incompetent to stand trial. She based her opinion on evaluations by psychologists who had seen Colette, offense reports, and two interviews. Dr. Fallis diagnosed Colette with schizoaffective disorder. Schizoaffective disorder is a mental illness that has features of two different conditions, schizophrenia and an affective mood disorder (either major depression or bipolar disorder). Of the other six doctors who had seen Colette over the past year, three had diagnosed her with paranoid schizophrenia, one with either schizoaffective disorder or paranoid schizophrenia, another with major depression, and one with a cognitive disorder and paranoid schizophrenia. Dr. Fallis testified that she did not believe Colette was malingering based on her behavior during her interviews.

On cross-examination Dr. Fallis was forced to admit that she had conducted no objective tests to determine if Colette was malingering. In fact, only two doctors who had seen Colette prior to Dr. Fallis had administered any tests to determine malingering, and both indicated less than optimal effort and the possibility of malingering.

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We called Dr. McGarrahan to rebut Dr. Fallis's testimony. Dr. McGarrahan had conducted a thorough evaluation of the defendant and administered four different tests to detect malingering. She testified that she believed Colette had symptoms of borderline personality disorder but that she did not suffer from severe mental illness. Dr. McGarrahan explained that even though Colette had a master's degree in engineering, her performance on objective testing was at the level of a moderately mentally retarded person. Also, Colette's school and medical records contained lots of notes excusing her from schoolwork, and her ability to function in the community was inconsistent with the way she presented to doctors. In fact, there were several occasions in which doctors found that Colette was incompetent, and on the same day she met with her supervision officer or court officials and appeared completely normal. To explain why her opinion was different from a number of other doctors, Dr. McGarrahan testified that once one doctor diagnosed Colette with schizophrenia, the others seemed to rely on prior evaluations.

It was clear that Colette had some mental issues. Our own expert, Dr. Price, classified Colette's diagnosis as a borderline personality disorder (BPD). A BPD is a serious pattern of instability in interpersonal relationships, self-image, emotions, and impulsivity. (A more descriptive name for a BPD might be Unstable Personality Disorder.) The meaning of "borderline" in BPD is that it "borders" on other personality disorders as well as several mental disorders, rendering a person with BPD very unpredictable. But BPD is not a mental disorder and would not typically be considered to be a severe mental disease or defect under the Texas insanity standard.

For the majority of the competency trial, Colette quietly read her Bible or swayed back and forth in her chair. But when Dr. McGarrahan was discussing malingering, Colette yelled out, "I am not faking!" Dr. McGarrahan was then able to explain how Colette's behavior indicated that she is able to understand what is being said and that her outbursts occur during testimony that is not helpful to her legal situation. During our closing argument, Colette had another outburst, and we were able to argue directly to the jury that Colette understood what was happening.

At the conclusion of the trial, the jury found Colette competent to stand trial. Unfortunately, we were not scheduled to start trial right away. This meant that Colette would still be out on bond awaiting her next trial date. However, later that same day Colette made threats to harm herself to her supervision officer and the judge held her bond insufficient. Colette would await trial in custody.

The murder trial delayed

We came up for trial again in April 2013. A few days before trial the defense filed a notice of intent to raise the insanity defense. They also raised the issue of competency again, so our trial was going to be delayed. (Although Colette was presumed to be competent based on the outcome of the last trial, the issue of competency can be raised at any time.) This time her defense attorney also produced a motion requesting permission to testify at the competency trial. Out of concern for potential conflict, the judge allowed counsel to withdraw and appointed a new defense attorney for Colette. The new defense attorney promised to get up to speed on the case as quickly as he could, but once again, we were re-set for trial, this time until November 2013—a full two years after Collette's initial incompetency commitment to Vernon.

In the meantime, we were finally able to get Colette's medical records from California. We had attempted to get the records by an out-of-state subpoena, but in citing HIPAA laws, the State of California made it very difficult to obtain the records. They showed that she was hospitalized and diagnosed with paranoid schizophrenia in 1994, but this took place after she exhibited strange behavior upon being caught stealing from her employer.

Despite getting a new defense attorney, we still expected an insanity defense. Therefore, we obtained a court order and had Colette evaluated by Dr. Randy Price. Dr. Price attempted to interview Colette, but she would not cooperate. When he tried to talk to her, she chanted in a made-up language. As he raised his voice while talking to her, she would get louder as well. Dr. Price reviewed the offense reports, all of our records, and listened to the tape recording of the murder. His conclusion was that Colette was sane at the time of the offense.

A second competency hearing

In November 2013, it was time for trial. The defense raised the issue of incompetency again, so we first had to have another competency hearing. (One more ruling of competency and we would finally be in trial!) We had a visiting judge presiding over the case, and this time the competency trial was to the judge. Once again the defense called Dr. Fallis. As she had previously testified, she said that Colette was not competent to stand trial. The defense also called a nurse practitioner for Tarrant County MHMR who treated Colette in jail. She testified that Colette was prescribed certain psychiatric medications and that there was a noticeable difference in Colette's appearance and behavior when she was not taking her medications. On cross she testified that in her first meeting with Colette, Colette seemed normal until she identified herself as being with MHMR—then Colette started yelling religious statements and answering questions with a religious theme. She admitted that when Colette is well, she exaggerates her illness to seem more ill than she is and that Colette would act out and refuse medication as her court dates approached.

The defense's final witness during competency was Colette's former defense attorney, Wes Ball. Mr. Ball testified that Colette would not assist him in her defense. He said that when he tried to ask her questions related to the events surrounding Arthur's death, she would not answer. Mr. Ball testified that Colette would respond only with religious answers. On cross, Mr. Ball admitted that it is possible that Colette had the ability to answer his questions and assist him but was choosing not to take part in her defense.

For our case, we called Dr. McGarrahan again. Dr. McGarrahan had reviewed Colette's jail records, listened to testimony of the other witnesses, and met with Colette in the holding cell before trial. Dr. McGarrahan again testified that she did not believe that Colette was suffering from severe mental illness and was malingering. We also called a detention officer from the Tarrant County Jail. She testified that Colette would behave appropriately when being escorted to visit her family and friends or when it was time to order commissary. But when it was time to meet with mental health officials or go to court, she would chant and exhibit bizarre behavior. Finally, we called Dr. Price to describe his meeting with Colette and offer his opinion that she was purposefully choosing not to cooperate with him. At the end of all the evidence, the judge found that Colette was competent to stand trial.

The murder trial (finally)

After this competency hearing, we immediately launched into the trial, with jury selection starting the next morning. We had prepared a special juror questionnaire to address relevant issues in our trial and assist in making strikes. For example, we included questions about divorce, mental health conditions, and if anyone had specialized training in psychology and marital counseling. Because many of Colette's statements and outbursts were religion-based, we asked how frequently potential jurors attended religious services. We even asked if anyone had ever suspected or caught their spouse having an extra-marital affair (we included a note that they would not be asked about that in court). While some of those questions could potentially inflame prospective jurors, we felt like they were important questions to ask. Asking these questions was very helpful, and we were surprised how much understanding the jury demonstrated about the issues of the case.

We spent the majority of voir dire discussing mental illness and insanity. It was important for potential jurors to understand that a person can have a mental illness and still not be insane.[3] We wanted jurors to realize that people use slang terms like "crazy" and "psycho" to refer to other people all the time, but that doesn't necessarily make them insane in the legal sense. This was important because in the tape recording of the murder, Arthur referred to Colette a number of times as being "crazy," "psycho," and in need of treatment because she was mentally ill.

The prosecution has the burden to prove beyond a reasonable doubt that the offense was committed, and the defense then has the burden to prove by a preponderance of the evidence that the defendant was insane at the time of the alleged conduct.[4] We presented our case in chief as an ordinary murder case and did not address the issue of sanity at this time. We called the officers who

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arrived at the scene, the crime scene officer, the firearms examiner, the medical examiner, and Detective Lopez.

We also called the 911 call-taker and played Gabby's emotional 911 call. Gabby testified about the events surrounding her father's murder and about life with Colette. She told the jury that Colette had hidden Arthur's guns from him after he moved out. We also called Arthur's divorce lawyer to testify that, unaware of Arthur's death, he filed a petition for divorce on Arthur's behalf the very day after his murder. Because we suspected the defense was going to argue that Colette's recording of the murder was not something a sane person would do, we also had him explain that it is not uncommon for parties going through a divorce to record conversations in attempts to gain the upper hand.

We concluded our case by calling Barry Dickey, our audio-video expert, and playing the tape of the murder. The majority of the tape contained a conversation between Arthur and Colette's sister. However, when Arthur would complain of Colette's abusive behavior, Colette could be heard attempting to explain or justify her actions.

Colette was disruptive multiple times during the trial. When Gabby testified, she yelled at her and called her a liar. On several occasions the disruptions were so loud that the judge had to send the jury out and have the defendant removed from the courtroom. Colette remained in the holdover cell for portions of the trial, but the judge had a speaker placed outside her cell so that she could hear what was taking place in the courtroom.

The defense began its case by calling one of Colette's sisters, Marie Cook. She testified that Colette's family was aware of her mental illness and wanted her to get help, but Arthur would not allow it. On cross, we pointed out that she had seen Colette only a handful of times during her and Arthur's 22-year marriage and that the couple's children were probably more aware of what was taking place in the home.

The defense's only other witness was Dr. Fallis. On direct, Dr. Fallis testified extensively about her belief that Colette suffered from a severe mental disease or defect at the time of the offense. However, on cross she admitted that she could not testify as to whether Colette knew the difference between right and wrong.

In rebuttal, we called a few witnesses to testify about Colette's behavior both before and after the murder. A claims agent for New York Life Insurance Company testified that Colette was the beneficiary of Arthur's life insurance policy and that just weeks after his death, she attempted to recover death benefits. The paperwork Colette submitted implied that Arthur's death was an accident. Gabby's best friend's mother testified that Colette was very upset about the divorce and was extremely worried about her financial situation. Daughter Naomi testified that her mother was manipulative and controlling. She also described an occasion as a child when Colette dragged her out of the house by her hair because she didn't want to go to school.

Our final witness was Dr. Price, who testified that Colette was not insane at the time of the offense. He believed that Colette might have a borderline personality disorder but that she does not suffer from a severe mental disease or defect. Furthermore, in his opinion, Colette knew the difference between right and wrong. Although the defendant would not speak with him about the murder, in his opinion, the tape recording of the offense was the best evidence.

The jury deliberated for about three hours before finding Colette guilty of murder.

At the punishment phase, we felt like, from a prosecution standpoint, the jury had already heard everything there was to hear about Colette. However, we did recall Naomi to tell the jury that after the murder, Colette had emptied all of the family's bank accounts, including her and Gabby's college funds.

In punishment, the defense called a couple of doctors who worked for Tarrant County MHMR and had seen Colette while she was on bond and in jail. They testified about Colette's continued need for medical treatment.

But the biggest surprise of the trial came when Colette decided to testify. Even on direct, Colette tried to control the direction of her testimony by interjecting her own facts and not answering her lawyer's questions. We objected many times for nonresponsive answers, which the court sustained. Colette was insistent that she would never hurt Arthur. However, when asked what should happen to her if she did hurt him, her response was, "Death."

When it came time to argue, we didn't ask for a specific sentence. Instead, we told the jury that Colette deserved to spend a lengthy amount of time in prison. The jury deliberated for about an hour and a half before sentencing Colette to 45 years. After all of her attempts to delay justice, she finally had to answer for Arthur's murder.

We faced a number of challenges in this prosecution. We made some mistakes along the way, mainly in giving too much weight to the initial assessment of the court's expert, but in the end successful prosecution came down to our preparation. With mental illness being such a concern in our society and in the criminal justice system, we were pleased that the jury didn't allow Colette to exaggerate her symptoms of mental illness and that they held her responsible for the murder she committed. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 46B.003.

2 A defendant planning to offer evidence of the insanity defense must file with the court a notice of the defendant's intention to offer that evidence at least 20 days before the date the case is set for trial. Tex. Code Crim. Proc. art. 46C.051.

3 A person is legally insane if at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong. Tex. Penal Code §8.01.

4 Tex. Code Crim. Proc. art. 46C.153.

Requesting a defendant's military records

A beginner's guide for procuring these often difficult-to-get records

While handling a recent murder case, I quickly discovered how difficult it can be to obtain military records for a defendant. The defendant claimed his crimes—brutally beating a prostitute with a baseball bat and then dumping her body—were the result of posttraumatic stress disorder (PTSD) from multiple deployments to Iraq and Afghanistan. The defendant linked his behavior to the horrible atrocities he witnessed during combat.

By Craig Moore
Assistant District Attorney in Travis County

His attorney designated a psychologist who evaluated the defendant and concluded that he may in fact suffer from PTSD. Remarkably, neither the psychologist nor the defense attorney requested or reviewed any military records to substantiate the defendant's claims. I knew the defendant had been honorably discharged from the Navy but had no information about whether he had actually seen combat. While I agree that soldiers returning from war may experience PTSD, the defendant had not produced any documents to support his defense.

My first order of business was to obtain and review the defendant's military records. If he had experienced traumatic events or received counseling and treatment for any mental health issues, then I expected this information to be documented in his file. After consulting with fellow prosecutors on what to do, I sent a subpoena and cover letter with the defendant's name and date of birth to the National Personnel Records Center, Military Personnel Records division (NPRC-MPR) in St. Louis. In a follow-up call to check the status of my request, a representative said the entire process could take up to 10 weeks. Ten weeks! Fortunately we had plenty of time to get the records and continue our preparation for trial.

During a call to the representative after about eight weeks of not hearing anything, she politely said that the NPRC-MPR could not process my request because the defendant had discharged from the Navy after a certain date. I also did not include enough personally identifiable information in my request. She added that I would have to make a new request, and the processing time could take up to another 10 weeks. It was obvious that law school had not adequately prepared me to deal with the bureaucracy of the federal government.

While working on the new request, we were able to plead the

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case for a significant sentence, and justice was served. Many weeks later I received a postcard regarding my second request for the defendant's records. Again, there was a problem with the request and I would have to submit another one—and yes, processing could take up to another 10 weeks. Frustrated with this process, I thought to myself, "Oh Alice, how far does the rabbit hole go?" I wrote this article to tell prosecutors what I learned about the process of requesting military records.

In reviewing a defendant's military records, the prosecutor's goal is to find information that is admissible or that may lead to admissible evidence to use at trial. The utility of such efforts will depend on the facts and circumstances of a particular case. Does it make sense to request military records for a first-time possession of a controlled substance? Probably not, but with the possibility of a lengthy processing time, it will be helpful to get the request done right the first time.

Available options

It may sound a little far-fetched, but convincing the defendant to request his own records and provide copies to you is an option. Oftentimes, it is in the defendant's best interest to provide records to the State if those records will advance a particular defensive theory or mitigate punishment in some way. Veterans and active duty soldiers generally have greater rights to access their own records than do members of the public. If the defendant is a veteran, he can request his records from the NPRC-MPR by filing out a SF-180 online at www.archives.gov/veterans/military-service-records.

Another option, which might be better than relying on the defense, is to make a request under the Freedom of Information Act (5 U.S.C. §552, also referred to as FOIA). The information available to the public through an FOIA request is limited by the Privacy Act of 1974 (5 U.S.C. §552a). In the military, the FOIA Coordinator for each command normally doubles as the Privacy Act coordinator.[1] The FOIA/PA coordinator is the liaison responsible for responding to a request for records, including proper instructions on how to obtain the records. Cooperative defendants can sign an FOIA/Privacy Act release to expedite obtaining records.

The Privacy Act prohibits the federal government from disclosing information contained in a "system of records," which is information "retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual."[2] The records we need for trial are likely contained in a system of records. An exception to this broad protection is granted to law enforcement agencies, including police departments.[3] Therefore, reach out to local police officers early in the investigation and ask them to request records on the defendant. The detectives in my case were able to get a packet of information from the Defense Manpower Data Center, including the defendant's photo, Defense Enrollment Eligibility Reporting System (DEERS) Extract, assignment history, CTS Deployment file, DD-214 Extract, and Verification of Military Experience and Training (VMET). This information was extremely useful in learning more about him, including a previously unknown fact that he had been married years ago.

There is yet another option: obtaining military records with a subpoena or court order. For purposes of this article, a "subpoena" refers to a subpoena *duces tecum* that has a judge's signature instead of a prosecutor's signature.[4] Any first-year law student who was actually awake during constitutional law will want to lecture us about the principles of federalism—that is, that branches of the federal government do not have to respond to a state subpoena. While Mr. First Year is technically correct, the federal branches have policies pertaining to the disclosure of information in response to state court demands. Similar to law enforcement agencies, the Privacy Act provides an exception to requests for information made through subpoenas and court orders.[5]

Military identifiers

There are five active duty branches in the U.S. military: the Army, Navy, Air Force, Marine Corps, and Coast Guard. Determining the proper agency to receive a subpoena is critically important and will depend on, among other things, the defendant's service identifiers. In situations where two or more veterans or active duty soldiers have the same name, these identifiers will ensure that your request is for the right person. The defendant's date of birth, Social Security number, and race/ethnicity should already be in your file. You will also need to find out in which branch the defendant served and his approximate dates of service. Again, the local law enforcement agency

should be able to access this information. The defense may also be willing to hand over this information, including the defendant's DD Form 214.[6] Incorrect or incomplete identifiers may result in delays to the request, so make sure the information is correct. As a general rule, always send with the subpoena a cover letter that includes identifiers as well as detailed information about the records you are seeking.

National Personnel Records Center

The National Personnel Records Center, Military Personnel Records (NPRC-MPR) in St. Louis, Missouri, is the central repository of military personnel, health, and medical records of discharged and deceased veterans.[7] The NPRC-MPR is a federal record center and part of the National Archives and Records Administration.[8] The NPRC-MPR should have custody of the Official Military Personnel File (OMPF), which contains administrative records about a veteran's service history.[9] Records are transferred to the NPRC-MPR six months after a person has discharged from the military.[10] Prosecutors should request the defendant's OMPF by serving a subpoena on the director of the NPRC-MPR.[11] The NPRC-MPR may not produce the entire OMPF in response to a subpoena, so be prepared to serve additional subpoenas or contact the NPRC-MPR directly if you suspect additional documents are available but have not been produced. Sending an FOIA request to the NPRC-MPR is also a good idea. If the defendant's health and medical records are not in the OMPF, request them from the Department of Veteran Affairs.[12] Visit www.archives.gov for complete information about obtaining records from the NPRC-MPR, including making FOIA requests.

Active duty records

There is no centralized location like the NPRC-MPR for active duty service records. As a result, you may encounter more difficulty in obtaining records for trial. Each branch of the military has polices for how to respond to a FOIA request for records, and these policies are subject to the restrictions in the Privacy Act. To acquire active duty personnel information for all branches of the Department of Defense through a FOIA request, visit www.dod.mil/pubs/foi/contactUs.html.

For active duty service records, the subpoena should qualify as an exemption to the broad protections given to the defendant under the Privacy Act. The Code of Federal Regulations provides instructions to military branches on how to handle requests for production of records. Specifically, sections under 32 C.F.R. part 97 govern the release of official information in litigation and testimony by Department of Defense personnel. Additional rules governing the release of Navy and Army records are found in sections under 32 C.F.R. part 725 and 32 C.F.R. part 516, respectively.

Navy and Marines

A subpoena for naval records should be served on the general counsel at the Department of the Navy, Office of the General Counsel, Navy Litigation Office, 720 Kennon Street SE, Bldg. 36 Room 233, Washington Navy Yard, DC 20374-5013, who will then refer the matter to the proper delegate for action.[13] The request for records must identify the parties, their counsel, and the nature of the litigation; identify the information or documents requested; and describe why the information is needed.[14] There are a number of factors affecting whether the Navy will comply with the subpoena.[15] For example, subpoenas that are unduly burdensome, conflict with existing laws, or interfere with ongoing law enforcement proceedings will likely be rejected.[16] If the Navy complies with the subpoena, then expect certified copies of records to be forwarded to the clerk of the court from which the subpoena was issued.[17]

Army

A subpoena for army records should be served on the Chief, U.S. Army Litigation Division.[18] The Army's policy is to make records reasonably available, including for use in criminal cases pending in state courts, unless the information is classified, privileged, or otherwise protected from public disclosure.[19] Similar to the Navy, there are factors affecting whether the Army will comply with the subpoena.[20] Serve the subpoena, including a cover letter describing the nature and relevance of the Army records you are seeking, at least 14 days before the desired date of production.[21] If the Army decides not to challenge the subpoena, then expect full compliance.[22]

Air Force

A subpoena for Air Force records should be served on the Chief, General Litigation Division, Office of the Judge Advocate General.[23] All

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releases of information from Air Force records, whether the requester cites the FOIA or not, must comply with the principles of the FOIA.[24] Accordingly, a subpoena will be treated no differently from a standard FOIA request. Procedures on how to make a FOIA request to the Air Force are found at www.foia.af.mil/index.asp. The Privacy Act applies, so you will need to coordinate with the Air Force's FOIA/PA representative to obtain records responsive to your subpoena.

Coast Guard

The Coast Guard is the only military branch that is a part of the Department of Homeland Security. Refer to relevant sections of 6 C.F.R. part 5 for rules pertaining to the disclosure of records and information from the Department of Homeland Security. A subpoena for Coast Guard records may be served on the Office of General Counsel, Department of Homeland Security.[25] The subpoena and cover letter must identify the nature and relevance of the information sought with as much specificity as possible.[26]

Conclusion

The Hydra is a mythical creature with the body of a serpent and many heads—similarly, the federal government is a large bureaucracy with many agencies. In a quest to obtain military records in a timely manner, comparisons of the two may occur often. Remember, this is not a request for pen packets or certified copies of judgments and sentences, which is a fairly routine process for prosecutors and investigators. For that reason, it may be helpful to identify someone in your office to create a template for a subpoena and cover letter, assist you in getting the judge's signature and filing the subpoena with the clerk's office, and work with you or your investigator to properly serve the subpoena on the appropriate entity. This is especially important in smaller counties with fewer resources. In the cover letter, be sure to include some version of the following statement: "If you do not have records pertaining to (defendant's name), we would appreciate any information you may have that will help us locate them."

There is no perfect process. Because federal agencies do not have to respond to state subpoenas, you may encounter unanticipated difficulties with getting the appropriate federal entity to comply and produce records. You may eventually have more success with simply making a standard FOIA request. The value of sending a subpoena, however, is that the Privacy Act will not prohibit you from obtaining documents maintained in a system of records. Whatever route you choose, make sure the records are in admissible form if you will need them at trial. Good luck and happy hunting! ❇

Endnotes

1 Interview with John A. Barnes, Supervisory Paralegal Specialist, FOIA/PA Coordinator, MCAS Miramar, San Diego, CA (July 29, 2013).

2 5 U.S.C. §552(b).

3 5 U.S.C. §552a(b)(7).

4 See *Doe v. Di Genova*, 250 U.S. App. D.C. 274, 779 F.2d 74 (1985) (subpoenas, grand jury or otherwise, do not qualify as orders of court of competent jurisdiction unless they are specifically approved by court).

5 5 U.S.C. §552a(b)(11).

6 The DD Form 214, officially DD Form 214 "Certificate of Release or Discharge from Active Duty," but generally referred to as a "DD 214," is a document of the United States Department of Defense issued upon a military service member's retirement, separation, or discharge from active-duty military.

7 More information about the National Personnel Records Center, Military Personnel Records is available online at www.archives.gov/st-louis.

8 *Id.*

9 *Id.*

10 Telephone interview with Marie Carpenti, Administrative Aid, National Archives and Records Administration (July 25, 2013).

11 Demands for the production of records stored in a Federal Records Center (FRC), including the National Personnel Records Center, must be addressed to and served on the director of the FRC where the records are stored. 36 C.F.R. §1251.8(e).

12 See www.archives.gov/veterans/military-service-records/medical-records.html.

13 32 C.F.R. §725.6(d)(1)(iii); 32 C.F.R. §257.5(c).

14 See 32 C.F.R. §725.7 and 32 C.F.R. §725.8(b)(2)(i).

15 See 32 C.F.R. §725.8(a).

16 *Id.*

17 See 32 C.F.R. §725.8(b)(2)(i)(A).

18 32 C.F.R. §516.14; 32 C.F.R. §257.5(b).

19 32 C.F.R. §516.40(a); 32 C.F.R. §516.44(a); see also *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (finding no contempt for the agency employee who refused to produce documents based on an order from his superiors).

20 32 C.F.R. §516.44(b).

21 32 C.F.R. §516.41(d).

22 32 C.F.R. §516.41(f)(4).

23 32 C.F.R. §257.5(d).

24 32 C.F.R. §806.3(a).

25 6 C.F.R. §5.43(a).

26 6 C.F.R. §5.45(a).

Building a "wall of courage"

While freshening up the break room at the office, the Victims Services Unit had a great idea for both brightening a blank wall and memorializing local victims.

By Jill A. McAfee
Director of Victim Services in the Bell County District Attorney's Office

Change is good, or so they say. In our office, change has been great!

The change I am referring to in our office came about 10 months ago when we filled an open position for a victim assistance coordinator with a very determined advocate who decided our victim services section needed a facelift. She was right. We have a beautiful office and lovely waiting areas for our victims, but Dana Bettger, the new kid on the block, decided our break room/kitchen was just too sterile-looking and decided, with District Attorney Henry Garza's blessing, to cozy it up a little with curtains, table runners, and plants. Dana wanted one more thing to complete the effect: artwork.

All three of us had different opinions on what would be best, but as Henry and I were driving to Galveston for TDCAA's Annual Criminal and Civil Law Update in September, he turned to me and said,

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From left to right are Jill McAfee, Victim Services Director; Dana Bettger, Victim Assistance Coordinator; and Henry Garza, District Attorney, all in the Bell County DA's Office, posing in front of the new "wall of courage."

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"How about pictures of our victims with something that says, 'Families that have touched our lives'?" And so it came to be! We put together what has since become known as our Wall of Courage. (See a photo of it on the previous page.)

The Wall of Courage is a reminder of how many lives are touched by crime everyday and how courageous victims and their families are. It is a constant reminder that crime doesn't just affect the victims but all the people around them. It is a testament to the courage, strength, and determination of those left behind to follow through and work with the justice system even when it seems hopeless.

The pictures on the wall are victims of felony crimes. Some pictures are of homicide victims and others are survivors who worked closely with us during the years to prosecute their cases, but all of them have had a great impact on our lives, and each has a story of their own that will forever remain in our hearts. Not simply pieces of evidence, these are real people, real families, and real life stories. We got permission from each family to use their favorite photo of themselves or their loved one on our wall. Because we have many more victims than wall space, we plan to change out the photos for different ones every six to eight months.

While getting permission to use the pictures, I asked victims and families to give me one word that described how they felt about their experience with us during trial. That is where the words between the photos came from. One of the survivors owns Visual Basics, a graphic design company, and asked if they could help make this vision a reality. They did the wording for us on vinyl decals and charged us only the cost of the materials; we found the picture frames at a discount online. Total cost was under $250.

Everyone who has seen the Wall of Courage has expressed emotion, pride, and remembrance. It brings a form of reverence to the room that many victims and their families will use to gather and give each other strength and encouragement during court proceedings.

This wall design was the result of three people putting their heads together to pay tribute to the reason we are all here, but truly it is the result of how important victims of crime

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Justice through science

The role of the Texas Forensic Science Commission (TFSC) and some common questions answered

By Lynn Garcia
(left) General Counsel, and
Leigh Heidenreich
Commission Coordinator, both at the Texas Forensic Science Commission

The Texas Legislature created the Forensic Science Commission (FSC) in 2005 in the wake of significant problems in the DNA/serology section of the Houston Police Department crime laboratory. From 2005–2007, the commission had no budget and no staff. It considered its first complaints in 2007. Controversy ensued almost immediately as the Commission reviewed a complaint challenging the science used in the arson convictions of Ernest Ray Willis and Cameron Todd Willingham.

Investigating problems in forensic science is often controversial due to the inescapable tension between science and the law. Scientists readily accept that their understanding of certain principles may be subject to change and revision numerous times throughout their careers. In fact, the continuous search for new and better answers is at the heart of good science.

The legal system, on the other hand, is poorly equipped to cope with evolving scientific principles. When an expert testifies about the forensic analysis performed in a criminal case, the trier of fact assumes the answer is as definitive as it can be, not that the expert will change her mind some years down the road when new scientific discoveries are made or when old principles have been debunked. Add to this the fact that scientists have an ethical obligation to notify stakeholders if they discover material changes, and we have the potential for conflict even years after a case is decided.

Our background

The commission is a small state agency physically located in the Stephen F. Austin building in Austin and administratively supported by Sam Houston State University in Huntsville. We have two full-time staff (the co-authors of this article) and nine commissioners (seven scientists and two attorneys). The nine commissioners serve staggered two-year terms and are appointed by the governor. The two attorneys represent both sides of the adversarial system, and the governor chooses them from a list of 10 submitted by the Texas District and County Attorneys Association (TDCAA) and the Texas Criminal Defense Lawyers Association (TCDLA).

The commission has come a long way since its early days, and we are proud to have developed close relationships with many prosecutors in our state as we work on issues of concern to the entire criminal justice system.

What does the commission do?

The commission's main job is to investigate allegations of negligence and misconduct involving accredited forensic disciplines performed by accredited crime laboratories in Texas.[1] For a list of accredited forensic disciplines and crime labs, see www.txdps.state.tx.us/CrimeLaboratory/LabAccreditation.htm. We also maintain a system for laboratories to self-report instances of negligence and misconduct that they discover on their own. Our investigations typically entail extensive document review and interviews with crime lab personnel. We publish our reports on our website at www.fsc.state.tx.us.

During the most recent legislative session, the Legislature clarified the scope of the commission's jurisdiction, in part due to confusion that arose in the wake of the Willingham and Willis arson investigations. The commission is now permitted to review cases involving forensic disciplines and entities that are not currently subject to accreditation. However, these reviews are limited to making observations regarding the integrity and reliability of the science and suggesting recommendations for

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best practices. The commission may also initiate its own investigation of any type of forensic analysis (accredited or unaccredited) without receiving a complaint, but only if a majority of the commission believes the review would advance the integrity and reliability of forensic science in Texas.

One example of a review initiated by the commission involves the discipline of microscopic hair analysis. The FBI recently informed the public that some of its examiners overstated the extent to which the science underlying hair microscopy allowed for a positive association between a known hair sample and crime scene evidence. The FBI has also indicated that it trained many microscopic hair analysts in state and local crime laboratories, including some laboratories in Texas. Of course, *this does not necessarily mean* that state and local analysts in Texas made similar overstatements. The commission is working with all of the crime laboratories that engaged in microscopic hair review as well as TDCAA, TCDLA, and the Innocence Project of Texas to conduct a review of hair cases.

How does the FSC's work impact pending criminal cases?

As of June 2013, the commission's reports are *not* admissible in civil or criminal actions in the State of Texas.[2] However, the reports we write should assist prosecutors in understanding the types of concerns that may be raised at trial when there are questions about the integrity or reliability of the science. We encourage prosecutors to read the reports and supporting documents on our website and to contact us with any questions you may have.

How will I know if one of the FSC's discipline-specific reviews affects me?

Because the commission has a partnership with TDCAA in working on discipline-specific reviews such as the hair microscopy cases, we are determined to ensure that prosecutors whose cases may have been impacted are closely involved in the case review process. The review panel may seek prosecutors' assistance in locating critical documents in the case. After consideration of all available information, the review panel may reach a decision regarding the fundamental integrity or reliability of the hair microscopy used in the case. However, the commission's role is limited to the forensic analysis, and it has no role in determining guilt or innocence. It will be up to individual prosecutors to assess whether any additional steps need to be taken in the court system depending upon the facts and circumstances of the entire case.

What is the status of the Salvador drug cases in Houston?

In February 2012, the Department of Public Safety (DPS) crime laboratory in Houston discovered that Jonathan Salvador, one of the examiners in its drug chemistry section, used the evidence in one alprazolam case to support the results in a separate case for which he was struggling to issue a positive finding. DPS immediately notified stakeholders, including the law enforcement agencies in 36 counties surrounding Houston that had submitted evidence in close to 5,000 cases worked by the examiner. The commission investigated the case and found that Salvador committed professional misconduct. The Texas Rangers also investigated, and the Harris County District Attorney empaneled a grand jury, but the grand jury ultimately no-billed Salvador.

Initially, the Court of Criminal Appeals (CCA) held that any forensic testing performed by Salvador was unreliable, regardless of whether there was evidence left to re-test. In a case called *Ex Parte Coty*, the CCA reversed itself, asking the parties to brief the question of when the court should assume a due process violation in a case worked by an examiner when he committed misconduct in another case or cases. (See the article in this issue on page 12.) The CCA remanded *Coty* to the habeas court, requiring it to use a new legal standard in determining whether Mr. Coty is entitled to relief. Under the first prong, if the applicant demonstrates that the examiner's work is unreliable, the CCA will infer the evidence in the applicant's particular case is "false" under a line of cases generally referred to as "false-evidence claims." To establish falsity, the applicant must show that:

1) the examiner is a state actor;
2) the examiner has committed multiple instances of intentional misconduct in another case or cases;
3) the examiner is the same examiner who worked on the applicant's case;
4) the misconduct is the same type

of misconduct that would have affected the evidence in the applicant's case; and

5) the examiner handled and processed the evidence in the applicant's case within roughly the same period of time as the other misconduct.

If the applicant establishes these five criteria, then the CCA will infer the evidence is "false," and the burden shifts to the State to rebut the inference of falsity. To rebut the inference, the State must demonstrate that the examiner committed no misconduct in the applicant's particular case.

Assuming the applicant establishes the inference of falsity under the first prong and the State is unable to rebut the inference, then the applicant must meet a second prong of the test. Under the second prong, the applicant must show that the evidence in question was "material" to his conviction. This analysis will take into account the facts and circumstances of each case. Thus, when there is significant evidence beyond the laboratory report or analyst testimony to show the applicant committed the crime in question, the applicant will have a difficult time establishing materiality. However, in cases where the laboratory report or analyst testimony was the primary or only piece of incriminating evidence, the applicant may indeed be able to establish materiality.

One issue that came up during the Salvador investigation is the significant challenge of notifying all stakeholders (prosecutors, defendants, defense attorneys, judges, etc.) in cases involving a high-volume forensic discipline with thousands of cases like drug chemistry. To address this issue, the commission and the Texas Criminal Justice Integrity Unit (TCJIU) convened a stakeholder roundtable in June 2013. The commission and the TCJIU released a report suggesting a roadmap for defendant notification in future cases involving high-volume forensic disciplines, which may be found on the commission's website at www.fsc.state.tx.us.

What about that arson review?

In April 2011, the commission made a series of recommendations to improve the quality of fire investigations in Texas in response to a complaint regarding the science used in the criminal cases of Ernest Ray Willis and Cameron Todd Willingham. One suggestion was that the State Fire Marshal's Office (SFMO) consider conducting an internal review of arson cases for which its staff provided testimony to ensure that outdated and/or invalid fire science principles were not used in the forensic reports or testimony. Over the last few years, fire scientists have recognized that some of the indicators once used to demonstrate that a fire was set intentionally should no longer be relied upon as conclusive evidence of an incendiary fire. The commission's recommendation was consistent with the widely accepted ethical principle that forensic practitioners have a duty to alert appropriate stakeholders in the criminal justice system if they become aware of significant scientific changes or other factors (e.g., negligence, misconduct, etc.) that could have had a material impact on a criminal case.

To date, there have been only a handful of cases (five or six) in the entire state where the SFMO issued a letter to a prosecutor notifying him of the agency's concerns regarding the reliability of its investigators' forensic analysis in the original criminal case. The SFMO's letter intended to advise the prosecutor of the issue. It is then up to the prosecutor and/or a court of competent jurisdiction to decide what, *if any*, further action is appropriate within the greater context of the case.

The District Attorney for Pecos County has filed an Attorney General opinion request asking whether the SFMO has the authority to review old arson cases and make determinations regarding the reliability of the science used in those cases. We look forward to the Attorney General's decision. We also understand the SFMO has made improvements to the arson review process based on feedback from the District Attorney for Pecos County.

What is the FSC doing to prevent future problems?

The commission is committed to proactive training of forensic examiners, lawyers, and judges in our state. We have a partnership with the Texas Criminal Justice Integrity Unit through which we offer a variety of training courses. We also work closely with the Texas Association of Crime Lab Directors to identify training that is helpful to them. We try to participate as often as we can in continuing legal education programs around the state, and we are

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working closely with the forensic science community to ensure that all forensic examiners become certified in their forensic disciplines over the next 7–10 years.

What if I have a question?

Please call us! Though we are a staff of two, we love our jobs and especially love talking to prosecutors about forensic issues affecting their lives. Feel free to email or call anytime. Contact Lynn Garcia at lynn.garcia@fsc.texas.gov and Leigh Heidenreich at leigh@fsc.texas.gov, or call us at 512/936-0770. ❇

Endnotes

1 See Tex. Code Crim. Proc. art. 38.01.

2 *Id.* at §11.

Meet Nellie Gray Robertson, the first female county attorney in Texas

An innocent question, plus a Hood County prosecutor's interest in history and ancestry, led to the discovery of Texas's first female county attorney, who in some respects has been lost to history.

By Lori J. Kaspar
County Attorney in Hood County

When I was campaigning for the office of Hood County Attorney (a position I now hold), Karen Nace, one of the ladies in the local historical society, said, "You realize you're not the first woman who will be the county attorney in Hood County? There was another woman a long time ago—Nellie Robertson."

Karen sent me a couple of clippings she had on Nellie as well has her graduating class photo from Granbury High School (Class of 1912)—and I took it from there. Because I was already a member of Ancestry.com (I had been doing genealogy research on my own family), I decided to use the site to look for information on Nellie. Fortunately, someone (bless his or her heart) had digitized the University of Texas School of Law yearbooks from 1916, 1917, and 1918, and I got dozens of hits on Nellie. In addition, her relatives in Colorado had done quite a bit of family research and had made their "trees" public.

I've since "introduced" Nellie to numerous groups in and around Hood County, the first one being the Hood County Historical Society meeting last year. Three of Nellie's relatives showed up for the presentation, and through them I was introduced to Jean Robertson, Nellie's nice. Jean is the only living relative who had any personal relationship with Nellie, and she and I are close now and see each other often. (I share my Nellie research with her, and she bakes me cookies!)

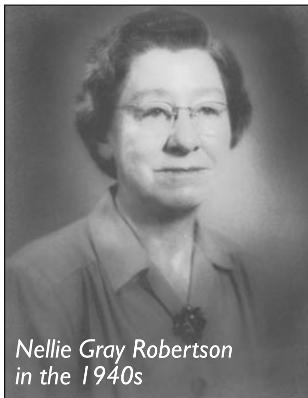
Now I'd like to share what I've discovered about this smart, tough, and tenacious woman with other Texas prosecutors.

More than 100 years ago

It was 1912. Nellie Gray Robertson was the youngest of six children,[1] and she wanted to make her mark on the world. She vowed to become independent and support herself with a career.

Nellie was born February 28, 1894, in Granbury (Hood County), Texas.[2] It was a time when women had few legal rights, and most women depended on their husbands

for survival. Nellie knew firsthand the consequences when that support system failed. Her father, William Jarrett Robertson, had left home shortly after Nellie's birth, leaving the family destitute. He drifted in and out of their lives for years while Nellie's mother, Arminda Barton Robertson, struggled in poverty. The family was "dirt poor," according to Nellie's niece, Jean, and they depended on Nellie's older brothers to provide money and food.[3] William died in Louisiana in 1910, and while Arminda was qualified for a Confederate Widow's pension, she did not begin receiving it until 1937.[4]


Nellie Gray Robertson in the 1940s

When Nellie graduated from Granbury High School in 1912, she did what few poor women dared to do: She went to college to study law.[5] Nellie entered the University of Texas in Austin in the fall of 1912,[6] a year before the first Texas women became licensed attorneys.[7] In 1918, Nellie became the first woman in Hood County—and in the state of Texas—to be elected as county attorney.[8] She was only 24 years old.

Nineteen-eighteen was a banner year for other female law graduates at the University of Texas. One-sixth of the graduates that year were women. It would take 40 years before the ratio of female-to-male law students at UT would surpass that of 1918.[9] Organizations for women on campus included the Texas Woman's Law Association, the Present Day Club, Kappa Beta Pi, the Pennybacker Debating Club, the Woman's Assembly, and the Woman's Council. Nellie Robertson belonged to all of the women's organizations and was an officer in all but one.[10]

In 1918, women had yet to gain the right to vote in general elections, but that did not deter Nellie Gray Robertson from running for office. She returned to Granbury in 1918 and ran unopposed in the July Democratic primary.[11] In the November general election, the male voters of Hood County overwhelmingly supported Nellie over her male opponent—she received all but two of the 448 votes, becoming the first female county attorney in the state.[12]

In 1920, Nellie ran for re-election, but this time she had a primary opponent. Nonetheless, she prevailed with 776 votes to Mr. E. L. Roark's 570 votes.[13] Nellie ran unopposed in November and secured a second term in office. At that time, the Hood County Attorney position was only a part-time job. So in 1921, Nellie opened the Hood County Abstract Company; she continued as its owner and operator until 1925.

In 1922, Nellie ran for Hood County Judge in the Democratic Primary against four male opponents. Although she received 300 votes, she lost the race.[14] However, in May 1923, the newly elected county attorney, Jack Grissom, resigned his post and the county commissioners appointed Nellie to fill the remainder of his term. In 1924, Nellie ran again for county attorney and won a third term.

Nellie also served as an officer in the District and County Attorneys'

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MISS NELLIE G. ROBERTSON of Granbury

WOMAN SERVES ABLY AS HOOD CO. ATTORNEY

Special to The Star-Telegram.

GRANBURY, Texas, Aug. 20.—Nellie G. Robertson, County Attorney of Hood County, who was elected as the Secretary of the State Association of County Attorneys, at its meeting held in Fort Worth a few weeks ago. Miss Robertson, whose home is in Granbury, has been practicing law for sometime, and prosecutes her cases in the courts.

A 1921 story in the Fort Worth Star-Telegram *newspaper announcing Robertson's election as Hood County Attorney*

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Association.[15] In 1921, she was elected as the secretary and treasurer of that organization.[16] Nellie served as a district judge in 1922; the local bar members appointed her to replace the district judge after he was disqualified on a case. At one time, Nellie also contemplated running for state representative. Instead, she retired from public office in 1926.[17]

In January 1925, shortly after her last election victory, Governor Pat Neff appointed Nellie Robertson to sit as the first female Chief Justice of the Texas Supreme Court. Neff appointed three women justices—Robertson of Granbury, Hortense Ward of Houston, and Edith Wilmans of Dallas—to hear the case of *Johnson v. Darr*.[18] The case involved a tract of land owned by the Woodmen of the World. The Woodmen was a male-only organization, and nearly every male lawyer and judge was a member. As a result, all three members of the sitting court were disqualified. Governor Neff (considered a lame duck, having lost the recent election to "Ma" Ferguson) decided the only sensible thing to do was to appoint an all-woman court. The qualifications for sitting as a justice were threefold: 1) a minimum of seven years practicing law or having held the office of district judge, 2) a minimum age of 30, and 3) never having fought in a duel.[19]

Governor Neff and the state of Texas made history—and national headlines—when news broke of the all-female court. Newspapers from coast to coast proclaimed the news of Texas' "petticoat justice" and the "Portias" who would serve on the court.[20] Not everyone was pleased, however. The clerk of the court reportedly refused to "play nursemaid to a bunch of women" and declared he would go fishing.[21]

Unfortunately, just before the all-female court convened in Austin, Nellie Gray Robertson and Edith Wilmans discovered they could not serve as justices because each woman was just months shy of the seven-year requirement. Governor Neff appointed Ruth Brazzil and Hattie Henenberg to replace Robertson and Wilmans, and he named Hortense Ward as the chief justice.[22] The news of the two replacement justices, however, did not make national news; as far as the rest of the country knew, Nellie Robertson was still the first female chief justice. The all-female court rendered its opinion on May 4, 1925, upholding the lower court's decision.[23]

When Nellie left office in 1926, she moved to New York to write law books for Doubleday Publishing Company. By 1930, she had returned to Texas and soon afterward, she began operating Stewart Title in Beaumont. She was also a partner in the Beaumont firm of Stewart, Burgess, Morris & Robertson.

In addition to her legal career, Nellie Robertson was an associate lay leader for the Cleburne district of the Central Texas Methodist conference. She was also a grand matron in the Eastern Star.

Nellie worked hard throughout her career, but she played hard, too. In addition to playing tennis, baseball, football, and golf, Nellie was a skilled poker player.[24] Her niece, Jean, said Nellie would play "for money, for matchsticks, or for whatever was handy." Nellie's mother liked to tell a story about an incident that happened at the courthouse. Nellie lived with her mother, Arminda, during her tenure as county attorney, and Arminda was annoyed that Nellie had come home late for dinner several nights in a row. Arminda recalled, "I put on a clean apron and marched right down to the courthouse. And what do you think I found when I got there? There was Nellie, playing poker with the men from the courthouse!" Arminda said she walked up to the poker table, scooped up all of the money and the poker chips into her clean apron, and marched home. According to Arminda, that cured Nellie from being late for supper.[25]

Nellie retired from her law practice in 1954 and died the following year from complications of diabetes. She never married. She is buried in the Granbury Cemetery.

Nellie was a strong and independent woman who believed women should be educated and should stand their own two feet. When asked about being the first elected county attorney in the state, she shrugged and said it was "no big deal." Nellie also took her brief appointment (and subsequent disqualification) to the Texas Supreme Court in stride. When asked how she felt about missing the chance to be the first female Supreme Court justice, Nellie replied, "It is what it is."[26]

The Texas Historical Commission has approved the Hood County Historical Society's application for a historical marker to commemorate Nellie Gray Robertson as the first elected female county attorney in Texas. The local group plans to install the marker at the historical Hood County Courthouse where Nellie had her office. ❇

Endnotes

1 Goldthwaite, Carman; "Texas Dames," 132-135; 2012.

2 Texas Department of Health Bureau of Vital Statistics, Nellie Gray Robertson Death Certificate #25535, May 25, 1955.

3 Interview with Mrs. Jean Robertson, June 8, 2013; Goldthwaite, Carman; "Texas Dames," 132-135; 2012.

4 Texas State Library and Archives Commission, Austin, Texas, Confederate Pension Applications.

5 Jean Robertson, Nellie's niece, had no idea how Nellie was able to afford college considering how poor her family was. Jean assumes Nellie worked to pay her way through her six years at the university. Interview with Mrs. Jean Robertson, June 8, 2013; "Goldthwaite, Carman; "Texas Dames," 132-135; 2012; Nellie Robertson Obituary, 18 Tex. B.J. 667 1955.

6 The university verifies that Robertson attended from the fall of 1912 until the spring of 1918; however, its records do not indicate she graduated. Robertson, Nellie Gray, transcript, University of Texas; Texas Department of Health Bureau of Vital Statistics, Nellie Gray Robertson Death Certificate #25535, May 25, 1955.

7 The 1910 federal census listed only three female attorneys in Texas. Texas did not swear in its first three female attorneys until 1913. Texas State Historical Association, available at www.tshaonline.org/handbook/online/articles/jsw02.

8 "Woman Serves Ably as Hood Co. Attorney," Aug. 20, 1921, *Fort Worth Star-Telegram*; "Will be First Woman County Attorney in Texas," *Dallas Morning News*, July 16, 1918.

9 UT Law enrolled its first female law student in 1906, but the first women did not graduate until 1914. In 1918, 17 percent of the graduating class was women. This percentage was not seen again until the 1960s. "Celebrating 100 Years of Women at UT Law," Allegra Jordan Young, Spring 2006 UT Law, page 20.

10 Kappa Beta Pi, 197, 1918 UT Cactus; Pennybacker Debating Club, 243, 1918 UT Cactus; Present Day Club, 217, 1918 UT Cactus; Texas Woman's Law Association, 222, 1918 UT Cactus; Woman's Assembly, 168, 1918 UT Cactus; Woman's Council, 167, 1918 UT Cactus.

11 Hood County Election Results 1918-1961, 2 (only one actual handwritten book, housed in historical safe in the historical Treasurer's office in the Hood County Courthouse).

12 Hood County Election Results, 10; Goldthwaite, Carman; "Texas Dames," 132-135, 2012; "Will be First Woman County Attorney in Texas," *Dallas Morning News*, July 16, 1918.

13 Hood County Election Results, 21.

14 Hood County Election Results, 34.

15 The first record of the association was in November 1905. At the time, the organization consisted of Texas prosecutors who met annually to discuss laws and policies. The Texas District and County Attorneys Association, August 2010.

16 "Woman Serves Ably as Hood Co. Attorney," Aug. 20, 1921, *Fort Worth Star-Telegram*; "Ku Klux to be Discussed by Law Guardians," Aug. 4, 1921, *Fort Worth Star-Telegram*.

17 "Woman Elected Prosecutor in Hood Co., Texas," Jan. 5, 1925, *Albuquerque Morning News*.

18 "Neff Names Three Texas Women to Function as Special Supreme Court," Jan. 2, 1925, *Dallas Morning News*; *Johnson v. Darr*, 114 Tex. 516 (1925).

19 "A Case When Women Ruled Supreme," Hollace Weiner, 59 Tex. B.J. 890 1996.

20 "Texas' all-woman Supreme Court," Dean Moorhead, *Port Arthur News*, Feb. 11, 1973; "Texas Governor Places Three Portias on Special Tribunal," *Greensboro Record*, Jan. 7, 1925.

21 "A Case When Women Ruled Supreme," Hollace Weiner, 59 Tex. B.J. 890 1996.

22 "Another Woman on High Court Bench," Jan 8, 1925 *Dallas Morning News*.

23 Ward wrote the opinion; Brazzil and Henenberg each wrote concurring opinions. *Johnson v. Darr*, 114 Tex. 516 (1925).

24 Nellie Robertson Obituary, 18 Tex. B.J. 667 1955; Interview with Mrs. Jean Robertson, June 8, 2013.

25 Interview with Mrs. Jean Robertson, June 8, 2013.

26 Interview with Mrs. Jean Robertson, June 8, 2013.

News Worthy

Electronic versions of the CCP and PC available

Two of TDCAA's code books, the 2013–15 Code of Criminal Procedure and Penal Code, are now available for purchase from Apple, Amazon, and Barnes & Noble (for iPads, Kindles, and Nooks, respectively). Because of fewer space limitations in electronic publishing, these two codes include both strikethrough-underline text to show the most recent legislative changes and annotations. Note, however, that these books contain single codes—just the Penal Code and Code of Criminal Procedure—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files. ❇

Prosecutor booklets available for members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

From advocate to crime victim

How one night changed this McLennan County prosecutor's perception of property crimes

As a prosecutor assigned to the Crimes Against Children Division I am constantly in contact with survivors of sexual or physical abuse and their families. Helping these survivors of heinous crimes navigate the legal system is one of the things I enjoy most about my job; it gives me great satisfaction and joy to see the result of my cases for them and their families, and it is truly rewarding to be a part of their healing from the trauma of the offense and the process of bringing their cases to trial.

By Gabrielle A. Massey
Assistant Criminal District Attorney in McLennan County

However, I never imagined I would find myself the victim of any crime and on the other side of one of the desks in our office: nervous, scared, and impatiently waiting to find out what would happen to the man who walked off the street, into my home and forever changed my view of what was "just a property crime."

I live not far from the McLennan County Courthouse in a neighborhood made up of homes mostly built in the early 1900s. My small bungalow is actually one of the newest houses, having been built in 1932. The neighborhood is "transitional," with the well-maintained Castle Heights neighborhood (yes, there is an actual castle) two blocks to the south and a shady "pay by the week" motel two blocks north. With the combination of my job, the rougher streets in the neighborhood, and my general love of animals, I am the proud owner of six dogs: four sweet and silly pit bulls, an American Staffordshire terrier rescue, and a very intimidating 18-pound cocker spaniel. As if six dogs is not enough protection—and as a single female prosecutor and Texan—I also have three handguns in my house and a small, wooden, lead-filled bat by my front door. My mother lives six doors down from me in a turn-of-the-century Victorian, and I have always felt safe walking to her house. That all changed on Thursday, June 27, 2013.

It had been a typical Texas summer day with the temperature reaching a sweltering 105 degrees. Late that evening, after it had finally cooled off enough to water my vegetable garden, I was out in my oversized backyard (it encompasses two lots). The garden is in the back corner, far from my house and back door, and I had all six of my dogs outside with me. About 10:00 p.m., the dogs started to bark and took off towards the neighbor's side of my yard. I try to be considerate of my neighbor's young children, and I do not let the dogs bark late into the night. Therefore, I called my dogs back so they wouldn't disturb the kids' sleeping.

Little did I know that at this exact time, Jonique Ramon Webster, a five-time convicted felon who had gotten out of the Hutchins Unit just that morning having served a 10-year sentence for burglary of a habitation out of Dallas County, was walking into my front door. I would later find out that Mr. Webster had been walking down my street and saw my next-door neighbor smoking a cigar on his porch; Webster had walked up and asked for a "hit." My neighbor promptly gave him the cigar but was so uneasy at Mr. Webster's strange demeanor and seeming intoxication that he immediately called 911.

After Mr. Webster left my neighbor's porch with cigar in hand, he apparently walked straight up to my door and tried the door handle. Evidently (and embarrassingly), after arriving home from dinner that night either myself or the friend I was with had failed to lock the door behind us as we entered the house. My friend ended up leaving from the gate in my backyard, so neither of us had returned to the front door by the time Mr. Webster had discovered our error.

About 30 minutes later, I went inside with two of the dogs to feed them. I got their food ready and went to the front porch to feed my outside cat when I discovered I had unknowingly had a visitor.

I will never forget opening my front door and seeing a gray bicycle leaned against my porch. Although the bike looked familiar, I was very confused as to why someone would leave his bike outside my door. It did not occur to me that this bike had in fact come from my own home. Looking back, my confusion is laughable. However, in that moment my mind was racing, trying to make sense of the scene in front of me. I looked to the left, where two doors down is a doctor's office and parking lot, and saw three police cars and a man wearing nothing but oversized shorts. At this time, I still had no idea what was going on or what had happened. I actually had the thought that this man might have accidentally left his bike on my front steps, as crazy as that sounds.

I then looked down and saw my driver's license, concealed handgun license, and a credit card on the floor right inside the door. I looked at the table just inside my front door where I always set my purse and saw that my bag was lying on its side with my wallet open beside it and my badge partially visible. My brain was searching for some way to put what I was seeing together and make sense of it, yet the thought still had not occurred to me that someone could have been in my house. I actually thought, "Hmm, how did my purse fall open and all of its contents fall out?" I picked up my wallet and looked in it and saw that there was no cash. All the pieces came crashing together in my head as I was certain there should have been a small amount of cash in my wallet. When I looked in my wallet at dinner earlier in the evening, I had cash, so I knew there was something wrong—it was not just a strange series of events, such as my dogs knocking my purse over and causing its contents to spill in my living room. Someone had been in my home.

I immediately grabbed my wallet and driver's license from the floor and headed out the front door towards the officers outside. As I was walking up to the parking lot where they were speaking with the half-dressed man, I realized I knew one of the officers. I actually had him subpoenaed for trial two weeks later. After a brief quizzical hello, I told them that I thought someone had been in my house and explained the scene inside my front door and on my porch.

At this point Mr. Webster (the half-dressed man) started yelling that he had done nothing wrong and had no idea what I was talking about. One of the officers handed me a small wireless receiver that looked like a flip cell phone and asked if it was mine. It was, and then one of the officers detained Mr. Webster, which prompted him to start screaming that he wasn't going "back." Officer Roy with the Waco Police Department pulled me aside and had me start writing a statement. If the last few minutes hadn't been strange enough already, now I was staring at this blank "Statement of Witnessed Actions," and I started shaking. I could barely think straight.

As I wrote my statement I kept thinking about how I was living one of the reports I read daily, and the experience was surreal. It is one thing to read the flat words of a witness statement in a sterile government office, but it's an entirely different situation to have to put into words what I was experiencing while having the lights of the police vehicles flashing, officers spread out through my home and yard, and the man who had been in my home taking my belongings just feet from me. When reading the statement later it was hard to not find the statement humorous and embarrassing. I used the words alarm, alarming, or alarmed at least five times in a two-page statement, but in that moment my heart was pounding, my hands were shaking, I could barely think straight, and evidently I was very alarmed.

While I was writing my statement a gold, four-door car pulled up. It was Mr. Webster's grandfather. When he was informed why Mr. Webster was being detained, he threw up his hands, scoffed, got back in the car, and left. Officer Roy explained to me that when my next-door neighbor had called 911 on the suspicious person, he gave a description of a man wearing a dark-colored Hawaiian shirt and tan shorts. When the officers were out looking for the suspicious person, they saw Mr. Webster who, at the time, was wearing only white boxer shorts and gray socks. Upon speaking with him, there was no crime that they were aware of and Mr. Webster had no warrants, so they allowed him to call his family to come pick him up. I realized then that if I had been just 10 minutes longer in the garden or inside my house, he would have been able to go home with his family, and who knows if he would have been found again.

After Mr. Webster was placed in the patrol vehicle, the officers searched around my house and

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Crime Scenes came out and started taking pictures. In the front yard and driveway they found three $1 bills folded up just as I keep them in my wallet. Also, on the side of my porch, tucked beside a step, one officer found a dark Hawaiian shirt, tan pants, and black boots. After the Crime Scene technician, Ashley Young, photographed the folded and hidden clothes, she emptied the pants pockets. Mr. Webster had $129 in cash, lottery tickets, a bus pass, his Social Security card, and his Texas Offender card in his pockets. Additionally, my car keys and house keys were found in the grass in my front yard. My next-door neighbor who called the police and his wife came outside and gave statements as well. We talked at length, and they agreed that I should never call my dogs off for barking again, as they also feel safer with my built-in, four-legged "alarms."

Throughout the hour or so that the police were at my house photographing, collecting evidence, and fingerprinting, I had the recurring realization that I was in a police report. I probably said it out loud at least six or seven times that I just could not believe this was happening to me and that I was going to be in a report sent to my office. I was mortified at the fact that photos were being taken in which my colleagues could see just how messy my house became the week of a trial, and I had the urge to go around picking up the random shoes and books lying around the living room. Also, I was experiencing the common victim reaction of blaming myself for the crime. I thought if only I had checked the door or left a dog inside, this would not be happening. As the officers were packing up, Mr. Webster kept knocking around in the back of the patrol car and yelling, "Just take me home!" I still am not sure if he was referring to his grandmother's house or to jail.

As I began to collect the items strewn around the table inside my front door, I saw a small brown cigar, matching the description my neighbor gave of the cigar he gave Mr. Webster shortly before he called the police. I ran out and caught CST Young, and she came in, photographed it, and collected it for evidence as well. Possible DNA from Mr. Webster in my home! My prosecutor brain was ecstatic: This was shaping up to be a great burglary of a habitation case. But the rest of me, the crime victim, was still on edge, uncomfortable with the reality of what had just occurred beginning to set in.

That night with every bump, creak, passing car, or dog barking down the street, I was up, wide awake, with a gun in one hand and a dog beside me, scoping my house and yard. To say I did not sleep well would be a great understatement. I did not sleep at all.

Back at the office

I went into work the next morning with frazzled nerves and a feeling of dread at the thought of having to explain the burglary to all of my peers. I knew they would all be concerned for me and glad that I was unharmed, but I also knew that the jokes would follow. As our office is small, about 25 attorneys, we are truly more like a family than a group of coworkers. So I knew my "brothers and sisters" would surely heckle me for the fact that Mr. Webster did not even have to "break" in but instead the door was left unlocked to welcome him into my home.

I was not disappointed on either front. Everyone in my office was genuinely concerned for me, and there were even jokes about making the crime scene photos into a slide show and having popcorn to watch. I also had countless staff members and prosecutors stopped by my office to check on me, offer their guns, suggest to have friends in law enforcement come by my house to check on me, and even ask me to spend the night in their homes if I wasn't comfortable in mine. I have always considered myself a strong and independent person, but in this situation I gladly accepted one of our felony prosecutor's offer to stay at her house. As her husband is a U.S. Marshal, I was certain I would be well-protected and feel safe there.

After that first night away from my house, I went back to my place, but I still did not feel comfortable or as at peace as I had been before the burglary. My mother had just left for a two-week trip and I was to be looking after her dogs for her. So I packed up a few things, took a couple of my own dogs with me, and went to her house for the night. For the next two weeks I stayed at my mom's house, only staying in my home during the day. As soon as evening was approaching, I would walk, with at least one pit bull (generally my largest, an 80-pound male), back to my mother's for the night.

Upon her return, I knew it was time for me to swallow my fear and

sleep in my own bed again. The first night home was much like the night Jonique Webster broke in; I hardly slept. With each passing night it did become easier. Still, there were countless nights I would bolt out of bed because of a noise, or wake out of a dead sleep convinced my front door was not locked and go check (with a gun and dog, of course). With time these habits have lessened, but on occasion I still wake up to a sound in the night or to double-check the door.

Within a couple of weeks of the burglary, our office received the report from the Waco Police Department. I had informed our elected District Attorney, Abel Reyna, about the burglary as I knew I would be disqualified from working on the case—I was clearly not a disinterested party. However, our entire office would not have to abstain from prosecuting so long as measures were put in place to ensure Mr. Webster's rights would not be violated. The Court of Criminal Appeals' unpublished opinion *Ex Parte Reposa*[1] relied on that court's earlier *Marshall v. Jerrico* findings, which concluded that a prosecutor may be disqualified due to lack of disinterest only if the defendant can show an actual conflict of interest exists that makes the prosecutor prejudiced "in such a manner as to rise to the level of a due process violation."[2] Texas' Disciplinary Rules do not require a prosecutor's office to be recused from every case where a prosecutor or prosecutor's family is involved, but the rules suggest the prosecutor be screened from participation to the extent feasible. As I could be sectioned off from touching the case, it was not required that we turn it over to a special prosecutor. To add extra separation from me having anything to do with the prosecution of the case, Mr. Reyna assigned the case to Robbie Moody, a felony prosecutor who had been assigned to Intake at the time, which is located on an entirely different floor from my office and with whom I have very little interaction. Because I am in Crimes Against Children, I indict my own cases.

Although it was probably easier on Robbie as far as contacting the victim (all he had to do was dial my extension or go down two flights of stairs), I am sure I was a high maintenance victim at the same time. One of the first things I wanted to know was Mr. Webster's criminal history. Robbie informed me he was a five-time convicted felon (mainly for state jail property crimes), and he had one trip to the penitentiary as well as numerous misdemeanors. The most disturbing thing on his criminal history (to me as a prosecutor of sex crimes) was that two of his misdemeanors were for indecent exposure. One of those was during the time frame of his penitentiary trip from Dallas on his first conviction for burglary of a habitation. He had paroled out of prison, come back to Waco, violated parole by committing an indecent exposure, and got sent back to prison to complete his sentence of 10 years. Sounded like a familiar story, and I was so thankful I didn't walk in while he was in my home.

Mr. Webster was indicted for burglary of a habitation (enhanced) and therefore faced a punishment range of five to 99 years or life in prison. Robbie and I discussed what I would be happy with as a sentence, as well as the potential that I would have to testify if there was a trial. Part of me was terrified at the thought of a trial, and part of me was excited to see the court experience from another viewpoint. Robbie decided a 45-year offer was reasonable given the facts, how quickly Mr. Webster had returned to committing burglary after his release from prison, and his extensive criminal history. The defense attorney considered the offer for about a month before countering first with 20 years in TDCJ, which Robbie promptly rejected, and finally with 40 years. Robbie contacted me and after discussing it, we both thought that was reasonable, and he accepted the counter-offer.

To me the most important thing was that Jonique Webster be removed from society long enough that he will not pose a threat to anyone else's peace of mind for the foreseeable future. As this offense was not a 3g, Mr. Webster will be eligible for parole after serving a quarter of his sentence, and he is eligible for good time as well, so he could be out in as little as five years. Given his extensive criminal history and the remarkably short time he was out of prison before reoffending, I feel strongly that Mr. Webster will be a continued threat to society. I have registered for Texas Victim Information and Notification Everyday, commonly called VINE, so that I will be made aware of his potential parole date when it arises, and at the appropriate time I will protest his parole and try to ensure that he serve as much of his sentence as possible. My goal in doing so is that no one else will endure countless sleepless nights because of this man.

Maybe it was fate that my front

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door was open that night (which I check and double-check still to this day). As strange as it may sound, I am actually glad that he chose my home to walk into as I have learned so much from this experience as to what a victim of crime actually goes through: confusion, shock, fear, anger, and finally the ability to regain some of what was lost with the conclusion of the case. I am also painfully aware of how fortunate I was to be outside that night. Who knows what would have happened if I had been in my living room watching television or in the kitchen making food? Jonique Webster is obviously a career criminal who cannot refrain from committing crimes. Even when he had a pocket full of cash, a supportive family, and every reason to want to stay out of prison, he could not even make it one day without violating someone's privacy and sense of security.

I never envisioned myself as having to make a statement to the police about a crime I was personally involved in or how "just a property crime" would really affect me. As a prosecutor it is easy to emotionally connect with and have empathy for my girls and boys who have been sexually abused or physically hurt or with the adult victim of a sexual assault, an aggravated assault, or murder. However, sometimes I would forget the emotional damage caused by the violation of a person's property.

The greatest lesson I have learned through this experience is that every crime committed against a victim, even those with no physical harm, can be emotionally scarring and cause them fear and trauma. Additionally, no matter who you are, what you do, or how safe you may feel, crime surrounds each of us everyday. Not just in the papers of the reports we read and pictures of the scenes, but the very real people on the other side of those papers and pictures. Every file that crosses each of our desks is about real people and we, as prosecutors and employees of district and county attorneys' offices of Texas, have the most unique and amazing jobs in the world. We have the opportunity every day to help people to heal and move past traumatic events, and I cannot thank enough the responding officers, prosecutors, and staff in my office for helping me do just that. ❇

Endnotes

1 See *Ex parte Reposa*, No. AP-75,965, slip. op. at 9-10, 2009 WL 3478455, at *10-11 (Tex. Crim . App. 2009) (not design. for pub.).

2 *Id.* Slip op. at 9-10, 2009 WL 3478455, at *10.