THE TEXAS PROSECUTOR

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

Answering the call

How special prosecutors in Dallas tried a disgruntled JP for the revenge killings of two Kaufman County prosecutors and an innocent bystander.

On Thursday morning, January 31, 2013, I was in my office in Dallas when my cell phone rang. I saw that the call was from Sue Korioth, the chief appellate lawyer in the Kaufman County Criminal District Attorney's Office. When I answered the phone, I assumed she was calling about the case I had tried in Kaufman the week before, but I was wrong. "Bill," she told me, "Mark's been shot outside the courthouse." I could tell by her tone of voice that this was not a joke. Mark Hasse was also an assistant DA in Kaufman, and Sue and he were close friends. They both were former Dallas County prosecutors who now prosecuted in Kaufman. As we continued to talk and the shock of the news wore off, my prosecutorial instincts kicked in: "You guys will most likely need a special prosecutor on this case. Let me know if I can help."

By Bill Wirskye
Special Prosecutor in Dallas

Mark Hasse's murder

On the morning of his murder, at about 8:40 a.m., Mark Hasse parked in his usual spot and began the short walk to the Kaufman County Courthouse where he had a 9 o'clock docket. He was approached by a masked man dressed in black. After a short exchange of words and a scuffle, the masked assailant produced a handgun and fatally shot Mark numerous times before fleeing the scene in a waiting car. Although Mark had a pistol with him, he was unable to use it to defend himself. Law enforcement had little to work with other than a description of the getaway car. The story of Mark's murder dominated both local and national media.

The Friday before his murder, while I was waiting on a jury verdict in Kaufman, I'd had a long conversation with Mark. We shared a bond. Like Mark, I was a former Dallas County prosecutor. As the jury deliberated, Mark spoke with me about his family and his plans for retirement. He also told me war stories about prosecuting in Dallas County in the 1980s. He loved prosecuting, and I understood the sentiment. The jury I was waiting on was out on a murder case in which I had been appointed special prosecutor. Even though I enjoyed practicing criminal defense, I still loved prosecuting. Toby Shook, my law partner at the time and also a former Dallas County prosecutor, felt the same way. My conversation with Mark broke up when the bailiff told us that the jury had reached a verdict. As the jury returned to the courtroom, both Mark and his boss, DA Mike McLelland, were present.

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*Recent gifts to the Foundation**

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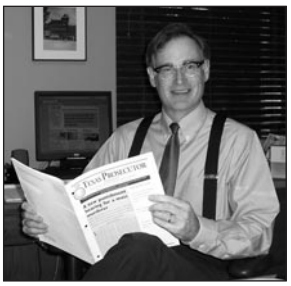
Leadership and management kick off a new era of training

Say you are a newly elected district attorney, county attorney, or criminal district attorney. Perhaps before you were elected, you had a reputation as an excellent trial attorney, defense counsel, wise and fair judge, or a hard-working assistant prosecutor.



By Rob Kepple
TDCAA Executive Director in Austin

Or maybe you are pretty new to a prosecutor's office, but you have done well in your first court assignments, and after a year you are promoted. You are rewarded with the responsibility of supervising some even newer lawyers.

Whatever the situation, what prepared the attorney to lead an office or a community or to manage a staff? The answer is short: nothing. A lot of attorneys make excellent leaders and managers, but just because you can win a case in court doesn't mean leading or managing comes naturally.

The Texas District and County Attorneys Association has existed to serve the prosecutors of Texas for 110 years. In the modern era of grant-funded training that began in the early 1970s, TDCAA has grown into the fifth largest MCLE trainer out of over 1,500 legal training entities in Texas. It has done a great job of training prosecutors and staff in many areas, but to date the training on leadership and management has been hit or miss.

With the help of the Foundation, that will change. It is time for a sustained program of leadership and management training for prosecutors. Whether you are the elected in a large jurisdiction or a single-person shop, you lead your office and your community in matters of criminal justice. It is our obligation to give you the tools for that job. And if you are an assistant who has been thrust into a management role because you happen to be good in trial, we owe it to you to help you gain a core competency in management skills.

This is the kind of sustained training program for which the Foundation was built. The Foundation is working today to identify and partner with significant supporters who recognize that the quality of justice in our communities hinges on prosecutor offices that, from top to bottom, work as a cohesive unit.

Stay tuned. We are confident that the Foundation will help us find the resources we need for a whole new level of training and support for our profession! ❇

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Newest online ethics training

In the last edition of *The Texas Prosecutor* I announced the completion of another ethics training, available online for free at http:// tdcaa.litmos.com/onlinecourses. The training, "A Prosecutor's Duty to the Truth: A Roundtable Discussion," has been available for a several weeks now, and it is drawing great reviews. The advice is geared toward newer prosecutors, but the collective wisdom of the roundtable participants—all seasoned elected prosecutors—seems to resonate with those who take the class. The piece of advice that gets the most approval: Listen to the defense attorney. The defense attorney can bring things to your case you just may not know about, and if you have built a good relationship with the defense bar, they will feel like they can share with you evidence that may alert you to insurmountable problems about the case early in the process.

By Rob Kepple
TDCAA Executive Director in Austin

Check out the online training and let us know what you think.

2017 Annual Update in San Antonio

As many of you know, TDCAA hosts the largest gathering of prosecutors and staff in the nation every September at our Annual Criminal and Civil Law Update. We work hard to keep the cost affordable, which means that we normally go to venues on the coast … during hurricane season. That has been a winning strategy but for the few times hurricanes did darken the coast.

But a little break in tradition: In 2017 TDCAA will host the Annual conference at the San Antonio Convention Center. Thanks to our meeting planner, **Manda Herzing**, for securing a great group of host hotels clustered around the Riverwalk and within walking distance of the Convention Center.

State Bar talks prosecutor accountability

In the last few years we have witnessed a national debate about accountability for prosecutors. Here in Texas we seen prosecutors held accountable in all sorts of ways: by ballot box, removals, courts of inquiry, and even criminal prosecution. All pretty standard stuff for elected officials and public servants.

So I guess I wasn't particularly surprised when the State Bar president recently took the time to single out prosecutors among all the lawyers subject to scrutiny and promise that the Bar was going to be actively seeking out suspected bad behavior by prosecutors. In a recent President's Opinion column, **Trey Apffel** wrote:

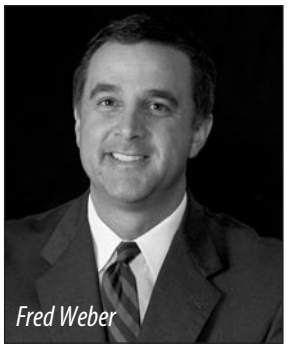
> "In the attorney disciplinary area, cases involving prosecutorial misconduct continue to garner media attention. … As a former member of both the Commission For Lawyer Discipline and a district grievance committee for many years, I can assure you that the Office of Chief Disciplinary Counsel [CDC] and the commission take allegations of prosecutorial misconduct seriously and thoroughly review all complains raising such allegations.
>
> "The CDC has developed training for its lawyers focused on the proper investigation and prosecution of these cases and developed strong working relationships with individuals and entities in the criminal justice system to facilitate the sharing of information and the ability to quickly obtain relevant evidence related to prosecutorial misconduct. The CDC and commission are also diligent in ensuring that the process is fair to all those involved and ever-mindful of confidentiality obligations.
>
> "Recent sanctions imposed —including a resignation in lieu of discipline, a disbarrment, two probated suspensions, and a public reprimand—demonstrate the commission's and the CDC's commitment to fulfilling their mandate to protect the public by thoroughly investigating any grievances in-volving prosecutorial misconduct and pursuing those with merit."

Fair enough. We know that we are held to a high standard, and our profession is up to the task. Rumblings from around the state are that the Bar has indeed been active as of late concerning prosecutors. And big-picture-wise, an accountability mechanism is not a bad thing for the profession—some of our counterparts around the country do not have an active Bar grading their papers, and it has left their policymakers struggling to find other avenues of accountability. Indeed, a California prosecutor with whom I spoke recently bemoaned the lack of activi-

ty by the California Bar's disciplinary arm, observing that Bar proceedings were essential to public confidence in the criminal justice system. So count yourselves lucky—I guess!

Former TDCAA employees make good

I am very proud that TDCAA has consistently had a staff of great folks dedicated to serving you. And it is always fun to see our former staff members do well. I can't mention everyone, but a few notables caught my attention in the last couple months.


Fred Weber


Wes Mau


Kelly Loftus


Dade Phelan

First, two former TDCAA employees have made the big time as elected prosecutors. **Fred Weber**, who served you as a TDCAA law clerk in 1994–1995, took office in January as the Caldwell County Criminal District Attorney. Also taking office in January was **Wes Mau**, the Hays County Criminal District Attorney, who served as both a TDCAA law clerk and staff attorney from 1992–1994. **Kelly Loftus**, TDCAA Research Attorney in 1994–1996, has just been promoted to Chief Prosecutor of the 371st District Court in Tarrant County.

Finally, congratulations to **Dade Phelan**, who served as the TDCAA Publications Manager in 2000 and 2001. In January Dade took office as the State Representative for District 21 out of Beaumont. And shortly after the legislative session began in January, Dade had the honor of presiding over the Texas House of Representatives as the Speaker of the Day. He made us so proud, banging the gavel and all so well. I expect to see many more former TDCAA employees make history in the future.

OAG's newest criminal chief: Adrienne McFarland

Congratulations to our old friend **Adrienne McFarland**, who was recently promoted by the Attorney General to the position of Deputy Attorney General for Criminal Justice. Many of you have had the pleasure of working with Adrienne when she served as the Chief of the Criminal Prosecutions Division. Those folks do a great job helping prosecutor offices out, and we are thrilled that Adrienne is now in the top spot.

Jon English goes to Galveston

Congratulations to **Jon English**, TDCAA's Research Attorney, on landing a job as an Assistant Criminal District Attorney in Galveston County. Many of you have benefited from Jon's excellent legal research and keen insights into Texas politics (having been a House staffer for a number of years). We here at TDCAA have benefited from Jon's friendship and the donuts he often brought in the morning. Gonna miss those donuts. Oh, and Jon too! We are thrilled for him and happy he is part of the profession as an assistant CDA!

Encouragement for the STAAR test

Ready for an uplifting story of a prosecutor doing good in his community? Here's a heart-warmer for you. Anyone who has children in third grade or higher has heard about the STAAR (State of Texas Assessments of Academic Readiness) test, which is administered to Texas schoolchildren to determine how well schools are covering subjects from math and reading to social studies and science.

Austin Stout, an ACDA in Bexar County, knows all about the STAAR test. His wife, Katy, is a fourth-grade teacher at an elementary school on San Antonio's west side, and this year was her first to administer the test to her students. "She'd been trying to figure out ways to get the kids motivated," Austin remembers. "The kids get really stressed out over the test—there's a lot of pressure on them, and Katy wanted to do something to calm them down before they started."

Katy texted her students' parents to ask that they all send in notes of encouragement for their children; Katy planned to give the messages to the kids a few minutes before starting the test. But the weekend before the

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Awakening to the scourge of family violence

I am a staunch advocate in the fight against family violence, but I haven't always been. While I currently speak and train on family violence across the state and country, I haven't always taken it very seriously. While I currently scrap, fight, and claw to protect victims' rights and to hold batterers accountable, I used to let batterers walk away scot-free. For my first few years as a prosecutor, I knew nothing about the reality of family violence in our society.

By Staley Heatly
District Attorney in Wilbarger, Hardeman, and Foard Counties

Sometimes it takes a shocking event to make us aware of the reality that surrounds us. It is easy to go through each day, absorbed in our lives, ignorant of the suffering that goes on just around the corner. But every once in a while, something happens that brings reality to our doorstep. It is up to us to decide whether we acknowledge it or turn away from it.

For me one of these "awakenings" occurred in 2009, but to get there, we have to start in 2006, when I first assumed the role of district attorney. When I came into office, there was a significant case backlog resulting from a several-month period when the office was vacant. (Mine is a solo office, so if there is no elected prosecutor then there is no prosecution.) Looking at this big backlog, I decided that I had to figure out how to prioritize my resources and efforts.

Obviously, the most serious crimes (murder, sexual assault, etc.) took precedence over state jail felonies. We also quickly attended to the "squeaky wheel" cases where the victims were calling for updates and urging prosecution. These were often burglaries, thefts, or assaults between unrelated parties. Of the remaining cases, my investigators and I went through each one to make the threshold determination as to whether we had sufficient evidence to proceed with the case. We quickly developed a thick stack of cases in which the victims had filed an affidavit of non-prosecution. I thought this was curious. Why would a victim want to drop charges against a perpetrator?

I asked one of the long-time employees what the office policy was on these family violence cases with an affidavit of non-prosecution. She told me that the position had usually been, "If they don't care, why should we?" As I looked at this large backlog of cases before me, that reasoning sounded pretty solid. If those victims didn't care, why should I? After all, I had plenty of cases where victims were demanding that something be done. Why would I waste my time on these cases when the victim doesn't even care? It seemed like an easy choice.

I dismissed those cases and I continued to reject or dismiss family violence cases that contained an affidavit of non-prosecution for the next two years.

When it all changed

In March 2009, Tommy Castro and his girlfriend, Kristina Earnest, moved to Vernon, along with two of Kristina's children, Kati, 5, and J.W., 22 months. Less than four months later Kati's limp body was brought to Wilbarger General Hospital covered in bruises from head to toe. There was nothing emergency room staff could do for the girl. Her veins had collapsed and her heart had stopped. She died on July 5, 2009.

The autopsy results showed that Kati had died from blunt force trauma to the abdomen. When confronted with the autopsy results, Kristina Earnest confessed to having killed her own child. She was arrested and charged with capital murder. But that was not the end of the story. Eventually, our investigation led us to discover that Tommy Castro was the actual perpetrator of the crime.

After being placed in jail and separated from Castro for three weeks, Earnest eventually told police that her confession was false. She said that Castro had threatened to kill her other children if she did not take the rap. She also told us how Castro had killed Kati. After beating her with a wooden board, Castro stepped twice with his full weight on the child's abdomen, causing the transection of Kati's duodenum. This matched information that we received from Shyla Frausto, Castro's previous girlfriend. She described to us how just a year earlier an enraged Castro had beaten her 10-year-old son with a wooden board and stepped on him as punishment. Fortunately, Frausto's son was big enough and strong enough to survive those brutal attacks.

Both Earnest and Frausto described horrific beatings during

their time with Castro. Both women said he started beating their children only when he didn't get a sufficient reaction from beating them. The more we looked into Castro's past, the more women we found. We discovered that Castro had been beating, abusing, and sexually assaulting his girlfriends since the early 1990s.[1]

While Castro did have some prior misdemeanor convictions involving family violence, there were many instances in which the criminal justice system had failed to hold him accountable. As an example, in the mid-1990s in a large jurisdiction, Castro was caught in the act breaking into an ex-girlfriend's house and attempting to assault her. The ex-girlfriend was hiding in the bathroom and Castro was trying to break down the door when police arrived. Despite Castro's confession, the case was dismissed when the victim filed an affidavit of non-prosecution.

As we examined Castro's criminal history, it became obvious that we (as a criminal justice system) had failed on many occasions. It didn't take deep thinking on my part to figure out why. Castro's previous cases had been treated by police and prosecutors the same way I had been treating family violence cases in my jurisdiction for two years: with disdain. As I considered his history, I couldn't help but wonder if Kati Earnest might still be alive if the criminal justice system had taken those previous cases seriously.

As we got ready for trial, I knew that our greatest obstacle would be explaining to the jury why a mother would falsely confess to murdering her own child. Because I knew nothing about the dynamics of family

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Executive Director's Report (cont'd)

test was to begin, she still hadn't heard back from four or five parents, so those kids would be without an encouraging note come Monday morning.

"I had previously gone to the school for career day, so I was familiar with some of the students," Austin explains. "I said to Katy, 'Let me write a letter to those kids who are missing one.'"

Armed with Bexar County CDA **Nico LaHood**'s recent charge for people in the office to be more involved in the community, Austin wrote a short note for the kids on office letterhead: "Dear [Kiddo], I wanted to take a minute and wish you much luck as you begin the STAAR test. Take a deep breath, read everything carefully, and use all of the strategies that you've learned. Also, make sure to remember to add lots of details to your writing. I know that the many months you've spent practicing have more than prepared you to conquer this test. You're ready to rock this! Good luck!"

The reaction was swift. Katy reports overhearing one student tell another, "Man, you're lucky! You got one from Austin! I just got one from my mom." Katy posted Austin's letter on Facebook, and it made its way (as these things do) to my inbox, and now I share it with y'all. Between Austin, who works in the juvenile section in Bexar County, and his schoolteacher wife Katy, they're clearly making an impact on the youth of San Antonio. Good for y'all!

HOPE for animals

Prosecutors have engaged in a lot of crime-prevention efforts in the past. Recently a Harris County Assistant District Attorney, **Jessica Macklin Milligan**, has been recognized for her efforts in education and training for the purpose of preventing animal abuse. Jessica, the Houston DA's Office Animal Cruelty Specialist, has created a program called HOPE (Helping Our Pets through Education). The program is designed to educate elementary school aged children on how to properly care for their pets and to understand the consequences of animal cruelty, dog fighting, and cockfighting. (Read more about it on page 29.) The goal of this program is to instill empathy in our young people, teach students how to recognize animal abuse, and show them what they can do to stop it. ❇

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violence, I knew that I would need an expert not only to educate the jury, but also to educate *me* about how abusive relationships work. My investigator, Jeff Case, found Dr. Judith Beechler in early 2010. A professor of counseling at Midwestern State University in Wichita Falls, Dr. Beechler has worked with victims of family violence for over 20 years. Over the course of several meetings, she very patiently explained to me the dynamics of abusive relationships. The more I spoke with Dr. Beechler, the more I understood the behavior of survivors of family violence. Their actions are frequently a manifestation of emotional, psychological, and physical abuse. While their behavior may seem counterintuitive to some, it makes sense when viewed from the survivor's perspective.

Dr. Beechler's testimony was critical in the Castro trial. The jury had the opportunity to hear from third-party witnesses who saw how Castro dominated Kristina and isolated her from friends and family. They also got to hear from Kristina and Shyla Frausto about the abuse that they suffered at Castro's hands. That testimony, combined with Dr. Beechler's explanation of the dynamics of abusive relationships, led the jury to conclude that Kristina's confession was false, that she was a victim of abuse, and that Castro was the real killer of little Kati Earnest. After hearing from a half-dozen prior victims at the punishment phase, it took the jury only 30 minutes to sentence Castro to life in prison.

Waking up

The Castro case was a wake-up call for me. It woke me up to the reality of family violence in our society and in our criminal justice system. It showed me just how flawed my thinking had been, and it made me understand that if we let people like Castro get by with abuse, it will only get worse. The justice system had numerous opportunities to stop Castro, and each time we failed. Each time we allowed Castro to manipulate us through his victims. He was winning, and the rest of us, especially his victims, were losing.

Of course, the vast majority of batterers are not Tommy Castro—they probably won't kill anyone. But they leave behind a trail of emotionally bruised and battered survivors and children who carry the scars of abuse and pass them on to the next generation. The impact of family violence on victims is powerful. Its impact on our society is tremendous. Violence in the home leads to violence in society. Statistics show that men who commit family violence are much more likely to be violent toward their children. Boys who witness violence in the home are at least two times more likely than boys that grow up in homes without violence to become batterers themselves. Additionally, some statistics show that girls who witness family violence in the home are much more likely to be involved in abusive relationships as adults. This violent behavior is passed down from generation to generation. According to the latest statistics from the Texas Council on Family Violence, about one in three Texas women has suffered from intimate partner violence.

A change in policy

In the summer of 2010, we decided to implement a "no dismissal" policy in family violence cases. It did not take us long to figure out that such a policy was unworkable. One of the first cases we received after implementing the policy was a loser. It was poorly investigated, and even with a cooperative victim it would have been almost impossible to successfully prosecute.

It was then that we realized that the initial investigation of a family violence crime is the most important stage of the case. If the victim has called 911, she has reached a point where she is in fear for her life and she is very likely to cooperate with police. A day later, when the fear has passed and only the bruises remain, she is more likely to listen to the batterer's apologies and promises to be a better partner. This makes the response and initial investigation stage of the case the most critical part of a family violence case.

My office worked with the local police chief, and he agreed to let us conduct a day-long training with his officers. The training went extremely well and had a particularly interesting start. A few minutes after my investigator and I started the program, a veteran police officer raised his hand to ask a question. He wanted to know if we were actually going to prosecute family violence cases. He said that officers never spent much time working on them in the past because they knew that nothing

would ever happen after arrest. At this training we reached an agreement: If the officers would conduct a quality investigation, my office would perform a quality prosecution.

Almost overnight we started receiving well-investigated cases that we could prosecute even with an uncooperative victim. (Of course it helps when you can train all 25 police officers in the department on the same day.) When our local police knew that we were going to make these difficult cases a priority, they made them a priority too.

Aside from the basics of how to conduct the initial investigation, we also talked to the officers about the dynamics of family violence and the psychological effects on victims. We discussed the cycle of violence and power and control. We didn't get into great detail, but it was important to discuss this issue because many of the officers had questions about counterintuitive victim behavior. They didn't understand why she was back with the abuser the next day. They wanted to know why she wouldn't give a written statement a week after the incident. These things frustrated some officers and frankly made them angry with the victims.

I must admit that even after receiving extensive training on family violence I am still sometimes frustrated with victims. As prosecutors, our goal is to use the truth to see that justice is done. When a victim sits in your office and lies to you, it can make you angry. The worst thing we can do is lash out at a person who has already suffered enough. It is important for us to know that the behavior we see in front of us is the result of abuse. The victim has been manipulated by the abuser (both emotionally and physically) and the behavior we see is a manifestation of that manipulation. Understanding that makes it easier to deal with uncooperative victims.

Making it a priority

Combatting family violence has been a priority of my office since Kati's death in 2009. It has also become a personal passion. I now speak and train on family violence across the country, and last year I toured Ecuador for two weeks speaking and training on family violence at the invitation of the U.S. Embassy and the Ecuadorian Interior Ministry. It is unfortunate that it took such a horrible case to open my eyes to the reality of family violence. I often wonder about those batterers to whom I gave a free pass during my first two years in office. How many other people have they hurt since then?

In the first couple of years after the Castro case, we obtained some long sentences against repeat family violence perpetrators. Thanks to excellent investigations by local police and solid expert testimony from Dr. Beechler, it didn't matter if the victim was cooperative or combative. We were getting good results. At some point, however, I started realizing that no matter how many times we locked these guys up, they would be right back out battering again when they were released. That is when I started getting information from the Texas Council of Family Violence on batterer intervention programs.

Batterer intervention and prevention programs (called BIPPs) generally offer long-term group counseling sessions for abusers. The goal is to change batterers' thought processes so they no longer view relationships as being based on power and control, but rather on equality and non-violence. With the help of friends and volunteers, Texoma Batterer Intervention and Prevention Program, Inc. opened its doors in Vernon in September 2013. It is the most rural BIPP in the state of Texas. We sent our facilitators to Duluth, Minnesota, for training and purchased a curriculum that is well-accepted in the field. Our BIPP offers a 27-week program with weekly group sessions that are two hours each. Attendees are ordered to the class as a probation condition or as part of a pretrial diversion agreement. The BIPP not only works to change the behavior of batterers, but it also hosts family violence awareness rallies and provides support for victims. It is changing lives and bringing about awareness in our community. Unfortunately, not all of those that are ordered to the class complete it, but those who do say that it has had a profound impact on their lives and relationships. At least for some, we are stopping the transmission of that violent behavior to the next generation.

Parting thoughts

My experience with the Castro case taught me that if we don't make these cases a priority, the opportunity to hold these abusers accountable will slip away. It is too easy to let files with affidavits of non-prosecution linger. No one is calling and asking

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for updates. No one is pushing for prosecution. But what is the batterer doing as that case lingers? Chances are he is passing that abusive behavior on to another generation.

Once we started prosecuting these cases with vigor, it got the attention of people in the community. We started getting long sentences for repeat batterers. Now abusers in my community know that if they get arrested for family violence, they are going to be held accountable. I have had relatives of uncooperative victims contact my office and say, "I saw in the paper that you will prosecute even when the victim doesn't want to help. Are you going to prosecute the man that has been beating my daughter for years?" They are always so relieved when the answer is "yes." ❇

Endnote

1 For a more thorough analysis of the Castro case, see "Unraveling a Web of Lies," which appeared in *The Texas Prosecutor* journal's September-October 2011 issue, available at www.tdcaa.com/journal/unraveling-web-lies.

How VACs can assist with protective orders

Several years ago a young mother presented to our Criminal District Attorney's office for a protective order and made an everlasting memory in this victim assistance coordinator's (VAC's) mind on how very beneficial protective orders are for crime victims.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

After being notified by our receptionist that a protective order applicant was waiting in the lobby, I went to retrieve the victim to bring her into my office. As I opened the door to the lobby I saw a beautiful young mother, whom I'll call Misty, holding twin newborn babies, one in each arm. The babies were so precious, very tiny, and they were wrapped in matching bright pink blankets.

Misty told me how her boyfriend (the father of the girls) abused and isolated her while she was in the hospital. She was hospitalized for several weeks on bed rest while waiting for the twins to arrive, and her boyfriend remained in the hospital room with her at all times. When a nurse or doctor would come in, he told her to act like she was asleep and would not let her answer any questions or make any requests of the staff. Her boyfriend wanted complete control of the situation, and Misty was in no condition to argue or fight back.

As time went by she really needed to tell the doctor something about her pregnancy, and she spoke up when the doctor came into the room. After the doctor left, her boyfriend was so jealous that he began to punch Misty and punch the bed, and Misty began to scream. One of the nurses came in about that time and witnessed the situation. Her boyfriend demanded the nurse get out of Misty's room, and the nurse then called hospital security. The boyfriend was subdued by security staff and escorted out of the hospital. And even though the hospital's security department pursued a criminal trespass warning from the local police department, the boyfriend was not arrested.

Misty had come to our office seeking a protective order (PO) upon her release from the hospital. (A hospital security officer had guided her in our direction.) The twins were only three days old.

As a VAC, one of my job duties was to interview applicants for protective orders, screening to see whether they meet the criteria pursuant to the Chapter 71 of the Texas Family Code. Screening interviews are necessary in determining whether family violence, dating violence, stalking, human trafficking, or sexual assault has occurred and is likely to occur in the future. If the applicant disclosed that one of those offenses occurred, I assisted the victim in completing an Affidavit in Support

of Application for Protective Order. Our office policy was for the PO affidavit to then be shared with a prosecutor for approval to file for a protective order. Many times a prosecutor met with the victim at this time. Having a VAC helping with the screening process frees up prosecutors to focus on other cases until it is determined a protective order application is warranted.

After listening to Misty's recollection of the abuse and determining we could move forward with an application for protective order, Misty completed a PO intake packet. The intake forms offer an applicant an opportunity to document in further detail additional information necessary to complete an application for protective order. Misty revealed on the intake forms that her boyfriend was on parole for a violent offense. (In my experience, I have found that many times PO applicants will provide additional information on the written intake forms than what they initially share with me verbally.)

After I saw that he was on parole, I gathered more information from Misty on how she had met him; it was not long after his release from prison, and she became pregnant after knowing him only a few months. Misty shared with me how she had tried to leave him before she was hospitalized but was fearful of what he would do next. He had a very violent temper. She also told me of several other abusive incidents that had occurred while they were dating. She had never reported any of the abuse to law enforcement because he threatened to harm her if his parole officer ever found out.

Ultimately, we were able to get the hospital security officer to testify at the final PO hearing, and Misty was granted a two-year protective order by our district judge. The boyfriend's parole was revoked, and he was sent back to prison. Misty testified and remained cooperative throughout the entire process.

I am a firm believer in protective orders. I have been the person whom crime victims have told for the very first time what horrific circumstances they have endured. After hearing their reports of abuse, I became their biggest advocate through the judicial system, doing my best to help them complete every step of the protective order process. I have also seen firsthand how crime victims are empowered by going before a judge and testifying about the abuse they have suffered. Some say a protective order is "just a piece of paper," but the process by which a victim obtains that "piece of paper" inspires many victims to take charge of their own lives again. Many victims have been in such abusive relationships for so long that they have lost all realization of how normalcy and living peacefully feels.

From the law enforcement prospective, issuance of a protective order (that "piece of paper") ensures documentation of the abuse in the Texas Crime Information Center (TCIC) and the National Crime Information Center (NCIC). TCIC/NCIC provide data and statuses of protective orders for access by all law enforcement agencies.

In the next few months, TDCAA will be rolling out our new Protective Order training initiative, and our first venue will be at our Domestic Violence Seminar, which will be held June 24–26 in Austin. People who attend the PO training will also receive a protective order manual (with forms and a CD) written by staff from the Harris County DA's Office. Please look for our upcoming PO training announcements and make plans to attend!

Victim Impact Statement (VIS) revision

This summer I have been invited to serve on the Texas Department of Criminal Justice's Victim Services Division VIS Revision Committee. The committee will review the format of the VIS form, VIS Quarterly Activity Report, *It's Your Voice* brochure, and VIS Recommended Processing Procedure. If you have suggestions that could aid our committee in making these documents user-friendly for victims as well as criminal justice professionals, please share them with me by email at Jalayne .Robinson@tdcaa.com. ❇

Can the statute of limitations be waived? The judges revisit—and overrule—recent precedent

Eric Heilman pleaded guilty to a lesser charge as part of a plea bargain, then returned on a writ of habeas corpus to claim the statute of limitations absolutely barred his conviction—and the caselaw said he was right. In *Ex parte Heilman*, the Court of Criminal Appeals reexamined its caselaw on the waivability of statutes of limitations and concluded that *all* such challenges are waivable rights.[1]

By Andrea Westerfeld
Assistant Criminal District Attorney in Collin County

Heilman's plea

In October 2008, Eric Heilman was a police officer in Beaumont. He took part in a failed undercover narcotics sting with a confidential informant and another officer. Even though no transaction occurred, he still arrested the suspected drug dealer when he tried to leave, seizing cash and a large amount of cocaine. When Heilman wrote his probable-cause affidavit, though, he did not mention either the undercover operation or his confidential informant. Ultimately, a prosecutor *pro tem* began a grand-jury investigation into Heilman. No indictment or information was ever returned, but in December 2010 Heilman pleaded guilty to tampering with a governmental record. In exchange, the State agreed to not indict him for a state-jail offense and to not oppose early termination of his deferred adjudication. As part of the plea, Heilman signed a written waiver of the statute of limitations.

After receiving early termination of his deferred adjudication, Heilman filed an application for a writ of habeas corpus. Among other things, he argued that the trial court lacked jurisdiction to accept his plea because the statute of limitations had run. The trial court agreed, vacating the original proceedings. On appeal, the Beaumont Court of Appeals upheld the ruling, finding that the charging instrument on its face established that the statute of limitations prohibited the State from prosecution.[2] Both the trial court and the appellate court relied on *Phillips v. State* to hold that the statute of limitations could not be waived.[3]

Phillips and categories of waivable rights

In *Marin v. State*, the Court of Criminal Appeals identified three categories of rights:

1) absolute requirements and prohibitions (which cannot be waived under any circumstance);

2) rights of litigants that must be implemented unless expressly waived ("waivable-only" rights); and

3) rights of litigants that are implemented upon request (waiver by inaction).[4]

Originally, in *Proctor v. State*, the Court of Criminal Appeals placed the statute of limitations defense in the third category, meaning it was waived unless the defendant specifically asserted it at or before trial.[5] But more recently, the Court drew a distinction between two different types of limitations defense: 1) defenses "based on facts" and 2) those that are "pure law."[6]

The first type of *Phillips* limitations defenses merely gives rise to a factual defense, requiring factual development beyond the face of the charging instrument. But the second type, "pure law," is apparent from the face of the charging instrument. While *Phillips* continued to consider the first type of defense part of the third *Marin* category, and thus waived unless specifically raised, it concluded that the "pure law" defense was a jurisdictional defect and could not be waived at all—part of *Marin*'s first category.[7]

The basis of this new distinction was the constitutional—both federal and State—prohibition against *ex post facto* laws. The right to be free from *ex post facto* laws is a category-one absolute right and cannot be waived.[8] The Court drew on a Supreme Court case—*Stogner v. California*[9]—that held that a state statute allowing time-barred prosecutions for child sexual assault cases was an *ex post facto* law. Thus, the

Phillips court reasoned, any prosecution of a case after the statute of limitations expired must also be an *ex post facto* law.[10]

Overruling *Phillips*

The *Heilman* court reexamined *Phillips* and determined that it was overbroad by applying the *Ex Post Facto* clause to *all* prosecutions after the statute of limitations expires when the Clause applies only to *legislative* actions.[11] Thus, while the Legislature could not pass a law extending the statute of limitations in Heilman's case, that does not necessarily prohibit non-legislative actions that might result in his prosecution, such as a waiver and plea as in the instant case.

The Court examined several post-*Stogner* Supreme Court decisions to ultimately conclude that a defendant "must be able to point to a legislative origin of the alleged violation."[12] This does not mean that the legislature must act *directly*. For example, a judge's application of federal sentencing guidelines that were retrospectively increased after the date that the defendant committed the offense will still trigger the *Ex Post Facto Clause* because such application creates a significant risk of a higher sentence.[13] A state parole board could also violate the Clause by changing its rules retroactively.[14] But courts exercising pure judicial power—such as accepting a plea bargain—do not implicate the *Ex Post Facto* Clause.

The majority also rejected some of the dissenting claims that it was not necessary to overrule *Phillips* to reach the result. *Phillips* turned on the conclusion that, after the statute of limitations expired, prosecution was "forever and absolutely barred," no matter the circumstance.[15] Thus, because the statute of limitations on the misdemeanor offense had expired two months before Heilman's plea, its prosecution was "absolutely barred" under *Phillips*, in any circumstance. Overruling *Phillips* was necessary to reach the instant result, and it was dictated by the original reading of *Proctor* and subsequent Supreme Court caselaw. This reading also ensured that Heilman would be held to the bargain he made.[16]

Dissention in the ranks

Several judges disagreed that overruling *Phillips* was the answer or even necessary for the resolution of the case. Three separate dissenting opinions explained why overruling *Phillips* was not necessary. Judge Meyers believed that *Proctor*, not *Phillips*, should be overruled. He contended the statute of limitations should not be a defensive issue because it affects whether the State timely filed a case and should instead be proved by the State in every case just like venue.[17]

Judge Johnson, on the other hand, believed that *Heilman* should simply be held to his own explicit waiver. Because, unlike in *Phillips*, the statute of limitations issue here was "reparable" because another offense could still be charged that was not barred by the statute of limitations, Heilman could waive the issue and plead to a lesser-included offense.[18] However, in a concurrence, Judge Newell challenged the reliance on "reparable" by noting that the only charging instrument was for the misdemeanor offense. There was no indictment filed that was proper under the statute of limitations, and merely because one *could* have been filed did not change how the case was actually resolved.[19]

Finally, Judge Alcala concluded that *Phillips* should be only partially overruled. Because *Heilman*'s claim did not actually involve retroactive legislation, the *Ex Post Facto* Clause was not even raised and that issue—the main basis of *Phillips*—was not presented here. The *Phillips* opinion could stand purely on the holding that an *ex post facto* violation was a category-one, unwaivable right, and it was unnecessary to extend that categorization to all "pure law" issues. Thus, only the "pure law" language of *Phillips* should be overruled.[20] But Judge Newell also addressed this claim, pointing out that the *Phillips* court had in fact expressly rejected the State's argument that there was a distinction between an *ex post facto* argument and a "plain vanilla" limitations claim.[21]

Application for the future

So what does *Heilman* mean for future practice? It should not be read too broadly in future *ex post facto* challenges to argue that the Clause could not be invoked simply because the actor involved was a court rather than the legislature. The Court took care to caution that the *Ex Post Facto* Clause can still be invoked by judicial action if it involves, for example, reinterpretation or extension of an existing statute.[22] But the required connection to some sort of legislative action is still important to remember when facing any claims of *ex post facto* laws in the future. More straightforwardly, *Heilman* simplifies the rules when considering statute of limitations claims. No longer must we examine such claims to decide if they are "pure law" or factual claims. Rather, the same rule applies to each, and a defendant waives any statute of limitations argument if he does not raise it at the time of trial. ❇

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Endnotes

1 *Ex parte Heilman*, No. PD-1591-13, slip op. (Tex. Crim. App. Mar. 18, 2015) (not yet published).

2 *State v. Heilman*, 413 S.W.3d 503, 505-508 (Tex. App.—Beaumont 2013).

3 *Phillips v. State*, 362 S.W.3d 606 (Tex. Crim. App. 2011).

4 *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993).

5 *Proctor v. State*, 967 S.W.2d 840, 844 (Tex. Crim. App. 1998).

6 *Phillips*, 362 S.W.3d at 617.

7 *Id.*

8 *Ieppert v. State*, 908 S.W.2d 217 (Tex. Crim. App. 1995).

9 *Stogner v. California*, 539 U.S. 607 (2003).

10 *Phillips*, 362 S.W.3d at 614.

11 *Heilman*, slip op. at 7-8.

12 *Id.*, slip op. at 11.

13 *Peugh v. United States*, 133 S. Ct. 2072, 2083–85 (2013).

14 *Garner v. Jones*, 529 U.S. 244 (2000).

15 *Heilman*, slip op. at 12 (citing *Phillips*, 362 S.W.3d at 616).

16 *Id.* at 16.

17 *Id.*, Meyers dissent at 2-3.

18 *Id.*, Johnson dissent at 5-6.

19 *Id.*, Newell concurrence at 1-2.

20 *Id.*, Alcala dissent at 6-7.

21 *Id.*, Newell concurrence at 3-4.

22 *Id.* at 13-14.

NEWSWORTHY

Photos from our Homicide School

Continued from the front cover

Answering the call (cont'd)

They both warmly congratulated me on the guilty verdict. As I left the Kaufman courthouse that week, I shook Mark's hand and told him I'd see him around soon.

In the days following Mark's murder, I wondered if his death was related to his work as a prosecutor. Like most attorneys who have been prosecutors, I knew the work could be dangerous. That thought was always there in the back of my mind. I took precautions when I prosecuted in Dallas but the threat never quite seemed real or urgent. Now it did. Prosecutors across the state and around the nation were taking new security precautions. The dangerous nature of prosecutorial work now was at the forefront of everyone's minds.

A week later, Sue called again, and Toby and I answered. "Mike has decided that we're going to need special prosecutors on Mark's murder. Can you guys do it?" On February 7, 2013, Toby and I were sworn in as Kaufman County district attorneys *pro tem* charged with investigating and prosecuting the murder of Mark Hasse. A massive local, state, and federal law enforcement effort was underway in Kaufman following Mark's murder. A command post was set up in an old National Guard armory. Numerous tips came in to the investigation, but the case slowly went cold.

One person of interest from the outset was Eric Williams. Williams lived in Kaufman with his wife, Kim. Williams was a lawyer and former Kaufman County Justice of the Peace who had been successfully prosecuted for theft by both Mark and Mike in March 2012. After his conviction and probated sentence, Williams's life fell apart. People in Kaufman saw less and less of him around town.

Officers interviewed Williams within hours of Mark's murder, but he denied any involvement. He submitted to a gunshot residue test, which came back negative. Despite the possible motive, there was no evidence linking him to the crime.

As February and March passed by, life was slowly returning to normal in Kaufman County. Not much was happening within the investigation. The command post was closed and the remaining investigators moved into a conference room at the sheriff's office. I gave regular updates to Mike, but I had little of substance to report. Tips had stopped coming in, and the phone wasn't ringing. People began to whisper that Mark's murder may never be solved.

The McLelland murders

Mike and Cynthia McLelland lived in a nice home in Kaufman County right outside the city limits of Forney. At about 6:40 a.m. on Saturday, March 30, 2013, about two months after Mark's murder, someone entered their home and shot down Mike and Cynthia in a blizzard of .223 caliber bullets. The murderer was in and out of the McLelland home in less than two minutes. Friends found the McLellands' bullet-riddled bodies about 12 hours later, and they summoned Kaufman County Sheriff David Byrnes.

Late that Saturday evening, my cell phone rang. I answered the call and instantly heard the fear in the voice of the Kaufman police chief. "Bill, the DA and his wife have been found murdered in their home. The sheriff needs you and Toby out there at the crime scene as soon as possible. We don't know if it's related to Mark's murder."

As Toby and I drove to the crime scene, we each struggled to process the news. First Mark had been murdered and now Mike and Cynthia. Our thoughts turned to the safety of the other members of the office. We had no idea whether anyone else had been murdered that day. We both were on our cell phones, frantically talking to prosecutors and investigators from the Kaufman County DA's office. As we approached the McLelland home and ended our phone calls, an awkward silence fell between us. While parking outside the crime scene tape, we looked at each other and said almost simultaneously, "It must be that JP."

Toby and I looked for Sheriff Byrnes. We found him talking with Major Dewayne Dockery of the Texas Rangers. Byrnes looked ashen. "In my 40 years of law enforcement, I've never seen anything like this," he told us. It was virtually unprecedented to have one prosecutor murdered, but now we had two prosecutors from the same office murdered with-

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in two months. We all agreed we were dealing with a criminal who had crossed a line that few had ever approached—the murder of two prosecutors and one of their family members.

As we waited for the crime scene to be processed, we discussed Eric Williams. Sheriff Byrnes had already dispatched his deputies to locate him. Those deputies found Williams and his wife that night as they returned to Kaufman from a Saturday evening drive to the Lake Tawakoni area. Williams again denied involvement. He was now not only a person of interest but he was a common denominator—he was the one and only defendant that Mark and Mike had prosecuted together.

As dawn broke on Easter Sunday, law enforcement officers from around the area once again flooded into Kaufman County to help solve the three murders. The command post was reopened, and tips and calls once again began to pour in. The Kaufman County Sheriff's Office, Company B of the Texas Rangers, and the Dallas Division of the Federal Bureau of Investigation took the lead. Every member of the Kaufman County DA's Office was placed under armed guard. By Monday, the Kaufman County courthouse square resembled an armed encampment. All DA employees were being escorted by heavily armed officers. Despite the loss of their boss and colleague, and in the face of threats to their own safety, the prosecutors, investigators, and staff of the Kaufman DA's Office carried on. They made court appearances and ensured that the criminal justice system in Kaufman County continued to function. On April 10, 2013, Governor Perry appointed Judge Erleigh Wiley to take Mike's place as District Attorney of Kaufman County. Toby and I marveled at her courage as she stepped up to take the reins in a difficult and dangerous time. The courage and determination of Erleigh and her staff inspired prosecutors everywhere.

The media also descended on Kaufman County. News stories focused on the potential of the Aryan Brotherhood or the Mexican drug cartels being behind the murders. While officers continued to investigate all potential suspects and follow up on any tip that came in, their attention increasingly focused on Eric Williams. Among the many tips to the command post was an anonymous email threat to murder other Kaufman County public officials unless certain Kaufman judges resigned from office. This tip stood out because it contained very specific facts regarding Mark's murder, facts that were probably known only to the real murderer. It seemed as if the suspect was taunting the investigation.

The arrest of Eric and Kim Williams

On April 11, 2013, Kaufman County Chief Deputy Rodney Evans and Major Dockery conducted a consensual interview with Eric Williams. During the interview, Williams made several suspicious statements. Investigators also determined that Williams had conducted Internet searches on Mark and Mike. Based on this information, a search warrant was obtained for the Williams house. On Friday, April 12, investigators executed the search warrant. The media quickly caught wind of the search, and it was carried live on local and national TV. The search revealed that Eric Williams was the source of the anonymous email threat, and he was arrested for the terroristic threat. Investigators felt Williams was involved in the murders, but there was not enough evidence to charge him—yet.

The day after the search warrant was executed, a friend of Eric Williams who had seen the search on TV called in to report the location of a storage unit in Seagoville, Texas. The friend had rented the unit for Williams. Another search warrant was obtained, and the search of the storage unit revealed numerous weapons and the car used in Mike's murder. Investigators now knew they had their man.

Several days later, during a consensual interview with the FBI, Kim Williams broke down and reluctantly admitted to investigators that her husband was the murderer and that she was the getaway-car driver in both crimes. She also insisted that no one else was involved in the murders. She confirmed what investigators suspected—that Mark and Mike were killed because they prosecuted Eric Williams in March 2012. Based on her statement and the evidence collected so far, both Eric and Kim Williams were charged with capital murder in the deaths of Mark Hasse and Mike and Cynthia McLelland. The regional public defender for capital cases was appointed to represent Eric Williams. Two Dallas criminal defense lawyers, Paul Johnson and Lalon Peale, were appointed to represent Kim Williams.

Investigators focused on collecting additional evidence and corrobo-

rating Kim's statement. They were able to locate the car used in Mark's murder; it had been towed from the Seagoville storage unit in the days following the murder. They became increasingly convinced that no other suspects were involved in the murders. The case against Eric and Kim Williams was growing stronger with each passing day.

Grand jury

In early May 2013, Toby and I began presenting the case to a Kaufman County grand jury. We also began to draft the indictments. Although we were confident in our case, we wanted to ensure that we had two "clean indictments" (not jeopardy-barred) to proceed on if something unexpected happened in the first trial—like a rogue juror. This case was just too important. We would try Eric Williams twice if necessary.

On June 27, 2013, the grand jury returned indictments against Eric and Kim Williams for three charges of capital murder apiece. The indictments were identical against each defendant and alleged capital murder of Mark Hasse in the course of committing retaliation; capital murders of Mike and Cynthia McLelland in the course of burglary and as a multiple murder; and capital murder alleging the murder of Mark and Mike during different criminal transactions but pursuant to the same scheme and course of conduct.

Judge Michael Chitty of the 422nd District Court of Kaufman recused himself from the cases because he had presided over Eric Williams's first trial and would likely be a witness. Judge Mike Snipes of Dallas County Criminal District Court No. 7 was appointed to preside. Judge Snipes required us very early on to designate the indictment on which we would proceed. At the time, we had more evidence in the McLelland case so we chose to proceed on that indictment. We still had the Hasse capital murder indictment in our hip pocket in case something went wrong. In a surprise to no one, in late July 2013, we filed notice of the State's intention to seek the death penalty.

Kim Williams

Two pieces of the puzzle that remained missing were the murder weapons. Despite the best efforts of investigators, neither weapon could be located. Although our case was strong, as prosecutors, we still wanted to have the murder weapons. In her interview with the FBI, Kim Williams acknowledged that she and her husband had traveled to Lake Tawakoni the night of the McLelland murders. We wanted to follow up on this with her, so Toby and I entered into discussions with her lawyers. We made it very clear that we were not offering her a deal but that we would take her truthful cooperation into account once we had tried her husband. In August 2013, her lawyers allowed her to lead law enforcement to a bridge over Lake Tawakoni from which Kim said her husband had thrown something into the lake the night of the McLelland murders. The DPS Dive Team immediately started searching the area. In March 2014, after numerous dives, the dive team recovered two pistols, a black mesh mask, and a mangled cell phone from the bottom of Lake Tawakoni. Ballistic testing soon told us that we had found the revolver used to kill Mark Hasse.

Kim Williams also told us that Eric Williams was not finished killing. She said her husband had a mental "hit list" of future intended victims. The next two names were Judge Erleigh Wiley and former Kaufman County District Court Judge Glen Ashworth. Significantly, she gave us details about the planned murder of Judge Wiley that we were able to corroborate with physical evidence.

Our hope was to try the guilt-innocence case without calling Kim Williams as a witness. As with any co-defendant, you can never be sure what a jury might think of them. We knew we might have to call her at punishment as she might be the only way to get the "hit list" of other intended victims in front of the jury.

Discovery

The massive, multi-agency investigation had generated approximately 25 terabytes of data, most of it digital media evidence. Knowing that discovery and trial preparation would be too big of an undertaking for two solo practitioners, we called the Tarrant County Criminal District Attorney's Office. They answered our call for help and generously offered us personnel and resources. ACDA Miles Brissette joined our team to spearhead the discovery process; Criminal Investigator Danny Nutt came aboard to locate punishment evidence; Mark Porter, a certified video analyst, began the painstaking task of analyzing hours of video for trial; and Rona Wedderien began to prepare outstanding

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trial exhibits.

We made an early decision to turn over copies of everything in our possession. In addition, so as not to be accused of hiding any potential *Brady* material in an avalanche of discovery, we provided the defense a spreadsheet with more than 370 names of potential persons of interest. Only through the efforts of the Tarrant County DA's Office was this Herculean task completed.

We also called on the Garland DPS Crime Lab to help us comply with Article 38.43 of the Texas Code of Criminal Procedure. This statute requires DNA testing of all biological material collected during the investigation of a capital murder where the State seeks the death penalty, unless the defense agrees otherwise. When the defense did not appear agreeable, we made the decision to be proactive and test everything we had in our possession, regardless of its potential evidentiary value. The Garland DPS Crime Lab tested hundreds of items of evidence (swabs, cigarette butts, etc.) in only 90 days. Their hard work allowed us to proceed to trial in a timely manner.

Change of venue

The Williams defense team filed a motion to change venue in late October 2013. We promptly filed a response stating that a fair trial could be had in Kaufman County, which we deeply believed. However, we decided to avoid any potential appellate issue by agreeing to a change of venue. We were surprised and happy when the defense suggested Rockwall County. In January 2014, Judge Snipes entered an agreed order moving the case to Rockwall. Once again, we called for help, and this time Rockwall County Criminal District Attorney Kenda Culpepper answered. Kenda pledged personnel and logistical support and introduced us to Rockwall County Sheriff Harold Eavenson, who handled a high-profile defendant and a high-profile trial with gracious efficiency. In addition, Kenda personally fielded numerous media inquiries, donated plenty of working space, and made us feel at home. To add even more local knowledge, Rockwall First Assistant Damita Sangermano volunteered to join our growing team.

As jury selection approached, Toby and I began to call on current or former prosecutors to add to the trial team. Each person answered our call for help without hesitation. We swore in Assistant United States Attorney Jerri Sims and Dallas criminal defense lawyer Tom D'Amore. Both Jerri and Tom were former Dallas County prosecutors who each had tried numerous high-profile death penalty cases. We also asked John Rolater, Chief Appellate Attorney for the Collin County DA's Office, to assist us. DA Greg Willis graciously donated to the effort. Lisa Smith, Deputy Chief Appellate

The trial team

Attorney for the Dallas County DA's Office, also joined the team. I also want to mention Erleigh Wiley, Sue Korioth, and the entire Kaufman County Criminal District Attorney's Office, who helped us in ways too numerous to mention and served as a constant source of inspiration. We know that only through the combined efforts of our extended prosecutorial family could we ever succeed in a trial of this size and importance.

Voir dire

On March 28, 2014, 3,000 potential jurors were summoned on a special capital venire. Each potential juror filled out a lengthy questionnaire. Each member of the prosecutorial team spent his or her summer reading questionnaires. Individual voir dire began in late September. Toby, Tom, and Jerri spent a total of 31 courtroom days in Rockwall selecting the jury. By the second week of November, we finally had 12 jurors in the box and two alternates.

Pretrial

Two important pretrial battles went in the State's favor. Judge Snipes ruled in our favor that the facts of Mark's murder would be admissible, if we chose to offer them, during the State's case in chief on Mike and Cynthia's murder. Although we were confident about the correctness of the judge's ruling, it gave us the choice of holding back the facts of Mark's murder until we decided to put it on—either during guilt or during punishment. Because we felt so strongly about our guilt evidence in the McLelland murders, we decided to hold off on putting on the Hasse murder until punishment.

Judge Snipes also ruled that the testimony of Garland DPS Firearm Examiner James Jeffress would be admissible. The defense challenged his testimony generally under *Daubert* and specifically regarding his comparison of the spent shell casings from the McLelland crime scene to a live .223 round found in the Seagoville storage unit. Jeffress opined that based on tool marks, the same weapon had ejected both the spent casings and the live round. It was an excellent piece of forensic work. Even though we never recovered the McLelland murder weapon, we could now show a jury that the murder weapon had ejected a live round found at the storage unit. It was a damning piece of circumstantial evidence.

The trial

The trial of Eric Williams began on Monday, December 1, 2014, in the packed auxiliary courtroom of the Rockwall County Courthouse. I confined my opening to the facts of the McLelland murder only. My nervous energy began to dissipate as I noticed the defendant becoming increasingly and visibly agitated and angry. Relying on what I had learned at TDCAA Baby Prosecutors School in 1994, once I got that visible reaction from the defendant, I stood next to him to focus the jury's attention on his reactions.

The trial moved fast due to little cross-examination from the defense. They no doubt felt constrained in their ability to defend knowing that we had the option of opening up the facts of the Hasse murder during our case in chief, but we never felt the need. Similarly, although we had Kim Williams prepped and ready to testify, we made a judgment call before we rested that we did not need her for guilt. Our team put on 28 witnesses in three days. The defense rested behind us, and we argued on Thursday morning.

Toby opened argument by laying out in calm detail our airtight circumstantial case. The defense strategy then became clear when lead defense attorney Matthew Seymour argued that our case was circumstantial only, and we didn't have any "biometric evidence" to put Williams at the crime scene. I did not think the jury was buying his argument, but I have been wrong before.

As I stood up to close the guilt arguments, I felt an odd unease. Was it because I was arguing a case where I personally knew the victims? Was it because I was standing up in court asking for justice when the victim had died for doing the very same thing I was doing? I had never argued a case that was so personal, and I had never felt so uneasy in an argument. When I sat down, I was glad it was over. Fortunately, the jury had little problem returning a guilty verdict. As one reporter said, "The only person in the courtroom surprised by the guilty verdict was the defendant." Our team felt a temporary sense of satisfaction. We now had a three-day weekend to prepare for punishment.

We opened the punishment phase with the jury hearing the facts of the Hasse murder. We also brought the jury an ex-girlfriend of Williams whom he had attempted to abduct at gunpoint in 1995. The

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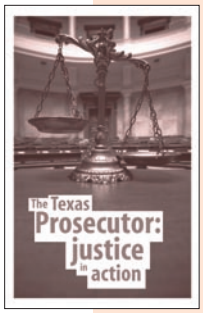
News Worthy

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. ❇



Investigator Scholarship application now online

Twice a year, the Investigator Section of TDCAA offers a scholarship to the child of a TDCAA member for college expenses. The application and essay topic for 2015 are now available at www.tdcaa.com; just search for "scholarship," and be sure you download the application for this year. ❇

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jury also heard about Williams making a bizarre and violent threat to a local lawyer. We were intent on showing that these murders were not isolated events; rather they were the natural culmination of the violent and psychopathic life of the defendant.

When we rested, the defense called numerous witnesses who attempted to portray the defendant as a brilliant lawyer who had been "wronged" or "over-prosecuted" by Mark and Mike in his first trial. They employed the time-honored defense of "blame the victim." It angered us, but we knew the jury would soon hear from Kim Williams. They would get a glimpse behind the mask of a psychopathic killer.

Our rebuttal case opened with Kim Williams shuffling to the witness stand in leg irons. The courtroom was eerily silent as she coldly and dispassionately laid out the facts of the three murders. Quiet sobs from family members in the audience were audible behind us as she described Cynthia McLelland's murder as "collateral damage"—an eyewitness who could not be left alive. She also told the jury about her husband's "hit list." The jury found out that the murders would have continued but for the Williamses' arrest. Just as important to me, Kim Williams described the facts surrounding the original theft trial. She left no doubt that her husband was guilty of that crime and that Mark and Mike were good prosecutors just doing their jobs when they convicted Eric Williams in March 2012. This was one fact I wanted everyone to know.

Punishment arguments ended on Wednesday afternoon, December 17. The jury deliberated the special issues for three hours before asking Judge Snipes to go to their hotel. Our team spent a long and sleepless night second-guessing ourselves. We were hardly back in court Thursday morning before the jury signaled that they had reached a verdict. We felt no joy when the jury sentenced Eric Williams to death—only relief and sadness. As everyone exchanged hugs with family members and each other, I was simply glad it was over.

On December 30, 2014, in a Kaufman County courtroom, Kim Williams pled guilty to her role in the murders and received a sentence of 40 years. During victim impact statements, several of the victims' family members acknowledged her help in prosecuting her husband and thanked her. Civic leaders gave interviews to the media expressing their hope that life in Kaufman County could now return to normal.

Final thought

Everyone who works or has worked at a prosecutor's office understands and appreciates the important and sometimes dangerous work prosecutors do. Mark and Mike were on the front lines every day, answering the call by representing the State of Texas. When they went down in the line of duty, many others unhesitatingly and unselfishly answered the call to seek justice for them and Cynthia. The investigation into their deaths and the resulting prosecution was a true team effort. State, local, and federal law enforcement, along with current and former prosecutors, investigators, and staff all answered

Two generations of victims, two trials, and two life sentences

Montgomery County prosecutors secured justice against a man who continuously sexually abused a child and, years later, her daughter.

Trying a sexual assault of a child case is not as simple as putting the child victim on the stand and winning a guilty verdict. Even if the child is the State's only witness, she is not alone when she testifies. Certain forces surround her and attach themselves to her like a poltergeist invading a vulnerable host. These forces, such as the defendant's influence over her, family pressures, and psychological conflicts within the child, are invisible to the untrained eye but still manipulate the child victim.

By Nancy Hebert, Vincenzo Santini, and Mary Nan Huffman (left to right), Assistant District Attorneys in Montgomery County

The more forces that take hold of the victim and the longer they're present, the more inescapable their grasp. The clutches of sexual abuse may render a victim, the only eyewitness to the crime, incapable of testifying against her perpetrator. If prosecutors are oblivious to these outside influences, the case will be pulled in the defendant's favor, as he is usually the one behind them.

Forces possessing our victim

In the *State of Texas v. Roy Wayne Jackson Jr.*, our child victim, Brandi Renner,[1] was the product of sexual abuse. At age 22, her biological father, Lewis Zeine, was convicted of sexually abusing and impregnating Brandi's mother, Allison Renner. Allison was just 12 years old when she gave birth to Brandi, and Allison never wanted Zeine prosecuted. In Allison's flawed thinking, Zeine's love for her was real and their relationship consensual. Nonetheless, Zeine was sentenced to 25 years in prison, and 12-year-old Allison was left to raise Brandi by herself.

Brandi was born into a world where having sexual relations with older men was acceptable and normal. When she was three months old, Allison had sex with 18-year-old Roy Wayne Jackson, and he impregnated Allison, who was still only 12, and they had a son.

Allison's parents reported Jackson's sexual abuse, and in 1997 the Montgomery County DA's Office filed charges against him for aggravated sexual assault of a child. However, neither Allison nor Jackson wanted him to go to jail as Lewis Zeine had, so the two fled to Missouri. Jackson extorted Allison's parents, telling them that he would return Allison only if they signed Affidavits of Non Prosecution stating they approved of Allison and Jackson's relationship. Jackson's plan worked. The affidavits were scripted, the case was dismissed, and Allison and Jackson remained together for the next 16 years.

During those years, Allison gave birth to two more sons, but as Allison got older and focused on work, Jackson focused on Brandi.

Jackson first sexually abused Brandi when she was just 8 years old, and there was nothing gradual about it: He went straight to fully penetrating Brandi's sexual organ. In addition to the bleeding, tears, and pain, Jackson threatened that if Brandi told anyone, he would kill her mother and brothers. Brandi believed Jackson because she had witnessed him physically assault her family.

Despite this fear and intimidation, Brandi gathered enough strength to tell her mother what Jackson did, but Allison failed to protect her daughter. She never called the police or took Brandi for a medical exam. Her inaction not only caused Brandi to tell her mother she lied about the allegations, but it also empowered Jackson. His sexual abuse intensified. About once a week he raped her in various homes and motels all over Montgomery, Harris, and Liberty Counties. Anytime Brandi refused him, he punched her in the face and forced her into submission.

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When she was 11, Brandi told Jackson's mother, Susan Pearson, that Jackson sexually abused her. But Pearson cared more for her own son than a step-granddaughter and did nothing about the outcry. Once again, a trusted adult failed to stop Jackson.

The sexual abuse continued. But Jackson did not want to get Brandi pregnant and catch another criminal charge like he did with Allison, so he took Brandi to the doctor to start her on birth control pills. However, Brandi failed to take the pills as directed, and Jackson impregnated her when she was 13. After finding out about the pregnancy, Jackson told Brandi she was too young to have his baby so he and Allison made a plan to dispose of the evidence. Two days after Brandi's 14th birthday Jackson and Allison took her to an abortion clinic. Brandi thought it was just a regular checkup until Allison and the doctor had her sign consent forms to abort the child.

After the abortion Jackson wanted better protection against pregnancy, so he took Brandi back to the doctor for a birth control patch. Despite this precaution, Jackson impregnated Brandi a second time when she was 15 and while the family was living in Liberty County. This time there would be no abortion. Brandi told her cousin about Jackson's abuse, and her cousin called the police.

Finally, after seven years of abuse, Brandi's words were being taken seriously. Texas Department of Family and Protective Services immediately placed Brandi in a foster family that was also willing to take Kenneth, her son, once he was born, ensuring both Brandi's and Kenneth's protection and allowing the Montgomery County Sheriff's Office to conduct its investigation with a cooperative complainant. Without a cooperative complainant, it's difficult to corroborate her allegations.

Corroboration = Credibility

The key to a successful sexual assault investigation is corroboration. How often have we prosecutors heard a jury come back after a not-guilty verdict and say, "I believed the child's testimony, but there just wasn't enough evidence"? Jurors want to believe what a child says, but the forces delaying a child's outcry also commonly result in the loss of the "CSI"-type evidence, which jurors assume exists in every case. Corroboration is that "something more" that jurors crave. Quite simply, corroboration equals credibility.

Sexual assault investigations begin with words—a child's words. And a prosecutor wants to get past the mutinous murmur of the venire asking the inevitable question, "Wait, you want me to convict someone of this serious crime based on the word of a child?" To do so, detectives must find evidence that independently verifies these baseline allegations. Maybe it's as simple as a child remembering playing UNO and eating pizza rolls the night Grandpa touched her, and Grandma remembers that she baked pizza rolls while the victim played cards with Grandpa. Or maybe it's the victim's memory that "he picked me up early from school that day when I was in Ms. Smith's class," and school records confirm an early release from Ms. Smith's class on the day in question. These seemingly insignificant bits of evidence are critical to the investigation and to corroborating the victim's story.

In Montgomery County, a Corroboration Challenge checklist is placed in every forensic interview room challenging detectives to find at least 10 ways to independently corroborate a child's statement. (Find a PDF of this checklist on our website, www.tdcaa.com.) The goal is when a child walks into a courtroom to testify, she is not alone but rather surrounded by evidence validating her credibility. And credibility means that this child witness is worthy of belief beyond a reasonable doubt.

Corroborating Brandi's outcry

To establish a baseline of Brandi's allegations, lead detective Trey Gordy reviewed the girl's forensic interview, the Medical Forensic Assessment (SANE) report, and the patrol deputy's report. From there he drove Brandi and her foster mother around the county so she could show him the homes and motels where Jackson had abused her. With only Brandi's words Gordy created a timeline of the sexual assaults.

Next, he collected evidence that independently verified Brandi's allegations. Gordy ran Jackson's criminal history from the time-frame of his abuse. In addition to his prior aggravated sexual assault charge, Jackson had been arrested for driving while license suspended, driving

while intoxicated, evading, and possession of a controlled substance. Gordy pulled Jackson's old arrest records for his addresses, and all of them matched both where and when Brandi said he abused her.

Gordy also subpoenaed records from Brandi's pediatrician, ob-gyn, school, and abortion clinic. These records independently verified where and when Brandi said Jackson abused her and confirmed both pregnancies. Also, the pediatric records verified Brandi's prescription for birth control pills and patch and that Jackson accompanied her to both visits. Gordy also collected receipts from a Motel 6 and Executive Inn showing Jackson stayed at the motels the same dates Brandi alleged he sexually abused her.

Most importantly, Gordy collected buccal swabs from Brandi and her newborn son, Kenneth, to establish paternity through DNA. Gordy could not obtain Jackson's swabs because he was on the run, but all was not lost. Instead, the detective collected buccal swabs from Jackson's three sons to see if Kenneth shared the same Y-STR paternal lineage as Jackson. DNA analyst Sarah Shields with Bode Technologies confirmed that Kenneth shared Jackson's paternal lineage.

Next, Gordy searched for Jackson by contacting his friends and found him living in San Jacinto County under an alias. Gordy obtained a search warrant and collected Jackson's buccal swabs, and Shields conducted a confirmatory STR DNA paternity test establishing Jackson as Kenneth's biological father through a probability of paternity of 99.999998 percent.

Seven years of abuse

Because Jackson's abuse lasted 30 or more days and Brandi was under 14 during most of that time, he was charged with Continuous Sexual Abuse of a Child. This charge had the most bite because the punishment range for this first-degree felony is 25 years to life without parole.[2] However, that statute did not exist until 2007, so we added a second count of aggravated sexual assault of a child for the sexual abuse Brandi suffered while she was under age 14 and prior to 2007. We also added a third count of a sexual assault of a child from an incident of abuse when Brandi was 15.

There were many instances of abuse both inside and outside Montgomery County and inside and outside the indictment. Before moving forward with a trial strategy, we needed to evaluate which extraneous offenses would be admissible under Article 38.37 of the Texas Code of Criminal Procedure.

Section 1 of Article 38.37 permits extraneous evidence of the defendant assaulting the *same victim* alleged in the indictment. So long as the prosecutor gives 30 days' written notice, it is mandatory that the judge admit this evidence. Even without a hearing this evidence "*shall be admitted* for its bearing on relevant matters, including: (1) the state of mind of the defendant and the child and (2) the previous and subsequent relationship between the defendant and the child."[3] "By enacting Art. 38.37, the legislature in effect determined that, in certain sexual abuse cases, evidence of 'other crimes, wrongs, or acts' committed by the accused against the child victim are [sic] relevant and admissible."[4]

This was important for our case because Jackson impregnated Brandi in another county, meaning the DNA evidence (proof of his paternity of baby Kenneth and therefore proof that he had raped Brandi) was not part of our indictment. However, this extraneous evidence was critical for the jury's assessment of Brandi's credibility.

And what about Allison's case and the abuse she suffered at the hands of Jackson? Was it proper for the jury to hear that evidence?

Section 2 of Article 38.37 deals with extraneous evidence of the defendant assaulting *another victim* not alleged in the indictment.[5] Admitting evidence under this section, however, is not mandatory. It is within the judge's discretion whether he allows this evidence for its bearing on relevant matters, including the defendant's character and if the defendant acted in conformity with that character. Before the evidence can be introduced, the judge must conduct a hearing outside the jury's presence to determine if the evidence is sufficient to support a finding beyond a reasonable doubt that the offense occurred, as well as whether the probative value is substantially outweighed by the danger of unfair prejudice.[6]

In preparing for trial we knew all seven years of Brandi's abuse was admissible, but we could not confidently rely on Allison's extraneous evidence coming out in our case in chief.

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Preparing child victims

Preparing the victim happens over the course of many meetings. It is not polite or productive to ask someone to relive the worst thing that's ever happened to her immediately after introducing yourself. When we first meet with a victim, the goal is to establish a rapport. Gaining her trust is imperative for the child's ability to open up to the prosecutor and, ultimately, to a jury. These first meetings are fairly short, spending just enough time to find out what the child likes and how she is doing.

It is also important to keep the child informed. I've heard that when children start a new school one of their biggest worries is, "Where are the bathrooms?" The unknown is one of the scariest aspects for a child. Keeping this in mind, we let the child know that in the first couple of meetings, we are not going to talk about "all that yucky stuff" yet, that we would save that for another time. After hearing this, the child feels relieved, her demeanor changes, and she appreciates being treated like an adult.

The timing to discuss the minute details of the abuse can be just as important as building rapport and earning a child's trust. Too many times, a victim gets ready for trial too soon, only to have the trial date moved. Having the child relive the abuse can cause her emotional fatigue and stress. For this reason, we wait to schedule The Meeting (the one where we discuss the details of the abuse) until after docket call.

When meeting with the child, we always use the buddy system. A prosecutor should never meet with the child alone. When a victim meeting is scheduled, be sure to grab a victim assistance coordinator, an investigator, or another prosecutor to join you. This gives the child practice talking in front of multiple people. Also, the "buddy," who is less familiar with the case, may interject clarifying questions that the lead prosecutor might have assumed to be clear. Most importantly, those who work with children know that a child may not initially disclose all of the abuse in the forensic interview. It is common for additional instances or details to be disclosed during the meeting for whatever reason (whether the child was afraid of getting in trouble, too embarrassed to reveal all the secrets, or too exhausted to discuss the particulars anymore).

"The meeting" with Brandi

It was the Friday afternoon before trial, and even though we had previously met with Brandi, we never had her detail Jackson's abuse. However, Brandi was 17 now, and we were only three days away from trial. Trial chief Nancy Hebert was prosecutor Vincenzo Santini's "buddy" for the meeting, and we all felt the weight of it. We knew we were in for a long night because Jackson's abuse started so long ago and there was so much of it. Our goal was to make sure we pinned down at least one event (and its details) for each count in the indictment, without causing Brandi too much fatigue.

Brandi was ready. Her demeanor could be summed up in one word: resolved. Brandi had resolved to tell us everything—and for the next five hours that's exactly what she did. When trying to establish dates for our Continuous charge, Brandi remembered another instance of abuse that we didn't know about previously (meaning, she disclosed it for the first time in our meeting). Everything went as well as it could, and after those five hours we were all emotionally exhausted—but also ready for trial. Our hope was now that Brandi would remain resolved despite the many forces surrounding her.

First trial strategy revolves around Brandi's testimony

Trial was set on December 9, 2013. We understood many of the forces around Brandi, and we knew that in these types of cases nothing ever goes as planned. We felt the best trial strategy revolved around Brandi's live testimony; the girl had been removed from her family's influence and placed in foster care. Also, Brandi cooperated with both the sheriff's and our office's investigations, she was open with us in our meetings, and her version of events was consistent throughout. Plus, we had Gordy's strong corroborative evidence, including the DNA paternity results for Brandi's young son. When discussing the forces that could potentially impact the case, we kept reassuring ourselves, "We have a baby; we have a baby." Yet during the first trial, the fact that we had a baby almost destroyed our case.

Trial was going as planned. Gordy testified about the corroborative evidence and Shields testified to the paternity results. The only thing left was for Brandi to give her account of Jackson's abuse, as she had done consistently to that point. But this time was different. She

wasn't as forthcoming and struggled to answer even the simplest questions. We were just about to get into details of Jackson's abuse when Brandi asked to take a break.

During the break we went to check on Brandi, and that's when she dropped a bombshell. Brandi not only recanted her prior outcries but also stated that her 16-year-old half-brother (Jackson's oldest son) was Kenneth's father.

The important thing to do at that moment was to keep calm and not get angry at Brandi—after all, she was still a victim of nearly a decade of sexual abuse. She was obviously under some kind of immense pressure. But before identifying the source of this pressure and her recantation, court and counsel needed an update.

We gave defense counsel *Brady* notice on the record and discussed how trial would proceed. We informed court and counsel that we were overnighting Jackson's sons' buccal swabs for DNA paternity analysis because they had not yet been excluded as Kenneth's father. Results were expected the next day. Defense counsel moved for a continuance to conduct its own DNA analysis but would not be able to continue with trial for a few months because of other preferentially set cases. Then, on her own motion, the judge declared a mistrial, claiming manifest necessity for the defense's ability to retest the possible exculpatory DNA results.

It took over a year of failed defense writs claiming we were barred by double jeopardy for us to have another shot at Jackson. This time we had the upper hand.

Witness tampering

Before leaving the courtroom after the judge declared a mistrial, we had our investigator, Joey Ashton, order Jackson's jail cell inspected, his jail mail copied, and his jail phone calls recorded. In that inspection, Ashton uncovered Jackson's handwritten note ordering his son to refuse any DNA tests and for his son to keep telling Brandi to say Jackson never touched her. This confirmed our theory that Jackson had improperly influenced Brandi's testimony.

The next day, Jackson's sons' paternity results came back. All three sons were excluded as Kenneth's father.

Next, Ashton listened to jail calls Jackson had placed to his mother, Susan Pearson. He had used another inmate's ID to place the calls, but Ashton tracked the calls using Pearson's phone number. In conversations just prior to the first trial, Pearson promised Jackson a not-guilty verdict because she had affidavits already written up; the plan was to spring them on us at the very end of trial so we couldn't defend against them.

After hearing this, Ashton met with Brandi's foster parents to see if they found these affidavits or any other evidence of tampering. The foster parents did find a letter handwritten by Brandi in the girl's closet that stated Jackson never touched Brandi and that Jackson's son was Kenneth's father—the same recantation that had come up at trial. The foster parents also discovered that Brandi's brothers had snuck her at least three disposable cell phones without their knowledge. In subsequent jail calls, investigator Ashton heard Pearson say she was in contact with Brandi through cell phones.

After finding out that the DNA excluded his sons, Jackson called his mother and told her that their old defense was out the window. He said they needed to get new affidavits, just like in Allison's case—affidavits stating that Brandi and Jackson had Allison's permission to be a couple. Jackson went on to claim that their consensual sex didn't happen in Montgomery County. Then there was a conversation about which county would be the smartest choice of venue.

There was even a call where Jackson dictated an affidavit to his mother for Brandi to sign. This affidavit scripted another defense where Brandi admitted to raping Jackson when he was passed out on pain pills and alcohol. Jackson even proposed that if all else failed, Brandi should "disappear" after turning 18.

Next, Ashton and I met with Brandi to confront her with this evidence. She admitted that her stepgrandmother and her brothers made her lie. She stated she knew what it was like to grow up without a father, and she didn't want that for her brothers. She also stated her intent to leave foster care when she turned 18.

Second trial strategy involves outcry witnesses

We knew going into the next trial that Brandi was too far under Jackson's influence to rely on her testimony. Instead, our strategy focused on having the people to whom Brandi disclosed Jackson's abuse testify on her behalf. These people are "outcry witnesses."

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Texas Code of Criminal Procedure Article 38.072 is a special exception to hearsay in child abuse cases. It allows for the first person, age 18 or older, to whom a child under 14 tells about abuse to testify about that abuse.[7] The age of the child refers to the age at the time of the abuse, not the age of the child at trial.[8]

The outcry witness is not always the first adult the child tells; rather, it is the first person willing or able to testify about the requisite specificity of the abuse. A general allusion to sexual abuse is not enough.[9] The law even allows multiple outcry witnesses to testify when the child discloses new instances of abuse over time.[10] The determination of the proper outcry witness is established in a hearing conducted outside the jury's presence during which the court must be satisfied that the statement is reliable and the defendant was given a written summary of the testimony at least 14 days prior to trial.[11]

Before starting the second trial, the judge held an outcry hearing and determined that only the abuse that occurred while Brandi was 13 or younger was admissible. This meant we could not go forward on Count Three because those acts occurred after Brandi turned 14.

During the hearing, Kari Prihoda from Children's Safe Harbor testified about what Brandi disclosed to her during the forensic interview, and prosecutor-turned-outcry-witness Nancy Hebert testified about what Brandi disclosed during our five-hour pretrial meeting.[12] Because the forensic interview occurred before our pretrial meeting, the judge ruled that Prihoda could testify to everything Brandi disclosed to her when she was under age 14. Hebert was allowed to testify to the new disclosure Brandi made during the pretrial meeting because Article 38.072 is act-specific, not person-specific.[13] The judge made sure not to overlap incidents.

Because we wouldn't have a live victim point out Jackson as the perpetrator in open court, we knew there would be an issue proving identity. To get around this, Hebert showed Brandi a photo of Jackson during the pretrial meeting, and Brandi confirmed it was the same person who sexually abused her. The judge admitted this testimony and the photograph as evidence under 38.072.

However, for 38.072 to work, Brandi had to be "available" to testify (so as to not violate Jackson's Sixth Amendment right to confrontation).[14] There were several discussions about how to establish Brandi's availability without necessarily revealing that we were not going to call her as a witness. We decided to serve Brandi a subpoena and at the close of our case swear her in outside the jury's presence and have her testify on the record that she was present and had been available to testify since the start of the trial.

However, prior to trial, Brandi turned 18 and moved away without telling us where she was living. She even left baby Kenneth with the foster family. We were really concerned how to move forward with outcry witness testimony if Brandi did not show up to trial and was "unavailable" to testify. As a back-up plan, we decided if Brandi was "unavailable," we would prove to the court that the defendant's influence and pressure caused Brandi's unavailability through the doctrine of forfeiture by wrongdoing.

Forfeiting "availability" by wrongdoing

Even locked up, Jackson controlled Brandi. All the evidence uncovered by investigator Ashton proved Jackson and his family tampered with her, put words in her mouth, and caused a mistrial. Jackson wasted the time of the court, the 100 citizens who showed up for jury duty, and the 12 people who sat through three days of testimony, not to mention the cost for overnight testing of Jackson's sons' DNA. There was no way the law should allow Jackson to capitalize on this miscarriage of justice.

A defendant cannot capitalize from frightening a witness—let alone a victim—into disappearing before trial so that she becomes unavailable to testify. And Texas Code of Criminal Procedure Article 38.49 states just that.

The doctrine of forfeiture by wrongdoing states, "A party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness: 1) may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony; and 2) forfeits the party's right to object to the admissibility of [the evidence or statements from the unavailable witness]."[15]

Not only are the unavailable witness's statements admissible, but so is evidence of the defendant's tampering.[16] All that is required to admit this evidence is for a judge to make a

finding by a preponderance of the evidence in a hearing outside the jury's presence.[17] The judge does not have to find the actor's sole intent was to cause the witness' unavailability, that the statements were reliable, or that a crime has been committed. However, if the actor was convicted of tampering under the Texas Penal Code, then forfeiture by wrongdoing is presumed.[18] There is also no requirement for written notice because a witness cannot be unavailable until trial begins.

We were ready to use this doctrine in the strong likelihood that Brandi did not show up for trial.

The second trial

But Brandi did show up. We were able to track her whereabouts through Facebook and through her supervised visits with Kenneth. We kept Brandi with our victim assistance coordinator, Pam Traylor, just in case the defense wanted to call her.

The second trial started off similar to the first, except this time ADA Mary Nan Huffman was co-counsel—former trial partner (and chief), Nancy Hebert, was now an outcry witness. We presented Gordy's corroborating evidence and Shields' DNA conclusions. But we had to make up for the fact we weren't calling the victim. We did so by putting on more witnesses: Forensic nurse Ashley Huynh, forensic interviewer Kari Prihoda, and outcry witness Nancy Hebert all spoke on Brandi's behalf. To combat the defense's theory that Brandi was a liar who recanted her story, we called investigator Ashton to testify about the tampering evidence.

We also called Dr. Lawrence Thompson from the Harris County Children's Assessment Center to explain why a victim would make herself unavailable and not want to testify in trial. He talked about factors of influence, including the family pressuring the victim. He also helped jurors understand the process of disclosure, recantation, and reaffirmation. Dr. Thompson never reviewed any of the evidence but shared his knowledge of child sexual abuse from all his years of experience. Because we called him as our last witness, we were able to give him hypotheticals similar to our case, and the jury could follow along from the testimony that had already been presented.

We also tried to enter the extraneous evidence from Allison's case in our case in chief under §2 of Article 38.37. Before we rested our case, we asked for a hearing outside the jury's presence. In the hearing we didn't call Allison as a witness but rather proved Jackson's sexual abuse, which resulted in two pregnancies, with self-authenticating records of vital statistics (birth certificates), backed up by Shields' DNA results. The judge ultimately declined to admit the evidence of Allison's abuse during our case in chief. However, when Allison took the stand in the defense's case and testified that she was never concerned about Jackson sexually abusing her children, we approached the bench again, and the judge changed her ruling. The evidence of Jackson's 1997 charge was admitted in front of the jury.[19] (See the article on page 33 for another case, this one in Smith County, where prosecutors utilized the same statute.)

Once the evidence was presented and testimony was finished, the jury had everything they needed to render the right verdict. Yet when those 12 jurors stood up and turned to walk into the deliberation room, we couldn't help but second-guess our decision not to put Brandi on the stand. Did they *need* to hear from her to find Jackson guilty? Were they going to hold our trial decision against us? We had to wait and see.

It took the jury only about two hours to find Jackson guilty. During punishment we put on one of Jackson's cellmates to testify that Jackson had put out a hit to kill us. The cellmate testified that Jackson told him that either Jackson or someone else would sit across from the DA's office and snipe us as we left work. He also stated that Jackson wanted to feed our dead carcasses to his girlfriend's pet pig, which, we found out during cross-examination of his girlfriend, was named Bacon. Even with such egregious facts for our underlying charge, we focused on what Jackson did to Brandi during those seven years. We argued, "One child molested one time is a life sentence for that child." But if there were jurors who didn't want to give Jackson a life sentence for every instance of abuse, we gave them a simple formula. Testimony came out that Jackson raped Brandi once a week for seven years. We argued that jurors should give him one year for every instance of rape: That would be 364 years in prison (52 weeks in a year times seven years). This formula was easy for the jury, and they came back with two life sentences in under an hour.

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About the binding on our *Annotated Criminal Laws of Texas* books

After the 83rd Legislative Session in 2013, we published and sold our *Annotated Criminal Laws of Texas*, a big, fat book containing multiple codes in a single volume. Some of those books started coming apart after just a few weeks of use, and we happily replaced for free those defective copies with new ones for anyone who asked, sending our apologies along with the books.

This year, in preparation for our biennial blitz of writing and publishing books once the state legislature adjourns, we have opted to use a different binding process for the 2015–17 editions of the *Annotated* book. So please order this book with confidence—our printer has assured us of no such problems this time around.

Thank you for your patience and for your business! ❇

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This verdict helped make the world right again, because we had been living in Jackson's world for over two years (and we weren't even his victims). We were proud of the jury, proud to represent Brandi, and proud of ourselves for not giving up or falling for Jackson's lies. We felt justice was served, even if Brandi couldn't fully appreciate the verdict. Afterwards, she thanked us and moved back with her mother, Allison, and her parolee father, Lewis Zeine. Even though we tried to show her a better world, Brandi went right back to the world that was so cruel to her.

Conclusion

With so many forces haunting Brandi and crippling her ability to stand up for herself, we structured our case so she wouldn't have to. We used every law available to us—Article 38.37 on extraneous evidence, Article 38.072 on outcry witnesses, and Article 38.49 on forfeiture by wrongdoing—to ensure Brandi's escape from the clutches of Jackson's sexual abuse. ❇

Endnotes

1 Pseudonyms were used for all the victims in this case.

2 Tex. Penal Code §21.02(h).

3 Tex. Code Crim. Proc. art. 38.37, §1.

4 *Hinds v. State*, 970 S.W.2d 33, 35 (Tex. App.—Dallas 1998, no pet.).

5 We could not re-indict Jackson for aggravated sexual assault of Allison because we were barred by 1997's statute of limitations (10 years after the victim's 18th birthday).

6 *Wheeler v. State*, 67 S.W.3d 879, 888 (Tex. Crim. App. 2002)

7 Tex. Code Crim. Proc. art. 38.072, §2(a).

8 *Marquez v. State*, 165 S.W.3d 741 (Tex. App.—San Antonio 2005, pet. ref'd).

9 *Garcia v State*, 792 S.W.2d 88 (Tex. Crim. App. 1990).

10 See *Hernandez v. State*, 973 S.W.2d 787 (Tex. App.—Austin, pet. ref'd).

11 Tex. Code Crim. Proc. art. 38.072, §2(b).

12 The fact that Brandi was 17 during her disclosure to Nancy did not affect her ability to be an outcry witness because the statute states the victim has to be a child, under 18, during the disclosure and applies only to acts committed against a victim under age 14.

13 *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.—Texarkana 2000, pet. ref'd).

14 See *Sanchez v. State*, 354 S.W.3d 476 (Tex. Crim. App. 2011).

15 Tex. Code Crim. Proc. art. 38.49(a).

16 Tex. Code Crim. Proc. art. 38.49(b).

17 Tex. Code Crim. Proc. art. 38.49(c).

18 Tex. Code Crim. Proc. art. 38.49(d).

19 This article applies to the admissibility of evidence in any criminal proceeding that commences on or after September 1, 2013, regardless of the date of the offense.

Harris County's HOPE program

It stands for Helping Our Pets through Education, and it's a different approach to combatting animal cruelty before it starts.

Meet Hope, a black and white border collie, with one blue eye and one brown. (She's pictured at right and below.) She's my family dog. She has no special training or certifications, and she can't do any tricks. She's just a special little girl with an incredible story.

By Jessica Milligan
Assistant District Attorney in Harris County, pictured with Hope the dog

In 2007 Hope was wandering the Trinity River bed in East Texas with another dog, a large black lab, when a man pulled out a shotgun and shot her three times: in the face, in the chest, and through her left front leg. The man also struck the lab in the head with a machete before getting into his truck and driving away. We don't know whether this man was abandoning the dogs or just out for a day of "target practice," but it was a moment that changed my life—because a week later, my husband and I went into a store for cat food and there Hope was, her front left leg barely held together with a flimsy cast and her teeth shattered, in the care of an animal rescue organization trying to find her a home. As we stopped to hear her story, Hope literally dragged my husband out the front door, as if to say, "It's about time you got here. I have been waiting for you to come pick me up and give me a ride home." What choice did we have? She needed a chance and she somehow knew we were it.

At the time, I was a felony prosecutor handling violent crimes against people, but I had no idea people could be so cruel to animals. Not only had Hope been shot three times, but when we removed her bandages for amputation, we found an iron-shaped burn on her back, and she was as thin as a rail. She had been through a lot. At the time, I tried to tell myself that what happened to her was an anomaly, an isolated incident from a depraved heart. Years later, however, as I transitioned into prosecuting animal-related cases exclusively, I realized how prevalent animal cruelty is and how devastating it can be. I also had a rude awakening as to how much our youth bear witness to and, worse, participate in animal cruelty cases.

That's why one particular week in my career stands out in my mind. That week, I received three animal cruelty cases involving teens that were particularly upsetting. One group of teens beat a dog and buried it alive. Another group put a propellant agent on a dog and lit it on fire. A third group of kids glued a kitten's mouth shut and drowned it. Despite enduring many challenging cases in my career, as an animal lover, it was a week I wish I could forget.

I know, as prosecutors, we've all seen terrible things. We learn to compartmentalize what we see in order to survive, but when we really sit down and think about the things we deal with, I think we all wonder how the world got so dark and when the work we do will have a long-term impact and make it better. But time and time again, we simply react to what has already occurred with little thought about how we can make a change for the future. Granted, as a prosecutor, our primary role is to seek justice for victims after a crime has already been committed. But there comes a time when we have to wonder if prosecution alone is enough. I don't think it is.

Article 2.01 of the Texas Code of Criminal Procedure reads, "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, *but to see that justice is done*." Each of us takes our oath seriously and we strive to do that each day, but if you read the statute carefully, does it not also challenge us to do more? Isn't part of seeking justice also trying to reach out to the community, teach what the laws say, and help prevent crimes before they occur? Some may disagree, but the more challenging

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cases I see, the more I think we do have this obligation. Prevention is part of justice.

How do we prevent animal cruelty?

As prosecutors we are uniquely positioned to reach people. Most adults in other careers are intrigued by what we do, and if you have ever participated in a career day at a school, you know kids are even more fascinated. Not only are they are sponges, soaking up information from all around them, but they are also "mockingjays," repeating anything they hear to anyone who will listen.

When I was thinking of ways to combat animal cruelty, my first instinct was to get into the schools and talk directly to our youth. I wanted to teach them how to properly care for animals, recognize that every animal experiences pain, and understand the consequences of being cruel to them. Even more importantly, however, I wanted to plant the seed of empathy. I wanted to *show* them, not just tell them, how amazing animals can be and to provide a positive interaction with an animal that they may otherwise never experience. It was my hope that these young people would learn how to care for animals properly and teach others to protect animals too. It became my mission to create an animal cruelty education program for elementary schools.

To get this mission off the ground, I knew I needed to get into the schools to reach students of all backgrounds and ensure that those who were not learning these concepts at home would have a chance to learn them at school. But I knew I could not get into the schools by myself. I needed a sponsor or the support of an agency with a good reputation, an interest in animal-related laws, and an earnest passion for the protection of animals and people. In seeking support, I initially considered myriad organizations but ultimately began to look for another angle. In the summer of 2014, it dawned on me to run the program through my employer, the Harris County District Attorney's Office. This, to be sure, would be an unconventional thing for a prosecutor's office to undertake, but it occurred to me to present the idea to my boss, District Attorney Devon Anderson, and seek permission to pursue the program as an ADA and animal cruelty specialist. I am grateful that without even a moment's hesitation, Devon agreed. It was time to transition this idea into a reality.

My initial list of tasks to get this program going included the following: 1) develop a program name; 2) coordinate the animal component; 3) create a logo; 4) find an audience; 5) develop and maintain a budget; 6) coordinate the curriculum and create an interesting slideshow; and 7) spread the word to the public. How I tackled each element is outlined below.

Crossing off the to-do list

1 Even the best program or seminar can fail without a strong title that draws the attention of potential attendees. I preferred an acronym that is catchy and would convey the purpose behind the program. At first this seemed difficult, but I kept thinking about my dog, Hope, who had been through so many of her own challenges. I recalled how deeply and emotionally she impacts everyone she meets and everyone who hears her story. After that, naming the program was easy; we would name the program after her: HOPE, which stands for Helping Our Pets through Education.

2 To instill empathy in students attending this program, the animal component of this program is critical—but it was also the most challenging. I originally planned to coordinate this component with local rescue organizations and have a different animal brought over for each class. This seemed like a win-win idea because it would showcase the animal for adoption and provide an inspiring story at each presentation. However, the more planning I did, the more nervous I got about the demeanor of random animals in an unfamiliar environment and how well they would react to large numbers of children interacting with them at the end of each program. Obviously, if one of the kids got injured during a presentation, beyond the obvious tragedy of seeing a child hurt by one of the animals, the underlying goal of invoking empathy in these children would be a failure. It goes without saying, too, that the liability for our office, the rescue organization, and the school district would be huge. Ultimately, these concerns led me to reconsider using random animals and I decided to use my own. Hope loves kids, is extremely socialized, has demonstrated no adverse effects or aggression from her own history, and has never met a stranger. Plus, we were already using her name—why not

use her as the mascot too? Turns out she is perfect for the job. Hope loves to "go to work," and kids are fascinated by her and her story.

3 If you have a creative person in your agency that can create a logo for you, I would strongly suggest seeking his help. For me, this person was Juan Manuel De Anda Jr., a computer graphics and multimedia specialist in our IT Department. Within days of telling him about our program, Juan came up with our logo (that's it, at right), which we immediately loved. It identifies our office as the sponsor and clearly displays the purpose behind our program.

4 Like many of us, I have spoken at several elementary schools on different occasions throughout my career. I used those contacts to develop a list of schools that might invite us to their campus. In addition, my summer intern, Adrianne Norman, did some serious cold-calling to various school districts to explain the program and find additional interested teachers. We also created a page on our website for teachers and principals to contact me and schedule a presentation date. While I was worried we might not generate much interest, these methods have been very successful. We announced the program in September 2014, and I have already spoken to more than 1,000 students. We are still receiving requests from schools as the program's first school year winds down. In addition to elementary schools, we have been contacted by museums to speak at summer programs and by other school districts to attend parent information sessions and community meetings. The volume of invitations alone is an indication that others are recognizing the need to underscore and discuss animal cruelty in our communities.

5 This program, perhaps surprisingly, is not costly. It can be as simple or as extensive as you want it to be. For our version, we went simple. We ordered shirts with the logo for anyone assisting or speaking at the schools, a collar and leash for Hope with the name of the program embroidered on both, and stickers for the kids with the logo. We also print certificates to hand out to the students upon completion of the program, and I bring demonstratives, such as a pet bed and water dish, to show the kids what animals need. I paid for the shirts, demonstratives, collar, and leash myself, but most agencies can cover these modest expenses, as well as a prosecutor's mileage and the printed materials, out of the agency's discretionary funds.

6 While developing a curriculum is time-consuming, it was not particularly difficult. A few years ago, I established a Responsible Pet Ownership course for adult offenders on probation or deferred adjudication for an animal cruelty offense in Harris County—such a course was previously non-existent in Harris County or any of the surrounding counties. Based on that, I generally knew how to put curriculum together and merely altered that material to make it youth-appropriate. In planning, I focused on a fifth-grade audience but made the curriculum appropriate for any age depending on the needs of the neighborhood, time constraints of the school, the questions the students ask, and the stories that are shared. The topics generally covered include: 1) the objective of the program; 2) how to care for pets, such as proper nutrition, veterinary care, exercise, attention, and shelter; 3) animal cruelty laws in Texas; 4) consequences of animal cruelty for the offenders and animals; 4) the link between animal abuse, child abuse, and domestic violence; and 5) how to speak up for animals and report animal abuse. At the end of the presentation, students take an "oath of kindness," swearing to be kind to animals and report animal cruelty when they see it. Obviously, some of these topics take longer to explain than others, especially if a school requests more information regarding specific neighborhood problems, such as dog-fighting, cock-fighting, or animal abandonment. But the curriculum is flexible enough to allow and foster discussion of such problems. Even if the students do not remember all of the topics, they will remember the program as a whole, especially the direct contact they have with Hope.

7 Marketing this program is not my expertise, but our office is fortunate to have Camille Hepola in our Public Relations Department. Camille was instrumental in writing a press release regarding the HOPE program and scheduling a press conference where all of the radio stations, television stations, and written media reporters around the county were invited to learn about the initiative and share the information

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throughout the community. Hope attended the press conference, and we shared her story and the objective behind HOPE. We also invited and discussed other animal cruelty victims in Harris County to promote the benefits of a preventative program like HOPE. Several media members attended and willingly published the information via print and broadcast media, directing additional schools to our website for further information and registration.

Is it working?

While it is difficult to quantify the success of this program, I am confident it is making a difference because the students are undoubtedly responding. Their curiosity, stories, smiles, strength, and commitment to being part of protecting animals is unlike anything I have ever experienced. Several students have reached out to me afterwards and explained how they now want to become police officers and prosecutors.

Other stories are difficult to share without a few tears, but one is particularly on point. One boy was frightened when it was his turn to interact with Hope. When I asked him if he wanted to pet her, he hesitated and told me he had never touched an animal before. I promised him she was gentle and would love the attention. As he started petting her, you could see his confidence increase and after a few minutes, he raised his head with a glowing look and enthusiastically shouted, "That was *awesome*!" This is exactly what I hoped for when starting this program. Now, whenever that boy gets close to a dog, his first reaction will most likely be positive rather than fearful or negative. And while I cannot guarantee he will never hurt an animal, I am confident that his experience with Hope has created a sense of empathy for animals that will never be lost.

Statistics will likely never determine the impact of a program like this, but we do know that every person has the potential to interact with hundreds of animals over the course of his life. So if we can reach even one kid in a positive way, we can save hundreds of animals. That's how I define success!

Conclusion

Many reading this article may still be hesitant about starting a program like HOPE. Whether dockets are too time-consuming or you are skeptical about having the resources to keep an intervention program going, rest assured: If you can get it off the ground, you can keep it going. Various prosecutors throughout our office have volunteered to help with the program as needed, and community members have offered their assistance for presentations. Retired teachers have contacted me to volunteer their expertise in teaching, should the need arise, and teachers at the schools themselves are a great resource to carry the message further in their classrooms. If you are interested in starting any type of crime prevention program, I would strongly encourage it. As you progress through the process and see the result, I think you will find the more you do, the more you feel like you are seeking justice in ways you didn't realize were possible.

I have never been so grateful for the opportunity to be creative and stretch my career beyond the normal expectations. It has been so rewarding because it reminds me there is still a lot of good in this world. I would encourage any prosecutors with the desire to implement a similar program to go for it. Kids really are our future and if we take the time to invest in them and give them information and tools they need to make good decisions, they will move forward with confidence to protect their fellow citizens, both furry and human alike. ❇

A powerful tool in sexual assault of a child prosecutions

In 2013, the Legislature amended CCP Art. 38.37 so prosecutors can introduce evidence of a defendant's sexual crimes against other children in the State's case in chief. Smith County prosecutors recently utilized this statute for the first time.

Some of the most difficult and important cases we prosecute are those where children have been sexually abused. Defendants who victimize vulnerable children need to face justice. However, there is more than just the case at hand to worry about. A "not guilty" verdict will give a child molester another opportunity to hurt an innocent life. The pressure to convict is even greater when the defendant has been previously convicted of sexually abusing a child. Unfortunately, the burden of proof usually rests on the shoulders of these traumatized children.

By Chris Gatewood, Leslie McLean, and Jacob Putman
(left to right), Assistant Criminal District Attorneys in Smith County

In its 83rd Regular Session, the Texas Legislature addressed the difficulties prosecutors face in handling child sex cases where a defendant has previously sexually abused another victim. In 2013, the Legislature amended Art. 38.37 of the Texas Code of Criminal Procedure to permit prosecutors to introduce evidence—during the State's case in chief—that the defendant had previously committed separate sexual offenses against other children. New §2(b) greatly expands the State's ability to successfully prosecute offenders for sexual crimes against children.

How it used to be

If your caseload includes sexual crimes against children, then you are familiar with Art. 38.37. Before September 1, 2013, Art. 38.37 addressed other sexual acts the defendant committed only against the child named in the State's indictment. Once a prosecutor complied with the statutory notice requirement, the victim could testify about the defendant's sexual acts alleged in the indictment and extraneous acts of sexual abuse. However, the statute indicated that the jury could consider the extraneous evidence only for its bearing on 1) the state of mind of the defendant and the child; and 2) the previous and subsequent relationship between the defendant and the child.

Article 38.37 was helpful because it gave prosecutors a vehicle to further develop the victim's testimony before the jury. However, due to the nature of the offense and the type of criminal involved, several issues still plagued prosecutors. Sexual assault of a child is a crime of secrecy, manipulation, and control. Oftentimes, the child identified in the indictment is not the first victim, but due to the constraints of the Texas Rules of Evidence and Art. 38.37, the jury would be led to believe that this was the only time the defendant had acted on his perversions. Accepting that sexual crimes against children actually occur and rendering a guilty verdict on the word of a child alone can be difficult for jurors. Before Art. 38.37 was amended, prosecutors could be left frustrated when thinking of trial: If only the defendant's prior victim(s) could testify, the State's case would appear much clearer.

The new statute

In 2013, the Texas Legislature passed Senate Bill 12, which provided prosecutors with much-needed assistance. The legislative intent for the amendment was clear:

> Because of the nature of child sex offenses, there is typically very little evidence to assist prosecutors with proving their cases. Victims, especially children, are many times so scarred by the physical and emotional trauma of the event that there are often long delays in the reporting of the crime, and these delays can lead to the destruction

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> or deterioration of what little physical evidence exists. As a result, the primary piece of evidence in most child sexual abuse cases is a traumatized child. …
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> "Evidence of prior, similar offenses against other victims will provide prosecutors with a much-needed tool to assist them in showing a defendant's propensity for committing these types of crimes. This, in conjunction with the evidence presented in the current case, may help to prove beyond a reasonable doubt in a juror's mind that the defendant is in fact guilty.[1]

Section 2(b) specifically permits the prosecutor to offer evidence—after a required hearing and favorable ruling by the court—of other sexual acts committed by the defendant against other victims. Furthermore, the jury is permitted to consider such evidence for *any* purpose, and §2(b) clearly allows the jury to interpret the extraneous sexual acts as evidence of the defendant's character and that he acted in conformity with that character. Section 2(b) is an unambiguous and necessary departure from Rules 404 and 405 of the Texas Rules of Evidence.

Recently, we were able to apply §2(b) and secure a guilty verdict on a difficult case.

Smith County case

In February 2014, William Smith was indicted by a Smith County grand jury for aggravated sexual assault of a child under 6 years of age. Like many sexual abuse cases, the evidence consisted primarily of the statement of a small and fragile child. There was no DNA evidence, eyewitnesses, or confession at the State's disposal. The victim, whom we will call Brittany, made an outcry shortly after an instance of abuse. Brittany identified her abuser as William Smith, a man who lived in her family's home. Smith was not a family member or close friend; in fact, he was a registered sex offender with a prior conviction for sexual abuse of a child.

In 2012, Brittany, her mother Nicole, her stepfather Jimmy, and her three stepsiblings were living in a four-bedroom brick house in Lindale. Brittany was 4 years old at the time. Nicole was employed as a cashier at a local gas station. Smith pulled into the gas station because he was having car trouble, and he struck up a conversation with Nicole. After learning about Smith's troubles, Nicole called and asked Jimmy to come lend a hand. Jimmy and Smith immediately hit it off, and they began to spend time together.

Smith had no consistent place to live, and he eventually told Jimmy that he needed somewhere to stay. Nicole and Jimmy were both aware that Smith had served time in prison, but both denied knowing the specific charge when our investigators spoke with them. Sometime around November 2012, Jimmy and Nicole allowed Smith to move into one of the bedrooms in their house.

Smith lived with the family for approximately 10 months. Nicole began to leave the children alone with him, and as time progressed, Smith regularly supervised the children with no other adults present. Sadly, an unstable family or a neglectful parent often surrounds sexual assault victims, and Brittany's case was no exception. While Brittany was in Smith's care, Nicole was buying and using methamphetamine. In July 2013, Nicole's drug usage escalated to the point that Jimmy decided to take his children and leave. That left Brittany, Nicole, and Smith in the house.

Brittany's outcry of sexual abuse came in August when Nicole returned home one evening. As usual, Smith was the one who watched Brittany while Nicole was out. When Nicole entered the house, Brittany grabbed her by the leg and said, "I need to tell you something." The two went into Nicole's bedroom to talk, and Brittany told Nicole that Smith had touched her "down there." Brittany was able to demonstrate what she meant by moving her finger back and forth on her private part.

Nicole immediately confronted Smith about the allegation, but he denied touching Brittany. In an effort to diffuse the situation, Smith agreed to leave the house for the night. Nicole then called her sister, Samantha, who lived in Dallas; Samantha drove to Lindale the next morning and took Brittany back to Dallas.

Reviewing evidence

As we reviewed the evidence and prepared this case for trial, we were certain of Smith's guilt, but we knew that convincing a jury would be a difficult task. For every favorable piece of evidence we had, there was something that a defense lawyer could use to create doubt in jurors' minds. Brittany's outcry to Nicole was clear and unmistakable, but at the time of trial, Nicole was still using methamphetamine. Furthermore, CPS records revealed that a couple years before Brittany's outcry,

Nicole had falsely accused Jimmy of sexually abusing his biological children. Nicole's reliability and credibility as a witness was clearly a problem.

Shortly after Brittany moved in with her aunt Samantha in Dallas, the Collin County Children's Advocacy Center conducted a forensic interview. During the interview, Brittany recounted in great detail how Smith had touched her private part when she was on the couch and when she was in the bathroom. She referred to Smith as "William in the brick house." However, Brittany also referenced another William, "William in the apartments." Brittany stated that "William in the apartments" had touched her butt with a stick. During the interview, Brittany went back and forth between the different Williams, which complicated matters. The interviewer had a difficult time keeping the facts straight.

The obvious concern was that the defense would use this other William to muddy the waters, even though the lead investigator had been able to positively identify and distinguish between the two different Williams and the two different incidents. When trial came around, we would need to prove that our 4-year-old victim could accurately distinguish between the two Williams and the two separate instances of abuse.

After Brittany's forensic interview, she underwent a sexual assault medical forensic examination at Children's Hospital in Dallas. According to the medical documentation, Brittany had a severe case of labial adhesion (labial adhesion is when the labia minora are fused together). In preparing for trial, we spoke with the Sexual Assault Nurse Examiner (SANE), who said she could testify that a labial adhesion is consistent with repeated sexual abuse. However, Brittany had spoken of only two instances of sexual abuse. The defense would likely use the nurse practitioner to establish that the adhesion was likely (although not definitively) caused by poor hygiene. The nurse practitioner's testimony did not promise to be compelling evidence.

Meeting with Brittany

We prefer to meet with child victims long before trial, and Brittany was no exception. Our initial goal was to determine if Brittany would be able to testify, and we needed to know how she would come across to a jury. Luckily, Brittany was living with her paternal grandparents in a small town about 45 minutes from our office in Tyler, and Brittany's grandmother agreed to bring her to our office.

When they arrived at our office, our victim services coordinator, Sherry Magness, escorted her and the grandmother to our victim's area, which is child-friendly. The lead prosecutor on the case, Jacob Putman, sat down with her. Brittany was a 5-year-old, blonde-haired girl. She was unusually calm and quiet compared to most of the young children with whom we have worked. After Jacob introduced himself, Brittany looked him straight in the eyes and immediately asked if he wanted to talk about what Smith had done to her.

As a general rule, we do not discuss the facts of a case with a child victim during the first meeting, especially a child as young a Brittany. We prefer to build a rapport with her, give her the opportunity to relax, and (we hope) develop enough trust in us to tell her story. The stories these children have to tell are traumatizing, so it is nice to briefly focus on just getting to know them. Even though Brittany was forward about the abuse, Jacob decided it would be better to wait until our next meeting before we discussed the facts. Brittany's physical demeanor was unusual for someone her age: She maintained direct eye contact for the duration of our meeting, and she seemed distant and emotionless.

Jacob was confident that Brittany would be competent to testify because her level and degree of communication was mature. However, we were concerned that a jury would interpret her lack of emotion as a sign of coaching or rehearsal. We planned to meet with her on a few more occasions to talk about the abuse and discuss what testifying in trial involved, and we wanted to show her the courtroom. Unfortunately, shortly after the first meeting with Brittany, she moved in with her father who lived nine hours away. While living with her father was a positive arrangement, the geographical distance made meeting with her impractical. In light of the evidentiary hurdles and our lack of access to Brittany, we knew that Art. 38.37, §2(b) would be crucial during the trial.

Criminal history

Before William Smith's case was presented to the grand jury, we requested his criminal history. The informa-

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tion that we received proved helpful to the case. He had pled guilty to one count of sexual abuse of a child in November 2000 in Comanche County, Oklahoma. After his guilty plea, the court assessed punishment at 20 years' confinement. However, after we examined the paperwork, we learned that Smith was initially charged with *two* cases of sexual abuse of a child—Brittany was his third victim. As a result of a plea agreement, Smith pled guilty to one charge and the State agreed to dismiss the remaining charge.

One of the certified documents included in the paperwork was a copy of a probable cause affidavit, which contained the names of both victims, whom we will call Laura and Claire. Our investigator was tasked with locating them, but we were concerned that now, 14 years after the offense, the two may have changed names, moved, or even passed away. Even if we could find them, we were worried that they might be unwilling to testify.

After a few weeks and several unanswered messages, Jacob received a call from Laura. He identified himself as a prosecutor with the Smith County Criminal District Attorney's Office and began the conversation with a simple question: "Do you know why I am calling?" He was surprised but encouraged by Laura's response: "You're calling about William Smith." Apparently, Laura had kept track of Smith while he was in the Oklahoma prison system, and she knew that he had served 10 years of his 20-year sentence. Laura was even aware of his release date from prison, which happened to be on her birthday.

During the conversation, Jacob described the circumstances of Smith's new charges and clarified the problems that were present in the case. He then made a plea for Laura's help. He explained that Art. 38.37, §2(b) would allow her to testify during the guilt phase of the trial, making clear that her testimony was essential to the case. He then asked if she would be willing to come to Tyler to testify at Smith's trial. She paused for a moment and then told him that she would do everything in her power to help.

Laura's story

We needed to know the details of Laura's abuse so we could give proper notice under Art. 38.37, §2(b), and Laura agreed to tell her story. Sometime around 1990, when Laura and her sister, Claire, were 6 and 4, their mother married William Smith. At the time, they lived in Florida.

Shortly after the marriage, Smith began a ritual of separately waking each girl during the night and sexually abusing them. Neither Laura nor Claire was aware of the abuse the other suffered. Not long after the abuse began, Laura made an outcry, and CPS began an investigation. During Laura's interview with CPS, she recanted her statement because her mother told her that she and Claire would be taken away if she stuck to her story.

Unfortunately, CPS closed the case, and Smith returned to his routine of sexual abuse. The family moved to Texas and later Oklahoma, and Smith continued to molest each girl three to four times a week. When Laura was 15, she decided that she could no longer endure the horror. She made an outcry to a friend, and police in Oklahoma began an investigation. Fortunately, when Laura was interviewed this time, she did not recant. Her sister, Claire, initially told law enforcement about the abuse she suffered, but she later refused to talk—again, the product of her mother's intimidation.

The State of Oklahoma charged Smith with the sexual assault on Laura, and he entered a guilty plea to 20 years in the Oklahoma prison system. Smith was sentenced in November 2000 and was released on parole in 2010. He then left Oklahoma and moved in with his mother in Lindale.

Jacob asked Laura whether she thought Claire would be willing to testify. Laura agreed to contact Claire, but she was not optimistic. Laura's concern was that even now, 14 years later, Claire would continue to refuse to discuss the subject.

We immediately filed notice of intent to offer Laura's testimony under Art. 38.37, §2(b) and began to prepare for the hearing required by Art. 38.37 §2-a, where the trial judge would need to make a finding that our proposed §2(b) evidence was sufficient to convince a jury beyond a reasonable doubt.[2] Although we had Smith's certified conviction for sexual assault of a child, we did not want to take any chances. We planned to present as much evidence at the §2-a hearing as possible to ensure that the judge would rule in our favor. Thus, we felt it necessary to have Laura make the six-hour drive to Tyler. To accommodate our witnesses, we asked the court to set the §2-a hearing on the morning of the trial's voir dire,

which was a Monday. The court and defense agreed to the setting.

As the trial date approached, we made arrangements with Brittany's father to make the nine-hour drive to Tyler the Saturday before trial. Laura also agreed to drive to Tyler on Sunday night so that everyone would be present for the hearing on Monday morning. Monday morning arrived and all the witnesses were present. We went to court for docket call while Brittany, her grandparents, and Laura waited in our victim's area. However, we were frustrated to learn that the defense attorney was ill and unable to proceed with trial. Our witnesses had made the trip for nothing, and the court reset the case for a month.

But there was a silver lining. About a week later, Jacob received a call from Laura. We were delighted to learn that Claire was now willing to testify. Laura gave Jacob Claire's number and he immediately called. Claire had been hesitant to speak about the abuse; she had not spoken a word of it since childhood because it was too painful. Nevertheless, after talking with Laura, Claire felt empowered and was willing to tell her story. After a lengthy conversation, Claire agreed that she would do her part to guarantee that Smith would never have access to another child. She agreed to travel to Tyler for the trial setting, and we were more confident that we would secure a guilty verdict. Brittany's testimony would be clear, the certified conviction would corroborate Laura's testimony, and Claire was on board. Unfortunately, the §2(b) notice regarding Claire's testimony would be untimely because the trial setting was less than 30 days away and we were committed to no further delays, so she couldn't testify at the §2-a hearing.

The §2-a hearing

On the Monday morning of trial, the court held the §2-a hearing. We first offered Smith's certified conviction through a fingerprint expert. We felt it necessary that Smith's judicial admission to sexually abusing Laura be established immediately. The defense attorney was very aggressive with Laura because the hearing was outside the presence of the jury; he attacked her viciously, insinuating that her testimony was a fabrication, despite the fact that Smith's certified conviction sat only a few feet from the witness stand. The defense attorney picked apart each detail of the abuse that Laura suffered over nine years. At the end, Laura was shaken and crying on the stand.

The judge ruled that Laura's testimony and the certified prior would both be allowed into evidence under §2(b). Laura was pleased with the ruling but now anxious about the second round of cross-examination. We assured Laura and Claire that the defense attorney could not afford to be so aggressive with the jury present.

The trial

Brittany and her grandparents had flown to Tyler for the trial. We were able to speak with Brittany before the §2-a hearing and after voir dire. On Tuesday morning, we called Brittany to the stand. As expected, she testified about the sexual abuse she had experienced at Smith's hands. Without hesitation, she pointed to him, identified him, and bravely answered all the questions both sides had for her. Even though we had limited access to Brittany before trial, she was confident on the witness stand. Her mother, stepfather, the forensic interviewer, the nurse practitioner, her aunt, and the lead detective all testified.

Our last witness for the guilt-innocence phase was Laura. Her testimony was unflinching. The jury learned about the horrors she experienced in the darkness over a nine-year period. The jury heard the similarities in the cases: Laura was around the same age as Brittany when the abuse began, and Smith would touch her the same way he touched Brittany. During cross-examination, the defense was not able to shake Laura. As she walked out of the courtroom, the jury was in tears.

The jury deliberated for two hours and returned a guilty verdict. Smith had elected to have the jury assess punishment. Under §12.42(c)(2)(A) of the Texas Penal Code, a person convicted of a sexual offense against a child can receive a mandatory life sentence if he has been previously convicted under another state's laws containing elements that are substantially similar to the elements of one of the enumerated offenses. The judge in our case determined that the Oklahoma statute under which Smith had been convicted was too broad to meet the requirements of §12.42(c)(2)(A), so his punishment range was 25 years to life instead of the mandatory life requirement. During the punish-

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ment phase, Claire testified to the sickening details of Smith's actions—this was the first time that she had publicly talked about her abuse. Her story echoed Laura's testimony, that Smith had sexually abused Claire three to four times a week for nine years.

The jury returned a life sentence in four minutes. William Smith will never be eligible for parole.

Conclusion

In amending Art. 38.37, the Texas Legislature acknowledged the need for a new approach in child sexual abuse cases. Section 2(b) offers prosecutors a tool to lighten the heavy burden that child-abuse victims often suffer during trial. As previously explained, for every favorable piece of evidence we possessed in Brittany's case, there was a piece of evidence that a defense lawyer could use to create doubt in the minds of jurors. We are thankful that §2(b) provided us with the corroboration necessary to ensure that justice was done. Section 2(b) will be an invaluable resource for those prosecutors who try these cases. ❇

Endnotes

1 Senate Research Ctr., Bill Analysis, Tex. S.B. 12, 83rd Leg., R.S. (2013).

2 See Tex. Code Crim. Proc. art. 38.38 §2-a.

"Cutting Out" domestic violence, one hairstylist at a time

How Brazos County prosecutors taught local hairstylists how to recognize the signs and symptoms of domestic violence in their clients

There is something safe and comforting about a hair stylist's chair. It is a unique spot where confessions, personal experiences, and life stories are not only shared but also encouraged. It is a place where women go to take care of themselves and, absent the men and children in their lives, they open up. Why? Because a hair stylist is someone they trust, not just with their appearance but with their secrets. That makes salons and stylists the perfect targets for a domestic violent outreach program.

By Jessica Escue
(pictured at far right), Assistant District Attorney, pictured with
Gracie Aguilar
(far left), Office Manager,
Melissa Carter,
(middle, in back), Victim Assistance Coordinator, and
Jarvis Parsons,
(in front) District Attorney,
all in Brazos County

Breaking down the barriers and misconceptions about domestic violence has been one issue that we, like so many prosecutor's offices, struggle with. In Brazos County in 2014, domestic violence accounted for approximately 55 percent of our violent felonies. We began to ask ourselves, how do we start tackling this problem head on?

Last fall, Brazos County's elected district attorney, Jarvis Parsons (my boss), asked me to come to his office. "I have an idea," he said. He then told me that he had been thinking about ways to bring information about domestic violence and the resources available to the general public. Several years ago, Jarvis had heard from another prosecutor (Dee Hobbs, then the first assistant county attorney in Williamson County) about a domestic violence program that targeted hairstylists, and Jarvis recognized what a great opportunity it was. He knew that if we could train stylists to recognize the signs of domestic violence and how to approach the subject, we could take advantage of the unique relationship between a stylist and her client to get information and

resources to victims who desperately needed it.

I quickly realized what a valuable resource a stylist could be in the battle against domestic violence. A beauty salon is one of the few places that a victim of domestic violence will likely be away from her abuser and one-on-one with another person. In consulting with the client about her hair and beauty needs, a stylist can often see signs of abuse that others could miss, including bruising, hair missing or falling out, or unusual behavior. Stylists and clients also have a trusting relationship that allows the client to feel comfortable sharing personal information. A salon was also an ideal location for talking with a domestic violence victim, as most abusers would likely not be in hearing distance during the conversation. After noting all these benefits, I immediately told Jarvis that I wanted to help, and we began work to find a way to train stylists on domestic violence.

Cut It Out

Jarvis researched whether there were any domestic violence programs taking advantage of the special stylist-client relationship, and he discovered the Cut It Out program run by the Professional Beauty Association. Cut It Out began in Birmingham in 2002 and relies on the warm relationship that women have with their stylists and beauticians to encourage victims to seek help. Since its founding, the program has spread to train stylists all over the country to recognize the signs of domestic violence. Its materials include a PowerPoint presentation on myths about domestic violence, facts about victims of domestic violence, and helpful aids in broaching the subject with a client, as well as videos and testimonials. The materials can be altered to fit a time slot from 30 to 60 minutes; we also tweaked the presentation to include contact information for the National Domestic Violence Hotline as well as our local domestic violence shelter, Phoebe's Home, which provides residential and non-residential services to victims of domestic violence.

We had the information for the stylists ready to go at that point, but the next issue was how to get that information to victims (clients) in a way that does not place them at risk. We knew that many times a victim will not immediately take advantage of resources but may need them at a later date. We started by making flyers with tear-off tabs containing the phone number of Phoebe's Home for the salons to hang in the women's bathrooms. For those victims who can't carry around a shelter's number without fear of the abuser finding it and making things worse, we created a QR code (the little square barcodes you see on signs and other promotional items) which could be printed on the back of a salon's appointment card. This QR code was programmed to send the person to the Phoebe's Home website and could be given out to a victim without anyone else realizing the significance of the information.

Training salon professionals

We were now ready to get started. Our team—Jarvis; myself; our office manager, Gracie Aguilar; and one of our victim assistance coordinators, Melissa Carter—began contacting salons, spas, and cosmetology schools to ask whether they would be interested in having us come to present a short program on domestic violence. The interest we got was extremely encouraging. All over Brazos County, stylists and salons responded that they would love to see our presentation.

We started out going to bigger salons, presenting information on domestic violence to stylists, salon owners, and other professionals to get our message out. Our sole goal from the beginning was to help victims get out of these abusive situations. We made clear to the stylists that even if the client never called the police, their concern and encouragement could help the client get out of a dangerous situation which could possibly—and all too often does—cost her life.

We met with entire salons during their monthly staff meetings. We were flexible with the salons and their time: Sometimes these meetings were really late at night and sometimes really early in the morning, and whether it was 30 minutes or an hour, we took what we could get. In our meetings with stylists, we talked with them about common myths about domestic violence and explained some of the burning questions that people have about individuals in domestic violence relationships, such as "Why does she not leave?" We explained that domestic violence is a common but often an unreported problem that affects women of all races, educations, socio-economic levels, and personality types. We also presented informa-

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tion on how best to approach a client who they suspected was being abused, as well as local resources that the client could tap to leave a violent relationship. We also told them what *not* to do when speaking with a domestic violence victim, including the importance of confidentiality and discretion. Above all, we told the stylists not to feel pressure to "fix" the situation. We explained that sometimes victims may be defensive or may not be ready to leave an abuser. The most important thing that they could do for their clients was to be supportive, follow their instincts, and let the client know that they would be there for them.

We also got the opportunity to teach at a local cosmetology school. In that setting, we spoke to about 50 students about the problems of domestic violence and what they might see after they became licensed. It is our hope that our office can start providing this talk for each class of the hairstyling students to better prepare them to recognize the signs and symptoms of someone caught in an abusive relationship.

Although I was prepared to teach stylists on how to speak with victims of domestic violence, I was completely unprepared for the number of actual victims of domestic violence that we would encounter among the stylists we trained. During our first training, I began noticing that some of the women were tearing up or completely shutting down. I had seen this behavior before during voir dire for domestic violence cases but was unprepared for how often I would see it during our Cut It Out campaign. Often these women would approach us at the end of the talk to tell us about their situation or that of a loved one. Some of these women, who were completely isolated and felt totally alone, finally had the courage to speak up and talk about their situations. At the end of the talk, we gave out our business cards and told them to feel free to call us with any questions or concerns.

The response

Although the program is only in its infancy, since our presentations, numerous stylists have called to tell us about the impact that the program made, and the feedback so far has been fantastic. Stylists contacted us to tell us that behavior they'd dismissed, such as a client having to constantly text to tell her boyfriend where she was or a client's boyfriend being the one to inform the stylist on how she could change the client's hair, was now seen in a new light. Because of our class, these stylists now felt comfortable talking with their clients about domestic violence and resources available to them.

So far, we have trained more than 150 stylists in Brazos County alone. Based on the fantastic response, we began contacting the prosecutor's offices in neighboring counties to see if we could bring the program to the eight counties covered by our domestic violence shelter. So far, we have done a program for Madison and Leon Counties and are looking at giving programs at salons in Washington and Burleson Counties.

Cut It Out has also been very effective in raising the public's awareness of the problem of domestic violence and has helped break down the stigmas and myths associated with it. This has not only helped the victims of domestic violence but it has also helped stylists (potential jurors) understand these women a little bit better. We see it as being an integral part of our fight against domestic violence and something we will continue to do.

However, the most important thing the Cut It Out program has done is equip the people who are best positioned to help victims of domestic violence get the resources they desperately need. These victims, who may never call the police, will now have another lifeline to help them leave a dangerous and destructive situation.

For more information, please see the national Cut It Out website at https://probeauty.org/cutitout. ❇

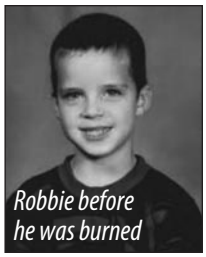
Seeking justice for the "burned boy"

Robbie Middleton was set on fire at age 8 by 13-year-old Don Wilburn Collins, a crime that attracted nationwide media attention. More than 12 years later, Robbie died of his injuries, and prosecutors tried Collins for murder.

By Kelly Blackburn
Trial Bureau Chief in the Montgomery County District Attorney's Office

On June 28, 1998, Colleen Middleton watched as her son, Robbie Middleton, ran down the front porch steps, through the front yard, across the street, and into the woods. It was his 8th birthday, and he was headed to a friend's house to invite him to spend the night.

Less than 30 minutes later Colleen Middleton saw her son again. He was lying in the street, just down from their house, surrounded by neighbors. She did not recognize him and could not comprehend what she saw in front of her. Robbie was naked; his skin was melting off his body; and his eyelids, ears, hair, lips, and genitals were all burned off. Eight-year-old Robbie had suffered deep, third-degree burns to 99.5 percent of his body.


Robbie before he was burned

Despite predictions that he would not survive his injuries, Robbie suffered through unimaginable pain and over 200 surgeries until, 12 years later, he died from skin cancer, a direct result of the injuries he suffered on June 28, 1998. One of the neighbors watching as Robbie laid in the street that day was 13-year-old Don Wilburn Collins, who nearly 17 years later, would be convicted of capital murder for Robbie's death.

The investigation into the burning and ultimate death of Robbie stretched over 16 years and consisted of more than 200 witness interviews, thousands of miles traveled, the cooperation of multiple law enforcement agencies, the cooperation of the Montgomery County Attorney and Montgomery County District Attorney's Office, and the miracles and knowledge of the expert medical personnel at Shriner's Burn Hospital in Galveston. After waiting for justice for years and enduring a civil trial, juvenile certification hearing, motion to transfer venue hearing, and jury trial, the Middleton family was finally able to see justice served when a Galveston County jury held Collins responsible for molesting Robbie, setting him on fire, and killing him.

Rob Freyer, Mark Brumberger, and I handled the Collins prosecution.[1] The case presented numerous legal issues and the expected factual challenges that arise with a 17-year-old case, but we were all committed to seeing that justice was done for Robbie and his family and to prevent Collins from being released back into society. At the time of his jury trial Collins had a pending felony case in Liberty County for failing to register as a sex offender, and he spent most of the trial sitting at counsel table reading the newspaper.

The horrifying crime

The Middletons' home was located in a rural area of east Montgomery County on a small dead-end street. Everyone on the street knew one another. The kids in the neighborhood were routinely unsupervised while outside riding bikes, swimming, and playing. For Robbie's birthday his family celebrated by having a small family party and a cake his mom bought from a local grocery store. He got a tent and little bit of money from his uncle, and Robbie wanted to sleep outside in his new tent. He waited all day for his friend, Analverto "Beto" Padilla to get home.[2] Once he did, Robbie began walking to Beto's house to see if he could camp out with him. Beto lived in a neighborhood separated from Robbie's home by about five acres of woods. There was a small trail through the woods that kids used to get from one neighborhood to the other. The woods were also the perfect location for Collins to wait for unsuspecting victims.

Robbie was popular, loving, friendly, and caring—everything Collins was not. The younger boy enjoyed riding bikes, fishing, and joking around—he had a sarcastic sense of humor. His personality and positive outlook on life helped him survive for 12 years after his fateful meeting with Collins.

On the other hand, Collins was the kind of person who stomped kit-

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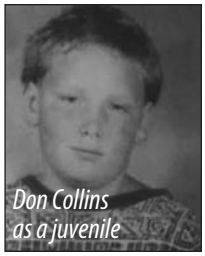
tens to death and molested children.[3] After his mother died when he was 8, Collins lived with his father. He began drinking alcohol and smoking marijuana. Eventually, his father was sent to prison, and Collins then bounced between family members who were willing to take him in, sleeping on their floors and couches. He eventually went to live with his maternal aunt and uncle, who lived in Robbie's neighborhood. He got along with no one, had no friends his age, and appeared to "stalk" younger children, especially children of whom he was jealous, like Robbie. No parents in the neighborhood allowed their children to play with Collins. He was just 13.


Don Collins as a juvenile

Two weeks before setting Robbie on fire, Collins sexually assaulted him in the wooded area by their homes. Like many victims of sexual abuse, Robbie did not tell anyone because he was embarrassed and scared. Collins admitted to multiple people that he had sexually assaulted Robbie and that Collins was scared that Robbie would outcry. It was this fear of being caught that led Collins to lie in wait for Robbie in the woods, tie him to a tree, pour gasoline on him, and light him on fire.

Robbie was approximately 200 feet into the woods when Collins attacked him. On fire and blinded, Robbie somehow retraced his steps to get out of the woods. Neighbor Mark Currier was driving his two boys to choir practice and Chad and Laura Thomason were coming home from playing bingo at the local VFW when they noticed Robbie stumbling out of the woods. They testified that he appeared to be naked and covered in mud. They stopped their cars and watched as Robbie stumbled across the road and sat down. As they approached him, they realized he wasn't muddy—he had been burned. Robbie's body was still smoking, he smelled of gasoline, his eyes were completely white, his skin was melting off of his body, he was naked, and his eyelids, lips, hair, and genitals were burned off. Currier noticed smoke coming from the woods, and he ran down the trail to make sure the fire was no longer burning. Currier testified that he found the burned area along the trail about 100 yards from the street. A small tree had been burned, the ground was saturated with gasoline, and the smell of gas filled the air. He also noticed small burned areas and clothing scattered down the trail that showed Robbie's path out of the woods as he tripped, fell, and ran into trees in an effort to get back home.

According to Currier and the Thomasons, Robbie did not appear to be in any pain as he sat calmly on the hot asphalt. He kept saying that he couldn't see and that he was cold and thirsty. Others in the neighborhood brought water, blankets, and ice, but Chad Thomason, who is an off-shore diver, told everyone not to touch Robbie or give him anything to drink because he knew it would make things worse. By this time Colleen heard that Robbie had been burned and was with Robbie on the street. Everyone was asking Robbie what happened—was it an accident? And who did this to him? Robbie kept saying that he didn't know, but after repeated questions, he finally said; "Rex got mad at me and threw gas in my face."

From the street, Robbie was transferred by Life Flight to Memorial Herman in Houston and then to Shriner's Burn Hospital in Galveston. Doctors at Shriner's testified that Robbie had deep, third-degree burns over 99.5 percent of his body and that he was not expected to live through the night. Once at Shriner's, Robbie was taken directly into surgery to remove all of the burned skin on his body, and the process of replacing his skin with both cadaver and lab-grown skin immediately began. The only portion of Robbie's body that was not burned was a small, quarter sized spot on the bottom of his right foot. Doctors took very thin scrapings of healthy skin from that area and re-grew thousands of pieces of skin to patch together new skin for the boy, and over the next 12 years, he endured 200-plus surgeries and thousands of procedures.

During the original investigation, detectives were unfortunately not called out to the scene until the next day. They knew from interviews with people in the neighborhood that Robbie said a boy named Rex had burned him. Detectives spoke with Rex Taylor, a teenage boy who lived on Robbie's street. Rex told detectives that at the time Robbie was burned, he was swimming in the San Jacinto River with three of his friends. He stated that because he was being named as Robbie's attacker, one of the parents came and got them and brought them back home to speak with officers. Rex and all of

Robbie and his mother, Colleen, at Shriner's Hospital in Galveston

Robbie with his cat

the teenagers who were with him were completely cooperative during the entire investigation, and they each testified at Collins's juvenile certification hearing and at the trial. All of them stayed in touch with Robbie up until his death and it was clear to everyone, including Colleen, that Rex had nothing to do with setting Robbie on fire. Collins, on the other hand, told anyone that would listen, including news reporters, specific details about how he thought Rex had burned Robbie and that "Rex told everyone he was swimming, but I know that he had the time to do it."

Detectives turned their attention toward Collins after they saw him on television talking to reporters about the case. Collins gave impromptu interviews on the street to two different news stations about what he saw and what he had done the day Robbie was burned. While speaking with the media, he gave details about the crime that only someone at the scene would have known. He also talked about playing with gas and burning his hand, said he was having nightmares about what he had seen, and discussed how long it took Robbie to make it out of the woods. He noted that Robbie had fallen four times on his way out of the woods, which was consistent with what detectives and Currier saw on the trail. Detectives also learned that Collins had collected and saved pieces of Robbie's burned clothing from the trail, and Collins eventually provided them to police.

Within a few days, Detective Bruce Zenor contacted Colleen Middleton at Shriner's Hospital. Colleen stated that Robbie had told her that "Don" (Collins) had burned him. Shriner's Hospital nurses Ellen Cox Robinson and Chris Easter had also been present and heard Robbie whisper "yes," when Colleen asked him, "Did Don do this to you?" That same day detectives obtained a Juvenile Order of Apprehension from the Montgomery County Attorney's Office for Collins' arrest

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for aggravated assault. Collins was detained and spoke with detectives after being magistrated. During the interview, he admitted to being involved in Robbie's attack.

On July 31, 1998, against the advice of Dr. David Herndon, Robbie's treating physician, detectives met with Robbie and Colleen at the hospital and conducted an audio-recorded interview with Robbie. Robbie told detectives that he did not see anyone because he was ambushed. He remembered seeing paper, a jug, and dogs, and he recalled hearing a car door slam. Robbie then remembered being on fire. During the attack, Robbie stated that he recognized Collins's voice and also heard the voice of an older boy but did not recognize it. At the time of this interview, near-lethal amounts of pain and anxiety medication were being administered to the boy.

A few days later, detectives spoke with Colleen by phone. She said that Robbie told her that "Tracey," "Chris," "Don," and "Richard" were present when he was burned and that "Richard" had tied him to the tree and set him on fire. On August 7, 1998, detectives spoke with Colleen again, and she told him that Robbie told her that "Richard" had "hung" him upside down in a tree, and that "Tracy" was "choking" him with fishing wire. Colleen would later testify at trial that Richard Scoggin did in fact hang Robbie from a tree while all the kids were playing at the river, but it had happened about year before Robbie was burned.

While hospitalized, Robbie also stated that his grandmother poured hot coffee on him and that their dog slammed the back door causing the house to blow up, which burned him. It was clear that Robbie was hallucinating and that his mental faculties were impaired from the trauma and large amounts of medication. (At trial, Dr. Herndon was able to explain Robbie's mental state when these statements were made and why they were inconsistent. He testified that for months after he was injured, Robbie was having night terrors, extreme anxiety, and hallucinations, and that his heart rate and metabolism were the equivalent of a long-distance runner who had just run a race.)

Meanwhile, Collins was in juvenile detention. Detention officers began contacting detectives on the case to say that other juveniles in the facility were reporting that Collins was making horrific statements to them about what he had done to Robbie. Three juveniles came forward and said that Collins would get mad at other kids and threaten to burn them like he burned "that other kid." Collins told one of them that he burned Robbie because he and his uncle raped Robbie, and they were afraid he was going to tell his parents. Collins also told the same young man that he thought it was funny how Robbie's eyes looked after he set him on fire—like they were going to pop out of his head.

Collins was released after spending six months in juvenile detention awaiting trial, but in January 2000, the Montgomery County Attorney's Office dismissed the case against him. Authorities there believed that his statement was inadmissible because detectives did not follow the correct legal procedure while taking it. Prosecutors were also concerned that Robbie had made inconsistent statements to law enforcement about who burned him, and they chalked up Collins's statements while in juvenile detention to simple teenage bragging and trying to seem tough to all the other kids.

Despite the Middleton family's efforts to reopen the case and continue the investigation, it sat cold until they enlisted the help of Craig Sico, a plaintiff's attorney from Corpus Christi, in 2010. Sico helped them file a lawsuit against Collins in an effort to get a copy of the offense report, just so they could learn what work had been done on the case. Sico's only goal in filing a civil suit against Collins was to breathe life back into the criminal case. He was able to obtain the case file from the 1998 investigation, and he took depositions from one of the responding officers, both of Robbie's treating physicians, and two nurses who treated Robbie. Sico also took a videotaped deposition from Robbie—a mere 17 days before he died, as it turned out. During the deposition Robbie testified that Collins poured gasoline on him and lit him on fire. He also stated that approximately two weeks prior to being burned, Collins had sexually assaulted him.

While the civil suit was pending, Collins was serving a prison sentence for failing to register as a sex offender.[4] In December 2011, the civil trial was held in Fayette County, where the Middletons were living at the time. Collins did not appear at the trial. After hearing the testimony, which consisted of videotaped depositions, the jury awarded the Middle-

ton family over $150 billion in damages. This remains the largest civil verdict ever awarded in United States history.[5] After the civil trial, the Montgomery County Sheriff's Office and the County Attorney's Office reopened the criminal investigation, which ultimately led to filing a Petition for Discretionary Transfer on September 16, 2013. At the time, Don Collins was 28 years old.


Collins's booking photo

Judge Kathleen Hamilton in the 359th District Court of Montgomery County heard the petition; Mark Brumberger and Amanda Hill with the Montgomery County Attorney's Office handled the certification hearing. They presented witnesses who testified regarding the admissibility of Collins' statement, about what Collins told them he did to Robbie, causation of Robbie's death, and the investigation. The central legal issues that Mark and Amanda had to deal with were whether Collins could be certified as an adult for capital murder or murder, whether the State showed due diligence in its investigation, and whether the State had probable cause to prosecute Collins prior to his 18th birthday. Collins was certified to stand trial as an adult, and the case was transferred to the DA's Office.

Transfer to Galveston

In 1998 this case was covered extensively by the media in Montgomery County and the surrounding areas. News crews camped out 24 hours a day in the neighborhood where Robbie and Collins lived and tracked the moves of the detectives on the case, including following them to their homes and anywhere they drove. The media again became involved in the case when the civil case was filed and when the certification hearing was heard. We expected the defense to file a motion to transfer venue due to the media coverage, which they did. Judge Hamilton presided over Collins's trial, and after a hearing on the defense's motion to transfer venue, she decided to move the case to Galveston County.[6]

Putting on this type of case in another jurisdiction created a logistical nightmare. Every investigator in our office was on call in case we needed witnesses transported, and we had to coordinate housing and transportation for all of us, our staff, and more than 40 witnesses. Most of our witnesses were very low-income, did not want to miss work, did not have transportation, and did not have money to spend on food and gas while out of town. Our victim-witness coordinators, Danielle Murray and Ilda Rupert, were amazing and did an incredible job of coordinating all of the witnesses and their needs. DA Investigator Rico Cano was by our side during the entire trial and spent two weeks away from his family to ensure we had everything we needed.

Additionally, 10 of our witnesses were incarcerated in TDCJ. Because we did not want these witnesses to be labeled "snitches" by other TDCJ inmates, we did not want to bench warrant them through the normal procedures. We coordinated with TDCJ-OIG and scheduled to have all 10 inmates available for testimony on one day. Two days before, all 10 inmates were picked up from TDCJ units all over the state and transported to Montgomery County Jail, where they spent the night. They were then transported by the Montgomery County Sheriff's Office to the Galveston County Jail the night before they were to testify. After they testified, they were transported directly back to their units, or if we thought their safety was at issue, they were transported to a different unit. As you can imagine, this could not have been accomplished without a coordinated effort between TDCJ-OIG, the Montgomery County Sheriff's Office, the Montgomery County District Attorney's Office, and the Galveston County Sheriff's Office.

Because there was still some publicity involved with the trial even with the transfer to Galveston County, we began voir dire with a questionnaire. Galveston County issued summons to 300 potential jurors. Potential juror excuses were heard by Judge Hamilton, and we were left with 191 potential jurors. Rob Freyer handled voir dire. He had to address many different issues, such as the fact that the crime occurred 17 years ago, some witnesses had criminal convictions, some witnesses were children when the offense occurred but were now adults, lost and destroyed evidence, a 30-year-old defendant who was a juvenile at the time he committed the offense, difficulties in the investigation of the case, the horrific nature of the offense, causation for Robbie's death 12 years after the offense, and a hybrid range of punishment.[7]

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Our case in chief

Because of the extensive and complicated nature of the case, we knew that it should not be tried in a linear, timeline fashion. We opted to begin with the medical testimony regarding Robbie's injuries, mental state, and cause of death. We also wanted Dr. Herndon, who has been the chief of staff at Shriner's since 1981, who treats burned children from all over the world, who does speaking engagements all over the world, and who developed the procedures that prolonged Robbie's life, to be our first witness. Also, because he had treated Robbie for so long, he talked about him like he was his son. Dr. Herndon not only testified about the extraordinary and amazing things he and other doctors did to extend Robbie's life, but he was also able to talk about Robbie's mental state while his body was on fire, immediately after being burned, and during the months afterwards.

Because Robbie survived for 12 years after the attack, causation was a central issue at trial. Dr. Herndon testified about the cancer that Robbie developed from the child's many skin grafts—they prolonged his life and eventually caused his death. Dr. Herndon's expert opinion was that there was no doubt in his mind that the cancer was a direct result of Robbie being burned. Dr. Robert McCauley, an expert in the field of treating and repairing burned children and Robbie's plastic surgeon and oncologist, as well as Dr. Hal Hawkins, a forensic pathologist who performed Robbie's autopsy, also testified that Robbie's death was directly caused by the burns he received 12 years earlier.

In a suppression hearing prior to trial, Judge Hamilton ruled that procedural errors occurred when Collins gave his statement to detectives, and she granted the defense's motion to suppress. The jury was never going to hear his recorded confession. Because of this, we wanted Robbie to tell the jury that Collins caused his injuries and to provide the jury with the reason why, and we did it through Robbie's videotaped deposition. His deposition was essential to our capital murder case, as it established that the murder was committed as part of a retaliation to conceal Collins's rape of Robbie. Proving that the statement was a dying declaration was essential to its admission and it was also a very contested part of the trial. Dr. Herndon and Dr. McCauley laid the predicate for its admission by testifying that when Robbie gave his civil deposition, Robbie knew that his death was imminent.[8] We also argued that because Collins set Robbie on fire to keep him from telling anyone that Collins had raped him, Robbie's deposition should be admissible under the theory of forfeiture by wrongdoing. Judge Hamilton ruled that the deposition was admissible under both theories, and jurors watched the video of Robbie, who was extremely weak and barely able to speak, testify that Collins set him on fire after sexually assaulting him a few weeks before.

Assistant District Attorneys Kelly Blackburn and Rob Freyer (in suits, far right front) with the Middleton family after Collins's trial

The jury was then presented with witnesses and evidence related to the initial investigation in 1998. This evidence included testimony from witnesses at the scene, Robbie's prior inconsistent statements about how he was injured, testimony regarding Robbie's burned clothing recovered from Collins several days after the incident, and disproving that Rex was involved. Jurors also watched the news footage of Collins speaking to reporters the day after Robbie was burned.

We then moved into the 2011 investigation with Montgomery County Sheriff Detective Tommy

Duroy, who re-interviewed all the earlier witnesses and located additional ones who were not willing to come forward in 1998. Two of those whom Duroy located were key to our case. Heather White, Collins's cousin who was 13 at the time of the incident, testified that the night of Robbie's burning, she was sleeping with Collins on the couch in the living room when he admitted that he tied Robbie to a tree with fishing wire, poured gas on him, and lit him on fire. Heather testified that when she told another family member about what Collins said to her, she was told, "The adults will handle it." Sandra Holloman, a family friend of Collins's relatives who was also teenager at the time, testified that two days after the attack she was at a party with Collins and he bragged to her that he was the one who had burned Robbie.

Next we called 12 witnesses who were in juvenile detention along with Collins in 1998, and they all testified to admissions that he made to them while in detention. We also called Michael Crawford, who was incarcerated with Collins in 2010 in the Liberty County Jail. He testified that he was talking to Collins about Collins being accused of burning Robbie, and Collins told Crawford that he was a juvenile at the time so that there was nothing that he could be prosecuted for now and that he guessed he "got away with one."

Our final witness was Collins's cousin, R.M., who was raped by Collins in 2001, when R.M. was 8 years old. R.M. testified that after the rape, Collins told him "that if you tell anyone I will burn you like I burned Robbie."

After closing arguments, the jury deliberated for approximately five hours before reaching a verdict and convicting Collins of capital murder.

Punishment

We then began the punishment phase of the trial. We called Colleen Middleton back to the stand to talk about Robbie and everything the Middleton family had gone through over the last 17 years. Then we called two other people whom Collins had raped when he was a juvenile, and we called Robbie Middleton's sister, Heather, to talk about the time when Collins stomped her kitten to death because she refused to come outside and play with him. She also testified about a time when Collins tried to molest her.

The last witness we called was Rebecca Whitlock, Robbie's physical therapist at Shriner's Hospital. She told us about how Shriner's is set up, all the things it does for burned children, and what happened to Shriner's after Hurricane Ike in 2008. After Ike hit Galveston, Shriner's contemplated shutting the hospital down, but Robbie raised money, passed out pamphlets, and testified at the Shriner's Convention in San Antonio about how Shriner's Hospital saved his life, and to this day, Shriner's is still in Galveston. Whitlock talked about how Robbie never let his burn injury define him, how he did so much over his young life to help other burned children, and how he used to sit outside grocery stores and raise money for burned children to travel to Shriner's and receive the treatment they needed. She developed a very close relationship with the boy, like everyone else at Shriner's. She put the finishing touches on the person Robbie really became and everything he meant to the people of Galveston.

The defense did not call any witnesses during the punishment phase. On the record and outside of the presence of the jury, they stated that they had spoken to members of Collins's family and even retained a "mitigation expert" to investigate any possible mitigation evidence to present; however, none was found and, in fact, testimony from those witnesses would have been detrimental to Collins's case.

The jurors deliberated punishment for about an hour before sentencing him to the maximum, 40 years in the Texas Department of Criminal Justice (TDCJ). The world is a safer place with Don Wilburn Collins locked in a prison cell. However, the sentence he received is truly lacking when compared to the unimaginable, horrific injuries Robbie suffered, the pain and suffering he endured the rest of his life, and the devastation to Robbie's family. The only silver lining to the story is that Robbie and his family became true advocates and were able to help an unknown number of burned children from all over the world by raising funds for them to travel to Shriner's Hospital. Robbie's injury and death furthered research in the type of skin cancer that he developed due to his injuries, and he became a living example that some people are truly good and their lives make this world a better place just for being in it. ❇

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Endnotes

1 Rob Freyer is the Chief Assistant District Attorney over the Major Offender's Division at the Montgomery County District Attorney's Office, and Mark Brumburger is an Assistant County Attorney for the Montgomery County Attorney's Office. In Montgomery County, the County Attorney's Office handles juvenile cases, and the District Attorney's Office handles adult felony and misdemeanor offenses. We were also assisted in prosecuting Collins by Brett Ligon, District Attorney; J.D. Lambright, County Attorney; Assistant District Attorneys Brittany Litaker, Lora Ciborowski, and Wes Lerouax; and Amanda Hill, Assistant County Attorney.

2 Padilla is currently serving a 25-year sentence in the Texas Department of Criminal Justice for aggravated robbery. He testified in the certification hearing; however, he refused to testify at trial because he did not want to be labeled a "snitch" against Collins.

3 Heather Middleton, Robbie's sister, testified that Collins stomped her kitten to death right in front of her because she would not come outside to play with him. In addition to sexually assaulting Robbie, testimony at trial established that Collins sexually assaulted two other children: R.N. when she was 6 years old, and R.M. when he was 8. Collins was charged as a juvenile with molesting R.M., and, at age 16, was given an indeterminate TYC sentence, from which he was released when he was 21 years old. Our investigation also led us to believe that Collins also sexually assaulted J.T., Collins's 4-year-old cousin. One witness also testified that "every dog in the neighborhood hated Don Collins."

4 Collins was required to register as a sex offender due to his conviction for sexually assaulting R.M. in 2001.

5 The civil trial was one of the biggest attacks the defense mounted in the criminal trial. Defense counsel continually argued that the only reason this case was going forward was because of a money-grubbing, fame-seeking civil attorney and that Craig Sico that was the puppet master behind the entire thing. We decided to not hide from the civil trial. Like every other weakness in our case, we tackled it head on, addressed it, and moved on. We spent a lot of time talking with Sico prior to the trial and getting to know him as a person. He too was concerned about seeking justice for Robbie, but he never once told us how to do our job. Sico is an extremely successful and wealthy plaintiff's attorney, but he is also a father of small children and a great family man. He spent thousands of his own dollars fighting for Robbie and never received a dime for his work. He never expected to—the Middletons have no money to pay him, and Collins was in prison with no assets. From the very beginning in opening statements, the defense tried to demonize Sico and make him out to be somebody we knew he was not. Prior to trying to introduce Robbie's video deposition, we called Sico to the stand. The jury was ready to see a slimy plaintiff's attorney, but that is not what they got. He was very down to earth, never got argumentative, did a great job explaining his reasons for filing a civil suit against Collins, and was also able to tell the jury a little bit about who Robbie was. By the time he was finished testifying, the "civil trial defense" had been put to bed and was no longer an issue.

6 Montgomery County district courts are courts of general jurisdiction. At the time, Judge Hamilton was handling all juvenile cases in addition to her civil and criminal dockets.

7 Judge Hamilton decided the range of punishment for this offense was capped at 40 years.

8 In fact, Robbie died 17 days after giving his deposition.