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

Walking the ethical line

Balancing crime victims' rights with your ethical duties as a prosecutor can be challenging, but it's the right thing to do for victims—and for your case.

By Cynthia A. Morales
Assistant District Attorney in Nueces County

A very wise, very experienced prosecutor once told me that the worst names he had ever been called—and he had been called many—had been by crime victims. As he expressed it: "They want me to fix something that no one can fix—the hole in their heart caused by the crime. And no matter what happens—indictment, conviction, sentence, even the death penalty—nothing can ever fix that hole. And I would tell them, believe it or not, I am on your side. It may not seem so, but I really am."


Cynthia Morales

This statement reflects a fundamental dilemma for most prosecutors. Our mandate to see that justice is done. But representing the State, not the victim, invariably leads to a delicate balancing act between crime victims' wishes and prosecutorial duties and an occasionally uncomfortable alliance between prosecutors and crime victims. Keeping that balance, so that you can do the best job possible as a prosecutor, can be tremendously difficult.

Ask a hundred prosecutors how one should balance the relationship with a victim and the prosecution of a case, and you will get a hundred different answers. Yet there is one fundamental step that we prosecutors could, and should, take to help both crime victims and our own prosecutions: knowing and respecting crime victims' rights, which are already set out in Texas laws and the Texas Constitution, and incorporating them into our prosecutions within the framework of our ethical duties. Most of us know that there is a crime victims' bill of rights in Texas, but we are a bit fuzzy on the details. Because there are now designated victim assistance coordinators in every prosecutorial jurisdiction in Texas given the specific duty of ensuring that victims are afforded their rights,[1] it can be tempting to think, "The victim assistance coordinator has that covered; my job is to focus on winning this case." Certainly, victim assistance coordinators do a fantastic job and inestimable work. But if we prosecutors don't personally know what rights crime victims have and don't personally make implementing those rights part of how we handle our cases, victims' rights won't be fully realized in Texas. Aside from helping prosecutors keep on the "white hat" of "doing right" that is part of our chosen profession, incorporating crime victims' rights into the prosecution of cases helps make cases stronger and helps ensures that justice is done.

The law

Under both Article I, §30 of the Texas Constitution and article 56.02 of the Code of Criminal Procedure, the two most significant pronouncements of crime victims'[2] rights in the state of Texas,[3] it is the "attorney for the state" who has the primary responsibility for ensuring and enforcing crime victims' rights in Texas. The Texas Constitution gives the "state, through its prosecuting attorney" the "right to enforce the rights of crime victims," and article

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TDCAF News

By Emily Kleine
TDCAF Development Director

Good news to report

We continue to move ahead in full swing here at the Texas District and County Attorneys Foundation. The Annual Criminal and Civil Law Update in Corpus Christi was a great opportunity for me to meet and visit with many TDCAA members. Thank you for your input and enthusiasm!

To recap some of what was shared at the Annual Update:

- **the 2006–2007 Annual Campaign** far exceeded the expected outcome: **$363,988.58 was raised**;
- **AT&T** has graciously funded TDCAA's website renovation, which is now underway;
- **Anheuser-Busch Companies, Inc.** has generously agreed to underwrite our 2008 DWI training summit, Guarding Texas Roadways (read more about it below); and
- fundraising efforts are currently underway to fund a new appellate attorney position, victim services coordinator position, continued educational and training efforts, and general operating costs.

DWI training summit

TDCAA members have long asked for DWI training for prosecutors and law enforcement. The foundation has made it possible to bring you efficient and valuable instruction, thanks to funding from Anheuser-Busch Companies, Inc. **Guarding Texas Roadways** is a training summit in which four expert speakers will be broadcast via satellite on March 7, 2008, from Anheuser-Busch's headquarters in St. Louis. Prosecutors, police officers, and judges are invited to attend the training at 36 locations throughout the state (all Anheuser-Busch distributorships). Four hours of MCLE and TCLEOSE will be offered, and it is **free**. Registration will be online in December, and brochures will be mailed in the coming months. Don't miss this opportunity!

TDCAF Advisory Committee

The TDCAF Advisory Committee will meet in early November to lay out a precise action plan and goals for 2008. We welcome any suggestions you may have to enhance our development efforts. Remember, this foundation was created with the sole purpose to better serve you, our TDCAA members. Please call me at

Recent Gifts

Clint Allen, Cass County Criminal District Attorney
Richard Anderson, formerly of the Harris County District Attorney's Office, *in honor of Carol Vance*
Craig Caldwell, Cherokee County Attorney
Jefferson Davis, Nacogdoches County Attorney
Mary Anne Haren Gallagher, Dallas County District Attorney's Office, *in memory of Mark Tolle*
Amy and Pete Inman, *in memory of Judge Sam Johnson*

Corrections from the list of donors in the September/October 2007 issue

Henry Garza's contribution was made *in memory of Steve Hughes*
Bert Graham's contribution was made *in honor of Ted Busch*
Karen Morris' contribution was made *in memory of Tom B. Morris*
We apologize for these errors.

TEXAS DISTRICT AND COUNTY ATTORNEYS FOUNDATION

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Sarah Wolf, Editor/Photographer

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the Executive Director's Report

By Rob Kepple
TDCAA Executive Director

TDCAA members elect the 2008 leadership

In 2008, we will enjoy the leadership of **David Williams** (CA in San Saba) as our Chairman of the Board, and **Bill Turner** (DA in Bryan) as our President. In addition, the membership elected new executive committee members and regional directors: **Barry Macha** (CDA in Wichita Falls), President-Elect; **Scott Brumley** (CA in Amarillo) Secretary-Treasurer; **Nelson Barnes** (ADA in Belton), Assistant at Large; **Cheryll Mabray** (CA in Llano), Region 3 Director; **Chuck Rosenthal** (DA in Houston), Region 5 Director; **Elmer Beckworth** (DA in Rusk), Region 6 Director; and **Elizabeth Murray-Kolb** (CA in Seguin), Region 8 Director.

Congratulations, and thanks for your willingness to serve other prosecutors through the association.

Our members' generosity

At this year's Annual, a call for help was answered. **Emily Asel**, a new prosecutor at the Harris County District Attorney's Office, was recently diagnosed with a brain tumor. She is expecting her first child and has not been with Harris County long enough to acquire health insurance. Conference attendees pitched in and raised $4,356 to assist her and her family during this difficult time. Thank you for your compassion and your generosity.

The luckiest innocent guy in the world?

A few weeks ago while driving to work, I heard a radio broadcast about Ronald Gene Taylor, who had been released from prison in October after a DNA test demonstrated that he had not committed the sexual assault he was tried for in Houston in 1993. What startled me was a quote from someone at an innocence group praising the Harris County DA's Office for its work in freeing Taylor. I later learned that this particular case was one in which the Houston PD crime lab misinterpreted the DNA test results. The DA's office agreed to get the proper testing done, and it was discovered that Taylor did not, in fact, commit the crime of which he was convicted. In fact, Harris County District Attorney **Chuck Rosenthal** appeared in court and apologized to Taylor for the mistake. As you can imagine, the news media was all over this, with plenty of film footage of happy family reunions.

But the media always seems to leave out the interesting twists. You see, Taylor, a/k/a Bobby Don Lathon, was on parole for burglary and delivery of a controlled substance back when this case was tried, and blue warrants were pending to return him to the pen. In addition, other aggravated kidnapping and sexual assault charges were also pending, and they were dropped when the State secured a 60-year sentence in the sexual assault case (the one at the center of the innocence claims). And as it turns out, Taylor didn't discharge his sentences for the burglary and delivery cases until July 2007, so he actually did about three months of time purely on the bad case, not 14 years as the media is trumpeting.

Icing on the cake? The statute of limitations has now run on the aggravated kidnapping and sexual assault charges that were pending at the time of Taylor's wrongful conviction, so the State can't try him on those charges.

I say none of this to diminish the fact that the State convicted the wrong guy in this sexual assault. I say it to clarify the situation and fill our members in on the rest of the story. And it's to Chuck Rosenthal's credit that he kept this information to himself during the hubbub over Taylor's release.

And there are some solid lessons here. First, it's a good reminder that prosecutors need to get it right the first time. Second, Harris County prosecutors handled the situation professionally, with a thorough review and a straight-up apology for a mistake.

But I still can't help thinking to myself that Taylor is the luckiest innocent guy to date.

A Hill County Wrangler hangs it up

Ron Sutton, the 198th District Attorney out of Junction, has announced that he will retire at the end of his term next year. Ron will end his work as the DA for Kerr, Kimble, Mason, McCulloch, and Menard Counties after 32 years, and we are sure going to miss his steady hand.

Ron has had a storied career, and a number of movies have been made about his cases, including the murdering nurse Genene Jones and the Ellebracht slave ranch.

But Ron is truly a renaissance man, and with his many talents I am pretty sure he won't be bored. After all, he is a gardener, fisherman, pastry chef, disk jockey, and musician. Well, it may have been awhile since he played with the Hill Country Wranglers, but I am hopeful that next time I go to the legendary London Hall, maybe he'll be playing. Thanks, Ron, and good luck!

Speaking of big-screen glory

With all the horror movies out there today, you should have expected this. You might recall that a few years ago **Richard Alpert**, an assistant in Fort Worth, tried a woman who hit a pedestrian with her car, then drove home and parked in her garage—with the poor guy alive but lodged firmly in the windshield. The woman and her co-conspirators refused to help the man, and he later died of his injuries. They attempted to cover up the crime, and she eventually ended up in the pen for 50 years.

The movie *Stuck* has recently been screened at the Toronto Film Festival. Based on this case, with the crime scene moved to Rhode Island and some additional plot twists, the movie was filmed without the approval or contributions of any of the Texas families or others involved. Only time will tell if this nugget of bad taste gets picked up for distribution, but it seems unlikely. As one movie critic observed, this situation "shows that the truth is generally too messy to exploit in a marketable movie."

A great coming-out party

Many of you learned for the first time at the Annual Criminal and Civil Law Conference in Corpus Christi that **Judy Bellsnyder**, one of our terrific meeting planners for the last 10 years, retired in August. She did a great job of making sure that your needs were met at our conferences, and we will sure miss her.

But our new dynamic duo, **Ashley Myers** and **Jennifer Matney**, took the reins with a month to go and pulled off one of the smoothest Annuals we have ever had. I want to thank them and the entire TDCAA staff, who worked together as one to deliver a great training event.

The highlight reel is always controversial because I may praise a speaker you personally just didn't care for. For instance, we got overwhelmingly positive reviews of **Richard Wintory**'s keynote address on prosecutor independence. But a handful of folks thought it was a waste of time and wanted to get to the meat and potatoes right away. We will continue to do our best to balance our presentations so everyone gets what they need, but with that said, we had some great review of some other speakers.

Major George Brauchler from Golden, Colorado, on cross examination, got high praise. And attendees loved the new misdemeanor track. Ironically enough, one of the most popular speakers was a member of the loyal opposition, **David Gonzales**, a defense attorney from Austin, who spent some time talking about DWI laws from the defense perspective. Your reviews of his comments were very positive, and y'all liked the idea of talking openly about our agreements and disagreements with the defense bar. We hope to continue developing a meaningful dialogue in areas that benefit both sides of the criminal bar.

Back to Padre in 2010

For those of you who were saddened that South Padre Island slipped from our Annual Update rotation for a year, cheer up. Padre is back on the agenda, this time for September 22-24, 2010. It's never too early to mark your calendar for an annual conference (as those of you who are calling for hotel rooms in Galveston for 2008 are just now finding out).

A real Texas prosecutor

If you were at the Annual conference in Corpus, you got to see some of our award winners up close and personal. But one could not attend. That's because while we were enjoying the conference, the winner of the C. Chris Marshall Award for contributions to the association in training and education was busy doing what she does so well: trying a gnarly, high-profile capital murder case as a district attorney pro-tem.

I am very proud to tell you that Assistant Attorney General **Lisa Tanner** is the 2007 C. Chris Marshall Award recipient. Lisa has been a great contributor to our training programs and a real force in Texas prosecution for many years. During the conference she was picking a jury in the notorious Kentucky

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Fried Chicken murder case out of Kilgore. It's one of those cold cases with enough twists, turns, false leads, and different suspects to make any DA want to scream, "Special prosecutor!" And of course, Lisa has stepped up to the plate.

We hope that Lisa is done in time to enjoy our company for a formal presentation of the award at the Elected Prosecutor Conference in Galveston in December. Well done, Lisa, and thank you for all you do!

Welcome

Carl Dorrough took the helm as the interim DA in Gregg County after **Bill Jennings**, the DA since 1996, retired from the post. Carl was the first assistant in Longview and will formally seek appointment to the post. Bill ran a good shop during his tenure, and y'all can expect more of the same from Carl.

Go-to Texas prosecutors

In October the *Texas Lawyer* magazine released its shiny coffee-table publication called "The Go-To Guide: Texas' Top Notch Lawyers," which features a handful of Texas prosecutors among the deep-rug suits. Congratulations to **Richard Alpert** (ACDA in Fort Worth), **Dick Baker** (AUSA in the Northern District of Texas), **Andy Beach** (ACDA in Dallas), **John Bradley** (DA in Georgetown), and **Kelly Seigler** (ADA in Houston) for their recognition in the state-wide publication!

Award winners from this year's Annual Update

Seven TDCAA members were given Professional Victim Assistance Certificates. Pictured at top are Rebecca Ureta, Peggy Parrott, Willie Mae Williams, and Molly Thurman. Not pictured are Linda Bigham, Laura Flores, and Patricia Sursely.

Six people received Professional Criminal Investigator (PCI) awards too. Pictured above are Michael L. Harris, David Castillo, and Joe D. Commander. Not pictured are Delbert L. Holloman, Patrick E. Smith, and Ronald Keaton.

Chuck Rosenthal, the DA in Harris County, was named Prosecutor of the Year. Rosenthal was honored for his devotion to seeking justice and for his efforts in launching the Texas District and County Attorneys Foundation. He is pictured at left with Bill Turner, the DA in Bryan. "We are recognizing Chuck not for trying a single headline-making case, but rather for his relentless search for truth in the prosecution of criminal cases," said Turner, who nominated his Houston colleague for the award. "In his 30 years as an assistant and elected prosecutor, Chuck has developed a reputation for being fearless when it comes to fighting for the rights of victims and has never shied away from the tough cases."

And Riley Shaw, an assistant CDA in Tarrant County, was honored with the Oscar Sherell Award for his hard work at the legislature earlier this year. He is pictured at bottom left with Shannon Edmonds, TDCAA's director of government relations. "It was a hard-fought session this year, and we would not have made any headway without the help of TDCAA," Shaw says. "I am honored to receive this award and would like to thank my boss, Tim Curry, for the opportunity to try and make a difference for all prosecutors around the state."

Not pictured but just as important, Lisa Tanner, an assistant attorney general, was named the C. Chris Marshall Award winner, which honors the prosecutor who has served the association through teaching and training. (Ms. Tanner could not attend the award ceremony because she was in the middle of trying the Kentucky Fried Chicken murder cases.) Congratulations to all three winners!

Hotel information for the 2008 Annual Update in Galveston

Well, we've hardly put one Annual conference in the history books, and we already need to pass along important information about the next one.

TDCAA's room block at the San Luis, which is the host hotel for the 2008 Annual Update in Galveston, is already sold out. (It was sold out Monday, Oct. 1, if you can believe it.)

If you need to make room reservations for next year, the Hilton has a few overflow rooms available; its phone number is 409/744-5000. You can also try the Hotel Galvez at 409/765-7721. Or, you can keep checking availability at the San Luis because it's likely that there will be cancellations and rooms will open up between now and next September.

We will post information about additional overflow rooms at other hotels as it becomes available, so please keep an eye on our website, www.tdcaa.com.

Photos from the Annual Criminal & Civil Law Update


HOMELAND SECURITY

More photos from the Annual

Thanks to John Roppolo, chief investigator in the Hays County Criminal District Attorney's Office for sharing these phototos.

TDCAA Book Order Form

Name **Office**

Shipping address (no P.O. boxes)

City **ZIP** **Phone**

Purchase order # (state offices only)

Visa or Mastercard # **Expiration date**

NEW! **Annotated Criminal Laws of Texas 2007–09** (bound)		65.00	
10–24 copies		59.00 ea.	
25 or more copies		56.00 ea.	
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Guide to Report Writing (2001)		5.00	
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File folders (with printed outline for case notes; 100 per box, 300 per case)		43.00 per box (legal)	
manilla: letter or legal (circle one)		60.00 per box (letter)	
blue or green: legal only (circle one)		56.00 per box	
Victim brochures (generic or personalized)		call for prices	
NEW! **Directory of Texas Prosecutors & Staff** (2007–09 update)		20.00	

Shipping 1 item: $9 • 2–3 items: $13 • 4–5 items: $16 • 6–9 items: $20 • 10+ items: call for cost • (folders cost $6/100)

Tax (include shipping; 8.25%; write "exempt" if tax-exempt)

TOTAL

Continued from the front cover

56.02 more pointedly says that the "office of the attorney representing the state [along with other law enforcement agencies] … shall ensure to the extent practicable that a victim … is accorded the rights granted"[4] in the article. Most of the notification provisions in chapter 56 specifically require that "the attorney representing the state," "the attorney for the state," or "the district attorney's office" provide the required notice, information or explanation,[5] and the victim has the specific right to have his or her victim impact statement considered "by the attorney representing the state in entering into the plea bargain agreement."[6]

Article 56.04, which establishes victim assistance coordinators, says that the duty of a victim assistance coordinator is to ensure that victims' rights are afforded, but its language, especially in light of the language in other provisions in Chapter 56, can't be read as creating an exclusive duty; indeed, the same statute requires the victim assistance coordinator to work closely with various entities, including prosecuting attorneys, to carry out that duty.[7] But even if the letter of the law for most victims' rights could be carried out by a victim assistance coordinator sending out materials and notices and explaining matters to victims, the responsibility under the law is clearly a collective one of a prosecutor's office.

The practical reality

Though a prosecutor's office generally has to rely on the hard work of its victim assistance coordinators for initial and primary contact with victims, some victims' rights are best, or even must be (such as in considering the victim impact statement in plea bargaining) carried out by prosecutors themselves.[8] Some victims' rights, which are incorporated in other sections of the Code of Criminal Procedure apart from article 56.02—such as the right of certain victims to use a pseudonym in court documents,[9] the right for victims to be present in the courtroom during proceedings despite "the Rule" (absent certain findings from the judge),[10] the opportunity (at the prosecutor's discretion) to provide victim character evidence and victim impact testimony at punishment,[11] and the right to present a statement after sentencing[12]—all directly affect the conduct and proceedings of a criminal case and would fall squarely in the province of the prosecuting attorney. A completed victim impact statement[13] could affect a trial judge's decision on an open plea, the terms of a plea bargain agreement (e.g., regarding restitution), or the conditions of probation. Notifying a victim of his pertinent rights applicable after the trial, such as the right to be notified of community supervision modification, revocation, and termination hearings[14] and the right to be notified, be present, and provide a written or live statement at parole release hearings,[15] could have a very real impact on the outcome of a community supervision case or release on parole. The exercise of a victim's rights—before, during, and after the trial of a case—can have a direct and substantial effect on whether justice is achieved.

On a more fundamental level, it just makes sense for prosecutors to ensure that the victims in their cases are afforded their rights. If you have a victim who is informed and cooperative, your case can become better and stronger. Victims who feel included are generally more cooperative and helpful to your present case and in any cases they are involved with in the future.[16] For many victims, the trial prosecutor is the face of the criminal justice system; how victims are treated and the opportunities for them to participate will affect their attitude toward the justice system well into the future, as well as their healing from the crime.[17] Even something as simple as keeping in touch with a victim can make a tremendous difference. Making sure victims understand the system, their role, and your role, can smooth the relationship.

Even when a case is lost, if the victim receives an explanation of the process, is informed of settings and the progress, is given a chance to be present and involved to the extent consistent with the law and good prosecution, and is treated with understanding, respect, and courtesy, it is likely that these small steps will make the difference between a victim who comes out of the experience embittered and one who is pained but faces the result with calm resolution. Every step along the way, your treatment of the victim is going to affect your case.

For practical reasons then, as well as the responsibility placed collectively by the Texas Constitution and Chapter 56 on "the office of the attorney for the state," being aware and respectful of crime victims' rights is the correct thing to do.

The ethical issues

Still, carefully implement victims' rights within the context of the law and the special role and responsibilities of a prosecutor.[18] A prosecutor represents the State, not the victim.[19] Victims do not become a party to a criminal proceeding,[20] and prosecutors cannot claim to represent them at trial,[21] nor advocate for the jury to assess the punishment that the victim would want imposed.[22]

In fact, a prosecutor must deal fairly and justly with a person accused, "no matter how repulsive" the defendant.[23] Prosecutors have specific constitutional duties to defendants, such as the duty to disclose material mitigating, exculpatory, and impeaching evidence; to preserve and make available any favorable material physical evidence not otherwise available to the defendant; not knowingly introduce false testimony; and to correct any false testimony of which the prosecutor becomes aware.[24]

In this context, it is clear that victims' rights were provided to allow victims "the means to have access to and provide input into the criminal justice process—not to control it."[25] Both the constitutional and statutory Texas crime victims' bill of rights specifically say that the victim does not have standing to participate as a party in a criminal proceeding nor contest the disposition of a charge.[26] A crime victim's rights are to be effectuated "within the criminal justice system" rather than "superseding or overriding it."[27]

Nevertheless, prosecutors do have ethical responsibilities—aside from their statutory duties under chapter 56—to crime victims. Although prosecutors clearly do not owe victims the duties outlined for clients in the disciplinary rules,[28] victims would fall under the provisions of Rules of Disciplinary Conduct 4.01 (Truthfulness in Statements to Others) and 4.03 (Dealing With Unrepresented Persons).[29] While most prosecutors would readily apply rule 4.01 (which would prohibit lying to the victim), rule 4.03 presents a duty most might not be aware of: to correct any misunderstanding an unrepresented person might have about your role in the case. In the context of a prosecution, this rule imposes an ethical responsibility to make sure the victim understands the prosecutor's role, particularly the fact that the prosecutor is not representing the victim. To suggest or imply otherwise to the victim would be a violation of both rule 4.01 and 4.03. Similarly, to mislead a victim about a material fact or law would be a violation of rule 4.01, even if done in an effort to advance your case in the way you think best.

Other rules of disciplinary conduct could also affect a prosecutor's relationship with a victim.[30] Depending on the nature of your case, you may have to discuss some of the ethical constraints placed on you by these rules with your victim.

Ultimately, the key principle to ethically dealing with victims and ensuring the provision of a victim's rights is making certain that victims understand the role, rights, and responsibilities of prosecutor and victim. With that understanding in place, you can move forward to assist victims in ensuring their rights, within the proper context, while still retaining your own necessary independence to handle the case as justice requires.

Incorporating crime victims' rights into prosecution

The best means to incorporate crime victims' rights into the prosecution of criminal cases will vary from jurisdiction to jurisdiction and prosecutor to prosecutor, but here are some suggestions on how prosecutors and prosecutors' offices might be able to better ensure that crime victims' rights are being recognized and applied.

Prosecutors' offices.

Training. Specifically focused training in crime victims' rights and prosecutors' responsibilities for them, as well as how to do so effectively and ethically, is important for a new prosecutor's education, but refresher courses are also needed for experienced prosecutors. Both the Crime Victims Services Division of the Office of the Attorney General (www.oag.state.tx.us/victims/victims .shtml) and the Victim Services Division of the Texas Department of Criminal Justice (www.tdcj.state.tx.us/victim/victim-home.htm), which houses the Texas Crime Victims Clearinghouse, can provide resources and even conduct training for prosecutors. The Texas District and County Attorneys Association has also included crime victims' rights training for prosecutors in some seminars.

Office policies. An office policy outlining each position's relative responsibility

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is extremely helpful in establishing the responsibilities of the victim assistance coordinator, trial prosecutor, and appellate prosecutor. Prosecutors often have more direct access and information about what is going on in a case than victim assistance coordinators. Sometimes in smaller offices where the victim assistance coordinator has other office duties, the prosecutor may actually have more direct contract with the victim. In larger jurisdictions, it may not generally be feasible for prosecutors to have much contact with most victims, but there may be a few simple actions (such as relaying information to VACs) that would result in better compliance with crime victims' rights. Every jurisdiction's needs and solutions will be different. What is expected in terms of interaction and coordination of the VAC and prosecutor in the shared responsibility to ensure victims' rights in your jurisdiction? How can victims' rights best be ensured by your office as a whole? Establishing specific policies and procedures regarding roles and interaction, and educating staff about how prosecutors and VACs can work as a team, can go a long way in helping an office smoothly and effectively protect victims' rights.[31]

Individuals.

Educate yourself. Whether or not your office offers specific training or you attend a training on crime victims' rights, educate yourself. Read the law. Learn your office policy. Talk to your victim assistance coordinator.

Develop a personal plan. Many trial prosecutors have a trial checklist they use in every case to make sure that important matters are taken care of as the case is prepared for trial, a plea, or another resolution. The checklist would be a good place to incorporate victim's rights to the extent possible given your jurisdiction, the operation of your victim assistance coordinator's office, and your own caseload. Victims' rights could be added to an existing sequential checklist (e.g., various rights listed under "pre-arraignment," "trial preparation," "trial," "post trial," as appropriate), in separate thematic section ("Victim's notifications/issues") or in another manner suitable to the checklist you already have. Some things that could be added to a checklist:

- Make sure the victim has been contacted. Or send a personal letter in every injury case (or even every case) to the victim inviting cooperation in the case and informing the victim that he has rights as a crime victim.
- Talk to the victim about his rights during the initial interview and make sure that he understood the information from the victim assistance coordinator. Some people are too shy to say that they just don't understand the written materials or the role of a victim assistance coordinator, and they trust only information "directly from the attorney."
- Consider whether certain specific victims' rights or protections (e.g., bond conditions, AIDS testing, use of pseudonym, etc.) are applicable to a case and take necessary steps where appropriate to enforce them.
- Check to see that a victim impact statement has been filed, and if not, follow up directly with the victim and emphasize the importance of a VIS on your case and in the future. Because most victim notifications utilize the information provided in the VIS, a victim who wants notice but fails to fill out a VIS will risk not being notified. Ask the victim to complete one, and check again before the plea or trial to make sure one has been turned in.
- Make sure the victim understands—and has ongoing explanations as needed—the trial and plea bargain process, has provided contact information, and is getting notified (whether by you or the victim assistance coordinator) of important dates and court settings as well as important case decisions and their consequences.
- Explain to the victim how to exercise relevant and important rights during and after trial, and help the victim exercise those rights where you can (e.g., presence in court, post-sentence statement). Make sure actions which the law specifically requires of a prosecutor related to victims' rights[32] are taken.
- Ensure that the victim understands his role in the criminal justice system as well as yours. This point is critical to fulfilling your responsibilities as a prosecutor and minimizes any misunderstandings or hurt feelings that arise from a victim thinking that you are "his attorney."
- Work with your victim assistance coordinator. Working in tandem with your VAC and facilitating your victim's cooperation with the VAC is probably the best thing that you can do to ensure that your victim's rights are provided. Walk the victim over to the coordinator's office if need be. Don't assume your victim is being cooperative already, and don't assume your coordinator can do it all alone (though yes, they can work miracles sometimes!). Helping your VAC help your victim can help you win your case.

Conclusion

As prosecutors, our commitment to crime victims' rights should be an important part of our professional dedication to seeing that justice is done. Making the effort to educate ourselves about crime victims' rights and our own ethical and legal responsibilities, and committing ourselves to incorporating crime victims' rights into our prosecutions, will make us more ethical—and more effective—prosecutors.

Endnotes

1 Tex. Code Crim. Proc. art. 56.04(b).

2 "Victim," for the purposes of crime victims' rights under chapter 56 of the Code of Criminal Procedure and article I, §30 of the Texas Constitution, is defined as a victim of the offense of sexual assault, kidnapping, aggravated robbery, or injury to a child, elderly individual, or disabled individual or who has suffered bodily injury or death as a result of the criminal conduct of another. Tex. Code Crim. Proc. art. 56.01(3); Tex. Const. art. I, §30(c). Most victims' rights are extended to a close relative of a deceased victim or the guardian of a victim. See Tex. Code Crim. Proc. art. 56.01(1), (2) and art. 56.02 as well as Tex. Code Crim. Proc. art. 36.03 and art. 42.03(1)(b).

3 The Texas Legislature passed the Crime Victims' Bill of Rights in 1985, codified in chapter 56 of the Code of Criminal Procedure, with the primary listing of rights being in article 56.02 ("Crime Victims' Rights"). This article generally provided the right to be protected, to be informed, to be notified, to be present, and to provide input. In 1989, crime victims' rights became part of the state constitution with the adoption of article I, §30. Crime victims rights are also recognized in the Family Code for victims of juvenile offenders, see Tex. Fam. Code §§57.001-008, and in the probation and parole proceedings context. See Tex. Gov't Code § 76.016 and §§508.117, 508.153, 508.190 and 508.191. Other sections of the Code of Criminal Procedure also help enforce and protect victims' rights.

4 Art. I, §30; Tex. Code Crim. Proc. art. 56.02(c). When article 56.02 was originally adopted, the language of section (c) read, "the district attorney's office shall ensure . . .". Act of May 16, 1985, 69th Leg. R.S., ch. 588, §1, 1985 Tex. Gen. Laws 2217, 2218, and the bill analysis for the enacting legislation states that "The district attorney's office would have to safeguard these rights." House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 235, 69th Leg. R.S. (1985), located in *State ex. rel. Hilbig v. McDonald*, 839 S.W.2d 854, 861, appendix B (Tex. App.—San Antonio 1992, orig. proceeding). The current language, which expanded the responsibility of ensuring victims' rights to include "the sheriff, the police, and other law enforcement agencies," was added in 1989. Act of May 28, 1989, 71st R.S., ch. 966, §1, 1989 Tex. Gen. Law 4087, 4087.

5 See Tex. Code Crim. Proc. art. 56.02(a)(3)(A) (right to notice of court proceedings, including appellate proceedings, and including cancellations or rescheduling); (a)(4) (right to be informed concerning general procedures in the criminal justice system, including general procedures in guilty plea negotiations and arrangements, restitution, and the appeals and parole process); (a)(9) (right to the prompt return of property if held by the attorney for the state); (a)(10) (the right to have the attorney for the state notify the victim's employer, upon request, of the victim's cooperation and testimony if the victim has to be absent from work); (a)(13)(A)(right to have the victim impact statement considered "by the attorney representing the state . . . before sentencing or before a plea bargain agreement is accepted"); art. 56.08 (notification of rights by "the attorney representing the state", including a statement that the victim impact statement "will be considered by the attorney representing the state in entering into the plea bargain agreement); and art. 56.11(g)(requiring the attorney for the state to provide notice to the victim [and certain witnesses] of the right to notice of release or escape of a defendant in certain cases "not later than immediately following the conviction"); Tex. Code Crim. Proc. art 56 .08(a), (b), (d), and (e) and Tex. Code Crim. Proc. Art. 56.11(g).

6 See Tex. Code Crim. Proc. art. 56.08(e)(1) and art. 56.02(a)(13)(A).

7 Tex. Code Crim. Proc. art. 56.04(b).

8 E.g., Tex. Code Crim. Proc. art. 56.08(e)(1) and art 56.02(a)(13)(A).

9 Tex. Code Crim. Proc. art. 57.02 and art. 57B.02.

10 Tex. Code Crim. Proc. art. 36.03.

11 Tex. Code Crim. Proc. arts. 37.07, §3(a)(1) and 37.071 §2(a)(1). See *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002).

12 Tex. Code Crim. Proc. art. 42.03(b)(1).

13 Tex. Code Crim. Proc. art. 56.03.

14 Tex. Gov't Code §76.016(a).

15 Tex. Gov't Code §§ 508.117, 508.153.

16 This is well documented in various studies of crime victims and their participation in the criminal justice system. See Richard Barajas and Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 29 BAYLOR L. REV. 1, 19 (Winter 1997); Keith D. Nicholson, *Would You Like More Salt with that Wound? Post-Sentence Victim Allocution in Texas*, 26 ST. MARY'S L. J. 1103, 1117-19 (1995).

17 For example, the right to make a post-sentencing statement, far from being a "meaningless gesture," often provides a needed sense of inclusion and closure for victims. See Nikki Morton, *Cleaning Salt from the Victim's Wound: Mandamus as a Remedy for the Denial of a Victim's Right of Allocution*, 7 TEX. WESLEYAN L. REV. 89, 98-100 (Fall 2000).

18 For an in-depth discussion of the ethical considerations of the relationship between victims and prosecutors, see Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of de facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695 (Spring 2007).

19 Tex. Const. art. V, §21; Tex. Code Crim. Proc. arts. 2.01, 2.02; *Draughton v. State*, 831 S.W.2d 331, 336 (Tex. Crim. App. 1992). As noted in *Davis v. State*, a victim has "no control over what charges the State brings, and who the State charges, and when the State brings the charges . . . no authority over the disposition of the offense . . . The State may bring charges even though the [victim] declines to pursue the charges . . . refuses to testify . . . or testifies on behalf of the defendant . . . . [and a victim's] desire that charges against a defendant be dropped has no legal effect on the State's charges . It is axiomatic that a party has the authority to pursue or not pursue charges, and to resolve the charges with or without a trial. The party here [in a criminal case] is the State of Texas, not the [victim]." *Davis v. State*, 177 S.W.3d 355, 362 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

20 *Davis*, 177 S.W.3d at 362.

21 *Rougeau v. State*, 738 S.W.2d 651, 656-57 (Tex. Crim. App. 1987). The court noted that if it were to take the prosecutor's statement to the jury of repre-

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senting the victims as literally true, this would be a violation of possibly half of the code of professional responsibility. *Rougeau*, 738 S.W.2d at 657, fn.2.

22 *Torres v. State*, 92 S.W.3d 911, 921 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd); *Boyington v. State*, 738 S.W.2d 704, 708-09 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

23 *Rougeau*, 738 S.W.2d at 657, citing *Bullington v. State*, 180 S.W. 679 (1915).

24 Edward L. Wilkinson, *Legal Ethics & Texas Criminal Law: Prosecution and Defense*, p. 262, (Texas District and County Attorneys Association, 2006), discussing *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), and *Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

25 Peggy M. Tobolowsky, *Victim Participation In The Criminal Justice Process: Fifteen Years After The President's Task Force On Victims Of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 103 (Winter 1999); *State ex rel. Hilbig*, 839 S.W.2d at 859 (holding that the "Legislature intended to give victims access to the prosecutor—not the prosecutor's file").

26 Tex. Const. art. I, §30(e); Tex. Code Crim. Proc. art. 56.02(d); *In re Sistrunk*, 142 S.W.3d 497, 501-03 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding). The latter case provides a rather sober cautionary tale of what can go wrong.

27 *Jimenez v. State*, 787 S.W.2d 516, 523 (Tex. App.—El Paso 1990, no pet.) (quoting Tex. Code Crim. Proc. art. 56.02(a)).

28 Tex. Disciplinary R. Prof'l Conduct 1.01, 1.02, 1.03, and 1.09, reprinted in Tex. Gov't Code tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, §9); Wilkerson, *Legal Ethics & Texas Criminal Law*, p. 313.

29 Tex. Disciplinary R. Prof'l Conduct 4.01, 4.03. If the victim did happen to have an attorney, then rule 4.02 (Communications with One Represented by Counsel), rather than 4.03, would apply.

30 Tex. Disciplinary R. Prof'l Conduct 3.01, 3,02, 3.03, 3.04, 3.07, and 3.09.

31 The Department of Justice, for example, has specific guidelines regarding the implementation of victims' rights at each state of criminal proceedings. See the USDOJ's "Attorney General Guidelines for Victim and Witness Assistance," located at www.usdoj.gov/olp/final.pdf . While the guidelines do not always state whether an action is to be handled by the actual prosecutor or by staff, some directives are clearly addressed to the actual prosecutor, such as advocating for the interests of victims at sentencing hearings and advocating for the victim's right to make a statement and present information in relation to an offender's sentence. Attorney General Guidelines for Victim and Witness Assistance, pp. 32-33.

32 See Tex. Code Crim. Proc. art. 56.08(d), which requires the attorney for the state to provide the CSCD with the victim's current address and phone number if the defendant receives community supervision, and Tex. Gov't Code §76.016(a), which specifically relies on the attorney for the state fulfilling this responsibility; see also Tex. Code Crim. Proc. art. 56.11(g), which requires "the attorney who represented the state in the prosecution of the case" to provide written notification of certain rights to victims in certain cases "no later than immediately following the conviction."

Law & Order Award winner

Senator Tommy Williams (R-The Woodlands), pictured at right with Harris County DA Chuck Rosenthal, was recently presented with TDCAA's Law & Order Award in appreciation for his hard work on behalf of prosecutors during the 80th Legislative Session. In addition to passing legislation to crack down on prescription drug fraud and abuse (SB 1879) and to permit courts to seal search warrant affidavits in sensitive investigations (SB 244), Williams led Senate opposition to the passage of an overly-expansive new legal privilege for the media and he helped defeat other legislation that many prosecutors opposed. The Law & Order Award recognizes legislators who defend the interests of prosecutors, law enforcement, and crime victims on criminal justice and public safety issues.

Criminal Law

By Jamissa Jarmon and Lori Valenzuela
Assistant Criminal District Attorneys in Bexar County

Putting Nicholas to rest

Bexar County prosecutors try a man for causing the death of a child—with no body.

When children move in with their mother's boyfriend, life for them changes drastically. In the case of Nicholas Plaza, such a move ended his life. He died at age 5, and to date his body has never been recovered. But this past July, Ruben Zavala, Jr., "the boyfriend," was tried and held responsible for hurting Nicholas.


Jamissa Jarmon


Lori Valenzuela

Trying this case without Nicholas' body was a daunting task. Aside from the lack of physical evidence, Ruben Zavala never confessed to hurting or killing the boy. We were faced with proving the case with circumstantial evidence, testimony from unsympathetic people who lived with Nicholas at the time of his death, and various statements from the defendant that varied in consistency. In the end, a Bexar County jury did the right thing by convicting Zavala and sending him to prison.

Background

Nicholas' tragic story began when his mother, Priscilla Plaza, started dating Zavala in the summer of 2001. Up to that point, Nicholas had led a normal life. He lived with Priscilla, his grandmother Virginia Elizondo, his aunt Leticia Plaza, and his cousin Christopher. Born prematurely, he had overcome illnesses and difficulties that accompany an early birth. His family had consistently taken him to his pediatrician, and when he moved in with Zavala, he was up to date on his vaccinations and wellness checks. There were no indications that he was suffering from any physical ailments or illnesses.

Nicholas and his extended family functioned as most nuclear families do. The adults worked and organized their schedules so that the children could be cared for at all times. When that was not possible, Nicholas and Christopher went to childcare and later attended school. In 2000, Nicholas was enrolled in pre-kindergarten and had an impeccable attendance record. All of that changed a few weeks before he was to begin kindergarten.


Nicholas Plaza

That's when Priscilla and Zavala started spending a significant amount of time together. Priscilla began staying out late and spending the night at the Zavala home. A few days before Nicholas started school, Priscilla's mother, Virginia Elizondo, told Priscilla that she was concerned for Nicholas because of the hours she was keeping. In protest, Priscilla decided to move in with Zavala, who lived with his parents, Celia Ramos and Ruben Zavala, Sr. In the three-bedroom Zavala home, Zavala, Priscilla, and Nicholas all shared one room.

Nicholas did, in fact, start school. Less than a week later, Priscilla and Zavala stopped taking him to school. Zavala wanted to avoid an active warrant for a kidnapping charge (more on that later), so the three of them began the routine of leaving early, remaining away from the home for the day, and coming back late at night.

While all of this was going on in the Zavala home, Nicholas' grandmother, Virginia, was desperately trying to track down her grandson. Over the following two months, she contacted police, Child Protective Services (CPS), the Federal Bureau of Investigations (FBI), the Bexar County probation department, and the district attorney's office. Each time, all

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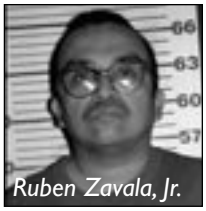
doors were closed to her because Nicholas was with his mother and there was no proof that he was in danger. Eventually, CPS opened an investigation and sent a worker to the Zavala home. On one occasion, the CPS worker encountered Zavala who lied and said he was his brother, Jacob Ramos. CPS never made contact with Nicholas or Priscilla.

Nicholas started having health problems around this time. His hair started falling out, and he developed blisters in his mouth and spots on his face. Later he sustained two serious injuries, one to his penis and the other to his leg. These injuries coincided with Priscilla and Zavala's frequent trips out of town. While gone, they sometimes would not eat and often slept on the streets.

Zavala would often take his anger toward Priscilla out on Nicholas. Zavala would force-feed the boy and sometimes make him throw up. It was Zavala who pointed out Nicholas' injuries to others and Zavala who admitted that he rolled over onto the boy, injuring his leg. Zavala gave Nicholas repeated baths and would often close the bathroom door so that the two of them were alone. Later, Priscilla said that Nicholas had told her that Zavala was sexually abusing him.

On October 23, 2001, the last day anyone saw Nicholas alive, his health had deteriorated significantly. In statements given to the police, Priscilla, Celia and Zavala all agreed that Nicholas had not walked in three weeks. His leg injury was so severe that he crawled or was carried when he needed to go someplace. These adults agreed that Nicholas' hair was falling out in clumps, he urinated in his bed, and his mouth was bleeding from blisters. He was pale; according to Zavala (who did not testify but whose statements were admitted), Zavala compared Nicholas to Casper the Ghost. Additionally, Priscilla and Celia testified that the cut on his penis was so deep that his penis looked like "it was going to fall off" and "probably needed stitches."


Ruben Zavala, Jr.

Up to that point, only Zavala and Priscilla had been caring for Nicholas. However, Zavala's mother, Celia, decided things were bad enough to warrant a trip to the hospital. She thought that Nicholas looked like he was going to die. Celia threatened Priscilla and Zavala that if they did not take Nicholas to the doctor, she was going to take him herself. Zavala replied that his mother could watch the boy while he and Priscilla were job hunting, but when Celia looked for Nicholas, she found only pillows under the boy's bedcovers arranged to appear as though the child were sleeping under them. Zavala claimed that he had taken Nicholas to a neighbor's house and that the neighbor was going to take him to a doctor.

Later that day, Zavala called Celia and told her to come pick him and Priscilla up. He instructed Celia to lie to Priscilla and tell her that Nicholas had been removed from the home by CPS. Celia complied, and no one ever saw Nicholas again. Although Priscilla never called CPS or her mother to confirm the story, she assumed that Nicholas was with her mother, Virginia. Priscilla remained in the Zavala home until November 21, 2001, when Zavala was arrested on the active warrant. The time lapse was one of many hurdles that hindered the investigation.

The investigation

After Zavala was arrested, he was interviewed by police, and he claimed that Nicholas had died when the child and Priscilla were alone in their bedroom. "In order to help Priscilla," Zavala had placed Nicholas' dead body in a Dumpster. Zavala was later sent to prison for a probation violation. Priscilla was also interviewed and swore that she did not know where her son was or what had happened to him. She confirmed that Celia had told her that CPS took Nicholas away.

After the 2001 investigation, the case was not filed with our office. It went dormant, save for Zavala's random letter or request from prison claiming he wanted to provide information on Nicholas' case. He gave some statements, but they remained essentially consistent with his previous statements. He continued to claim that he had disposed of Nicholas' body in a Dumpster.

In 2005, George Saidler, a detective with the San Antonio Police Department, was assigned to the case after Zavala initiated another contact with law enforcement about Nicholas' disappearance. Detective Saidler reviewed the file and insightfully took the evidence to Dr. Nancy Kellogg, a child abuse expert. Dr. Kellogg reviewed the file and interviewed Priscilla, and she determined that Nicholas had sustained

serious bodily injury to his leg and penis. Additionally, enough time had lapsed at that point to believe that Nicholas's body would never be found despite repeated searches and involvement by local agencies, including the Heidi Search Center.

Ultimately, the defendant was charged with murder and injury to a child (SBI). When the State struck a deal with Priscilla for her testimony, it became apparent that the better offense to charge was injury to a child. The biggest issue for us was that Nicholas' body has never been found. To date, there had only been two "no body" cases tried in Texas: *Fisher v. State*[1] and *McDuff v. State*,[2] but in each of those cases there had been some evidence of a deceased person.[3] Not so in our case.

Aside from not having a victim or even a body, we had to prove our case with witnesses who were not sympathetic to the jury. The first was Priscilla, who was an accomplice as a matter of law and who had been indicted and had pled to a cap of 20 years in exchange for her testimony.[4] The other was the defendant's mother, Celia, who didn't have a legal duty to help Nicholas but certainly had a moral duty—which she shirked. By the time trial rolled around (late summer 2007), two State's witnesses, Ruben Zavala, Sr., and Jacob Ramos, had died. Additionally, Nicholas' injuries had never been seen by medical personnel, so we were left having lay witnesses describe them to prove serious bodily injury.

The trial

We started our case with Virginia Elizondo, Nicholas' grandmother, who gave an overview of her grandson's life before he and his mother moved into the Zavala home. It was important for the jury to understand that before Zavala came into the picture, Nicholas was a happy, healthy little boy. We knew that the contrast between "before Zavala" and "after Zavala" would affect the jury.

To describe the injuries, we called Celia and Priscilla. Both women described the leg injury, including Nicholas' inability to walk for three weeks, and the cut on his penis. Both admitted that they thought that Nicholas might die if he did not get medical treatment. They testified that Zavala fed, bathed, and cared for Nicholas the majority of the time, which helped support our charge of omission. Then we called numerous law enforcement officers, including detectives who had taken the defendant's statements from the initial investigation in 2001, then followed up with information gleaned from the more recent investigation, calling Dr. Kellogg and Erica Graham, a forensic serologist.

We knew that the contrast between Nicholas "before Zavala" and "after Zavala" would affect the jury.

Ms. Graham had performed testing on a pair of boy's underwear recovered at the Zavala home. Ms. Graham testified that the biological substance found on the underwear was blood that came from a male biological relative of Priscilla. Graham also stated that there was a significant amount of blood on the underwear. Dr. Kellogg confirmed that the amount of blood on the underwear substantiated a cut in the genital area and supported the lay-witness testimony that the penis injury was serious. We concluded our case with a witness from the landfill where we believe Nicholas' body was dumped. He testified to the size of the landfill and the impossibility of finding a body.

During trial we relied on the fact that the witnesses had seen Nicholas' injuries and that the defendant said he disposed of Nicholas' body. The time lapse since his disappearance corroborated that Nicholas was in fact dead. The defense did not put on a case, but through questioning the State's witnesses, Zavala's defense appeared to be two-fold. Its first aspect was that the responsibility to care for Nicholas and to seek medical attention fell solely on Priscilla. Defense counsel blamed Priscilla and her general lack of parenting skills as the cause of Nicholas' death. Secondly, the defense asserted that Priscilla, not Zavala, was with Nicholas when he died. In two of Zavala's statements, he claimed that he was in a different room when Nicholas died. Zavala contended that he only tried to help the woman he loved, and when he could not resuscitate the boy, he decided to dispose of Nicholas' body. The defense never directly accused Priscilla of killing Nicholas, but rather implied that because she was Nicholas' mother, she had a duty to get Nicholas medical treatment.

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At the close of the case, the jury charge included offenses ranging from first-degree injury to a child to a state jail felony injury to a child. The jury came back with a guilty verdict on the first-degree felony.

Punishment

For punishment we presented evidence of Zavala's previous kidnapping charge, which was the reason Zavala had been running from the law when he and Priscilla were together. The evidence in that case was eerily similar to Nicholas' situation: Zavala was dating a woman who had an infant. She, too, had moved into Zavala's parents' home, and Zavala began caring for her son. Like Priscilla, she had quit her job upon Zavala's request. They traveled to other cities and lived on the streets. After they broke up, Zavala asked to meet her so that they could discuss some issues, and she agreed. While at a local restaurant, Zavala asked to take her then-18-month-old son to the bathroom, and Zavala disappeared with the child. Later, Zavala left her a voicemail saying that he had her son, and he wanted her to move back into his mother's house or he would "pop a cap in his (own) ass and take his son with him." There was a gasp from some of the jurors when this tape was played. It was evident that after that woman's testimony, Zavala was a predator—the facts of Nicholas' case were so alarmingly similar.

During punishment, the defense only called one witness, Celia. She testified that she was in bad health and that she had no one but her son to take care of and bury her. We asked for 99 years in prison and in the end, the jury assessed 67. Our discussions with the jury later revealed that the jury compromised on the sentence, and we surmised that Celia's testimony was sympathetic to some jurors.

Lessons learned

What we learned is that these cases are extremely difficult, but not impossible, to prove. In most scenarios, time is the State's enemy, but in this case, time was on our side. The lapse in years confirmed what was known from the beginning, that Nicholas was dead. After five years, there had been no fruitful leads in the investigation, and we knew that Nicholas (or his body) was never going to be found.

The most notable figure in seeking justice for Nicholas was Detective Saidler. In charge of the cold case unit, he was able to think outside the box to look for ways to prove the offense. Detective Saidler reinterviewed witnesses, found information on leg injuries, and followed any leads from the defendant. Specifically, Detective Saidler's consultation with Dr. Kellogg about the SBI issue ultimately led to the charge against Zavala. That was creative investigating. Without a body, we needed a way to prove that Nicholas suffered serious bodily injury, and Dr. Kellogg was able to put Priscilla's, Celia's, and Zavala's descriptions of Nicholas' injuries in perspective. Additionally, Dr. Kellogg's testimony corroborated their description of the penis cut because she was able to take their description and match it with the bloody underwear.

It was easy to be intimidated by the fact that our best evidence against Zavala was Nicholas himself, and he was gone. Going forward without a body or medical records to show injury and relying on an unpredictable witness, such as Celia, was all part of taking a chance and hoping that your evidence will be enough to prove your case and get the jury to do the right thing. In this case, they did.

Endnotes

1 851 S.W.2d 298 (Tex. Crim. App. 1993).

2 939 S.W.2d 607 (Tex. Crim. App. 1997).

3 In *Fisher*, the victim's bone fragments and blood were found, and in *McDuff*, a witness had seen the victim in the trunk of the defendant's car where blood and hair were subsequently discovered.

4 One last note about the case: As of press time, Priscilla had not been sentenced.

Criminal Law

By Jay Johannes
Assistant County and District Attorney in Colorado County

Starting a pretrial intervention program

How one program works in Colorado County

Once the initial charging decision is reached in a case, a prosecutor is concerned with the appropriate resolution. Experience tells us that cases can be broken down into four simple categories:

- good people doing something stupid;
- bad people doing something stupid;
- good people doing something bad; and
- bad people doing something bad.


Jay Johannes

Cases in the first category are often the most difficult for prosecutors to resolve. Traditionally, Texas prosecutors have considered three options when dealing with the good people who've gotten themselves into stupid situations: deferred adjudication, probation, or jail. But Government Code §76.011 provides a fourth option: pretrial intervention.

Pretrial intervention is a form of supervision appropriate for some first offenders. It gives defendants a way to atone for their transgressions without many of the lingering effects of a deferred adjudication or conviction. Therefore, prosecutors should consider having a sound, well-thought-out pretrial intervention program in their arsenal. You'll need your district court's approval because while Government Code §76.011 authorizes community supervision and corrections departments to operate pretrial intervention programs, these departments are under the general supervision of the district court. (Sample forms for many programs discussed in this article are available online at www.tdcaa.com. Click on the Newsletter Archive button, and scroll down to the November-December 2007 issue stories.)

Eligibility

A well-designed program has clearly defined eligibility parameters. Failure to establish these parameters leads to inconsistent application, cries of favoritism, and the tendency for every defendant to seek pretrial intervention. Once the defense bar becomes familiar with your policy, most will restrict their requests to cases eligible under your program guidelines.

First, determine which classes of cases are eligible, depending upon your prosecutorial philosophy and the prevailing attitude in your jurisdiction. Some offices limit pretrial intervention to nonviolent misdemeanors. Other jurisdictions may include state jail felonies. The only restrictions regarding eligibility for pretrial intervention are those defined by your office.

Once the eligible types of offenses are established, the eligible offenses within those classes must be defined. The simplest programs may limit participation to defendants charged with nonviolent offenses. Larger counties may have multiple special programs tailored to respond to specific offenses (e.g., Tarrant County's Assault Family Violence Program).

In addition to the offenses eligible for pretrial intervention, a good policy will define the criteria an offender must meet to be eligible for the program. Typically, participation in pretrial intervention programs is limited to first offenders. Additional restrictions may include current enrollment in high school or college or defendants who would otherwise face loss of a job or professional license.

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Participation in Colorado County's pretrial intervention program is limited to first offenders of high school or college age who are charged with non-violent misdemeanors who have never had a previous pretrial intervention and appear to have a legitimate opportunity for advanced studies or licensure. It is structured that way to eliminate impediments to their acceptance into college or graduate school or professional licensure.

Application procedure

In most jurisdictions, court days do not leave much time for cool reflection. Therefore, it is important to have an application procedure in place that allows a prosecutor to review a case file and an applicant's information in depth before deciding to grant or deny pretrial intervention.

The application procedure may be initiated upon a prosecutor's recommendation or at a defendant's request. Regardless of who initiates the process, an application packet should contain, at a minimum, the following: a resume, school transcripts, character letters, and a sworn application.

The application itself should be sworn to enable prosecution for perjury if it occurs. The application should consist of probing questions that dig a little deeper into a defendant's background than simply whether the defendant has been previously convicted or undergone a pretrial intervention. The application should inquire about prior juvenile and adult arrests regardless of outcome and prior placement in city or county jails. Additionally, the application should require the defendant to write his version of the offense to make sure he is accepting responsibility for his conduct.

Another equally important component of the application process is a personal interview with the defendant. It affords the prosecutor an opportunity to gauge the defendant's sincerity through a no-holds-barred, cross-examination-style interview. The defendant should be informed that the interview is off-the-record and mandatory. Failure to submit to the interview without defense lawyer interruption or interference results in program ineligibility. This is that rare opportunity for a prosecutor to engage in a "Law and Order"-style interview while the defense lawyer sits uselessly on the sideline. Does the defendant appear contrite and comprehend that he has jeopardized his future? Or is he smug and uninterested in this "mere" formality before the prosecutor rubberstamps what he believes is already his? Did the defendant even bother to dress appropriately, cover his tattoos, and/or remove his piercings and studs?

The pretrial agreement

The pretrial intervention agreement should be detailed enough to document that the defendant understands his obligations. To participate in the program, the defendant should agree to the following: to serve a specific term of supervision, enter a plea of guilty or nolo contendre at a revocation, and to not receive credit for any fees paid or community service performed in the event of a revocation.

Moreover, the agreement should require the defendant to sign a plea memorandum under oath admitting the offense and waiving his right to a speedy trial and to a jury trial.

Pretrial intervention rules

Once placed into the pretrial intervention program, the local community supervision and corrections department will supervise the defendant. The defendant's rules should be drafted in advance to ensure uniformity and that program goals are met. However, special cases may require a unique set of rules.

At a minimum, the program's conditions should contain the standard rules used in probation cases. Preferably, special rules will be tailored to the crime committed, such as offense-specific classes, periodic urine analysis, or community service restitution tailored to the offense. Strict curfew is a good rule to impose to keep the defendant from being out at all hours and getting in more trouble. For example:

> **Curfew.** Be at your residence by 11:00 p.m. and remain there until 6:00 a.m. except when at work or on a direct route going to or from work.

The maximum term of a pretrial intervention is two years.[1] The criminal case must be filed with the court and the judge must sign the agreement to authorize the defendant's participation in the program.[2]

Once the paperwork is complete, the case should be reset until the end of the intervention period. At that time, the defendant's criminal history should be ordered and examined for new entries. Once it is determined that the defendant successfully completed the

pretrial intervention, the prosecutor should file a motion to dismiss the case.

Alternatively, in a procedure used in Tarrant County, the defendant enters a formal guilty plea, and the judge recesses the hearing for one year. If the defendant successfully completes the program, the hearing is reconvened, the defendant withdraws his plea, and the case is dismissed.

Fees

The agreement should detail the fees that the defendant must pay. The fees are similar to those of standard community supervision where the defendant may be ordered to pay a fee not to exceed $60 per month as a condition of participating in the pretrial intervention program.[3] These fees must be deposited by the custodian of the county treasury into a special fund for the benefit of the community supervision department.[4]

In addition to the monthly participation fee, the court may order the defendant to pay or reimburse a community supervision and corrections department for any other expense incurred as a result of the defendant's participation in the pretrial intervention program or that is necessary to the defendant's successful completion of the program.[5] Fees could be charged for drug or alcohol treatment, anger management, or other programs. These fees, too, must be deposited in the county treasury for the benefit of the community supervision department.[6]

Unlike community supervision, the prosecutor may charge a fee not to exceed $500 beginning September 1, 2007. The fee must be deposited in a special fund and used solely to administer the pretrial intervention program. It may be expended only as part of a budget approved by commissioners court.[7]

Revocation

Invariably a small percentage of participants will violate the pretrial intervention agreement. A pre-determined policy on dealing with revocations can help avoid confusion and uncertainty regarding the proper response when such a situation presents itself.

The revocation standard can range from zero tolerance for violations to a sanctions ladder that escalates with the severity of the infraction. Seldom would revocation be sought for Class C offenses, for instance. A defendant's refusal to accept an agreed sanction, either through an amended condition of pretrial intervention or the commission of a new offense sufficient to cause revocation, would result in the prosecutor docketing the case, sending a notice letter to the defendant, and going forward as if the defendant had never been placed in the pretrial intervention program.

Some prosecutors require a candidate to waive his ability to seek an expunction, but doing so may significantly reduce the value of a pretrial intervention.

Consistency is the key to a well-oiled program. The best practice is to work with the same probation officers to handle the pretrial intervention caseload. They will be familiar with the revocation standards and can implement the policy uniformly.

Expunction policy

The overriding benefit of pretrial intervention is the State's ability to punish, rehabilitate, and observe a defendant over an extended time while leaving open the successful defendant's ability to expunge his record. Some prosecutors require a candidate to waive his ability to seek an expunction, but doing so may significantly reduce the value of a pretrial intervention. The best policy may be a compromise that requires a defendant to wait a predetermined amount of time before seeking an expunction.

If expunctions are allowed in felony cases, the defendant or his counsel should be aware that the Department of Public Safety is not bound by a district attorney's agreement not to fight expunction.[8] Additionally, most felony pretrial interventions will not meet the requirements of the Code of Criminal Procedure's Art. 55.01 because the dismissal will not indicate a lack of probable cause.[9]

Because pretrial intervention is not court-ordered supervision under CCP art. 42.12, as long as the defendant was not charged by indictment or information with a felony arising out of the transaction underlying the misde-

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meanor, and assuming the defendant is otherwise eligible, the defendant may seek an expunction.[10]

Conclusion

Pretrial intervention programs can be as simple or as elaborate as necessary to accomplish their goals. Regardless of which type is appropriate, a sound program provides prosecutors with a tool to address crimes committed by otherwise good citizens and leaves offenders with the opportunity to move forward as productive members of their community.

Endnotes

1 Tex. Gov't Code §76.011(a).

2 In Colorado County, the Pretrial Intervention Agreement and Rules of Community Supervision are treated as one document with the court's authorization located at the end of the Rules. For clarity the Agreement and Rules have been discussed in separate sections in this paper.

3 Tex. Code Crim. Proc. art. 102.012(a).

4 Tex. Code Crim. Proc. art. 103.004(d).

5 Tex. Code Crim. Proc. art. 102.012(b).

6 Tex. Code Crim. Proc. art. 103.004(d).

7 Tex. Code Crim. Proc. art. 102.0121.

8 *Texas Dep't of Pub. Safety v. Katopodis*, 886 S.W.2d 455 (Tex. App.—Houston [1st Dist.] 1994, no pet).

9 *Texas Dep't of Pub. Safety v. Solis*, 2005 Tex. App. LEXIS 9553 (Tex. App.—San Antonio 2005, no pet).

10 *Baker v. Texas Dep't of Pub. Safety*, No. 03-00-00441-CV, 2001 Tex. App. LEXIS 3020 (Tex. App.—Austin May 10, 2001, no pet.)(not designated for publication).

INVESTIGATOR SECTION

By Tony Robinson
Chief Investigator in the Dallas County Criminal District Attorney's Office

Absconders beware!

The Dallas County DA's office has focused its energy and manpower to track down probation absconders with great success.

Real-world events often dictate change, adaptation, and innovation. Our experiences in the first six months of 2007 in building a Probation Absconder Unit may be useful for those of you who are considering new ways of tackling the problem of apprehending probation absconders. I believe our experiences highlight the advantages of inter-departmental cooperation in achieving this goal.


Tony Robinson

The Dallas County District Attorney receives over 80,000 case filings per year. As a result we have a large probation client base. Currently over 10,000 probationers have absconded and have active warrants for their arrest. In 2005 the Dallas Morning News newspaper ran an article detailing our probation violation problems, but until this year, no additional resources were allocated to address this problem. As you would expect, it has continued to grow.

Many times, change begins with a breath of fresh air. Ours came with Dr. Michael Noyes, who was hired as the new director of Dallas County Adult Probation Department. He brought to Dallas County years of experience from Pennsylvania, where he led several probation departments from several different levels. For Dallas County, his most critical asset and strength was what we lacked most: a new vision and fresh approach to how we administer probation and rehabilitation programs. In our daily work with our colleagues in the probation department, we learned that Dr. Noyes came in with a clear message: Under his leadership, Dallas County was going to change. Tragic events in March 2007 advanced the speed of change and highlighted the need for adaptation and innovation.

In mid-March, a murder occurred in the southeast section of Dallas; a

Chevrolet Impala with 22-inch rims was at the scene. The Dallas Police Department Deployment Unit was on the lookout for this vehicle and spotted it on March 23. Undercover officers followed the car and called for marked units to initiate a felony stop. Officer Mark Timothy Nix responded to the location and attempted to stop the Impala with lights and a siren. The driver, Wesley Ruiz, refused to stop and led officers on a high-speed chase for about two miles before wrecking his car. Officer Nix tried to enter the Impala with his baton but was unsuccessful due to the tinted windows. Mr. Ruiz fired one shot through the window, mortally wounding officer Nix.

Ruiz had a history with Dallas police and with our office. In May 2006 he was placed on probation for eight years for drug possession. Four months later, he stopped reporting to his probation officer, but it wasn't until February 12, 2007, that a warrant was issued for his arrest. He was still on the loose when Officer Nix encountered him in March.

Time for change

Soon after this tragedy, Dr. Noyes contacted newly elected Dallas County District Attorney Craig Watkins about a collaborative effort to address the absconder problem. Watkins informed me of his wish to participate and instructed me to meet with Dr. Noyes. Our first meeting was in April of this year, and we were accompanied by Deputy Chief Joe Costa of the Dallas County Sheriff's Office. The meeting was very positive, and we agreed to meet every few weeks and formulate a plan to create an absconder unit. The Sheriff's Department Warrant Division is comprised of 24 two-man squads whose responsibility is to apprehend all persons with active warrants. In our initial discussions I proposed utilizing the 72 district attorney investigators under my command. Our mission would be to pool our resources to locate and apprehend these absconders. We all agreed my investigators would be an asset to this venture, and Dr. Noyes offered to fund a full-time DA investigator for the 2008 fiscal year to work exclusively in the unit. This position was approved by the commissioners court and is now full-time within the unit; five probation officers and clerical staff comprise the unit.

We generally assign probation absconder files to about 20 DA investigators, and so far we have rotated files among them so as not to overload any particular person. We originally wanted to assign one sheriff deputy to the unit but were unable to; deputies' primary role is to assist us in apprehending the high-risk absconders. We are hoping if we show success this fiscal year, we can assign a full-time deputy to work within the unit. We don't put in any work shifts as it relates to tracking absconders; our office's investigators do their work during normal work hours. When we go tactical to locate and apprehend absconders, we may do surveillance at different hours during and after our normal work schedule. And the arrest warrant execution can be done anytime of day based on the intelligence received during our surveillance.

In July 2007 we decided to target the top 20 absconders, so Greg Johnson of the Absconder Unit formulated a list that he culled from the 17 district courts in Dallas County. He gave the list to me in August, and I retrieved the absconders' probation files. I assigned them to my supervisory investigators to do a risk assessment on each absconder and forward to their division investigators to locate. Each absconder was classified as low, medium, or high risk. Low and medium risk warrants can be carried out by DA investigators with my approval, and high risk warrants are carried out by the warrant division or local police department SWAT teams. Before any warrant is executed, a written operational plan must be approved by the chief or assistant chief investigator, and the first assistant DA is briefed.

A written operational plan is an internal document we use to outline the operation we are executing. It details the location, who is involved, the threat level, and what radio channel will be used. It also describes the house or building we will be entering, what staging location will be used, and the nearest hospital if needed. And it also includes what personnel will be participating, what uniform they will be wearing, and what vehicles they are driving if they are not DA personnel.

Before we went after anyone, Sheriff Lupe Valdez sponsored a press conference to inform the community of our new initiative, and as of September 16, we had apprehended 12 of the top 20 violators without incident. They included offenders whose crimes range from drug possession to murder. As of press time in mid-October, 20 criminals have

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been caught and arrested through the Absconder Unit.

Advice for others

These are the resources and procedures we deploy to execute these warrants and I would strongly recommend anyone to follow these guidelines as a safeguard. I am currently working on a standard operating procedure for the unit which will be in place by November.

My advice to anyone wanting to start such a unit would be to use every available law enforcement resource. Also enlist the support of your county and district judges, and get their input as to which absconders to target. We will be very aggressive over the next fiscal year to show our commissioners how successful the unit has been so that we can acquire funding for new positions to expand the program.

From a technology standpoint, employ every available resource database you have; we use Acurint LE PLUS and LEXIS NEXIS. The most useful resources we have are the Texas Workforce Commission database which any county can contract with for access. This database allows you to locate people almost instantly by finding out where they are employed or if they are receiving any type of benefits, i.e. food stamps, welfare, or unemployment compensation. There is also a National Pooling Database for law enforcement you can have access to, which will provide the location and subscriber of cell phones. This technology allows us to almost pinpoint an absconder's whereabouts before we go to the field, thus limiting costs and wasted field trips.

In closing, I would like to encourage all counties to look into this type of program to address your local absconder problems. If I can assist you in any way via phone, mail, or even in person, please feel free to contact me (my office number is 214/653-3761. I sincerely hope this article will serve as inspiration to or as a catalyst for tracking down absconders in your jurisdiction.

AS THE JUDGES SAW IT

By Tanya Dohoney
Assistant Criminal District Attorney in Tarrant County

Questions

1 Kenneth Staley committed a capital murder in Tarrant County. His procedural posture is that of an incompetent-to-be-executed, death-row inmate with no scheduled execution date. The trial judge set aside his prior execution date after finding him execution-incompetent. (That is, while he was competent during trial, he is now not competent to be executed.) As a result of the competency proceeding, the judge entered findings that, when Staley is medicated, he appears to be asymptomatic, but Staley has refused to take psychotropic medication to treat his schizophrenia. The district judge decided that Staley posed a danger to himself when he was not medicated and, accordingly, involuntarily medicating Staley was in his best medical interest. So the court ordered that Staley's medication be compelled.


Tanya Dohoney

Staley appealed the trial judge's order, questioning the constitutionality of State-dictated anti-psychotic medication to restore execution competency. The State moved to dismiss and characterized the compelled-medication order as non-appealable.

Who wins?

2 When the prosecution offers extraneous-offense evidence during a trial's guilt phase, must a trial judge *sua sponte* include a reasonable-doubt instruction regarding proof of the extraneous offense in the jury charge?

3 Gary Young previously represented misdemeanor DWI client Leslie Goodman before his election as Lamar County District and County Attorney. When Goodman discussed his DWI case with Young, he apparently described his daily drinking habits. Goodman was convicted for that 2000 DWI offense.

No lesson learned, Goodman kept imbibing and driving, and his drinking habits led to another DWI arrest. Now the elected prosecutor, Young indicted Goodman on felony DWI charges with the 2000 DWI alleged as jurisdictional. Goodman sought to disqualify Young based upon the prior attorney-client relationship, and Young countered that he could use public records to prove up the 2000 DWI without resort to any confidential communication. After the trial court denied disqualification, Goodman sought mandamus relief from the Texarkana Court of Appeals. The appellate court acknowledged that a trial judge has authority to disqualify a prosecutor only when a conflict rises to the level of a due-process violation. Due-process rights are implicated when an attorney defends a client on a case and then participates in that client's prosecution in a matter that bears a substantial relationship to the first case. Finding the due-process violation "inescapable" in Goodman's case, the Texarkana court granted mandamus relief.

Was the court correct?

4 Convicted of aggravated robbery and aggravated sexual assault in 1995, Tony Lee Blacklock is serving two stacked life sentences. During Blacklock's trial, his victim, who already knew him, identified him before the jury as the perpetrator. However, DNA evidence from semen in the victim's vaginal smears was inconclusive on identity.

Ten years after his conviction, Blacklock moved to retest these samples pursuant to Code of Criminal Procedure article 64.03(a)(1)(B) & (a)(2)(A) which allow a convicting court to order DNA testing if it finds, among other things, that identity was or is at issue in the case if the convicted person establishes by a preponderance that he would not have been convicted had exculpatory DNA results been obtained.

Does the fact that the victim knew her attacker and positively identified Blacklock undermine his ability to obtain the requested post-trial DNA testing?

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5 Rickey Lynn Harrison's 8-month-old son lived with his mother and her extended family. Although Harrison typically lived elsewhere, on one fateful night, Harrison decided to cozy-up to his baby and the baby's mother. While the mother showered, she left the baby in bed with Harrison, and she heard the baby crying. When she finished her shower, the little boy was having a hard time breathing and looked sleepy. Moments later, he vomited; regurgitation occurred two more times during the night. Ultimately, the baby stopped breathing and was pronounced dead. Autopsy results showed death resulted after blunt-force trauma to the abdomen which could only have resulted from a punch, kick, or stomp, not a fall.

Tried for his 8-month-old son's murder, Harrison did not testify, but the prosecution introduced a statement he made to the police which included a description of how Harrison would "play-fight" with his 8-month-old child. In that statement, the defendant conceded that he would "softly hit" the little boy's body during this game and could have hit him too hard. Evidence also included another skimpy confession of guilt. The defense witnesses included Hazel Evans, who testified about Harrison's relationship with his son. When defense counsel asked her how she knew Harrison, she said he was a friend of her son's. Then she volunteered that Harrison was "a sweet person" and "a good person" and had watched her kids without incident.

After this witness's direct testimony, the prosecutor approached the bench and explained that the witness's character testimony had opened the door to cross-examination about Harrison's prior assault convictions. The defense argued that Hazel Evans' volunteered, nonresponsive comments actually focused on Harrison's character around children and, thus, did not open the door to the assault cases. The trial court allowed the State to ask "were you aware" questions about these priors.

On appeal, Harrison's counsel argued that Evans' testimony was innocuous and was also limited to the specific character traits of being a good father and being good with children, attributes that would not logically be rebutted by evidence of prior violent acts. The Waco Court of Appeals, with the Chief Justice dissenting, reversed.

Was the door opened to the "were you aware questions" about prior assaults?

6 Isaiah Paul Delao committed a capital murder in McLennan County by shooting a man while robbing a local bar. Trial evidence revealed that, after Delao was identified and brought in for questioning, he informed the police detective that he was taking medication, had difficulty reading, and was a mental health patient. Delao requested to have his mental health counselor present during police questioning, and this request was fulfilled. During this interview, the police detective specifically inquired about Delao's background, education, and family; Delao's prompt responses were detailed and appropriate. A few of his comments vaguely bordered on requests to stop the questioning (i.e., I wanna go home, when can I go home, I'll come talk to you later). At the conclusion of the discussion, Delao confessed to the crime's details. The entire hour-long statement was recorded, and the DVD recording was introduced at trial. Expert testimony intended to impugn the voluntariness of Delao's confession was admitted. Delao's attorney contended that the defendant's mental disabilities kept him from fully understanding his legal rights and made Delao more susceptible to coercion and persuasion. After hearing all of the evidence, the trial court found the confession voluntary. The issue was placed before the jury as well and, likewise, they rejected the involuntariness claim. Delao ultimately received a life sentence.

The Waco Court of Appeals affirmed his conviction after rejecting several claims, including an attack on the trial court's confession ruling. Delao raised on appeal his trial allegations regarding his diminished capacity, enhanced susceptibility, and purported termination requests. The Waco court applied the usual totality-of-the-circumstances standard to the voluntariness question and affirmed.

On PDR, Delao argued that the voluntariness of a confession given by a mentally retarded/ill person cannot be assessed under the same standard as that used for a person of normal mentality.

Does a unique standard apply to these facts involving mental illness?

7 After the State rested in this assault prosecution, the attorney for Brenda Pitts Bennett objected to the trial judge's failure to instruct the jurors on the law of self-defense. The verbose objection included a phrase stating, "And we respectfully request that the court charge the jury on the law of self-defense as it relates to this case." On appeal, Bennett complained that the jury's instructions did not address defense of a third person

and defense of property. The Dallas Court of Appeals determined that the phrase "as it relates to the case" sufficiently put the trial judge on notice of Bennett's defense-of-third-person charging request.

Was the court right or wrong?

8 Cory Stevens received 10 years' deferred adjudication on his 1995 involuntary manslaughter conviction in Brazoria County. Lo and behold, in 2003, he picked up a DWI in Tom Green County and, accordingly, faced that prosecution and a revocation in the eight-year-old manslaughter case. Although the Tom Green County stop appeared promising because it was based on several observed traffic violations, that case ended after the trial court granted suppression, apparently finding a lack of officer credibility (because the stop facts were so clear-cut), although no express findings were entered.

On the heels of this success, Stevens next sought to curtail his revocation by filing a motion to suppress in Brazoria County. The only evidence at this hearing was the transcript of the suppression testimony from the earlier DWI hearing. Unfortunately, the State's attorneys did not question the applicability of the Fourth Amendment to the revocation scenario. See *Pa. Bd. of Prob & Parole v. Scott,* 524 U.S. 357, 363-64, 118S. Ct. 2014, 141 L.Ed.2d 344 (1995) (holding that the exclusionary rule does not apply to proceedings other than criminal trials). Ultimately, the Brazoria County trial judge granted suppression based upon the prior Tom Green County disposition after determining that collateral estoppel precluded an independent review of the evidence regarding the validity of the DWI traffic stop. A State appeal ensued and, while acknowledging the questionable nature of the trial court's collateral estoppel ruling, the Fourteenth Court of Appeals affirmed the suppression by extending deference to the Brazoria County trial court's decision, which was premised on the suppression hearing transcript. (Anyone else a little frustrated with the application of law throughout this case?)

On State's PDR, what was the outcome?

9 Tarrant County prosecuted Eric Paul Michael for child-sex acts perpetrated against a 9-year-old who attended a sleepover with Michael's daughter. After the child reported to her mother that Michael had licked her vagina, law enforcement authorities videotaped the young girl's interview. Later, during the trial, defense counsel impeached the child-victim's testimony with several prior inconsistent statements made during the recorded session. Discrepancies involved the bedroom's logistics, the child's position on the bed, and the flaccid state of the defendant's penis. As rebuttal, the State proffered the girl's teacher/babysitter to testify about her truthfulness. When objecting, defense counsel claimed that the child's credibility had not been attacked and, instead, that their theory focused on no attack happening. After the prosecutor pointed out specific credibility-questioning instances, the trial court allowed the teacher's opinion testimony. On appeal, the Fort Worth Court of Appeals rejected the defense complaint of improper bolstering.

Does impeachment with prior inconsistent statements automatically open the door to rebuttal evidence regarding character for truthfulness?

10 Two little girls, Ujeana and Precious, typically lived with their grandmother, Zula Mae. On an October evening in Wichita County, their mother, Sharon Ann Williams, removed her daughters from Zula Mae's fully-appointed home and took them to her boyfriend's duplex which lacked just about everything. The duplex had no kitchen, no bathroom, no basic utilities, little furniture, and lots of trash.

That night, the girls burned to death while Williams was out. The mother's first jaunt that evening was for cigarettes and food. She returned briefly after obtaining her smokes, but she had forgotten the children's Little Debbie snacks. After telling her boyfriend that she wanted to go out with friends, Williams and her beau put the girls to bed with a lit candle positioned upright in a metal pie pan for light. The bedroom contained a bed and a dresser, a nailed-up exterior door, and two interior doors (one was non-functional, missing its doorknob). Williams left the house, leaving the boyfriend in charge. The boyfriend checked on the girls intermittently. He also quickly slipped out of the house to nab a cigarette from his neighbor. The candle remained lit in the bedroom. After the boyfriend fell asleep, the candle's open flame resulted in a raging fire which consumed the girls; the boyfriend awoke to their screams and unsuccessfully tried to save them from the conflagration. The fire burned at 1,200 degrees and, during most of it, all the doors to the room were closed.

Away from the site of the inferno, Williams' evening out included buying and eating the girls' snack she had previously sought, visiting with innumerable

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friends at a motel and elsewhere, and making some new "friends"—a couple of unnamed men with whom she took vaguely-described rides.

Presciently, two weeks before the fire, the grandmother, Zula Mae, had expressly warned Williams about taking the girls to the duplex and the fire hazard presented by using candles in the makeshift home.

Is there sufficient evidence to prosecute Williams for reckless injury to her two children?

Answers

1 The State wins; appeal dismissed. *Staley v. State*, AP-75,462, ___ S.W.3d ___, 2007 WL 2622426 (Tex.Crim.App. September 12, 2007) (9:0) (Hervey). The Texas Constitution in §5(a) grants the Court of Criminal Appeals final appellate jurisdiction in criminal cases except as limited by the Constitution or prescribed law. Article 44.02 of the Code of Criminal Procedure grants defendants the right to appeal any criminal action as the rules provide. Staley failed to cite any authority—constitutional, statutory, or otherwise—supporting the court's jurisdiction for this appeal from an interlocutory order, so it is dismissed.

2 No. *Delgado v. State*, No. PD-0203-07, ___ S.W.3d ___ (Tex.Crim.App. September 26, 2007) (Cochran) (7:2:0). Resolving a conflict among the appellate courts, this decision holds that an instruction on proving extraneous acts beyond a reasonable doubt is only required *when requested.*

Here are the facts. While surveilling a bar known as a drug-dealing haven, officers witnessed a drug sale. The dope-deal participant, Morales, subsequently pinpointed his cocaine supplier as a man sitting right inside the bar. The officers entered. They saw Delgado extract a couple cocaine baggies from his pocket and unsuccessfully attempt to conceal them behind the bar. A subsequent consent search of Delgado's car uncovered more similarly-packaged contraband.

In an abundance of pretrial caution, the State informed the trial judge and Delgado that it intended to offer evidence of the Morales-Delgado delivery transaction that led the authorities to Delgado—an event which arguably falls into the same-transaction-contextual-evidence category, not requiring such notice.

When the prosecutor sought permission to discuss the drug transaction early in the trial process, Delgado's attorney voiced no opposition. The jury heard the Morales drug-sale facts absent any objection or limiting-instruction request (at the time proffered and at charging). After acquitting Delgado of possession with intent to distribute, the jury convicted him of simple cocaine possession.

Although CCP article 36.14 requires that a court's charge set out the law applicable to the case, the issue of *who exactly decides which law applies* has bedeviled courts for years. This opinion includes a history of charging decisions. That lesson winds up with a discussion of Almanza's protective framework which was designed to thwart reversals from defense sand-bagging on charging matters. See generally, *Almanza v. State*, 686 S.W.2d 157, 161-72 (Tex. Crim. App. 1985) (op. on reh'g). But *Almanza* left open the issue of assigning the responsibility for deciding what law applies to a case between the court on its own motion or to the defense.

Although trial courts have an absolute *sua sponte* duty to prepare a charge that sets out the law regarding the specific offense alleged, they have no concomitant duty to instruct the jury without a request by the defense on all potential defensive issues, lesser-included offenses, or evidentiary matters. Submission of these charges frequently rests on strategic choices by the litigants. For example, if neither side requests a lesser-included instruction, courts should defer to the parties' implied decision not to include one and, therefore, not do so *sua sponte*. Likewise, consideration of a limiting-instruction can be strategic and, when not requested at the time of the evidentiary proffer, caselaw considers the evidence admitted for all purposes. Accordingly, an extraneous-offense limiting instruction should be submitted in the guilt-innocence phase charge only upon request when such an instruction was already issued at the time of the extraneous admission's introduction.

Contemplating these issues, Judge Cochran concluded that, because there is no duty to limit the jury's consideration of an extraneous offense unless requested, there is no duty to instruct juries on the burden of proof concerning an extraneous offense.

Note the statutory exception to this general rule in capital sentencing based

upon CCP article 37.07, §3(a)(1)'s requirements.

3 No. Young sought mandamus of the Texarkana court's order, and a unanimous Court of Criminal Appeals conditionally granted this second mandamus because the Texarkana court clearly abused its discretion by granting Goodman's initial mandamus. *In re State Ex Rel. Gary D. Young*, AP-75,648, ___ S.W.3d ___, 2007 WL 2781293 (Tex. Crim. App. September 26, 2007) (9:0) (Price). Regardless of Young's mandamus victory, the court describes his conduct as "ethically ill-advised."

Here's the law. Mandamus relief lies when a relator establishes that no adequate remedy at law exists and the act sought to be compelled is ministerial, not discretionary. Magistrates have a ministerial duty to rule upon a timely presented motion, but they have no similar duty to rule a certain way. In short, it is improper to order a trial judge to rule a certain way unless a "clear right to the relief being sought" exists based upon unambiguous law and facts.

The Court of Criminal Appeals reviews a mandamus which requests relief from a lower court's mandamus order under a clear abuse of discretion standard. A lower appellate court abuses its discretion by granting mandamus absent a proper basis so, on review, the high court reviews the lower appellate court's mandamus ruling *de novo*. Here, because precedent does not firmly and unequivocally mandate that Young be disqualified, Goodman has no "clear right to relief." The Texarkana court's mandamus order constituted a clear abuse of discretion.

On the disqualification issue, for the purposes of this opinion, the court

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assumed without deciding that a trial judge has the authority to disqualify an elected prosecutor if his continued representation of the State would violate the defendant's due-process rights—but this assumption is not of such indubitable provenance that it rendered the trial court's decision ministerial. While caselaw reveals that a plurality of the Court of Criminal Appeals has held that a due-process violation must be shown before disqualification is appropriate, another plurality has held that a trial judge lacks authority to disqualify an elected prosecutor solely on the basis of a disciplinary rule violation. But even if a trial judge's ruling is erroneous, that fact does not, in and of itself, justify mandamus relief.

4 No. The fact that the victim testified that she knew her attacker and identified him is irrelevant. *Blalock v. State*, PD-1639/1640-06, ___ S.W.3d ___, 2007 WL 2781659 (Tex. Crim. App. September 26, 2007) (9:0) (Hervey). The language and legislative history of article 64.03(a)(1)(B) make it very clear that a defendant requesting DNA testing can raise the issue of identity by showing that exculpatory DNA tests would prove his innocence—in spite of other evidence or procedural acts (such as a guilty plea) to the contrary.

Blacklock's case was decided under a prior version of article 64.03(b) which prohibited convicting courts from finding that a guilty plea removed any question of identity being an issue. The current version of this article is even broader; it allows identity to be considered an open question regardless of the type of plea entered or the existence of a confession or similar evidence.

5 Absolutely. A unanimous court reversed the Tenth Court of Appeals' reversal. *Harrison v. State*, PD-1226-05, ___ S.W.3d ___, 2007 WL 2781653 (Tex. Crim. App. September 26, 2007) (9:0) (Meyers).

Generally, evidence of a person's character is not admissible to prove conforming conduct. However, a defendant may inject his character into issue by introducing character/reputation evidence himself under TRE 404(a). It matters not whether the defense intentionally introduces this testimony or that a defense witness blurts it out voluntarily. Once the evidence comes in, the State is entitled to rebut it via Rule 405's methods—that is, either reputation or opinion evidence using "have you heard" or "were you aware" questions about specific instances of conduct inconsistent with the character trait raised by the defense. The purpose of such rebuttal is to discredit the character-witness testimony, not the person whose character was put in issue.

There appears to be one potential exception to this rule. In line with one of the cases cited, Meyers drops a footnote to telegraph to defense counsel that admission of rebuttal character evidence can be thwarted by objecting to nonresponsive statements or asking that they be stricken or disregarded.

6 No. Application of the totality-of-the-circumstances test is the appropriate standard. *Delao v. State*, PD-0067-07, ___ S.W.3d ___, 2007 WL 2781295 (Tex. Crim. App. 26, 2007) (9:0) (Meyers). By analogy, the court considered the Supreme Court's application of the totality-of-the-circumstances standard not only to adult confessions, but also to those of juveniles. See *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560 (1979). Texas caselaw has followed the Supreme Court's lead. See *Griffin v. State*, 765 S.W.2d 422 (Tex.Crim.App. 1989). Finding that this all-encompassing standard takes into account factors such as intelligence, age, experience, education, and maturity, the unanimous court held that the totality-of-the-circumstances standard of review for evaluating the voluntariness of confessions applies equally to persons of all levels of mental capacity.

7 Wrong. Preservation did not occur. *Bennett v. State*, PD-1350-06, ___ S.W.3d ___, 2007 WL 2781655 (Tex. Crim. App. September 26, 2007) (8:1:0) (Keller). Self-defense and defense of third person are separate defenses enumerated in different sections of the Penal Code. By itself, a request regarding one does not alert the trial judge with respect to the other. Nor does an open-ended, loosely-worded objection shift the onus to the trial judge, even if the trial evidence supported submission. A specific request is required, and trial judges are not required to mull over all of the evidence to determine whether a defendant's generic request meant more than it expressly said. While "magic words" are not required, the substance of the requested instruction must be conveyed. Because defensive instructions must be

requested to be considered law applicable to the case requiring submission, Bennett's failure to do so here resulted in no trial court error. While none of this is earth-shattering, it is always good to see preservation rules in ink.

8 State wins! The Fourteenth Court misapplied the standard of review. *State v. Stevens*, PD-0226-06, ____ S.W.3d ____, 2007 WL 2848865 (Tex. Crim. App. October 3, 2007) (6:3:0) (Womack). It's not new law that reviewing courts afford deference to a trial judge's determination of historical facts which are supported by the record and to the mixed law/fact determinations that are premised on demeanor calculations. Likewise, appellate courts use a *de novo* standard to review pure legal issues and applications of law/fact not hinging on any credibility analysis. When the Fourteenth Court considered the State's argument that collateral estoppel did not preclude the presentation of the suppressed DWI evidence in Brazoria County, the court misapplied the standard of review and afforded deference to the Brazoria County judge's decision which only involved a pure legal issue. Then, the Fourteenth Court parroted the truism that a reviewing court may affirm a trial court's decision if it is correct on any theory applicable to the case and affirmed although no theory other than collateral estoppel applied to this case. Unfortunately, the case's appellate orbit continues for yet another do-over on remand.

Judge Cochran pens her three-vote concurrence to make it clear that she questions whether the doctrine of collateral estoppel applies to a probable-cause finding from a suppression ruling, an issue the court declined to address in *Guajardo v. State*, 109 S.W.3d 456 (Tex. Crim. App. 2003). The concurring opinion also mentions the other problematic aspects of attempting to apply collateral estoppel based upon the DWI suppression ruling in that the suppression ruling was not a final judgment (and did not even involve any real fact-finding).

9 No. The Court of Appeals applied the incorrect standard of review. *Michael v. State*, PD-1611-05, ____ S.W.3d ____, 2007 WL2848851 (Tex. Crim. App. October 3, 2007) (7:2:0) (Womack).

Judge Womack's opinion reads like an evidence horn book, and his decision is based upon the erroneous review by the Fort Worth court, leaving consideration of the ultimate evidentiary issue for the lower appellate court on remand.

This decision holds that impeachment with a prior inconsistent statement does not always mean that the impeached witness's *credibility* has been attacked. TRE 608(a) only authorizes rehabilitation when credibility is questioned.

Identifying five forms of impeachment, Judge Womack categorizes two as specific and three as nonspecific types. Specific forms include impeachment by prior inconsistent statements (aka self-contradiction) and impeachment by another witness. This form attacks the accuracy of certain testimony by implying that the witness normally tells the truth but is wrong this time. Nonspecific impeachment forms attack either bias, motive, or interest or testimonial defects and also generally question the witnesses' truthfulness. This second form is akin to calling the witness a liar. Generally, a witness's character for truthfulness may be rehabilitated with good-character testimony *only after an attack on the witness's general truth-telling character*. Impeachment by prior inconsistent statement normally involves an attack on the witness's accuracy, *not* her character for truthfulness. Nevertheless, where the cross-examiner's intent and method demonstrate a more general attack on character, then rehabilitation through Rule 608(a) is appropriate. The determination of whether character rehabilitation evidence is permitted after impeachment with self-contradiction evidence depends upon whether a reasonable juror would believe that the witness's character for truthfulness was attacked by the cross-examination, evidence from other witnesses, or statements of counsel. This cause was remanded to answer that question.

10 No. Reversal and acquittal ordered for legally insufficient evidence of reckless conduct. *Williams v. State*, No. PD-0446-06, ____ S.W.3d ____, 2007 WL 2848986 (Tex. Crim. App. October 3, 2007) (8:2)

This is a tough case and a complex opinion (there are 80-something footnotes). The State alleged two counts of reckless injury to a child: 1) by taking the girls from a house with working utilities to a building without them and leaving

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the children in a room with a lit candle; or 2) by leaving them asleep in a building without utilities with a burning candle instead of taking them to a house with working utilities. Overall the court holds that the indictment's allegations would rarely constitute reckless criminal conduct. Criminal recklessness arises where there exists moral blameworthiness involving the actual disregard of a known substantial and unjustifiable risk. Because the heart of recklessness is the conscious disregard of the risk created by the actor's conduct, mere lack of foresight, stupidity, irresponsibility, thoughtlessness, and ordinary carelessness do not suffice. Recklessness requires a defendant actually foresee the risk involved and consciously decide to ignore it, necessitating subjective awareness of the danger and disregard of the same.

Here the State failed, as a matter of law, in its initial burden of production to show criminal recklessness. The test set out has four prongs. First, the act or omission, viewed objectively at the time of commission, had to create a substantial and unjustifiable risk of harm. Second, the risk must be of such a magnitude that its disregard is a gross deviation from the standard of care that a reasonable person would have exercised in the same situation. Third, the defendant had to consciously recognize the substantial and unjustifiable risk at the time of the conduct, and, finally, criminal recklessness requires that a defendant consciously disregard the risk.

Judge Cochran's decision completely derided the allegations, which focused on the duplex's lack of utilities. Whether on its own or in combination with other claims, a lack of utilities does not give rise to a substantial and unjustifiable risk of serious injury or death considering either a camping-is-OK or a being-poor-is-not-criminal analysis. After a brief discussion of camping basics and fire-based-on-wiring statistics, the court resorted to consideration of the fact that one in three children worldwide live without modern conveniences, so lack thereof cannot be criminal.

Addressing the significance of Zula Mae's warning, Judge Cochran wistfully notes that all of us are guilty of ignoring our mothers' wise words. She also contends that the grandmother's warning was too general and unfocused to establish Williams' subjective awareness of the risk of deadly accident. Moreover, considering other cases with similar admonitions, the court finds that the significance of the warnings must be viewed in context with the likelihood of the occurrence and magnitude of the risk posed at the time of the behavior. Simply because Williams ignored Zula Mae's warning, that did not give rise to Williams' criminal recklessness without additional evidence.

The court next considered the indictment language regarding Williams' leaving the girls in bed with the candle under her boyfriend's supervision. Judge Cochran considered this reckless allegation highly unique because Williams did not leave the girls asleep with the candle, but with her *more trustworthy* boyfriend caring for them. The judge found no other case where a defendant left children with a caregiver whose competence was unquestioned. Thus, her conduct did not grossly deviate from an ordinary standard of conduct, involve an extreme degree of risk, or involve any conscious risk creation.

Finally, the court's decision briefly delves into a discussion of Texas Penal Code §6.04's "but for" causation and curiously utilizes a foreseeability analysis.

From the opinion's expansive language, it is highly doubtful that additional/different pleading could have saved this prosecution in the eyes of the court's majority. Overall, the majority's opinion is a feast upon which any defendant facing an allegation of reckless conduct will soon be licking his chops.

Presiding Judge Keller, joined by one other judge, points to considerations she believes were overlooked by the majority. She contends that leaving the children with a lit candle was unjustifiable for myriad reasons. She also points to Williams' failure to return when originally planned as evidence supporting the jury's verdict. Also, the presiding judge did not find Williams' boyfriend was imbued with the same competence granted him by the majority. Judge Keller believed that the indictment alleged a criminal offense, that the majority's interpretation of recklessness was far too narrow, that the comments regarding fire risks were unfounded and too expansive, that the majority's reliance on a civil foreseeability analysis was imprudent, and that socioeconomic studies should not play a part in construing laws.

Welcome to our newest meeting planner, Jennifer Matney!

The newest addition to the TDCAA staff is Jennifer Matney, our meeting planner, who joined the association in late August—just in time to finish tying up loose ends for the Annual Criminal and Civil Law Update. Jen hit the ground running and was a gloriously calm, collected presence during the craziest season of TDCAA's year. She even graciously agreed to join an amateur volleyball league with several association staffers, and her obvious skills put the rest of us to shame. She has fit seamlessly into the office.

Jen, a Bozeman, Montana, native, came to us from Randolph-Mason Woman's College, where she worked as a regional admissions counselor based in Austin. (The Lynchburg, Virginia, school is also her alma mater, and she majored in biology.) When she's not dealing with hotels and wiping up the volleyball court with lesser players, she is chillin' with her husband, Andrew, catching up on historical literature, or riding English (with a concentration on the sport of eventing)—her coworkers now know that that has to do with horses. She also has an artistic side and a weakness for fancy paper.

We are overjoyed to have Jen on staff, and we're relieved she feels the same way. "I love it here," she says. "I love the people and the whole feel of the association." Please welcome her the next time you see her at a seminar!

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