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

Montgomery County's domestic violence rocket docket

A new court dedicated to misdemeanor family violence cases was launched last fall; here's the story on how it's working.

By Echo Coleman
Assistant District Attorney in Montgomery County

When former Assistant District Attorney Claudia Laird ran for judge of County Court-at-Law No. 2 in Montgomery County, she ran on a platform aiming to curb domestic violence. After Judge Laird won the election, I sat down and talked with her—she's a former colleague at the DA's office—about starting a dedicated domestic violence misdemeanor docket. She was enthusiastic, to say the least.

I started my legal career as a prosecutor in the El Paso District Attorney's Office under District Attorney Jaime Esparza, who has passionately focused on domestic violence and made many advances in how to handle these potentially dangerous and difficult cases. (See the story on page 25 for more on how El Paso's family violence program works.) I knew that the more quickly we contacted victims, the more likely they would cooperate with the case and the more likely the State would obtain a conviction. Thus, it would be vital for this court to have a dedicated prosecutor with the time, training, and compassion to effectively see these cases through to completion. At the time Montgomery County was desperately behind other counties in winning convictions for domestic violence cases; only about half that went to trial ended with a conviction.

Domestic violence is an area near and dear to the hearts of our elected district attorney, Brett Ligon, and his first assistant, Phil Grant, but we didn't have enough money in the budget to pay for a dedicated prosecutor in this court. Montgomery County is one of the fastest growing counties in Texas, but our budget is not growing at the same rate. So with the help of our county grant writer, I found a federal grant through the Violence Against Women Act, which is disbursed through the Office of the Governor. The grant pays for 65 percent of the position and our office matches the remaining 35 percent.

Once the grant was approved

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First Investigator Board Golf Tournament

Please join us in a big round of applause for our Investigator Board members who organized the first Investigator Board Golf Tournament at The Club at Concan in beautiful Concan, Texas, on March 24 (see some photos below). This event raised $5,000 for the Texas District and County Attorneys Foundation. Special thanks to co-chairs **Wayne Springer** and **Melissa Hightower**; **Danny Kindred**, District Attorney in Medina County; staff members who came out to volunteer; and **John Dodson**, County Attorney in Uvalde County.

By Jennifer Vitera
TDCAF Development Director in Austin

2011 Annual Report

We are honored to show you our 2011 Annual Report. It summarizes what we accomplished 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.

How is the Foundation helping this year?

With the support of the Foundation, TDCAA hosted a three-day seminar in San Antonio targeting the unique role of prosecutors' office personnel in combating domestic violence (see the brochure at right). Domestic violence crimes affect all prosecutors—misdemeanor- and felony-level, rural and urban. Information in this seminar was aimed at prosecutors, investigators, and victim assistance coordinators to help them investigate and prosecute domestic violence crimes as well as more compassionately and effectively provide assistance and information to domestic violence victims.

We extend our heartfelt thanks to the **Coastal Bend Foundation** and the **Texas Bar Foundation**, which underwrote the costs of providing books to all attendees.

We are still looking for corporate and foundation partners from across the state to support the Domestic Violence Training Initiative in the future. Please email Jennifer Vitera at vitera@tdcaa.com for contacts in your area.

2012 DWI Summit

The Texas District and County Attorneys Association (TDCAA), in cooperation with the Texas Department of Transportation (TxDOT), Anheuser-Busch Companies, Inc., and the Texas District and County Attorneys Foundation (TDCAF), is proud to offer the Guarding Texas Roadways: 2012 DWI Summit. Thank you to Smart Start, a supporter of this year's event, which will be in early November.

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We are asking members to please help the foundation identify corporations and individuals who might be interested in supporting this popular training. Please contact Jennifer Vitera at vitera@tdcaa.com if there is someone in your area we can send more information to.

COASTAL BEND COMMUNITY FOUNDATION

TEXAS BAR FOUNDATION

Tax letter update

Just like last year, in an effort to keep Foundation expenses down, we have been including Tax ID and IRS information on all thank-you letters for your generous dona-

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tions. In the past, we mailed out an additional receipt with tax information around this time, but from now on your thank-you letter will serve as your tax receipt. If you would like a copy of your thank you letter/receipt, please feel free to call me at 512/474-2436 and I will be happy to provide one.

Golf Tournament at the Annual Update

The 4th Annual Foundation Golf Tournament and silent auction will take place Wednesday, September 21 (the week of the Annual Criminal and Civil Law Update) in South Padre. (The exact location of the tournament will be announced later.) We are asking members to please help the Foundation identify corporations and individuals who might be interested in sponsoring or donating an auction items for these events.

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.

2012 Annual Campaign membership challenge

We hope by now you have received the 2012 Annual Campaign invitation. The Foundation is committed to continuing and improving the excellence TDCAA provides in educating and training Texas prosecutors, law enforcement, and key personnel.

This year will be our third membership challenge between the investigators, key personnel, and victim assistance coordinators. For the last two years, the investigators have taken home the win—but 2012 is a new year! Just like last year, we've got two different fundraising goals for our membership groups, one for elected prosecutors and one for investigators, key personnel, and victim assistants.

Elected Prosecutor Annual Campaign Challenge. This year we are asking for 100-percent support from all 333 elected prosecutors across the State (either through a personal gift or a contribution through the office's asset forfeiture fund) to the Annual Campaign. You can make a pledge that can be paid out through December 31.

Campaign challenge for investigators, key personnel, and VACs. Three of our membership groups have stepped up to challenge each other in their fundraising efforts. We will track the results based on dollars raised compared to percentage of membership in each of these groups. We will feature a bi-monthly update on who's leading the way on our website and in The Texas Prosecutor.

We appreciate your support and consideration!

Leadership America

Last year I had the honor of participating in Leadership Texas, which took me across our wonderful state to learn more about issues facing our communities. During my visits I had a chance to meet with a few of our TDCAF Board and Advisory Committee members along with TDCAF corporate supporters. This year I've been invited to participate in the next level of the program, Leadership America. The purpose of this program is to explore issues confronting today's interconnected global society in the political, social, educational, and economic realms. It is a great way to build relationships with other professionals across the state and country, and it allows us to introduce folks to the TDCAF. ❇

*Recent gifts to the Foundation**

W. Clay Abbott
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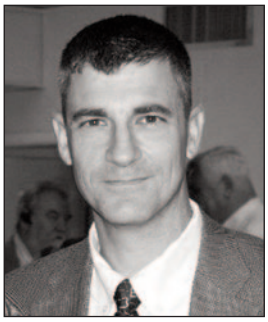
Prosecuting under pressure

Several weeks ago I was doing an interview with a reporter who was inquiring about some of the very public innocence-related issues which have been circulating in the media of late. During the course of our discussion, the reporter asked me if I'd ever felt "pressure" to prosecute a case. In response, I told her there were different kinds of pressure associated with *every* case I've handled. I'm pretty sure she was referring to a pressure to obtain a conviction or certain sentence on a particular case, but in any event, after speaking with her I began thinking about the different types of pressure prosecutors encounter daily in the performance of their jobs. The more I thought about it, the more I began to wonder if there are any other occupations where an individual is under as many different and conflicting kinds of pressure as that of a prosecuting attorney. We as prosecutors have to be all things to many different people we encounter in our jobs. On top of that, we are one of very few professions not afforded the grace of making a mistake. In other words, the consequences of our decisions and how we perform our jobs can literally have lifelong consequences for multiple people and interests associated with the cases we encounter. We pretty much have to bat a thousand.



By William Lee Hon
Criminal District Attorney in Polk County

In most criminal prosecutions, the first source of pressure the prosecutor might feel may come from law enforcement. In this circumstance, a case will be presented by a department or an officer who has put time and effort in an investigation and filing a charge. In many instances, the officer will have very strong opinions about the quality of his work and the correctness of his decision-making. When the case is handed over to the prosecuting attorney, there is frequently a subtle (and sometimes not so subtle) expectation that a conviction will be obtained and an appropriate sentence achieved. In the face of this expectation or pressure, it is nonetheless the job of the prosecuting attorney to remain objective and open-minded as to the ultimate merits of the case and, where warranted, what a fair punishment might be. In my experience, it is in this circumstance where the views of the officer and the views of the prosecutor might sometimes diverge. How the prosecutor handles such conflicts can have very profound implications upon the relationship between the prosecutor and the officer as well as the district attorney's office and the law enforcement agency both now and in the future.

The next source of possible pressure on a prosecutor is from victims or their families. Of course, this pressure might not typically exist in drug cases or DWIs. However, in those cases where a person was physically harmed or killed or has suffered some type of property or financial loss as a result of criminal conduct, these people often have very strong feelings about how a case should turn out. In my experience, the most emotionally challenging cases I've handled have been those with child victims and, of course, where someone has been killed. Sometimes victims express this pressure outright by saying what they want or expect, while other times, the pressure comes from some internal sense of obligation on the part of the prosecutor. (I think it's only natural for the prosecutor to want to ease the suffering of victims and make them whole.) The way our system of justice is designed, victims must rely on the prosecutor to obtain justice on their behalf—they are essentially helpless in many respects, yet their hearts are tied up in the outcome of the case. I can't tell you how many cases I've tried where the victims or their families have been on the front row during the trial or as I've given my closing argument to the jury. Ladies and gentlemen, *that* is pressure. And yet at the same time, the prosecutor cannot let that very natural desire to help victims override his or her independent judgment or objectivity with the case. Short of becoming absolutely heartless, this is one of the hardest types of pressure for a prosecutor to manage.

Beyond the pressure from law enforcement and victims is the not-infrequent pressure that the prosecutor feels from the public to obtain a particular result. This type of pressure is not so prevalent in your daily run-of-the-mill criminal cases, but every now and then, a crime in your community will wind up all over the

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front page of the local newspaper or in the media. Public opinion will be very much in favor of a particular outcome. Unfortunately, this public sentiment will often be based upon inadequate or unreliable facts. Due to ethical constraints, there is not much prosecutors or law enforcement can do to change or counter public opinion. As long as the prosecutor and public are on the same page and the prosecutor has the wind at his back, there's not much of a problem here—but what happens when the prosecutor's obligation to see that justice is done conflicts with the prevailing public sentiment? I look at Mike Nifong in the Duke University lacrosse case as a perfect example of a situation where a prosecutor apparently allowed himself to make decisions based upon the intensity of the media glare rather than an overriding sense of fairness or objectivity—and we all see how that turned out: Nifong was removed from office and disbarred. At the end of the day, the prosecutor has to be able to step back from the spotlight and cameras and make very important decisions based upon credible evidence and not what people who have less than the entire picture expect. Never has that old adage "to thine own self be true" been more meaningful than for the prosecutor who has to handle a high-profile, high-publicity case.

To a degree, an individual prosecutor may also feel pressure due to the size and extent of her caseload. I know this varies from office to office, but I'm not aware of any prosecutors in our area, at least, who are bored from lack of work. Rightly or wrongly, prosecutors have to be productive and move cases along. This doesn't necessarily mean that prosecutors are or should be judged by their win-loss ratio. Nonetheless, judges expect for cases on their dockets to be disposed of. Defendants and their lawyers do occasionally insist on such a thing as a speedy trial. The risk of prosecution witnesses moving or becoming lost also sometimes fosters a sense of urgency in the mind of the prosecuting attorney.

In regard to defendants, although some cynics out there might believe otherwise, these people are *not* an unimportant consideration to a prosecuting attorney. Even in the hustle and bustle of a busy criminal trial practice, most prosecutors I know are not indifferent to their obligation to see that justice is done for each defendant. They readily acknowledge that their decisions profoundly impact an individual human life. I think most prosecutors want to be compassionate and fair-minded. It pains me greatly when I see prosecutors portrayed in the media as ruthless and unfair. While I'll readily admit that I can be aggressive and unforgiving when the facts warrant it, I have also lost sleep many nights wondering if I was ruining the life of someone who might still be capable of redemption. The decisions we make when seeking an indictment, what type of plea offer to make, and the punishment to seek from the judge or jury are not always easy ones.

These are just a few of the types of pressure that I routinely experience in my job; I'm sure that you can name others. I'm aware of few other professions that experience so many different sources of pressure in the daily performance of their job. How a prosecutor handles or manages these sometime conflicting sources of stress can greatly influence how that person manages his workload; how he relates to his family, friends, and colleagues; how long he will stay in the profession; and whether he might eventually suffer burnout. I know I've stated in earlier columns how rewarding it can be as a prosecutor and how much I enjoy this profession—I know that sounds a little inconsistent with a discussion concerning sources of prosecutorial stress, but that's still how I feel. I try to manage my time efficiently, spend time with my family, stay in shape, and pursue multiple outside hobbies and interests. That approach seems to work pretty well for me since I've been doing this for 16 years now. ❇

All the prosecution news that's fit to Tweet!

We have just made what will prove to be a significant change on our TDCAA website: the Issues In Prosecution section on the front page is now a TDCAA Twitter Feed. Here is why that is important for you.

By Rob Kepple
TDCAA Executive Director in Austin

If you have kept up with the TDCAA web page (or better yet, have it as your computer's home page!), then you know what is happening in our profession by reading the news articles in Issues In Prosecution. The down side is that the good news we post there doesn't always get spread around your community and the state. (Only 150 people on average read any given article.) Good and interesting things are happening everyday, and it is a challenge to get the word out.

The solution? Twitter. We actually have *two* Twitter accounts. One, @TDCAA, focuses on public policy and legislative issues. The other, @TDCAANews, replaces Issues in Prosecution from our website's home page. It compiles in one location news from throughout the state and elsewhere on what's happening in prosecution.

We can now post all of the interesting articles from around the state and simultaneously send them out to everyone in the state who follows us. And that list is growing to include governmental organizations, individuals, and news outlets. So now when you post an article on Twitter, we can re-tweet your story to everyone who follows TDCAA's feeds. And you can do the same by re-tweeting the news that you find on the TDCAA feeds through your Twitter contacts.

So if you haven't already, sign up for your own Twitter account and follow both @TDCAA and @TDCAANews to stay updated on what's going on in prosecution.

Texas prosecutors, you are being called out

On March 29, the Innocence Project produced its second in a series of regional panel discussions, titled the Prosecutorial Oversight Tour, in Austin. You can read about this tour and watch video of the discussion when they post it at http://prosecutorialoversight.org. The impetus is the *Connick v. Thompson* decision, in which the Supreme Court of the United States relied on the doctrine of prosecutorial immunity in denying Mr. Thomson monetary damages for *Brady* violations that contributed to his wrongful conviction for capital murder. The thrust of the tour at this point seems to be to either chip away at prosecutorial immunity or encourage states to find other ways to hold prosecutors accountable.

This is important stuff and deserves attention and discussion. But leave it to the "loyal opposition" to approach the issue in a less than even-handed fashion. We should not have been surprised when, on the eve of the Texas tour stop, the *Texas Tribune*, essentially acting as a press agent for the Innocence Project, announced that the IP is releasing a study that shows that there was prosecutor misconduct in 91 criminal cases from 2004 through 2008 and—drum-roll here—none of the prosecutors were ever disciplined. "It paints a bleak picture about what's going on with accountability and prosecutors," is the quote the *Tribune* attributed to the IP folks from California who did the study of Texas.

Now, did we get a chance to look at the report provided to the media so we could comment intelligently on it? Of course not. The media outlets had it, but it was "embargoed" for their use only in writing their story-cum-Innocence Project press release. For those of you new to the game, that is standard operating procedure in these affairs, so we were not particularly surprised.

But now it is your turn. I have tried diligently to get a copy of the full IP report, which is being written by the Veritas Initiative out of California. (You can check it out at www.veritasinitiative.org/news/prosecutorial-oversight-tour-texas-data-released.) It appears that as of this journal's press time the IP report is not actually ready yet. The underlying data is what has been turned over to the media and others, and we now have a copy of it. I encourage you to look at their list of cases, which you can find on the TDCAA website in the Journal Archives (look under this issue's Executive Director's Report for the Excel file). If you find a case that you handled on the list, I would sure like a call from you to discuss it.

The list may surprise you. The methodology in compiling the list

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appears to be simple: Do a Westlaw search for any case in which the term "prosecutor misconduct" appears. Period. That means any case in which that term is even alleged, however frivolously, is included. No additional research. No additional discussion with participants, such as the prosecutors who are accused of misconduct. And we aren't talking about cases involving the traditional notion of prosecutorial misconduct—underhanded or unfair behavior designed to subvert the defendant's right to a fair trial. We are talking about such trial issues as objections to argument or complaints about an improper predicate. You know, typical appellate stuff.

Prosecutor conduct is always a fair topic and deserves the attention of the public. I know that TDCAA leaders and prosecutors in general are committed to being a part of the discussion—if it is accomplished in an even-handed and intellectually honest fashion. We are committed to giving you the information you need to be an honest actor in the discussion as it plays out in your community. In the coming months, prosecutors working with TDCAA staff will be working to correct the misimpression left by this report. Once again, if you've got a case on this list, I'd love to talk to you; call me at 512/474-2436.

John R. Justice in trouble?

In the January-February 2012 edition of *The Texas Prosecutor*, I let you know that the John R. Justice Student Loan Forgiveness program had been cut from $10 million to $4 million dollars. Everyone had hoped that the new-ish program would go the other direction and grow, because it serves all of the prosecutors and public defenders in the country. These economic times have not been good to many criminal justice and fledgling initiatives, however, and we just got word that the Texas allocation of the funding for 2012 would be $112,113 (down from $701,233 in 2010) to be split between all qualified prosecutors and public defenders. Our friends at the Texas Higher Education Coordinating Board have been considering the most equitable way to distribute the money, including "investing" it all on Powerball lottery tickets (actually they didn't consider that, but that was my recommendation at one point).

There are currently 121 prosecutors participating in the program, and the THECB is working to distribute the money in a fair way that honors the three-year commitment the current John R. Justice recipients made to be eligible for the funds. The next application period opens in the fall, so stay tuned. If you have questions, you can call **Lesa Moller** at the THECB directly at 512/427-6366. Lesa has done a great job of running this program for y'all, and she will do her best to get you the answers you need.

Danny Buck Davidson on the silver screen

By the time you read this, the new movie *Bernie* will be showing at the local cinema near you. The film is described as a dark comedy retelling the true story of a Carthage, Texas, undertaker and the wealthy woman he murdered in 1996. The headliners are Jack Black as undertaker Bernhardt Tiede Jr. and Shirley MacLaine as the dowager Marjorie Nugent (whose body was found in a freezer).

But in what promises to be an Oscar-worthy performance, Longview's own Matthew McConaughey plays the role of Panola County Criminal District Attorney **Danny Buck Davidson**. I've only seen the trailer released on Youtube, but I really think he nailed it. (You can watch the trailer at: www.youtube.com/watch?v=F7VSAFvPq7c.)

Finally, many of us dream about having a memorable tag line. The trailer for the movie shows a scene in which Matthew McConaughey/Danny Buck is talking to the media, and with baseball bat in hand, sagely declares: "Wheel of misfortune: your name comes up, Danny Buck's comin' to get you first." Not exactly "Go ahead—make my day," but I think Danny can get a lot of mileage out of that in court.

Andrews County Attorney retires

Thanks on behalf of the profession to **John Pool**, who on April 1 retired as the Andrews County Attorney. John did a great job in his corner of west Texas and is best known for his pioneering work in prosecuting a death caused by a drunk driver with multiple DWI-related convictions as murder. His work has brought some real justice for the victims of these crimes throughout the state. **Tim Mason** has stepped in as the County Attorney and will take the job full-time come January 1, 2013. Thanks, John, and welcome Tim. We look forward to Andrews County continuing to lead!

Training we *won't* be offering

Our TDCAA training team, **Erik Nielsen, Manda Helmick,** and **Dayatra Rogers**, led by the Training Committee and its Chair **Ryan Calvert** (ACDA in Collin County), do a great job of getting you timely and relevant training. Stuff you need to do your job. We don't mind taking ideas for good training from other folks, and indeed sharing trainers and topics is standard in this business. But there is one topic being offered as a keynote at this summer's State Bar Annual Meeting that we will *not* bring to our fall conference. It is the presentation by a former lawyer and best-selling writer and novelist, Richard Patterson, titled "Expanding the Role of the Lawyer in Society." Yikes. I know prosecutors are lawyers too, but I'm not sure that would play out well! ❇

Confessions and statements and admissions—oh, my!

Less trumpeted than in prior years—not all issues are sexy—there have nevertheless been some significant confession opinions issued in recent months. Decisions on whether an inmate is automatically in custody for purposes of *Miranda*, the relevance of age to the custody inquiry, and clarification of the dual rights to counsel have been reached. The admissibility of pre-arrest, pre-*Miranda* statements as substantive evidence has also been re-broached but, in both state and federal high courts and the Fifth Circuit, remains undecided.

By John Stride
TDCAA Senior Appellate Attorney

Inmate interviews may not require *Miranda* warnings

As we all know, "custodial interrogation" involves a "custody" prong, and if custody does not exist, there is no need to consider the "interrogation" prong. We all know, too, that in determining custody, the focus is whether a reasonable person would feel free terminate the interview and leave.[1] But for many years it was an open question in Washington D.C., as to whether an incarcerated person was automatically in custody for purposes of *Miranda*. Catching up with the Court of Criminal Appeals (finally), the Supreme Court of the United States (SCOTUS) has now confirmed that such a person is not inevitably so.

Fields was serving a state prison sentence in Michigan when, one evening, a corrections officer took him to a conference room to be interviewed by two sheriff's deputies about allegations that, prior to prison, he had sexual relations with a child.[2] Initially and later on, Fields was told that he was free to leave to return to his cell. While the deputies were armed, Fields was free of all restraints and the door to the room was not consistently shut. Although, at one point, he became agitated and yelled so that a deputy allegedly warned him that he could cooperate or leave, he eventually confessed. The interview lasted for about five hours and Fields neither received *Miranda* warnings nor an admonishment that he did not have to talk. Before trial, he sought to suppress his confession on grounds that he told the deputies several times he didn't want to talk. The state courts affirmed but the Sixth Circuit, relying on what it perceived as clear SCOTUS precedent, reversed.

Not quite gobsmacked, the Supreme Court tolerantly explained that the lower court had misread precedent and that, in fact, the SCOTUS had never before decided the issue whether, for purposes of *Miranda*, a prisoner is always in custody when isolated from the general prison population and questioned about conduct outside prison. But after reviewing "all the features of the

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interrogation" including "the language used to summon the prisoner to the interview and the manner in which the interrogation was conducted," the court held that Fields had not been taken into custody for purposes of *Miranda*. The three elements of 1) imprisonment, 2) questioning in private, and 3) questioning about events in the outside world are not necessarily enough to create custody for *Miranda* purposes. The absence of restraints or threats, the facilities, and the offer of food and water all supported a finding that Fields could leave and return to his cell.

Five years ago, under similar circumstances, the Court of Criminal Appeals (CCA) decided *Herrera*.[3] The majority of the court may have had to wait for affirmation of its decision, but its analysis, including a review of cases from other jurisdictions, was spot on. Moreover, the CCA additionally held that article 38.22 of the Code of Criminal Procedure was not violated by admission of a confession obtained this way, albeit because the defendant failed to meet his burden to show that—beyond the fact he was incarcerated—he was in "custody" for purposes of *Miranda*.

The right to counsel invoked at magistration is independent from that at a subsequent custodial interrogation

You may remember *Pecina* from the Court of Criminal Appeal's opinion in 2008, where the court held that the defendant had invoked his 6th Amendment right to counsel at magistration.[4] The decision is in line with *Rothgery v. Gillespie*.[5] Well, *Pecina* was kicked back down by the CCA and bounced right back up from the lower appellate court again. This time, the question was whether the defendant had invoked his 5th Amendment right to counsel at magistration.[6]

Pecina injured himself while stabbing his wife to death. Officers obtained his arrest warrant and took a magistrate to the hospital to warn him.[7] The magistrate told Pecina that the officers wanted to speak to him. Out of the officers' presence, the magistrate warned him, and Pecina affirmed both that he wanted a court-appointed attorney and that he wanted to talk to the officers. Back with the officers, he repeatedly waived his rights and gave a statement. The trial judge, finding that Pecina had effectively waived his right to counsel, denied a motion to suppress. The Second Court of Appeals ruled that Pecina had waived both his 5th and 6th Amendment rights to counsel, but the CCA, holding that he had invoked his 6th Amendment right, remanded for a harm analysis. Maybe chagrined, the intermediate court then held that Pecina had invoked his 5th Amendment right to counsel. This was so despite the SCOTUS issuing in the meantime *Montejo v. Louisiana*.[8]

In the CCA's second review of this case, Judge Cochran writing for the majority usefully described the 5th Amendment right as a right to "interrogation counsel" and the 6th Amendment right as a right to "trial counsel."[9] She continued by clarifying the two rights and stating that a defendant's invocation of the right to counsel during an art. 15.17 magistration hearing "says nothing about his possible invocation of his right to counsel during later police-initiated custodial interrogation." Further, she maintained, in correcting the intermediate court's incomplete statement of the 5th Amendment right to counsel, that to protect the "privilege against self-incrimination, the police may not continue or reinitiate custodial interrogation of a suspect who has previously requested assistance of counsel *after the police informed him of his right to counsel at the beginning of custodial interrogation*."

Here, Pecina had undergone magistration, then, separately, custodial interrogation, and his invocation of his right to counsel at magistration did not carry over to custodial interrogation. Thus, by voluntarily speaking to the officers, he had waived both his 5th and 6th Amendment rights to counsel for purposes of custodial interrogation. When wrangling with the 5th and 6th Amendment rights, this case, like Montejo, is far too important not to understand. Fortunately, the law has become much simpler.

Youth informs the custody inquiry

Historically, in deciding whether a person is in custody, we must consider all the circumstances. In other words there is no focus on particular factors—even if there is recognition of a suspect's peculiarities such as his health, IQ, language, etc. In fact, less than a decade ago, Justice Kennedy writing for the majority of the SCOTUS reversed the Ninth Circuit for placing undue reliance on a suspect's youth and inexperience with law enforcement when deciding whether

he was in custody.[10]

In a sharp break from traditional analysis, however, the SCOTUS has now ruled that a person's youth is relevant to the custody inquiry for purposes of *Miranda*. Once again, the court draws on its death penalty opinions to transform the law. As age was already a factor under the objective test, the court has plainly added weight to this factor in *J.D.B.*

J.D.B., a 13-year-old, was questioned by police near the scene of two homes that had been burgled.[11] His grandmother and aunt were also questioned. Five days later, after learning that a camera similar to one stolen had been seen at school in J.D.B.'s possession, a juvenile investigator visited the school to re-interview the youth. The investigator advised the school administration of his intent and a uniformed police officer with the school escorted J.D.B. out of class to a closed-door conference room where the investigator questioned J.D.B. for at least half an hour. The two officers and two school administrators were present, J.D.B. was not given *Miranda* warnings, he was not told that he was free to leave, and his grandmother was not notified. Under the urging of the assistant school principal and the investigator and told that, regardless, the case was going to court and that he faced the prospect of juvenile detention in the meantime, J.D.B. confessed. (OK, so the facts could have been better). He gave a written statement and was then permitted to leave so he could catch the bus home. The trial court denied a motion to suppress filed on grounds that J.D.B. was improperly denied *Miranda* warnings, and the state appellate court affirmed.

The closely divided SCOTUS (Kennedy, J., was the swing vote), observing the coerciveness of most custodial interrogation, recognized recent studies indicating that this is a "troublesome" and especially "acute" problem with juveniles. Although the inquiry of whether a suspect is in custody remains objective—not involving the actual mindset of the suspect—the SCOTUS rejected any notion that a child's age has no place in the inquiry:

> So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances unknowable to them nor to anticipate the frailties or idiosyncrasies of the particular suspect whom they question.[12]

In an apparent attempt to temper this departure from its precedent, the majority continues: "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." And with that comment—one that is more disturbing than ameliorative—we can but wonder if the decision means anything. Is this the start of a slippery slope as other inherent qualities of suspects are highlighted during the custody inquiry, thereby transforming the objective test into one that is increasingly subjective? Or does this mean that the issue of age during the custody inquiry will evade principled results at the convenience of the court deciding the issue? If either is the result, this softening judicial mindset could become more than a troublesome and acute problem for law enforcement.[13] In any event, the case was remanded for the state courts to determine whether J.D.B., taking into account all of the relevant circumstances of the interrogation *including J.D.B.'s age*, was in custody.

Federal courts split pre-arrest, pre-*Miranda* silence

It is just about axiomatic now that a defendant's post-arrest, post-*Miranda* silence may not be used against him in court.[14] But the issue of whether the prosecution may use a defendant's pre-arrest, pre-*Miranda* silence against him is much less certain. The CCA, Fifth Circuit, and SCOTUS have yet to dispositively decide the issue, but the recent Fifth Circuit case of *Ashley* recognized the split in the circuits.[15]

Ashley was a United States Postal Service (USPS) worker on duty the days that letters containing gift cards passed through the facility where she worked. Each time, a few days later, store videotapes recorded her husband—one time accompanied by her—using stolen gift cards to purchase items. A USPS investigator attempted to question the pair, but they refused to discuss the matter. At Ashley's trial, however, her husband testified that he received the cards by trading merchandise with an unidentified Hispanic person. In its case-in-chief, the prosecution offered and the trial court admitted Ashley's pre-trial silence before she had been taken into custody or admonished of her *Miranda* rights.

On appeal, although Ashley

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claimed the introduction of the evidence was impermissible, the court found any error harmless and did not reach the propriety of the admission. Nevertheless, helpfully, the court did acknowledge decisions from the seven other circuits that had decided the matter. The Fourth, Ninth, and Eleventh Circuits permit the use of such evidence as substantive evidence of guilt while the First, Sixth, Seventh, and Tenth Circuits do not. The former hold that the evidence is admissible because the government has not yet implicitly assured a defendant that his silence would not be used against him. The latter hold that with some exceptions including impeachment, a defendant has a right to remain silent even before arrest because to hold otherwise would impair the constitutional right that does not even require the protection of the *Miranda* warnings for its existence. Interestingly, an opinion of the Ninth Circuit[16] interprets a 1986 opinion of the Fifth Circuit as supporting the position that pre-arrest, pre-*Miranda* silence can be used, but while the Fifth Circuit might have hinted so, it did not decide so.[17]

The CCA, a dozen years ago in a footnote in *Lee*, similarly observed the split in the circuit courts. It provided a list of cases that might serve to inform the ultimate decision.[18] Also, nearly a quarter of a century ago, by way of dicta in *Waldo*, the CCA also declared that "[p]re-arrest silence is a constitutionally permissible area of inquiry."[19]

In the intermediate state courts, the most recent expression on the topic is *Steadman*.[20] There, the Eleventh Court of Appeals held that the pre-arrest silence of a defendant who has not received any *Miranda* warnings is a constitutionally permissible subject of inquiry. But the issue of whether a defendant's pre-arrest, pre-*Miranda* silence can be used against a defendant as substantive evidence is ripe for dispositive decisions from the CCA and the SCOTUS. We are well past the "best by" date on this particular issue. Although one might not have thought so, judging by the two-decades-old-split in the federal circuits, the question is a close one.

Surprise! Within minutes of this edition of *The Prosecutor* going to the printer, the Court of Criminal Appeals ruled in *Salinas* that a defendant's pre-arrest, pre-*Miranda* silence is *not* protected by the 5th Amendment.[21] Wishes *do* come true. ❇

Endnotes

1 See, e.g., *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Stansbury v. California*, 511 U.S. 318 (1994) (per curiam). *J.D.B.* reveals below, however, that the test is no longer quite so objective now that age may take greater prominence in the inquiry.

2 *Howes v. Fields*, 182 L.Ed.2d 17 (2012).

3 *Herrera v. State*, 241 S.W.3d 520 (Tex. Crim. App. 2007).

4 *Pecina v. State*, 268 S.W.3d 564 (Tex. Crim. App. 2008) ("*Pecina II*").

5 554 U.S. 191 (2008) (6th Amendment right to counsel attaches at an art. 15.17 magistration hearing).

6 *Pecina v. State*, No. PD-1095-10, 2012 Tex. Crim. App. LEXIS 143 (Tex Crim. App. Jan. 25, 2012) ("*Pecina IV*").

7 The standard magistrate's warnings were supplemented by a warning that the defendant "may be subject to deportation if you are not a U.S. citizen." *Id.* at n.4. Such a warning is not required by statute and it may be better not given on grounds of chilling any interrogation or because it is more than the law requires for the proceedings and is simply something else the defendant can raise on appeal. See Tex. Code Crim. Proc. art. 15.17.

8 556 U.S. 778 (2009) (overruling *Michigan v. Jackson* and clarifying the scope of the two rights to counsel).

9 Former Presiding Judge McCormick had identified the two rights in another practical fashion: the 5th Amendment addresses a "suspect" while the 6th Amendment addresses an "accused." See *Holloway v. State*, 780 S.W.2d 787, 790 (Tex. Crim. App. 1989).

10 *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) ("Our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration").

11 *J.D.B. v. North Carolina*, 131 S.Ct. 1553 (2011).

12 Citations and quotation marks omitted.

13 We can be sure that it will not take the defense bar long to latch onto the majority's analysis in an attempt to spread it to a suspect's other peculiarities.

14 See, e.g., *Doyle v. Ohio*, 426 U.S. 610 (1976); *Sanchez v. State*, 707 S.W.2d 575 (Tex. Crim. App. 1986).

15 *United States v. Ashley*, 664 F.3d 602 (5th Cir. 2011).

16 *United States v. Oplinger*, 150 F.3d 1061, 1066-67 (9th Cir. 1998).

17 *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996).

18 *State v. Lee*, 15 S.W.3d 921, 924 n.5 (Tex. Crim. App. 2000), overruled on other gr'ds, *Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007).

19 *Waldo v. State*, 746 S.W.2d 750, 755 (Tex Crim. App. 1988) (deciding the inadmissibility of post-*Miranda* silence).

20 *Steadman v. State*, 328 S.W.3d 566, 568-71 (Tex. App. — Eastland 2010), rev'd on other gr'ds, No. PD-1356-10, 2012 Tex. Crim. App. LEXIS 474 (Tex Crim. App. March 7, 2012).

21 *Salinas v. State*, No. PD-0570-11, (Tex Crim. App. April 25, 2012).

The history of crime victims' rights

By Suzanne McDaniel
TDCAA Victim Services Director in Austin

An important part of the observance of Crime Victims' Rights Week is the review and history of victim rights. The history of victim rights is also integral to training, understanding the development of the statutes in Texas, and most importantly implementation. (See the last issue of this journal for entries up to 1980.)

We are continuing our update of the victim rights timeline and ask for your input:

1982 President Ronald Reagan established the President's Task Force on Victims of Crime with Lois Haight Harrington as chair. The Harris County District Attorney's Victim Witness Office coordinated the Houston hearing, one of seven in the nation. Congressman, former judge, and Harris County ADA (at the time) Ted Poe provided testimony.

The final report, issued in December, made 68 recommendations, among them that Congress enact legislation to provide federal funding to assist state compensation programs, a federal resource office, and funding to assist in the operation of federal, state, local, and private/nonprofit victim assistance agencies that provide comprehensive services. The task force's report was the impetus for the United States Congress's passage of the Federal Victim and Witness Protection Act of 1982, designed to change the status of a crime victim from a person who merely identifies the perpetrator and testifies in court to the role of an active participant in the criminal justice process. Victims are allowed to provide impact statements to the court describing their experiences and costs of being a crime victim and guaranteeing the right to claim restitution.

1983 The Texas Crime Victim Clearinghouse was established in Governor Mark White's office with approval of a Criminal Justice Division grant submitted by Suzanne McDaniel. The clearinghouse serves as a central source of information about services and issues involving crime victims in Texas.

U.S. Attorney General Ed Meese appointed the Task Force on Family Violence. Bexar County Criminal District Attorney Sam Millsap and ADA Denise Martinez provided testimony at the San Antonio public hearing in 1984.

1984 The United States Congress enacted the Victims of Crime Act (VOCA), which created a matching grant program to encourage states to create victim compensation programs and local programs to assist crime victims. Congress also passed the Fair Standards for the Treatment of Crime Victims and Witnesses Act and created the Office for Victims of Crime, all legislation recommended by the 1982 President Task Force on Crime Victims.

1985 The 69th Texas Legislature passed H.B. 235, adding Chapter 56 (Rights of Crime Victims) to the Code of Criminal Procedure. It included Art. 56.04 (Victim Assistance Coordinator), requiring district attorneys whose jurisdiction has a population of 150,000 or more to designate a person as a victim assistance coordinator.

The rights provided by Art. 56.02(a) for a victim, guardian of a victim, or close relative of a deceased victim include:

1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;

2) the right to have the magistrate take the safety of the victim or the victim's family into consideration as an element in fixing the amount of bail for the accused;

3) the right, if requested, to be informed of relevant court proceedings and to be informed if those court proceedings have been canceled or rescheduled prior to the event;

4) the right to be informed, when requested, by a peace officer concerning the procedures in criminal investigations and by the district attorney's office concerning the general procedures in the criminal justice process, including guilty plea negotiations;

5) the right to provide pertinent information to a probation department conducting a pre-sentencing investigation concerning the impact of the offense on the victim and the victim's family by testimony, written statement, or any other manner prior to any sentencing of the offender;

6) the right to receive information regarding compensation to victims of crime, the payment of medical expenses for a victim of sexual assault and, when requested, to refer-

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ral to available social service agencies that may offer additional assistance; and

7) the right to be notified, if requested, of parole proceedings and to provide to the Board of Pardons and Paroles for inclusion in the defendant's file information to be considered by the board prior to the defendant's parole. In addition, Art. 56.02(b) provides that a victim is entitled to the right to be present at all public court proceedings related to the offense, subject to the approval of the judge in the case.

The 71st Texas Legislature passed H.J.R. 19 proposing a constitutional amendment to Article I of the Texas Constitution by adding §30, that a crime victim has the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process. In addition, on request, the crime victim has the right to: notification of court proceedings; be present at all public court proceedings related to the offense unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial; confer with a representative of the prosecutor's office; restitution; and information about the conviction, sentence, imprisonment, and release of the accused. Texas voters approved the amendment on November 7.

1993 The Texas Legislature passed H.J.R. 23 proposing a constitutional amendment to deny bail, after a hearing, to any person accused of a violent offense (murder or aggravated assault, kidnapping, or robbery) or sexual offense (aggravated sexual assault, sexual assault, or indecency with a child) committed while under supervision of a criminal justice agency of the state or a political subdivision of the state for a prior felony. Texas voters approved the amendment on November 2.

The Violence Against Women Act (VAWA) was passed by the United States Congress. It dramatically improved the law enforcement response to violence against women and made many more services available to victims of sexual assault.

Children's Advocacy Centers of Texas, Inc. (CACTX) was founded as a nonprofit membership association with a charter membership of 13 local children's advocacy centers. The mission of CACTX is to restore the lives of abused children by supporting children's centers in partnership with local communities and agencies investigating and prosecuting child abuse.

1995 In January, the Texas Board of Criminal Justice adopted a board rule permitting victim witnesses to view executions. At the time, viewing was limited to immediate family members and individuals with a close relationship to the deceased victim. In 1998, the rules were relaxed to allow victim witnesses to include friends of surviving relatives. By 2005, victim witnesses also encompassed close friends who were supportive during the trauma of the trial, law enforcement personnel involved in the capture of the offender, and prosecutors who tried the case.

The Texas Crime Victim Clearinghouse was moved administratively from the Governor's Office to the Texas Department of Criminal Justice.

The AMBER Alert System began in Texas when Dallas-Fort Worth broadcasters teamed with local police to develop an early warning system to help find abducted children. AMBER stands for America's Missing: Broadcast Emergency Response. The name was created as a legacy to 9-year-old Amber Hagerman, who was kidnapped while riding her bicycle in Arlington and then brutally murdered.

1997 The 75th Texas Legislature passed S.J.R. 33 proposing a constitutional amendment to permanently dedicate the crime victim compensation fund to be used only for assisting victims of crime. A constitutional dedication of the fund would protect the monies from any attempts to statutorily remove the dedication temporarily or permanently to spend the monies for purposes not related to the Crime Victims' Compensation Act. Texas voters approved it on November 4.

H.B. 921 amended Art. 12.01(1) of the Code of Criminal Procedure, by providing a limitations period of 10 years from the 18th birthday of a victim of indecency with a child under §21.11(a)(1) of the Penal Code (had been 10 years from the date of the offense), sexual assault under §22.011(a)(2) of the Penal Code (had been 10 years from the date of the offense), and aggravated sexual assault under §22.021(a)(1)(B) of the Penal Code (had been five years from the date of the offense).

2000 The U.S. Congress re-authorized VAWA, adding services for rural, older, and immigrant women, as well as those with disabilities.

2001 The 77th Texas Legislature passed H.B. 1572, which authorized the Office of the Texas Attorney General to contract with the Office of Court Administration and/or the Texas Department of Criminal Justice to implement a statewide computer network victim notification system to victims of crime and counties in Texas. Texas VINE (Victim Information and Notification Everyday) is a single entry point (one toll-free statewide number) for victims to receive standard information and notification on offender status and court events. The Office of Attorney General reimburses participating counties for approved expenses via grant contracts.

H.B. 656 amended Art. 12.01(1), Code of Criminal Procedure, by adding subsection (B) that there is no limitation period for a sexual assault offense if, during the investigation of the offense, biological matter is collected and subjected to forensic DNA testing and the testing shows that the matter does not match the victim or any other person whose identity is readily ascertained.

2004 Texas Attorney General Greg Abbott convened a group of victim advocates called the Crime Victim Services Advisory Council to evaluate the financial soundness and continued viability of the Compensation to Victims of Crime Fund. In the 2000–01 biennium, the Texas Legislature appropriated $13 million from the fund and $114 million for the 2004–05 biennium. Unless something was done, the fund was likely to be insolvent in three years. General Abbott submits the council's 12 recommendations—aimed at protecting the fund—to Governor Rick Perry, Lt. Governor David Dewhurst, and House Speaker Tom Craddick.

2005 The Texas Legislature passed S.J.R. 17 proposing a constitutional amendment that any person accused of a felony who is released on bail pending trial and whose bail is subsequently revoked or forfeited for a violation of a condition of release may be denied bail pending trial if it is determined that the person violated a condition of release related to the safety of a victim of the alleged offense or to the safety of the community. Texas voters approve the constitutional amendment on November 8.

The 80th Texas Legislature passed H.B. 8 ("the Jessica Lunsford Act"). The law:

1) added the death penalty or life without parole for a repeat conviction for the aggravated sexual assault of a child victim younger than 6 or a child victim younger than 14 and the defendant causes serious bodily injury, threatens death, or uses or exhibits a deadly weapon;

2) provided for a mandatory minimum punishment range of 25 to 99 years (no early release) for "super aggravated" sexual assault of a child (described above);

3) created the new offense of continuous sexual abuse of a young child or children which involves two or more acts of sexual abuse against one or more child victims under age 14 over a period of at least 30 days with a mandatory minimum punishment range of 25 to 99 years (no early release);

4) eliminated the statute of limitations for indecency with a child by contact or exposure, sexual assault of a child, aggravated sexual assault of a child, and continuous sexual abuse of a young child or children;

5) extended the statute of limitations to 20 years after the 18th birthday for a child victim of sexual performance by a child, aggravated kidnapping with intent to violate or abuse sexually, and burglary of a habitation with intent to commit certain sexual offenses; and

6) eliminated probation from a jury for sexual performance by a child and the following offenses where the victim is less than 14 years of age: indecency with a child by contact, sexual assault, aggravated sexual assault, and aggravated kidnapping with intent to abuse the victim sexually.

We as victim advocates continue to add to this list, so please send your suggestions to mcdaniel@tdcaa.com.

Crime Victim Rights Week 2012

How did your community observe this year's Crime Victims' Right Week? Please send articles and photos to me at mcdaniel@tdcaa.com so that we can share with others. Every person who sends an article or photos will receive a free TDCAA tee shirt! These are limited edition and not available for sale anywhere, so you'll be a fashion maverick in one of these.

Domestic Violence Seminar

About 160 people attended our Domestic Violence Seminar in April, and attendees were among the most

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diverse in recent memory—a good mix of prosecutors, investigators, key personnel, and victim assistance coordinators (VACs) traveled to San Antonio to learn how to fight this type of (all too common) crime.

Did you attend? Did you learn a lot? Please email me at mcdaniel @tdcaa.com with the best tip you came away with; everyone who emails will receive a free TDCAA tee shirt! (How's that for incentive?) ❇

NEWS WORTHY

A note about death notices

The Texas Prosecutor journal will begin accepting information to publish notices of the deaths of current, former, and retired TDCAA members on a regular basis. Such notices must come from a Texas prosecutor's office, should be fewer than 500 words, can include a photo, and should be emailed to the editor at wolf@tdcaa.com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❇

Photos from Train the Trainer

Photos from our Domestic Violence Seminar

Ex parte Moussazadeh: *Padilla*, parole eligibility, and involuntary pleas

I'm terrible with names, however lyrical they might be, so don't expect me to get this one right. Some say Moose-ah-zay-duh. Others say Moose-ah-zuh-day-uh.[1] I'm confident I will end up confusing this defendant with T.J. Houshmandzadeh the next time I draft my fantasy football team.[2] Hopefully, I was able to grasp the Court of Criminal Appeals' recent opinion, *Ex parte Moussazadeh* a little better. While managing to side-step the troubling issue of whether *Padilla v. Kentucky* applies retroactively, the court appeared to announce a new rule regarding advice to defendants about parole eligibility. This, combined with the United States Supreme Court's recent decisions in *Lafler v. Cooper* and *Missouri v. Frye*, may point to the coming dawn of a new age in plea bargaining where prosecutors will be effectively required to double-check defense counsel's work out of practical necessity.

By David C. Newell
Assistant District Attorney in Harris County

The more you know

Max Gyllenhaal—no wait, I mean, Max Moussazadeh—pleaded guilty to murder without an agreed recommendation for punishment. The defendant, a juvenile at the time of the offense, had served as a lookout while one of his three co-defendants shot and killed a man during a robbery. The State had originally charged the defendant with capital murder but agreed to reduce the charges to murder in exchange for the plea and an agreement to testify at a co-defendant's trial. The defendant indicated during that testimony that he understood he was facing a significantly lesser term of imprisonment than he would have faced had he been convicted of capital murder. The crime occurred on September 12, 1993.

Unfortunately, the law regarding parole eligibility for murder had changed 11 days before the defendant committed the crime unbeknownst to everyone involved in the plea.[3] Before September 1, 1993, a defendant was eligible for parole on a capital murder conviction after serving a flat 35 years, but after that day, he would not be eligible until he served a flat 40 years. Similarly, before September 1, 1993, someone convicted with a deadly weapon finding had to serve one-fourth of his sentence up to 15 years, while after that date he would have to serve one half of his sentence up to a maximum of 30 years. And finally, before September 1, 1993, a person convicted of murder without a deadly weapon finding was eligible for parole when his good time plus flat time equaled one-quarter of the sentence up to 15 years, while after that date he would not be eligible for parole until he had served one-half of his sentence or 30 years. The trial court sentenced Moussazadeh to 75 years in prison without a deadly weapon finding.

The Fourteenth Court of Appeals affirmed the judgment of the trial court, and the Court of Criminal Appeals denied habeas corpus relief because the defendant had failed to prove by a preponderance of the evidence that his plea was induced by a misunderstanding of the applicable parole law which formed an essential element of the plea agreement. The defendant filed a subsequent application for a writ of habeas corpus based upon *Padilla v. Kentucky*. The Court of Criminal Appeals reconsidered its original decision on the defendant's writ of habeas corpus on its own motion with orders for briefs on the issues raised in the subsequent writ.[4]

When is *Padilla v. Kentucky* not like *Padilla v. Kentucky*?

Upon reconsideration of Moussazadeh's writ, the Court of Criminal Appeals held that trial counsel's failure to provide correct information regarding parole eligibility amounted to ineffective assistance of counsel and rendered the defendant's guilty plea involuntary.[5] The court agreed with the State that *Padilla v. Kentucky*, which dealt with erroneous advice regarding immigration consequences, had no bearing on the case. The court also claimed that it would continue to recognize the distinction between the direct and collateral consequences of a plea.

However, the court crafted a holding that mirrors *Padilla v. Kentucky* in both scope and rationale. According to Judge Johnson, who wrote for an eight-judge majority, parole eligibility can be determined with some degree of certainty just by reading the applicable statute. Because a defendant will likely consider the actual minimum amount of time he will spend incarcerated to properly accept or reject a plea offer, a defendant needs accurate information regarding the law on parole eligibility. And the terms of the relevant parole-eligibility statute were succinct and clear with respect to the consequences of a guilty plea, making it easy for trial counsel to determine Moussazadeh's parole eligibility simply by reading the text of the statute.[6] Thus, the court recognized a duty on the part of trial counsel to both provide correct advice and refrain from providing incorrect advice regarding parole eligibility. The Court of Criminal Appeals refused to draw a distinction between an attorney who gives erroneous advice and one who fails to give correct advice in the same manner that the United States Supreme Court refused to limit its holding to situations where a defense attorney affirmatively misadvises his client regarding the immigration consequences of his plea.

But to reach this conclusion the court had to overturn prior caselaw, something the United States Supreme Court did not have to do in *Padilla*. In *Ex parte Evans*, the Court of Criminal Appeals had held that an applicant seeking to challenge the voluntariness of his plea must prove by a preponderance of the evidence that parole eligibility was an affirmative or essential part of the plea bargain because both parole eligibility and parole attainment were both extremely speculative. The court noted that this was an incorrect statement of the law because parole eligibility remains the same for any given conviction even though parole attainment is highly speculative because it is based on many different factors associated with the prisoner's parole application. Consequently, the court overruled *Evans* and held that Moussazadeh had proven that the representation of counsel was deficient.

Presiding Judge Keller concurred with the result but correctly noted that by overruling *Evans*, the court had created a new rule of constitutional law and retroactively applied it without conducting any kind of retroactivity analysis. She questioned whether there was some new, unstated retroactivity analysis on the horizon and expressed the opinion that the court should explain how the case fits into its previous retroactivity jurisprudence. Moreover, she would have limited the holding to the facts of the case, namely situations where trial counsel affirmatively gives incorrect advice regarding parole eligibility. She would not have held, as the majority did, that the mere failure to advise a defendant on his parole eligibility also amounted to deficient performance of trial counsel. However, Presiding Judge Keller did agree that the court could have resolved the case without overruling *Ex parte Evans* because both the State and the trial court had ratified trial counsel's misinformation regarding parole eligibility.

The irony here is that one of the issues the court asked for briefing on was the issue of *Padilla v. Kentucky*'s retroactivity.[7] In fact, it appears that the court did not actually address any of the issues that it sought guidance on. The judges did not address whether *Padilla* constituted a new legal basis for an application of a subsequent writ of habeas corpus. They did not decide whether *Padilla* was an application of the established rule in *Strickland v. Washington*. They did not determine whether *Padilla* announced a new rule that was retroactive on collateral review. And while they did reconsider their reasoning in *Ex parte Evans*, they did not appear to do so in light of *Padilla*, which they simply dismissed as inapplicable at the outset of their analysis. In contrast, however, they did overrule their own precedent and apply their new understanding of the law regarding parole eligibility retroactively without explaining their justification for doing so, a step the United States Supreme Court avoided in *Padilla v. Kentucky*. How's that for a black fly in your Chardonnay?[8]

Direct and collateral consequences

One significant difference between *Moussazadeh* and *Padilla* remains. While Justice Stevens seems to have written *Padilla* with the goal of giving it as broad a reach as possible, as a practical matter, *Moussazadeh* should not have the same potential for mischief. Despite the Court of Criminal Appeal's failure to harmonize its current opinion with past precedent regarding *stare decisis* or retroactivity, the court's ultimate

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conclusion is correct. Determining and advising defendants of the law surrounding parole eligibility (rather than parole attainment) should be a much more straightforward task than determining the immigration consequences of a plea; it's simply a matter of opening a book and reading the statute. And the court still expressly recognizes a distinction between direct and collateral consequences of a guilty plea, while the United States Supreme Court remained coy, if slightly antagonistic, toward that conceptualization. So while the United States Supreme Court left open in *Padilla* the idea that the failure to advise on other consequences of a guilty plea (such as sex offender registration) may result in an involuntary plea, the Court of Criminal Appeals opinion in *Moussazadeh* seems more limited to a consequence that is direct or at least more easily determined.

But *Moussazadeh* may be an example of a collateral consequence of *Padilla*, namely the increased scrutiny upon the advice of trial counsel regarding his plea. Another example can be seen in the United States Supreme Court's recent decision of *Lafler v. Cooper*. There, the court held that the decision to reject a plea bargain and proceed to trial can be ineffective assistance where the attorney's advice to reject the plea is based upon an apparent misunderstanding of the applicable law.[9] In reaching this conclusion, the court rejected the argument that an otherwise fair trial inoculates any errors in the pretrial process. While the court acknowledged that erroneous strategic predictions about the outcome of trial is not necessarily deficient performance, the parties in the case conceded that trial counsel's performance in advising *Lafler* to reject the plea bargain offer was deficient.

That same day, the court recognized in *Missouri v. Frye* that the failure to communicate a formal plea bargain offer with a fixed expiration date to a defendant could amount to ineffective assistance of counsel and require the reinstatement of the original plea offer.[10] Both *Frye* and *Lafler* start from the position that the criminal justice system "is for the most part a system of pleas, not a system of trials" and that "horse trading" between the prosecutor and defense counsel determines who goes to jail and for how long. Both cases pointed to *Padilla* for the notion that plea bargaining is a critical stage that entitles a defendant to effective assistance of counsel and provides both the State and the trial court a substantial opportunity to guard against claims of ineffective assistance based upon bad advice leading to a plea.[11] As the court noted in *Frye*, "at the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that lead to any offer, the advantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea.[12] Notably, in *Moussazadeh*, "all counsel" as well as the trial court were mistaken about the law regarding parole eligibility at the time of the plea entry.

Of course, most prosecutors did not need these cases to internalize these lessons and routinely make sure the record clearly demonstrates proper admonishments and informed decision-making at the time a plea is taken. But the multiple opinions shared between the Court of Criminal Appeals and the United States Supreme Court on the issue of plea bargaining highlights the increased attention that these courts are currently paying to the plea bargain process. "All counsel" should take advantage of the opportunity at the entry of a plea to ensure that the record reflects that a defendant is properly admonished of the consequences of his plea and that any advice given by trial counsel was not based upon a mistaken understanding of the law.

Now if only the record could help me get the names right. ❇

Endnotes

1 Let's call the whole thing off.

2 Championship.

3 This also pre-dated TDCAA's traveling legislative updates.

4 Presiding Judge Keller has warned against using Rule 79.2(b) to reconsider original applications of writs of habeas corpus lest they become Trojan horses for subsequent applications for writs of habeas corpus. *Ex parte Moreno*, 245 S.W.3d 419, 431 (Tex. Crim. App. 2008)(Keller, PJ. concurring). Presiding Judge Keller did note that such reconsideration should be limited to those situations where the issue was originally raised in the first application and there was an indisputable mistake of fact or law that had been made by the court itself. Though a majority of the court has yet to take this explicit position, the court does seem to believe, though it does not say so, that both situations are present in this case.

5 *Ex parte Moussazadeh*, 2012 WL 468518 (Tex. Crim. App. Feb. 15, 2012).

6 See e.g. *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)(noting that Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute).

7 *Ex parte Moussazadeh*, 2010 WL 4345740 (Tex. Crim. App. 2010)(not designated for publication).

8 "Ironic," *Jagged Little Pill*, Alanis Morissette (Maverick 1995).

9 *Lafler v. Cooper,* 2012 WL 932019 (March 21, 2012).

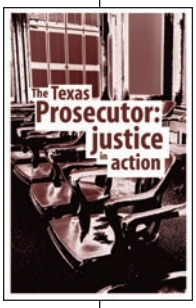
10 *Missouri v. Frye*, 2012 WL 932020 (March 21, 2012). Admittedly, this is not a revelation in Texas where the Court of Criminal Appeals had come to the same conclusion 12 years earlier. *Ex parte Lemke*, 13 S.W.3d 791 (Tex. Crim. App. 2000).

11 *Frye*, 2012 WL 932020 at *6; *Lafler*, 2012 WL 932019 at *4, *11.

12 *Frye*, 2012 WL 932020 at *6.

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 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. ❊

What law have you run across that you can't believe is on the books? Or what law do you *wish* were on the books?

By K. Sunshine Stanek
Assistant Criminal District Attorney in Lubbock County

Ahhhhhhhhhh, September in Lubbock, Texas. The sunny skies, warm winds, cool starry evenings, and smell of corn dogs wafting through the air. That's right: September means South Plains Fair Days in Lubbock County. For two solid weeks there are hundreds of thousands of fried items sold, baked goods and animals judged, games played and rides ridden. Downtown business people eat their lunches at the fair for days on end and families are entertained long into the dark of night.

And with the fair coming to town, so come the carnival ride workers, more commonly referred to as the carnies. These are the men and women who bring the rides to town, assemble, operate, and then disassemble them when the fair ends, presumably moving on to the next town's fair. These folks are responsible for the safety of the children who ride these rides because not only do they set up the rides, but they also take the tickets from the kids and place small children on the rides, adjusting seat belts, straps, and door handles.

Apparently the legislature recognized the significance of this job, most likely as it relates to children's safety, and enacted Penal Code §49.065, Assembling or Operating an Amusement Ride While Intoxicated. Along with the job description of a carnie comes a large amount of downtime on the job, where some employees may choose to imbibe in the occasional beverage. And some have even become legally intoxicated and continued to attempt to perform their job duties. Although we don't see these cases very often, they are very popular when they are presented to our office. You can imagine the unique facts and colorful witnesses that surround these cases, based on the environment they arise out of—the South Plains Fair. Apparently drunk carnies and children on amusement park rides do not mix. If they do, law enforcement will rely on 49.065. One of my all-time favorite laws.

Sara Ruth Spector
Assistant District Attorney in Medina County

Criminalizing the forced ingestion of illegal drugs by a fetus is a law that many prosecutors, Child Protective Services (CPS), and law enforcement officers wish were on the books in Texas. Many states have prosecuted

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mothers for giving birth to babies with drugs in their system, including Tennessee, Florida, Alabama, Wisconsin, and South Carolina. To my understanding, there has been no U.S. Supreme Court ruling on this issue.

Texas Penal Code §22.12 states that the statutes of injury to a child and endangering a child do not apply if committed against an unborn child and if the conduct is committed by the mother of an unborn child.

As a former CPS prosecutor and as a current criminal prosecutor, it is my opinion that Texas needs to follow suit with other states and allow criminal prosecution of mothers and fathers who expose their unborn children to illegal drugs. I have personally witnessed a newborn baby on a breathing machine in intensive care detoxing from meth. No baby should start his or her life in this manner.

Brent Robbins
Investigator in the Denton County Criminal District Attorney's Office

Transportation Code §547.501(c) says, "A motor vehicle operator shall use a horn to provide audible warning only when necessary to ensure safe operation." When I was a cop on the street, we called this law Unnecessary Use of Horn. Honk your horn to "say hi" to your friends? Violation! Honk your horn simply because you're frustrated from sitting in traffic? Violation! Honk your horn for any reason other than to "ensure safe operation?" Violation!

Feather-legged chicken excrement? Perhaps. But sometimes, "feather legged" stops yield unexpected results. Once, at 1:30 in the morning, I had just finished issuing a citation to a driver on the highway. As I turned to go back to my patrol car, a vehicle blew past me, just feet away (this was years before the "move over" law existed) and blasted the horn. Scared me to death. Once my heart started beating again, I decided I was going to stop the vehicle and give the driver a piece of my mind.

After I made the traffic stop and approached the vehicle, I was overcome by the odor of burning marijuana. I questioned the driver, asking him why he honked at me. He told me that he was "just saying hi" because he "loves the police." Well, the odor of burning marijuana gave me probable cause to search the vehicle, and I found nearly 5 pounds of marijuana in the trunk. He didn't "love the police" as much when I placed him under arrest.

Justin Jones
Assistant Criminal District Attorney in Denton County

I have never seen one filed, but I always wonder about Parks and Wildlife Code §61.023—Applying Contraceptives to Wildlife Resources: "No person may intentionally apply contraceptives to any vertebrate wildlife resource unless that person first obtains written authorization from the department." Need I say more? Although its purpose is well-intended, it certainly brings to mind some interesting visuals.

Rickie Cayton
Assistant Criminal District Attorney in Lubbock County

If you've never prosecuted a commercial collector of wildlife for violating the Texas Parks & Wildlife Department's (TPWD) non-game permit statutes, you're missing out! A couple of years ago, I learned more about ornate box turtles and commercial non-game permit violations than I ever thought possible.

In case you weren't aware (I wasn't!), the TPWD classifies animal species and regulates their commercial use. It strictly controls commercial collectors of wildlife through licensure requirements and regulation of collections and sales to protect the state's ecosystem and potentially endangered species. Certain violations of the non-game permit statutes are criminal offenses.

In my case, a local pet-store owner had committed several violations over a period of years, and the TPWD had been tracking him for some time. Each time they'd attempted to pull his license, he was able to weasel out of it. This time, we charged him for acquiring milksnakes from people who didn't hold valid non-game permits and acquiring ornate box turtles (a prohibited species), both Class C misdemeanor offenses. Suffice it to say, when I explained the nature of the State's case to the 20 veniremen sitting there in that tiny Justice of the Peace courtroom, I got some surprised looks. I knew it would be an uphill battle to get six West Texas jurors to care about a handful of non-game animals, and it turns out I had

underestimated just how tough it would be.

Ultimately, after deliberating for 20 minutes, the jury walked my defendant. Even though the defense ridiculed us for standing up for the "Ace Ventura" investigation, I'm glad I did. Prosecuting this case taught me about the amount of work the TPWD puts into protecting our state's wildlife and how much effort our local game wardens put into doing their job. Every time I go into a pet store, I think about my turtle case. It was definitely the oddest case I've prosecuted, but it was well worth the learning experience. ❇

News Worthy

E-books are here!

TDCAA announces the launch of two new e-books, now available for purchase from Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both ~~strikethrough~~ underline text to show the 2011 changes *and* annotations. Note, however, that these books contain single codes—just the Penal Code (2011–13; $10) and Code of Criminal Procedure (2011–13; $25)—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files. ❇

Continued from the front cover

Montgomery County's domestic violence rocket docket (cont'd)

in the fall of 2011, Montgomery County's first dedicated domestic violence misdemeanor docket premiered. I was equally excited and terrified about the new venture because I had no idea how this new program was going to work.

Our first step to get up and running was a Domestic Violence Warrant Roundup. District Attorney Ligon started the roundup program after his election as a way to utilize the media and bring attention to our efforts to crack down on crime while serving outstanding warrants in the county. October is Domestic Violence Awareness Month and it was also the first full month after receiving our grant funding, so we found it to be the perfect time to kick things off. Investigators in our office pulled a variety of open arrest warrants for domestic violence cases, both felony and misdemeanor level. We invited all of our local law enforcement to get involved executing outstanding arrest warrants. We ended up with the largest multi-agency participation we've ever had; law enforcement officers from every local agency in the county showed up to support the domestic violence cause and to serve the warrants. Local news agencies rode along with our officers, which put the word out in the community that a new court was in place and we were serious about handling these difficult and dangerous cases. The roundup was a success with more than 40 defendants arrested (out of 200 attempted; these were our best results on a warrant roundup to date), the community was behind us, and our court was off and running.

Previously, Court No. 2 exclusively handled probate matters. Once Judge Laird took office, she instituted the criminal docket to handle misdemeanor assault-family violence cases. Our docket currently handles only half of such cases for the county so that we can compare how the remaining cases fare on a regular court docket in Montgomery County.

How the new court differs

Most cases on a regular docket are not set for arraignment until at least a month after the offense, and even then they are given a reset for another month after that. The prosecutors assigned to those courts work all misdemeanor offenses so they handle hundreds of cases, and the victims in domestic violence cases get their required phone call but often not as much attention as we prefer. There just isn't as much time in a busy and fast-growing county to handle each case with the specialized attention we would otherwise like to provide.

This new, specialized docket aims to change that. My position covers all of the County Court-at-Law No. 2 cases from start to finish. As the sole prosecutor, I handle intake, screening the cases for enhancements, contacting the complainants prior to filing the case, and

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maintaining contact with the complainants through the duration. I always make my own contact calls to the complainants. After I have talked to them, I may refer them to one of our victim assistance coordinators for services or other referrals, but I always encourage them to call me if they need something. So far, I have found that my personal contact with the victims is often what will make or break the case.

Due to the dedicated docket, the cases are fast-tracked. Defendants have court arraignment within a couple of weeks on average after an arrest. The cases have only two settings: arraignment and a pretrial hearing two weeks later. At the pretrial setting, the parties either reach a plea agreement, or the case is set for trial. Once it is set for trial, the court no longer accepts a plea bargain. This method is definitely different from other courts in our county: No longer are defense attorneys able to set cases on the trial docket to "bluff" us into a better plea.

The accelerated docket seems to have a strong effect on both sides of the table. I had to figure out how to get my case files from intake quickly, review them, call the victim, file charges, procure the evidence from the law-enforcement agency, and review it all in time for court. At the same time, the defendant doesn't have time to wear the victim down with a pending case until she changes her mind about cooperating. When I talk to the victim before defense counsel does—and oftentimes before the defendant has had a chance to pressure her—I get to explain a lot of things: that she has some power to keep herself safe while the case is pending, that she can call me if her abuser threatens her into dropping the charges, and that our office can help her relocate if she needs to. In a lot of cases, by the time the case is set for trial (often about a month after the offense), the emergency protective order is still in place, the victim is still emotionally involved in seeing the case through, and memories are still very fresh. In the vast majority of my cases, when I walk into arraignment I have already talked to the victim, listened to the 911 call, and have the photographs in the file; I know exactly what the case is worth. And that is usually two weeks after the offense occurred.

As for the defense bar, it has also quickly adjusted to the accelerated docket. Those attorneys who handle a lot of domestic violence cases have already figured out to sit down with me between dockets and work the case out early. Both parties have to labor just as hard to keep up with the court's pace, and nobody really gains an advantage from the quick docket. Judge Laird is firm and fair and does not give either side any room to push her rules. Once everyone realizes this, a general atmosphere of working within the rules takes over, and everyone adjusts accordingly.

Part of my job is to improve relations with our law enforcement community. I have started training officers on how to investigate and document a domestic violence scene, determine the aggressor, get information from witnesses, write more details into their reports to avoid hearsay, comply with *Crawford*, and deal with recanting witnesses. Better contact with law enforcement can be the key to proving a case that I otherwise couldn't, so I give out my number and tell officers to call me if they have questions while on the scene. They appreciate having a contact with our office they can call, and I have seen a difference in attitude since we began working with them to improve communication.

Thus far, the docket has started with good success. Initial results from our dedicated domestic violence court show an average conviction rate of around 85 percent. Prior to this docket, the county-wide conviction rate for such cases was hovering around 50 percent. While there have been many kinks to work out of the new system, we are cautiously optimistic that we can extend our early success into long-term stability. One of the early issues was simply getting the cases transferred by the court, jail staff, and county clerk's office from the originating court into Court No. 2 at the time of arrest. I also had to figure out the logistics of making my call to the victim, file the charges, get the case to the investigator and victim assistance coordinator, then have the case file back in my office in time for the docket, all within just a few days. Getting the evidence into my file and reviewing it in time for docket was also an issue. In our county, the wait for a 911 recording takes between four and six weeks, so we had to work out a system to get those more quickly for this court. I had to sit down with every person involved in the chain and decide on a course of action based on how long it takes everyone to complete each part. I must say I am fortunate to work with a wonderful team of individuals who are all dedicated to their jobs, and

that made the transition much easier! After the first couple of months, we started getting the basics down, and then it became simply a tracking game of staying on top of the docket and making sure the files were moving smoothly through the system.

While we count our initial conviction rate as a success (including Class C assaults with family violence findings that we can use later for enhancement purposes if defendants commit a future DV offense), we also count as a success that we are getting to some of the root causes of the violence in the home. This is especially true when the case is not one that we can prove and we know the victim will stay with her abuser. We keep track of the number of defendants taking the Batterer's Intervention and Prevention Program (BIPP) and whether it is part of a probation term, in return for a reduction in charges, or even as part of an agreement to dismiss the charges. We are also at the very beginning stages of implementing our own BIPP program in our county jail for inmates who accept jail sentences (although this BIPP will not be state-certified because it's condensed and shortened). Eventually, our goal is to expand our domestic violence division to handle all misdemeanors, adding more dedicated misdemeanor and felony prosecutors, and allowing Montgomery County to better prosecute these difficult cases. We hope that our initial success in our first dedicated court will push us farther down the path toward that goal. ❇

Why we fight against domestic violence

An excerpt from TDCAA's new book, *Family Violence Investigation & Prosecution*

By Ellic Sahualla and Patricia Baca
Assistant District Attorneys in El Paso County

The family is the core of a community and the thread that ties individuals to something larger. When something so elemental is twisted by violence, it undermines everything about our way of life. Yet the criminal justice system has traditionally been ineffective in combating family violence, so the sickness only festers.

In El Paso, we decided we weren't going to accept that any longer. With a lot of hard work, community collaboration, and some luck, we developed an innovative, aggressive program that's been overwhelmingly successful. This chapter is about sharing that program so others can benefit from the lessons we had to learn the hard way.

Family violence by the numbers

One of the most disturbing things about family violence is the sheer scale of the problem. Consider calls to the National Family Violence Hotline. In 2010, there were 198,760 calls; in 2011, that number jumped to 208,662, a 5-percent increase.[1] Texas alone accounted for 17,331 calls in 2011.[2] While our largest cities—Houston, Dallas, Fort Worth, Austin, and San Antonio—accounted for 46 percent of those calls,[3] that means small towns and rural areas generated even more. Family violence is a problem in communities everywhere.[4]

Escalation is also a disturbing trend. Consider the following data:[5]

Family Violence in Texas

Year	# of Incidents	# of Murders
2001	180,385	113
2002	183,440	117
2003	185,299	154
2004	182,087	116
2005	187,811	143
2006	186,868	120
2007	189,401	104
2008	193,505	136
2009	196,713	111
2010	193,505	142

As these numbers reveal, while there are small fluctuations from year to year, there's been a relatively steady increase in family violence incidents over the last 10 years. Worse, traditional law enforcement techniques haven't made a dent in the number of even the most serious cases: those in which a victim is killed by her abuser.

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These aren't crimes that happen in isolation, either. They touch lives and families everywhere and profoundly affect people who aren't victims themselves. The Texas Council of Family Violence reached out to Texans in a 2002 survey to see what people had to say about the issue. Their findings are summarized below:[6]

- 74 percent of Texans said that they or someone they're close to have been a victim of family violence;
- 47 percent reported having personally experienced family violence;
- 31 percent had been severely abused at some point in their lives;
- 75 percent of Texans claimed that they would call the police if they experienced family violence, but only 20 percent of those who reported having experienced family violence actually called the police;
- 73 percent believed that family violence is a serious problem in Texas
- 84 percent felt that they could personally do something about family violence;
- 74 percent recalled recent communications concerning family violence; and
- 78 percent would be more likely to vote for a political candidate who helped family violence victims.

These numbers were higher among Hispanic Texans, which the survey over-sampled to trace the unique experience of family violence in the Hispanic community:

- 77 percent of all Hispanic Texans said that they or someone they're close to had been a victim of family violence;
- 64 percent reported having personally experienced family violence;
- 39 percent had been severely abused at some point in their lives;
- 18 percent reported being forced to have sex against their will;
- 40 percent of Hispanic victims took no action whatsoever in response to family violence;
- 63 percent recalled recent communications concerning family violence; and
- 86 percent would be more likely to vote for a political candidate who helped family violence victims.

While this survey is now a decade old, the number of annual family violence incidents has only increased since it was administered. There's nothing to indicate that a new survey would reveal any improvement in public perception about family violence. In fact, as of 2011, only 38.5 percent of Texas women had a positive view of law enforcement's efforts regarding family violence,[7] and a full 50.9 percent felt that the State of Texas simply wasn't doing enough to help victims.[8] If anything, the problem has only gotten worse.

Why do we fight?

Numbers are one thing; experience is another. As prosecutors, we've seen innumerable victims caught up in a cycle they can't get out of. Whether it's financial, emotional, or community pressure, or simply a sad reality in which family violence has become a normal part of everyday life, many victims end up trapped. Two different victims I've dealt with exemplify the issues seen in family violence cases.

In one case, I prosecuted a defendant for misdemeanor assault family violence where the victim had simply been pushed into some furniture a couple of times. The injuries were minimal: some light bruises on her legs. The victim was a tiny, sweet, timid lady who wasn't in the country legally and relied on the defendant for a place to live and financial support. The defense's theory of the case was that she'd made the outcry of family violence to get a U-Visa. When I came down from court and let the victim know the jury had found the defendant guilty, she started to cry. I'd been prosecuting family violence long enough to be jaded, and I immediately assumed that she was upset because he'd been convicted. That's when she grabbed my hand tightly and whispered something through her tears that I'll always remember: "If I'd just wanted a visa I could've reported him the first week we were together. He got away with it so many times. *So many times.* Until now I thought he always would." She'd been a virtual slave to a horrible existence and the system had repeatedly failed to help her. *Victims stuck under an abuser's thumb are why we fight.*

Another victim who comes to mind had been beaten severely over and over again. The defendant was a gang member who'd already had a pen trip, and pretty much any time he wasn't in jail he was putting his hands on the victim. When officers responded to the most recent attack, they literally had to pull the defendant off of her as he choked her. The strangulation was so bad that the next day, her face was covered in petechiae (spots that resemble a rash that are caused by burst blood vessels). She didn't want to prosecute and wasn't particularly sympathetic. She had a substantial criminal histo-

ry herself and spent every hearing mad-dogging me from the gallery of the courtroom. When the defendant was convicted and sentenced to another stretch in the penitentiary, she had just one question for me: "How does 'good time' work? How long did you take him away from me for?" *Victims who've been in the cycle of violence for so long that it becomes a normal, acceptable way of life are why we fight.*

And in case after case, we see the effects of family violence on those close to victims, especially their children. Kids exposed to family violence are tragically commonplace. In 2010, shelters and resource centers served 80,869 people in Texas, and 31,378 of them were children.[9] The mere fact that kids see or hear abuse in the home makes them victims as well. Most experts agree that violence is a "'learned behavior' and 'much of that learning takes place in the house.'"[10] According to the National Center for Children Exposed to Violence, children who see family violence, especially repeatedly, are at a much greater risk for numerous problems later in life, including perpetrating violence themselves.[11] I've personally had the heartbreaking experience of seeing young people as witnesses to a family violence case one day and family violence defendants a few years later. *Children, the next generation, our future, are why we fight.*

Fighting smarter

The drive to make a difference is a good thing, but fighting smarter is essential. As the numbers above demonstrate, law enforcement efforts simply haven't been effective in curbing family violence. I've spoken to attorneys on both sides of the bar in jurisdictions across Texas and come to one conclusion: A big part of the problem is that we've tended to approach family violence like any other crime, failing to appreciate what a unique phenomenon it really is.

Family violence can't be fought like just any other crime. An offense that happens within a family or intimate relationship is an entirely different animal from, say, an assault by a stranger or acquaintance. The complex dynamics at work behind these cases put family violence, especially misdemeanor assaults with relatively minor injuries, among the most difficult crimes of all to prosecute. Without a strong working knowledge of the legal standards and practical techniques unique to family violence, even an otherwise solid attorney can't be effective.

Family violence prosecutors inevitably deal with countless cases in which the victim doesn't want to prosecute or actively works against you. It's easy to decline or dismiss a charge when you see that pursuing it will be an uphill battle. That might be the right call with other types of cases, but we're never going to make a meaningful difference in reducing family violence if we don't protect the most defenseless victims: those who must be saved from themselves. Simply put, what's been business as usual just isn't good enough anymore.

A new approach

In El Paso, we looked at the suffering in our community and got fed up with the status quo. Our District Attorney, Jaime Esparza, decided to make fighting family violence one of his very highest priorities, and our team set about developing a radical program for addressing it. This section covers the goals that we had, the steps we took to build partnerships and consciousness about the issue in the community, and the position our office adopted towards these kinds of cases; the next section will go over the specifics of our program.

After pooling our collective experiences and discussing the issues with some of the experts in the field, we settled on three things:

- creating an early intervention program,
- engaging both the community and outside agencies in the fight against family violence, and
- changing the attitude and approach that our office took towards these cases.

We implemented the early intervention program—our 24-hour contact initiative—on August 11, 2008. Our plan for the program was to establish contact with family violence victims within 24 hours of the defendant's arrest to ensure their safety, let them know what services were available to them as victims, gather additional evidence to aid in the prosecution of the cases, and shorten the time it took to bring family violence cases all the way to plea or trial. The program involves review of every family violence case handled this way by a team including the district attorney himself and works because of the ongoing efforts of our investigators, victim advocates, and attorneys. The specific steps we now take in prosecuting these cases are described in detail

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under "From Emergency Call to Jail Call in El Paso," below.

What we hoped to accomplish wasn't just greater success in prosecuting family violence cases. We wanted to make sure we were working to change the perceptions of the community itself, starting with our own office. We also focused on developing true expertise in our office as a whole (not just within our family violence unit) in prosecuting these cases. And above all, we wanted to make sure that victims were safe, families were whole, and violence didn't stay hidden behind closed doors.

We knew we couldn't do all of that alone, so one of our first steps was to develop strong partnerships with other stakeholders in our community. Law enforcement was an obvious starting point. Instead of officers seeing prosecutors only in the courtroom, we decided we needed to open a dialogue with them and see what they actually dealt with in the field. We now regularly have family violence prosecutors ride along with officers on special duty, responding principally to family violence calls.[12] Doing so has given each side a greater respect for the other and a better understanding of what needs to be done to successfully investigate and later try a family violence case. The investigative techniques described in Chapter 3 of our book are the best practices developed through this collaboration. Seeing what officers deal with has also made our attorneys much better at conveying the tense drama of a family violence scene to a jury.

Other relationships were also cultivated and developed, such as our work with representatives from Fort Bliss, El Paso's military base. Teaming with military personnel has helped us understand the challenges that family violence presents within armed forces life. For example, the interplay of military culture and the realities of military life require special sensitivity. A defendant who suffers from post-traumatic stress disorder requires a different approach than one who's simply a violent person. Our partnership with the military has also provided unique opportunities to address family violence on-base in ways we simply can't on our own, such as having the defendant closely monitored by a superior officer while his charges are pending, which helps make sure the victim stays safe.

More broadly, we've worked to make family violence a highly visible issue in our community and enlisted the help of outreach programs, schools, and entities such as the Center Against Family Violence to change public perceptions about reporting and prosecuting these crimes. One of our biggest efforts has been an annual "Help-Hope-Healing" conference. The conference isn't for the professionals who deal with family violence, but instead for its victims and their families. We bring in celebrity speakers who have endured family violence to talk about their experiences and our attorneys and staff members join victims in a "walk across El Paso" to show them they aren't alone. Attendees are provided with as many services as possible, but perhaps the most important resource they're able to tap into is each other. By making every effort to publicize the event and its results, we help raise awareness and encourage victims to report attacks and hold attackers accountable.

We've also begun to address the cycle of violence before it begins through education. We partnered with the El Paso County Attorney's Office, which prosecutes juvenile offenders, and created a campaign called "¡No te dejes!" or "Don't let yourself!" Its centerpiece is a presentation by attorneys from our two offices aimed at teenagers who may be exposed to dating violence. It includes a high-production-value video that follows the life of a high school student who gets into an increasingly abusive relationship with a boy she goes to school with. After showing the video, the presenter discusses teen dating violence with the young audience members, providing them with information, answering their questions, and leaving them with a packet of materials that discusses the issues and provides resources they can turn to. Dozens of these presentations have been delivered at schools and other venues all across El Paso, and the reception has been strongly positive. While it may seem that getting through to teenagers is a lost cause, our experience is that they've been receptive, and we believe that talking to young people about family violence reduces their vulnerability to it as adults and helps change the next generation's sense of what type of behavior is acceptable.

There are similar programs for adults that we've created and promoted, including three different video presentations. The videos were made available in both English and

Spanish. They explore the signs and cycle of family violence, the creation of safety plans (escape preparations by victims who know they're in an abusive relationship), and finally, the issues faced by and services available to undocumented victims, who are particularly vulnerable to family violence because they have no legal residency status in the United States. These presentations have been delivered to groups of women all over El Paso and met with a strongly positive response. Like the teen dating violence initiative, what we've found is that, quite apart from the specific information these efforts convey, it's the message they send about family violence itself that's had a real impact, and we've seen firsthand how attitudes have started to change in our jurisdiction. Sometimes it's not about what you say; it's about starting the conversation.

Attitudes in the courthouse

It's one thing to foster change in the community and another to reflect back on ourselves. Part of changing our approach to family violence cases has been developing a new culture in our own office. We had to change the sentiments that went along with the traditional approach to family violence, which started with our district attorney himself. Mr. Esparza repeatedly hammered home how personally important these cases were to him, and that helped urge an evolution in how seriously our attorneys and staff members handled family violence. He'd also always had a commitment to keeping victims involved in the court process, and that was reemphasized in this context. Over time, it became unthinkable not to vigorously pursue the same cases that would've once been dismissed or declined outright, and we worked with victims more closely than ever before.

Beyond that, pursuing these cases aggressively meant buckling down and staying the course. The reaction from the defense bar in particular was stunningly negative. Many defense attorneys became angry and confrontational when cases they were once getting dismissed for a non-prosecution affidavit now had notes in them from the DA himself. Some judges became concerned about backed-up dockets. And our own attorneys faced a learning curve as they developed the skills necessary to confidently try family violence cases. Changing the way we handled them meant having some grit and sticking to our guns in the face of adversity. It was also an opportunity, though, to let those tough circumstances further unite us as an office. Eventually we got through the difficult early days, and it was worth it.

From emergency call to jail call in El Paso

From the time an emergency call is placed in El Paso County, three overall steps take place in the prosecution process. The first is, naturally, the investigation of the crime. From there, we follow up on cases and evaluate them at our daily family violence meetings. Finally, the cases we accept wind up in court, to be prosecuted either by the attorney assigned to that court or by one of our dedicated family violence attorneys. This section describes that process from beginning to end.

Investigation. The initial investigation of a family violence case is the foundation of its eventual strength at trial. We're lucky enough in El Paso to have a 24-hour intake system known as the District Attorney Information Management System (or DIMS). During any warrantless arrest situation, which includes family violence,[13] the responding officer can call DIMS at any time of the day or night and speak with an assistant district attorney to present the case. The prosecutor reviews the case and decides whether our office will accept it for prosecution, so a charging decision is made on the spot. One of the best aspects of this system is that an attorney is involved from the beginning and can make sure that officers ask the sorts of questions and collect the sorts of evidence that will allow us to successfully pursue the case in court.

The prosecutor isn't actually there on the scene, though, and the jury that hears about the case later on certainly won't be, so we decided to do something about that. Thanks to the Office of the Governor's Criminal Justice Division, we were given grant funding to provide the El Paso Police Department with video cameras to record family violence investigations. Officers can now record statements from the victim, the defendant, and anyone else involved,[14] memorialize the scene itself, and document any injuries to either party. This has provided an unprecedented kind of evidence that dramatically captures the details of a chaotic situation and prevents later recantations.

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Once all of the evidence is collected and a charging decision has been made, the case moves from being a police matter to a prosecution matter. Local law enforcement officers have been trained to be sensitive to a victim's needs, and victims are provided with services and resources ranging from standby assistance and transportation to emergency protective orders for when the defendant bonds out of jail. But as far as the criminal case is concerned, the next step for us is the family violence meeting the following business day.

Meetings. Every day we have a team that meets to review family violence cases and act on them as necessary. The work begins well before the meeting though. Two clerks assigned to the unit come in at 7:00 every morning to gather the information we'll need for the meeting. One clerk runs the jail roster of all defendants who were arrested on outstanding warrants, pulling any family violence cases in which an arrest was made within 10 days of the crime,[15] while the other clerk collects all family violence cases processed as warrantless arrests through DIMS on the previous day. The two clerks then work together to make sure each file contains all the evidence that was collected as well as an up-to-date criminal history on each defendant. We've streamlined this system to the point where all of that's usually done by 8:00 a.m.

From there, we have two teams that each consist of a victim advocate and an investigator. They divide the cases up based on the area of town where the victim lives and then they head out to speak with them face-to-face. Safety is paramount. Our teams note whether the defendant is still in custody and they're very careful when they go knocking on doors. The investigators who have been chosen to work with our unit are highly experienced former police officers who know how to handle volatile situations.

Once the team makes contact with the victim, they find out if she and her family members are safe; if not, we offer to take her to a shelter. Our victim advocate goes on to provide the victim with information about the services available to her, including the brochure found on the CD included with our book. The advocate also explains how the criminal justice system works and gives the victim some ideas for developing a safety plan. Our investigator gathers additional contact information, such as the numbers of family members and close friends, so we have alternative ways of reaching the victim (who may eventually become uncooperative) later on. He also obtains a records release form if she received medical treatment, takes photographs of any visible injuries (bruises in particular are usually much more prominent the day after an assault), and collects any other evidence that might have been overlooked or unavailable during the initial investigation. All this is documented in detail in our computer system so that prosecutors can get an accurate sense of exactly what was said and done during the home visit. This information is put together into complete files by the two secretaries assigned to our unit, and they play an important role at the meetings.

During those daily meetings, each case is evaluated by a team of prosecutors, investigators, and victim advocates. With each case, the police report is read amongst the group and the photos, videos, emergency calls, and criminal histories are reviewed. Whatever the victim said during the home visit is also discussed. Further, we're able to immediately identify defendants who are on parole or probation and those who have other pending cases already. That allows us to address each defendant appropriately by filing a motion to revoke or upgrading the present case if possible.

As the meeting proceeds, our secretaries are responsible for entering a wide variety of information into a database we maintain. We keep track of each case and note whether there were visible injuries, an emergency call, any weapons used, if alcohol was involved, whether the victim was pregnant, and so forth. These data points help us keep track of trends in family violence so we can remain proactive instead of reactive.

After a thorough review of the evidence, a minimum recommendation for any plea agreement is made for each case by the DA himself, or when he can't be present, by the chief of the family violence unit. That recommendation is physically written into the case file in bold red ink that no one could overlook, which is why these recommendations have come to be known as "red writing" here in El Paso. The red ink began accidentally, but it quickly became instrumental in changing the culture of family violence prosecution in our courthouse. Once a prosecutor or defense attorney picks up a file and

sees the red writing from the district attorney himself, they know it's a case to be taken seriously.

Prosecution

Besides the meeting participants, our family violence unit consists of a chief, a supervisory attorney who screens, presents, and prosecutes felony cases, and specialized family violence prosecutors who handle misdemeanors (which constitute the majority of family violence cases) in a dedicated family violence court. Having a team and a court dedicated to family violence is a huge asset. These are cases that require specialized knowledge to pursue successfully and a judge who's sensitive to the issues and conversant in the complex body of law implicated in family violence. The unit is also a resource to the other 80 or so attorneys in our office who end up with the many family violence cases that we chose not to keep "in house." These cases are tough and often complicated, but they make a fantastic training opportunity for new and experienced prosecutors alike; the lessons learned in taking even a misdemeanor family violence case through trial can be applied to dealing with crimes of any type or level of seriousness.

Having a group dedicated to tackling family violence is also important because it increases efficiency. Our unit has great standing relationships with a variety of agencies. The ability to contact our liaisons and almost instantly obtain evidence or other assistance makes prosecuting these cases a much smoother process. A specialized unit also gives us the opportunity to review cases office-wide and make sure we're achieving the outcomes we want. Our chief and supervisory attorney look over every family violence case that's closed in El Paso County, and that helps us ensure each case is taken seriously and every victim is contacted throughout the prosecution process.

Developing a unit (or in small offices, at least a person) who deals exclusively with family violence cases is ideal. If it sounds expensive, you're right—it takes resources that can be scarce, but they're out there. Much of what we do is paid for through grants, and I'd encourage any office thinking of creating or expanding a family violence program to explore alternative funding that takes the burden off local taxpayers. It's tough to admit that justice sometimes has a price tag, but it's definitely worth finding a way to pay it.

Evaluation. Our program has been a resounding success, but you don't have to take our word for it. The Criminal Justice Division of the Office of the Governor recently sponsored a thorough evaluation of our work. The study was conducted by the Institute on Family Violence and Sexual Assault, which is part of the Center for Social Work Research at the University of Texas at Austin, and it was led by veteran researcher Dr. Noël Busch-Armendariz. The evaluation focused on the impact, effectiveness, and efficacy of our program in terms of our response to victims of family violence and whether our program could be successfully replicated elsewhere.[16]

The study included interviews of members of our unit, judges, defense attorneys, law enforcement officials, personnel from the Center Against Family Violence, community supervision representatives, and perhaps most importantly, real-life victims of family violence. The researchers coupled this qualitative approach with quantitative data and delivered a nearly 60-page long summary of their findings. Its key conclusions were as follows:

1) Implementation of the 24-hour contact program has instituted a noteworthy paradigm shift in El Paso, where family violence is viewed as a serious and prosecutable crime that will not be easily dismissed and for which offenders will be held accountable for their crimes of violence. The program has altered legal practices by criminal justice professionals—including ADAs, law enforcement, and defense attorneys—and increased skill-building, peer support, and mentorship with the district attorney's office. Unfortunately, myths about family violence persist, so effort to address these myths should continue.

2) The 24-hour contact program provides significant emotional support to family violence victims and increases their access to important community and financial resources.

3) Collaborations among key players in the criminal justice system and community victim service providers (e.g., law enforcement, local family violence shelter, probation, and the Battering Intervention and Prevention Program) have been considerably strengthened as a result of the program.

4) The prosecution of family violence has been significantly enhanced through the collection of

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better evidence, and increase in evidence gathering, improved preparation of case files, and an increase in preparedness and effectiveness of ADAs for trial.

5) Victims and professionals in the criminal justice system reported a range of mixed reactions to the district attorney's stance on victimless prosecution. Some favored having the burden of responsibility placed on ADAs, while a minority of victims expressed frustration with diminished control over decision-making regarding the prosecution of offenders.[17]

While the researchers noted that our program was "the only one of its kind in the country," they found the potential for replication elsewhere "feasible and credible."[18] And what did the study determine were the most important elements for instituting similar programs elsewhere? Leadership from prosecutor's offices and buy-in from the rest of the folks involved.[19] In other words, if your office is dedicated to making a change in how these cases are prosecuted and what the community's perception of family violence is, it can. All it takes is the courage to act and the commitment to see it through despite the challenges you'll face.

Knowing that we really can make a difference is why we fight. ❇

Editor's note: The book, *Family Violence Investigation & Prosecution* by Ellic Sahualla and Patricia Baca, is available at www.TDCAA.com for $40.

Endnotes

1 Email from Emily Toothman, Hotline Program Specialist, The National Domestic Violence Hotline, to Patricia Baca, Family Violence Unit Chief, El Paso County District Attorney's Office (Feb. 20, 2012, 12:24 MST) (on file with author).

2 Id.

3 Id.

4 See Texas Department of Public Safety, *The Crime Report of 2010*: Chapter 5—Family Violence 40–46 (2010), www.txdps.state.tx.us/crimereports/10/citCh5.pdf (breaking down family violence incidents across all jurisdictions in Texas).

5 *Id.* at 37; Texas Council on Family Violence, Family Violence Statistics in Texas 1 (2009), www.tcfv.org/pdf/dvam2009/Year%202009%20Family%20Violence%20Statistics.pdf.

6 Texas Council on Family Violence, Facts and Statistics, www.tcfv.org/resources/facts-and-statistics (last visited March 2, 2012).

7 Noël Busch-Armendariz, Laurie Heffron, & Tom Bohman, Statewide Prevalent of Intimate Partner Violence in Texas 44 (2011), available at www.utexas.edu/ssw/dl/files/cswr/institutes/idvsa/publications/DV-Prevalence.pdf.

8 Id. at 43.

9 Texas Council on Family Violence, 2010 Family Violence in Texas, *The River,* Oct. 2011, at 3.

10 Rosie Gonzalez & Janice Corbin, The Cycle of Violence: Domestic Violence and its Effects on Children, 13 Scholar 405, 419 (2010).

11 National Center for Children Exposed to Violence, Statistics, www.nccev.org/resources/statistics.html#domestic (last retrieved March 2, 2012).

12 If you choose to do the same, you're going to face ridiculous claims that your office is disqualified because an assistant district attorney might be a witness. That's simply not true. See *Gonzalez v. State*, 117 S.W.3d 831, 387–38 (Tex. Crim. App. 2003) (defendant must show actual prejudice based on violation of advocate-witness rule for relief to be possible); *House v. State*, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997) (same); see also Tex. Disciplinary R. Prof'l Conduct 3.08, cmt. 9 (rule "is not well suited … for procedural disqualification. [I]t serves two principal purposes. [T]o insure that a [client isn't] represented by a lawyer who could be a more effective witness [and] is not burdened by counsel who may have to offer testimony that is substantially adverse to the client's cause").

13 Tex. Code Crim. Proc. art. 14.03(a).

14 Texas is a "one-party consent" state when it comes to recording a conversation; as long as the recording officer consents, the recording is legal and admissible. Tex. Pen. Code §16.02; Tex. Civ. Prac. & Rem. Code §123.001(2); see generally Tex. Code Crim. Proc. art. 18.20 (providing relevant definitions).

15 There's nothing magical about the 10-day cutoff. We just felt intuitively that after about 10 days the victim would've reconciled with the defendant or not and she was less likely to be in need of the immediate services our office might provide.

16 Noël Busch-Armendariz & Sapana Donde, The 34th Judicial District Attorney Takes on Family Violence Crime: An Evaluation of the 24 Hour Contact Initiative 7 (2011), available at www.utexas.edu/ssw/dl/files/cswr/institutes/idvsa/publications/El-Paso.pdf.

17 Id. at 8–9.

18 Id. at 9.

19 Id. at 41.

Handling a due process contempt hearing

Called to try a contempt case in a neighboring county, one prosecutor takes a crash course in contempt and shares his newfound knowledge with his peers.

By Cody Henson
Assistant District Attorney in Williamson County

The mere utterance of the word "contempt" strikes fear into the heart of attorneys. It brings to mind visions of Vinny Gambini and the Honorable Judge Chamberlain Haller exchanging verbal punches in the classic comedy *My Cousin Vinny*. We gnash our teeth as Mr. Gambini fumbles for words in front of the stoic judge and eventually finds himself held in contempt of court with bail set at $200.

The fundamentals are the same, but the process would have played out differently in Texas. Imagine that Mr. Gambini is a Texas attorney and the Honorable Chamberlain Haller is a district court judge. As Mr. Gambini walks off the ledge of contempt, he is entitled to a personal recognizance bond, legal counsel, and a full due process hearing to determine his guilt or innocence.[1] And who is going to handle the contempt hearing? Queue the attorney pro tem or special prosecutor! You, as that prosecutor, have now been tasked with the responsibility of learning the law, marshaling the facts, and presenting the case to a court during a due process hearing. So what are your responsibilities? What is going to be expected of you? Are you really going to have a hearing?

In February 2012, I volunteered to do just such a job in a neighboring county. In performing my duties I found myself trying to navigate a complex process that is not clearly defined in any statute, caselaw, or learned treatise. Was it direct or constructive contempt? Civil or criminal contempt? What is the punishment range? What were the first steps I needed to take? Were we actually going to have a hearing? What if the contemnor wanted to plead guilty to the allegations? What authority did I have to resolve the case outside of a hearing? As I prepared for my duties I found the answers to some of these questions and learned some valuable lessons along the way. I hope that this article will somehow assist the next prosecutor or local attorney who is called upon to perform such a task.

What is the law?

The law on contempt of court is broad and often in conflict and hard to follow. For the sake of brevity this article will provide a brief overview on the law of contempt, focus specifically on what to do when an officer of the court is held in contempt, and finally, explain how to prepare for what is often called a "due process hearing."

To effectively prosecute a contempt of court charge it is important to have a basic understanding on the law as it relates to contempt. Section 21.002(a) of the Texas Government Code provides courts with the authority to punish for contempt. Contempt is a "broad and inherent power of a court."[2] "A court shall require that proceedings be conducted with dignity and in an orderly and expeditious manner and control the proceedings so that justice is done."[3] Contempt of court is broadly defined as "disobedience to or disrespect of a court by acting in opposition to its authority."[4] "Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during litigation, or otherwise tends to impede, embarrasses or obstruct the court in discharge of its duties is guilty of contempt.[5]

An attorney may be fined or imprisoned for misbehavior or for contempt of court.[6] The punishment for contempt is a fine of up to $500, confinement in the county jail for up to six months, or both.[7] Despite this punishment range, "an attorney may not be suspended or stricken from the rolls for contempt unless the contempt involves fraudulent or dishonorable conduct or malpractice."[8]

It is important to remember that contempt "is a tool that should be exercised with caution."[9] The Court of Criminal Appeals noted "[c]ontempt is strong medicine"—the alleged contemnor's very liberty

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is often at stake—and so it should be used 'only as a last resort.'"[10]

Civil or criminal contempt?

Contempt can roughly be classified as either civil contempt or criminal contempt.[11] The question you need to resolve is why was the offending party held in contempt? Was it because he refused to comply with a court order, or is he being punished for some completed act which affronted the dignity of the court?

It is important to distinguish between civil contempt and criminal contempt. Civil contempt is "remedial and coercive in nature" and seeks to "persuade the contemnor to obey some order of the court ..." while criminal contempt is "punitive in nature."[12] In criminal contempt "the contemnor is being punished for some completed act which affronted the dignity and authority of the court."[13] The distinction between the two is also important to determine what rights are afforded to the accused. In a criminal contempt case the accused may exercise his or her constitutional right against self-incrimination.[14]

Direct or constructive contempt?

Next you need to determine if the contemptuous behavior was direct or constructive. Direct contempt occurs within the presence of the court.[15] Constructive contempt occurs outside the court's presence.[16] In most cases a court maintains authority to immediately address and punish direct contemptuous conduct.[17] This is based upon the premise that the court has direct knowledge of the contemptuous conduct and must expeditiously quash any disruption and maintain the order of the court;[18] however, there is no requirement that a judge summarily punish such direct contemptuous conduct. The analysis is based upon exigency and "when the immediate need to maintain decorum in the courtroom dissipates, so too dissipates the judge's power to punish the contemptuous conduct without first affording the contemnor notice and an opportunity to be heard."[19]

In a constructive contempt situation, a court may not summarily punish based upon alleged contemptuous conduct as there is no immediate need to quell the disruption.[20] Due process requires that the accused party receive notice of the allegations and an opportunity to prepare a defense.[21] As a notice requirement, the court must issue a valid show cause order or some equivalent legal process that provides the alleged contemnor with notice of the allegations and provides him with an opportunity to prepare a defense.[22]

When an officer of the court is held in contempt, special procedures are triggered and must be followed. Section 21.002(d) of the Texas Government Code provides that an officer of the court who is held in contempt by a trial court "shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence."[23] After the offending party is held in contempt, the trial court should refer the matter to the presiding judge of the administrative judicial region in which the alleged contempt occurred.[24] The Texas Government Code requires that the presiding judge of the administrative judicial region assign a judge, other than the judge of the offended court, to determine the guilt or innocence of the officer of the court."[25]

Special prosecutor or attorney pro tem?

When an officer of the court is held in contempt, courts often call upon the local or an adjoining district or county attorney's office or members of the local bar to assist in prosecuting the contempt charge. This role is frequently referred to as a special prosecutor or an attorney pro tem. Although the terms are often used interchangeably, it is important to understand the distinction between the two. A special prosecutor is an attorney who is not a part of the district attorney's office who is enlisted to assist the district attorney in a particular case.[26] In appointing a special prosecutor it is not necessary that the district or county attorney be absent, disqualified, recused, or otherwise unable to perform her duties.[27] Approval of the special prosecutor by the trial court is not required, and the "district attorney remains primarily responsible for the prosecution, control, and management of the case."[28]

Alternatively, in defining the role of an attorney pro tem, article 2.07 of the Texas Code of Criminal Procedure states in part that "[w]henever an attorney for the state is disqualified to act in any case or proceeding, is absent from the coun-

ty or district, or is otherwise unable to perform the duties of his office, or in any instance where there is no attorney for the state, the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state."[29] If the appointed attorney is not an attorney for the state, he or she must file an oath with the clerk.[30]

My own journey

My journey began when the presiding judge of the court in which the attorney was held in contempt contacted our office for assistance in prosecuting the charge, which arose during a contested hearing on a motion to adjudicate. It was alleged that during the hearing the contemnor had engaged in conduct that disrespected the court. Due to the fact that members of the local district attorney's office were present during the hearing and were now witnesses in the case, our office was called upon to assist in the prosecution of the contempt charge.

Prior to writing this article I was not aware of the distinction between a special prosecutor and an attorney pro tem. I have now concluded that my role would most accurately be described as that of an attorney pro tem. Although the local district attorney's office had been neither formally nor voluntarily recused, an analysis could lead to the conclusion that members of that office staff were key witnesses in the case and were therefore either "disqualified to act" or "otherwise unable to perform the duties of [the] office.[31] Additionally the district attorney did not remain primarily responsible for the prosecution, control, or management of the case.[32] To officially establish my role I filed a proposed order with the judge who had been assigned to hear the case which appointed me as "prosecutor pro tem." Additionally I filed an oath of office and swore to it before beginning the proceedings. However, as an "attorney for the state" this does not appear to be required under article 2.07 of the Texas Code of Criminal Procedure.[33]

On March 14, I packed my books into my Kia Spectra and headed out to a beautiful little town in the heart of the Texas Hill Country for the contempt hearing. In accordance with the Texas Government Code, a visiting judge had been appointed to oversee the hearing and determine the guilt or innocence of the alleged contemnor.[34] I prepared a bench brief prior to the hearing and filed it with the district clerk and provided a copy to the visiting judge and the attorney for the contemnor. It provided a brief outline of the law, the facts of the case, and my arguments in favor of a finding of contempt.

The facts of the case were quite simple. The contemnor and the State's attorneys had engaged in a lengthy contested motion to adjudicate. The contemnor was upset with what he believed to be a failure by the State's attorneys to honor a plea agreement and expressed this concern on several occasions.[35] As the court proceeded to sentencing, the contemnor attempted to exit the courtroom and the court cautioned the contemnor by stating "[Mr. Contemnor], don't leave please. We're not finished and you're being disrespectful to the court by walking out when I'm pronouncing sentence." The contemnor noted he did not agree with the court, and the court again stated the need for the contemnor to be respectful. Instead of heeding the court's advice, the contemnor interjected and said, "I think you should be respectful of what went on before we ever got here," and informed the judge that he believed the court was not following the law.

The contemnor then stated, "I feel like there is a little kangaroo court up here." At this time the court provided the contemnor with the first of several warnings that his behavior was becoming contemptuous: "[Mr. Contemnor, Mr. Contemnor], you're getting really close now to contempt." Before the court could finish the aforementioned statement the contemnor challenged the court to "hold me in contempt." The following exchange demonstrates the court's patience in cautioning the alleged contemnor about his conduct and provide him with an opportunity to retreat from his position.

> The Court: "You want me to hold you in contempt, [Mr. Contemnor]?"
> Contemnor: "Go right ahead."
> The Court: "You want to … you keep on. I will hold you in contempt of court."
> Contemnor: "Whatever. Do what you got to do."
> The Court: "Mr. Contemnor, you really … you really disappoint the court after—"
> Mr. Contemnor: "You're disappointing me, Judge."
> The Court: "Well, I'm sorry you're disappointed."
> Mr. Contemnor: "I'm very disappointed in you."[36]

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The court, after providing the contemnor with at least two direct warnings and several opportunities to retreat from his contemptuous behavior, then continued with the sentencing. After sentencing, the record reflects that the contemnor stated, "Y'all can kiss my ass."[37] Witness interviews and testimony from the hearing revealed that this comment was directed at the assistant district attorneys seated in the jury box, but because this statement occurred in the presence of the court, the contemnor was immediately held in contempt and informed that a citation for contempt would be issued. The contemnor responded by stating, "Have fun in your court, Judge."

As the hearing began I was a little uneasy about how to proceed. Although I had handled several hearings in the past, this was my first contempt proceeding. I was in a courtroom that brought back memories of *To Kill a Mockingbird* and the honorable lawyer Atticus Finch. The witness stand appeared to be only inches from the jury box and certainly looked as if it was not made with comfort in mind. The pews were wooden and the entire courthouse seemed to have remained unchanged since it was built in 1911. It was a beautiful building and a true testament to the rule of law, but somehow a cloud of nerves obscured my senses and I quickly realized that the hearing was about to begin.

I had meticulously prepared this case from the very beginning—I also knew that I was about to ask the court to hold a fellow member of the bar in contempt of court. I understood both the personal and professional ramifications that such a finding could cultivate. However, I also felt a strong need to vindicate the dignity of the court. I felt it was my duty to represent the facts and to seek justice.

Because the county had very few court reporters, one of whom was now diligently reporting this hearing, I had placed a copy of the transcript and a business records affidavit from the original proceedings on file with the district clerk at least 14 days before the hearing. I also provided a copy of the transcript to the attorney for the contemnor. This was probably not necessary, but I wanted to leave nothing at risk in the event of a sustained objection to the admissibility of the transcript. The defendant was not asked to enter a plea and under the assumption that we were proceeding with a bifurcated hearing, I began to call my witnesses.

Although there were more than 12 people in the courtroom when the contemnor was held in contempt, I had narrowed my witness list to only two. The transcript provided the court with a good overview of the facts, but it was devoid of any articulation of voice inflection, physical gestures, or demeanor of the parties involved. I was cognizant that in reversing a conviction for contempt that was based purely upon affidavits the Supreme Court of the United States had recognized:

> "A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record."[38]

It was my belief that such demonstrative evidence could be fully developed only through live testimony. My goal was to provide the court with a personal, blow-by-blow account of the contemnor's alleged behavior.

My first witness was the assistant district attorney who was representing the State in the original proceeding. I offered the transcript of the proceeding and began my direct examination. We covered the nuts and bolts and through his testimony I attempted to paint a picture for the court. It was important to emphasize the tone of voice to demonstrate the disrespect that the contemnor showed to the tribunal.

My next witness was a local probation officer who was sitting in the jury box and witnessed the entire proceeding. The testimony was essentially the same; however, this witness could testify to the comment of "y'all can kiss my ass." This was important as it was this specific conduct for which the contemnor had been cited for contempt. It was also important, in candor to the presiding judge, to establish that this comment was directed at the assistant district attorneys and not the court.

The attorney representing the contemnor did an excellent job in putting forth his client's case. Although no plea had been entered, the contemnor took the stand and commendably accepted responsibility for his conduct. He emotionally testified that he was upset with the State for what he perceived to be a

failure to honor a plea agreement. He communicated the emotion and circumstances that led him to engage in such conduct and expressed his concern that the viability of his law practice would be in jeopardy if he was assessed a long jail term.

In the end the judge found the contemnor in contempt of court and sentenced him to 72 hours in the local county jail. The contemnor was immediately remanded to the custody of the sheriff and an order of "Contempt and Commitment" was filed with the local district clerk. It was over. The process had provided for a full ventilation of the facts and the punishment had been fair.

At the end of the day I learned some valuable lessons. I learned that contempt is strong medicine, and when an officer of the court is held in contempt the law is designed to provide a venue that allows the contemnor to defend or explain his conduct. As attorneys we are accountable for our actions—it is important to remember that we are zealous advocates and in the heat of battle we must guard our words and remind ourselves that we have a duty to "so demean [ourselves] as to show respect for the dignity and authority of the court."[39] When we enter a courtroom it is incumbent that we remember "[a]n attorney is an officer of the court, and the relationship between the court and attorneys is reciprocal. In their proper spheres they both have certain rights, and the rights of one should be recognized and respected by the other. This is essential, if courts are to function in an orderly manner."[40]

I hope that the next attorney who is called upon to act as an attorney pro tem or special prosecutor finds this article helpful. If I can be of any assistance please do not hesitate to contact me at codygranthenson@yahoo.com. I will be happy to share any forms or documents that will help you in your pursuit of justice. ❇

Endnotes

1 Tex. Gov't Code § 21.002(d); see also *Ex Parte Gordon*, 584 S.W. 2d 686, 688 (Tex. 1995); *Ex parte Krupps*, 712 S.W.2d 144, 147 (Tex. Crim. App. 1986).

2 *In re Reece*, 341 S.W. 3d 360, 362 (Tex. 2011).

3 Tex. Gov't Code §21.001(b).

4 *Reece*, supra at 364 citing *Ex Parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) (orig. proceeding).

5 *Ex Parte Norton*, 191 S.W.2d 713, 714 (Tex. 1946).

6 Tex. Gov't Code §82.061(a).

7 Tex. Gov't Code §21.002(b).

8 Tex. Gov't Code §82.061(b).

9 *In re Reece*, 341 S.W. 3d 360, 364 (Tex. 2011).

10 *Reece*, supra at 364 citing *Ex parte Pink*, 746 S.W.2d 758, 762 (Tex. Crim. App. 1988) (citing *Wilson v. Johnston*, 404 S.W.2d 870, 873 (Tex. Civ. App.—Amarillo 1996, orig. proceeding).

11 *Ex parte Krupps*, 712 S.W.2d 144, 149 (Tex. Crim. App. 1986): *Reece*, supra at 365.

12 *Ex Parte Werblud*, 536 S.W. 2d 542, 545 (Tex. 1976); see also *Krupps*, supra at 149.

13 *In re Reece*, 341 S.W. 3d 360, 365 (Tex. 2011); see also *Werblud* supra at 545.

14 *Werblud*, supra at 547.

15 *Ex parte Gordon*, 584 S.W. 2d 686, 688 (Tex. 1995); see also *Ex parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986).

16 *Gordon*, supra at 688, see also *Ex parte Chambers*, 898 S.W. 2d 257, 259 (Tex. 1995); *Ex parte Werblud*, 536 S.W. 2d 542, 546 (Tex. 1976); *Ex parte Krupps*, 712 S.W.2d 144 (Tex. Crim. App. 1986).

17 *Reece*, supra at 364.

18 *Gordon*, supra at 688; see also *Reece*, supra at 364.

19 *Ex parte Knable*, 818 S.W.2d 811, 813, 811 (Tex. Crim. App. 1991).

20 *Reece*, supra at 365.

21 *Id.*

22 *Gordon*, supra at 688.

23 Tex. Gov't Code §21.002(d).

24 Id.

25 Id.

26 *Mai v. The State of Texas*, 189 S.W. 3d 316, 319 (Tex. App.—Fort Worth 2006, pet ref'd, 2006).

27 *Id.*; see also Tex. Code of Crim. Proc. art. 2.07(a).

28 *Mai*, supra at 319.

29 Tex. Code of Crim. Proc. art. 2.07(a).

30 Tex. Code of Crim. Proc. art. 2.07(c); see also *Mai* supra at 319.

31 Tex. Code of Crim. Proc. art. 2.07(c); see also *Mai* supra at 319.

32 *Mai* supra at 319.

33 Tex. Code of Crim. Proc. art. 2.07(c)-(d).

34 Tex. Gov't Code §21.002(c).

35 Reporter Record, Contested Motion to Request Adjudication at 91.

36 Id. at 93-94.

37 Id. at 94.

38 *In re Little*, 404 U.S. 553, 556, 92 S. Ct. 659, 661, 30 L. Ed. 2d 708 (1972) (Burger, C.J., concurring).

39 *Norton*, supra at 715-716.

40 *Id.*

Spreading the good news

A newly revamped website for the Tarrant County Criminal District Attorney's Office offers the public a snapshot of what's going on at the courthouse—and after more than 80,000 page views, it's clear that the good guys are getting the word out.

By Melody McDonald
Public Information Officer in the Tarrant County Criminal District Attorney's Office

If anyone would have told me that one day I would write an article for *The Texas Prosecutor* about the newly revamped Tarrant County Criminal District Attorney's website, I would have thought they were crazy.

First of all, as a career journalist, I never imagined I would work for a district attorney's office. Secondly, until about four months ago I didn't know a thing about HTML codes, domain names or widgets.

But when Criminal District Attorney Joe Shannon hired me in August as the office's first Public Information Officer, we knew that to reach the public we had to do two things: embrace social media and update the website. The website had been operating for several years but had suffered from serious neglect. It was hopelessly outmoded.

Our vision was to create a website that was fresh, innovative, and constantly changing. We wanted the public and the press to be able to go to www.tarrantda.com at any hour of the day and be able to find out what was going on at the courthouse.

It was a challenge, but several months later we rolled out something unique and uncharted. The website features a Twitter feed, a blog, and videos, including a videotaped welcome message from Mr. Shannon. It showcases the staff, including the work they do out of court, and it prominently displays Tarrant County's worst offenders and their mug shots. The trial board, which is refreshed several times a day, gives a snapshot of what's happening in the 10 felony courts.

"We wanted to make this a living website," Mr. Shannon explained. "It's never dormant. It's being updated all the time. We hope that the information provided to the public and the press will enhance the operation of this office. We sincerely believe that more information will result in a better understanding of law enforcement in general and prosecution in particular."

To date, the website has had more than 80,000 page views—and it has been live for only two months. Talk about a whirlwind.

Switching sides

As far back as I can remember all I ever wanted to be was a reporter. And by some accounts, I was a pretty good one.

But after 12 years at the *Fort Worth Star-Telegram* newspaper and watching hundreds of people get laid off, it was time to look for something outside of the newspaper business, something more stable.

The stars apparently were aligned in my favor.

One afternoon last summer, I arrived at the Tim Curry Criminal Justice Center to interview a prosecutor about a story I was writing about post-conviction DNA testing. I was particularly flustered that morning because the paper had given more of my co-workers their pink slips.

As I was making my way through the metal detectors, with my shoes off and my hair windblown, I looked up and saw Mr. Shannon, who was on his way out. I had covered the Tarrant County courthouse for years so I knew Mr. Shannon well, along with many of the judges, defense attorneys, and prosecutors.

He stopped to chat and, of course, I told him the reason for my discomposure.

"Do you need a public information officer, by chance?" I asked,

half-joking.

"As a matter-of fact, I have been considering hiring one," he replied. "There are so many good journalists out there who are switching sides, now would be the time to strike." And strike he did.

About six weeks later, I found myself vying against other members of the media for a newly created position in the Tarrant County Criminal District Attorney's Office. Mr. Shannon was looking for someone to handle media calls, disseminate information about the office, write press releases, and redesign the website. He was keenly aware that the local news media was too short on staff, time, and money to come to the courthouse everyday or sit through long trials. He needed someone to bridge the gap between the media and the public.

Later, when Mr. Shannon called to offer me the job, I accepted without hesitation or reservation. Although the *Star-Telegram* had been good to me over the years, I wasn't about to let this opportunity slip away. I was now officially on the "other side."

Lucky for me, Mr. Shannon is media-friendly (his daughter, Kelley Shannon, is a longtime journalist), progressive (he is the only 71-year-old person I know with an iPad), and he's not afraid of change.

"We will try things and if they don't work, that's OK," he told me. "We will then try something else."

Thinking outside the box

My first day on the job was August 29 and it was a memorable one. Less than two hours after I got there, while in a meeting with Mr. Shannon, I got a call on my cell phone from a local news station wanting to do a story about a juror who had "friended" a defendant on Facebook. That day I helped arrange three on-camera interviews with an assistant district attorney who spoke about the issue. It has been non-stop ever since.

"It was like I threw chum into the water," Mr. Shannon said about hiring me to deal with the media.

Two weeks later Mr. Shannon hired Victor Neil and Gorland Mar, of Modish Creative, to build the new website. We looked at other district attorney's websites for ideas and came to two definite conclusions: We wanted the ability to communicate directly with the public and the press, but we did not want the website to look or sound political.

Over the next several months, technology specialist Rhona Wedderien and I were in almost daily contact with the web designers. Although they could put our ideas into action, we had to give them the content.

Every existing page on the website, some of which had statistics that were 10 years old, had to be rewritten, edited, and redesigned. The new pages—including Newsroom, Jury Duty, and How Justice Works—had to be conceptualized and created from scratch.

Then we started thinking outside the box. We decided to post on the website the mug shots and a description of Tarrant's Worst Offenders, including death row inmates, gang members, and predators. We chose to put up a new list each week of Tarrant County's Ten Most Wanted. We asked the staff to come up with names for a blog and then they voted on which one they liked best: Open Court.

We tapped into the talents of the district attorney's forensic video analysts and their resources and began producing our own videos to educate and inform the public. Currently we have posted videos about the Crimes Against Children Unit, the Gang Unit, and the Misdemeanor Unit, and we are working on one for the Economic Crimes Unit. Eventually all of the special units will have videos on their respective pages.

And while all of this was happening very fast, sometimes it didn't feel fast enough. There were plenty of hiccups and learning curves along the way.

Unveiling the website

On Dec. 19, with great anticipation, the new and improved website went live, complete with our first blog post which explained our mission:

> The courthouse is a fascinating place, overflowing with information the public should know.
>
> It's a place filled with con men, crooks and killers. Here, emotions are high and victims run deep.
>
> It's a place where passionate prosecutors put in long hours, with little fanfare, standing up for those who have been beat down, broken, and abused.
>
> This blog—named "Open Court" by the Criminal District Attorney's staff—will highlight the work of those prosecutors. It will also be a place to post informative, interesting, heart-wrenching, wild, or wacky happenings around the courthouse.
>
> The courthouse is an intriguing place. It's filled with saviors, saints and heroes. Here, people

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find justice, redemption and, sometimes, forgiveness. It's a place where good battles evil.

And on most days, the good guys win.

Since that first post, the blog has been used to inform, educate, and even entertain the public. It has featured stories about a DA investigator becoming the one-millionth visitor to Cowboys Stadium, how ADAs are required to ride out once a year with police, and why the show *Unusual Suspects* was in town filming.

The blog has also been used to post victim impact statements, offer tips on how to avoid being scammed, and explain complex legal topics. One blog features a video of Mr. Shannon explaining adverse possession, a complicated topic that has been the subject of numerous news reports—some of which were inaccurate.

In addition to blogging, we also tweet daily about interesting happenings and trials. Those tweets have their own special box on the home page so those who don't follow @TarrantDAOffice or understand Twitter can see what is happening by going to the website.

The website also has special sections devoted to the staff's activities in and out of court. "ADAs in Action" highlights those who have received notable awards or appointments. "Community Outreach" showcases the various things staff members do outside the office to better the community.

We are also using the website to try and deter crime. During New Year's weekend the District Attorney's Office publicly announced plans to post the names and ages of those charged with driving while intoxicated in a blog on our website.

Boy, that got people's attention. That single blog post—which lists the name of 81 people—has had more than 20,000 page views.

"The thought process behind posting the names of those charged was the hope that the average, law-abiding citizen would take pride in their good name and would not want the fact that they were charged known by the general public," said Assistant Criminal District Attorney Richard Alpert, who came up with the idea. "It was my hope that this would generate a great deal of public discussion, which would have a deterrent effect."

Positive reaction

For the most part, the reaction to the website has been overwhelmingly positive. Some representatives of the defense bar spoke out against publicizing the names of those charged with DWI but quickly quieted down.

To be sure, the creation and upkeep of the website has been a lot of work. It was very time-consuming when it was being revamped and, now that the new one is up and running, it can be even more demanding at times—especially because there is only one PIO and more than 300 attorneys and support staff who work for the District Attorney's Office.

But we are definitely getting back everything we have put into it. The website has enabled our office to be more open and transparent. We don't have to rely solely on the news media to tell the public when we put away a killer or work to change a law. We can deliver information to the public quickly and accurately.

We hope that www.tarrantda.com will eventually become the public's go-to-place for courthouse news.

After all, it's free, you don't have to log in, and there are no pop-up ads—at least not yet. ❇

Partnering with salons against family violence

Introducing SAFE With Style, a partnership between Williamson County prosecutors and local hair salons to combat domestic violence

By Dee Hobbs
Assistant County Attorney in Williamson County

Several years ago the owner of a local salon requested we come and speak to employees about domestic violence. One of our investigators frequented this salon and had built a friendship with the owner, and some of the stylists had voiced concerns about a few of their clients. Once the stylists discussed their observations with our investigator, she quickly identified signs of domestic violence.

The owner paid the stylists to attend the training to guarantee a good turnout. Afterward, we learned that one of the stylists had been in a domestic violence situation herself and the group identified about half a dozen clients over the past year who were, as they put it, "textbook" cases of domestic violence.

Hairstylists, as many of us can imagine, are in a position of confidence. (Think about it: What do you share with your stylist?) A hairstylist, for many people, is their only regular contact outside of work or home. The stylist notices changes in behavior or style, bruises (especially on the head and neck), and most are good listeners. A stylist will usually have a minimum of 30 minutes to an hour of uninterrupted time to spend with her clients. A bond is formed. It is this bond that can often be the saving grace that gives domestic violence (DV) victims the courage to seek help.

Several of our criminal cases began because a stylist encouraged her client to report to police what happened the night, weekend, week, or month before. As prosecutors we used the stylist's observations to help in the trial. Jurors might be suspicious of assault claims that are made awhile after the fact, but the one consistent exception appears to be when the stylist—an uninterested party in the jury's mind—witnessed the signs of domestic violence and prompted the victim to come forward. For the jury, this third party's observations remove any suspicion that the victim is vindictive or has ulterior motives for going to court.

In one case, a victim went to the salon after a vicious assault. While discussing hairstyles, her life, and her secrets, she complained about her side hurting. The stylist worked the entire session trying to convince the client to seek medical attention. The client finally complied and went to the doctor, who diagnosed several rib fractures and reported the incident to law enforcement as a possible domestic violence assault. Our office was able to successfully prosecute that case and fortunately had the medical records to prove that the husband had injured this woman. We would never have known about the violence in that household if the stylist had not recognized the signs of domestic abuse and worked so hard to convince the victim to ask for help.

The seed of an idea

As prosecutors we are always exploring creative ways to combat the problems that plague our communities. Domestic violence is often the "dirty little secret" that victims are afraid to share. We can seek protective orders, pursue criminal charges, and provide services only to those victims we know about. We must also educate the community about the existence and dangers of domestic violence to remove as many barriers as we can to encourage victims to seek the help they have so long been denied and so adamantly deserve.

Statistics show that there are two places domestic violence abusers will "allow" their victims to go unaccompanied and on a regular basis: to their ob-gyn doctor and their hairstylist. And, given our past experiences with stylists and their assistance in domestic violence cases, I had an idea, which I share to encourage other prosecutors to consider implementing too: the SAFE (Salons Against Family Endangerment) With Style program. SAFE is a partnership between our office and various local salons. It is not yet up and running, but we are putting the pieces together. I share the idea in

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this article to encourage other prosecutors' offices to consider implementing such a program.

Our role as prosecutors is to educate stylists on the signs of domestic violence with a focus on its statistics, warning signs, cycles, and emotional impact in a short course. The prosecutor's office then certifies the stylist as a SAFE stylist; entire salons can be certified through SAFE if a certain percentage of the stylists were certified in domestic violence identification and prevention. A prosecutor can also be the liaison between the salons, victim advocates within the county, and the local shelters. In speaking with several salon owners and stylists in our area I found that this industry has attempted in the past to get involved, but miscommunication between the salons and shelters, prosecutor's offices, and law enforcement kept them from putting their desires to help into practice. We, as prosecutors, can break down those barriers.

The salons' role is to provide an outlet for materials and information about domestic violence to let victims know that help is available and that they are not alone. These materials can be placed in the salon's bathrooms or in an area away from general public view. If feasible, the salons can donate services and products to shelters or victims directly with vouchers to help victims regain self-esteem that has long been denied and in some cases help them prepare to re-enter the workforce.

Salons in our area have offered to donate the proceeds from a day's profits to help shelters, and as new store locations open, to promote the SAFE program at the grand opening event. Resources are always limited, so any influx of unexpected donations will greatly assist in providing for victims of domestic violence. Salons can also have volunteer drives to give their patrons the opportunity to assist local shelters, re-sale stores that benefit shelters, and victim assistance coordinators (VACs) within the county. Often, it takes making people aware of the need to get them involved.

Recent publicity

In a recent interview with a local newspaper on protective orders and the devastation of domestic violence, the reporter asked what people can do to curb this disturbing trend. I explained that it is going to take a community wide approach and some "out of the box" thinking. I gave the example of the SAFE With Style program that I wanted to create in our county. This was only meant as an example, a side note to the topic at hand, but the reporter ran with the idea as a major part of the story. I believe it started, "Can a haircut and a perm stop family violence? Criminal Courts' Chief Dee Hobbs thinks so." Believe me when I tell you that my co-workers had a lot of fun with that article.

The upside to the publicity is that it started a whirlwind of interest and discussion. Local television outlets ran stories about the proposed program on the news. The domino effect has been amazing. I have received numerous inquiries from salons in and around our county. It turns out that several police officers' wives own salons in the area, and they are on board. Even some corporate-owned salons have expressed interest. The television story featured a few stylists who expressed how excited they are to participate. One owner called me the next day to say that their customers were trying to drop off checks to help offset the cost of starting the program. I even received an e-mail from a gentleman who started off by saying that he was not a salon owner and he was not in the industry, but that his wife and stepchildren had been in a horrible domestic violence situation before they came into his life. He volunteered to help however he could. He said it pains him to this day that he cannot take away the horrible things his family had to go through but that he wanted to work hard to make sure others can break the cycle.

It is going to be a long road but the chance to make a difference is worth the effort. I envision a time when the SAFE With Style Board of Directors (a future 501(c)(3) charitable non-profit organization) can brag about the number of service hours they have provided statewide, the amount of money raised to combat domestic violence, the number of lives they have saved, the number of lives they have changed for the better, and that they recognize those in their own industry that have gone above and beyond in the name of ending domestic violence.

The battle against domestic violence rages on. We are low on resources but strong in heart and determination. We can make a difference; we just need to recruit more soldiers. Where do we start? With a haircut and a perm? Maybe. But more important than where we start is where we finish. We must end with a resounding and unified voice

clearly telling offenders, "No more! Not in our community!" to show victims that help is here, the time is now, and that their voices will be heard! The concept is unorthodox, the heroes are unlikely, but the possibilities are limitless. It may only be *hair* today, but if we get involved, if we reach out to the community, if we work together, our victims can be *safe* tomorrow. ❇

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