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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

Online solicitation takes heat from the high court

Understanding the recent Court of Criminal Appeals holding in *Ex Parte Lo* that struck down a portion of the online solicitation statute as unconstitutional, plus tools for prosecutors in their continued battle against sexual predators

In Fall 2009, a 15-year-old boy received text messages from his former choir teacher. The messages inquired about the victim's dating life and progressed into specific inquiries about his sex life, particularly with whom he was having sex and how he was having sex. The victim shared very graphic details about his sex life with the 49-year-old defendant, whose replies were also sexually explicit.[1]

By Jessica Akins
Assistant District Attorney in Harris County

The State believed the defendant possessed the intent to arouse or gratify his own sexual desire, so he was indicted for the third-degree felony of online solicitation of a minor. He filed a pre-trial writ of habeas corpus, claiming the statute was unconstitutional because it was facially overbroad, vague, and violated the dormant commerce clause.[2]

The Court of Criminal Appeals agreed. On October 30, 2013, the Court issued *Ex Parte Lo*, a 9-0 decision, holding that §33.021(b) of the Texas Penal Code was overbroad and thus unconstitutional on its face.[3] Here is an overview of the issues before the court and some insight into our four-year journey that is *Ex Parte John Christopher Lo*.

The statute

For his actions, the defendant in *Ex Parte Lo* was charged with online solicitation of a minor under subsection (b)(1) of §33.021, which states that a person commits an offense if he:

- is 17 years of age or older;
- possesses the intent to arouse or gratify the sexual desire of any person;
- communicates in a sexually explicit manner;
- with a minor (a person younger than 17 years of age);
- over the Internet, by electronic mail, or by text message.[4]

The legislative history of this statute provides insight into the problems law enforcement agencies face in the ongoing battle to protect children from online predators.[5] Proponents of the bill recognized the process of grooming, where predators develop a relationship with their intended victim prior to a sexual assault. The process may start with the predator befriending a child online, developing his trust, and eventually engaging in sexually explicit conversations. Sadly, the result many times is a meeting with the child to solicit sex (oftentimes conduct constituting sexual assault of a child). This statute was enacted to allow law enforcement to stop predators before they have the opportunity to meet and injure the child.

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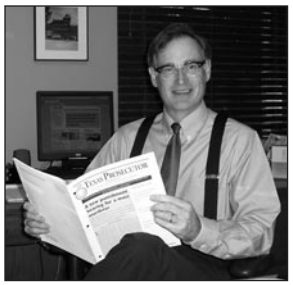
Serving the victims of crime

Assisting the victims of crime is a priority for prosecutors. But it has been a challenge, ever since the legislature passed the Crime Victims Bill of Rights and required prosecutor's offices and law enforcement agencies to employ a victim assistance coordinator—but then didn't fund it. Offices found lots of different ways to pay for victim assistance coordinators, and the Office of the Attorney General has been very helpful in providing grants to help fill the need. TDCAA focused on victim services in 2010 when we created the Victim Services Section and its governing body, the Victim Services Board.



By Rob Kepple
TDCAA Executive Director in Austin

To keep the effort moving forward, the Board of Trustees of the Foundation voted in January to financially support the full-time position of TDCAA Victim Services Director. The Board has pledged to raise funds to keep that position going for prosecutor's offices well into the future.

We are pleased that because of the Board's support, we have been able to hire a real pro: **Jalayne Robinson**, the former victim assistance coordinator in Wood County and former Chair of the Victim Services Board. Jalayne brings a wealth of experience, education and enthusiasm to her new position, whose purpose is to bring training and expertise to prosecutors and victim assistance coordinators all around the state, so I expect you will be seeing a lot of Jalayne as she tackles her new position. Check out her first column on page 10.

Jalayne Robinson

Texas Prosecutors Society and the endowment

We are also happy to report that the Foundation Board of Trustees has made another annual contribution to the TDCAF Endowment. The endowment was established three years ago in conjunction with the Texas Prosecutors Society. The society, an invitation-only organization of Texas prosecutors, former prosecutors, and distinguished friends of the profession, represents a body of people dedicated to advancing the profession well into the future. The society members have each pledged $2,500 over 10 years to support the endowment, which now stands at over $120,000. This seed money will, Lord willing, grow exponentially into the future, and those prosecutors who are just beginning their careers will see this effort bear fruit as they become the leaders of the profession. ❇

*Recent gifts to the Foundation**

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* gifts received between February 8 and April 4, 2014

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Mandatory *Brady* training update

In the January-February edition of *The Texas Prosecutor*, I discussed the mandatory *Brady* training requirement that went into effect January 1, 2014. In short, everyone who was a prosecutor before that date has one year to get the one-hour training. If you became a prosecutor on or after January 1, 2014, you must take the course within 180 days. TDCAA has been tasked with providing the course and keeping records relating to compliance.

By Rob Kepple
TDCAA Executive Director in Austin

You will continue to have plenty of opportunities to attend the class this year. We have incorporated the one-hour *Brady* training into every course we put on (see a list of them in the box at right). In addition, we have scheduled a series of free, three-hour ethics regionals that incorporate the mandatory training (see a schedule of those on the opposite page). Finally, TDCAA is producing a free, one-hour webinar that will provide *Brady* credit as well as one hour of MCLE. That should be available this summer through the TDCAA website.

One note to the few prosecutors who may have started between January 1 and January 12, 2014, and who did *not* attend our Prosecutor Trial Skills Course in January (where the *Brady* training was offered): By our calculations, if you wait until the July Prosecutor Trial Skills Course to get the *Brady* training, you will be a few days late, so you'll need to get that hour of credit before then. You can always attend an ethics regional or even pick up the hour you need at another one of our seminars.

Lone Star Prosecutor Awards

At 2013's Annual Criminal and Civil Law Update, the TDCAA Nominations Committee and the Board of Directors gave the Lone Star Prosecutor Award to the **Kaufman County Criminal District Attorney's Office**. And by that, I mean each individual member of that office who continued to go to work and do their jobs during those dark days after the murders of prosecutors **Mark Hasse** and **Mike McLelland** and Mike's wife, **Cynthia**, and before the suspects were captured. That was a tough time, and it was great to be able to recognize those individuals for such dedication to serving their community.

We presented **Erleigh Wiley**, the Kaufman County CDA, with the office award at the 2013 Annual. But I recently had the honor of traveling to the Kaufman office and presenting the entire staff with their own individual Lone Star Prosecutor Awards, along with a pizza lunch. (A gorgeous carved stone award is nice and all, but nothing says appreciation like pizza!) Thanks to all of you for demonstrating what it means to work at a Texas prosecutor's office.

Weekly case summaries

All members of a prosecutor's office are entitled to receive the weekly case summaries we send out by email (and later post on the TDCAA website) each Friday. (If you have not already, go to www.tdcaa.com/case_summaries/subscribe.php and sign up to start receiving them. Be sure to register with your county email address so that we can identify you as eligible to receive these emails.)

Jon English, TDCAA's Research Attorney, does a great job of summarizing each week's offerings from our appellate courts and explaining each decision. Even more useful is the insightful, educational, and sometimes entertaining commentaries by experienced prosecutors who can tell

TDCAA seminars with Brady *training*

Intoxication Manslaughter, April 28–May 2, at the Convention Center in Galveston; registration and hotel information now available at www.tdcaa.com/training.
Civil Law Seminar, May 28–30, at the San Luis Resort in Galveston; registration and hotel information now available at www.tdcaa.com/training.
Financial "White Collar" Crimes, June 18–20, at the Sheraton Gunter Hotel in San Antonio; registration and hotel information now available at www.tdcaa.com/training.
Prosecutor Trial Skills Course, July 13–18, at the Radisson Town Lake in Austin.
Annual Criminal & Civil Law Update, September 17–19, at the Convention Centre in South Padre.
Elected Prosecutor Conference, December 3–5, at the Westin Domain in Austin.

TDCAA Brady *& Ethics Regional Seminars*

Training in all cities goes from 1:30 to 5:00 p.m. and provides three hours of MCLE credit, 1 hour of which satisfies the legislatively mandated *Brady* training requirement. The cost is free for everyone in prosecutor's offices, special prosecutors, and prosecutors pro tem. Registration is online only at www.tdcaa.com/training.

Date	City	Location
Thursday, June 5	Houston	Jury Assembly Room, 1201 Franklin St. (Harris County Courthouse)
Wednesday, June 11	Amarillo	Central Jury Room, 501 S. Fillmore (Potter County Courthouse)
Friday, June 13	Dallas	Central Jury Room, 133 N. Riverfront, 2nd floor (Frank Crowley Criminal Courts Building)
Friday, June 20	San Antonio	Sheraton Gunter Hotel, 205 E. Houston St., 2nd floor ballroom (hotel parking is at individual expense)
Friday, July 18	Austin	Radisson Town Lake Hotel, 111 Cesar Chavez, 2nd floor ballroom (garage parking is complimentary to our group)
Wednesday, August 27	Lubbock	2nd floor auditorium, 916 Main St. (connected to the courthouse)

you why case is important. The big picture, as it were.

A great example is the commentary recently offered about *Easley v. State*, a Court of Criminal Appeals opinion issued March 12, 2014. The issue was whether a trial court had committed a per se constitutional violation by prohibiting a defense attorney from asking a proper question on voir dire. You could see where that could go: If the defense prevailed, one bad ruling by a trial court at voir dire and the rest of a trial would be a waste of time. The court fortunately ruled that the error was subject to a harm analysis, to which many of you probably responded, "Well, duh."

Our commentator was able to provide a remarkable history lesson and remind us that not long ago, reversals for pretty lame reasons were commonplace. (How many of you remember the reversal of a capital case because the judge did the jury shuffle as requested by the defense, but shuffled twice?) The history lesson bears reprinting here:

"Once upon a time there were several forms of error, all of them bad: fundamental error, error incapable of harm analysis, and error that was harmful unless shown harmless beyond a reasonable doubt. Appellate courts would presume harm. Cases had to be tried and tried again, and the people despaired of justice. But then some judges took pause and said to themselves, 'This is silly; these things would make no difference.' New judges arrived, new rules were made, and new decisions slew the precedents of old, one by one. And now, another misbegotten line of authority is put to the sword. Errors in voir dire are not *per se* constitutional error. And we all lived happily ever after."

How can you resist such insight week after week? Head to our website to sign up for these weekly emails today.

A really rural forum about domestic violence

One of the challenges our profession faces is the diversity in size of our offices. So many Texas prosecutor offices are solo shops, while other offices have divisions devoted to specific types of offenses. It is natural that our training would be directed by those prosecutors who are experts in a category of crime, but are we missing the creative prosecution solutions happening everyday in rural Texas?

Last year the Texas Council on Family Violence (TCFV) partnered with TDCAA to host a domestic violence summit of Texas prosecutors, and the usual very diverse mix of urban and rural offices attended. We got a lot of great ideas, but there was an undercurrent from the ultra-rural jurisdictions that was loud and clear: "We don't have the resources to do any of what you're suggesting."

Suspecting that a lot of good work in domestic violence was going on in very rural communities, we did something we have never done before; we hosted another domestic violence summit with only rural prosecutors in the room. And by that, I mean that the only people allowed at this summit were those prosecutors who could not order someone else to do the work—people in solo offices or with very few staff attorneys.

As it turns out, rural prosecutors have some advantages over their urban counterparts. You may be a single prosecutor, but you know every cop and sheriff's deputy by name. Some of the prosecutors in the room literally knew everyone in

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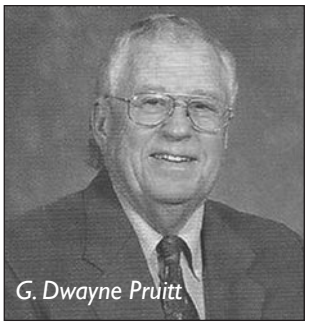
the community. They know about the defendants, and they know about the victims. They often know the entire defense bar and have developed good working relationships with them.

Now there are certainly some problems—in rural communities, victims are much more isolated and farther away from a safe haven. As was explained by one prosecutor, in her jurisdiction it seems like the victim is always living in a trailer on the property of the abuser's family, and that causes some real problems.

We didn't solve all of the problems of prosecuting domestic violence in a rural community, but getting a group of exclusively rural prosecutors together really worked to reveal rural solutions. This is something that we will be looking to do again.

The passing of Pruitt

His name was actually **George Dwayne Pruitt**, but for as long as I can remember he was just Pruitt. Pruitt, a former Terry County Attorney, passed away after a brief illness in March. I can tell you that our profession will miss a fine leader and a real Texas character. Pruitt was president of TDCAA in 1999, and he was recognized as the State Bar Criminal Justice Section Prosecutor of the Year in 2002. He had a fine sense of justice; more than one of the ethics scenarios we regularly teach come from cases and situations he had worked through with us. Even after he retired from public service, we'd see him at the occasional Annual Update on the coast. But we hadn't seen Pruitt around as much lately; he was fond of disappearing into New Mexico on his horse for weeks on end.


G. Dwayne Pruitt

Pruitt was known for telling stories with colorful language, and words like "gotdammit" and "sumsabitches" never sounded wrong in his tales. At his memorial, I am told that one of his relatives believed that when Pruitt reached the pearly gates and stood in front of St. Peter, he was likely to have looked past the gate, seen his wife Carol, and shouted out, "Gotdamn, it's good to see you!" And St. Peter, knowing Pruitt, waved him on through with a smile.

Welcome!

Please welcome three new county attorneys to the family. Rebecca Lange was recently appointed as the County Attorney in Llano County, Heather Stebbins has been appointed as the County Attorney in Kerr County, and Rebekah Whitworth has been appointed as the County Attorney in Mason County. We look forward to seeing you all soon at TDCAA seminars!

Primary results

This being a gubernatorial election cycle, most criminal district attorneys races are on tap this year. Here are the results of contested primaries for prosecutors' seats, with incumbents noted by an asterisk. (We are not listing unopposed candidates or candidates appointed due to vacancies, etc.)

These primary winners have no opponents in the fall:

- Anderson County CDA: **Allyson Mitchell** (R) (defeated **Doug Lowe***).
- Caldwell County CDA: **Fred Weber** (D) (**Trey Hicks*** retiring).
- Galveston County CDA: **Jack Roady*** (R) re-elected.
- Hays County CDA: **Wes Mau** (R) (**Sherri Tibbe*** retiring).
- Hidalgo County CDA: **Judge Ricardo Rodriguez** (D) (defeated **Rene Guerra***).
- Polk County CDA: **Lee Hon*** (R) re-elected.
- Smith County CDA: **Matt Bingham*** (R) re-elected.
- Tarrant County CDA: **Judge Sharen Wilson** (R) (**Joe Shannon*** retiring).
- Tyler County CDA: **Lou Ann Cloy** (R) (**Joe Smith*** retiring).
- 452nd DA (Kimble, etc.): **Tanya Ahlschwede*** (R) (elected following appointment). ❇

Next to the jury box

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

As a prosecutor, I think about my role in the courtroom and the physical position I have occupied while seeking justice. I have always thought of our table situated next to the jury box as a position of honor, a place close to the deciders of fact, peers from all walks of life who serve on our juries. And so as it happens, this phrase "next to the jury box" has taken on a related significance with my involvement in a TDCAA and Texas Council on Family Violence (TCFV)-led initiative called, you guessed it, Next to the Jury Box. More on that important effort in a moment.

During this next year, I look forward to highlighting a few key aspects of prosecution that I have heard prosecutors and others prioritize. In the last two issues, I discussed realities facing border prosecutors and steps at the state and local levels we have all taken to address these challenges.

In this issue I raise prosecution of family violence as a topic worthy of further conversation, effort, and innovation. I further note a few of the overlaps between family violence and the continued presence and ramifications of organized criminal activities related to drug trafficking in our communities.

In March 2013, I participated with many of my colleagues in a summit on family violence that served as the culmination of several months' coordination and meetings on the topic. The summit brought together elected district and county attorneys and other prosecutors in leadership from across the state to share their experiences, challenges, and innovations in prosecuting family violence. At the summit, we discussed various aspects of family violence including recent legislative changes, Battering Intervention Prevention Programs (BIPP), family violence response to active and military veterans and their intimate partner victims, prevalence of family violence in Texas, and family violence fatalities. In short, the Next to the Jury Box Summit represented a chance for us to learn new information and sound off on the challenges and opportunities inherent in this area of our responsibility, with an eye toward informing better policymaking at the local and state levels.

TDCAA and TCFV partnered again this year with a slightly adjusted focus. I have the honor of participating in a smaller group of my colleagues called the Leadership Core, which helps lead the overall planning and course of Next to the Jury Box. (A special thanks to Rob Kepple for his leadership in the effort.) It was at our first meeting in January that we shared an epiphany when we heard more about TCFV's publication, the 2012 *Honoring Texas Victims Report* and other vital statistics related to family violence.

According to that report, in 2012, 114 women were killed by their intimate partners in Texas. From Potter to Harris, from El Paso to Cameron, from Dallas to Wichita Counties, communities across our state encountered family violence fatalities. Harris led all counties with 30 deaths, followed by Dallas (9) and Tarrant (6); counties with smaller populations like Lubbock also experienced greater per capita rates of death than larger population centers, bringing home the idea that we must take murders in both contexts seriously. Some 37 of the 114 women killed were aged between 30 and 39; three young women under 19 years old and 9 women 60 years and older died. Sixty percent of fatalities involved firearms. An additional 15 family members, friends, and others—including 5 children—were killed during the same criminal episode; 61 additional people witnessed these horrific acts, 44 of them children. As compared to the previous year, Texas experienced an increase in family violence murders of women by their intimate partners: 114 in 2012 and 102 in 2011. For the full report as well as reports from the last 20 years, head to www.tcfv.org.

Overall, rather than thinking of these fatalities as inevitable and seemingly random in nature, we began to see that family violence fatalities are identifiable, knowable, and preventable.

And although family violence fatalities cause all of us to take pause, we must also consider family violence that includes actions short of

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murder. We know for instance that over 70,000 victims sought services in our state's family violence shelters and centers in 2013. Around 13,000 children and 11,000 adults received shelter from intimate partner violence in that same year. And those life-saving centers received more than 180,000 hotline calls.[1] On one day alone in 2013, Texas programs served 5,923 adults and children but could not meet 1,311 requests for services.[2]

More broadly, over 37 percent of Texas women have experienced intimate partner violence in their lifetime, translating to over 3 million women currently living in our state. Some 22 percent of women victimized in this way became pregnant as a result of forced sex. Moreover, some 1 million Texans currently experience abuse within their relationship, and over 10 million people in Texas know someone who has been in an abusive relationship. In large part due to these realities, over 97 percent of those surveyed agreed that victims of family violence should have access to support services. Over 86 percent of Texans responding to a survey gauge access to services as important or very important. Almost 70 percent of those surveyed said they would be more likely to vote for political candidates who help victims of family violence.[3]

And according to TCFV's Access to Safety, Justice, and Opportunity: A Blueprint for Domestic Violence Intervention in Texas, when comparing the availability of family violence services, Uniform Crime Report data, the U.S. Census, and other metrics, living in a border county represents a significant predictor of a person's need for family violence services. Additional predictors of need include lack of education and whether a person is a female age 20 to 24.[4] This makes sense from what we know about the ways in which immigrant women experience greater danger from batterers who may also traffic illegal drugs and even people. Hispanic women along the border can experience isolation from family and friends and too often fear contacting authorities or accessing shelter and other resources because their batterers implicitly or directly threaten them with physical and other kinds of harm.

In short, I know as the elected prosecutor for the 81st Judicial District that family violence represents a problem for victims and families that live in this region, but knowing this information helps me understand and prioritize family violence prosecution. Reading the narratives in *Honoring Texas Victims* further helps me to contextualize these murders. And this data helps me provide leadership necessary at the local and state level to begin to interrupt generational cycles of violence and turn the tide when it comes to family violence. As prosecutors, I believe we have a particular duty and ability to help family violence centers, law enforcement, the judiciary, and others forge community-based and statewide solutions.

We must continue to forge new, outside-the-box solutions that make these key connections. We should look to efforts all over the state, such as the leadership at the local and statewide level that our colleague, new TCFV Board Member, and elected District Attorney in El Paso County, Jaime Esparza, has taken on during the last 10 years; his and others' innovative strategies help chart our path forward.

Armed with this knowledge regarding prevalence and best practices, we can work on the Next to the Jury Box project and come to terms with some key realities and practices that will foster successful outcomes for victims of family violence. Big picture-wise, consider that family violence response and prosecution calls for the below three main areas of focus:

1 **Safety for victims and accountability for offenders.** Plainly stated, if we cannot significantly contribute to the long-term safety of the victims for whom we fight in court, we as prosecutors miss the mark. Obviously we strongly hold on to the need for accountability for batterers as we do for all of those who commit crimes in our districts. But it is time for us to come together to resolve the question of what outcomes make the best sense in service of safety for victims and accountability for offenders.

2 **Community leadership against family violence.** As elected officials and those who work for them, prosecutors are community leaders against family violence, not just in the courtroom. This calls for prioritization of family violence prosecution from the top down, setting the tone within the office and in other areas such as victim services, law enforcement, schools, and in the popular discourse. As is the case for other areas of prosecution, our good intentions without support do not materialize in truly taking family violence seriously.

3 **Regular and systemic approaches to evidenced-based prosecution.** We have also begun to forge practical solutions to family violence prosecution. These practices include:

- prioritizing filing and obtaining protective orders for victims;
- obtaining pleas with a finding of family violence (a practice with broad implications regarding later enhancement, divorce and custody proceedings, and firearm prohibitions);
- determining whether the prosecution can move forward without the victim's participation;
- setting up a system for evidence collection that includes regular and quick collection of witness statements, photos, 911 recordings, video, medical records, and other evidence that may allow prosecution to proceed one way or the other; and
- realizing that quick intake and adjudication foster greater peace of mind for victims and increase the likelihood of continued participation.

And so I have committed this year to increasing my knowledge and acumen when it comes to family violence prosecution. I further commit to working with you to gather your continued feedback and points of view with the intent of creating practical solutions that we can all successfully implement.

Ah yes, that Next to the Jury Box Project. Starting in January, the Leadership Core has met and will continue to meet to learn more about key aspects of family violence prosecution and to plan two additional summits. The first occurred February 27 and 28 in Austin; we focused on small town and rural prosecution, inviting one-person (or near to it) offices to come together to communicate their challenges and successes. The second summit, April 10 and 11 in the Dallas area, included elected prosecutors from mid-size to large jurisdictions. (See photos from both, below.)Look for more on this in the coming weeks as well as recorded webinars prosecutors can access for CLE.

In the end these efforts come down to Rosa, Dyrika, Evangeline, April, Lashonda, Shelia, Haroldine, the other 107 women killed in 2012, the additional 2,506 women killed by their male intimate partner since 1990, and the more than 70,000 Texans who seek family violence services every year. Please consider joining TDCAA and TCFV as we engage in approaches that positively impact the cyclical dysfunction that family violence causes so that we are cognizant of every Texan's right to security and safety in our communities. ❇

Rural prosecutors' domestic violence forum

Mid-size and large office domestic violence forum

Endnotes

1 These figures supplied by the Texas Health and Human Services Family Violence Program.

2 As reported in the National Network to End Domestic Violence's 2013 Annual National Program Study, available at www.nnedv.org.

3 See *Statewide Prevalence of Domestic Violence in Texas*, The University of Texas at Austin Institute on Domestic Violence and Sexual Assault (2011) (www.utexas.edu/ssw/dl/files/cswr/institutes/idvsa/publications/DV-Prevalence.pdf. accessed March, 10, 2014).

4 For the full analysis and an executive summary of the Access to Safety, Justice, and Opportunity, go to www.tcfv.org/stateplan.

Feeling like a one-man band or the Lone Ranger?

A one-man band is a musician who plays a number of musical instruments simultaneously using his hands, feet, limbs, and various mechanical and electronic contraptions. As victim assistance coordinators (VACs), do you sometimes feel like a one-man band, precariously juggling tasks all by yourself? Or are there times you feel like the Lone Ranger—the only helper in a vast wilderness—when guiding crime victims through the criminal justice system?

By Jalayne Robinson
TDCAA Victim Services Director

We at TDCAA realize the majority of VACs in prosecutor offices across Texas are the only people in their office responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We realize VACs may not have anyone else locally to turn to for advice and at times could use assistance or moral support.

My job as TDCAA's new Victim Services Director will be to partner with VACs in prosecutor offices across Texas to create unity as we demystify the criminal justice system for crime survivors and offer support that can reduce victims' severe emotional stress. Having worked as a VAC for the Wood County Criminal District Attorney in Quitman for over 22 years, I am completely aware of how VACs working with victims on the front lines are constantly challenged by a wide range of complex issues each and every day. I also understand how helping victims find solutions to complicated problems and comforting people during their most vulnerable and often panic-stricken state is unbelievably meaningful and worthwhile, and we love our jobs!

The Lone Ranger Creed (below) parallels the duties of us who offer crime victims' services. We, too, should be a friend to crime victims, treat them equally, make the most of the resources we have, advocate for truth, and be prepared to help victims fight for their rights.

It is my hope you will lean on me for support when you are feeling like a one-man band or the Lone Ranger as you handle difficult victim-related situations. I am available to provide victim services support, training, and technical assistance to prosecutor offices, VACs, and support staff via phone or e-mail or by actually traveling to your city for in-office consultations. I encourage your input, expertise, and ideas as we help each other develop outstanding Victim Services Divisions in each prosecutor office. My vision is for VACs statewide to connect to peers, share ideas about best practices, and change crime victims' lives in their communities.

The Lone Ranger Creed

By Fran Striker, circa 1933

"I believe that to have a friend, a man must be one.

That all men are created equal and that everyone has within himself the power to make this a better world.

That God put the firewood there but that every man must gather and light it himself.

In being prepared physically, mentally, and morally to fight when necessary for that which is right.

That a man should make the most of what equipment he has.

That 'this government, of the people, by the people, and for the people' shall live always.

That men should live by the rule of what is best for the greatest number.

That sooner or later, somewhere, somehow, we must settle with the world and make payment for what we have taken.

That all things change but truth, and that truth alone, lives on forever. In my Creator, my country, my fellow man." ❊

Please e-mail me at Jalayne.Robinson@tdcaa.com with questions, for support, or to schedule an in-office consultation.

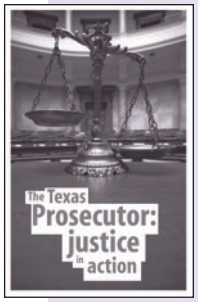
Calling all therapy dogs!

Numerous prosecutors across Texas are recognizing the value of using therapy service dog programs in court proceedings when preparing child witnesses. We would like to highlight "best practices" from prosecutor-based service dog programs around the state in an upcoming edition of The Texas Prosecutor. Please send photos, captions, and a short paragraph about your courtroom service dog program to us at Jalayne.Robinson@tdcaa.com. Sharing your program with our entire membership may assist other prosecutors considering a court-

News Worthy

Prosecutor booklets available for members

We at the association recently updated our 12-page booklet 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 email 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. ❇



OMG! I totes need a search warrant! *State v. Granville* and cell phone searches

In case you were wondering, a cell phone is not a pair of pants. In this age of Galaxy Gear and Google Glass, the Court of Criminal Appeals recently made clear in *State v. Granville* that our smart phones are not merely fashion accessories.[1] This is due in large part to a cell phone's potential to store much more personal information than your pockets. So if the police collect an individual's cell phone while booking that individual into jail, officers will need to get a warrant to examine the contents of the cell phone if they want to pull it out of the property room to search it. And while there are certainly exceptions to the search warrant requirement, it remains to be seen whether the "search incident to arrest" doctrine will justify a warrantless search of a cell phone after *Arizona v. Gant*.

By David C. Newell
Assistant District Attorney in Harris County

Police search for TMI

Factually, *Granville* did not make for an ideal test case to authorize warrantless cell phone searches. Anthony Granville was a high school student arrested for the Class C offense of causing a disturbance on a school bus. His cell phone was taken from him during the booking procedure and placed in the jail property room. Later that day, an officer having nothing to do with the arrest or any investigation of the disturbance got the phone out of the property room. He did so because he had heard the day before that Granville had taken a picture of a student urinating in the urinal at school the day before.[2] After taking Granville's phone from the property room, the officer turned it on and began scrolling through it to find the picture in question. It was there, of course, and the State charged Granville with the state-jail felony offense of Improper Photography or Visual Recording.

At the motion to suppress, the prosecution argued that the officer could search anything in the property room without a warrant so long as he had probable cause to believe the defendant had committed a crime or that there was evidence on the phone. The prosecutor also argued that any expectation of privacy in Granville's personal belongings was diminished, and he never exhibited a subjective expectation of privacy. The trial court disagreed and suppressed the evidence. The trial court entered specific findings that the phone belonged to Granville, the officer had to manipulate it to conduct the search, and there was no search warrant even though there was sufficient time to get one.[3] The State appealed.

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Cell phones are private :-/

A nearly unanimous Court of Criminal Appeals held that Granville had a legitimate expectation of privacy in his seized phone.[4] Judge Cochran explained that courts commonly find that a person has a legitimate expectation of privacy in the contents of his cell phone because of its "ability to store large amounts of private data in both the cell phone and by accessing remote services." According to Judge Cochran, "A cell phone is unlike other containers as it can receive, store, and transmit an almost unlimited amount of private information."[5] Because the potential for an invasion of privacy is so great, a defendant has a legitimate expectation of privacy in the contents of his cell phone.

But to better understand the controversy in the case, you have to go back to a case called *Oles v. State*. There, a murder suspect was arrested on an open warrant, and police inventoried his clothing.[6] There was no evidence on or within the clothing that was immediately apparent to the naked eye. Eight days after the clothes were inventoried, an investigator took the clothes to a medical examiner's office to determine if the clothing contained blood traces. Blood on the suspect's shoes matched the murder victim. The CCA upheld the warrantless search by relying upon *United States v. Edwards*, where the United States Supreme Court upheld a search of obviously bloody clothes taken much closer to arrest. The CCA held, consistent with *Edwards*, that the defendant in *Oles* still retained an expectation of privacy in his belongings, but it was diminished. Consequently, the CCA doubted that Oles harbored a subjective expectation that his inventoried items were still private. As mentioned above, this formed the basis for the prosecutor's argument to the trial court.

However, the Court of Criminal Appeals refused to extend this diminished-expectation-of-privacy-in-clothes rationale to the contents of a cell phone.[7] According to the court, clothing does not contain private banking or medical information or records. Searching a person's cell phone is like searching his home desk, computer, bank vault, and medicine cabinet all at once.[8] Clothing is displayed every time a citizen walks out into the world, but the contents of a cell phone are not. Furthermore, the institutional needs that underpin the diminished expectation of privacy in jail are not necessarily as great when considering property that jailers have already inventoried and are safeguarding in the property room. Finally, the court seemed to rely upon the doctrine of *res ipsa loquitor* to obviate the need for a showing of a subjective expectation of privacy in the contents of a cell phone. In a footnote, the court wrote, "Just as one assumes that a person has a subjective interest in his diary, in his medical records, in his bank records, in the content of his telephone calls, and the content of his personal computer, one may assume, without further proof, that a person has a subjective privacy interest in his cell phone." Or, the thing speaks for itself.[9]

Presiding Judge Keller and Judge Price concurred to analogize the cell phone to the previously seized but unseen pornographic film in *Walter v. United States*.[10] In *Walter*, 871 boxes of pornographic film were delivered to the wrong corporation.[11] The employees of the corporation were unable to see what was on the film by holding it up to the light, so they turned the film over to the FBI. Without obtaining a warrant, the agents viewed the films with a projector.[12] Likening the contents of a cell phone to sealed packages in the mail that had to be manipulated by law enforcement to ascertain the contents, the concurrence felt that the United States Supreme Court had already decided the issue.[13] Judge Keasler was the only judge who dissented, doing so on the basis that the majority erroneously found a subjective expectation of privacy in the phone based solely upon former possession and the ability of the phone to contain vast amounts of data.

BTW, what about search warrant exceptions?

Of course, this case decides how to regard the contents of a cell phone only after the phone has been lawfully seized, not how those contents are affected by search warrant exceptions. At the trial court level, the State did not argue exigent circumstances or any other recognized exceptions to the warrant requirement, such as search incident to arrest.[14] So, for example, the court does not discuss how the threat of remote wiping might create an exigent circumstance.[15] However, the court did note that most courts addressing the search-incident-to-arrest exception have required the search of the phone to be contemporaneous (or nearly so) to the arrest

itself. The court cited several examples where searches were declared invalid because they occurred up to an hour or more after the arrest.[16] The court contrasted this with cases where the search occurred mere minutes after the arrest and seizure.[17] Make of that what you will.

But more importantly, the court acknowledged that the United States Supreme Court has agreed to consider two cases on each side of the issue. Most notably, the Court of Criminal Appeals relied upon one of those cases, *United States v. Wurie*, to support the decision to uphold the suppression.[18] In *Wurie*, police arrested the defendant after watching him sell someone crack. At the station after the arrest (prior to booking), the officer noticed the defendant's cell phone kept ringing, and the officer opened the phone to see who it was. The officer pressed one button to see the call log indicating the call was coming from the defendant's home. The police used the phone number to get the defendant's address, and they later used the information to obtain a search warrant.

The First Circuit Court of Appeals followed much the same analysis later adopted by the Court of Criminal Appeals to invalidate the warrantless search incident to arrest. After acknowledging that the majority of courts addressing the issue have upheld these types of searches, the First Circuit Court of Appeals nevertheless equated the cell phone with the footlocker in *United States v. Chadwick* rather than an item immediately associated with the arrestee like the clothing in *United States v. Edwards*.[19] And much like the Court of Criminal Appeals after it, the First Circuit waxed rhapsodic about how much and how personal the information contained on a modern cell phone is. Because the information is the kind one would normally store in his home, it would be off limits to officers performing a search incident to arrest under the original standard set out in *Chimel v. California*.[20]

But the United States Supreme Court also granted review in *People v. Riley*, an unpublished California case that upheld a more thorough search of a cell phone incident to arrest.[21] There, the defendant was stopped for expired registration, and an inventory of the car yielded two guns that were later connected to a drive-by shooting. Upon finding the guns, police placed the defendant under arrest and searched through his cell phone. The officer noticed that all of the entries starting with a letter "K" were preceded by the letter "C" which gang members use to signify "Crip Killer." Consistent with California precedent, the California appellate court upheld the search because the phone was an item immediately associated with the defendant's person. Obviously, the court did not rely upon *Riley*, but that could easily be because the analysis in *Riley* is not as fleshed out as the analysis in *Wurie*.

W.W.S.D? (What Would Scalia Do)?

So, at the risk of devolving into a round of fantasySCOTUS,[22] which is it, *Wurie* or *Riley*? While the Court of Criminal Appeals was not addressing a search incident to arrest in *Granville*, the majority seemed to find the analysis in *Wurie* more persuasive. That may reflect that the court is betting that a majority of the Supreme Court will follow an analysis similar to that set out in *Wurie*. After all, a major component of *Wurie* was the observation that information contained on a phone would fall outside of the search-incident-to-arrest rationale first announced in *Chimel*, a rationale the Supreme Court sought to get back to in *Arizona v. Gant.*

But remember that Justice Scalia was the crucial vote in *Gant*. And in his concurring opinion in that case, he advocated for a warrantless, "reasonable belief" search for evidence of the crime of arrest contemporaneous with a traffic stop.[23] With that in mind, Justice Scalia might be amenable to a quick scan of a phone similar to the conduct in *Wurie* because it would be contemporaneous with the arrest, limited in scope, and arguably related to the offense of arrest.[24] Moreover, Justice Scalia did not accept Justice Sotomayor's invitation to re-examine the reasonable expectation of privacy test in light of "the digital age" in his majority opinion in *United States v. Jones*.[25] So, perhaps he would not be that impressed with the vast amounts of digital information currently accessible from a cell phone.

And yet, Justice Scalia routinely tries to find the traditional values of the framers even in applications of the most modern technology such as thermal imaging or GPS tracking.[26] In light of these cases, perhaps he will find the analogy between the contents of a cell phone and the personal papers found in a home persuasive. And he was strongly

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opposed to the idea of a search incident to arrest (or any exception to the warrant requirement for that matter) justifying the taking of buccal swabs on booking for purely identification purposes in *Maryland v. King*.[27] He could equate the type of rummaging around in a person's cell phone as a "general warrant" that the Constitution was designed to prohibit. Fortunately, we should get an answer by the end of this term.

End of line[28]

As is always the case, it is better practice for law enforcement to get a search warrant if they have the time and facts to do so. While the Court of Criminal Appeals did acknowledge, consistent with *Oles*, that police could search the outside of a lawfully seized cell phone for DNA and fingerprints without a warrant, *Granville* categorically rules out any additional search of the contents of a cell phone without either a warrant or an applicable warrant exception. Future cases will flesh out what constitutes exigent circumstances or consent in the digital age, but fortunately we will likely have an answer to whether police can search a cell phone incident to arrest when the search is contemporaneous with that arrest. Until that time, keep *Granville* in your pocket—right next to your cell phone. ❇

Sent from my iPhone

Endnotes

1 "A lot of alliteration from anxious anchors placed in powerful posts." *Broadcast News*, Gracie Films (1987).

2 The pictures of twerking would have been constitutionally protected. *Ex parte Lo*, 2013 WL 5807802 (Tex. Crim. App. Oct. 30, 2013).

3 The trial court also framed the legal issue by asking prosecutors if police could arrest him for jaywalking and search his phone for pictures of Prometheus afterwards. *State v. Granville*, 2014 WL 714730 at *2 (Tex. Crim. App. Feb. 26, 2014). Dude, you had Judge Cochran at hello. *Jerry Maguire*, Gracie Films (1996).

4 *State v. Granville*, 2014 WL 714730 (Tex. Crim. App. Feb. 26, 2014).

5 Practitioners interested in gaining a full appreciation of the debate surrounding this issue should not only read this opinion carefully, but they should also examine the references and authority. The court refers not only to a number of different and thoughtful cases, but also studies, polls, and news articles when discussing the nature of cellphones and privacy in the digital age. Resorting to such a wide variety of materials may be necessary when arguing metaphysically about the nature of privacy and how it intersects with technology. This case is a good place to start for such an approach.

6 *Oles v. State*, 993 S.W.2d 103 (Tex. Crim. App. 1999).

7 The Court of Criminal Appeals chose not to discuss the warrantless search of the crumpled cigarette package found in the defendant's pocket that the United States Supreme Court upheld in *United States v. Robinson*, 414 U.S. 218 (1973). Arguably, a cell phone is a "container" that is more analogous to an empty package of cigarettes than a pair of pants. But by framing the issue in *Granville* as a choice between a cell phone and clothing rather than a cell phone and a pack of cigarettes, the Court of Criminal Appeals avoided the comparisons between a cell phone and a container associated with the arrestee that many courts have relied upon to uphold such searches. And besides, cigarettes are bad.

8 One case the court relied upon to justify this distinction was *United States v. Chadwick*, 433 U.S. 1 (1977). There, the United States Supreme Court held that the warrantless search of a 200-pound footlocker seized pursuant to a defendant's arrest at a train station required a warrant. Thus, it was analogous to a subsequent search of a seized cell phone, albeit one of those brick phones from the '80s.

9 Just ask Siri. (Yes, I looked up how to cite to Siri, but there is no accepted citation format. Guess I should have just asked her.)

10 *Walter v. United States*, 447 U.S. 649 (1980).

11 Because corporations are people and they have needs, too.

12 No word on whether there were exigent circumstances.

13 Admittedly, the concurrence doesn't fully flesh out the parallel, but I am trying to draw out the implication of their reliance upon *Walter* here. Presiding Judge Keller does not mention the role played by the First Amendment in *Walter*'s holding, but she clearly sees a parallel between the snailmail in *Walter* and the email in *Granville*. At least I hope it was that and not a subconscious acknowledgment that the Internet is essentially a repository for porn. And pictures of cats.

14 *State v. Granville*, 373 S.W.3d 218, 222 (Tex. App.—Amarillo 2012, pet. granted). Obviously, exceptions such as exigent circumstances or consent will have to be litigated, but the court only hints at how the search-incident-to-arrest might play out in the future.

15 See e.g. *United States v. Gomez*, 807 F.Supp. 2d 1134 (S.D. Florida 2011) (holding that police could search cell phone that was ringing due to exigent circumstances); see also *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012) (discussing possibilities and ways to deal with danger of remote wiping); but consider *Turrubiate v State*, 399 S.W.3d 147 (Tex. Crim. App. 2013) (holding that the smell of burning marijuana inside a home coupled with occupant's knowledge of police interest did not establish that destruction of evidence was imminent to establish exigent circumstances); *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) (holding that the natural destruction of alcohol in the bloodstream did not amount to an exigent circumstance by itself).

16 See e.g. *United States v. Gibson*, 2012 WL 1123146 (N.D. Cal. April 3, 2012) (one to two hours); *United States v. Park*, 2007 WL 1521573 (N.D. Cal. May 23, 2007) (not designated for publication)(90 mintues).

17 See e.g. *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009) (need to preserve evidence justified officers' warrantless retrieval of call records and text messages from cell phone of suspected narcotics arrestee immediately upon arrest); *United States v. Curry*, 2008 WL 219966 (D. Me. Jan. 23, 2008) (not designated for publication) (search of cell phone was "substantially contemporaneous" with arrest).

18 *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013).

19 Or like a cigarette package in *United States v. Robinson*.

20 *Chimel v. California*, 395 U.S. 752 (1969).

21 *People v. Riley*, 2013 WL 475242 (Cal. App. Feb. 8, 2013)(not designated for publication), *cert. granted*, 134 S.Ct. 999 (2014). Please note that I am not trying at all to offer perfectly correct citation form. I'm just giving you enough so you can look the stuff up on your phone if you want. LOL.

22 www.fantasyscotus.net.

23 *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J. concurring).

24 Indeed, it is possible that a majority of the United States Supreme Court will agree with the analysis in *Wurie* but believe that the limited search conducted in that case was justifiable similar to the facts in *United States v. Flores-Lopez*. There, the 7th Circuit viewed the cellphone at issue in the same way the 1st Circuit and the Court of Criminal Appeals did when they describe a modern cell phone as "a diary writ large." However, the 7th Circuit felt the invasion was permissible when it consisted of only looking up the cell phone's number. *Flores-Lopez*, 670 F.3d at 810. This type of cost-benefit analysis is also the kind of thinking that could persuade Justice Breyer to join the four "conservatives" on the court. See e.g. *Maryland v. King*, 133 S.Ct. 1958 (2013).

25 *United States v. Jones*, 132 S.Ct. 945, 957 (2012) (Sotomayor, J. concurring).

26 See e.g. *Kyllo v. United States*, 121 S.Ct. 2038 (2001) (likening thermal imaging of the inside of a home to a trespass); *United States v. Jones*, 132 S.Ct. 945 (2012) (likening a GPS tracker to a trespass of a carriage). Come to think of it, maybe Justice Scalia hates trespass and likes to yell, "Hey you kids, get the hell off my lawn!" See e.g. *Florida v. Jardines*, 133 S.Ct. 1409 (2013).

27 *Maryland v. King*, 133 S.Ct. 1958, 1982 (2013) (Scalia, J. dissenting).

28 This is how the Master Control Program indicated a conclusion. *Tron*, Walt Disney Productions (1982).

A letter from the Department of Public Safety crime lab

By D. Pat Johnson
Deputy Assistant Director,
Law Enforcement Support Division

As reported in the November-December 2012 edition of this journal, DPS Crime Laboratories anticipated a change in its laboratory reports during 2013. One change dealt with the sampling of drug evidence and was instituted by March 1, 2013. Implementation of the other change was delayed until January 1, 2014. It relates to the uncertainty of several measurements made while examining evidence, as follows.

Regarding controlled substance evidence, if in the form of a solid (powder, plant matter, etc.), it is weighed using a laboratory balance. There is an uncertainty in this weight, which is now reported with some drug exhibits in a case (only those exhibits where the weight is critical to the penalty), and this uncertainty is shown as plus or minus a weight (indicated in bold, below). For example:
Exhibit No. 1: Plastic bag of white powder
Result: Contains Cocaine
7.05 grams (+/-**0.02**) grams net weight

Regarding the analysis of a blood sample for alcohol on a DWI case, there is an uncertainty in determining the quantity or concentration of alcohol in the blood. For example:
Exhibit No. 2: Blood in gray top tube from John Doe
Result of Analysis: 0.115 (+/-**0.005**) grams of alcohol per 100 milliliters of blood (99.7% confidence level)

Other examples of measurements that may include an uncertainty are the amount of a drug detected in a blood sample and the length of a shotgun barrel. Note that this uncertainty of measurement is being reported by DPS crime laboratories to satisfy requirements of the organization that accredits our laboratories. Please call the laboratory serving your county if you have any questions. ❇

Chuck Dennis Award winner

Kenneth Newton, a criminal district attorney's investigator in Collin County, was honored with the Chuck Dennis Investigator of the Year Award at February's Investigator School. He is pictured at right (on the left) with Kim Elliott, a criminal district attorney's investigator in Lubbock County and the chair of the Investigator Board. Congratulations, Kenneth!

Continued from the front cover

Online solicitation takes heat from the high court (cont'd)

The Court of Criminal Appeals has accepted that grooming is a legitimate subject of expert testimony.[6] In doing so, the court held that grooming falls within the scope of behavior of offenders who sexually victimize children, which is a valid field of expertise. The court rejected the notion that empirical data was necessary to establish grooming as a field of expertise. Instead, it focused on the expert's specialized knowledge gained from personal interviews with inmates convicted of child sex offenses, psychological records of inmates, and an examination of the facts surrounding offenses against children. Numerous other courts, both within Texas and across the nation, have recognized the concept of grooming, contributing to the conclusion that grooming is a well-recognized phenomenon of what certain individuals do to seduce children. It is a common behavior of child molesters.

Miley's wrecking ball

Timing is everything.

My oral argument in the Court of Criminal Appeals occurred on September 11, 2013. The MTV Video Music Awards (VMAs) had broadcast two weeks earlier, on August 25, 2013. You know the one—where Miley Cyrus twerked her way into being relevant.[7] On social media. At the water cooler. And apparently … in my courtroom.

There are nine judges on the Court of Criminal Appeals. They sit in a lengthy semi-circle bench; oral argument at the court involves back-and-forth dialogue between an appellate prosecutor and them. By the time a case is submitted for oral argument, both parties have already briefed the issues, so the court is aware of the State's position and is prepared to discuss the legal issues.

From the onset, it was clear the judges were concerned with the heightened constitutional standard that applies when content-based speech is restricted. In an effort to appease that concern, I utilized the lower court's opinion rationalizing this law as narrowly tailored to achieve a compelling State interest, protecting children from online predators.

Judge Cochran, who would later author *Ex Parte Lo*, inquired whether the State could bring charges against Miley Cyrus for her performance on the VMAs. I had not seen the award show. Honestly, I was not even completely cognizant on the act of twerking. My response to her query was no. Of course not. Miley was twerking to America for reasons unknown. (America is still confused.) But even if her intent was to sell music albums by selling sex, by arousing and gratifying the sexual desires of her fans, it was still a broadcast to millions of people. It was not a personal communication with an individual she knew to be a minor, whereas online solicitation is a victim-oriented offense. We believed the statute was directed at personal interaction, i.e. "one-on-one" speech, initiated by an adult with someone they knew or believed to be a minor, with the intent to arouse or gratify a sexual desire.

And this is where reasonable minds differ.

With regard to this particular element of the offense—"communicates in a sexually explicit manner with a minor"—the State utilized the Code Construction Act by focusing on the plain meaning of the word "with," as in personally communicating with a specific, named person, as opposed to the scenario where something is broadcast "to" a group of people.[8] We believed the law was designed to protect a specific person. But the court was not swayed by this variance.

About this time, the right side of the bench became preoccupied with vampires. Judge Alcala asked me about the application of this statute to books, particularly the cult-favorite vampire series … and then she asked me the name of the series. I instinctively opened my mouth to reply, then clamped my jaw shut. Whoa, she almost got me. I was not about to utter the word *Twilight* in a court of law, nor would I be revealing my allegiance to Team Edward.[9] So I just waited. There were a few moments of vampire discussion among the judges, which was actually quite comical.

After they sorted out the vampire genre, we continued onto hypotheticals regarding risqué art and sexy television ads. There was an overall concern that the statute was too broad, in that it would encom-

pass all kinds of other sexually explicit communication by artists when they produce literature, film, and art.

We did not share the court's belief that the statute was all-encompassing. In light of the fast-paced, ever-changing world of technology, we were aware there was a crucial need for this law. Children were at risk. I never imagined the court would truly equate artistic expressions provided to society at large with sexually explicit speech directed to a known minor.

I recall feeling frustrated because I was completely unable to steer the conversation back to the safety and welfare of children. But on that day I was reminded of the first lesson in appellate oral advocacy: It doesn't matter what I want to talk about. It's not about me. It's about the court and its concerns. As an advocate, I discuss the law at their leisure. Bottom line: They just didn't like the statute.

After the conclusion of oral argument, I sat down and looked to State Prosecuting Attorney Lisa McMinn. I recall saying, "What just happened?" She mirrored my look of bewilderment, which slightly eased my pain. There was no question about it. Something major was about to happen.

Ex Parte Lo

On October 30, the Court of Criminals Appeals found that §33.021(b) of the Texas Penal Code was an invalid, content-based regulation on free speech that was not narrowly tailored to achieve the State's compelling interest in protecting children from sexual predators. The opinion parallels the dialogue of oral argument, that the statute was overreaching with regard to constitutionally protected sexually explicit speech. With a nod to the vast realm of sexual expression, Judge Cochran listed several famous and popular works of art, suggesting they would fall under the umbrella of prosecution: including the Venus de Milo, *Fifty Shades of Grey*, "The Tudors," and *Eyes Wide Shut*.[10]

The court specifically held that everything §33.021(b) prohibits and punishes is speech. Everything included in the statute is either already prohibited by other statutes (such as obscenity, distributing harmful material to minors, solicitation of a minor, or child pornography) or is constitutionally protected speech.[11]

But there is some good news. Subsection (c) is still a viable statute.

Luring statute

Under §33.021(c), a person commits an offense if he uses electronic communications to knowingly solicit a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.[12]

Back in 2009, the First Court of Appeals evaluated constitutional challenges to subsection (c). In *Maloney v. State*, the First Court rejected defense claims that the statute was overbroad and vague.[13] In *Ex Parte Lo*, Judge Cochran utilized *Maloney* when highlighting the differences in subsections (b) and (c) of the online solicitation statute.

She first noted that subsection (c) was similar to statutes in other jurisdictions that had been held constitutional, because it included conduct that is not constitutionally protected: requesting a minor to engage in illegal sex acts. She acknowledged that the compelling interest of protecting children from sexual predators is well served by subsection (c), unlike subsection (b).

If you have a constitutional challenge to subsection (c) or a defendant attempts to lump it in with a subsection (b) analysis, be familiar with both *Maloney* and *Ex Parte Lo*. Prosecutors should be able to defeat a defense challenge to subsection (c) by handing these cases to the judge.

Another statute bites the dust

After the opinion in *Ex Parte Lo* was issued, it came to our attention there was a statutory prohibition that needed to be resolved. Section 402.010 of the Government Code, effective June 17, 2011, directs that a court may not enter a final judgment holding a statute of this state unconstitutional before the 45th day after notice of the constitutional challenge and a copy of the petition, motion, or other pleading is provided to the attorney general.[14] The Court of Criminal Appeals had not complied with this statute in holding §33.021(b) unconstitutional.

The opinion in *Ex Parte Lo* was unanimous, 9-0. We felt there was little to no room to urge a motion for rehearing, but as a matter of strategy we decided to challenge the court's failure to comply with the notification statute. We wanted to get our foot in the door and had two

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other legal issues we wanted to pursue. And clarification on the notice provision was needed, as some courts were complying by providing notice and some courts were not.

Our attention-grabber worked —sort of. The court denied all three grounds on rehearing and wrote only on the attorney general notice issue. In its opinion on rehearing, the court held that §402.010 of the Texas Government Code was unconstitutional because it violates the separation-of-powers doctrine of the state constitution. With this ruling, the Court of Criminal Appeals was no longer required to give notification to the attorney general.

It is unclear how the opinion on rehearing will affect lower criminal courts and civil courts. In her concurring opinion, Judge Keller indicates the burden of the notification statute is placed on all courts, not just the Court of Criminal Appeals. Stay tuned.

What now?

After much research and discussion, including consultation with Harris County District Attorney Devon Anderson, First Assistant Belinda Hill, and Chief of the Appellate Division Alan Curry, we decided not to file a writ of certiorari in the United States Supreme Court. Due to the unanimity of the holding and our inability to find a similar statute for comparison, we were not confident in our chances for success.

Looking to the future, we concluded the best course of action was to persuade our legislators to amend the statute in the 2015 legislative session. In fact, *Ex Parte Lo* provides insight into the changes the court would like to see implemented to overcome future constitutional challenges. During this decision-making time, some of the best in our business[15] have reached out to our office and offered valuable advice and support. We are truly grateful and look forward to rectifying this situation soon.

But protecting future victims was not the only problem created by this opinion; pending cases were also cast into uncertainty. When *Ex Parte Lo* was issued in October, we immediately tracked down all of the pending cases where the defendant was charged solely under subsection (b) of §33.021. We first looked to see if the facts would support the elements of another crime, such a possession of child pornography, distributing harmful material to a minor, or the luring statute still intact in the online solicitation statute. If the facts did not support a different offense, we dismissed the case. And obviously, no one in the state should be filing any charges under subsection (b) until the statute has been amended. If another statute is applicable, check the statute of limitations for the new offense. Remember the time during the pendency of an indictment or complaint is not computed in the period of limitation.

A third challenge raised by the holding in *Ex Parte Lo* concerns past convictions under §33.021(b). After the motion for rehearing was denied in March, we sent letters to approximately 90 defendants convicted under subsection (b), as well as their lawyers, notifying them of the holding in *Ex Parte Lo* in the event they wanted to take legal action. The majority of these individuals were on community supervision, but some were sentenced to prison.

Some things to be mindful of when your office is evaluating these cases:

- Does the defendant have multiple convictions? This may affect the harm analysis in post-conviction matters.
- Does the defendant have an open warrant? Was the defendant arrested on the original case? Are there any open cases stemming from the original online solicitation case (i.e., motion to revoke probation, motion to adjudicate, failure to register as a sex offender, etc.)? These cases need immediate attention to verify that a capias has not been issued solely on violations stemming from an unconstitutional statute.
- Other considerations include ICE notifications, coordination with probation departments, and coordination with law enforcement agencies that handle sex offender registrations, etc.

We must all remember that, as prosecutors, it is our primary duty not to see that a defendant is convicted, but to see that justice is done.[16] Whether we agree with it or not, as the law currently stands, several defendants stand convicted (or placed on deferred adjudication probation) under an unconstitutional statute. It should be our duty to examine each case and determine the best course of action. Other future court decisions may make it clearer how these cases should be treated.

A case to look for

Late in 2013, after the decision in *Ex Parte Lo*, the First Court of Appeals requested additional briefing on a

pending appellate case, *Schuster v. State*.[17] The defendant in *Schuster* was charged under subsection (b) of the online solicitation statute in 2011 and pled guilty in 2012. He had prior convictions for possession of child pornography and was sentenced to 40 years imprisonment.

Schuster's trial counsel failed to challenge the constitutionality of the statute. It is well-settled caselaw that a defendant waives a claim of constitutional error when he fails to make an adequate objection at trial. So Schuster's appellate counsel furthered an ineffective assistance claim for the failure of his trial counsel to challenge the statute. A defendant demonstrates ineffective assistance of counsel by showing his counsel was deficient, which caused him prejudice. In this scenario, the focus is on the first prong of the *Strickland v. Washington* test, whether counsel's representation was deficient for failing to question whether the statute was overbroad. Because let's face it, if it was deficient, the second prong of prejudice would not be hard to show.

The Court of Criminal Appeals has long held that defense counsel is not deficient for failing to object on the basis of an unsettled area of law. And the State argued at the time Schuster pled guilty that the leading authority on this issue was the lower court's opinion in *Lo*, holding the statute constitutional.

This is important because Strickland discusses the evaluation of defense counsel's conduct *at the time* of the proceeding. The opinion in *Schuster* will shed light on appellate recourse for defendants prosecuted under this statute.

A big thank-you

For those of you who put your heart and soul into prosecuting crimes against children, a big thank-you. In my opinion, they are the most difficult cases to prosecute—but they can also be the most rewarding.

And to my personal crime fighters, John Wakefield and Kathy Kahle, you continue to inspire me. Thanks for standing by my side when I lost your case. As prosecutors, our duty to protect children never ceases. See you in Austin, 2015. ❇

Endnotes

1 Messages from the defendant included: "Did she let u (sic) come inside her?"; "Were you her first?"; "All 3 loads inside her? Any in her mouth or ass?"; "How big r u (sic) anyway?"; and "Did she moan, U r (sic) so big for a sophomore?"

2 A "facial" challenge asserts the statute is unconstitutional on its face, in all applications, whereas an "as applied" challenge pertains to the applicability of the statute to a specific defendant.

3 *Ex Parte Lo*, No. PD–1560–12, 2013 WL 5807802 (Tex. Crim. App. Oct. 30, 2013).

4 Tex. Penal Code §33.021(b).

5 House Research Organization, Bill Analysis, Tex. H.B. 2228, 79th Leg., R.S. (April 11, 2005).

6 *Morris v. State*, 361 S.W.3d 649 (Tex. Crim. App. 2011).

7 Urbandictionary.com defines twerking as 1) the act of moving and shaking one's bottom in a circular, up-and-down, and side-to-side motion, derived from strip club dances; and 2) something that Miley Cyrus should never, ever do.

8 Thank you, John Messinger.

9 Urban Dictionary defines Team Edward as those fans of the *Twilight Saga* who prefer vampire Edward Cullen to werewolf shape-shifter Jacob Black.

10 Jonathan Rhys Meyers and the curator of the Louvre are equally relieved.

11 The defendant in *Ex Parte Lo* was charged under subsection (b)(1), which criminalizes sexually explicit communication with a minor. Subsection (b)(2) involves distributing sexually explicit material to a minor. This subsection was also struck down; the court reasoned that distributing harmful material to a minor is already an offense.

12 Tex. Penal Code § 33.021(c).

13 *Maloney v. State*, 294 S.W.3d 613 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

14 Tex. Gov't Code §402.010(a); Tex. Gov't Code §402.010(b).

15 Lisa McMinn, John Rolater, and Rob Kepple.

16 Tex. Code. Crim. Proc. art. 2.01.

17 *State v. Peter John Schuster*, No. 01-13-00039-CR.

See something, say something?

What to do when a trial prosecutor notices a defense attorney who may not be doing his job?

True-to-form appellate lawyer disclaimer: While this article is intended as a helpful guide for trial prosecutors, most ineffective assistance of counsel (IAC) claims are raised in post-conviction proceedings. On direct appeal, IAC claims are frequently rejected because the trial record is silent regarding ineffectiveness and an appellate court cannot infer ineffectiveness based upon unclear portions of a trial record.[1] For this reason, the majority of IAC claims are effectively raised in a post-conviction application for writ of habeas corpus because this is typically the first chance a record can be fully developed. Therefore, those who handle post-conviction writs are the most likely candidates to embark upon an in-depth review of IAC claims.

By Shara Saget
Assistant Criminal District Attorney in Dallas County

That being established, *do not stop reading*—because a successful IAC claim can affect us all. (If this were a movie, here is where the scary music would start.)

So you have encountered what could be deemed ineffective assistance of counsel. Do you—as a trial prosecutor—have an obligation to do or say anything? While your gut reaction may be, "No, that's not my job," remember that our role to seek justice calls for us to be concerned about whether a defendant is deprived of the effective assistance of counsel. So while it is technically not our job to perform the duties of both prosecutor and defense attorney, it is worth understanding how some IAC claims can be prevented to ensure that hard-earned convictions are upheld.

IAC overview

IAC claims can be raised in three places: in a motion for new trial, on direct appeal, and in a post-conviction writ of habeas corpus. A defendant has the difficult burden of proving, by a preponderance of the evidence, that:

- counsel's performance fell below an objective standard of reasonableness, and
- a reasonable probability exists that, but for counsel's errors, the result would have been different.[2]

A "reasonable probability" does not require a showing that the result of the trial would actually have been different (i.e., a not-guilty verdict) had it not been for counsel's ineffectiveness. Rather, the second prong is satisfied by a showing that, but for counsel's unprofessional errors, the result of the proceeding most likely would have been different, e.g., evidence would not have been admitted. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[3]

These two prongs do not have to be addressed in order, and if a defendant fails to meet one prong, the court does not have to address the other prong. A defendant's burden is difficult because a reviewing court will "commonly assume a strategic motive if any can be imagined and find counsel's performance deficient only if the conduct was *so outrageous* that no competent attorney would have engaged in it."[4]

The front line of defense

Unfortunately, there exist rare instances when a defense counsel's representation is so outrageous that a reversal is warranted because no competent attorney would have engaged in such conduct.[5] For this reason, it is worth keeping an eye out for those who hinder justice and double our workload by depriving a defendant of the effective assistance of counsel. Trial prosecutors are the front line of defense when it comes to detecting and possibly remedying the impact of a defendant being deprived of his right to the effective assistance of counsel.

The following is a list of common IAC claims in non-capital trials that can be remedied at the trial level through simple preventative measures.

1 **Failure to communicate a plea offer.** To avoid a later claim that a plea offer was not communicated, a prosecutor's best practice is to place any rejected plea offers on the record during a pre-trial hearing or prior to

accepting a plea of guilty or *nolo contendere*. If you face resistance in placing pleas on the record, take measures to document plea offers. For example, in Dallas County, a section for plea bargain offers is provided on the pass slips that are filed with the court.

It is worth noting that the United States Supreme Court handed down two decisions in 2012 that have made it a bit more difficult for defendants to establish prejudice under claims of ineffectiveness during plea negotiations.[6] A defendant must now show, by a reasonable probability, that: 1) he would have accepted the earlier offer if counsel had not given ineffective assistance; 2) the prosecution would not have withdrawn the offer; and 3) the trial court would not have refused to accept the plea bargain.[7]

2 **Involuntary plea.** This argument is usually presented in a claim that the defendant was unable to understand the English language, did not understand the consequences of his guilty plea, or rejected a plea bargain based on the erroneous legal advice of counsel.

If you suspect that a defendant has difficulty understanding English, the best practice is to gently remind the court, if necessary, to question the defendant regarding his ability to understand English. Furthermore, at the time of the plea, it is best to ask questions that will elicit a response beyond a simple "yes" or "no." While this may seem bothersome, it is worth the effort. I handled a writ where the court determined that a plea was involuntary under this exact IAC claim. The trial record consisted of the defendant's one-word responses at the time of his plea hearing. Years later, a habeas hearing was held and the court found that the defendant had a limited understanding of English at the time of his guilty plea and was not provided with an interpreter. Although counsel was not found to be ineffective, relief was granted and the defendant was permitted to withdraw his plea. Therefore, it is best to ensure that the defendant can understand English or to agree to a continuance if it is discovered that a defendant needs an interpreter.[8] Finally, make sure the record reflects that any waivers and admonishments have been translated in the defendant's native language.

As with many consequences of a plea of guilty or *nolo contendere*, the best preventative measure is to ensure that all necessary admonishments are placed on the record. If you cannot place the admonishments on the record, make sure that the written documents are in compliance with Tex. Code Crim. Proc. art. 26.13, which include admonishments on immigration consequences,[9] the punishment range for the charged offense,[10] and the obligation to meet sex offender registration requirements.[11] An omission on the record can lead to future IAC claims that are much easier to refute with clear written proof that the proper admonishments were given. That being said, the failure to receive an admonishment under art. 26.13 does not automatically mean that a defendant can meet the prejudice prong of the *Strickland* test, but it is better to avoid such risks.

3 **Failure to investigate.** For the most part, there is not a lot a prosecutor can do to ensure that defense counsel has properly investigated a case prior to the issue presenting itself in a motion for new trial (addressed below) or post-conviction proceedings. However, one way this claim may arise is in an allegation that defense counsel did not investigate a defendant's claim of incompetency. Therefore, if you suspect that a defendant may have competency issues, it is best to place on the record why your concerns have been alleviated before continuing on to trial or permitting the defendant to enter a plea of guilty or *nolo contendere*. This could be as simple as making sure an admonishment under Tex. Code Crim. Proc. art. 26.13(b) is placed on the record.

4 **Failure to obtain discovery.** We are now all obligated to comply with the Michael Morton Act (SB 1611), the discovery rule enacted January 1, 2014.[12] The best practice is to hand over any and all discovery requested by the defendant to avoid this IAC claim. If your office has not created forms to assist with the implementation of this act, make sure to document what discovery defense counsel has received and the date the discovery was turned over. Refute any claims that discovery was not received by placing the date(s) the discovery was handed over on the record.

5 **Failure to file pre-trial motions.** First, if defense counsel has indeed filed pre-trial motions, make sure the record is clear as to which motions were filed and the trial court's rulings. This minor detail can prevent a claim being raised later, when it is more difficult to retrace pre-trial events.

Second, this claim typically

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presents itself in a post-conviction proceeding long after defense counsel has decided not to pursue a pre-trial motion to suppress evidence. For this claim, a defendant must prove that, had defense counsel filed a motion to suppress (or any other pre-trial motion), it would have been granted.[13] So, to state the obvious, make sure evidence is admissible and shore up its admissibility with testimony regarding the surrounding circumstances that led to its discovery.

6 **Failure to call witnesses.** This is an IAC claim that a trial prosecutor will not likely be able to remedy, but if it is clear that defense counsel is having difficulty securing a witness, including an expert, note on the record that the witness is not available. This will assist in refuting future IAC claims where the defendant must prove that a witness was available and willing to testify.[14] Otherwise, this claim does not usually arise at trial unless a dissatisfied defendant makes it known in open court that his attorney has failed to call a witness or consult an expert—at which point, the State can agree to a continuance if necessary and/or request that the trial court ensure, on the record, that the defendant is satisfied with his representation.

7 **Failure to object.** While a defense attorney is not required to make meritless objections, there are times when an objection is warranted and the defense misses it.[15] For this reason, we should not take a defense attorney's silence as a license to continue down the road of improper questioning. A defense attorney's failure to object today can become grounds for a post-conviction writ of habeas corpus tomorrow. The result will be a reversal due to a failure to object to an improper and prejudicial line of questions that could have been avoided.[16] The same rings true for improper argument during closing.

8 **Failure to request jury instructions.** This is one area where a trial prosecutor can likely predict what the defense will do. Therefore, if the facts of a case *clearly* warrant a particular jury instruction and you have noticed that defense counsel has failed to make a request for the instruction, simply mention in the charge conference that you assume defense counsel will be making a request for the instruction. For example, it does not pay to turn a blind eye to the fact that defense counsel has clearly raised an affirmative defense but inadvertently failed to request a jury instruction for that affirmative defense.[17] This will only give rise to subsequent IAC claims that may be successful.

9 **Failure to present mitigation evidence.** This claim is closely linked to the failure-to-investigate IAC claim. As such, there is not much a prosecutor can do in the form of preventative measures. While it is not uncommon for a defense attorney to forgo the presentation of mitigation evidence, when a defendant is facing a significant sentence such an omission may be cause for concern. The question is whether beneficial evidence was actually available and whether the failure to present mitigation evidence is so outrageous that it could not be considered sound trial strategy.[18] Such a claim is dependent on defense counsel's trial strategy which will not come to light until raised in a motion for a new trial or post-conviction writ of habeas corpus.

10 **Obvious cases of IAC.** If you encounter a defense attorney who cannot remain awake during proceedings, shows up inebriated or impaired in some way, or is meeting his client accused of murder for the first time on the day of trial, the best remedy is to notify the court and agree to a continuance.

While this list is not exhaustive, it is easy to see that the over-arching theme is to place what you can on the record and document what you cannot. If all else fails, ensure that a defendant is pleased with his representation by requesting that the court question the defendant on the record.

The trial attorney's final word

Finally, if an IAC claim is raised in a motion for new trial, an opportunity arises for defense counsel to explain his actions or inaction, so request that the court conduct a hearing. It is important to make sure that the record is clear as to the trial court's findings regarding the IAC claim(s). Keep in mind that it does not matter if the court agrees with defense counsel's trial strategy. The test is whether there exists "no reasonable trial strategy" to justify counsel's acts or omissions because it is at this point that trial counsel's performance "falls below an objective standard of reasonableness" as a matter of law.[19]

During a motion for new trial, a trial prosecutor can still take preventative measures to refute IAC claims. Upon examination of defense coun-

sel, make sure to ask specific questions regarding efforts to investigate, locate witnesses, retain experts; reasons why certain pre-trial motions were not filed; and reasons why mitigation evidence was not presented. This is also a good time to refute any claims that defense counsel did not meet with his client.

In final argument, it is key to remember that the court must consider the "totality of counsel's representation," not isolated acts or omissions.[20] Finally, minimize the effects of any ineffectiveness by distinguishing between the guilt-innocence and punishment phases if counsel acted within the realm of counsel guaranteed by the Sixth Amendment in the guilt-innocence phase but not during punishment.

Although these steps can seem burdensome, they can help tremendously in ensuring that a conviction withstands an IAC claim. It certainly would be a lot easier to do nothing in a situation like this, but doing nothing now may mean that you or your colleague will have to try the case again later. Any comments or questions may be directed to me at shara .saget@dallascounty.org. ❇

Endnotes

1 *Mata v. State*, 226 S.W.3d 425 (Tex. Crim. App. 2007).

2 *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

3 *Strickland*, 466 U.S. at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome").

4 *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005) (emphasis added); see also *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007) ("If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal").

5 *State v. Morales*, 253 S.W.3d 686 (Tex. Crim. App. 2008).

6 See *Missouri v. Frye*, 132 S.Ct. 1399, 1409 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384-85 (2012).

7 *Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013).

8 See *Ex parte Cockrell*, No. WR-78,986-01, 2014 Tex. Crim. App. LEXIS 276 (Tex. Crim. App. Mar. 12, 2014) (defendant's counsel found ineffective because failure to request an interpreter under Tex. Code Crim. Proc. art. 38.31(a) constituted deficient performance because a reasonably competent attorney would have realized that defendant's condition met the definition for "deaf person" and he made ineffectual efforts to address the problem instead of invoking the mandatory provisions of art. 38.31).

9 *Padilla v. Kentucky*, 559 U.S. 356 (2010); Tex. Code Crim. Proc. art. 26.13(a)(4). See "*Padilla* changes everything" on page 32 of this issue for even more information about this case.

10 Tex. Code Crim. Proc. art. 26.13(a)(1).

11 See *Carter v. State*, 82 S.W.3d 392 (Tex. App. Austin 2002) (Tex. Code Crim. Proc. art. 26.13 does not require that a defendant be admonished regarding the specific details or effects of registration).

12 See Tex. Code Crim. Proc. art. 39.14.

13 See *Yuhl v. State*, 784 S.W.2d 714, 717 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (unless defendant can show unfiled motion to suppress would have been meritorious, he cannot show ineffective assistance of counsel).

14 See *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) ("The failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony").

15 See *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000) (trial counsel's failure to object to that which is unobjectionable is not ineffective assistance of counsel, nor does it cause her performance to fall below an objective standard of reasonableness).

16 *Gutierrez v. State*, No. 05-12-01278-CR, 2014 Tex. App. LEXIS 3141, 20 (Tex. App.—Dallas Mar. 20, 2014) (not designated for publication) ("trial counsel failed to object to the prosecutor's repeated statements and arguments that appellant's immigration status meant he was not a candidate for probation, and further that appellant's status and lack of citizenship should be used as an aggravating factor in assessing appellant's punishment. We conclude this is one of those rare instances in which we can conceive of no possible basis in reasonable strategy or tactics for trial counsel's failure to object").

17 See *Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987) ("This Court has consistently held that an accused is entitled to an instruction on every defensive issue raised by the evidence"); see also *Villa v. State*, 417 S.W.3d 455, 457 (Tex. Crim. App. 2013) (defendant convicted of aggravated sexual assault under Tex. Penal Code §22.021(a)(1)(B)(I) received ineffective assistance because trial counsel failed to request a jury instruction on the medical care defense where the evidence showed defendant touched the child for the sole purpose of applying diaper-rash medication).

18 See *Rivera v. State*, 123 S.W.3d 21, 31-32 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that counsel's failure to present mitigation evidence fell below an objective standard of reasonableness where court could not attribute failure to "trial strategy"); see also *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) ("While a single error will not typically result in a finding of ineffective assistance of counsel, an egregious error may satisfy the *Strickland* prongs on its own").

19 *Andrews*, 159 S.W.3d at 102.

20 *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

Calling all Texas juvenile prosecutors!

The Texas Juvenile Prosecutor Network (TJPN) has been launched, and its aim is to connect and educate Texas prosecutors who handle juvenile cases.

By Jill Mata
Assistant Criminal District Attorney in Bexar County

Do you handle juvenile prosecutions and feel that "regular" prosecutors don't really understand you? Do you use words like respondent, petition, determinate sentence, status offender, release and transfer hearing—and get blank stares from your non-juvenile justice co-workers? Are you tired of saying to other prosecutors, "Yes, we also use the Penal Code!"? Or are you a brand-new prosecutor who has landed in juvenile court, not really sure what to do with these young people charged with an assortment of crimes?

If so, I have some exciting news for you! With the encouragement of Bexar County Criminal District Attorney Susan Reed, we presented the idea of establishing a Texas Juvenile Prosecutor Network (TJPN) to the TDCAA Board and received strong support to move forward. The TJPN can help us connect, brainstorm, assist, and communicate with each other throughout the state.

I have been a juvenile prosecutor for more than 15 of my 25 years in Bexar County, and the idea of a prosecutor-friendly forum to specifically advance juvenile justice is exciting! I have heard from many of you over the years. We talk on the phone, email each other, or meet at juvenile law seminars, and we realize that juvenile prosecutors have a unique role, both in juvenile justice and in prosecution. In the juvenile justice arena we are expected to be mindful of the precarious nature of youth and the established potential for rehabilitation as we assess our cases, craft charges, and offer plea agreements. As prosecutors we must provide a strong voice for crime victims, and our decisions must promote and support community safety, all while managing strict confidentiality rules set forth in the Family Code.

Now comes the fun part! You can help shape what the Network will look like and what it will do. First, let us know that you are interested. Contact me by email at tjpn@bexar.org. If you are old-school, you can call me at 210/335-1965. Make sure to leave your name, what office you're in, your contact information, and that you are interested in the TJPN.

Secondly, tell us what assistance you need as a juvenile prosecutor and/or what you can offer in terms of expertise and experience. Examples could include:

- training specific to juvenile cases, such as certification and discretionary transfer;
- handling juvenile sex offense cases;
- forms for use in filing petitions, motions, discretionary transfer, or trial;
- research on effective programs (because others expect us to weigh in on recommended treatment options for juvenile offenders); and
- information about establishing specialty court programs that focus on particular youth with mental health diagnoses or those involved in human trafficking;

Some envision the network hosting juvenile-specific discussion forums on topics like implementing the Michael Morton Act, truancy reduction, the school-to-prison pipeline, or "raise the age" legislation. Prosecutors are often called to offer opinion or testimony on proposed legislation, and being able to efficiently assess the views of prosecutors statewide would be a great benefit. There are a lot of important conversations going on about youthful offenders, adolescent development, and best practices in treatment, and prosecutors need to be in the middle of that movement rather than left out and later expected to deal with the consequences of major changes in the law.

What are our next steps? I encourage you to attend our inaugural TJPN meeting at the next TDCAA Annual Criminal and Civil Law Update in South Padre September 17–19, 2014, if you are able. We need to hear from all kinds of prose-

cutors handling juvenile cases and realize the issues are different depending on the size and location of your office. The network should represent everyone, and there is already a small, dedicated, and diverse bunch of folks interested in discussing our goals and ideas to create a network that will best serve our needs. We are looking forward to you joining us! ❇

News Worthy

Electronic versions of the CCP and PC available

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

General contractor gets a three-year sentence for false statement

Prosecutors rarely try construction fraud as False Statement to Obtain Property or Credit, but doing just that netted a Tarrant County general contractor three years in the pen for bilking his subcontractors of over $125,000.

By Sid P. Mody
Assistant Criminal District Attorney in Tarrant County

The expected use of the False Statement to Obtain Property or Credit statute[1] is typically mortgage fraud, where a defendant might lie on a loan application to induce a bank to lend him money. But this statute and its elements can be used effectively on a broader scale. At the end of February, I used §32.32 to prosecute Keith Baxter Alexander, a general contractor, for construction fraud—it's easier than a standard theft charge. With a False Statement to Obtain Property or Credit, a prosecutor must prove only two things: that a false statement occurred and that it was to obtain property or credit. Whether the defendant actually received that property or credit isn't really at issue, so a prosecutor doesn't have to get into tracking the money as much as in a theft case.

The case

In 2006, Keith Baxter Alexander was the owner of K.B. Alexander Company of Texas, Inc., a general contracting company. He was hired by Ed Kent, the owner of a used-car dealership, to oversee construction for EZ Ed's Auto in Fort Worth. As the general contractor, Alexander hired various subcontractors (often called "subs" in the industry)—everyone from concrete workers to electricians (13 subs in all). Alexander had a contract between himself and the dealership owner, plus other contracts between himself and the subcontractors.

Ed Kent would pay Alexander for the work completed every month, and Alexander was to pay the subcontractors who had worked during that period. In reality, though, he was not paying the subcontractors the full amount, if at all, and the scheme came to light only after con-

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struction on the dealership was finished and the owner discovered that mechanics liens had been placed on his property. (Mechanics liens are subcontractors' only secured recourse when they are bilked out of their wages.) To get some of these liens off of his property, the owner decided to pay the subcontractors directly. Some of the subs filed civil suits against the defendant for the amount still owed, but Alexander filed for bankruptcy to fend off the various claims against his company. After he went through bankruptcy, he turned around and created another construction company and started doing the same thing over again. In all, Alexander had withheld $125,000 from his subcontractors, and when his business filed for bankruptcy protection, his subs were (effectively) out their rightful wages.

Kent, the auto dealership owner, filed a complaint with our office, asking if this could be a criminal offense. When these types of cases come across our desks, they might appear to be civil issues at first, but prosecutors should look closely at each pay application to see what language it includes (because the general contractor signs it)—it just might show that the criminal offense of false statement has occurred. After a review and analysis of the pay applications (monthly invoices a general contractor submits to a client to keep track of what work was done during the month—more about these below), we felt comfortable taking the case to the grand jury with the charge of False Statement.

Generally most false statements to obtain property or credit will also fall under a simple theft statute, but not all thefts are false statements. In construction fraud, §32.32 is a lot easier statute to convey to a jury (because pay applications document all of the money month to month); jurors just have to follow a simple concept, that if an individual makes a false statement on a document that gets someone else to turn over money, then a crime has occurred. This charge prevents the defense from claiming the defendant merely used "bad business practices." On a theft case it's a lot easier for the defense to claim bad business practices and that the defendant intended to pay the subcontractors at the time the owner went to make a draw on the bank. In a False Statement, proving intent is not difficult because once the State proves the statement the defendant made on the pay application is false, all prosecutors have to worry about is addressing the numbers on the pay application and showing that they don't add up.

As a prosecutor, I always add as many counts as I can in the indictment because you never know what you will need; that way, you always have the option to waive counts. Generally in these cases I would not only include Count 1 on False Statement but also Count 2 on Theft. I would also add separate counts of theft and list each subcontractor as an injured party.

One other note about a theft vs. false statement charge: Like any financial-crime case, it takes a long time to even find out if a criminal act has occurred because of the sheer amount of paperwork to examine, and quite frankly the defendant is usually smarter than average. In this case, the EZ Ed's Auto build happened in 2006. Between the subcontractors placing liens on the property, to civil claims, to the criminal case finally coming to our office, the five-year statute of limitations on theft had already passed, so I was limited to a False Statement on this case (this charge has a seven-year statute of limitations).

Construction fraud

Many people have heard stories about subcontractors not being paid for a job, but they may not contemplate that a general contractor can be charged with a felony if he continues to receive money from a customer and doesn't turn it over to his subs.

To understand how such actions constitute a crime, it's helpful to know how the financial side of construction projects works. A general contractor is required, when building a piece of property, to turn over a pay application to the owner. Pay applications are standard industry documents showing what work has been completed on the property during a given time period (usually a month). Once a subcontractor submits to the general contractor the work he has completed or will complete in that time period, the general contractor converts that to a percentage (say, 25 or 50 percent) and inserts it into the pay application, which is then submitted to the owner so the owner can pay that month's salaries and expenses.

Generally on the second page of the pay applications is a dollar amount that the general contractor is charging the property owner for a specific subcontractor's work. A lot of times, the general contractor will mark this cost up by 15 or 20 per-

cent to get more money for himself (this is common practice—and not necessarily criminal—to pay the general contractor for the administration of a job).

The pay application also includes the "Previous Application Paid" number, which identifies all of the money that has been already paid to the general contractor (and then to the subs) for the work completed thus far on the property. If the amount previously paid out doesn't match what the subcontractors actually received, then a false statement—a crime—has occurred. The property owner, when looking at the Previous Application Paid number, will obtain a draw from the bank for additional money for which the general contractor is asking for the next month. A crooked general contractor has to keep lying and increasing the number of the Previous Application Paid number every time he submits a new pay application or the owner won't make a draw on the bank.

The "certification paragraph" on these pay applications (right above the general contractor's signature) becomes very important. In the case against Keith Alexander, the certification paragraph read, "The undersigned contractor certifies that to the best of the contractor's knowledge, information, and belief … all amounts have been paid by the contractor for work for which *previous certificates for payment were issued* and payments were received from owner, and that current payment shown herein is now due" (emphasis added) His signature on these pay applications—when he knew they were falsified—was a smoking gun of his guilt.

Going after a crooked contractor

When a subcontractor performs work but isn't paid in full, one option is to put a mechanics lien against the property. A subcontractor must file the lien by the 15th day of the fourth month following completion of its work and must also give notice to the owner of the property by the 15th day of the third month of performance. Getting these mechanic's liens and giving timely notice can be difficult for subcontractors because they are required to perfect their lien within a certain time period, but it is the only recourse for a subcontractor to be protected on his claim. But placing a mechanics lien doesn't entirely solve the problem; that lien penalizes the *owner* of the property (who has paid the full value of the contract), not the general contractor, who did not fully compensate the subs. In fact, a mechanics lien gives the *owner* a clouded title while the general contractor is able to walk away.

There may be recourse on the civil side for both the owner and the subcontractors against the general contractor. A lot of times, however, because of legal fees and various other costs, it isn't feasible for owners and subcontractors to go after the general contractor. When owners and subcontractors do file civil suits, they usually are filed against the general contractor's company, and unless the plaintiffs can pierce the corporate veil, their claims are limited by the company's assets (rather than the general contractor's assets). When these suits against the construction company do get filed, the general contractor can seek Chapter 7 bankruptcy protection for his company; once that happens, the various claims are listed as unsecured creditors.[2] In bankruptcy law, an unsecured creditor will generally be last on the list to get paid, behind creditors whose claims are secured by collateral that the creditor can reclaim if the borrower defaults on payment (such as a car loan or mortgage). Many times owners and subcontractors get pennies on the dollar or nothing at all from winning a civil suit, especially if the general contractor files for bankruptcy protection.

The important thing to remember in this scenario is that although a subcontractor can try to become secure for his loss by taking a lien on the property, he's taking the lien on the *owner's* property, not on the general contractor's property. And any claim against the general contractor will always be *unsecured*. The general contractor also has the benefit of an automatic stay when his company files for bankruptcy.[3] An automatic stay prevents any further efforts to collect on a civil judgment after a debtor declares bankruptcy. The goal of the automatic stay is to preserve the status quo and protect the company's remaining assets until the division of assets overseen by the bankruptcy court. The general contractor, by just filing for bankruptcy, gets this shield, and again, the owner and subcontractors are at least temporarily stopped from pursuing their claims against the general contractor.

There is of course no limit as to how many times a general contractor can create a new company and later file for bankruptcy for that, so a general contractor can create an endless

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cycle of stealing money from owners and subcontractors, then using the federal bankruptcy courts to wash his hands of liability.

Robbing Peter to pay Paul

General contractors might overstretch themselves in paying for a specific job; however, instead of taking a loss on that specific job, they start shifting money from other jobs to compensate for their loss. One misstep after another slowly starts growing, and finally they find themselves in a hole that affects multiple jobs, rather than only the single, original mess-up. A typical defense strategy is simply to call this "bad business practices"—the general contractor went over-budget and intended to pay everyone, but he just had too much overhead. The defense might make this claim because all the money from various projects typically goes into a single bank account, so the defense argues there is no criminal intent by the general contractor not to pay the subcontractors; rather it's simply a case of running out of money.

One way to dismiss this over-budget argument is to look for "change orders," which are generally found on the last page of the pay application. Change orders are revisions to the original contract when (as the name suggests) the client makes a change or when costs end up higher than the general contractor originally estimated. If a construction job has a lot of change orders or something went wrong during the project—and the file has ended up on your desk—make sure to go over the numbers carefully. Many times a project requires more work from the subcontractors than originally thought and the general contractor just doesn't have enough money to pay them. This happens all the time, but a reputable general contractor will include these overages on the last page of the pay application as one or more change orders, which the owner then has to pay. The final pay application will then show that the owner has paid the change orders.

What is important for a prosecutor when dealing with these types of cases is to understand the ramifications that "bad business practices" can have upon the owners of these properties. The only way a general contractor can shift money from one job to another is by making a false statement to the property owner that the money the contractor is receiving is going towards that owner's particular project. An owner will not continue to pay the general contractor over the course of the contract if he knows the money is not going toward his project and that he will eventually have to pay even more at the end to subcontractors.

Taking the case to trial

This is plain and simple deception by the general contractor over a period of time. He might get away with it for a while because he is in a position of trust, not only with the property owner but also with the subcontractors. When trying Alexander for this crime, I told the panelists during voir dire that the best way to explain a false statement is in reference to the word trust. Because of the trust a contractor has with a client and the trust that client places in the terms of the signed document, the client will turn over property or credit to that contractor.

When it came to proving that different subcontractors were not paid the full amount of the contract price, we had to show the jury the connection between the pay applications submitted to the owner and the total amount still owed to the subcontractors. We called all the subcontractors during the guilt-innocence stage to testify about their individual contracts with the defendant, that those contracts didn't change over time, and that the subcontractors weren't paid the full amount they were owed. One by one, my co-counsel, Susan Linam, and I checked off the amount they were paid as well as the remaining balance. We created a large chart for the jury to see and follow along during each subcontractor's testimony. Each sub's work and payment was different, so it was important to make sure the jury was keeping up with all the information. Nine subcontractors were not paid the full amount, and seven mechanics liens were placed on the property representing almost a third of the original contract price between Ed Kent, the property owner, and the defendant, which totaled a little over $125,000.

The jury, after deliberating for a little under an hour, came back with a guilty verdict. In the punishment phase, we tracked Alexander's pattern of behavior and showed the jury that this was not the only job where the defendant had scammed his subs. By getting Alexander's "clear report," we had a plethora of information on our defendant. A clear report compiles the results of a search of public records for anything

pertaining to a particular suspect; it's produced by Thomson Reuters.[4] Investigators around the country use clear reports to get more information on a suspect (anyone who completes a certification class can have access to it). It tells us everything from corporations to which the suspect has been linked, to civil lawsuits to which the suspect has been a party. Alexander's clear report showed that he had filed bankruptcy on two different construction companies after civil claims were brought against him for doing the exact same thing. We were also able to tell the jury that in 2013, the defendant again had a new construction company and was back to the same antics. We brought in witnesses who worked various other construction jobs with Alexander and testified that he had done the same thing with them, further adding to the total amount Alexander had stolen. We also introduced evidence that he had been forging various subcontractors' signatures on joint checks from owners on other projects.

Knowing the complexity of construction fraud and that these cases rarely get indicted, let alone go to trial, I didn't make a specific request for probation or penitentiary time. Rather I let the jurors decide what would be appropriate. After deliberation and understanding that the defendant had no prior felony convictions, the jury came back with a three-year penitentiary sentence. For us white-collar prosecutors, it is generally hard to get a jury to give pen time because defendants are often clean-cut and sympathetic with no prior criminal history. In this case I was ecstatic that the jury was able to the follow its complexities and give an appropriate sentence.

A lot times prosecutors forget to ask for restitution after a jury comes back with pen time, but the State can always ask for restitution for victims who are out money. It would be enforced after the defendant goes on parole and can be used as a factor to revoke parole if restitution is not paid. Of course, restitution is limited to the amount owed to the injured party listed on the indictment. In a False Statement case, the injured party is the one to whom the false statement is made, so that was Ed Kent of EZ Ed's Auto. Although I wanted to ask for the full amount of restitution for all the subcontractors, I was limited to the amount Ed Kent was still owed, which was roughly $20,000. That amount was nowhere near what the subs were owed to get the liens off of Kent's property, though. (One way to make sure the subcontractors can be paid through restitution would be to add separate counts of theft and list the subcontractors as injured parties, but I couldn't do so in this case because the five-year statute of limitations on theft had already run by the time this case came across my desk. Because False Statement has a seven-year statute of limitations, I was lucky to ask for restitution for what Kent, the injured party, was owed.)

Conclusion

These cases can be very complicated in showing not only a loss to the subcontractors but also the relationship between an owner, general contractor, and subcontractors. I'm lucky to be in a large office that has the resources for a white-collar unit, where investigators are able to do most of the legwork and organize the case to track the different amounts passing between the entities.

However, prosecutors in smaller offices shouldn't be afraid to try one of these cases. The key to prosecuting a False Statement to Obtain Property or Credit case is identifying where the false statement has occurred. If one of these cases does come across your desk, look for specific pay applications between the general contractor and the owner and then look at individual contracts between the subcontractor and the general contractor. If something doesn't add up, you probably have a false statement on your hands, and you can start breaking down the case by each subcontractor. It starts with the last pay application submitted by the general contractor to the owner of the property. Look for language stating that previous pay applications have been paid and then find the actual amount of what has been paid. I would then go and talk to all the subcontractors and ask what they are still owed.

In the end, like all other white-collar cases, the most important thing to do as a prosecutor is show that the numbers don't add up. ❇

Endnotes

1 Tex. Penal Code §32.32.

2 11 U.S.C. §701.

3 11 U.S.C. §362 (a).

4 https://clear.thomsonreuters.com/clear_home/index.jsp.

News Worthy

Applications for PCI, Investigator Section scholarship, and Investigator awards now online

Applications for the Professional Criminal Investigator (PCI) certificate, Investigator Section scholarship, and both the Chuck Dennis and Oscar Sherrell Awards are now online. Just look for this issue on our website, www.tdcaa.com, and click on this story to download the forms.

The PCI is open to to those district, county, and criminal district attorney investigators with a minimum of eight years of full-time employment in a prosecutor's office (if holding an Advanced Certificate with TCOLE) or five years of full-time employment (if holding a Masters Certificate with TCOLE).

The Investigator Section scholarship is available to the child of any TDCAA member (not just investigators). A document with the essay question is at www.tdcaa.com; completed essays should be sent to TDCAA, 505 W. 12th St., Ste. 100, Austin, TX 78701, by July 1. The scholarship will be awarded at TDCAA's Annual Criminal and Civil Law Update in September.

The Oscar Sherrell Service to TDCAA Award is given to recognize those enthusiastic investigators who excel in TDCAA work. Deadline for nominations is July 1; the award is given at our Annual Criminal and Civil Law Update in September.

The Chuck Dennis Investigator of the Year Award is given annually to that prosecutor's investigator who exemplifies the commitment of the law enforcement community to serving others, serving his office, and remaining active with TDCAA. The deadline for nominations is December 1, and the award is given at February's Investigator School. ❇

Criminal Law

The Conversation

A poem reflecting on the hardest part of our jobs: speaking to victims about how crime has hurt them

With the passing of this year's birthday, I have spent exactly half my life working as a prosecutor. There must be something about reaching that milestone that has made me look inward as I think about the job that has come to define so much of what and who I am. In those reflections, and after an invitation to speak to a victims' coalition, I began to think about what is, for me, still the hardest thing I do in my job. It is something I have done hundreds of times and yet it is still as painful today as it ever was; it is still the one part of my job I am most insecure about, the one task whose performance leaves me feeling inadequate.

By Richard Alpert
Assistant Criminal District Attorney in Tarrant County

As often happens to me when I dwell on matters that touch me, I wrote about those feelings. When I was done I had the poem that follows. For reasons I don't understand, reading it made me feel better about this task and my performance of it. For that reason I have shared it with TDCAA so they can share it with you, my professional family. My hope is that it will make other career prosecutors feel better about the job they do while opening a window to the less experienced about what lies ahead of them. Perhaps they can start thinking about how they will perform this task. Perhaps it will give the more senior members in your office an excuse to start a conversation with the less experienced prosecutors, which might, down the road, benefit a victim or a victim's family. I have decided to call these reflections "The Conversation." ❇

The Conversation

Tell me about your loved one.
Speak of all that was unique and wonderful
About the person ripped so abruptly,
So completely, from your life.

Find the words to describe to me,
And later to others,
How a dream becomes a nightmare
From which you can't awake.

Tell me about your child.
Share all that you miss
About the life you brought into this world,
Stolen from you before its time.

Speak to me of promises of a future.
Cut short by unspeakable circumstances,
Of the clothing and toys that fill a room—
A shrine to what might have been.

Bring a photograph, a captured moment,
That will remind us of the hope
And the happiness that is gone,
The broken home that time has not rebuilt.

Share a favorite story
So that we might have a small glimpse
Of the child they were and the person
They will never become.

Tell me about your husband.
Speak of your struggle to live the life you planned
Without the support and comfort
Of the one with whom you planned it.

Paint a picture with words,
Share a side of him that only you knew,
So that I might breathe life into the photos
Of the bloody and violent way his life ended.

Speak of bills that go unpaid, and debt that grows
With no end in sight.
As it takes all you have, to get out of bed
To be a source of strength for the children he left behind.

Tell me about your wife,
The mother of your children,
The other half
Of what made you whole.

Tell me how your kids have adjusted
To the empty space in the house,
That was once a home, built by two,
Sustained by you alone.

Speak to me of the life you planned,
The book that must now be rewritten
With a new ending that is so different
From what you had hoped and dreamed.

Do this for me until it becomes too hard to continue,
And then stop,
And trust that I will fill the gaps,
And make real for a jury, what this crime has taken from you.

Then repeat it all in a courtroom.
While facing the one
Who put an end to that promise
And broke your world.

And know that it's OK to cry,
But better to hold back the tears
Until you finish the story
That only you can tell.

And forgive me if I look away,
As that's the only way I can listen
And not be overwhelmed
By all that you've told me.

Do all this for me, and I promise
To do all I can
To get justice
For you and your family.

Do all this for me
In the hope that this experience
Will bring you
Some level of closure.

Do all this for me
As I pray that God gives you comfort
And the strength to continue
As I walk you down the hall, and out the door

Only to return to the conference room
To hold open the door
For the next family
With whom this conversation
Must begin again … ❇

—Richard Alpert

Padilla changes everything

An examination of how writs of habeas corpus alleging ineffectiveness of counsel have evolved since *Padilla v. Kentucky*

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

For most prosecutors, the immigration consequences attendant to a plea bargain in a criminal case were of, at most, minimal interest prior to the United States Supreme Court's decision in *Padilla v. Kentucky*.[1] Following that decision, the issue of immigration consequences took on constitutional dimension and necessarily became foremost in the minds of prosecutors. This was in large part due to the implication in *Padilla* that the decision applied retroactively, which resulted in a flood of writs, some on cases more than a decade old, wherein defendants sought to have their convictions vacated based on ineffective assistance under the *Padilla* rule.[2]

When the pendulum swung back again after the United States Supreme Court's decision in *Chaidez v. United States*, which held that the *Padilla* decision did not apply retroactively,[3] these writs again faded from the consciousness of most prosecutors. However, these writs are still relevant not only in that their existence requires diligence in future plea bargain proceedings, but also in defending against writs brought under pre-*Padilla* law. This article is designed to trace the evolution of the jurisprudence regarding immigration advice attendant to criminal plea bargains, to examine how prosecutors can protect their current cases from *Padilla* claims in the future, and to advise on how they can deal with claims of ineffective assistance relating to immigration which are based on pre-*Padilla* rules.

Padilla changes everything

The United States Supreme Court, in a radical departure from previously existing precedent, held that a criminal defense lawyer had an obligation of constitutional dimension to advise a non-citizen criminal defendant about the immigration consequences attendant to a plea of guilty or *nolo contendere* in a criminal case.[4] The court held that "when the law is not succinct and straightforward … a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear."[5] In issuing this holding, the United States Supreme Court expressly disavowed the extensive jurisprudence holding that immigration consequences were collateral to the criminal case; therefore, the criminal defense attorney had no duty to advise a criminal client regarding those consequences.[6]

The majority in *Padilla* not only marked a sea change in criminal law with their holding but also opened up a flood of litigation by way of their clear implication that the holding in *Padilla* applied retroactively.[7] Texas courts in particular held almost uniformly, prior to the holding in *Chaidez*, that the *Padilla* decision applied retroactively.[8]

Pulling back the reins in *Chaidez*

Following the flood of litigation (which the Supreme Court majority incorrectly predicted would not occur as a result of *Padilla*[9]), the United States Supreme Court decided in *Chaidez* that "defendants whose convictions became final prior to *Padilla* … cannot benefit from its holding."[10] This decision was quickly followed by the Texas Court of Criminal Appeals in *Ex Parte De Los Reyes*.[11] Ever resourceful, the defense bar then argued that by its language, the *Chaidez* decision did not apply to cases wherein deferred adjudication was granted because such cases did not result in a conviction.[12] The Texas Court of Criminal Appeals found that argument unpersuasive and ruled (in *State v. Guerrero*) that *Padilla* did not apply retroactively to cases wherein deferred adjudication was granted.[13]

While the *Chaidez* and *Guerrero* holdings have cut down on many of

the pre-*Padilla* writs, innovative defense counsel are still filing such writs based on pre-*Padilla* precedent. Writs are also being filed based on post-*Padilla* ineffective assistance. As a result, prosecutors must keep in mind how to avoid claims of ineffective assistance going forward in light of *Padilla*, how they can combat post-*Padilla* ineffective assistance claims, and how they can combat ineffective assistance claims based on pre-*Padilla* precedent.

Avoiding future *Padilla* claims

At their core, *Padilla* claims are ineffective assistance of counsel claims. Therefore, to some degree the prosecutor will be limited in what he can do to protect his cases from these claims because he cannot take over the role of the defense lawyer (on whom the defense of these claims lies). However, the prosecutor can take some concrete steps to both assist the defense lawyer in avoiding these issues and in protecting the record in a future appeal or writ proceeding.

First, the prosecutor should simply ask defense counsel if the defendant is a citizen. This should raise the issue to the defense lawyer, who should then be aware enough to ask his client. Prosecutors should ask this question in every case, not merely those where a defendant does not speak English or shows some other outward signs of being a non-citizen.

The prosecutor would also do well to check for any pre-trial services paperwork wherein the defendant is asked about his citizenship status, especially any paperwork where the defendant is asked to give a sworn response. Such pre-trial documents where the defendant represents that he either is or is not a citizen can be useful in determining whether the issue of immigration consequences needs to be raised early on. These can also be helpful after a writ is filed, if, for instance, the defendant alleges on his subsequent writ application that he was not informed of these consequences but swore in his pre-trial request for appointed counsel that he was a citizen. That is because such misrepresentations can be an independent basis for deportation, which lessens the writ applicant's ability to claim that it was his plea that ultimately made him deportable.[14]

The prosecutor should also make certain to take detailed notes in his file about any conversations with defense counsel about the defendant's immigration status. This step can be simply accomplished in most cases with a short conversation prior to the entry of the defendant's plea. The prosecutor should also make an effort to have every plea colloquy recorded, or at least every plea colloquy where immigration is known to be an issue. The prosecutor can then have the defendant state his immigration status on the record, make clear what steps have been taken to establish the immigration consequences of the plea, and ensure that the defendant understands these consequences and is entering a knowing and voluntary plea. It may even be worth reconsidering your county's plea paperwork to add a section dealing with the defendant's immigration status in more detail.

Dealing with post-*Padilla* habeas writs

In dealing with writs of habeas corpus regarding pleas that were entered after *Padilla*, the writ prosecutor will need to contact the applicant's trial counsel to inquire about his recollection regarding conversations he had with the applicant's immigration status. Oftentimes, the prosecutor will find that the trial counsel's recollection is nonexistent, as is his file. This is where the prosecutor's notes and a recorded plea colloquy come in handy. Again, pre-trial services paperwork, such as a request for court-appointed counsel can also be helpful in the scenario where the original trial counsel's memory and file are not.

A defense to an application for writ of habeas corpus based on *Padilla* will depend on what advice the prosecutor can show was given to the defendant. Pre-*Padilla*, this usually amounted to little or none, and it often began and ended with the general admonishment found in Article 26.13 of the Code of Criminal Procedure. Now that several years have passed since *Padilla* was decided, prosecutors should have more to work with—at least their own notes and potentially recorded plea colloquys. Nevertheless, situations will certainly still arise where it is unclear what advice was given. At the least, in every felony case, the defense counsel (and the court) should have advised the client about the 26.13 admonishment. This may be enough where the prosecutor can show that the deportation consequence in a given case is not "succinct and straightforward." This will require

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learning some immigration law, but several courts have examined the immigration law on a case-by-case basis and held that it was not succinct and straightforward under the facts presented, and therefore trial counsel had the duty to advise only that some negative immigration consequence may arise as a result of the plea.[15] This is often fertile ground on which to contest a writ of habeas corpus in this vein because there are so many variables in any given immigration situation.[16]

Regardless of what advice the prosecutor can prove was given to the defendant before he entered his plea, the prosecutor should keep in mind that as in all ineffective assistance of counsel cases, the writ applicant will need to prove not only ineffectiveness but prejudice as well.[17] It is on the prejudice prong that most of these pleas are successfully defended.[18] This is because the writ applicant not only has to prove that he was improperly advised, but he has to prove that but for the incorrect advice he would have proceeded to trial, and, most helpfully for the prosecutor, the writ applicant must prove that it would have been rational for him to reject the plea bargain and proceed to trial.[19]

Dealing with pre-*Padilla* habeas writs

Despite the fact that *Chaidez* and *Guerrero* have closed the door on applying the *Padilla* rule retroactively, inventive defense counsel have been seeking to make use of the *Padilla* precedent in this area in writs of habeas corpus.[20] Before *Padilla*, immigration consequences were considered collateral in Texas, and trial counsel in a criminal case had no duty to advise a client regarding those consequences.[21] While this precedent effectively closes the door on claims that defense counsel was ineffective for giving no advice at all, the writ prosecutor will no doubt find that an inordinate number of non-citizen defendants who entered guilty pleas prior to *Padilla* now allege that they were affirmatively misled by their trial counsel regarding the immigration consequences of their plea. That is because some pre-*Padilla* precedent held that where a habeas applicant could prove that his plea was induced by affirmative misadvice from his counsel about the immigration consequences of his plea, that plea could be withdrawn.[22]

Being that pre-*Padilla* writs will necessarily involve cases where pleas were entered prior to March 31, 2010, the writ prosecutor will likely find little help in the memories of defense lawyers and a great many missing or destroyed defense counsel files. Nonetheless, a conversation with the writ applicant's trial counsel is the necessary starting point. For those prosecutors who are lucky, defense counsel will recall going into painstaking detail with the writ applicant all of the potential immigration consequences of the applicant's plea and will have made all of those consequences known on the record. For the vast majority of writ prosecutors, trial counsel will be of little help. In the event you find yourself an unlucky writ prosecutor without helpful trial counsel and without a recorded plea proceeding, there are still potential resources available.

In this respect, even an unlucky writ prosecutor can usually expect some help from trial counsel. Even trial counsel who has no recollection of the plea and no file will usually testify that he would never have misadvised a criminal defense client about the immigration consequences of a plea. Prior to *Padilla*, most trial counsel had a habit of refusing to give any advice on immigration precisely because Texas courts had decreed that immigration was a collateral consequence. Usually, criminal counsel will testify that they gave no advice regarding immigration prior to *Padilla*, and because pre-*Padilla* claimants must prove affirmative misadvice, this is enough to successfully defend against the writ.

Again, pre-trial services paperwork, including requests for court-appointed counsel, can be helpful if your county's paperwork asks for a declaration of citizenship. Internal paperwork from the county jail can also be helpful if it has any items that call for a declaration of citizenship. The jail should also keep a record of when non-citizen inmates request to speak with their consulates. Prosecutors may also want to speak with the magistrate who handles arraignments to find out if he has any records regarding whether the writ applicant made it known that he was not a citizen or requested any advice about his immigration status at that time.

Also keep in mind that prosecutors' files (at least in larger offices) may change hands several times. Seek out colleagues who handled a writ applicant's file and pick their brains for any recollection of conversations they had with trial counsel

regarding the applicant's immigration status. If your office has a designated person who handles pre-trial diversion, make sure to speak with that person. Generally, pre-trial diversion requests made by non-citizens rely on the hardship the defendant's family would be put through if he were to be deported as a result of his criminal case as the primary reason why pre-trial diversion should be granted.

Remember that writs of habeas corpus alleging ineffective assistance based on faulty immigration advice prior to *Padilla* are essentially restricted to claims of affirmative misadvice. If all else fails, the Court of Criminal Appeals' recent expansion of the laches doctrine may still save the prosecution's case when a defendant has sat on his claim for too long before raising it.[23]

Conclusion

While the world of writs of habeas corpus based on ineffective assistance of counsel flowing from immigration consequences continues to evolve, there are concrete steps prosecutors can and should take to protect their future pleas and defend their final convictions. I hope that this article proves helpful to prosecutors facing these writs. Please feel free to contact me at Jason.Bennyhoff@fortbendcountytx.gov if I can be of any assistance. ❇

Endnotes

1 *Padilla v. Kentucky*, 559 U.S. 356 (2010).

2 *Id.* at 372.

3 *Chaidez v. United States*, 133 S.Ct. 1103, 1133 (2013).

4 *Padilla*, 559 U.S. at 369.

5 *Id.*

6 *Id.* at 365.

7 Holding that it was "unlikely that our decision today will have a significant effect on those convictions already obtained as a result of plea bargains." *Id.* at 372.

8 See, e.g., *Ex Parte Tanklevskaya*, 361 S.W.3d 86, 95 (Tex. App.—Houston [1st Dist.] 2011 (pet. granted, judgm't vacated by *Ex Parte Tanklevskaya*, 393 S.W.3d 787 (Tex. Crim. App. 2013)); *Ex Parte Sudhakar*, No. 14-11-00701-CR, 2012 WL 6061859 at *3 (Tex. App.—Houston [14th Dist.] Dec. 6, 2012 (pet. granted, judgm't vacated by *Ex Parte Sudhakar,* No. PD-0220-13, 2013 WL 1682780 (Tex. Crim. App. Apr. 17, 2013)) (not designated for publication).

9 *Padilla*, 559 U.S. at 371.

10 *Chaidez*, 133 S.Ct. at 1133.

11 *Ex Parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013).

12 *State v. Guerrero*, 400 S.W.3d 576, 588 (Tex. Crim. App. 2013).

13 *Id.*

14 8 U.S.C. §1227(a)(3)(D)(i).

15 See, e.g., *Ex Parte Lopez*, No. 04-11-00817-CR, 2012 WL 1431379 at *4 (Tex. App.—San Antonio Apr. 25, 2012, no pet.) (not designated for publication).

16 For example, while aggravated felonies are deportable offenses, the definition of the term "aggravated felony" is long, complex, and often not directly applicable to Texas statutes. See 8 U.S.C. §1101(a)(43); see also 8 U.S.C. §1227(a)(2)(A)(iii) mandating deportation for aliens convicted of aggravated felonies but not defining the term "aggravated felony." In particular, determining whether an offense under Texas law is deportable because it qualifies as an aggravated felony by way of being a "crime of violence" can be especially complicated. See 18 U.S.C. §16 (defining "crime of violence").

17 *Padilla*, 559 U.S. at 374.

18 See, e.g., *Ex Parte Fassi*, 388 S.W.3d 881, 890 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Ex Parte Moreno*, 382 S.W.3d 523, 530 (Tex. App.—Fort Worth 2012, pet. ref'd).

19 *Padilla*, 559 U.S. at 372.

20 See, e.g., *Ex Parte Tavakkoli*, No. 09-13-00082-CR, 2013 WL 5428138 (Tex. App.—Beaumont Sept. 25, 2013, pet. ref'd (not designated for publication).

21 *Ex Parte Luna*, 401 S.W.3d 329, 334 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Candelas v. State*, No. 01-13-00007-CR, 2013 WL 3354694 (Tex. App.—Houston [1st Dist.] July 2, 2013, no pet.); see *State v. Jimenez*, 987 S.W.2d 886, 888-89 (Tex. Crim. App. 1999).

22 *Rosa v. State*, No. 05-04-00558-CR, 2005 WL 2038175 at *3 (Tex. App.—Dallas 2005, pet. ref'd) (not designated for publication); see also *Ex Parte Saldana*, No. 03-09-00403-CR, 2010 WL 2789032 (Tex. App.—Austin, July 16, 2010, no pet.) (not designated for publication).

23 *Ex Parte Perez*, 398 S.W.3d 206, 215 (Tex. Crim. App. 2013) (holding that the State may now raise the equitable doctrine of laches with regard to the facts of the underlying case and not solely with regard to the State's ability to adequately participate in the writ proceedings).

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