THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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

the front view

In memory of the fallen

The ribbon pictured here is the ceremonial ribbon worn by the first president of TDCAA in 1905. The front of the ribbon is colorful, but the ribbon can be reversed to black for solemn occasions. This is one of those occasions. Our members mourn the loss of Mark Hasse, Mike McLelland, and Cynthia McLelland.

'Only a life lived for others is a life worthwhile'

Everyone who works in a Texas prosecutor's office can relate to the above quote from Albert Einstein. Only a life full of service and giving to others is a rich life. Not rich in money or rewards, but abundant in what really counts: protecting the weak, doing what's right, and seeking justice no matter the cost.

By Jennifer Vitera
TDCAF Development Director in Austin

We at the Texas District and County Attorneys Foundation recognize the many things you do to keep the people of this great state safe, and we thank you for your dedication and service. Our job is to help you do yours—by filling in the funding gap between what our grant allows and what prosecutor offices need.

As we look into 2013, there are many more opportunities for the Foundation to enrich its training and educational resources for Texas prosecutors. Please consider joining us in this mission by making a contribution to our Annual Campaign today. Visit www.tdcaf.org to give.

2012 Annual Report

We are honored to show you our 2012 Texas District and County Attorneys Foundation Annual Report (pictured at right). It summarizes what we've accomplished in the last year, lists all donors, and explains plans for the next year and beyond. Please take a few minutes to review it at www.tdcaf.org.

Elder abuse manual

The Foundation is seeking funds in support of a new publication, the *Elder Abuse Investigation and Prosecution Manual*. We are looking to raise $36,685 in support of this project. We ask that you please think about organizations and people in your community who might have an interest in partnering with the Foundation.

Golf, anyone?

We are already planning our annual golf tournament and silent auction, both of which coincide with TDCAA's Annual Criminal & Civil Law Update in September, and we need your help. We are asking members to please help the Foundation identify corporations and individuals who might be interested in sponsoring or donating an auction item for this event.

Please contact the Foundation at 512/474-2436 if there is someone in your area to whom we can send more information to regarding either one of these efforts.

Adieu, meilleurs voeux

I had a chance to catch up with a lot of you this last month but wanted to update those of you I missed. I am leaving the Foundation this month to pursue a continuing education opportunity in Paris, France. I have been so blessed to work as the Development Director for the TDCAF and have thoroughly enjoyed working with our outstanding staff, boards, and of course all of our wonderful members. We should all be very proud of how much our Foundation has accomplished in the last seven years and what we will continue to accomplish in the future. Our Foundation Board is prepared to continue all of our important work in the upcoming year, and our Board Chairman, Bert Graham, will continue our regular meetings and touch base soon. ❇

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TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION

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A difficult column to write

By David Escamilla
County Attorney in Travis County

In my last column I wrote about my belief that there was hardly anything better or more personally satisfying than working in a prosecutor's office and that, in future columns, I planned to write about incidents and events that tend to challenge or confirm that belief. Truthfully, I had intended to use the next few columns to continue recounting the highlights of being a prosecutor. Tragically, the last few months have instead focused our collective attention upon the dangerous risks that accompany our profession.

This column was very difficult for me to write. Over the course of the past week I've found so many excuses to avoid having to face the task. Writing this piece requires me to think about a topic that, up until now, I've felt was better ignored. And that's exactly why it needs to be faced.

In March, Kaufman County Criminal District Attorney Mike McLelland and his wife, Cynthia, were murdered in their home. This heartbreak followed, by less than two months, the ambush and murder of Kaufman County ADA Mark Hasse while walking from his car to the courthouse. All three were specifically targeted and killed, that much we know. And while it is still too early in the respective investigations for us to know the details or motive for these egregious acts, it is likely a safe assumption that they were killed because of Mike's and Mark's chosen profession. That is to say, they likely died because they had sworn to uphold the laws of Texas and the United States and had undertaken the duty to see that justice was done.

Mark and Mike were very much like the overwhelming majority of prosecutors in Texas; they were sincere and hard-working professionals seeking to make a difference in their community. Mark was a career prosecutor and, after rising through the ranks in the Dallas Criminal District Attorney's Office, rallied from injuries sustained in a traumatic flying accident to return as an assistant district attorney in Kaufman County. Mike came to prosecution more recently after earlier careers in the military and as a clinical psychologist. The common element of his several career choices was a desire to help and protect others.

According to statistics maintained by the National District Attorneys Association, such incidents are rare, as they represent the 12th and 13th prosecutors to be murdered in connection with their jobs. And data behind those statistics confirm that a majority of those prosecutors were killed by someone that they had either put in jail or were seeking to do so. But ours is nowhere near the most dangerous of professions. Those serving in our armed forces and deployed in combat zones put their lives on the line each and every day. And when compared to our law enforcement brethren, who annually suffer several casualties in the line of duty, prosecutors are relatively safe from actual violence committed in retaliation for performing their duty. All the same, as is evident from recent events, we are not immune to such violence.

I once heard the story of a longtime elected prosecutor who had decided not to seek re-election. When asked his reason for finally calling it quits, he responded that being an elected prosecutor was just a long and slow method of earning the animosity of everyone in his local community. While certainly an exaggeration, there is still an underlying truth to the assertion. And it's the nature of our profession—it comes with the job—that we often evoke an angry or emotional response from those we prosecute. Anyone involved in depriving another of his or her liberty can anticipate a negative reaction in return. We all know that most defendants suffer from a lack of good judgment and many continue exhibiting that mental deficiency by focusing their anger on the wrong things and, worse yet, the wrong people.

In almost 28 years working in a prosecutor's office I've never received a threat of violence specifically aimed at me. Nevertheless, we remain vulnerable to the risks of violence directed against us. I am aware of several threats, direct and indirect, targeted at co-workers during that same time span. I've also participated in too many discussions with lawyers and

other employees on the receiving end of these disturbing and intimidating threats, assuring and consoling them while at the same time advising they take appropriate steps to enhance their personal security. It's yet another sign of our changing society, albeit one that we too often ignore.

For many of us, closing our eyes to the prospect of danger has represented the most effective method to cope with this unpleasant aspect of our job. The murders of Mark Hasse and Mike McLelland were a sobering wake-up alarm for us all. At least for me, the time has come to recognize the full reality of our profession, the good as well as the bad. But this doesn't mean that fear must infect a significant part of our lives. As TDCAA Chairman Lee Hon (and Criminal District Attorney in Polk County) said in a recent New York Times article, "There's a fine line between being careful and being paranoid. One will drive you crazy." And regardless of any motivations for these killings eventually revealed by the investigations, it's time for prosecutors as a group to discuss job safety in a reasonable and responsible manner.

Fortunately, we have a treasure trove of resources available to assist in increasing our personal safety and security. Many agencies, state and local, have reached out to prosecutors with opportunities and suggestions for greater protection. Within hours of the news of Mike McClelland's murder, sheriff's offices and police departments around the state were contacting prosecutor's offices with words of support and offers of personal protection. The Texas Department of Public Safety has similarly communicated with TDCAA regarding initiatives to assist in our general protection.

It's not prudent to discuss specific suggested security ideas in this column, but TDCAA quickly moved to gather and disseminate safety information and recommended practices that would enhance security for prosecutor offices and employees. This material was sent to all elected prosecutors along with the suggestion that it be shared with office employees. We should all take the time to become familiar with this safety information and make choices to implement those practices and recommendations that we deem appropriate in our personal lives.

While there are certainly many personal changes that we could each apply that would serve to bring us a greater sense of security, there is unfortunately no panacea to guarantee our permanent safety. I've read that Mike McLelland implemented several safety precautions following the murder of Mark Hasse. Tragically, these precautions were not enough to counteract the evil directed against him. And still, we all must take proper precautions. I have not waivered in my belief that few occupations are more personally satisfying than working in a prosecutor's office. I hope most of us can still agree on that.

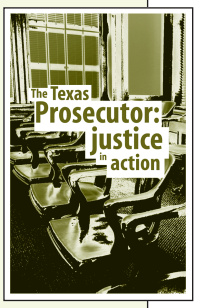
Governor Rick Perry has vowed to hunt down the killers and bring them to justice. And after he makes good on that promise, prosecutors will be there to assure that justice is done. Because it's our duty. Mark Hasse and Mike McLelland would expect no less from us. ❇

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 sarah.wolf @tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇



TDCAA e-books are available!

TDCAA announces the launch of two 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.

New editions of these e-books will be available after the 2013 legislative session this fall. ❇

Black ribbon day across the nation

By Rob Kepple
TDCAA Executive Director in Austin

The senseless murder of Kaufman County Assistant CDA **Mark Hasse**, followed by the murders of his boss, Criminal District Attorney **Mike McLelland**, and his wife, **Cynthia**, certainly shocked that community. But as in all tragedy we can see the best in people. It started with **Richard Alpert**'s poem honoring Mark in the last issue of *The Texas Prosecutor*, and when Richard decided to don a black ribbon on the days of Mike and Cynthia's memorial service and funeral, virtually our entire nation of prosecutors followed suit in a humbling display of sympathy, unity, and sense of common purpose. Countless prosecutor offices from around the county handed out ribbons to their folks, altered their websites with photos of black ribbons, and stood with the good folks of Kaufman County.

I cannot begin to individually recognize everyone who stood with us on those days—it would literally take pages. But thank you. It meant more than you can know, and we won't forget it.

Thanks to the leaders of Texas

I want to offer a special thanks to **Governor Rick Perry**, who made it a point to take a stand for Texas prosecutors in the wake of Mike's death by attending and speaking at the memorial service for Mike and Cynthia. The Governor's Criminal Justice Division, led by **Christopher Burnett**, has been terrific in demonstrating their support.

In addition, I want to thank former Texas prosecutors who now serve in the Texas Legislature, who donned black ribbons in their respective chambers: **Senators Jose Rodriguez** (D-El Paso), **Joan Huffman** (R-Houston), and **Royce West** (D-Dallas); and **Representatives Stephanie Carter** (R-Dallas), **Naomi Gonzalez** (D-El Paso), **Joe Moody** (D-El Paso), and **Gene Wu** (R-Houston). Finally, we've had tremendous support from Director **Steve McCraw** and the folks at the Department of Public Safety. Thanks to everyone from your Texas prosecutor offices.

Japan and the death penalty

In February TDCAA had the honor of hosting a delegation from the Japanese Bar Association. The delegation of about 20 lawyers (see the photo below) came to Texas to learn about life without parole (LWOP) and how it fits into the Texas death penalty scheme. They made no bones about it; the Japanese Bar Association is seeking to abolish the death penalty in Japan, and they were curious about how LWOP as a policy has impacted the death penalty here in Texas. (Japan carried out three executions last year.)

As hosts, we brought in the foremost expert on the Texas death penalty, **Roe Wilson** from the Harris County District Attorney's Office. I think the Japanese lawyers were hoping that there was a direct correlation between the institution of LWOP and the reduced number of death penalties in Texas. In short, Roe was able to inform them that it may be quite a bit more complicated than that. We did learn during our discussion that there are many similarities between the Japanese legal system and the Texas system, and there is no shortage of Japanese lawyer "war stories" very similar to our own.

Welcome to our newest Criminal District Attorney

On April 10 the governor appointed **Erleigh Norville Wiley** as the Kaufman County Criminal District Attorney. At the time of her appointment, Ms. Wiley was serving as judge of Kaufman County Court-at-Law No. 1. She is also a former Assistant Criminal District Attorney in Dallas. Congratulations Erleigh; you have a great group of folks there at your office!

Legislative Updates coming to a city near you!

By the time this edition of *The Texas Prosecutor* hits your desk, the 83rd Legislative Session will be in its final month. As we go to print no one can predict the final outcome, but we know that a number of bills relating to prosecutor conduct and the duty to disclose exculpatory evidence had traction this session. Significant changes in pretrial discovery anchored other proposed changes to the State Bar grievance rules, training, and statutes of limitations that will be in play until the very end of the session. Then, of course, there are the myriad proposals to change the Penal Code and Code of Criminal Procedure.

I guarantee there is going to be a lot to talk about before the new laws take effect September 1, so keep an eye out for the TDCAA Legislative Update regional training near you. We begin our tour in July and will stop in 22 locations around Texas by August 31.

Au revoir to Jennifer Vitera

My heartfelt thanks and bon voyage to our Foundation Development Director **Jennifer Vitera**, who in May pulled up stakes to live her dream: cooking school in Paris. We have all benefited from Jennifer's hard work and dedication to our profession, and she has left our Foundation on solid footing. She will be sorely missed!

And happy trails to John Stride

We knew it was just a matter of time, but **John Stride**, our Senior Appellate Attorney, is moving west. John is retiring from law at the end of May. He has bought a spread in Colorado and is taking his flock with him. John is a great appellate lawyer and will be missed, but we all knew he was a farmer at heart, having been a top hand at a sheep station in Australia. Thanks, John, for your work for the people of Texas. We will miss you! ❇

Photos from Prosecutor Trial Skills Course

Photos from our Investigator School

Chuck Dennis Award winner

Congratulations to John Blankenship, DA's investigator in the Brazoria County Criminal District Attorney's Office, who was honored with the Chuck Dennis Award at February's Investigator School in San Antonio. John is pictured at far left with Jeri Yenne, CDA in Brazoria County (center), and Terry Vogel, Investigator Board chair, at far right.

Photos from our Newly Elected Boot Camp

Photos from our Crimes Against Children seminar

Photos from a tree-planting ceremony in honor of Suzanne McDaniel


Photo 1


Photo 2


Photo 3

On April 22, farmily and friends of Suzanne McDaniel, longtime victims' services advocate and TDCAA Victim Services Director, gathered on the capitol grounds to plant a mountain laurel in memory of Suzanne. Here are a few photos of the event. Photo 1: Suzanne's grand-niece, Natalie, tossed rose petals at the base of the tree; all attendees were invited to do the same. Photo 2: About 110 people gathered on the capitol grounds for the ceremony. Photo 3: Suzanne's family had seats of honor. Photo 4: Suzanne's tree, a mountain laurel, has a central spot right in front of the capitol.


Photo 4

Photos from our Civil Law Seminar

A tribute to Mark Hasse and Mike and Cynthia McLelland

By Bruce Bryant
Chief Investigator, Criminal District Attorney's Office in Kaufman County

It was just two months ago that many of us gathered in Terrell to say goodbye to our friend and colleague Mark Hasse. Who could have thought we would need to do the same so soon, this time for Mike and Cynthia McLelland?

They were two of the finest people it will ever be our privilege to know. Our lives are richer for having known them. We are lessened by their passing. Cynthia and Mike McLelland, two lives well spent.

Cynthia, Mike, my wife Fran and I became friends because I had the pleasure and good fortune of working with their son Nathan when we both served with the Dallas Police Department. Cynthia and Mike were our friends from the moment we met them. It felt like we had known each other for 20 years. It was a special connection that only happens once or twice in a lifetime. From our first meeting until the last Sunday of their lives, many of our happiest moments were spent in their company. It didn't matter if we were together at each other's homes, at an American Legion meeting, or sitting around a table at our favorite Italian restaurant, those were happy times.

Cynthia was all warmth and good cheer. She loved to entertain. I doubt she was happier than when she had a house full of friends and family, with everyone enjoying a delicious meal and the talk is flowing. Religion, politics, war stories, and quilts—anything and everything was open for discussion. Cynthia was a quilter. I would never have imagined there was such a thing as a quilt retreat. But because of her I learned such a thing does exist. A whole weekend spent quilting. It's sheer bliss for quilters.

Last year Cynthia presented us with a beautiful quilted "Merry Christmas" wall hanging. Fran was overjoyed to receive such a gift. It went up the day after Thanksgiving and didn't come down until almost Valentine's Day. It was special when we received it and it's even more so now. We'll proudly display it again this Christmas and for all Christmases to come.

If Cynthia was all warmth and motherhood, Mike was a warrior. Mike proudly served his state and country. Mike was as an officer in the United States Army, a reserve deputy sheriff and a criminal district attorney. His army stories were the best: like the time at basic training at Fort Benning when his drill sergeant complimented him on his "war face." Or at ROTC summer camp in Oklahoma where he survived the heat on a diet of Cokes and candy bars, or when serving with the 8th Infantry Division in Germany as a brand new second lieutenant, tested by an army still recovering from the trauma of Vietnam. He had great stories. He loved to tell tales of his adventures and I loved listening to them. A couple weeks ago he promised to tell me about some of the places he had never "officially" been. I'll have to wait awhile to hear those stories.

The program from the McLellands' memorial

I'm sure everyone saw Mike on TV after Mark's murder. My friends and relatives that live out of state would ask me if my boss was "the guy in the cowboy hat." I would tell them that was Mike. What I didn't tell them was that I was probably responsible for that big black cowboy hat he wore. I'm the commander of the American Legion Post in Terrell. Mike was my first vice commander. Last Memorial Day Mike assisted me in laying a wreath during a service at the Terrell Veterans Memorial. Mike was wearing a cap that's the official headgear prescribed for members of the American Legion. It's not a bad-looking cap but it doesn't do anything to tame the Texas sun. The service started about noon and it was hot. By the time we were done Mike

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was thoroughly cooked. I think he went out the very next day and bought that cowboy hat and he wore it everyday thereafter. Even though Mike was a native Texan the sun was not his friend. He told me after he bought the black hat his grandmother once asked him why he was wearing a hat with a 6-inch brim. He told her because he couldn't find a hat with a 10-inch brim! I did give him some grief over that big black hat. I told him he was one of the good guys and should be wearing a white hat. But he was loyal to his hat and wouldn't change.


Mark Hasse

Cynthia and Mike were deeply in love with each other. Many people in the last few days have commented on that. I've heard remarks like, "They had a love affair"; "they were always holding hands"; "Cynthia was devoted to Mike"; and "Mike was so protective of Cynthia." It was obvious they loved each other and they were happy together. And now, together for all eternity, they have left us. They lived together, died together, and will be buried together. Cynthia's cremated remains rest in Mike's casket. Together for all time.

Mike told me on numerous occasions when things got rough, "Soldier on." I promise that we will soldier on.

On Mark Hasse

I had the privilege of working one-on-one with Mark for the last year of his life. I was the investigator assigned to the 422nd District Court; Mark was the lead ADA for that court. Mark was a lot of fun to work with. The courtroom was his natural element. He and one other lawyer are the two best trial attorneys I've ever seen. He did great opening and closing arguments—without notes! It was just a pleasure watching him work the room during trial.

Mark was a great storyteller. He was a very pleasant companion to have lunch with or just chatting with in the office. Mark had the energy of two men. He was constantly flying up and down the stairs in the courthouse to deliver a file or get something needed for a case. The door to my office would bust open and Mark would come tearing in with his standard greeting of "Dude." I miss hearing that. I miss him terribly. ❇

Recent gifts to the Foundation*

Richard B. Alpert
Arkansas Prosecuting Attorneys Association *In Memory of Mark Hasse*
Robert Newton Bland, IV
Jaclyn Borcherding
John M. Bradley
A. W. Davis, Jr.
Kyle William Dufour *In Memory of Mark Hasse*
James M. Eidson
Llano County DA's Office Staff
Doug Lowe
Marion E. McDaniel, Jr. *In Memory of Suzanne McDaniel*
McLennan County CDA's Office Staff *In Memory of Lyle Davis*
Minnesota County Attorneys Association *In Memory of Mark Hasse*
National Association of Prosecutor Coordinators *In Memory of Mark Hasse*
Oklahoma District Attorneys Association *In Memory of Mark Hasse*
Pennsylvania District Attorneys Association *In Memory of Mark Hasse*
Randall W. Reynolds, 143rd Judicial District Attorney's Office
Corky Roberts *In Honor of Carol S. Vance*
A. Ross Rommel, Jr.
B. J. Shepherd
Randall C. Sims *In Memory of Mark Hasse*
William W. Torrey *In Honor of Tom Krampitz* ❇

* gifts received between February 13 and April 4, 2013

Newsworthy

Applications for Investigator Section scholarship and awards due July 1

Turn in nominations and applications by July 1, 2013, for the Oscar Sherrell Award, Professional Criminal Investigator Certificate (PCI), and TDCAA Scholarship! Don't know if you qualify or what these are? Keep reading!

The Investigator Section Oscar Sherrell Award is given at the Annual Criminal & Civil Law Update in September to recognize an investigator with outstanding service to the association. Anyone can make this nomination; forms are available at our website (www.tdcaa.com/announcements/investigator-awards-deadline-july-1-2013).

The PCI certificate is for those investigators who have been employed with a prosecutor's office for a period of time and have achieved at least an Advanced TCLEOSE license or higher. Complete eligibility and requirements can be found on our website at www.tdcaa.com/announcements/investigator-awards-deadline-july-1-2013. You must meet the requirements (time/license) by the July 1, 2013, deadline to apply for the September award presentation.

Finally, the Investigator Section gives out at least two educational scholarships each year to children of TDCAA members and investigators. The upcoming award is open to eligible children of all TDCAA members. If you could use a little help with your child's education, check out the scholarship application online to see if you qualify! Again, this award is open to all TDCAA members: key personnel, victim assistance coordinators, attorneys, and investigators.

If you have any questions, please contact Terry Vogel at 806/935-5654 or 69thdainv@moore-tx.com. ❇

What to do about *Missouri v. McNeely*

Like many significant cases from the U.S. Supreme Court, *Missouri v. McNeely*,[1] leaves more questions than it answers. The fractured majority opinion, written by Justice Sotomayor, held that inevitable dissipation of alcohol in blood alone does not constitute an automatic exigency to support a warrantless blood test during a DWI investigation. The opinion, however, noted that depending on all the circumstances in a particular case, an exigency may develop. Without an adequate showing of exigent circumstances, a warrant is required, the court concluded.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

The ultimate impact of this decision on mandatory blood draw statutes like Texas has in Transportation Code Chapter 724 is unclear, but a few conclusions are certain. First and foremost, this case did not rule that Texas's—or any other—mandatory blood-draw law was unconstitutional. Justice Sotomayor in footnote 9 of the majority opinion cited a number of states' mandatory blood-draw provisions, not to declare them unconstitutional, but rather as support for her conclusion that a reasonable expectation of privacy against involuntary blood draws exists, placing DWI blood draws under the Fourth Amendment. She made positive note of implied consent statutes generally and reiterated the holding in *South Dakota v. Neville*,[2] that they do not violate the Fifth Amendment.

I am sure many defense counsel will cite *McNeely* as the end of everything related to blood evidence in DWI cases, but this is just not so. The opinion of the Supreme Court is endorsed in its entirety by only four justices. There assuredly will be subsequent opinions on the issue, and it seems very likely that those future decisions will include opinions concerning mandatory draw laws.

Further, the majority opinion does not say that exigent circumstances can never exist to justify a warrantless blood draw in a DWI case, but rather that they did not exist in *McNeely*. Missouri argued only alcohol elimination as an exigent circumstance and sought to have only that issue resolved by the court. The majority opinion clearly upholds the decision in *Schmerber v. California*.[3] *Schmerber* involved a crash, and testimony was introduced that a long delay would be necessary to obtain a warrant for blood; in its decision, the Supreme Court said the non-consensual blood draw was justified by exigent circumstances. In *McNeely* the majority of the court found that metabolism of alcohol alone does not create exigency. The majority opinion also found that "unreasonable" delay or the inability to procure judicial review could create exigency. Justice Sotomayor simply scolded Missouri for not trying.

So how does this impact the provisions of Transportation Code §724.012(b) requiring an officer to obtain a chemical sample (blood, for all practical purposes) in cases of crashes, DWI with a child, and felony DWI? As mentioned before, §724.012 was among those cited in footnote 9 without being overruled. But because the Supreme Court rejected *per se* exigency and firmly

Summary of *Missouri v. McNeely*
No. 11-1425; 4/17/13 (8-1)

Issue:
Does the inevitable dissipation of alcohol in blood alone constitute an automatic exigency to support a non-consensual, warrantless blood test during a DWI investigation?

Holding (Sotomayor, J.):
No, but—depending on the "totality of the circumstances" in a particular case—an exigency may develop. Otherwise, a warrant is required.

Concurring in Part (Kennedy, J.)
Would limit holding to the exact facts in issue.

Concurring and dissenting (Roberts, C.J., Breyer, & Alito, J.J.):
The totality of the circumstances test is fine in general, but drunk-driving cases are a discrete class, and the court should provide more guidance.

Dissenting (Thomas, J.):
Yes. "Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance."

held exigency must be found on a case-by-case basis, there is certain to be increased litigation.

Nothing in the opinion relieved officers of their statutory obligation to draw blood in these circumstances. Nothing in the opinion prevents officers from drawing blood if exigent circumstances exist in the specific investigation. The opinion simply requires the State to establish exigency by showing more than the fact that the defendant's liver is destroying evidence with each passing moment. (Special thanks to Justice Thomas who in his dissent seems to be the only one who seems to get that.) A crash, a child passenger, or any other complicating factor when added to metabolism may create exigency under *McNeely*. So could a genuine local inability to get judicial review in a reasonable amount of time, a factor noted by Justice Sotomayor's opinion. (Clearly a Monday morning warrant application for a Friday afternoon arrest is worthless.) Crashes, multiple crashes, custody of minor children, multiple defendants, or high arrest numbers (such as a holiday, festival, or major sporting event) could all be additional factors in creating exigency.

This puts a burden on every officer to get a blood sample in cases outlined in §724.012 but may require more effort than the State had to make before *McNeely* came down. The most conservative approach (and in these most important felony cases, why would we not take a conservative approach?), I recommend getting a search warrant, if possible, in all existing mandatory blood-draw situations. If an officer cannot get a blood search warrant in a reasonable time, then the law enforcement officer should explain why he was unable to get a warrant and proceed to get a blood sample under the Texas statute. That explanation (of why getting a warrant was impossible) is what prosecutors will use in suppression hearings to defend the evidence.

Prosecutors will also play an important role in how officers respond. Every agency and office should speak with their local prosecutors. I have included policy positions made by Richard Alpert in Tarrant County and Warren Diepraam in Montgomery County in the box below. They do not totally agree, and that is not entirely surprising. The Supreme Court's opinion raised as many questions as it did answers, and until the court answers some of these questions, we are all left to make our best educated guesses.

Prosecutors can also assist by providing protocols on how to show due diligence in obtaining blood search warrants in their own jurisdictions. Let officers know what magistrates to call, how to call, when to call whom, what forms to use, and what procedures to follow. Without the involvement of prosecutors on the front end, officers will not be able to answer the now very important question, "Why did you not get

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Richard Alpert, misdemeanor chief in Tarrant County:

"Instruct your officers to obtain a search warrant in all mandatory blood-draw scenarios (those arrested for intoxication manslaughter, intoxication assault, felony DWI, DWI with a child, DWI with bodily injury + transport, and DWI with a prior conviction for intoxication manslaughter, intoxication assault, or DWI with a child). While it is tempting to continue to rely on our mandatory provisions that might not even be in jeopardy, we believe that it is our primary duty to protect these more serious cases from protracted litigation and outcome uncertainty that would follow from our ignoring this case's potential impact. Using a search warrant in these cases will thwart any additional litigation that might arise post-*McNeely*."

Warren Diepraam, special prosecutions chief in Montgomery County:

"I have asked Montgomery County prosecutors and officers to be aware of exigency factors when doing mandatory blood draws and to make sure the officers document their reports. I have set out three guidelines: First, in all mandatory blood draw cases where the officer can't articulate an exigency, I am asking them to get a warrant. Second, during No-Refusal (when a judge is obviously available), I am asking law enforcement to get warrants in all DWI refusals. Third, in intoxication manslaughter and intoxication assault cases, officers get a mandatory sample before we arrive (generally) and I am having them continue that practice but am getting a warrant an hour after the mandatory draw."

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a warrant?" Adopt a written policy outlining the steps an officer must take to obtain a warrant. Include instructions for weekdays, nights, and weekends. Go over the exigency factors as they apply to your jurisdiction.

Be prepared for a flood of appeals and writs. I will follow up with comments on how to address those. For the time being, polish up briefs on procedural default. As Bob Schneider sings, "It is not the end of everything, just the end of everything you know." This too shall pass.

Finally, there is a tendency to panic when the Supreme Court seemingly changes our world in a pen stroke. Don't. Texas is in a very advantageous position because blood search warrants are not new to us. Our implied consent and mandatory blood draw laws have not been ruled unconstitutional and, based on the dissent and concurrences, may not be. This new opinion may be the push we need to make Texas no-refusal all the time. That would be a good thing. ❇

Endnotes

1 No. 11-1425 (issued April 17, 2013).

2 459 U.S. 553 (1983).

3 384 U.S. 757 (1966).

Diepraam honored by NHTSA

Warren Diepraam, a prosecutor with the specialized prosecutions division of the Montgomery County District Attorney's Office, was honored with a 2013 Public Service Award by the National Highway Traffic Safety Administration (NHTSA) earlier this year.

NHTSA Administrator, David Strickland, presented the award at the Lifesavers Conference in Denver (Strickland and Diepraam are pictured, below). Lifesavers is the world's largest traffic safety conference and is held yearly; the award is handed out at the conference to individuals or programs that have beneficially enhanced national traffic safety causes.

Strickland noted that Diepraam was recognized for his innovation, including prosecuting habitual drunk drivers for felony murder, rather than intoxication manslaughter, when they kill someone while committing a felony DWI, as well as his office's "no refusal" program. That's when peace officers, prosecutors, and judges team up to execute search warrants for blood samples when drivers suspected of intoxication refuse to provide breath samples.

Congratulations, Warren! ❇

A note about death notices

The Texas Prosecutor journal accepts 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 sarah.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! ❇

Trespassing on the porch with a drug-sniffing dog in *Florida v. Jardines*

If you're like me, you always thought that police could approach the front door of a residence seeking to speak with an occupant just like any private citizen could. And you probably thought that if an officer were lawfully present in an area open to common use of the public, he could rely upon what he saw, heard, or smelled for probable cause. This may still be the case, but the Supreme Court of the United States has now made clear in *Florida v. Jardines* that an officer had better not take a drug dog with him during this type of knock and talk.[1]

By David C. Newell
Assistant District Attorney in Harris County

What's that, Lassie? There're drugs in the house?

In 2006, Detective William Pedraja of the Miami-Dade Police Department received a Crime Stoppers tip that marijuana was being grown in the home of Joelis Jardines. About a month after receiving the tip, the police department and the Drug Enforcement Administration sent a joint surveillance team to Jardines's home. Detective Pedraja watched the home for 15 minutes and saw no vehicles in the driveway or activity around the home, and he could not see inside because the blinds were drawn. So Detective Pedraja approached the front door accompanied by Detective Douglas Bartlet, a trained canine handler who had just arrived at the scene with Franky, his drug-sniffing dog.

To hear the majority tell it, Franky the drug-sniffing dog was a cross between Cujo and Dynomutt. Justice Scalia noted his "wild" nature as well as his tendency to dart around erratically while searching.[2] As Franky approached the front porch he sensed one of the odors he had been trained to detect and began "bracketing" the odor by moving back and forth to track it. Detective Bartlet gave the dog the full 6 feet of leash as well as whatever safe distance he could give him, and Detective Pedraja stood back so he would not get knocked over. After sniffing the base of the front door, Franky sat, which is what he had been trained to do upon discovering the strongest point of the scent. Detective Bartlet pulled the dog away and returned to his vehicle after informing Detective Pedraja that Franky had alerted to the presence of narcotics.

For their part, the concurring justices, who joined the majority, regarded Franky as "a super-sensitive instrument, which [police] deployed to detect things inside that they could not perceive unassisted." Justice Kagan went on to note that drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information to their human partners.[3] "They are to the poodle down the street as high-powered binoculars are to a piece of plain glass."[4] Justice Scalia did not distance himself from this characterization, analogizing Franky the drug-sniffing dog to the GPS device in *United States v. Jones* and noting that where police use a physical intrusion to explore the details of a home, "the antiquity of the tools that they bring along is irrelevant."

Of course, the dissent took issue with the majority's selective recitation of the facts. As Justice Alito pointed out, "the opinion of the court may leave a reader with the mistaken impression that Detective Bartlett and Franky remained on [the] respondent's property for a prolonged period of time and conducted a far-flung exploration of the front yard." But Detective Bartlet and Franky approached the front door via the driveway and a paved path—the route that any visitor would customarily use—and Franky was on the kind of leash that any dog owner might employ. And while Franky did engage in "bracketing" behavior, the entire process—walking down the driveway and front path to the front door, waiting for Franky to find the strongest source of the odor, and walking back to the car—took at most a minute or two. More importantly, Detective Pedraja noticed the smell of the marijuana just as Franky had.[5]

Based upon his smell of the marijuana and Franky's alert, Detective Pedraja got a search warrant for Jardines's residence that day. When the

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police went to execute the search warrant later in the day, Jardines attempted to flee and was arrested. The search revealed marijuana plants, and police charged Jardines with trafficking in cannabis. At trial, Jardines moved to suppress the marijuana plants based upon an unreasonable search, and the trial court granted the motion. The Florida Supreme Court upheld the trial court's decision and held that the search was unreasonable because police did not have probable cause to enter the property with Franky. Additionally, the court discounted Detective Pedraja's observations because the trial court had made a factual finding that those human observations came after Franky had already alerted.[6]

No dogs allowed

Now, if you thought that *Illinois v. Caballes*—where the United States Supreme Court upheld a search of a lawfully stopped car based upon a drug dog alert—would control the outcome of this case, you would be wrong. And if you thought that *Kyllo v. United States*—where the United States Supreme Court held a thermal imaging scan of a residence without a warrant violated a defendant's expectation of privacy—would require suppression in this case, you would be wrong again. No, Justice Scalia based the majority holding upon *United States v. Jones*, explaining that the evidence was properly suppressed because police conduct violated Jardines's property rights.

Recognizing that the police investigation had been conducted on the curtilage of Jardines's home, an area treated just like the home for Fourth Amendment purposes, the court framed the applicable question as whether the search was accomplished through an unlicensed physical intrusion. Traditionally, the knocker on the front door is treated as an invitation or license to attempt an entry onto someone's property. According to the court, "this implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave." The court even noted that the traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the nation's Girl Scouts and trick-or-treaters.[7]

But according to the court, the knocker on the door doesn't authorize a trained drug dog to explore the area around the home. Thus, the court held that the scope of the license to approach the front door is limited not only to the particular area but also to a specific purpose. The background social norms that invite a visitor to the front door do not invite him there to conduct a search: "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy.[8] That the officers learned what they learned only by physically intruding on Jardines's property to gather evidence is enough to establish that a search occurred."

Well, wait, I know what you're thinking. Officers can walk up to the front door and knock just like anyone else can. And anyone can walk on your front lawn with their dog, right? Who cares about the officer's subjective intent? This is the exact argument that the dissent made, but the majority rejected it with some subtle appellate judo. The court first acknowledged its prior caselaw that the officer's subjective intent is irrelevant, but that, according to the court, was in a situation only where the stop or search is objectively reasonable. Here, the question was precisely whether the officer's conduct was objectively reasonable. Because the behavior of bringing a trained drug-sniffing dog to the door objectively revealed that their purpose was to conduct a search, they exceeded the implied license to enter the porch.[9]

Moreover, three justices would have rejected the search under the traditional, expectation-of-privacy analysis. Justice Kagan, joined by Justices Ginsburg and Sotomayor, explained that *Kyllo v. United States* already resolved the case. There, police used a thermal-imaging device to detect heat emanating from a private home even though they committed no trespass. To the concurring justices, Franky was a "supersensitive instrument" that was "not in general public use" and that could be used to "explore details of the home that would previously have been unknowable without physical intrusion.

This argument overlooks, however, that one reason the thermal imaging instrument in *Kyllo* was impermissible was because there was no guarantee that the use of the equipment would always be lawful, i.e. it could detect "the lady of the house" taking her daily sauna and bath rather than only detecting the growing of marijuana.[10] Unlike the thermal imaging in *Kyllo*, or even the

super-high-powered binoculars that the concurring opinion draws an analogy to, the drug-dog sniff would necessarily alert only to the presence of contraband. Indeed, in *Illinois v. Caballes*, the court had clearly rejected the same argument (regarding a drug-dog alert) the concurrence advanced in *Jardines*.[11] Here's hoping the fact that only three judges supported this rationale suggests that drug-dog sniffs are not searches absent a violation of a defendant's property rights.

Knock and sniff = bad, knock and talk = good

Going forward, the big concern from this case for law enforcement seems to be a potential to undermine a police officer's ability to walk up to and knock on a door without a warrant, just as any private citizen might.[12] After all, it probably would not take a lot of effort to elicit testimony from an officer that he approached the front door of the residence because he was conducting an investigation and was hoping to obtain consent to search or observe incriminating evidence or behavior. Would this provide the type of objective proof of the officer's subjective intent that would exceed the implied license to approach the door and knock?

But the majority opinion seems very focused upon the presence of the dog, not the other conduct of the officer. As discussed above, so long as the officer approaches the home by the front path, knocks promptly, waits briefly to be received, and then leaves if there is no invitation to stay longer, it appears a police officer's "knock and talk" will be permissible.[13] But like a traditional consent to search analysis or a case where a detention is unduly prolonged, where the officer exceeds the scope of that invitation, his behavior will be unreasonable.[14]

And of course you can "what if" this rule to death. Does this mean a drug-dealer can place a "No Cops Allowed" sign on his front door to prevent controlled buys inside the residence?[15] What about common areas of hotels or apartment complexes?[16] Do those areas constitute the same type of curtilage that the United States Supreme Court protected in *Jardines*?[17] Given how new both *Jones* and *Jardines* are, it's hard to predict where the United States Supreme Court and the Texas Court of Criminal Appeals will come down on these questions. Doubtless they will fall back on the typical factors used to determine whether those areas harbor the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"[18] On top of that the court will have to layer considerations attendant to lessees and invited guests as to whether those individuals can claim a property interest in the curtilage.[19]

These questions are certainly legitimate, but gaming out all the answers to every possible question would require far more discussion and analysis than this article can accommodate. What should be noted, however, is that scenarios similar to those touched on above have already been analyzed under an "expectation of privacy" standard.[20] And, as far as Texas is concerned, the Court of Criminal Appeals has already recognized that a violation of property rights provides standing to contest a search, though admittedly not as clearly as the United States Supreme Court did in *United States v. Jones*.[21] That is not to say that there will be smooth sailing ahead for law enforcement; Jardines has certainly provided fodder for new litigation under the Fourth Amendment. But some of the groundwork has already been laid, so let's hope *Jardines* will not require a complete reinvention of the wheel.[22]

One case can, however, be definitively discarded after Jardines. In *Rodriguez v. State*, the First Court of Appeals upheld the use of a drug-dog sniff outside a defendant's front door as support for a search warrant.[23] This case predated *Jones* so it was analyzed under the "reasonable expectation of privacy" analysis without regard to whether the police had exceeded the scope of the implied license to enter onto the property. While the dog-sniff search of Rodriguez's front door may not have violated his expectation of privacy, *Jardines* makes clear going onto the property, even by the front path, with a drug-sniffing dog violated Rodriguez's property rights and therefore the Fourth Amendment. Consequently, *Rodriguez* is no longer good law.

Is it retroactive?

Well, in *United States v. Peltier*[24] the United States Supreme Court held that any judicial enlargement of the exclusionary rule would be given retroactive effect only when the law enforcement officer had reasonable knowledge that the search was unconstitutional under the Fourth

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Amendment at the time of the search.[25] More recently, the United State Supreme Court reaffirmed this principle in *Davis v. United States*. There, the court faced what to do with searches that had been held unreasonable under *Arizona v. Gant*. According to the court, the exclusionary rule is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search.[26] Its sole purpose is to deter "future" Fourth Amendment violations. Consequently, officers who conduct a search in an objectively reasonable reliance on binding judicial precedent are not said to be subject to the exclusionary rule.[27] And while these cases focused upon cases pending on appeal at the time a new rule was announced (rather than a vehicle for overturning past convictions), the Supreme Court has also limited the ability to challenge a Fourth Amendment violation on habeas corpus to those situations where the defendant has not been afforded the opportunity to a full and fair consideration of his search-and-seizure claim at trial and on direct review.[28] Thus, it seems unlikely that there could be any meaningful retroactive application of this decision, assuming, of course it is not a "new rule."[29]

Conclusion

The United States Supreme Court is correct when it says that resort to a property-rights analysis made this case easy to decide. But it would have been just as easy to decide the case under an expectation-of-privacy analysis. The only difference would have been the result and fewer questions going forward. While police can knock on a person's front door to ask her questions, it remains to be seen just what additional conduct exceeds the scope of that implied license. One thing is certain, though. When it comes to knocking on doors, police officers should leave the dogs at home. ❇

Endnotes

1 *Florida v. Jardines*, 2013 WL 1196577 (Mar. 26, 2013)(5:3:4).

2 Indeed, Justice Scalia, author of the majority opinion, doesn't even refer to the dog by name. But he's probably a cat person.

3 See *Florida v. Harris*, 133 S.Ct. 1050, 1053-54 (2013).

4 Or as I like to think of it, it's the difference between a zombie and a zombie redneck torture family, or the difference between an elephant and an elephant seal. *Cabin in the Woods*, Lionsgate Films (2012).

5 The opinion is silent as to whether Detective Pedraja engaged in bracketing behavior.

6 This seems to explain Justice Scalia's complete failure to acknowledge that Detective Pedraja had also smelled marijuana and the search warrant was also based upon those observations. Similarly, the fact that Detective Pedraja smelled the marijuana seems to undercut Justice Kagan's effort to paint Franky as a "super-sensitive instrument."

7 Justice Scalia refrained, however, from shouting, "Hey you kids! Get the hell off my lawn!" See e.g. *Gran Torino*, Warner Bros. (2008).

8 Because understanding property rights is easy. See e.g. The Rule Against Perpetuities.

9 Presumably if the officers had an objective legal basis to be on the property independent of a "knock and talk," such as an emergency or a warrant, then the dog sniff would be justified.

10 *Kyllo v. United States*, 121 S.Ct. 2038, 2043 (2001).

11 See *Illinois v. Caballes*, 125 S.Ct. 834, 838 (2005).

12 *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011)("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door to speak." See also *Cornealius v. State*, 900 S.W.2d 731, 733-34 (1995)("Nothing in our Constitutions prevent a police officer from addressing questions to citizens on the street; it follows that nothing would prevent him from knocking politely on any closed door").

13 *Jardines*, 2013 WL 1196577 at *4 (2013).

14 See e.g. *State v. Weaver*, 349 S.W.3d 521, 532 (Tex. Crim. App. 2011)(noting that drug-dog sniff around van parked on private property exceeded the scope of the express consent to enter the business).

15 Cf. *Phillips v. State*, 161 S.W.3d 511, 515 (Tex. Crim. App. 2005)(holding that minor recruited by TABC was not a trespasser at bar despite the presence of a sign excluding minors); *Nored v. State*, 875 S.W.2d 392, 397 (Tex. App.—Dallas 1994, pet. ref'd.)("If the person in possession of the property has not made express orders prohibiting any form of trespass, and if the police follow the usual path to the front door, then the police have not violated the person's Fourth Amendment rights.").

16 See e.g. *Wilson v. State*, 98 S.W.3d 265, 272 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd.)(holding that the defendant had no reasonable expectation of privacy outside his hotel room door).

17 See e.g. *Evans v. State*, 995 S.W.2d 284, 286 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd.)(holding that fenced-in common area of an apartment complex was not part of the curtilage of the defendant's apartment); See also *Cuero v. State*, 845 S.W.2d 387, 391 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd.)(parking area of enclosed condominium complex was not the curtilage of the apartment).

18 See *United States v. Dunn*, 107 S.Ct. 1134, 1139 (1987)(addressing whether an area amounts to curtilage by considering the proximity of the area to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken to protect the area from observations by people passing by).

19 See e.g. *Minnesota v. Carter*, 119 S.Ct. 469, 474 (1998)(recognizing that overnight guests have expectation of privacy in apartment, but those merely "legitimately on the premises" had no legitimate expectation of privacy in the apartment).

20 See e.g. *Wilson*, 98 S.W.3d at 272 (no expectation of privacy outside of hotel room door); *Cuero*, 845 S.W.2d at 392 (no expectation of privacy in enclosed parking area of a condominium complex).

21 See e.g. *Wilson v. State*, 311 S.W.3d 452, 469 (Tex. Crim. App. 2010)(Hervey, J. concurring)(noting that seven judges decided in *Chavez v. State* that the state exclusionary rule is triggered when a defendant's personal or property rights are violated).

22 Of course, sailing on reinvented wheels may not be very smooth after all. Mixed metaphors often make for a very bumpy read.

23 *Rodriguez v. State*, 106 S.W.3d 224, 228 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd.), cert. denied, 540 U.S. 1189 (2004).

24 Freedom! Oh darn, wrong Peltier. Thanks a lot, Rage Against the Machine. See www.youtube.com/watch?v=H_vQt_v8Jmw.

25 *United States v. Peltier*, 95 S.Ct. 2313, 2317-18 (1975).

26 *Davis v. United States*, 131 S.Ct. 2419, 2426 (2011). This is a different *Davis* than the other Davises featured in Supreme Court precedent that you might be thinking of. He's like Ohio and Arizona in that respect. He gets around.

27 Note that in *Griffith v. Kentucky*, 107 S.Ct. 708, 716 (1987), the United States Supreme Court held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final. While the court did not overrule *Griffith* in *Davis*, it noted that even if a defendant can claim the new, substantive Fourth Amendment rule as a basis for relief, the remedy of suppression would not necessarily follow from that violation. Arguably, this suggests *Davis* has overruled *Griffith* sub silentio or at least removed any ability to enforce the claim of relief.

28 *Stone v. Powell*, 96 S.Ct. 3037, 3048 (1976).

29 See *Chaidez v. State*, 133 S.Ct. 1103, 1107 (2013)(noting that a new rule of criminal procedure is not retroactive where the court announces a new rule rather than an application of a principle that governed a prior decision to a different set of facts).

A crime against fashion (and the Penal Code)

Ownership of knuckles is clearly a crime, but this was the first time El Paso prosecutors had seen a set on a designer handbag.

By Mark Spinn and Adam Loving
Assistant District Attorneys in El Paso County

Although attorneys can (and do) argue over just about anything, we never imagined that our jobs as prosecutors would require wrangling over the legality of a purse handle.

Ladies, be aware that sometimes, there is a price to looking good. Sometimes, in fact, looking good can be downright criminal. Let us introduce you to our encounter with one of fashion's newest trends: the "knuckle clutch."

The Penal Code states, "A person commits an offense if the person intentionally or knowingly possesses … knuckles."[1] Knuckles are a prohibited weapon and are defined as "any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles."[2] You will notice that a "fashion" exception is conspicuously absent from this definition.

In the case that we prosecuted, the defendant did not simply possess knuckles. Rather, she was found in possession of metal knuckles attached to a small purse as its handle. Given this rather novel set of facts, we first had to determine if this was a case that merited prosecution. We did some research on the Internet and determined that these "knuckle clutches" are fairly common and readily available on eBay and Amazon. In fact, some are produced by very famous fashion houses and cost thousands of dollars. Nonetheless, the decision to prosecute was both simple and clear: We both believed that the purse handle fit the legal definition of "knuckles." That is, if the purse handle were used in a fight, it was capable of causing serious bodily injury because of its unique design.

During voir dire, our foremost concern was whether we could convey to the panel the rationale for the law recognizing "knuckles" as a "prohibited weapon." The next step was making the venire aware of the various ways that a person could "possess" a prohibited weapon. The last area of discussion was determining why a person merely possessing a prohibited weapon—and in a rather odd way at that—deserved to be

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prosecuted. After all, it is not like our defendant was manufacturing these purses or had just threatened someone with her purse handle. Fortunately, one of the venire members was a police officer who explained why knuckles are a prohibited weapon and how they were capable of being used.

At trial, we made a brief opening statement conceding that the defendant had not committed a heinous crime but nonetheless had clearly violated the law. Our only witnesses were two police officers, both testifying for the first time. The direct examination of the officers was fairly uneventful. They explained that they were called out to a fight in progress and that the defendant had been a passenger in a car owned by one of the people involved in the fight. The car's driver had been arrested so the officers were going to impound the car. The defendant asked the officers if they could first remove her purse from the car. The officers testified that they immediately recognized the purse's handle as knuckles (it is pictured below). The defendant readily acknowledged ownership of the purse and stated that she had purchased it in Las Vegas. She was far more concerned with preventing her purse from being towed away with the car than acknowledging that her purse's handle was a pair of knuckles.

Cross-examination, not surprisingly, was filled with far more drama. The defense attorney attempted to make the officers concede that a person could not use the purse's knuckles as a weapon without that person injuring herself. The defense attorney asked one officer to use the purse's knuckles as a weapon and punch the attorney's code book. The officer gladly obliged and placed his hand in the knuckles. His punch proceeded to rip through the back cover and several pages of the book, while the officer's hand remained unharmed. At this point, we asked the judge if we could publish the mangled book to the jury.

During closing arguments, we kept the first portion of our closing statement short and simply reviewed the elements of the offense and explained how the evidence had proven those elements. During the second half of our closing statement, we explained that an object can be both a purse and brass knuckles: Just because an item is a purse does not prevent it from also being a prohibited weapon.

The jury deliberated very briefly and returned a verdict of guilty. The defendant had also elected to go to the jury for punishment, but its deliberation took much longer in this phase. Ultimately, the jury levied a $250 fine. In light of her losing her purse, as well, this seemed like a just punishment.

Our research showed that this same "knuckle" design can be found on many different types of items, including cell phone covers, key chains, and belt buckles. In addition, celebrities such as Emma Stone and Kim Kardashian are frequently seen at fashion shows and movie premieres clutching their purses by their "knuckle" handles. Be on the lookout for these new fashion accessories as they begin to make appearances in courtrooms near you. With similar prosecutions, people will begin to realize that these items are more than fashion "statements," they are weapons. In fact, in Texas, they are "prohibited" weapons. ❇

Endnotes

1 Tex. Penal Code §46.05(a)(6).

2 Tex. Penal Code §46.01(8).

If it bleeds, it doesn't always plead

An Upshur County jury has unexpected sympathy for a mother who drank and drove with three kids in the car.

By Natalie A. Miller
Assistant District Attorney in Upshur County

There I sat, waiting, as my heart pounded in my throat, for the most agonizing moments of a trial to begin: the announcement of the jury's verdict. "I'll go ahead and read the verdicts in order," the judge said. "As to Count One, we the jury, find the defendant, Courtney Farnsworth Lemmon, not guilty of driving while intoxicated with child passenger, as charged in the indictment."

Well, not quite the verdict I had anticipated.

"As to Count Two, we the jury find the defendant, Courtney Farnsworth Lemmon, not guilty of driving while intoxicated with child passenger, as charged in the indictment."

Stop right there! I thought. There was blood evidence of Lemmon's intoxication! And there was a highly trained, experienced, and likable trooper who made the traffic stop and testified. And there was a seasoned chemist who shot down the defense's claims so badly, it was almost uncomfortable to watch. Each count, for each child in the car, had identical evidence, yet only on Count Three was Lemmon found guilty. What exactly had gone awry?

Suddenly, it dawned on me: jury nullification, the elusive option given to a jury I had only ever read about in law books or seen on television. Even with blood evidence, reliable witnesses, and 12 citizens of a relatively conservative East Texas county, my case had just fallen victim to almost complete nullification. It was time to go back to the drawing board.

The case

If I've learned anything during my year as a prosecutor, it is this: A slam-dunk case does not exist. Never feed the belief that you are the prosecutor who has found the mythical slam-dunk case. What you think you've found it is exactly that, a myth. In fact, the phrase, "this is a slam-dunk case," is vehemently forbidden from utterance in our office.

But one September afternoon of last year, sitting in my office as the newest felony prosecutor examining her newest file—*The State of Texas v. Courtney Farnsworth Lemmon*, DWI with child passenger—I smiled and thought I just might have a slam-dunk case sitting on my docket.

Admittedly, Courtney Lemmon was not your typical meth-slinging, tattooed defendant with an approaching retirement at the penitentiary. And, as far as I could tell, this was her first run-in with the law. But she was untruthful, vulgar, and very intoxicated on video—the makings of a great defendant for the State. She had lied to the trooper about where she was coming from, how much she had to drink, and when she had had her last drink. Lemmon claimed she had her last drink in Austin, which at the very least was five hours away from where she was stopped. Impossible. She also said she had spilled a drink in her car "earlier," and then the story changed to "a few days before." Which was it? It didn't matter; what mattered was she was too drunk to keep her story straight. And rather than thanking the trooper who released her children to their father rather than CPS for the night, Lemmon called him a "deutschbag."

Certainly, a jury would have no tolerance for a crass, visibly intoxicated driver who was endangering other drivers in their county. And no jury would like a mother who drove drunk with three children, all well under the age of 15, strapped in the back of her SUV. The case definitely had promise. As I flipped through the file, there lay my golden ticket—the blood analysis report. In the middle of the page I read, "0.13." Well beyond the legal limit and high enough to disparage the thought that at the time of the stop, her blood alcohol content was below 0.08. Surely, this case would end in a plea.

Our plea offer

Because this was her first felony offense, Lemmon's attorney received the typical DWI offer of probation—specifically, two years' con-

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finement probated for five years. As a condition of her probation, Lemmon would submit to a drug and alcohol evaluation, complete 400 hours of community work service, take a victim impact panel, have a guardian interlock installed in any vehicle she operated, and pay a DPS lab fee, CrimeStoppers fee, probation fee, and $2,000 fine. The only reason she escaped any jail time as a condition of probation was my sheer inexperience in determining felony plea offers.

I never heard anything back regarding my plea offer to Lemmon. But I did hear from the defense, quite clearly, via a slew of arguably unusual motions. Her attorney never challenged the reason for the stop—her busted headlight, which was not captured well on video but was noted in the trooper's report. Instead, her attorney subpoenaed a disk's worth of information from the lab in Tyler and asked the court to take "judicial notice of nystagmus causes other than alcohol." (The judge ultimately denied this motion as an improper comment on the evidence.) What would the defense be, and why, I wondered, was the case even heading toward trial?

The trial

The day voir dire began, I scoured the courtroom for the defendant I had seen on video. She was nowhere to be found. Instead, I spotted Lemmon, seemingly meek, young, and frankly a bit sympathetic. She sat huddled in a coat, wearing glasses and little makeup. It was then I should have known there would be many defenses in this trial; Lemmon would not even have to take the stand for the jury to listen her.

But I stuck to my voir dire notes, explained the meaning of intoxication, and tried to weed out those who thought blood draws invaded their privacy and those who would weigh officer testimony based upon the past. There was no need to discuss punishment, as Lemmon elected sentencing from the judge. The defense asked the panel why a defendant would not agree to a plea offer where there is blood evidence. Their answer: because machines can be wrong. The defense also reminded the jury that we had to prove intoxication at the time of driving, not at the time of the blood draw.

So there it was, why Courtney Lemmon refused my plea offer. Machines can be wrong, and she wasn't drunk when she was stopped. That is exactly what the defense argued at trial.

Now, I should say that the Lemmon trial was filled with firsts for me. It was the first and, I hope, last time, a juror raised his hand during my opening argument to talk to the judge. It was also the first time I'd ever questioned the chemist who performed the blood analysis. So I'd be lying if I said it was my brilliant redirect of the chemist, Karen Ream, that blew the defense's theories away. Ms. Ream alone, with her vast training and experience, single-handedly destroyed any idea that Lemmon was not drunk when she was stopped. Ream testified that because the stop happened around 11:15 p.m. and the blood draw happened at 11:40 p.m., there was just not enough time for Lemmon's BAC to spike from below the legal limit to well above the legal limit at 0.13. And it was Ream who shot down any speculation that the blood vial was expired or that an alcohol fermentation process occurred in the vial. Interestingly, after Ream's testimony, the defense decided to call no witnesses.

So there we sat. Witness testimony and scientific evidence showed that as Lemmon drove drunk that night without a headlight, she endangered not only other drivers, but also her own children.

With trooper testimony and video evidence, the jury saw at least one of Lemmon's children and heard that when they arrived at the jail Lemmon herself confirmed their ages—all under the age of six. The jury also learned this wasn't Lemmon's only traffic stop that night. Apparently, five to 10 minutes before the stop that ultimately led to Lemmon's arrest, a different officer, this one in Winona, had stopped her for the burned-out headlight, but she let Lemmon go on her way with only a ticket. The jury never saw that officer or the ticket, but I'm certain now the jury remembered the story, as the jurors, like that elusive officer in Winona, let a little sympathy outweigh the evidence and overshadow the law. But I think the difference between the jury and that officer is this: The jury wasn't all right letting a defendant, even a seemingly tamed, single mother of three, head on her way without any punishment. Maybe that explains the single guilty verdict. At the same time, that jury wasn't quite ready to give Lemmon three felony convictions. Maybe that explains the two not-guilty verdicts.

Or maybe I've still got it wrong. At this point, I'll never know for sure. I do, however, now know this.

There will be strong cases for the State but probably never a true slam-dunk. The strongest cases will have officers and chemists, like the ones I questioned in the Lemmon trial—witnesses who perform their jobs meticulously. But no matter how strong the case or how sympathetic the defendant, the decision to convict remains with the jury.

As a good friend and former prosecutor reminded me after this trial, "Sometimes juries just let everybody win a little." There's just no other way to explain it. ❇

Retaking out-of-state offenders

The Interstate Compact for Adult Offender Supervision has particular rules about sending offenders out of Texas or taking them back. Here's what prosecutors need to know.

The Interstate Compact for Adult Offender Supervision ("ICAOS," found in Government Code Chapter 510) is one of those relatively obscure areas of the law that arises from time to time, depending on how many offenders a particular jurisdiction takes in or sends out of state. It has its own body of law, and following is a short introduction to a small part of that law, retaking offenders.

By Regina Grimes
Section Director and Deputy Compact Administrator, Texas Interstate Compact Office at TDCJ, and
Kathie Winckler
Texas Commissioner, Interstate Compact for Adult Offender Supervision

How would a prosecutor receive a case where an offender must be retaken? The most common situation is when an offender who is on probation in Texas but whose probation has been transferred on request to another state commits a new offense or violates the terms of his supervision. Under the ICAOS, the new state can require Texas to take him back. When this happens, the local CSCD director or a probation officer will ask the prosecutor to file a motion to revoke and will request a warrant—and the prosecutor cannot say no. Why?

The Interstate Compact for Adult Offender Supervision is an act adopted by all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands, to establish the policies and procedures governing the interstate movement of criminal offenders. Its commission is composed of one representative of each state and has the power to "promulgate rules which have the force and effect of statutory law and [are] binding in the compacting states."[1] The compact and the rules promulgated under it supersede any conflicting state or local law; however, when inconsistent with state constitutional provisions, the constitution controls.

Interstate Compact rules are

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located at the commission's website, www.interstatecompact.org.

The process

When an offender must be retaken by Texas, a warrant must be issued. The commission defines "warrant" as "a written order of the court or authorities … which commands law enforcement to arrest an offender and which must *be entered in the National Crime Information Center (NCIC) Wanted Person File"* (emphasis added).[2] A TCIC-only warrant will not suffice; only an NCIC warrant is acceptable because only an NCIC warrant will be recognized and executed outside of Texas.

A prosecutor may be asked to file a motion to revoke and issue a warrant for reasons other than the offender committing a new offense or violating his probation, including:

- An offender who has been allowed to return to the state in which he lived at the time he committed the offense in Texas.[3] Although the offender is given permission to go to his state, the receiving state must be given an opportunity to investigate the plan of supervision for up to 45 days. If authorities there reject the offender, if the offender fails to show up after being allowed to leave Texas, or if Texas does not send a timely transfer request to the receiving state, the offender will be required to return to Texas.
- Offenders may travel or reside outside Texas with the approval of the receiving state or under a maximum 45-day travel permit issued by Texas.[4] If Texas should fail to follow those procedures and allow an offender to leave the state, either to reside or stay for more than 45 days, the state that discovers the offender's presence can require Texas to direct the offender to return within 15 calendar days. If the offender does not return to Texas, a warrant must be issued.

Instances where a prosecutor may be asked to issue a warrant for an offender for violation of supervision include:

1. An offender commits three or more *significant violations* arising from separate incidents that establish a pattern of non-compliance with the conditions of supervision in the receiving state or a subsequent receiving state. A "significant violation" under ICAOS rules is one for which a receiving state would revoke supervision for its own offender.[5]
2. An offender is convicted of a new felony offense in the receiving state.[6] This offender must be retaken after completion of a term of incarceration for the felony conviction or placement under supervision unless the receiving state consents otherwise. A warrant and detainer must be filed with the holding facility.
3. When an offender cannot be found by supervising authorities in the receiving state, he is declared an absconder. The receiving state notifies Texas of its unsuccessful attempts to locate the offender, and Texas then issues a warrant and detainer.[7]
4. A receiving state can require the sending state to retake a violent offender who has committed only one significant violation or any offender who has been convicted of a violent crime.[8]

It is particularly important to note that any warrant issued for an Interstate Compact offender is not subject to bail or bond.[9]

The sending state, specifically the local sheriff or other law enforcement agency that is responsible for safely transporting offenders, pays the costs for retaking. The state that has detained the offender is responsible only for incarcerating the offender until Texas comes to retake him. To defray the cost of retaking, several states and some Texas counties have imposed a fee or bond on the transferring offender prior to the transfer.

The importance of compliance

How do these compact rules, adopted by unelected representatives of the member states, trump state law? Because the U.S. Supreme Court said so. In *Cuyler v. Adams*,[10] the court found that the fact that an interstate detainer compact was given congressional approval transformed it into federal law.[11] A few years later, in *Carchman v. Nash*,[12] the court held that the congressionally consented compact was subject to federal construction and resolution. Therefore, we apply the same principles of federal supremacy as if Congress enacted the compact's provisions.

There can be serious consequences for non-compliance, including fines, fees, costs and judicial enforcement in U.S. District Court. For a more detailed explanation of the actions that can cause sanctions to be brought by the commission, go to www.interstatecompact.org, click on the Legal tab, then the Liability Whitepaper button to read, "Why your state can be sanctioned upon

violation of the Compact or the ICAOS Rules."

Staff members at the Texas Interstate Compact Office are available to assist with any questions or concerns you may have. Both of us are available by phone or email (contact info is below) to confer on any questions that may arise in handling Interstate Compact cases. Training for groups of attorneys and judges can also be arranged if requested. ❇

Editor's note: Regina Grimes is available at 512/406-5989 and regina.grimes@tdcj.state.tx.us, and Kathie Winckler can be reached at 409/771-5444 and Kathie.winckler@gmail.com.

Endnotes

1 Tex. Gov't Code, §510.017, art. IV(b).

2 ICAOS Rule 1.101.

3 ICAOS Rule 3.103 (a)(1).

4 ICAOS Rule 2.110.

5 ICAOS Rule 1.101.

6 ICAOS Rule 5.102.

7 ICAOS Rule 5.103-1.

8 ICAOS Rule 5.103-2.

9 ICAOS Rule 5.111.

10 449 U.S. 433 (1981).

11 Id. at 440.

12 473 U.S. 716.

Being the new kid in the child welfare unit

A few reflections and an overview for prosecutors handling Child Protective Services (CPS) cases

By Michael Kotwal
Assistant Criminal District Attorney in Dallas County

"Is this a typical day?" I asked with more than a little surprise while glancing around the almost-packed courtroom. A fellow ADA smiled without looking up from a rather impressive-looking stack of red case files and responded quite casually, "Not really. This is one of our lighter dockets." Not knowing what exactly was going on, I settled in at counsel table with a pen and a legal pad attempting to look very DA-like while feeling more like a new student on the first day of school.

I was very excited about my new assignment in the child welfare unit. Having been a trial prosecutor for over three years, I was very comfortable in courtrooms; however, with the exception of voir dire, I couldn't honestly recall ever seeing so many people packed in the gallery. I was also fairly sure the last time I remember seeing so many attorneys gathered in one place was the last conference I attended.

It wasn't long before a defense attorney sidled up to me and made a comment along the lines of, "You must be the new kid around here." I wryly confirmed his observation, which failed to keep him from asking me several questions about a case that I knew nothing about. I politely redirected him to one of the other ADAs.

I watched with fascination the seemingly endless procession of juvenile delinquency cases involving serious offenses by youthful offenders rotating in and out from the holding area, some with families present, some without. These hearings were mixed in with the child welfare cases where sometimes large groups of people, including parents, attorneys, and various other interested parties assembled before the judge to address various issues concerning children who had been victims of abuse and neglect requiring State intervention. I observed an endless variety that morning—kids without parents, kids with both parents, large families, no families, children who had suffered multiple levels of abuse, others that were more fortunate.

Almost nine years later, I have handled countless cases as a child welfare ADA and am no longer the new kid on the block, but I still truly enjoy getting to handle my own set of red files in cases that make a difference.

A walk through the system

As prosecutors, our responsibilities generally intersect the world of child

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abuse in terms of criminal prosecution: holding an individual or individuals criminally accountable for actions against children. While this focus remains critical to justice for the victims and community, child welfare cases incorporate these aspects and many others that impact children long after criminal cases are completed. One of the first lessons I learned in this unit was that there was not always a one-to-one correlation between a child welfare case and a companion criminal one. While this overlap certainly occurs in many cases involving physical or sexual abuse, there are just as many I have handled where, for a variety of reasons, criminal charges are not filed. Child welfare cases at their core involve answering the question: What is now in the best interest of the child?

In Dallas and many other jurisdictions, the District Attorney's Office represents Child Protective Services (CPS) in child welfare cases. Unlike criminal prosecution in which the DA's office represents "the State," the relationship with CPS is "attorney-client" in nature (minus billing of course). Housed within the Texas Department of Family and Protective Services, CPS is a division with responsibilities including investigation of abuse and neglect, working with families, and managing the thousands of children in foster care. To give some perspective of the volume of cases in this area, Dallas County has two juvenile district courts that hear only delinquency and child welfare cases, and 13 prosecutors in our office are assigned exclusively to these cases, collectively disposing of cases involving thousands of children in a given year.

Our cases generally begin when CPS removes children from their parents or guardians and places them into either foster homes or safe relative placements. Once this action occurs, the clock begins ticking on the case. As a prosecutor, I was accustomed to dealing with the Texas Penal Code and the Code of Criminal Procedure for most of my legal needs. Child welfare cases, however, are strictly governed by the Texas Family Code, which makes two things very clear: 1) cases are to be handled on a rigid timetable, and 2) the best interest of the child is of paramount concern. The Family Code mandates that cases be finalized within a year (or up to 18 months maximum providing that "extraordinary circumstances" are found by the court). Such timeframes were established by the Texas Legislature to ensure children were not lost in the system for years without any progress on their cases. The code outlines various hearings and when they should occur during the pendency of all cases. In criminal court, I was used to docket call often involving meeting with defense attorneys and agreeing on when and what to set next for the case—not so in child welfare. All of our case settings go before the judge, who makes detailed docket entries and checks on the State's compliance with code provisions.

Throughout the process, multiple parties are frequently involved. In addition to the State representing CPS and defense attorneys for the parents, the court appoints an attorney known as a guardian ad litem to represent the children in all proceedings. Additionally, many of our cases involve CASA (Court Appointed Special Advocates). CASA is a nonprofit organization charged with providing the court and parties additional information on the welfare of children currently in the system. (Although not routinely done in Dallas during our legal cases, it is my understanding that some counties use CASA as guardian ad litems as well). Throughout these various hearings, the courts are interested in the parents' compliance with rehabilitative services facilitated by CPS. They range from individual counseling to intensive drug treatment, and their goal is to afford parents an opportunity to reunify with their children if possible. During the course of a case, it is not uncommon for the State to be involved in a multitude of hearings involving such issues as modifying access, child support, or placement of the child. At some point prior to the year deadline, final decisions regarding the children must be made.

Resolving cases

Outcomes of child welfare cases vary depending on a host of factors. Using a mixture of litigation as well as formal mediations, final outcomes may include the following:

- return to the parents,
- permanent custody to relatives, or
- termination of parental rights with custody to the State.

Under Texas law, there is a legal presumption favoring parents and family for placement of children if at all possible. The myriad services offered by the State play a key role in shaping whether reunification with

the parents is in the child's best interest. The court-ordered services are tailored to the individual case facts and frequently involve major commitments by the parents, especially those involving drug treatment or intensive domestic violence counseling. Statistically in Dallas County, the majority of our cases resolve with either permanent custody to relatives or termination of parental rights. When custody is given to relatives, special attention is given to outlining the rules that both the relatives and parents must abide by, especially regarding visitation and access. Additionally, because many of the relatives are grandparents or great-grandparents, these households are taking on a considerable amount of responsibilities in raising usually young children. In such scenarios, CPS will often assist in providing financial and other support measures.

Obviously in many of our cases, neither the parents nor family members are deemed appropriate caregivers for children so the State must explore non-familial options. When the State proceeds to trial in these types of cases, we are generally seeking termination of parental rights with permanent custody awarded to the State so the child can be freed for adoption by foster parents. Termination trials parallel criminal ones in that they are divided into two phases. However, rather than guilt/innocence and then punishment, our trials involve a first phase of whether grounds for termination exist and a second phase of whether termination of parental rights serves the best interest of the child. Termination grounds are outlined in §161.001 of the Texas Family Code and provide a spectrum of conduct that would justify termination of parental rights, including such scenarios as abandonment, endangerment, direct abuse of the child, or prolonged incarceration by the parents. In the majority of our termination trials, the State relies upon grounds specified in §161.001(1)(D) and (E), which constitute endangerment. During jury selection, we focus a tremendous amount of time educating the jury panel on the different types of abuse and endangering conduct that may occur as not all forms of child abuse will leave physical marks. Many of the witnesses called by the State at this phase mirror criminal trials and include police officers, medical professionals detailing the abuse, and CPS personnel.

The second phase of our trials involves the question of best interest for the child. Along with proving the requisite grounds by clear and convincing evidence, the State has the burden of also demonstrating that termination of parental rights is in the best interest of the child, as outlined in Family Code §263.307 and established in caselaw. Factors include:

- the magnitude and frequency of the abuse to the child;
- the child's age and specific vulnerabilities;
- willingness and ability of the home environment to provide for the child's needs; and
- the ability of the placement to be able to meet the needs of the child whether they are medical, behavioral, or a combination in nature.

Much like the punishment phase of a criminal trial, this phase is sometimes the longest and most difficult question for a jury to answer. Often jurors have quickly agreed on the grounds but had much difficulty deciding on the "best interest" part of the termination question. Many of the witnesses at this phase include therapists, educational professionals working with the children, and the adoptive foster family members, especially if they are interested in providing the child with permanence.

My trial experience definitely helped prepare me for child welfare cases, especially in light of how often we are in court over contested issues. From the time I am assigned a new case, I have to start preparing the case and witnesses because under the Family Code, cases involving children removed into foster care require a hearing within 14 days of removal. Because these may be contested by the parents, the State must be prepared for what can amount to a mini-trial even at this early stage. If the State fails to makes its burden, the child may be returned home.

Preparing a child welfare case is similar to a criminal one; however, the State must always be mindful that proving grounds alone is insufficient. Much of my pre-trial preparation involves assessing evidence and witness testimony for proving best interest, as we are essentially asking the jury to agree that our long-term plan for the child is the best solution. Because we are often dealing with a large mix of witnesses, it is critical to have a firm understanding of what the witnesses can and, equally important, cannot testify to in court. Child welfare cases are a unique challenge in trial because not only is the

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State trying to prove certain conditions occurred but also that these conditions warrant the termination of parental rights to the child. This decision is understandably challenging to many jurors so it is incumbent upon the prosecutor to effectively educate the jurors in voir dire, then logically present the different pieces of evidence without drowning them in paper or terminology.

After the verdict

One of the most common questions I have been asked during my time in child welfare is, "What happens to all those children in the system?" The answer I generally give is an honest, "It depends." Many of our cases resolve without the need for a full jury trial. Mediation in Dallas County has become extremely popular for resolving cases as it saves both time and expense while allowing parties to craft solutions (as opposed to having one imposed by a court or jury). One of the most common resolutions is for children to be placed with relatives while allowing structured access by the parents, whose parental rights remain intact.

Alternatively, in termination scenarios, the State becomes permanent custodians of the children. At this point, children in the State's custody become part of the "263 docket" as we call it in Dallas—so named for Chapter 263 of the Texas Family Code covering children under the care of CPS. Children falling into this category are subject to periodic hearings during the year for the court's review of their cases. The first time I was assigned to the 263 docket, I remember being amazed at the sheer volume of case files—and then the thickness of the court files on many of the children. Sometimes, the hearings are relatively simple as the child is in the final stages of the adoption cycle. For other children, the result is not as clear. Many of the children have substantial issues that significantly undermine their chances of adoption.

A recurring theme, especially for older foster children, is a history of changing foster homes and rotating in and out of treatment facilities. Another aspect I noticed from covering 263 cases was the large number of children with multiple psychiatric diagnoses, coupled with long lists of psychotropic medicine orders. A lot of the larger files were packed with reports documenting problems in school, running away, and delinquent conduct. Sometimes at these hearings, the Juvenile Probation Department would detail the child's progress (or lack thereof) with probation requirements stemming from delinquency cases.

Even today when I cover 263 cases, I am struck by the contrast of children's cases: In one case there will be a smiling family physically and emotionally surrounding a child as they prepare for the next chapter in their lives as their involvement in child welfare court comes to an end, while the next will be a somber recitation about the mountain of problems a child is having as the State desperately seeks solutions. Eventually, all of these cases come to an end, if for no other reason than the child has reached adulthood. For all of the positive endings we see, some of the children's transition into adulthood will be marked by criminal cases, as well as being part of their own child welfare cases.

As is true for all prosecutors, some cases end better than others, but I can honestly say that the work we do in this unit makes a real difference to one of the most vulnerable segment of our society. Child welfare law has greatly evolved from the days of largely being ignored by the State or treated as another type of delinquency case. This area continues to develop at an extraordinary rate with many states now recognizing it as a legal specialization and an increasing body of case decisions that define this area. ❇

Tarrant County's Deferred Prosecution Program (DPP)

For several decades now, prosecutors in Fort Worth have allowed certain offenders to enter a program for a second chance. Here's how it works.

As the oldest diversion program of its kind in the state, the Deferred Prosecution Program in Tarrant County has for 40 years allowed young, low-risk offenders a second chance at life with a clean record. Known by its initials, DPP unburdens the courts of over 500 cases annually and disposes them through a type of mail-in probation run by the DA's Office.

By Pamela A. Boggess and Chris McGregor
Assistant Criminal District Attorneys in Tarrant County

For most of the program's history, investigators with the DA's Office met with applicants for a face-to-face interview as the last step in the admission process. Things changed in spring 2012, when that role shifted to a handful of misdemeanor prosecutors. Over the past year the program has grown in scope and numbers. Consequently, more prosecutors were needed to meet the interviewing demand. Now, 18 misdemeanor ADAs share the job of interviewing the hundreds of applicants who all want the same thing: a chance to have their criminal cases dismissed and the arrests expunged.

This article addresses the nuts and bolts of our program, as well as the experiences and lessons young prosecutors have drawn from it.

The offense

To qualify, applicants must be between 17 and 21 years old at the time of the offense. In a perfect world an applicant would have only one charge pending; however, facing multiple charges is not always a deal-breaker. We make exceptions in limited contexts, such as more than one qualifying offense arising out of the same transaction. Multiple cases from separate incidents, though, are an automatic disqualifier.

The most common offenses we see, by a long shot, are misdemeanor marijuana possession and theft. In fact, the recent inclusion of marijuana cases as a qualifying offense is the driving force in the numbers spike referenced above. Defense attorneys, we find, are very eager to get clients facing that charge into the program.

Even if the offense qualifies, we exclude those with facts involving violence, weapons, or an injury risk. For instance, even in a standard shoplifting case, if a defendant ups the ante by taking a swing at a loss-prevention officer, his case would be ineligible for the program. Furthermore, nearly all felonies are excluded. We do allow on occasion state jail theft and criminal mischief offenses, plus a few others that are handled on a case-by-case basis. A good number of misdemeanor offenses are also barred. Those include—for reasons that are fairly obvious—DWI, assault, prostitution, public lewdness, and any type of weapons case, to name a few. We do consider burglary of a vehicle cases, but these don't clear the application process very often.

The application

At the outset candidates are given a lengthy paper application. They have 30 days to complete and return it, along with a notarized affidavit that its contents are truthful and accurate. These deadlines have meaning, so from the start responsibility is placed squarely on the applicants. They must fill out the paperwork themselves. This theme—personal accountability—is a consistent one throughout the process and speaks to the larger purpose of DPP.

What we look for through the application is a small sense of who the applicant is as a person, what sort of background he has, and where he might be headed. And we see a real

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cross section of society in our applicants. We have the children of affluent parents who live in good neighborhoods and attend top schools, as well as those from hardscrabble backgrounds, and everyone in between (roughly 20 percent of applicants are represented by appointed counsel). The sad truth is that it's not uncommon for an applicant to have a parent in the penitentiary or for the applicant to be a dropout with children of his own and no viable skills to get him by in life.

It's equally true that the information we get in the application is only as reliable as the person providing it. To offset the risk of applicants minimizing their bad deeds or overstating their good ones, we require three written references from non-family members that speak to the applicant's character. References should be aware of the pending criminal charge. In addition, we have applicants submit high school transcripts (and college, if applicable). They provide both work and social history and answer to any past experiences with drugs, alcohol, Class C tickets, or other criminal cases. The latter is especially important because a full background search and criminal history is run on every applicant by a DA investigator. If we catch an applicant in a lie at this early stage, there's little hope he will be truthful in an interview. Furthermore, the background search often reveals other automatic disqualifiers such as gang affiliation, involvement in organized crime, a juvenile history, or arrests for certain Class C offenses such as disorderly conduct, assault, and possession of drug paraphernalia. Occasionally these go unmentioned by the applicant.

One wrinkle we've added to the application on marijuana possession cases is the inclusion of at least one five-panel drug test (clean, of course), taken at the applicant's expense, which is submitted along with the completed application.

Once that is done, applicants pay a $25 non-refundable fee (which helps defray the cost of our office's time). Applications are then reviewed, typically, by a staff member of our intake division. This is a time-intensive process, as dozens of applications come in weekly. At present, nine out of every 10 applications are returned for additional information or reference issues.

The primary causes for rejection at the application stage are either the failure to apply on time or because some disqualifying factor is discovered during the background check.

The interview

Once a candidate navigates the application and background check, an interview is scheduled. An additional $75 fee is also collected prior to the interview (again, to defray our costs). Because of the high volume of applicants, we have at any given time 150 to 200 interviews pending. This is the stage where the prosecutors come in. Before the interview, prosecutors review the file containing the application, references, and other relevant information. Interviews are conducted in offices reserved for that purpose. Two prosecutors are always present, as well as the applicant and defense attorney. To avoid a potential conflict of interest, a prosecutor cannot participate in an interview on a case drawn from her assigned court.

One prosecutor leads the interview, while the other is there in a secondary role, mostly as a witness. Because of the unique nature of prosecutors interviewing defendants, it's always helpful to have an extra set of eyes and ears to document what has taken place. Applicants are also required to have a parent or guardian accompany them, but usually they are not present in the interview, the idea being that an applicant will be more candid once removed from a parent's critical eye. The challenge, then, for the prosecutor is distinguishing between the truth and someone saying what they think the interviewer wants to hear. It demands that we make snap judgments as to credibility, similar to what we do with witnesses in our trials and everyday cases. Indeed, many of the same principles overlap. Sometimes the interview can feel like a cross-examination. As young prosecutors still learning our trade, this additional experience can only be a plus.

We make it known up-front that an interview does not guarantee acceptance into the program. And the ground rules are clear and simple: Be honest and accept responsibility. The offenders must admit guilt. Because the interviews hit upon all aspects of the applicant's life (not just the facts surrounding the charged offense), it is vital for us that the applicants tell the truth, unflattering though it may be. Applicants are told to expect tough questions about the offense, prior drug use or criminal activity, and issues involv-

ing maturity, contrition, and likelihood to reoffend. Of course, the style of the interview depends on the prosecutor conducting it. Though there are similarities, no two are exactly alike, but as a general rule, applicants who are forthright about their pasts are admitted to the program. Conversely, the overwhelming majority of rejections result from dishonesty.

The addition of misdemeanor marijuana cases has raised its own set of distinct concerns. Foremost, we've seen a tendency for some applicants to get clean long enough to pass the drug test required at the application stage. Owing to the previously mentioned case volume, there is commonly a six-week or more gap between application date and interview date. We have found that some applicants will return to drug usage in that in-between time. Weeding them out is not particularly difficult, however, as most will admit recent drug usage under threat of an immediate drug test. One memorable interview involved an applicant who appeared to be under the influence when he showed up (he did not get in to the program, needless to say). To combat this, we now insist that applicants provide a second clean drug test taken no more than a week before their interview.

In addition, modern attitudes toward the tolerance of casual marijuana use are mirrored in many of our applicants. Contrition is a tough sell with a lot of them. By way of example, even a thief understands that theft is wrong. However, a young person on the pro-legalization bandwagon is more difficult to convince that, whether he agrees with marijuana laws or not, he is still obliged to follow them while they remain on the books. Several have indicated a desire to move to Colorado.

The acceptance

If accepted into the program (as some 75–80 percent of those interviewed are), applicants must mail in monthly probation reports. Even at this stage, personal responsibility is paramount. Parents, family, friends, and defense counsel cannot complete or deliver reports. The standard probation period is six months but can be up to a year long. Because the criminal case is being conditionally dismissed, applicants must sign a waiver of speedy trial. In the rare instance when someone is unsuccessfully discharged from DPP, we re-file the original case and start back at square one.

Similar conditions to what you might find in a court-monitored probation are included with DPP. If restitution is applicable, we require that amount be paid. The same applies to appointed attorney's fees. We also incorporate other conditions designed to steer young offenders toward maturity and responsible decision-making. This could include anything from having a high school dropout obtain a diploma, to making someone with no work history get a job or volunteer in the community. Monthly drug testing is not unusual. Ultimately, we do our best to tailor conditions to the specific needs of the offender.

And by all accounts, the program is a success. Although not everyone we let in gets it right, most do. Over 95 percent complete their probationary term and are eligible to have their arrest expunged. And most who complete DPP do not reoffend later in life (we are aware of only a very small number). In fact from time to time program graduates contact us and credit DPP with giving them the wake-up call they needed. The easy conclusion to draw from this is that the right decisions are being made in the application process and in the interview so that only the most deserving applicants are allowed in. And this is as it should be, given the spirit of the program and the benefit extended to offenders.

For the prosecutors involved with DPP, there are positives beyond the practical ones mentioned above. For those of us who manage heavy caseloads, there's a risk of seeing defendants solely as a case number or offense. What we've discovered is that being involved in this process humanizes the work we do. In a sense, it lends a pulse to the body of our cases. Moreover, this program is helpful in achieving our mission: to see that justice is done. ❇

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RETURN SERVICE REQUESTED