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

# Vanished without a trace

A Denton County woman's disappearance six years ago culminated in the murder trial of her estranged husband—with no forensic evidence. Here's how prosecutors won a guilty verdict.

*By Susan Calvert Piel and Cary Piel*
Assistant Criminal District Attorneys in Denton County

A few days after Christmas in 2004, Kathy Munday Stobaugh was hours away from finalizing her divorce. Kathy had met with her attorney the previous day, preparing to go to court on Thursday, December 30 to obtain a default judgment against her husband of 20 years, Charles Stobaugh. That night, December 29, the eve of the divorce being finalized, Stobaugh called Kathy and asked her to come to his house, the marital home which sat isolated on 100 acres of farmland. Kathy drove to his house around 9:30 pm. She has never been seen or heard from since.

## Kathy's background

Kathy grew up in Gatesville just outside of Waco. After high school, she moved to Denton to attend Texas Women's University. While cruising the "drag" in Denton one night, she met a local man, ruggedly handsome Charles Stobaugh. She eventually dropped out of school and they married in 1984. During the marriage their roles were extremely traditional, and Charles was very controlling, especially with money. He enjoyed working the all-night shift at a local factory, as it allowed him to farm during the day. But his schedule left Kathy a mostly single parent when their daughter, Charee, was born in early 1988. Son Tommy followed in 1991.

Kathy eventually became disenchanted with their life and fearful of her husband. At one point she left Charles, seeking refuge in her hometown of Gatesville, surrounded by her family. She hired an attorney and filed for divorce. She set up house in Central Texas and got a job, but after a few months, Charles convinced her to come home, vowing he would change.

They subsequently purchased a farm in the rural outskirts of Sanger, which is outside Denton. The deed was listed in only Charles' name, as were all vehicles purchased during the marriage. They lived very frugally. Though Kathy always worked, her secretarial jobs did not pay as well as Charles' factory work.

Once the children reached school age, Kathy began again pursuing her education though Charles was not supportive of it. In addi-

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# 'Why do I give to the Texas District and County Attorneys Foundation?'

People have lots of reasons for contributing to the Foundation. Here are just a few:

"There are lots of organizations competing for our charitable dollars. Although the symphony, parks, and museums are worthy causes, I'd rather to give to organizations that benefit those who are sick, under-privileged, or abused. TDCAF has joined my list of preferred charities because its mission—training prosecutors and their staff—results in better advocacy for the victims of crime who depend on us." **—Lisa McMinn, State Prosecuting Attorney in Austin**

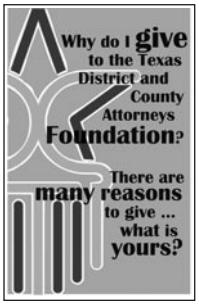
*By Jennifer Vitera*
TDCAF Development Director in Austin

"Primarily, I contribute to the Foundation because I owe TDCAA more than I will ever be able to repay. Having served on the Association's Board of Directors, I understand that it takes much more money than is available through dues and grants to continue to make and keep our new young prosecutors the best professionals of tomorrow. Because of all these things and many more, I will continue to contribute to the Foundation and encourage all I know to do the same." **—Patrick C. Batchelor, Attorney at Law, former County Attorney in Navarro County**

"I contribute to the Foundation in two capacities. In one, I give on behalf of the Brazoria County District Attorney's Office because I believe in investing in the future. The Foundation is appropriately named: Together we are building a foundation of training, education, experience, and history for current and future prosecutors to draw upon to see that justice is done.

"Secondly, I contribute personally because I can think of no better way to remember Joyce Wheeler, my children's second mother, who loved my children as her own. Without her assistance, I could not have been district attorney, so I give to the Foundation as a memorial to her." **—Jerilynn Yenne, Criminal District Attorney in Brazoria County**

These are just some of the reasons people give to the foundation—there are many more! Read other folks' reasons at www.tdcaf.org and downloading our Annual Campaign brochure (at right).




## 2011 Annual Campaign Membership Challenge

We hope by now you have received the 2011 Annual Campaign brochure or postcard, which is your invitation to be a part of the Texas District and County Attorneys Foundation. The foundation is committed to continuing and improving the excellent training provides to Texas prosecutors, investigators, key personnel, and victim services coordinators.

This year, we will conduct our second membership fundraising challenge. Just like last year, there are two different fundraising goals for our membership groups, one for elected prosecutors and one for investigators, key personnel, and victim coordinators.

From our elected members, we are asking for 100-percent participation from all 333 elected prosecutors across the State (either through a personal unrestricted gift or a restricted gift) to the Annual Campaign. Please take a look at the brochure we mailed you for more information and send in a donation today!

For our investigators, key personnel, and victim assistance coordinators, these groups have challenged each other to see which can raise the most money for the foundation. Last year the investigators took home the win, but 2011 is a new year! The field is wide open! We will track the results based on dollars raised compared to percentage of membership in each of these groups. We will feature a monthly update on who's leading the way on our website and in *The Texas Prosecutor*.

Funding from members, foundations, corporations, and the community at large greatly increases the quality of service we are able to offer to you, our members. I am asking you to please consider supporting the foundation by making a contri-

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bution of any size; you may send your gift using the return envelope in the Annual Campaign letter you will soon receive, or go directly to www .tdcaf.org to make a quick and safe contribution. The more funding we secure, the better TDCAA can develop programs to ensure the safety and security of our communities.

We appreciate your support and consideration!

## 2010 Annual Report available online


We are honored to show you our 2010 Texas District and County Attorneys Foundation Annual Report (at right). It summarizes what we've accomplished in the last year, lists all donors, and explains plans for the next year and beyond. Please take a few minutes to review it at www.tdcaf.org.

## Recognition and thanks

Last issue I mentioned the Leadership Texas Program that I am participating in, which took me to Dallas in March where I had the chance to meet local leaders and learn about issues facing the North Texas region, along with the many wonderful things happening in the community. During my visit I had a chance to meet with a few of our wonderful TDCAF Board and Advisory Committee members along with TDCAF corporate supporters. I will be in Midland and Odessa this May where I also plan on visiting with members along the way.

Thank you to Criminal District Attorney Matt Powell in Lubbock for setting up TDCAF introduction meetings in March.

And congratulations to our very own TDCAF Advisory Committee member Carol Vance who was honored by the Houston Bar Association Auxiliary with the 24th Annual Leon Jaworski Award.

## Latest fundraising efforts

The 3rd Annual Foundation Golf Tournament will take place Wednesday, September 21 (the week of TDCAA's Annual Criminal and Civil Law Update) in Corpus Christi. (The exact location of the tournament will be announced later.) We are also planning on adding a silent auction to the TDCAF dinner this year. Funds raised through the golf tournament and silent auction will support the 2011 Annual Campaign. We are asking members to please help the foundation identify corporations and individuals who might be interested in sponsoring or donating an auction item this event. Sponsorship levels are Platinum, $10,000; Gold, $5,000; Sterling, $2,500; and Bronze, $1,000.

## Sponsors needed for DV training

We are still looking for corporate and foundation partners from across the state to support our domestic violence training initiative. Our total budget goal for this program is $100,000; in the last issue of this journal we mentioned Dow Chemical's support of the *Family Violence Manual*. We still need additional contributions.

Please contact Jennifer Vitera at vitera@tdcaa.com if there is someone in your area to whom we can send more information to regarding either one of these efforts. ❇

## *Recent gifts to TDCAF**

Larry W. Allison**
Nancy Firebaugh Arthur
Kathleen Braddock
Michael N. Butera
Katherine A. Cabaniss
Bill Campbell
Yolanda De Leon
David Escamilla
Formosa Plastics Corporation
Michael L. Fostel *in memory of Paige Fostel*
H. E. Bert Graham
John Staley Heatly**
John C. Hille, Jr.
Doyle E. Hobbs, Jr.
Jerry Holmes *in memory of Sue Holmes*
Jerrold M. Hunter
Cannon Dean Jones
Life Safer Interlock
Doug Lowe
Barry L. Macha
Walter E. Pinegar *in memory of Diane R. Wilson*
Matthew D. Powell**
Judge Susan D. Reed
Lynn H. Sheffield
Terry J. Vogel
Mark Yarbrough**
Jerilynn Yenne**

* gifts received between February 2 and March 31, 2011
** denotes restricted gift

# An afternoon in the life of a rural prosecutor

I left you in my previous column on my way to docket call in Throckmorton. Throckmorton County is my most eastern county and is only 38 miles away from Graham and genuine fast food (they have a McDonald's!). I have only three cases on the docket this afternoon, which is good because I need to plead a case in Kent County after we finish this docket call.

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

I should first explain that a few years ago, I would have had many more cases in Throckmorton on the docket; however, thanks to the ingenuity and forward-thinking of the Throckmorton County Commissioners Court, that problem was solved. Awhile back, every meth cook living in a roach-infested camper trailer within 200 miles came to Elbert in Throckmorton County to steal anhydrous ammonia to make a batch. There was a small fertilizer business a few miles east of Elbert, which should be described more as a community than a town. It is extremely rural and thus seemed to be the perfect place to steal anhydrous.

I tell you, catching these anhydrous thieves was like tank-hunting doves: Just get you a couple of six packs and some Slim Jims and wait for the anhydrous thieves to come to water. On one occasion, as John Riley, the Throckmorton County Sheriff, was transporting a thief back to Throckmorton, he passed a pick-up going the opposite direction with several propane tanks in the back. He called the game warden, who went straight to the fertilizer tanks, and he caught those thieves.

Anyway, back to the commissioners court. We were trying anhydrous thieves left and right, none of the criminals were from Throckmorton County, and it was costing a fortune. The commissioners assessed the situation, approached the owner of the fertilizer business, purchased the anhydrous tanks, emptied them, and left them empty. That was several years ago and my case load in Throckmorton County has declined by probably 70 percent. Now that is good country common sense.

The first case on the docket is set for an arraignment. A lawyer who has a case way down the docket (case three) is loitering around, hoping the defendant will either hire him or the court will appoint him to the case. Either way it is fine with me—he is good to work with. I deal with about 10 lawyers almost exclusively. As a rural prosecutor, you get to know these lawyers, their families, and children. They are your friends and social companions. More often than not, during a jury trial I will eat lunch with defense counsel.

Sure enough, Case Three Lawyer gets appointed to represent the defendant in case one. I give him my file, and he meets with his client in the back of the courtroom. He approaches me and tells me he thinks I have a problem with the language in the indictment, and even if I win the case he will beat me on appeal. Once on a complicated case from a charging standpoint, I asked Barry Macha, the then-Criminal District Attorney in Wichita County, for advice on charging, he said, "I will get my appellate guy to look into it."

I *am* my appellate guy, and if I might quote Gomez Adams (when appearing in court *pro se*), "They say that a lawyer who represents himself has a fool for a client, and with God as my witness, I am that fool!" Serving as my own appellate guy, I also exclaim, "I am that fool." As a rural prosecutor you have to be a jack of all trades. You are the intake person, the research assistant, the appellate guy, the bond forfeiture guru—you are everything. It is unsettling when defense counsel springs a novel motion or argument on you in the middle of trial, and you have nowhere to go for help. You can't call back to the office and have a number of other prosecutors to bounce it off of. Thankfully, I have been able to call the association and other prosecutors for help and advice, but occasionally you just have to roll the dice on a prayer.

Case number two on the docket involves a person I grew up with and have known my whole life. Unfortunately, it is time for him to go to the pen. For the last month, I have had a steady stream of contact from friends and family telling we what a "good boy" this 47-year-old man is. This is an aspect of the job that I flat don't like. I rarely seek to have the court appoint a special prosecutor; I figure

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the voters trusted me to do the job even when it makes me uncomfortable. I have prosecuted many former friends, classmates, and acquaintances. It is not pleasant to state the plea bargain to the court with someone you know sitting across from you at the defense table and his mother who had you over for birthday parties 30 years hence watching the proceedings. I know many, if not most, of the people I prosecute, and I look at it as part of the job and move on. However, I can't say it does not take a toll on you after a while.

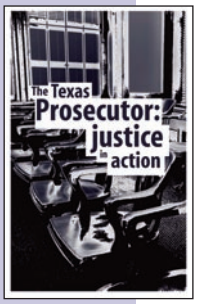
Case three is nothing special, and we finish and head to Kent County. Normally, the court would not set cases in different counties on the same day. This, however, is an emergency: A defendant awaiting his measure of justice is in the Dickens County Jail. You city folks might not appreciate this but neither Kent County nor Throckmorton County has a county jail; thus, they contract with neighboring counties at about $40 a day to house their respective bad boys. Forty dollars per day may not seem like much, but 40 dollars here and 40 dollars there turns into real money, and pretty soon we might be talking about cutting back on a road grader, and *that*, my friends, gets the commissioners' attention. I try my best to dispose of cases in a timely fashion so we minimize jail bills. The district judge, a former county attorney, shares this view so we are off to Kent County.

I suspect that some increase in greenhouse gases and global temperature could be attributed to court appearances in this district because it is almost 90 miles from Throckmorton to Jayton. We conclude our business in Kent County and head back to Haskell, a casual 45-mile drive. I have to hurry back because the ladies in the Haskell County Courthouse have a team in the Relay For Life Friday night. Each team throughout the community is responsible for having a male contestant in the "Mister Relay" beauty contest where each fella is dressed as a woman. It is not surprising they recruited me, considering my soft facial features and gentle nature. I can only give thanks that my granddaddy isn't around to see this. As an elected official in a rural jurisdiction, you do not get to skip a community event, fundraiser, or domino game—and frankly your attendance is expected.

Between driving, talking to lawyers, and dressing in drag for cancer prevention and cancer survivors, I will try several felony jury trials each year, help out the county attorneys in my district with juveniles if they ask me to, and make many appearances before the grand jury and at numerous plea dockets. I can honestly say, being a prosecutor in a rural community is the best job on this earth … so please don't tell anyone about it. ❇

## News Worthy

### *Prosecutor booklets available for members*




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

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

## A note from our database manager

Lara Brumen Skidmore, our database manager, has been working feverishly with prosecutors' office personnel to update our biennial membership directory. She has a few words of gratitude to you all: "I want to thank all of you who took the time to help me with the directory lists this year! I couldn't do it without you. To say you are appreciated is an understatement. Thank you." ❇

# TDCAA's Long-Range Plan

To make sure we continue to serve your needs, TDCAA operates on a continuing series of five-year plans. This is how your leadership keeps this outfit closely linked to the needs of our growing membership.

The TDCAA Board approved a new five-year plan in March, and it's time to get busy on it. Many of the items the board discussed were in the nature of "keep the focus on core training and support for prosecutors," so you can count on TDCAA to continue to get you what you need in the area of training, publications, and governmental affairs.

*By Rob Kepple*
TDCAA Executive Director in Austin

But there are some new adventures added to out "to-do" list in the next few years:

- develop resources on forensic sciences to help prosecutors;
- address the gap in insurance/representation that prosecutors offices are experiencing;
- assist offices when it comes to their need in recruiting, retention, and diversity;
- explore topics and technology for limited web-based training;
- explore the feasibility of a capital fund for shared training equipment; and
- explore the financial and technological feasibility of publishing books in electronic format.

As always, your input and enthusiasm for the association is appreciated and needed, so if you have ideas or energy to put to the task, just give me a call.

## Thank you, George Nachtigall!

Today, over 1,300 assistant county and district attorneys receive longevity pay from the state. The program was the brainchild of **Vilma Luna**, a state representative from Corpus Christi and a former assistant in Houston. The problem she addressed was simple: The State needed to encourage the best and brightest to make prosecution their profession, not just a short stop on the way to a lucrative private practice. Passed and fully funded in 2003, the program distributes millions to assistants every year.

What you may not know is that for the last 10 years there has been a lawsuit bubbling over the funding mechanism, a $15 or $30 cost on the posting of a surety bond that is split for prosecutor longevity and indigent defense funding. Seems a couple bondsmen didn't like this too much and have kept a lawsuit alive all these years. Our champion in the fight has been **George Nachtigall**, a senior assistant county attorney in the Harris County Attorney's Office. George has done a great job of protecting your interests and has thrown himself into this lawsuit with zeal.

I mention the case today because this fight has outlasted our champion. George has announced his retirement, effective at the end of April, after a 10-plus-year run at the CA's office. We all owe George a round of applause for his efforts and dedication to our profession.

## John R. Justice Student Loan Repayment update

Our friends at the Texas Higher Education Coordinating Board, **Lesa Moller** and **Kammi Contreras**, have done an outstanding job of getting the Texas loan repayment program up and running. As of April, here are the numbers: $660,000 will be awarded in amounts of $2,500 to eligible prosecutors and $5,000 to eligible defense attorneys. As this edition goes to press, 132 prosecutors and 66 defense attorneys have been approved for awards. And to tell you how great Lesa and Kammi are, you should know that they haven't drawn down all of the allowed administrative costs in the grant, so they will be asking the federal government for permission to use that leftover money to make some additional awards. How great is that?

The future of the program, though, is uncertain. At this time, the original $10 million federal funding in 2010 is a big fat $0 in the 2011 budget. It is going to take some work at the national level to get this turned around, so stay tuned.

## The Lord's Work

Most of us who prosecute in Texas have been to TDCAA's Prosecutor Trial Skills Course, affectionately known as "baby school." And many of us still in the profession may credit our continued dedication in the serv-

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# Boosting our chances on a State's appeal

*By John Stride*
TDCAA Senior
Appellate Attorney

The State's right to appeal is strictly circumscribed. The scope of appealable issues is narrow and the procedures to pursue an appeal are a trap for the unwary. The State can appeal an order of a trial court in a criminal case only if the order dismisses an indictment or any portion of an indictment; arrests or modifies a judgment; grants a new trial; sustains a claim of former jeopardy; grants a motion to suppress evidence; is issued for forensic DNA evidence; or pronounces an illegal sentence.[1] Indeed, the issues that the State may raise primarily follow those the government can appeal in federal cases.[2]

While the State—just like defendants—must present its arguments to the trial court to raise them on appeal, unlike defendants, the State must have a signed, written order to initiate its own appeal.[3] Also the notice of appeal is timely only if it is filed no later than the 20th day after the trial court's appealable order. No extension of time will be granted.[4] Further, the elected prosecutor must personally sign the notice.[5]

In addition, even if the State seeks to pursue a cross-appeal, the Court of Criminal Appeals has yet to decide whether, as the majority of the intermediate courts reaching the issue have held, it requires the State to file a notice of appeal when seeking a cross-appeal.[6] With these considerable limitations, then, the State must make the most of the available procedures to maximize its chance of success on appeal.[7]

Probably most State's appeals spring from trial courts' suppression of evidence, so this article will focus on these appeals.[8] In this context, there are three tried and tested tools that can make all the difference in putting your best foot forward. There is also a fourth tool—used infrequently even by the defense—that is available to the State. First, as prosecutors, we should make all the arguments you can present in good faith to support your position in the trial court. Second, we should seek and obtain findings of fact. Third, prosecutors should contemplate urging the trial court to reconsider its adverse ruling. Fourth, if you need to develop the record, use a bill of exception.

**1 Argue alternatives; give the trial and appellate courts options.** As we all know too well, a hearing on a motion to suppress[9] can result in the death knell of a case—for instance, when the critical statements or tangible evidence is excluded. It is at these hearings that the State needs to be especially on guard against dropping the ball. Although we may secure an adverse order, it is vital we make all possible arguments to support our position. For instance, if we are justifying the warrantless search of a vehicle, there are several arguments that might be made, including plain view, consent, automobile exception, search incident to arrest, inventory search, community caretaking, and exigent circumstances. If you sense the trial court is troubled by one theory, argue any others that could apply. No—offer them anyway! Otherwise, when you appeal, any arguments relied on but not presented to the trial court will be considered waived.

*Mercado* illustrates the price the prosecution will pay on a State's appeal for failing to present all its arguments to the trial court. At a suppression hearing on the legality of the search of a car, the State argued that the seizure of the drugs was proper as an inventory search, but the trial court disagreed and granted the motion. On appeal, for the first time, the State attempted to justify the search on the ground that it was a valid search incident to arrest. Although the Eighth Court of appeals was sympathetic to the new argument, the Court of Criminal Appeals was not: "[W]e hold that in cases in which the State is the party appealing, the basic principle of appellate jurisprudence that points not argued at trial are deemed to be waived applies equally to the State and the defense."[10] The essence of this ruling is simply that a trial court cannot abuse its discretion in ruling on the only theory of law presented to it.[11] The Court of Criminal Appeals reversed the court of appeals and affirmed the trial court.

Lest you think that the Court of Criminal Appeals has softened its approach on State's appeals over the last decade, examine *Rhinehart*, decided just this year.[12] This case involved the propriety of a juvenile

transfer order, which was argued at hearings in both the juvenile and district courts. At the hearings, the parties addressed only the issue of due diligence in proceeding with the case in the juvenile court. At the district court's hearing on Rhinehart's motion to quash the indictment—certainly an unusual vehicle to challenge a transfer order—the State lost the due diligence argument.

On appeal, the State raised the fresh arguments that: 1) Rhinehart had no right to appeal the juvenile court's transfer order prior to final conviction in district court and 2) a motion to quash is not the proper vehicle to challenge a transfer order. The Fifth Court of Appeals bought the second argument and reversed. But again, the Court of Criminal Appeals slapped back the State. While it reinforced the law that a defendant cannot appeal a transfer order before final conviction in district court, it also held that the State had forfeited its appellate arguments because it had not presented them to the district court. "[W]e apply ordinary rules of procedural default to decide that the State, as the losing party in the criminal district court, could not raise for the first time on appeal a claim that there was no valid basis for the criminal district court to have quashed the indictment." This ruling seems particularly harsh in light of Rhinehart's ill-framed motion in the district court. Nevertheless, the case serves as a vital reminder that it is incumbent on prosecutors to present to a trial court all arguments justifying its position.

The single exception to the preservation requirement imposed

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# *Executive Director's Report (cont'd)*

ice of others to two people, **Judge Ted Poe** and the late **Mike Shelby**. Both former prosecutors gave a great speech, known simply as "The Lord's Work," to new prosecutors; it came at the end of a grueling week of work and sent folks back to their offices on a true high. Indeed, Judge Poe's rendition of the talk is the only one to draw outstanding reviews that were turned in—before the talk had finished. (Judge Poe was an assistant DA and district judge in Houston and is now a U.S. Congressman. Mike Shelby was an assistant DA in Houston and former United States Attorney for the Southern District of Texas who would still be doing the speech for us had he not succumbed to cancer a few years back.)

Of all the training we do, we still receive requests for recordings of these two speeches. People still remember these talks above all others. The latest request put it well: "I attended 'baby prosecutor school' and a few other seminars with TDCAA in 2005 and 2006 when U.S. Attorney Michael Shelby spoke. He gave the same speech both times, and I was elated because the first time I heard it, I wished I could hear it again. I was so moved by Mike Shelby's speech at those seminars that I have never forgotten it. He had a famous speech about what it meant to be a prosecutor and be in the justice system. I would like to share it with some local prosecutors who may not have heard it. I am aware, unfortunately, that Mr. Shelby has since passed away, but his speech stays with me. Is there any way that anyone knows of that I could get a transcript of that speech?"

I wish we had a recording. But these continued requests are certainly a tribute to Mike and evidence of his enduring legacy. Perhaps when the time is right Congressman Poe will reprise his talk for all of us. In the meantime, you might be satisfied with a recorded rendition of the speech that Mike gave as part of his talk—the famous "band of brothers" speech from Shakespeare's *Henry V*. You can view one version of it at www.youtube.com/watch?v=cRj01LShXN8. But Mike did it better.

## True justice

Justice is what you fight for every day. We don't always see it, but sometimes an outcome can be satisfying. Take a recent murder case tried by **John Pool**, the County and District Attorney in Andrews County. The defendant was accused of killing the victim after $100 came up missing at his house. (Let's just say the defendant was running a little pharmaceutical operation out of his home, and the victim was a frequent customer.) The defendant, shorted by the victim, told his wife before he went to the confrontation that proved fatal to the victim, that it wasn't so much the money but the principle of the matter.

The jury agreed on that score and found him guilty. The sentence? Ninety-nine years—and a $100 fine. ❇

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on the State is for an argument based on standing. In *Klima*, the Court of Criminal Appeals permitted the State, appealing the trial court's decision to grant the defendant's motion to suppress, to raise the issue of standing for the first time on appeal.[13] While in *Mercado* and *Rhinehart* the State argued that this standing exception applied to justify the State's new arguments, the Court of Criminal Appeals expressly opined in both cases that it did not.[14] So standing is a very narrow exception to the rule that the State must preserve its arguments in the trial court to raise them on appeal. As a rule, prosecutors—like defendants—should argue in the trial court all theories to support their position. You fail to do so at your peril.

**2 Obtain findings of fact and tie the trial judge's hands.** On appeal from an order granting suppression of evidence, an intermediate court is required to view the evidence in the light most favorable to the defendant, not the State.[15] On top of that, if there are no findings of fact, the appellate court assumes that the trial court resolved any conflict in the evidence against the State. Indeed, the appellate court may go further to decide that the trial court did not believe the uncontradicted evidence that supported the State's position.[16] Absent findings of fact, then, an appellate court has considerable license to uphold a trial court's ruling. But this license can be restricted by securing findings of fact and, even better, a trial court is required to prepare them on the request of the losing party.

In the seminal case of *Cullen*, the trial court held a pre-trial hearing on a motion to suppress DWI video and audio tapes.[17] The trial court granted the defendant's motion and declined, on the State's request, to prepare and file findings of fact. The court of appeals affirmed. But the Court of Criminal Appeals appreciated the flaw in the justice system if requested findings were denied:

> The refusal of trial courts to enter findings of fact when timely requested by the State leaves appellate courts with nothing to review except a one-word ruling and forces the courts of appeals to make assumptions about the trial court's ruling. The ruling could be based on a mistake of law, on the trial court's disbelief of the testimony presented, or even on a clerical error. There is the possibility that we are basing our entire appellate review on the wrong word being circled.[18]

The benefit of findings of fact is to provide meaningful review. Accordingly the court instructed that from *Cullen* forward, upon the request of the losing party on a motion to suppress evidence, the trial court must state its essential findings. And, by "essential findings," the court meant that the trial court must make findings of fact and conclusions of law adequate to provide an appellate court with a basis upon which to review the trial court's application of the law to the facts.[19] If explicit written findings are made, appellate courts adopt the presumption that these are the essential findings and any other fact or credibility issues were regarded (however mistakenly) by the trial court as peripheral or non-essential to its ultimate holding.[20]

A request for findings is best made on the record in open court or in a written motion filed and presented to the trial court.[21] If a trial court does not make oral findings, it has 20 days from the date of its ruling in which to file its written findings.[22] Should the trial court not cooperate in timely filing its findings, the State should file a motion in the court of appeals to remand the case for the trial court to enter its findings.[23]

Not to be overlooked is the additional filtering process that findings of fact afford prosecutors contemplating a State's appeal. Any credibility findings will assist in determining whether we should appeal. If credibility determinations are memorialized and supported by the record, any review will usually be confined to the application of the law to the facts. Should the credibility findings be against the State and nothing in the record contradicts them, prosecutors should carefully reflect before attempting to appeal because an appellate court will be compelled to defer to those findings and will likely use them to affirm. Finally, be aware that that the deadline for filing the State's notice of appeal is unaffected by the trial court's deadline to file any findings of fact. Thus, in some cases, we may have to file the notice of appeal before seeing the trial court's written findings, but the State remains free to withdraw notice in the event of unfavorable findings.

**3 Move for reconsideration, giving the trial court a second**

**chance to get it right.** Sometimes we get an adverse ruling, but we recognize it was a close call for the trial court. In the heat of the moment, you failed to present the most compelling evidence or argument and you later think of something else that might have made a difference. Just because you have that adverse ruling does not mean there is a *fait accompli*. A formal motion to reconsider filed and presented to the trial court can tip the scales in the prosecution's favor and head off the need to pursue a State's appeal.

File a formal motion, include your reasoning, request a hearing, make your arguments, and provide the court with a ready-made order. The emphasis here is on making it easy for the trial court. Use the formula of K-I-S-S (keep it simple, stupid). Grab and maintain the court's attention. Make your point quickly and clearly and don't waffle; border on the stark. On several occasions over the years, I have avoided the need to pursue a protracted State's appeal or a feather-ruffling writ of mandamus by moving for reconsideration. Be aware, however, that a ruling on a motion for reconsideration is not considered an appealable order for purposes of a State's appeal.[24] Thus, the date of the written adverse ruling will start the appellate timetable. Finally, to maintain credibility, do not overuse this vehicle; preserve it for those special instances where a change in the result in the trial court is possible and would be significant.

**4 Use an overlooked vehicle, a bill of exception, for making a record.** On occasion during trial, events occur that do not appear on the record, but for appellate purposes, prosecutors desire to memorialize them. Events may develop while the court reporter is temporarily absent from the courtroom or present but not reporting (for example, when matters are discussed at the bench or in chambers). They might also involve the conduct of those present in the courtroom. Further, a trial court may sustain an objection without hearing the party's arguments or offer of proof and the party seeks to justify its position. In all these situations, it is possible to generate a record so that a matter is preserved for appellate review.[25] If the trial court permits, the prosecutor can relate what occurred in the presence of the court reporter during trial—but outside the presence of the jury. Otherwise, you might move to make a bill of exception.[26] While the defense occasionally—and less frequently than it probably should—avails itself of this oft-forgot vehicle, there does not appear to be any legal impediment to the State employing it too.[27]

On its face, the bill of exception rule is long, but we should realize that the rule also provides a fallback remedy in the event a party disagrees with the bill filed by the trial court. With the inclusion of the affidavits of three people who observed the event at issue, a "bystanders bill" can be filed controverting the trial court's bill.[28]

Preparing a bill of exception requires no particular words or form, but it should state the objection and ruling complained-of with sufficient specificity to apprise the trial court of the issue.[29] If the record already contains the evidence, it need not be repeated, but a careful prosecutor will nevertheless attach a certified copy of the court reporter's transcript. The bill should be filed within 60 days after sentence is pronounced or suspended in open court, or if a motion for new trial has been timely filed within 90 days after sentence is pronounced or suspended in open court.[30] The bill must also be physically presented to the trial court. Finally, in the face of a defendant's bill of exception, know that if we do not contest the judge's action on the bill we will be bound by the contents of the bill.[31]

Well, that completes the tips for a State's appeal. With good fortune, prosecutors will not need to pursue our own appeal but, at some point, many offices will invoke the process. Now we have a few more tools at our disposal. ❇

## Endnotes

1 See Tex. Code Crim. Proc. art. 44.01 (a-c) (listing most of the issues the State can appeal); *State ex rel. Lykos v. Fine*, 2011 Tex. Crim. App. LEXIS 1, *21, Nos. AP-76,470 & AP-76,471 (Tex. Crim. App. Jan. 11, 2011).

2 *State v. Moreno*, 807 S.W.2d 327, 329-30 (Tex. Crim. App. 1991) ("In enacting Article 44.01 the Texas Legislature intended to grant the State the same appellate powers as the United States Congress extended to the federal government. Thus, we interpret the State's authority to appeal from an order 'dismiss[ing] an indictment' under Article 44.01 in lockstep with the federal government's authority to appeal under Title 18, United States Code, §3731") (footnotes omitted).

3 See *State v. Cox*, 235 S.W.3d 283 (Tex. App.—Fort Worth 2007, no pet.) (dismissing State's appeal due to lack of a signed written order).

4 See *State v. Cowsert*, 207 S.W.3d 347, 351 (Tex. Crim. App. 2006) (addressing 15-day period to file notice of appeal), superseded by, Tex. Code Crim. Proc. art. 44.01(d) (extending appeal window to 20 days); accord, Tex. R. App. Pro. 26.2(b).

*Continued on page 12*

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5 See *State v. Blankenship*, 146 S.W.3d 218, 220 (Tex. Crim. App. 2004) (recognizing that a subordinate may sign the notice of appeal if the elected prosecutor expressly authorizes the subordinate to do so).

6 See *Baines v. State*, 2010 Tex. App. LEXIS 8777, *22-23, No. 06-10-00069-CR (Tex. App.—Texarkana, Nov. 3, 2010, no pet.) (rounding up the cases). This is not a very fair or practical requirement. The State has only 20 days to file its notice of appeal and will be denied any extension of time beyond that period. In contrast, the defense has 30 days to file its notice and can obtain an extension. Frequently, the defense will not file its notice of appeal until the State's time has already run. This additional period to file notice of appeal afforded the defense provides it with the opportunity to engage in improper gamesmanship simply so as to deny the State the right to cross-appeal. In fact, this incongruity in the parties' times to file notices of appeal can work against the State even if the defense has no improper motive in filing its notice of appeal after the 20-day window has elapsed. Accordingly, prosecutors should continue to challenge the requirement that they must file a notice of appeal so that they can pursue a cross-appeal.

7 Usually, a State's appeal is not even worth filing unless the chance of prevailing is in excess of 75 percent.

8 For a comprehensive review of the procedures of a State's appeal, refer to your office's copy of TDCAA's *State's Appellate Manual* (2010-2012) (a detailed resource for anyone working on appeals, petitions for discretionary review, and writs of mandamus and habeas corpus), which was distributed free to every prosecutor's office in September 2010.

9 "A suppression hearing is for limited purposes. [S]tatutes authorizing pre-trial proceedings do not contemplate a 'mini-trial' on the sufficiency of the evidence to support an element of the offense. The purpose of a pre-trial motion is to address preliminary matters, not the merits of the case. Preliminary matters are those issues that can be resolved before there is a trial on the merits of the case." *State v. Iduarte*, 268 S.W.3d 544, 587 (Tex. Crim. App. 2008) (internal citations omitted).

10 *State v. Mercado*, 972 S.W.3d 75, 78 (Tex. Crim. App. 1998); see also *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002) (rejecting State's "attenuation of the taint" argument made for the first time on appeal).

11 Id.

12 *State v. Rhinehart*, 2011 Tex. Crim. App. LEXIS 327, No. PD-0002-10 (Tex. Crim. App. March 9, 2011). Full disclosure requires that I mention that, unlike the unanimous decision in *Mercado*, this decision was 5-2.

13 *State v. Klima*, 934 S.W.2d 109 (Tex. Crim. App. 1996).

14 *Rhinehart*, 2011 Tex. Crim. App. LEXIS 327 at *23; *Mercado*, 972 S.W.2d at 77-78.

15 *State v. Kelly*, 206 S.W.3d 808, 819 n.19 (Tex. Crim. App. 2006).

16 See *State v. Ross*, 32 S.W.3d 853, 855-58 (Tex. Crim. App. 2000) (upholding the trial court's ruling granting suppression of the evidence despite uncontroverted evidence to support reasonable suspicion to stop and probable cause to arrest).

17 *State v. Cullen*, 195 S.W.3d 696, 698 (Tex. Crim. App. 2006).

18 Id., at 698.

19 Id., at 698-99.

20 *State v. Abran*, No. PD-0735-10 (Tex. Crim. App. April 5, 2011) (not yet reported or final). But if a trial court makes findings without a request from the losing party and the findings are inadequate for the appellate court to resolve the issues, the appellate court may remand the cause to the trial court to make additional findings. Id.

21 *State v. Oages*, 210 S.W.3d 643, 644 n.3 (Tex. Crim. App. 2006).

22 *Cullen*, 195 S.W.3d at 699.

23 This is the process employed where a trial court fails to enter mandatory findings, e.g., under the confession statute. See Tex. Code Crim. Proc. art. 38.22, §6 (and cases thereunder).

24 See *Cowsert*, 207 S.W.3d at 351-52 (holding the State lacked authority to appeal from a ruling on a motion to reconsider a suppression ruling because it would have improperly extended the State's fixed deadline to appeal).

25 Defendants have the advantage of creating a record at a hearing on a motion for new trial that the State does not—unless the defendant first obtains the hearing.

26 See Tex. R. App. Proc. 33.2.

27 There are abundant cases in which the appellate courts point out the availability of the bill of exception rule—and Rule of Evidence 103(b) on offers of proof)—after the defense has failed to use it to preserve an issue for appeal.

28 Tex. R. App. Pro. 33.2(3).

29 See *Currie v. State*, 692 S.W.2d 95, 97 (Tex. Crim. App. 1985); *Herrin v. State*, 525 S.W.2d 27, 29 (Tex. Crim. App. 1975).

30 See Tex. R. App. Pro. 33.2 (e)(2)(A & B).

31 See *Proctor v. State*, 503 S.W.2d 566, 570 (Tex. Crim. App. 1974) (binding the defendant to the bill's contents).

# Victim Services Board plans training

The new Victim Services Board convened for the first time in late March and planned workshops for the TDCAA Annual Criminal & Civil Law Update, September 21–23 in Corpus Christi, and the Key Personnel and Victim Services Seminar, November 2–4 in Houston. Every one of your elected board members took time from their busy jobs and lives to attend. Please get to know your regional member and let him or her know what issues are of interest to you, what training topics you would like covered, and what is working for your community so that we can share it with others. Board members are:

*By Suzanne McDaniel*
TDCAA Victim Services Director

**Cyndi Jahn**, Chair, San Antonio

**Laney Dickey**, Region 1, Littlefield

**Frank Zubia**, Region 2, El Paso

**Kathy Dixon**, Region 3, Burnet

**Christine Segovia**, Region 4, Beeville

**Nancy Ghigna**, Region 5, Conroe

**Jalayne Robinson**, Region 6, Quitman

**Blanca Burciaga**, Region 7, Fort Worth

**Jill McAfee**, Region 8, Belton

The geographically and demographically diverse board agreed overwhelmingly to focus on substantive matter for the workshops for new and seasoned victim assistance coordinators (VACs). Three-hour "core" training will be offered at the two conferences for new coordinators with interaction and assistance from veterans and other agencies.

With staff and community resources dwindling, coordinators are called upon more frequently to provide an even wider variety of services. Juggling all these duties requires setting priorities and honing management skills. Both seminars will offer hands-on, problem-solving sessions for participants.

Additionally a legislative update specifically designed for VACs will be provided along with great opportunities to network. For registration information, please access the TDCAA website at www.tdcaa.com.

## Building core strength

Our Victim Services Board agreed that we need to offer core training at both our Annual and Key Personnel/VAC seminars. They also agreed that we need to offer the best core training available anywhere. Prosecutors, VACs, investigators, and key personnel staff members are in a unique position to know what other folks in prosecutor's offices need. If they can't help you, they will know someone who can, to paraphrase our esteemed TDCAA president, Mike Fouts.

So, we are starting from scratch and designing a new curriculum to be used at our seminars and to train trainers. Your help is integral. Here is your challenge:

1. What information was most helpful as you started implementing victim rights in your office? Where did you get it?

2. What did you not know then that you wish you had? What are the five most important things that "seasoned" you would share "just starting" you?

3. What five things are still the toughest to juggle and how do you juggle them?

## Under construction

Need to find something victim assistance-related in a hurry because you are in an office with two phones ringing and prosecutors hunting you down because judges are after them? Did you realize after your computer crashed that someone stole your Code of Criminal Procedure—and that was from two sessions ago?

Good news! There's going to be a separate tab on the TDCAA website for all things related to victim services. It's going to be a one-stop shop to find statutes, journal articles, forms, brochures, resources, and of course, the application for Professional Victim Assistance Coordinator certification. Thanks to you all for the idea! We have been getting calls on locating information and realized it will be more accessible to put it all in one place.

It's not too early to start brainstorming, although we will wait until the end of the legislative session to start collecting forms and letters because of possible changes to the statutes. We need your input on the content you would find most useful. Let us know what works for your office and victims. Did you know that Dallas County (hat tip to Chris

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Jenkins) has a great jury counseling brochure and that Bexar County (hat tip Cyndi Jahn) has a terrific brochure for victims about what happens after a conviction? Exactly! We need to share the wealth of information, and the new web space will be perfect. Help us build it and folks will come.

## Victim Rights Week photos and stories wanted

Please, please send us your captioned photos and stories about what your community did for Crime Victim Rights Week. We would love to share them with everyone.

Thanks again for doing all you do and as always, please send your suggestions and comments to me at mcdaniel@tdcaa.com. ❇



# Letting defendants have the final word on evidence of intoxication is in its twilight

In 1966, the United States Supreme Court held that taking blood samples from a defendant at a hospital after he had been arrested for driving while intoxicated (DWI) was reasonable under the Fourth Amendment. More than 525,000 ALR hearings later, prosecutors and police officers reduced reliance on the defendant agreeing to a breath test by developing a system whereby they could seize blood samples pursuant to a search warrant.[1] And while the Court of Criminal Appeals later held that the implied consent statutes did not preclude the taking of blood samples pursuant to a search warrant issued under the Fourth Amendment, the question of whether it was appropriate for officers themselves to seize the blood remained open.

*By David C. Newell*
Assistant District Attorney in Harris County

Not anymore. With its decision in *Johnston v. State*, the Court of Criminal Appeals has essentially vindicated those folks who had been working tirelessly to shift DWI prosecution away from voluntarily given breath tests and towards "no refusal" programs. In *Johnston*, the Court of Criminal Appeals held that a police officer who was also a seasoned EMS provider did not violate the Fourth Amendment when he forcibly obtained a blood specimen at the police station pursuant to a search warrant. But before we set about transforming all police officers into Edward Cullen,[2] there are some aspects of *Johnston* that deserve some consideration.

## No refusal in the DWG

While most jurisdictions in Texas implement a "no refusal" policy only on certain weekends, the relatively small city of Dalworthington Gardens (known by those in Tarrant County as the DWG) just outside of Arlington operates its no refusal program all year.[3] In 2005, the Dalworthington Gardens Department of Public Safety became the first police department to train its officers on how to do a blood draw.[4] Chief Bill Waybourn reached out to Dr. Del Principe, Medical Director for Dalworthington Gardens Emergency Services Department, and Richard Alpert, Assistant Criminal District Attorney in Tarrant County, to develop a program that would allow police officers to draw blood based upon a search warrant in the event that a DWI suspect refused to provide a blood sample upon request. As Chief Waybourn described it, "We put a lot of forethought into this and a lot of work with the prosecutor's office to make sure we are doing it right."[5]

The 14-hour certification course developed by Dr. Principe included classroom instruction, homework,

with assigned reading materials and graded exams.6 After the officers completed the course, Dr. Principe required them to do a minimum of 50 "sticks" at the emergency room under the supervision of either a blood technician or nurse. Dr. Principe trained the officers to perform venipunctures according to accepted medical practice, and the training was equivalent to that given to the Arlington Memorial Hospital's blood-draw technicians by Dr. Principe.

Dr. Principe also developed two blood-draw checklists for officers when drawing a suspect's blood. While he did not include an itemized inquiry into a suspect's medical history in this checklist, he did teach officers the necessity of making such an inquiry to determine whether any medical issues might affect venipuncture blood draws. He did not develop a specific policy for instances when a suspect might resist or fight the officers, but he believed that officers unable to safely obtain a sample at the police station they would bring the suspect to the hospital. However, he also felt that forcibly taking blood from a DWI suspect is acceptable.

The blood-draw room at the police department was also established by Dr. Principe. The room was clean but not as sterile as an operating room because that level of cleanliness was not required. The cement floor could be cleaned easily in the event of a blood spill, and the room contained a nonporous phlebotomy chair and steel table, both of which could be cleaned with commercial sanitizer before each use.

## This won't hurt a bit

Officer Britt Stinson of the Dalworthington Gardens Department of Public Safety pulled Christi Lynn Johnston over for driving with an expired registration sticker. She exhibited signs of intoxication and performed field sobriety tests after which Officer Stinson placed her under arrest. He took Johnston to the police station, conducted a DWI interview as well as a second battery of field sobriety tests on video, and read her the DIC-24 form before asking if she would provide a blood sample. She refused.

Officer Stinson then got a search warrant for her blood and called Officer Darren Burkhart for assistance in drawing the blood. Officer Burkhart had cleaned the blood-draw room at the start of his shift and had made a practice of cleaning it after each time he used the room to draw a suspect's blood. When the officers presented Johnston with the warrant and explained what was going to happen, Johnston began to resist by kicking her feet and moving her arms. The officers restrained her feet and left arm with bandage gauze. Officer Stinson held down Johnston's right arm so Officer Burkhart could draw blood from a vein in Johnston's right wrist. She became cooperative after being restrained.

Officer Burkhart drew Johnston's blood by applying a tourniquet, wiping the area down with Betadine (rather than alcohol for obvious reasons), and injecting a needle attached to a tube holder and tube into Johnston's vein. There was only a "little bit of bleeding" that came from the puncture site after the draw that Officer Burkhart cleared up by applying pressure to the area. (See? Not so bad after all.) While Officer Burkhart did not do a thorough medical history inquiry before the blood draw, Johnston did not complain about the way the blood had been drawn.

Both officers had received their certificates indicating they had completed Dr. Principe's program.[7] Moreover, both officers had significant training as EMTs. Officer Stinson was certified as a basic EMT and had done approximately 125 to 130 blood draws. Officer Burkhart was an intermediate EMT. Though he had six years of training as a police officer, he had been an EMT for 16 and was employed as a firefighter and EMT rather than a police officer. He had performed venipunctures thousands of times and Dr. Principe described Officer Burkhart as "exceptional" at performing venipucture with as much training and experience drawing blood as an Arlington Memorial Hospital blood technician.

The State charged Johnston with DWI. Johnston filed a motion to suppress the blood test results, arguing that a blood draw conducted by a police officer at the police station was unreasonable under the Fourth Amendment. The trial court granted the motion to suppress even though he determined the officers were credible and that they had followed medically accepted procedures in drawing blood. However, the trial court determined that the officers were not qualified to draw the blood and that the blood had not been drawn in a reasonable manner because it was not drawn by medical personnel in a hospital or medical environment.

The State appealed. The Fort Worth Court of Appeals assumed that Officer Burkhart was qualified to draw blood and held that there was nothing inherently unsafe about the room in which Johnston's blood was drawn. However, the court of appeals was "troubled" by the failure of the officers to ask for a general medical history before the blood draw. It found the lack of a recording of the blood draw equally troubling as well as the lack of guidelines for the use of force during DWI blood draws. Thus, the court of appeals upheld the trial court's ruling and held that the blood draw was unreasonable.

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## Blood draws are presumptively reasonable

In reversing both the trial court and the court of appeals, the Court of Criminal Appeals first considered whether taking blood was reasonable. Writing for a six-judge majority, Judge Keasler analyzed the Supreme Court of the United States holding in *Schmerber v. California* to answer the issue. The Supreme Court noted that the quantity of blood is minimal and for most people the procedure involves virtually no risk, trauma, or pain, even taking into account the existence of specific medical conditions that might create an unjustified risk when determining that the blood draw at issue in *Schmerber* was reasonable. Consequently, the burden is now on the suspect challenging the blood draw to show that venipucture is not reasonable for him or her individually. However breathtaking an assumption this might sound, it actually appears to be consistent with the well-established principle that there is a rebuttable presumption of proper police conduct under the Fourth Amendment and the defendant bears the initial burden of producing evidence to rebut that presumption.[8]

Here, Johnston provided no evidence that she suffered from a medical condition that would have made another means of testing preferable. Thus, the failure of the officers to make a medical inquiry, regardless of whether it violated the protocol set out by Dr. Principe, did not render taking her blood unreasonable in this case. As the court noted, a DWI suspect naturally familiar with her own medical history is in the best position to identify and disclose any peculiar medical condition that could result in risk, trauma, or more than minimal pain from a blood draw. While prosecutors can now probably expect to hear about everything from blood thinners to Chagas disease as a reason for an unwarranted risk in a blood draw, it is incumbent upon the defendant to produce evidence that these situations rendered the decision to take blood unreasonable. And though the court was mindful of the legitimate concerns for the well-being and safety of DWI suspects, the majority remained confident that law enforcement officers would be conscientious in their decision making and the threat of an expensive civil rights suit would provide a strong deterrent against taking unnecessary risks.

The Court of Criminal Appeals also considered the reasonableness of the methods used by the police in forcibly obtaining Johnston's blood. The court explained, consistent with its previous opinion in *Beeman v. State*, that Chapter 724 of the Transportation Code was not controlling authority regarding the reasonableness of how a blood draw is performed under the Fourth Amendment. As Judge Keasler explained, "Whether a blood draw is conducted pursuant to a warrant or not, the assessment of reasonableness is purely a matter of Fourth Amendment law."[9] So while compliance with §724.017 provides one way to establish reasonableness under the Fourth Amendment, it in no way establishes the exclusive means for establishing reasonableness.

## More EMT than officer

One encouraging aspect is the acknowledgment that police officers can be qualified to draw a DWI suspect's blood. Here, Officers Stinson and Burkhart had completed Dr. Principe's blood-draw certification course prior to taking the appellant's blood. However, some caution is warranted as the court specifically declined to rely upon certification in the program, as it was not necessary to the court's opinion. Instead, they relied upon Officer Burkhart's specific training as an EMT to determine he was qualified to draw Johnston's blood. So while the court left open the possibility that police officers with less training and experience could also be qualified to draw a DWI suspect's blood, the question of whether the officer in this case was qualified did not appear to be a particularly hard one to answer. The court did note with apparent favorability cases from Arizona that had also upheld blood draws conducted by police officers even though those officers had less training than Officer Burkhart. So to the extent that an officer has comparable experience and training as an EMT, *Johnston* will easily support a determination that the officer is qualified to draw a DWI suspect's blood. Still, it is an open question whether simply adopting a program similar to that developed by Dr. Principe will properly certify an officer to perform a blood draw, though there is reason for optimism.

## A clean, well-lighted place

The court also considered the circumstances surrounding the blood draw. While there was some language in *Schmerber* that implied compulsory blood draws might need to be conducted in a hospital or clinic, the court rejected Johnston's argument that a blood draw at the jail was not per se unreasonable. Many jurisdictions have upheld blood draws by doctors, nurses, or techni-

cians within the confines of various law enforcement agencies.[10] Specifically, the court noted that an appellate court in Arizona had upheld a blood draw at the back of a patrol car by a police officer who had received only a week of phlebotomy training.[11] However, the majority resorted to that case only to emphasize that a medical environment would be ideal for drawing blood and that a blood draw in another environment would not be per se unreasonable. Moreover, Judge Johnson wrote a concurring opinion to clarify that she believed that a roadside blood draw would be unreasonable under the Fourth Amendment even as she acknowledged that the blood draw in this case was properly done.[12] Based upon the trial court's findings, the room was in accordance with accepted medical practices and therefore did not invite an unjustified element of personal risk of infection or pain.

The court also held that the "more troubling circumstances" that had led the court of appeals to uphold the trial court's granting of the motion to suppress did not render the blood draw unreasonable under *Schmerber*. For example, the court rejected the idea that the blood draw was unreasonable because Johnston was alone in the privacy of the police station with the arresting officer and the blood draw was not recorded. According to the court, nothing in the record suggested that any of these things subjected Johnston to any additional risk of infection or pain.[13]

More importantly, the court had no problem with the lack of a "use-of-force protocol" specific to DWI blood draws. It is not out of the norm, even in a medical setting, to restrain an uncooperative DWI suspect to obtain a sample of blood.[14] Moreover, the general policy was to use only the minimum force necessary. On this record, there was nothing to suggest the force used to obtain the sample was excessive or unreasonable.[15]

The major concerns raised by the court of appeals appear to mask at least two very emotional issues. It is estimated that at least 10 percent of American adults have a fear of needles, with most severe cases never being documented due to the tendency of the sufferer to simply avoid medical treatment.[16] Moreover, the concern about overzealous police conduct is certainly nothing new.[17] Consequently, it is not surprising that attacks would be levied against the invasiveness of a procedure that uses a needle performed by someone less neutral than a doctor or nurse.

However, the court has weighed these concerns in *Johnston* and held that a blood draw pursuant to a warrant is presumptively reasonable unless a defendant shows a substantial risk of harm or infection. Additionally, an EMT may be qualified to perform a blood draw even if he also happens to be a police officer, and a clean, easily sanitized room with a phlebotomy chair is acceptable for performing a blood draw regardless of whether it is at a jail. Finally, some use of force is permissible to seize blood pursuant to a warrant provided it is consistent with general use-of-force guidelines and acceptable medical practices.

Not every jurisdiction can carry out a similar program to the one in the DWG, but after the *Johnston* decision, it appears that dawn may be breaking for jurisdictions' "no refusal" policies. ❇

## Endnotes

1 Study Regarding the Ineffectuality of the Administrative License Revocation System as a Means of Enforcing the Implied Consent Law, Texas Department of Hyperbole (2010).

2 The dreamy main character in the *Twilight* book series who is, you guessed it, a handsome vampire.

3 www.dentonrc.com/sharedcontent/ws/dn/latestnews/stories/083008dnmetdwiblood.41e97be.html.

4 www.star-telegram.com/2008/07/08/748015/judge-throws-out-dalworthington.html.

5 www.dentonrc.com/sharedcontent/dws/dn/latestnews/stories/083008dnmetdwiblood.41e97be.html.

6 *State v. Johnston*, 2011 WL 8913234 at *1 (Tex. Crim. App. March 16, 2011).

7 *State v. Johnston*, 305 S.W.3d 746, 748 (Tex. App.—Fort Worth 2009).

8 See e.g. *Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005)(noting a defendant's initial burden to rebut a presumption of proper police conduct when moving to suppress evidence).

9 *Johnston*, 2011 WL 891324 at *9.

10 *Johnston*, 2011 WL 891324 at *10.

11 *Id.; State v. May*, 210 Ariz. 452, 112 P3d 39, 41-42 (Ariz. Ct. App. 2005).

12 *Johnston*, 2011 WL 891324 at *12.

13 *Johnston*, 2011 WL 891324 at *11.

14 *Id.*

15 By way of contrast, the recent case of *Hereford v. State*, where police tased a defendant in the groin or upper thigh area to get him to spit the crack out of his mouth provides an example of an unreasonable use of force during a search and seizure. *Hereford v. State*, 2011 WL 1266550 at *11.

16 Hamilton, James, Needle Phobia: A Neglected Diagnosis, *Journal of Family Practice* 41 (August 1995); The Texas Department of Hyperbole has not released a study on this subject, but it is likely that the estimates are even higher.

18 See e.g. *Wilson v. State*, 311 S.W.3d 452, 461 (Tex. Crim. App. 2010)(noting that Texas exclusionary rule is designed to prevent the use of evidence obtained after overzealous police officers violate the law).

# Photos from Train the Trainer


# *Jarrett named Prosecutor of the Year*

The Texas and Southwestern Cattle Raisers Association (TSCRA) named Michael Jarrett the TSCRA Prosecutor of the Year for his commitment to prosecuting livestock theft and related crimes. Jarrett is the first assistant criminal district attorney in McLennan County.

TSCRA Special Ranger Doug Hutchison, who nominated Jarrett for the award, said that his work has resulted in stiff convictions and that he has been responsible for thousands of dollars being paid back to theft victims. "Michael Jarrett takes crimes against the ranching community very seriously," Hutchison says. "We are lucky and proud to have him in our corner."

Congratulations on this well-deserved honor! ❇

*Caption: From left are TSCRA President Dave Scott; Kendal and Michael Jarrett; Larry Horwood, chairman of the TSCRA Brand and Inspection Committee; and Larry Gray, Texas and Southwestern Cattle Raisers Association executive director of law enforcement.*

*Continued from the front cover*

# *Vanished without a trace (cont'd)*

tion to working full-time, doing all the cooking, cleaning, laundry, and taking care of the children, Kathy took classes at North Central Texas Community College, then Texas Women's University. She confided in a coworker that her goal was to graduate, find a place to live, and get a job so that she could divorce her domineering husband. In December 2003 Kathy Stobaugh walked across the stage and got her long-awaited college diploma.

## Starting a new life

With degree in hand, Kathy then began to focus on her next chapter, life without Charles. By May 2004, unbeknownst to her husband, she hired a divorce attorney and signed a lease on a rental house in town. Her daughter, Charee, was her confidante. Though Charles did not even know of Kathy's plans to leave, Charee had made trips to the rental house with her mom and joined her on shopping excursions for furniture for that house. This was a fresh, new beginning for Kathy, and she was thrilled.

Charles and Kathy had approximately $77,000 in a savings account. On the eve of Charles' being served with the divorce petition, Kathy withdrew exactly half, down to the penny, and opened her very own bank account. She hid the guns and hunting weapons in anticipation of Charles getting served, for fear of his reaction. On June 2, 2004, a process server knocked on the door and served Charles with the divorce papers. He was livid. He ripped up the papers and threw them at the process server. Charee grabbed her brother and fled the house. Ultimately Kathy was able to calm him down and leave peacefully.

While Kathy began her new life, secured a teaching job for the Nocona Independent School District, and sparked a new relationship with an old high school classmate named Rocky, Charles did not handle the separation well. Though his entire family lived very close and was in constant contact with him that summer, Charles told no one that his wife had left him. He did not file an answer in the divorce, nor did he hire an attorney. Instead, he ignored it, wanting Kathy to come back home.

## Christmas break

In December, Kathy wanted to use her Christmas break from school to finalize the divorce and work out the terms of the property settlement with Charles, but up to that point, he was not willing to accept that the divorce was actually occurring. She gave Charles numerous options, preferring to preserve the land so that the kids would someday get it. He would agree to nothing.

Charles knew Kathy was meeting with her attorney over the Christmas break. On Monday, December 27, Charles proposed to Kathy that they sell everything they owned and split the money down the middle. Arguably, Charles did not actually want to sell "his" land but only proposed this option to be difficult. Kathy's divorce attorney explained that because Charles had dragged his feet for so long, it was now up to Kathy to decide how she wanted to split the assets—Kathy would be granted the divorce and whatever division of property she wanted by default. The attorney told Kathy to decide and let her office know so they could draft the decree.

Wednesday, December 29 was the last day of Kathy's life. She spoke to her brother Chris and discussed plans to go to Gatesville that weekend to attend their grandfather's birthday party. Kathy told her close friend Linda about the divorce and emailed her attorney the specifics of how she wanted the property divided, then spent the rest of the day working on lesson plans on her home computer, preparing for the upcoming semester. That evening her daughter, Charee, left to hang out with friends, leaving Kathy at home alone. Her sister-in-law and niece stopped by the house to get a receipt to exchange a Christmas gift, and shortly after they left, 13-year-old Tommy arrived unannounced at her door. Charles dropped Tommy off at Kathy's house around 8:30 p.m. Charles did not go to the door, nor had he called Kathy to arrange the drop-off. He simply let Tommy out of the car and drove back home.

Once home, Charles called Kathy and asked to speak to her about the divorce and her recent meeting with her attorney. Kathy told Tommy goodbye and headed

out the door to meet Charles at his house, telling Tommy, "I'll be back." At 9:16 p.m., while enroute to Charles' house, Kathy tried to call Charee. At the exact same moment, Charee tried to call her mom. The two called each other twice at 9:16, but because they were calling at the same time, none of the calls actually connected. They would never get the opportunity to speak to each other again.

By Charles' admission, Kathy arrived at his house at approximately 9:30 p.m. to discuss the imminent divorce. Kathy Stobaugh was never seen or heard from again, and the next morning her car sat in his driveway.

Charee tried to call her mom late that evening with no success. When Charee arrived home at 1:15 a.m., she woke up her 13-year-old brother and learned that Kathy had gone to the family farm to talk to Charles about the divorce. Unable to sleep, by 6:45 the next morning, Charee called her mother's cell phone again, and again the phone went straight to voicemail. She then drove to Charles' house, where she saw her mom's car in the driveway. She drove back to Kathy's house and continued trying to call her mom. By 9:15 a.m. she again drove to Charles' house. The car was still in the driveway, and this time she saw her father outside. During multiple late-night and early-morning phone calls to Kathy, Charee had never once tried to call Charles.

Charles explained to his daughter how he and Kathy had met the night before to discuss the divorce. He said he had insisted they sell everything and split the proceeds, and Kathy indicated she did not want to do that. According to Charles, the conversation had been fairly civil, but at the end Kathy voiced frustration that "the man always had to win" and told Charles that she was leaving. "Don't look for me," he claims she told him, "because no one will ever be able to find me." Charles then said he watched Kathy's taillights as she drove down the long driveway to the road, only to be surprised to find her car parked in the driveway the next morning, with the keys in it. Charles told Charee to not worry about it, indicating that Kathy had just gone off out of frustration. Dumbfounded, the 16-year-old girl, who had always been so close to her mom, did not know what to do.

## Missing for days

In the days following her disappearance, Kathy's family and friends did not know she was missing and left numerous messages on her voicemail. Neither Charles nor Charee called anyone to notify them of Kathy's disappearance nor to ask if they had heard from her. Charee continually called her mom's cell phone, leaving multiple messages that became more and more frenzied. Charles Stobaugh neither called nor left any messages.

Kathy failed to show up at her attorney's office Friday morning to do the prove-up on the divorce. She didn't go to an appointment with a realtor for a scheduled viewing of a house down the street from her kids' schools. Nor did she attend her grandfather's birthday party in Gatesville that weekend. Family members were concerned about her absence but not alarmed, as some other people had also missed the party because of illness. This close family could never have imagined that Kathy that she had been missing for days and they weren't notified.

As the days passed—Thursday, Friday, Saturday, Sunday—only Charles, Charee, and Tommy knew of Kathy's disappearance.

On Monday, January 3, classes resumed for Kathy's district. Kathy, a model employee, failed to show up to retrieve her kindergarten class from the cafeteria. The school receptionist called all the numbers in the file, including Charles Stobaugh's. Charles told her not to worry about it, explaining that Kathy "runs off all the time." Though she had worked at the school for only one semester, this description seemed at odds with the impression she had made on her coworkers.

After Kathy missed school, Toni Campbell, a fellow kindergarten teacher and friend, called Charee to ask what was going on. Though Charee was extremely reticent during the conversation, Toni did elicit that Kathy had been missing for five days. Toni demanded Charee go to the police, telling her that if Charee didn't, Toni would. After that phone conversation, Charee drove alone to the Sanger Police Department to report her mother missing.

## Searching for Kathy

Shaking, Charee relayed to the patrol officer, Josh Vest, that her mother had been missing for five days, after meeting Charles to discuss the divorce. Officer Vest then went to Charles' house. The officer recorded his very casual conversation with

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Charles as they stood in the driveway next to Kathy's car with his in-car camera. Each time Vest attempted to leave Charles' house, Charles offered a new theory to explain her disappearance. He told Vest of one middle-aged woman he knew that went back to college, resulting in her having a nervous breakdown. Vest was so suspicious of the circumstances and of Charles he immediately called the Texas Rangers for help. Thus began Ranger Tracy Murphree's pursuit of Kathy Stobaugh.

Ranger Murphree met with Charee that night. She explained to him that she knew her father did not want her to notify the police, but she did not know what else to do. She cried and trembled as she described how close she and her mom were and how she left Charles' house that night without telling him she was going to the police. She was clear that Kathy had never left before and would never leave her and Tommy.

In his three-hour interview with Ranger Murphree, Charles denied any knowledge of his wife's whereabouts. But as he had previously told Officer Vest, he claimed Kathy would periodically run off, though he was very short on details of these alleged trips. At first Charles claimed to have called Kathy during the first few days she was missing, leaving voice messages, but later admitted that was a lie. Charles claimed that Kathy had insisted on coming to his house to talk to him that night, but 13-year-old Tommy told the police that Charles initiated the meeting. Charles also explained he took Tommy to Kathy's before the meeting because Tommy wanted to play a new video game at his mom's house. This contradicted Tommy's version to police that Charles took him to Kathy's so he could talk to Kathy alone about the divorce. In that interview, Charles conceded that Kathy would never have walked down the road that night, and he reluctantly agreed that he believed something bad had happened to her. Soon after that interview, Charles retained an attorney.

A search warrant was executed on Charles' property two weeks after Kathy's disappearance, but no evidence was recovered. Family members from both the Munday and Stobaugh sides organized searches of Charles' property and the surrounding areas. Charles participated in no searches.

Kathy's family members descended on the Sanger area to search, put up fliers, and look for any clue as to her disappearance. Charee notified her father that some of Kathy's family intended to search Kathy's computer. Years later, during our office's investigation of this case, Charee confirmed that Charles took Kathy's computer to hide it from law enforcement and Kathy's family.

During the searches and investigation of Kathy's disappearance, a schism occurred in the Stobaugh family. The extended family had been very close, often farming and working the family dairy together. The entire Stobaugh crew had gathered for New Year's Day 2005 at Charles' mother's house, including Charles and the kids. Neither Charles nor the children mentioned Kathy's disappearance three days earlier. After the police were notified and Kathy's disappearance became headline news, some members of Charles family found his talkative and upbeat behavior at the New Year's gathering suspicious. Those suspicions only grew as family members spent hours walking in organized searches of Charles' farm that cold January as Charles stayed locked up in the house. Some wanted to protect Charles, while others were bent on discovering the truth of what happened to Kathy.

Law enforcement's focus was in finding Kathy's body. Ranger Murphree knew that she never made another cell phone call, accessed credit cards, or withdrew money from the bank after her meeting with Charles December 29. Despite extensive media coverage and distribution of fliers, there was no evidence that anyone had seen or spoken to Kathy since Charles had. Ranger Murphree's investigation revealed Kathy to be a very responsible, devoted mother who maintained close ties with her family. Despite numerous exhaustive searches for her body, Kathy could not be found. Ranger Murphree had been told by the DA's office at that time that without a body, there would be no murder case.

Over time the Munday family became frustrated with law enforcement's efforts. The family put up reward money and rented a billboard with Kathy's picture; it was located on a stretch of I-35 driven every day by Charles Stobaugh on his way home from work.

Eventually, the family accepted the fact that Kathy was never coming home. They knew Charles was responsible for her death. In 2008 Jeanne Munday, Kathy's mother, died. Jeanne had been devastated by

the loss of her only daughter and tormented that Kathy's killer was not held responsible for her death. In 2008 the family erected a headstone for Kathy next to Jeanne's grave; the date of death was December 29, 2004.

The family made every effort to maintain contact with Charee and Tommy, who lived with Charles. They managed to avoid the constant elephant in the room: the knowledge that the kids' father killed Kathy. The Munday family held out hope that someday Kathy would get justice, though at that point, it seemed unlikely.

## Cold case investigation

In August 2009 we tried a domestic homicide of a Denton police officer who shot his wife, *State v. Robert Lozano*. (See the November-December 2009 issue of this journal for an in-depth story on that trial.) Ranger Murphree was one of our primary witnesses in this cold case. When the jury was deliberating Lozano's guilt, Murphree sat with us in a conference room as we all nervously awaited the outcome. Cary asked him, "What's next?" Did he have any other cold cases worthy of a second look? Murphree clearly had one in the forefront of his mind. Kathy had been missing for almost five years at that point, and Murphree did not hide his regret that law enforcement had let her down. Murphree had been told time and time again that a murder case was impossible without a body. Before the ink was dry on Lozano's conviction, the pursuit of justice for Kathy Stobaugh had begun.

Though the Munday family had never given up hope that Kathy's case would be pursued, they were unaware of these developments. They were pleasantly shocked to get our call. We began interviewing all of the family members, including the Stobaughs. Everyone, without exception, described Kathy as devoted to her children, hard-working, and reliable.

We met with Tommy Stobaugh, who was now an 18-year-old high school graduate. Tommy was hostile from the beginning of the meeting, understanding that his father was the focus of the investigation. He told Cary to "go back to giving traffic tickets or whatever it is that you do."

Charee presented much differently. A student at Tarleton State University, we met with her in an office at Ace Hardware in Stephenville where she worked. The two meetings with Charee were heartbreaking. She could not speak of her mother without crying. Charee was steadfast that she did not believe her father was responsible for her mother's disappearance, but she knew her mother would never leave them and had no alternative explanation. She was very forthcoming that her father had not wanted her to go to the police and how as a scared 16-year-old kid she was overwhelmed when her mother disappeared. She readily admitted that her mother was scared of her father and acknowledged his controlling nature and explosive temper. When asked, Charee was clear that she wanted us to pursue this case regardless of the outcome.

Could a jury convict someone of murder with no body, no blood, no crime scene, no murder weapon, no confession, and no eyewitness? Though we lacked a body or any forensic evidence, we felt we had an extremely compelling circumstantial case—strong enough to take to the grand jury. After reviewing all of the evidence, our elected Criminal District Attorney, Paul Johnson, agreed we had enough to proceed, but he wanted to ensure Kathy's family was fully informed of the consequences of going forward without a body. We would take the case to the grand jury, but only if the family appreciated the uniqueness of this case and the finality of the jury's determination. At a meeting with the family, presented with all the possible alternatives including losing at trial, Kathy's father James Munday, with tears in his eyes, said, "But we've already lost now." The family was on board with pursuing the case despite any physical evidence. Kathy deserved her day in court, for a jury to at least be given the opportunity to decide.

On November 12, 2009, Charles Stobaugh was indicted for intentionally or knowingly causing Kathy Stobaugh's death or by committing an act clearly dangerous to human life with the intent to cause serious bodily injury to Kathy Stobaugh, with death resulting. Both paragraphs alleged a manner and means unknown.

The motive for the murder? Kathy met with her attorney the day before she was killed. Her lawyer, Tiffany Haertling, explained to Kathy that the property would be divided according to Kathy's wishes because Charles had chosen to sit on his hands. The day she was killed, she emailed her attorney her request for the property settlement: She

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wanted to be paid half the value of the farm equipment, which was extensive. She wanted half of Charles' 401(k). Charles would get the house, but she wanted half the farmland. She intended to lease it back to him for a nominal fee. Nominal or not, Charles Stobaugh would have to pay her to farm his own land! For a man who took extra steps to have the deed to that community property put exclusively in his name, that was a slap in the face—apparently too much for him to take.

## Taking it to trial

Our focus in preparing for this trial was presenting the overwhelming evidence that Charles was the last person to see Kathy alive and was the only person in the world with motive to kill her. It was also necessary to disprove any other explanation for her disappearance.

Though a homicide, this case had a strong white-collar-crime component to it. To have voluntarily vanished, Kathy had to have money. We obtained every check, credit card record, and bank statement and accounted for every dollar she spent. She paid all her bills and had no suspicious charges. Kathy had almost $20,000 sitting in her separate checking account, with the only activity the earning of interest. Right before trial, because the money had been dormant for so long, Kathy's money was escheated to the State of Texas. It was clear she had not set aside any money in anticipation of leaving, nor had she made any purchases after she left.

If she didn't take any money with her or charge anything on credit cards, Kathy would have had to get a job to support herself. The Texas Workforce Commission had only one record of Kathy Stobaugh's Social Security Number's use after her disappearance. One time, in 2006, her Social was reported in Tornillo, Texas, by someone named Morales. DA Investigator Dugan Broomfield made the long trip to West Texas to follow up the hit. The business in question employs migrant workers to pick cotton. Broomfield was able to confirm that Kathy had never been employed or seen at the business, nor had they ever hired anyone who remotely resembled her.

At Broomfield's request, Department of Homeland Security Agent Kirk Beauchamp searched federal databases for any sign of Kathy Stobaugh. Beauchamp was able to confirm that Kathy had not worked, applied for a passport, been arrested, been fingerprinted for any purpose, or crossed any United States port of entry since her disappearance. In this post-9/11 era, the federal government could find no evidence of her existence. Beauchamp's testimony at trial was absolutely amazing. He was clear that to exist in this country, regular people leave traces of their activities and movements, but there was no trace of Kathy.

At trial, Ranger Murphree spent four grueling days on the stand. He testified that any and every possible lead had been followed, and none had led to Kathy Stobaugh. Kathy had never worked, made a phone call, made a credit card purchase, withdrew any money from the bank, or contacted any known person since the night she met with Charles. Her car, left in his driveway, was fully functional. Murphree had investigated Rocky, the classmate with whom Kathy had a long-distance relationship, and found that work records showed him to be at work and writing checks in his hometown, four hours away, in the days leading up to and following Kathy's disappearance.

From the time Kathy received Charles' call, cell phone records indicated she did not call anyone, except for the unsuccessful attempts to reach her daughter. Bottom line: Kathy didn't make any arrangements in advance for anyone to pick her up from Charles' house, nor did she contact anyone after she allegedly left his house. Since 9:30 p.m. on December 29, 2004, there was absolutely no evidence Kathy existed.

## Dismantling the defense

Murphree walked the jury through every statement Charles had made to law enforcement and a private investigator hired by the Munday family. Every inconsistency was highlighted. He also explained to the jury how Charles, not Kathy, had reason to be upset about their pending divorce. Charles stood to lose his property the following day. The defense theory was that Kathy had walked away from her children, family, career, friends, and possessions because Charles wanted to sell the property and split the land. In reality, due to his own inaction, Charles had no say in how the property would be divided, and he knew it.

Citing his extensive law enforcement experience and 13 years as a Texas Ranger working primarily homicide cases, Ranger Murphree explained to the jury different meth-

ods of murder that did not necessarily leave blood. He also noted that DNA evidence, unlike blood, would not be useful in a domestic homicide in the marital home. The defense had made an issue of the lack of DNA evidence in the case, and Murphree explained to the jury that because Kathy and Charles had both lived in that house for 16 years, a search for DNA alone would not have had any evidentiary value.

Murphree walked the jury through every possible explanation for Kathy's disappearance. Could an evil third party have intervened? Using aerial photographs, Murphree demonstrated for the jury the remoteness of the farm. He explained the unlikelihood that a boogeyman would stalk his prey on this hill in the middle of 100 acres of farmland. What are the odds that a stranger would have nabbed Kathy moments after she uttered what Charles said were her final words, "Don't look for me, because no one will ever be able to find me."

By presenting evidence of how Kathy conducted her life, who she was, all of her household records, and the testimony from those who knew her personally and professionally, we were able to rule out a preplanned or spontaneous voluntary departure. Our approach was just like the old jury instruction on circumstantial evidence: step-by-step analysis of any other possible explanation for her disappearance ruled out all other reasonable theories of the case. By disproving every other alternative, there was only one possible explanation: Charles killed her.

## Charee Stobaugh

From the time the indictment was returned until trial, we made several unsuccessful attempts to set up meetings with Charee. Charee had been through an unimaginable ordeal. After losing her mother, her confidante, Charee moved back in with Charles. At 16, all of her mother's household responsibilities became hers. But she was Kathy's child, and she rose to the occasion. She graduated salutatorian of her high school class before heading off to college to obtain a teaching degree, just like her mom. By the trial date, she had graduated from college and moved back home with Charles and Tommy, and the wagons were circled. Gone was the crying, conflicted girl we interviewed in November 2009. She was completely under her father's control by the trial date.

Four days before trial she finally agreed to meet. We had not interviewed her in 14 months. She picked the location of our meeting, a Texaco station on the side of the interstate near the Stobaugh farm. This was not going to be an in-depth meeting. The last time we met Charee had wept as she described her mom. This time she described new memories of her mother leaving her as a child. She was clearly entrenched in her father's camp and admitted she had met with the defense attorney more times than she could count. Her tears for Kathy were gone, replaced with open hostility for our office. She changed significant details of her story, all benefiting Charles. Charee was lying, and she wasn't doing it very well.

During the trial, Charee's initial statement to the police was admitted in the missing person's report. In a move that obviously shocked some of the jurors, we did not call Charee to testify. We were not going to sponsor this witness. Instead, Charee was the defense's star witness. In fact, the responsibility of keeping Charles Stobaugh out of prison was placed squarely on the shoulders of his 23-year-old daughter.

During direct Charee smiled at the jury and laughed as she described Charles as an attentive, loving father. She appeared happy and relaxed on the stand and very rehearsed. She explained that "we" left voicemail messages for Kathy during those first few days of Kathy's disappearance. "We," she explained, meant her and Charles, though the calls were from her phone, she was the only one speaking, and Charles was never mentioned. She now proclaimed that she and Charles had decided together that the police must be notified of Kathy's disappearance. Through Charee, the defense attorney addressed virtually every blow that had been struck at Charles during the entire trial. She explained that Charles had a friend of his steal Kathy's computer from her house with Charee's help to have it examined forensically for clues to her disappearance. This was brand new, unsubstantiated information that contradicted what Charee had previously told us. The young woman had an explanation for everything, and her poise seemed at odds with the fact that she was testifying in her mother's murder trial. She was a Stepford Wife on the stand for an entire day of direct testimony.

Then came cross-examination.

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When confronted with all the new information, memories, and versions of events that directly contradicted the statements she had made to law enforcement between 2004 and 2009, Charee came down with a terrible case of amnesia. She could not remember anything she told anyone. Quietly asked about obvious changes in her testimony, she completely wilted on the stand. She admitted the unfettered access she gave the defense attorney while being too busy for over a year to meet with us. She described how her new memories and never-disclosed details resulted from conversations with her father and pointed questions from his attorney. Through her, the defense had focused on Kathy's relationship with Rocky. Again and again the defense mentioned Kathy's "secret sexual relationship" with him. In actuality, testimony showed that Kathy, months into her separation, had sex twice with Rocky, but the defense portrayed Kathy as an adulteress who abandoned her children. Charee described her new suspicions that Kathy had secret relationships with men, hiding in other rooms of their house for clandestine phone conversations. Charee's new memories and accusations directly contradicted any information she had ever given law enforcement. If she truly believed her father was innocent, why the need to drastically change her story? It was heartbreaking.

In the end, she went above and beyond for her father. Certainly, no more could have been asked of her.

## Deliberations

The jury had to weigh Charee's testimony against a mountain of circumstantial evidence and a parade of witnesses on Kathy's behalf. Would they take the time to sift through all the details—the phone records, the bank records, Kathy's school records, employment records, and the children's initial account of what happened—and compare it all to Charee's testimony? Witness after witness had adamantly described a mother that would never abandon her kids. The evidence was overwhelming that Kathy was on the brink of getting the divorce she wanted and walking away with money in her pocket, the ability to support her family, and an opportunity to begin a new life with her kids. The evidence was equally overwhelming that Charles did not want the divorce, was embarrassed that his wife had left him, and was not about to hand over half of his property.

At the end of the trial we were confident that the evidence was there if the jury chose to analyze it. Regardless of how strong the circumstantial evidence was, however, we still lacked the traditional components of a murder case: blood, forensics, an autopsy, a crime scene, a murder weapon, and, of course, a body.

What should have been a three-week trial had stretched into four weeks as back-to-back ice storms hit Denton County, but finally, the case was in the hands of the jury. In the first few minutes of deliberation, the jury sent out a note requesting the definition of "reasonable doubt." It would be the only note.

## Guilty

As the hours ticked by, the spectators stayed. The Stobaughs convinced of Charles' innocence paced the hallways with the other Stobaughs resigned to his guilt. The Mundays attempted to set aside the betrayal of Charee's testimony. Despite anxiousness about the jury deliberations, the Mundays expressed satisfaction that Kathy had finally gotten her day in court.

After 10 hours, the jury returned with a verdict. The courtroom was packed with members of both families. Ranger Murphree, his wife sitting by his side, had sat at the courthouse those 10 hours awaiting the verdict. When the judge announced, "Guilty," that tough Ranger looked a bit weak in the knees. Tears flowed freely in the courtroom, on both sides of the aisle. Across the courtroom, Charee and Tommy wept. Though adults, they are also child victims of family violence.

After an emotional plea for leniency from Charee, the jury sentenced Charles to 25 years in prison. The following week, on February 24, 2011, Kathy Stobaugh would have celebrated her 50th birthday. Her children spent that evening visiting Charles at the Denton County Jail. ❇

# Don't let an affidavit of nonprosecution stop you!

A real-life application of a previous article in this journal about why we should still prosecute when a family violence victim won't cooperate

I am a misdemeanor prosecutor, so I do not see many truly violent assault cases or any involving deadly weapons. But I certainly see my share of Class A assault-family violence cases. I have learned enough in my almost three years of prosecuting misdemeanors to identify those cases I will see on the trial docket as opposed to the plea docket. These cases generally have two things in common: First, the intake packet already includes the victim's signed affidavit of nonprosecution. Second, the defendant has certain identifiable characteristics: He has the ability to convince his sweetie that the affidavit of nonprosecution is the glue that will hold them together; he is arrogant enough to believe that if he can get her to sign the affidavit, nobody will care about her case and certainly nobody will find him guilty of assaulting her; and he has used this tactic successfully (sometimes many times) in the past. One can usually identify a defendant with these characteristics with a little digging. I look at his statements to officers, his arrest history in our county, any civil filings he may be involved in, and of course his criminal history.

*By Deanna Belknap*
Assistant County Attorney
in Hood County

## One particular recent case

I will call the victim Kimberly. As I read the offense report, I realized she had been assaulted by her live-in boyfriend. Kimberly called 911 that night and told the dispatcher what had happened, she made excited utterances to two police officers, she told an EMT what had happened, she went to the hospital for treatment, and the officer took photos of her injuries. I was actually encouraged because I knew when I saw Kimberly's affidavit of nonprosecution in the stack of papers that I did not necessarily need her testimony to prove this case to a jury. I even started trying the case in my head at my desk: I could enter the 911 call as a business record and excited utterance; I could enter the jail records (to show how big this guy was compared to the victim) as a business record, her statements to officers as excited utterances, the EMT and hospital records as business records with a medical treatment exception to the hearsay rule, and the photos of her injuries. After reading the defendant's statements to officers and taking a look at his arrest and criminal history, I signed the information and said to myself, "I'll see you in trial."

In the meantime, I went back and read the article published in the November-December 2010 issue of *The Texas Prosecutor* called, "If she doesn't want to prosecute, why should we?" written by Dr. Michael Vandehey and Shelly Wilbanks, an assistant CDA in Wichita County. I found inspiration in this article when I read it so I kept it handy. It succinctly reminds me of my duty as a prosecutor in pursuing these types of family violence cases and reminds me that not only is it acceptable as a prosecutor to go after these abusers (even if the victim does not want to), but that it absolutely the just thing to do in certain cases.

When Kimberly sat down in my office a week before trial, my first question was, "Why did you sign an affidavit of nonprosecution?" Her answer, as expected, was, "Because we are together again and he hasn't hit me since this happened." Well, of course he had not hit her because he had charges pending against him, but that did not seem to be as apparent to Kimberly as it was to me. So I proceeded to play her 911 call. This call recorded Kimberly screaming at our dispatcher that her boyfriend had just beaten her up, that he has beat the (expletive) out of her more than once in the past and the police have never done anything about it,

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and she demanded to know if we were going to do anything about it this time. Then she hung up.

While the call was playing in my office, Kimberly hunched up in her chair and burst into tears. I thought I had gotten through to her so I said, "Tell me about what happened that night." She told me her story, which was the same story she told the 911 operator, officers, the EMT, and the nurse at the hospital. She then told me about the prior abuse. She told me it did not matter how hard he hit her because she was already dead inside. She told me she did not leave because she had nowhere to go, she could not keep a job, she had seizures and could not afford medication, she was an alcoholic, and she had a 16-year-old daughter who lived with Kimberly's mother because she could not support her. I told her about all the services we could provide, that we have a great shelter that would help her get on her feet. I thought she was listening. She said she wanted help.

So we left it at this: I told her that she did what her boyfriend wanted and told us to drop the charges, so she could go home and tell him that. But I also told her that the State was not dropping the case. I told her I would do what I could to keep her from testifying, but I was going to subpoena her to be at the trial. I was also very clear with her that if she lied on the stand, I would have to make her look like a liar in front of the jury (I had a wealth of statements with which I could impeach her if necessary). I told her I did not want to do that and advised her against lying. She told me she understood. We ended the conversation with her telling me to do everything I could to put him in jail long enough to give her time to pack her stuff and get out. Of course, I offered her an officer escort right then to pack up her things and go to the shelter, but she declined.

In a final effort to protect her from the whole trial, I decided to make the defendant an offer he could not refuse. I offered him two months in jail knowing he would serve at least 30 days—plenty of time for her to get her stuff and move on. The defense attorney thought it was a great offer based on the defendant's criminal history and the amount of evidence I had in my case. Of course the defendant, being the type of guy he is, refused the offer. And, long before I ever talked to the victim, he had declined a deferred offer. (You may be wondering why he was even offered a deferred, so as a sidebar here I would like to say that if I get an abuser with no family violence on his record to plead to a deferred assault family violence in a case *where the victim does not want to prosecute*, I consider that a success—because I will hand-deliver his next one to the DA's office with my personal recommendation.)

As I was preparing for trial, I contacted another county for copies of the defendant's prior deadly conduct (felony discharge of a firearm) and DWI-2nd convictions. I learned he was revoked on his felony probation and spent three years in the pen. There was an old protective order against him in that county too, so I requested copies of those documents. I located the protected person from that order, who happened to be his ex-wife. In talking to her, I discovered he spent years abusing her and harassing her after she left him. I was grateful he had declined my previous offers, and I decided at this point that upon a guilty verdict, I would be asking for the maximum jail time. On rare occasion do I get to ask for max jail time on a class A misdemeanor with this much evidence to back it up.

## In the courtroom

I was prepared for voir dire. I talked to the panel in detail about why women stay with abusive men, why victims recant, and why it is so important for the State to prosecute even if the victim does not want to pursue charges (again drawing from Vandehey's and Wilbanks' article in this journal). We had four victims of family violence on the panel, who of course were struck for cause or by the defense, but not before they got their opinions out there and told the others why they did not leave their abusive relationships right away. They also said that their lives may have changed sooner if the State had intervened. Wow—I could not have written a better script! When voir dire was over, I knew these jurors were not going to hold it against me for proceeding even when the victim did not want to.

On the morning evidence was supposed to start, Kimberly pranced into court on the defendant's arm and defiantly told me, "I am going to do everything I can to keep him out of jail." I counseled her, and our victim's liaison from the sheriff's office counseled her. She advised us we were not God, we could not see the future, and she loved him no matter what we had to say.

While talking to her, I heard the judge take the bench. I panicked. I was about to present my opening argument and I now had no idea what I was going to tell the jury about Kimberly. No longer was she the timid victim who did not want to testify—she had become my outspoken adversary! All I could do was be honest with the jury. I explained to them that during opening I usually tell jurors about the evidence they are going to see during trial, but today I could only do that to a point because I really did not have a clue if the victim was going to testify. And if she did, I had no idea what she was going to say. I took them back to voir dire and reminded them about why women recant. Then I put on all my evidence; I did not put Kimberly on the stand. I had proved the case (in my eyes) and I rested.

To nobody's surprise, the defense called her to the stand to tell the jury "what really happened that night." She told a whole new story now, a story I had never heard. I impeached her like crazy but she stuck to her new story. She called me names—bad names. It was not pretty, but it was effective for the State's case. After it was all over, I argued to the jury that you simply cannot protect someone who does not want your protection, but that it was not about Kimberly anymore; it was about the defendant and the community. They found him guilty. I felt different after this verdict than I usually do after a guilty verdict is announced. I was extremely grateful for the verdict, but I felt kind of empty.

The defendant's ex-wife testified at punishment. She was a hero. After her testimony and before I put the rest of my punishment evidence on, he took my offer of 11 months in jail and waived his right to appeal. I was pleased and his ex-wife was pleased (I think she felt a little vindicated, too). But Kimberly—well, I guess I do not really know how she felt because she did not stay around to chat. Her mother told me she thought Kimberly was a little upset, but that she would be OK in the long run. I hear Kimberly now has some drug issues to deal with.

The jury panel in this case told me during voir dire that they believed it was the prosecutor's duty to look at each family violence case separately and make a decision to prosecute based on that individual case. That is exactly what I do, but to hear the jury panel suggest it actually (pleasantly) surprised me. This jury panel educated me. I learned that family violence is not acceptable to them either, and they were not going to hold it against me if I brought them a good case even though the victim did not want to pursue charges. I learned that our community is not going to find an obviously guilty defendant innocent just because the defense attorney makes an argument that "the State should have butted out" or that we "have only re-victimized the victim" by making her participate in a trial of which she wanted no part. I learned to trust that my jurors can understand the family violence dynamic.

This was just one example out of the thousands of family violence cases out there, but it is a fair representation of what can happen when we do prosecute an assault family violence case even when the victim does not want to pursue the charges. The decision I make as a prosecutor on whether to try a family violence case will always be made on an individual basis; I do not believe there is a simple office policy that can justly address each case's merits. I challenge other misdemeanor prosecutors, and I continually challenge myself, not to write off all these cases that come to us with affidavits of nonprosecution. If we have the evidence, we can fight the good fight for the victims who will not, or cannot, fight for themselves, and we should trust our communities to back us up. ❇

# No free rides on Texas roads

## How Williamson County prosecutors won a seven-minute guilty verdict for the first case against a defendant with thousands of toll violations

As of this spring, Charles Ackridge, the owner of a flooring company, had 1,946 unpaid tolls with the Texas Department of Transportation (TXDOT), which operates several toll roads in the state.

*By Jackie Borcherding*
Assistant County Attorney in Williamson County

How did one man rack up so many unpaid tolls?

Ackridge is the registered owner of several vehicles with no TxTags, the electronic stickers people place on their windshields to automatically pay a toll via an electronic account when they pass through a toll station. (Vehicles without stickers are photographed and the license plate noted; TXDOT then sends an invoice to the registered driver through the postal service.) Ackridge's vehicles have benefitted from TXDOT toll roads in central Texas—without payment of thousands of tolls—for the last three years. With one vehicle, for example, Ackridge racked up 1,946 tolls totaling $1,892.70, plus another $42,735.00 in unpaid penalties. This first account (totaling $44,627.70) led to class C misdemeanor charges of Failure or Refusal to Pay Toll.[1] TXDOT has yet to file on Ackridge's other vehicles, which have racked up approximately 6,000 in unpaid tolls whose values and penalties total in excess of $80,000. Apparently, Ackridge has multiple vehicles, frequently utilizing the toll roads in central Texas for his flooring business.

I first learned about Ackridge's thousands of toll violations earlier this year when he chose to set the first class C charge for a jury trial in Williamson County. (Because TXDOT and the State had anticipated reaching a plea agreement and not actually going to trial, only three of his thousands of toll violations had been charged at that time.) As an assistant county attorney here, I try class C misdemeanor cases pending in the justice of the peace courts. I was curious why this man rejected the State's plea offer, where he would pay $7,652.86 for his $44,627.70 of unpaid tolls and fees. I knew that the Texas Legislature recently codified the Failure or Refusal to Pay Toll as a criminal offense and that it carries a maximum fine of $250. The risk associated with jury trial was very high for the defendant, because if all 1,946 cases against him were filed and he were found guilty and assessed a maximum fine on each case, he would owe $486,500 in fines and fees, not to mention incur 1,946 class C criminal offenses on his record!

Our plea offer, wherein he took a conviction for one class C offense, was placed on deferred with a payment plan for $7,652.86 for the second class C offense, and had the third (and final filed class C offense) dismissed after payment of the $7,652.86, seemed to be a very reasonable offer and would dispose of all 1,946 cases. However, Ackridge was adamant that he wanted to be tried by a jury of his peers. Even after the plea offer was conveyed to Ackridge in November 2010, he continued to use the toll roads, neither obtaining a TxTag nor paying one toll.

Once I learned that Ackridge was rejecting the plea offer, I deciphered from the applicable statute the legal elements of this new criminal offense. Essentially, I was going to have to prove beyond a reasonable doubt that on March 24, 2009, at County Road 138, Entrance L02 on State Highway 130 in Williamson County, Charles Ackridge was the legal registered owner of a motor vehicle, with license plate such-and-such, and therefore the responsible for the non-payment of a toll at a tolling point. He failed to pay the proper toll and corresponding administrative fee within the time specified by the Notice of Toll Violation after written notice was sent by first-class mail to his address, as shown in the vehicle registration records of the Texas Department of Motor Vehicles. I knew Ackridge's defense was that he had "no written notice" of his tolls, because he actually told this to the media, KXAN News, last November when he originally rejected the plea offer. On the

contrary, TXDOT had alerted Ackridge to his thousands of unpaid tolls by mailing him two invoices and one violation notice for each toll via first-class mail to his home address, as the law requires. In TXDOT's customer service records, there were notations that Ackridge also spoke about his balance with two customer service representatives over the phone. Furthermore, after the court filing, TXDOT records showed Ackridge went to TXDOT to speak to a representative in person. At this point, it was abundantly clear that Ackridge was aware of his tolls, ignoring TXDOT's past-due notices, continuing to use the toll roads, outright refusing to pay for all of his tolls and fees, and rejecting any plea offers by the State. Jury trial was inevitable.

## Voir dire

When we proceeded to jury trial and began voir dire, I knew it would be important to ask questions of the jury panel to solicit any negative biases regarding toll roads and the notice system for nonpayment of tolls. So I asked the following:

1) Who has ever used the tollway?

2) Who has a TxTag? If not, why not?

3) What is your opinion of having to pay to use toll roads?

4) Have you ever had difficulty paying for a toll by mail?

5) Do you think a person should be allowed to drive on the toll road and not pay for it?

6) Do you agree that the failure to pay a toll should be a class C misdemeanor with a fine up to $250?

7) Do you agree that it is a person's choice to use the toll road and that that person must be accountable and pay for the toll and any late fees?

8) Does anyone think it is unfair to hold the registered owner of a vehicle criminally liable for the nonpayment of a toll associated with his vehicle?

9) On a scale of 1 to 5: "1" being that you hate toll roads and think you should not have to pay to drive on them, and "5" being that you love toll roads and think it is so worth the price of the toll to get to drive on toll roads, where do you fall?

Most of the venire panel had a very favorable opinion of the toll road system and absolutely no trouble paying for their tolls (either by TxTag or by mail). There were a few people completely unfamiliar with the toll road system, and one person out of 20 who had difficulty receiving notice and who complained of the high fees. Many people had challenged certain toll violations and TXDOT had worked with them effectively to clear up any misstatements. Overall, the panel's response to the toll road system was extremely positive, and people agreed that if you ride, you should pay.

## Going to trial

We then began the guilt/innocence phase of the jury trial. Judge Judy Hobbs of Precinct 4 presided and chose to bifurcate the trial so that the State had to first prove a single violation against Ackridge for March 24, 2009 (one of his earlier violations, we charged before the statute of limitations for prosecution would run). We could not introduce his thousands of other violations during guilt/innocence but only for purposes of punishment. In what TXDOT was calling nearly a "case of first impression," numerous TXDOT representatives sat in during the trial to learn the outcome of this new kind of criminal case. I've tried class C misdemeanors with large member audiences because of victims' families, but I've not tried any with so many interested employees of a state agency! And I certainly did not expect that one 60-cent toll violation case would get so much media attention.

During my opening statement and closing argument to the jury, I said that Ackridge's March 24, 2009, toll violation was, simply, a case about accountability; if the State proved the vehicle registered to him drove through a particular tolling point on the alleged offense date and did not pay after proper and timely notice, then Ackridge must be held accountable for his violation. There are no "free rides" on the toll road.

The State's witnesses, Michael Sullivan of the Law Enforcement Division of the United States Postal Service, and Colleen Davis, Court Liaison Coordinator for TXDOT, were very organized and helpful. Specifically, to prove the only disputed element at jury trial, proper notice, I called Mr. Sullivan to show proper mailing to Ackridge and receipt of mail at his residence. Sullivan testified that Ackridge has not changed his place of residence for the last three years, that he has only one address listed on his motor vehicle registration records (his residential address), and that he has never had any returned mail from that address.

I then called Ms. Davis to the stand to establish through numerous business records (invoices and viola-

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tion and collections letters) that Ackridge was properly and timely notified of his unpaid tolls, including the one in question. She was an extremely organized and articulate witness for the State. Her testimony showed that the TXDOT letters were sent via first-class mail, as statute requires, to Ackridge at his known residential address, and there was no returned mail on record. Ackridge did not testify at the jury trial, so there was no evidence to rebut that TXDOT properly and timely sent Ackridge written notice.

In addition to witness testimony, I had also gathered the necessary trial exhibits (letters, forms, vehicle registration and title records, etc.) from TXDOT. I used PowerPoint to organize all of the TXDOT account documentation to present during Davis's direct examination. I also located maps and TXDOT flow charts of how tolls become violations and how violations are properly noticed. It truly felt like a white-collar crime with all of the paperwork that had to be admitted to prove Ackridge was properly notified of his violations. There were literally tens of thousands of documents, kept in the regular course of business with TXDOT, for all of Ackridge's 1,946 unpaid tolls. Certainly, in the case on March 24, 2009, alone, there was overwhelming and well-documented evidence that Ackridge had repeatedly received notice of his violation and failed to pay it even two years later. Through the testimony of Sullivan and Davis, and the exhibits entered into evidence, the jury followed the long paper trail that led to Ackridge's guilt.

Interestingly, Ackridge's defense attorney, Ellie Ruth, argued in opening and closing that the jury could, by its verdict, send a clear message to the Legislature that drafted §228.055 that the notice system for these toll violation cases is flawed. For example, the Legislature could have required certified mail with return receipt, instead of just first-class mail, to ensure notice. (This option was in fact contemplated and rejected by the Legislature for being cost-prohibitive, as noted in the statute's legislative history.)

The prosecution countered that a jury trial is not the proper forum to enact legislative change. Ackridge was the one on trial, not TXDOT. The jury's purpose is to decide the facts of Ackridge's unpaid toll case, weigh the credibility of the witnesses, and determine guilt. In this case, there was evidence beyond a reasonable doubt that Ackridge's vehicle utilized the toll road and he failed to pay his toll; therefore, he should be held accountable for his nonpayment. Thus, the jury could send a clear message to Ackridge: If he uses the toll road, he should pay for it.

## Seven-minute decision

The jury convicted Ackridge of Failure or Refusal to Pay Toll in seven minutes. Jurors then heard punishment evidence of his thousands of unpaid toll violations with TXDOT and consequently assessed the $250 maximum fine for the offense on March 24, 2009. The jury spoke to the judge, prosecution, TXDOT, and the defense post-deliberations and said that there was no question that Ackridge had proper and timely notice of his toll violation and had failed to pay it. Moreover, the fact that he had not paid for thousands of other toll violations that he let accumulate over the past several years was egregious to the jury, thus resulting in their assessment of a maximum fine. Ackridge told KXAN news after the trial that he was "disappointed" with the jury's verdict. I informed the media that I believed the jury's seven-minute guilty verdict sent a very clear message to Ackridge that he will be held accountable for his use of the toll roads.

For what was a 60-cent toll, Ackridge is now liable for a $250 class C misdemeanor conviction. And he has 1,945 other toll violation cases, which ultimately may still be tried before a jury in Justice of the Peace 4. In coming months, the State will hold a pretrial hearing with Ackridge and his attorney to determine whether the defendant will reconsider a plea offer or whether the State will need to proceed with filing the thousands of other toll violation cases against him. Currently, he is still accountable for tolls and fees in excess of $80,000.

Because I was in unchartered territory, trying a defendant for violating the new law of Failure or Refusal to Pay Toll, I created a template via PowerPoint to organize the exhibits and witness testimony pertaining to each legal element of the offense so the jury could wade through the massive amounts of information and find the defendant guilty. One trial observer said I really "hand-held" the jury and explained every piece of evidence. I found the visual presentation of evidence to be very helpful for them to understand such a document-intensive case.

In the future, with Mr. Ackridge

at the defense table or someone else, I will be able to utilize my PowerPoint presentation to try any Failure or Refusal to Pay Toll case. I am happy to share this presentation with any prosecutor taking a toll violation case to jury trial. It may seem daunting at first, with the stack of evidence to prove a class C misdemeanor, but, like any crime, it is simply necessary to know the legal elements and clearly present the facts that prove each element. Of course, it helps to have great punishment evidence, like 1,945 similar cases that the defendant has pending, before arguing for the maximum fine on one case. And, lastly, it helps to state a familiar truth in closing argument that ties the whole case together: There is no such thing as a free ride!

*Editor's note: Defendant Charles Ackridge went to court again in mid-April over the second Class C charge of Failure or Refusal to Pay Toll and was again found guilty. On the third charge, he pled guilty and was placed on deferred for 30 days; the conditions of deferred included paying court costs, opening a TxTag account, and entering into a collections agreement with TXDOT to pay more than $21,000 in tolls, fees, and penalties. If Ackrdige complies with these terms, there will be no additional charges filed on his remaining toll violations.* ❇

## Endnote

1 See Tex. Trans. Code §228.055.



# Responding immediately to family violence

Inspired by El Paso's model domestic violence program, prosecutors in Bee County adapted it for their rural jurisdiction. Here's how.

"Women are worth the time." This was a recent headline in our local biweekly newspaper, *The Bee Picayne*, after a jury convicted a Pistolero gang member for brutalizing at least four young women he had been dating over several years. That defendant is now appealing two cases with stacked sentences totaling 70 years in prison, thanks to our new Violence Against Woman Grant Program and a very persistent assistant district attorney named James Sales who was hired under my border prosecution grant, both of which were obtained from Governor Rick Perry's office. This infusion of money has enabled us to form a new family violence program, which is modeled after one in El Paso.

*By Martha Warner*
District Attorney in Bee, Live Oak, and McMullen Counties

## Inspiration from El Paso

I heard El Paso District Attorney Jaime Esparza speak at the Elected Prosecutor Conference in Fort Worth two years ago about a very successful domestic violence program he had implemented in his office. His enthusiasm and passion for prosecuting family violence (FV) cases, which destroy entire families and create cycles of continuing violence, was contagious.

Under the El Paso program, there is an immediate response to an assault within the family by prosecutoral teams, which include victim coordinators and investigators who either respond at the scene or meet with the victim the next day. The victim coordinators develop a personal relationship with the victim by attempting to get them the help they may immediately need to feel safe, while the investigators take more photos and get good statements and the names of potential witnesses. They also gather all of the local officers' offense reports and review all of the 911 calls pertaining to the case. Each week Mr. Esparza meets with the prosecution team (specially assigned assistant district attorneys, investigators, and victim coordinators) and personally staffs each case. Delays are eliminated and the cases are dealt with very swiftly.

I knew immediately that the people in my rural South Texas communities of Bee, Live Oak, and McMullen Counties could be helped

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by the program Mr. Esparza outlined. However, like most rural prosecutors, we are trying to fight crime in miserably underfunded offices in districts where commissioners are desperately trying to balance budgets. Just to offer some background on my jurisdiction, Beeville, which is the county seat for Bee County and the largest town (at a population of 17,000) in the three counties, is home to the maximum security McConnell and Garza East and West Units of the Texas Department of Criminal Justice (TDCJ). These prison units may have saved the town from dying on the vine when our naval base was closed, but they have also increased the gang activity as members and recruits of the Mexican Mafia, Hermanadad de Pistoleros Latinos, Texas Syndicate, and Raza Unida attempt to control the drug and human trafficking in and around Beeville. Live Oak County has two main towns, George West and Three Rivers; they have been booming with transient oil field workers (the Eagle Ford Shale sweeps through South Texas). Tiden, which is the county seat of McMullen, shares all of the drug trafficking problems but few gang crimes due to its small size.

Before I qualified for the Border Prosecution Unit (BPU) grant, my office consisted of me and my only assistant, Deborah Branch, with three very hard-working support staff. There are also many demands on our underpaid and understaffed law enforcement officers due to the human, drug, and gang trafficking on the many highways feeding up from the Mexican border. Although this new FV program sounded wonderful, it was not economically feasible for my small office at the time.

## Grant funds to the rescue

Within a month of that conference, TDCAA's newly hired Victim Services Director, Suzanne McDaniel, notified district attorneys across the state about stimulus money that was immediately available through Governor Perry's office under the Violence Against Women Act (VAWA). And thanks to a lecture on grant writing by Bexar County Assistant Criminal District Attorney Katrina Daniels at the same Elected Conference at which Mr. Esparza spoke, and my incredibly bright administrative assistant Terri Hall, we applied for and were awarded a grant for $252,000 to hire an assistant prosecutor, an investigator, and a victim coordinator for our VAWA program. It would be a miniature version of what El Paso had implemented.

Historically there has always been a delay in getting these cases to my office which, until taking on this task, meant prosecuting only felonies. Many of our overworked officers had become hardened toward the victims who always cry wolf but then cry foul as they file nonprosecution affidavits within a week of the incident, claiming they made up the whole story, some even going so far as to say their bruises were self-inflicted. Other young officers were simply unprepared for the documentation that such a case requires.

My biggest concern was to find a good, aggressive prosecutor with excellent organizational skills. With the grant funds, I immediately hired Juan Garcia, a graduate of the University of Texas in Austin and Texas Tech Law School. He had prosecuted in Hidalgo County and speaks fluent Spanish. He was particularly excited about the challenge of creating a brand new program and has done a remarkable job.

I already had the perfect investigator in mind for this job: Dan Caddell has been in law enforcement for over 30 years. He is a sexual assault-family violence investigator and is training our officers. Over the last 13 years Dan and I have tried too many aggravated sexual assault cases to remember. He knows how to get the coorborating evidence that a prosecutor needs to make a potential losing case a winner. The only concern I had was getting him to move the misdemeanor cases quickly to Juan for informations within a week or two and the felonies for the next grand jury, even though the cases may not have met his standards of perfection. Again, the whole concept is to stop the long delays and get the victimized families the help they need quickly.

Our VAWA victim assistant coordinator, Joann Escobar, had worked with the adult probation office for eight years and has enthusiastically assisted many women. She works tirelessly, learning what resources are available for each individual case and keeping up with all of the paperwork including discovery and plea papers.

## How it works in Bee County

Dan and Joann share an office with all of the files while Juan has an

adjoining office. They gather offense reports, photos, and 911 calls every morning, then spend the rest of the morning making contact with the victims. If protective orders (POs) are needed, we refer those to our other victim coordinator, Christina Segovia, who works for the county attorney, Mike Knight. She covers all of the cases involving children and other victims of violent crime that are not considered family violence under our laws. Mr. Knight appointed me, Juan, and my first assistant, Deborah Branch, as assistant county attorneys to cover the misdemeanor family violence cases filed in Bee County.

We first set up separate dockets for all of the misdemeanor FV cases. That kept us from getting involved in the other misdemeanor dockets, which tend to be rather large. Mirella Davis, our county clerk, and her assistant, Mary Fritz, were very helpful and excited about the prospect of getting additional court costs on cases that historically end with no witness and thus a dismissal. Our county judge, David Silvas, was willing to add two more hearings and a jury trial to the schedule each month because of his concerns for the victimized families and children.

Domestic violence is often viewed as a losing battle for prosecutors. Our star witness is traumatized, afraid, and almost always reluctant to cooperate with law enforcement. As a result, investigations and prosecutions tend to go through the motions to the inevitable dismissal. Pursuing charges seems to be an ineffective allocation of a district attorney's limited resources. This program has changed that perception!

Establishing a respectful rapport with the victim supported by immediate documentation and collection of evidence enhances the quality of our cases exponentially. I had already started issuing grand jury subpoenas to victims who have filed nonprosecution affidavits in felony cases. In almost all of those cases I have been able to convince the victim to go forward with her truthful testimony after indictment.

Since our program began in August of last year, we have investigated 238 FV cases; 140 were misdemeanors and 98 felonies. About 85 percent of the victims do not want the State to file charges; however, we normally go forward even with the nonprosecution affidavit in our file. Our grand jury has no-billed 12 felonies, and three felonies were dismissed because our witnesses had moved. Thirty-four felony cases have been indicted and disposed of, and there are presently 49 pending investigation. Many of the misdemeanors are probated and some are offered pretrial supervision; however, a sizeable number of the defendants facing felony charges are looking at lengthy prison sentences because of the severity of the abuse.

## These women are worth it.

When a felony panel of 70-plus jurors was asked if the State should drop charges in a family violence case just because the victim had filed a non-prosecution affidavit, not one person raised a hand! I truly believe Texans feel victimized women are worth the time it takes to thoroughly investigate their cases and take them to trial. In several instances, I have seen heroes—including some children of the perpetrator—step into a volatile, dangerous FV situation just to protect those women. We hope to do that too, just on the back end. Our new FV program is wonderful, and I hope we can continue it. ❇

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