



*“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

# He almost got away with murder

A 17-year police veteran shot and killed his wife in 2002. Denton County prosecutors recently took the case of twists and turns to trial and, seven years later, won a 45-year sentence against the defendant. Here’s how they did it.

Even without a seven-year delay between when Bobby Lozano killed his wife, Viki, and when he was finally brought to justice, this case promised to be a fight. Not only was he a longtime officer with the Denton Police Department whose mother-in-law—the murder victim’s mom!—stood by him through trial, but we also had to overcome crime scene mistakes, many years of fading memories, no family support, and re-examination of the evidence.

## The crime scene

At 9:05 p.m. on July 6, 2002, Bobby Lozano called 911, saying he had just come home to find his wife with a gunshot wound. He reported that she was not breathing and that he would begin CPR. Paramedics arrived only four minutes later, and Lozano was standing at the front door holding his toddler son, Monty—not out of breath, not a hair out of place, and with no visible blood on him, his clothing, or the child.



*By Cary Piel and Susan Calvert Piel*  
 Assistant Criminal District Attorneys in Denton County

*Continued on page 15*

## *Also in this issue:*

Photos from our Annual Criminal & Civil Law Update in Corpus  
 .....page 10

All about Williamson County’s program to draw the blood of DWI suspects at the jail  
 .....page 23

A clip-and-save guide to filing deadlines  
 .....page 28

# There's still time to give to the Annual Campaign

Consider making a year-end gift to the 2009 Color in the Map Annual Campaign. TDCAF needs your support! (Go to [www.tdcaf.org](http://www.tdcaf.org) to see if your county has contributed and is "colored in.") For many members and friends of TDCAA, the end of the year is a traditional time for giving. Gifts to TDCAF not only provide important support for TDCAA programs, but they also yield significant and timely tax savings. Make your gifts by December 31 and receive a tax break when you itemize deductions on your 2009 income tax return.

Our goal is to raise \$100,000 and have 100 percent support from every county in Texas. If you have not

had a chance to contribute, please remember that every dollar counts! You may designate your gift for training or books, make a donation in honor or in memory of a loved one, or contribute an unrestricted gift for general operations. Please use the envelope in this issue of the journal to make a contribution.



*By Jennifer Vitera*  
TDCAF Development  
Director in Austin

## Honoring Carol Vance

Please save the date for the Champions for Justice event honoring Carol Vance, which is tentatively scheduled for April 22,

2010. We are in the process of securing a location in Houston and will pass along the details once confirmed. In addition, TDCAF is seek-

ing corporate and private sponsors to support this event. Please feel free to call me at 512/474-2436 with any ideas or questions you may have.

## Gifts in memoriam

Please remember TDCAF as you contemplate honoring or memorializing a loved one. Making a contribution to the foundation in the name of a friend, family member, or colleague is an exceptional way to show your appreciation. The foundation staff will send a special note to the honoree or his family that states your gratitude and explains how the gift will help ensure the future excellence of prosecution and law enforcement in Texas.

If you have contacts within your community who would like to learn more about the foundation, please call me at 512/474-2436. ✱

## Recent gifts to TDCAF\*

- Convenience Print
  - Michael E. Fouts
  - John P. Fouts
  - John F. Healey, Jr., *In Honor of Sam Dick*
  - John T. Hubert
  - Rob Kepple
  - Katherine McAnally
  - Cathy O. Morris
  - William Anthony Porter, *In Honor of the Honorable William M. Jennings*
  - Recovery Healthcare Corporation
  - Julie Renken
  - John E. Terrill, *In Memory of Tom Green*
  - Manny Tovar
  - William R. Turner
  - Larry Vanderwoude
  - Martha Warren Warner
  - Harriet Wesig
  - Mark Yarbrough
- \* Gifts donated between 8/2/2009 and 9/18/2009.

## Great fundraising idea from Ellis County!



The DA's office in Waxahachie recently conducted a weight loss challenge. The 16 participants paid \$20 to enter and set a collective weight-loss goal. If the group met the goal, they would use the money for a party to celebrate. If not, they would donate the money to the Foundation. "Well, our loss is the foundation's gain because we didn't lose enough," noted Patrick Wilson, an assistant district attorney. A check for \$310 (entry fees less the cost of a scale) is on its way. We love this creativity and thank everyone who participated: (front row, left to right): Mimi McBroom, Cindy Hellstern, Lindy Tober, Christin Barnes, Ginger Gentry, and Amy Nguyen; (back row, left to right): Kathy Grant, Don Maxfield, Patrick Wilson, Lee Auvenshine, Ann Montgomery, and Ricky Sipes. (Not pictured: Stacie Auvenshine, Sandy Fisher, Danny Gentry, Jo Beth Grubbs, and Joe Grubbs.)

# TABLE OF CONTENTS

## COVER STORY: He almost got away with murder

By Cary Piel and Susan Calvert Piel, Assistant Criminal District Attorneys in Denton County

2 **TDCAF News: There's still time to give to the Annual Campaign; Recent gifts to the TDCAF; Great fundraising idea from Ellis County**

By Jennifer Vitera, TDCAF Development Director, in Austin

4 **Executive Director's Report: The 2009 Texas Prosecutor of the Year (times two)**

By Rob Kepple, TDCAA Executive Director, in Austin

7 **The President's Column: A big thank-you**

By Barry Macha, Criminal District Attorney in Wichita County

8 **Newsworthy: Law & Order Award winners**

9 **Newsworthy: Award winners at the Annual Conference**

10 **Photos from the Annual Criminal & Civil Law Update in Corpus Christi**

11 **Newsworthy: Milestones for TDCAA staff; Rock Band at the Annual**

12 **TDCAF News: TDCAF holds successful golf tournament**

13 **The Way We See It: What would you do if you weren't in a prosecutor's office?**

15 **Newsworthy: Deadline for scholarship, PCI, and Chuck Dennis awards; Alpert wins National Traffic Safety Award**

23 **DWI Corner: Drawing blood in the jail**  
By Jana K. McCown, First Assistant District Attorney in Williamson County

26 **Juvenile Law: Enforcing restitution**

By Rodolfo Ramirez, Assistant District Attorney in Fort Bend County, assisted by Elizabeth Dondlinger

28 **Back to Basics: A clip-and-save guide to filing deadlines**

By Philip D. Ray, Assistant District Attorney in Williamson County

30 **Newsworthy: Help from the IRS on gambling cases**

31 **Victim Assistance: Are we all on the same page regarding Victim Impact Statements (VISes)?**

By Cyndi Jahn, Victim Assistance Coordinator in the Bexar County Criminal District Attorney's Office, and Chris Jenkins, Victim Assistance Coordinator in the Dallas County Criminal District Attorney's Office

33 **Criminal Law: A stormy childhood, now calm**

By Ben Hoover, Assistant Criminal District Attorney in Wichita County

## TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION

505 W. 12th St., Ste. 100, Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcaa.com

### 2009 Officers

<b>President</b>	Barry Macha, Wichita Falls
<b>Chair of the Board</b>	Bill Turner, Bryan
<b>President-Elect</b>	C. Scott Brumley, Amarillo
<b>Secretary/Treasurer</b>	Mike Fouts, Haskell

### Regional Directors

Region 1:	Lynn Switzer, Pampa
Region 2:	Bobby Bland, Odessa
Region 3:	Cheryll Mabray, Llano
Region 4:	Martha Warner, Beeville
Region 5:	Lee Hon, Livingston
Region 6:	Elmer Beckworth, Rusk
Region 7:	Staley Heatly, Vernon
Region 8:	Elizabeth Murray-Kolb, Seguin

### Board Representatives

<b>District Attorney</b>	Henry Garza
<b>Criminal District Attorney</b>	Joseph Brown
<b>County Attorney</b>	David Escamilla
<b>Assistant Prosecutor</b>	Nelson Barnes
<b>Training Committee Chair</b>	Christy Jack
<b>Civil Committee Chair</b>	Michael Hull
<b>Legislative Committee Chair</b>	David Weeks
<b>TAC Representative</b>	Laurie English
<b>NDA Representative</b>	John Bradley
<b>Federal Liaison Rep.</b>	Rene Guerra
<b>Investigator Board Chair</b>	Maria Hinojosa
<b>Key Personnel Board Chair</b>	Linda Poe

### Staff

Robert Kepple, Executive Director • W. Clay Abbott, DWI Resource Prosecutor • Diane Burch Beckham, Senior Staff Counsel • William Calem, Director of Operations and Chief Financial Officer • Shannon Edmonds, Staff Attorney • Gail Ferguson, Administrative Assistant • Tammy Hall, Financial Officer • Manda Helmick, Meeting Planner • Seth Howards, Research Attorney • Ashlee Holobaugh Myers, Meeting Planner • Erik Nielsen, Training Director • Dayatra Rogers, Assistant Database Manager • Andrew Smith, Sales Manager • Jennifer Vitera, Foundation Development Director • Sarah Wolf, Communications Director  
**Sarah Wolf, Editor • Diane Beckham, Senior Staff Counsel**

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, investigators, prosecutor office personnel, and other TDCAA members. Articles not otherwise copyrighted may be reprinted with attribution as follows: "Reprinted from *The Texas Prosecutor* with permission of the Texas District and County Attorneys Association." Views expressed are solely those of the authors. We retain the right to edit material.

## TEXAS DISTRICT & COUNTY ATTORNEYS FOUNDATION

505 W. 12th St., Ste. 100 Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcf.org

### Foundation Advisory Board Members

Dan Boulware, Chair (Cleburne)  
D. August Boto (Nashville, TN)  
Tom Bridges (Portland)  
Yolanda de Leon (Harlingen)  
Arthur C. "Cappy" Eads (Salado)  
Bob Fertitta (Columbia, SC)  
The Honorable Larry Gist (Beaumont)  
The Honorable Gerald Goodwin (Lufkin)

Michael J. Guarino (Galveston)  
Tom Hanna (Nederland)  
Rusty Hardin, Jr. (Houston)  
Pete Inman (Austin)  
The Honorable W.C. "Bud" Kirkendall (Seguin)  
The Honorable Oliver Kitzman (Brookshire)  
Tom Krampitz (Fort Worth)  
James E. "Pete" Laney (Hale Center)

The Honorable Michael J. McCormick (Lockhart)  
The Honorable John T. Montford (San Antonio)  
Sherri Wallace Patton (Fort Worth)  
The Honorable Susan Reed (San Antonio)  
Bill Turner (Bryan)  
Carol Vance (Houston)  
David Williams (San Saba)

## The 2009 Texas Prosecutor of the Year (times two)

At the 2009 Annual Conference, we announced and awarded the State Bar Criminal Justice Section Prosecutor of the Year honor. This year, though, the TDCAA Nominations Committee, TDCAA Board, and State Bar Criminal Justice Section bestowed *two* awards: to **Richard Alpert** (assistant criminal district attorney in Tarrant County, pictured below with **C. Scott Brumley**, county attorney in Potter County, and **Mike Fouts**, district attorney in Haskell County), and **John Bradley** (district attorney in Williamson County, pictured at bottom with me).



*By Rob Kepple*  
TDCAA Executive  
Director in Austin

And for good reason. You might recall in my last Executive Director's Report, I talked about the biggest innovation in law enforcement in a long time: mandatory blood draws to support DWI prosecutions. Law

enforcement and prosecutors, long frustrated with the lack of evidence in DWI cases—due in large part to the defense bar's success in convincing folks that it was worth the license suspension not to provide a breath sample—have been working hard, both at the capitol, behind their desks, and in the courtroom, to get that forensic evidence from defendants and into trials. Bradley and Alpert have been instrumental in that accomplishment.

First, properly trained police and prosecutors all around the state started getting search warrants for blood when DWI suspects refused to provide breath samples. Some smaller jurisdictions could procure warrants for every DWI stop, while in other jurisdictions the warrants were sought only on holidays or over certain weekends. Prosecutors who participated in these "no refusal weekends" report a staggeringly high percentage of intoxicated drivers, many with double the legal blood-alcohol concentration.

Second, major changes in statute were made during the 2009 Legislative Session to expand the list of situations requiring blood draws. (See the September-October 2009 issue of this journal for an entire article on the new law.)

So when it comes time to recognize the people behind these powerful developments, the Nominations Committee had an interesting situation. Educating police and prosecutors on how to run a blood-draw

program has been phenomenal, and now that blood draws (in many instances) are mandatory, even more training is necessary.

Everyone in the association recognizes Richard Alpert's work to train law enforcement and prosecutors in the area of DWI, and in particular in the proper method of conducting blood draws in DWI investigations. And John Bradley was a force during the 81st Legislative Session to expand the mandatory blood statute. I recall the old saw that there are 400 ways to kill a bill and only one way to pass it; John fought off about 350 of those bill-killers to ensure that the ground-breaking DWI bill was made into law.

Congratulations to the Prosecutors of the Year! Thank you for all of your hard work.

### A Texas Lone Star

Another major TDCAA award is the Lone Star Prosecutor Award, which recognizes outstanding work by a prosecutor in the trenches. It honors the type of work that may not grab headlines but is nonetheless a tribute to the profession.

This year, our Lone Star prosecutor is **Katrina Daniels**, an assistant criminal district attorney in Bexar County. **Judge Susan Reed**, criminal district attorney in Bexar County,



Randall Sims, Katrina Daniels,  
and Judge Susan Reed

described her as an energetic and dedicated prosecutor. **Randall Sims**, the district attorney in Potter County who co-presented the award, noted that during the legislative battles over the journalist shield bill, Daniels often worked through the night to draft and redraft proposal after proposal. That kind of dedication to a difficult task is worthy of recognition. Congratulations, Katrina. I'm glad you are a Texas prosecutor.

## **TDCAA leadership report**

At the 2009 Annual TDCAA Business Meeting held in conjunction with the annual conference in Corpus Christi, TDCAA members elected the association leadership for 2010. On January 1, 2010, current president **Barry Macha** (criminal district attorney in Wichita County) will become chairman of the board. **C. Scott Brumley** (county attorney in Potter County), will take the reins as president. **Mike Fouts** (district attorney in Haskell County) will be president-elect, and **Joe Brown** (the criminal district attorney in Grayson County) will be the secretary/treasurer.

In addition to the executive committee positions, the district attorney at-large position will be filled by **Henry Garza** (district attorney in Bell County). The assistant prosecutor at-large will be **Terri Moore** (first assistant criminal district attorney in Dallas County). In regional caucuses, **Eddie Arredondo** (county attorney in Burnet County) was elected as the Region 3 Director, **Lee Hon** (criminal district attorney in Polk County) was elected as the

Region 5 Director, **Doug Lowe** (criminal district attorney in Anderson County) was elected as the Region 6 Director, and **Larry Allison** (county and district attorney in Lampasas County) was elected as the Region 8 Director.

I'd like to take this chance to thank the folks who will be going off the board for their service to the association: **Bill Turner** (district attorney in Brazos County), **Cheryll Mabray** (county attorney in Llano County), **Elmer Beckworth** (district attorney in Cherokee County), and **Elizabeth Murray-Kolb** (county attorney in Guadalupe County). Being on the board is always a lot of work, especially during a legislative year, and the association's members are grateful for your leadership.

## **A new emphasis on domestic violence**

We have come a long way in the realm of domestic violence now that we recognize the problem and address it in statute and in prosecution. But the DA's office in El Paso has taken current laws and added a new element to the mix: speed.

The key to the new effort is to reach the victim quickly, which means that teams of investigators and victim advocates specializing in domestic violence cases get to the victim's house within 24 hours of the complaint. Is the offender there too? Sometimes. But according to **Jaime Esparza**, district attorney in El Paso County, this quick outreach and connection with the victim has led to much better results with their cases.

The El Paso program will be a topic of conversation at the Elected

Prosecutor Conference in Fort Worth in December. If you want to know more now, you can check out the story on the NPR program Latino USA at [latinousa.kut.org/858/](http://latinousa.kut.org/858/) (scroll down to see the story on El Paso).

## **Loan forgiveness news**

Last issue, I told you about the income-based repayment (IBR) program, which prescribes student loan payments according to a person's income. As this *Prosecutor* went to press, we learned that if a debtor does not pay off his loans adjusted under the IBR program within 25 years, some of the forgiven debt becomes taxable income. No one expects that student loan debt will survive for 25 years, but this is a good reminder to read the fine print! A bill that would delete that taxable-income status after 25 years, H.R. 2492, is pending in Congress. We will keep you informed.

## **Prosecutors bubbling up**

A couple of our folks have recently been appointed to leadership positions of note. **Joe Brown** (criminal district attorney in Grayson County) is now on the Texas Youth Commission Board, and **John Bradley** (district attorney in Williamson County) has been appointed Chair of the Texas Forensic Science Commission. Congratulations to you both.

## **New TDCAA staffers**

In the last edition of *The Texas Prosecutor* journal, we said goodbye to **John Brown**, our longtime director of operations and financial officer. Just recently, we hired **William**

*Continued on page 6*

Continued from page 5

**Calem** to take over that position. William was the grants program administrator for the Court of Criminal Appeals and has served as the director of administration and finance and the chief fiscal officer of



William Calem

the Texas Ethics Commission. He brings tremendous experience and energy to the association! We don't know about his ping-pong skills yet, but spring training will start soon enough.

We also recently hired a new, um, old database manager, **Lara Bru-men Skidmore**. As you might recall, Lara was in that position for many years before moving with her family to Washington several months ago. Once the job opened up again, she eagerly accepted the offer and can

even work from home in Washington, thanks to this little thing called the Internet. Lara, welcome home!

### Stuck again?

From the News of the Weird, y'all may recall one of the creepiest crime stories ever: the case of the woman who, while driving drunk at night, struck a homeless man and parked her car in the garage with the guy still stuck in the windshield. Without medical attention, the man eventually died. Tarrant County prosecutors **Christy Jack** and **Richard Alpert** tried the case to a 50-year sentence back in 2003, and the story was recently made into a movie. *Stuck*, billed as "the best man-stuck-in-a-car-windshield movie ever," is sure to be a crowd-pleaser.

Incidentally, what are the odds

that the same type of crime would happen again—in Texas, no doubt? Apparently, the odds are strong to very strong. Grand Prairie police report that in August, Vincent Riojas hit a man riding his bicycle, who was thrown into the car's windshield, flipped him over the roof and through the back window, where he became lodged in the car's backseat. Instead of stopping to care for the injured man or heading straight to the hospital, Riojas kept going and actually pulled the cyclist, Ronnie Keller, onto the rear floorboard to hide him. And once again, the victim was discovered too late to save his life.

More proof that real crime dramas aren't ever going to run out of material. ✱

Advertisement



**20%\* OFF BOTH BOOKS!**  
NEW EDITION!  
Author John Steinsiek designed this book for ease of use and quick reference. The handbook provides the user with the law, case law which has influenced the interpretation and application of the law, and practical tips for those serving civil process



LexisNexis\*

LAW ENFORCEMENT PUBLICATIONS

Authors Hultz and Spencer take an innovative approach to the study and practical application of modern criminal procedure. The book dissects and analyzes critical court cases involving the laws of arrest, search and seizure, investigative detentions, interviews, confessions and Miranda, the right to counsel, evidence, and law enforcement liability.



~~\$42~~ **\$33.60**  
1 volume, softbound, replaced annually  
ISBN 9781422427224  
Pub 31105

### ORDER TODAY!

visit: [lexisnexis.com/TDCAA](http://lexisnexis.com/TDCAA)  
call: **800-223-1940** (mention code 128655)

\*Offer valid for new orders only. Cannot combine with other discounts.

Plus sales tax, shipping, and handling where appl. cable. Prices subject to change without notice.

LexisNexis and the Knowledge Edge logo are registered trademarks of Reed Elsevier Properties Inc. © 2007 LexisNexis, a division of Reed Elsevier Inc. All rights reserved. LEXIPUB 07 0105

# A big thank-you

Thank you, members of TDCAA, for the honor and privilege of serving as your president. It has been a truly rewarding experience that I shall always treasure. As I come to the end of my term in office, there are a few reflections I would like to share with you.

First and foremost, I owe each of you my everlasting gratitude for your membership and helpful cooperation and readiness to respond to any call to service. You are the lifeblood of our association. Our continued success depends upon your participation.

No president ever had better officers, directors, and committee chairs with whom to serve. Their cooperation and dedication are deeply appreciated. The committee structure and the contribution of the committees are the backbone of TDCAA. Committee members have attended numerous meetings throughout the year, frequently traveling great distances and at considerable sacrifice. These unsung heroes carry out the work of our association in an unselfish manner for not only the benefit of our members, but also for the public and the administration of justice. My special thanks to those who served as chairs of our various committees for a job well done and to everyone who taught at one of our seminars or wrote an article for this journal or a book published by TDCAA.

The association staff is devoted

to their work, and they possess a deep sense of pride in the association's accomplishments. To them goes a vast amount of the credit for making our association tick. I am especially grateful for their loyalty and assistance beyond the call of duty. Longtime Administrative Assistant Gail Ferguson is a great example of that, and she has helped countless numbers of folks over the years locate the people or information they needed. So, too, are Tammy Hall, Financial Officer, and Dayatra Rogers, Assistant Database Manager, valuable in their respective fields. They keep TDCAA running like a well-oiled machine.

Senior Staff Counsel Diane Beckham and Communications Director Sarah Wolf deserve special mention because of the outstanding quality of the publications they produce for our association. Since coming to work for TDCAA in 1996, Diane's tireless efforts as editor of publications such as *Annotated Criminal Laws of Texas* continue to be nothing short of spectacular. Likewise, Sarah has done an extraordinary job as editor of our bimonthly journal, *The Texas Prosecutor*. And Sarah is to be commended for the excellent staff support she provides for our Texas District and County Attorneys Foundation (TDCAF).

Speaking of our foundation, I want to commend TDCAF Development Director Jennifer Vitera for the great job she is doing. She is

working very hard to ensure the foundation's continued success and commitment to educating and training Texas prosecutors and law enforcement. But Jennifer can't do it alone, and she needs all of us to step up and get involved in the foundation.

I truly believe that TDCAA provides the best training around. Many thanks to Training Director Erik Nielsen for making that happen. Thanks also to our resident road warrior, DWI Resource Prosecutor Clay Abbott, who travels around the state providing quality training. Meeting Planners Manda Helmick and Ashlee Myers deserve applause for the great jobs they do in making arrangements and coordinating our conferences.

Director of Operations William Calem is a welcome addition to the TDCAA staff as he takes over for John Brown. William is a great hire and comes to us from the Court of Criminal Appeals where he served as the grant program administrator. Also new on board is Seth Howards, Research Attorney, who answers legal questions for those who call and writes the weekly case summaries.

I wish to acknowledge and thank, for his special efforts, Staff Attorney Shannon Edmonds. His organizational skills are second to none. He is a terrific asset to our association and a valuable resource. His legislative updates are the best anywhere.

Finally, it has been my good fortune to have worked closely this past year with Executive Director Rob

*Continued on page 8*



*By Barry Macha*  
Criminal District  
Attorney in Wichita  
County

*Continued from page 7*

Kepple. We are indeed fortunate to have an executive director of Rob's caliber. His value to our association cannot be overstated. I am proud to know and to be associated with a true professional like Rob; more importantly, I'm very grateful to call him my friend. Thank you, Rob.

I want to extend my best wishes to Scott Brumley as he begins his tenure as TDCAA president. I also want to thank Bill Turner, our outgoing chairman of the board, for his outstanding leadership and service to TDCAA for many years.

Thank you again for the wonderful opportunity to serve as your president. It has been fun. I look forward to seeing each of you soon.

✱

## *Law & Order Award winners*



**T**his summer, TDCAA presented awards to several lawmakers honoring them for their work on criminal justice and public safety issues during the 81st Legislative Session.

Rep. Dan Gattis (R—Georgetown), in the top photo on the right with Shannon Edmonds, TDCAA's Director of Governmental Relations, came to the TDCAA Legislative Update in Bryan to receive his award. Rep. Gattis, a former prosecutor in Williamson County, was recognized for his work in passing groundbreaking legislation to facilitate the use of blood samples in DWI prosecutions.

Sen. Juan "Chuy" Hinojosa (D—Mission), above left, received his award at TDCAA's Annual Criminal and Civil Law Update in Corpus Christi. Sen. Hinojosa was recognized for his service as Vice-Chairman of the Senate Finance Committee and for his successful efforts to enhance local prosecution of border-related crimes.

Sen. John Carona (R—Dallas), above right, was recognized for his successful passage of Senate Bill 328, the DWI blood draw bill, and for his work as Chairman of the Senate Committee on Transportation and Homeland Security, including the passage of legislation targeting criminal street gangs.

See the previous issue of this journal for photographs and information on the other award recipients from this session. ✱



# Award winners at the Annual Conference



In photo 1 are Kara Welch and Gabriela Williams, who were awarded Professional Victim Assistance Certificates (PVACs). In photo 2 are Christy Jack (left) and Jack Choate (right) with Lindsey Roberts, who was honored with the C. Chris Marshall Award, which recognizes outstanding faculty. In photo 3 are Eloy Garcia (far left) and Zeke Cavazos (far right) of the Investigator Board, which gives a scholarship every semester. This year it went to Amanda Laine Say, daughter of Mandi and Scott Say (in the middle). In photo 4 are Melissa Hightower and Todd Smith; Smith was named the Oscar Sherell Investigator of the Year. Not pictured are the PCI winners: Kevin Davis, Gerardo Gonzales, Federico Gutierrez, Gary Hobbs, Teddy Horne, Marvin McLeroy, Thelbert Millsap, Robert C. Moore III, Macario Ponce, Gary West, Jimmy Weyrick, and Dale Williford.)

Congratulations to all of these honorees! ❁

# Photos from the Annual Criminal & Civil Law Update in Corpus Christi



## Milestones for TDCAA staff

### Introducing Sarah Edmonds

Sarah Jane Edmonds was born to Shannon and Meaghan Edmonds at 12:30 a.m. on Thursday, September 24 (during the Annual Criminal & Civil Law Update, in fact—though Shannon and Meaghan had stayed in Austin). She weighed 6 pounds, 2 ounces and was 19 inches long. She joins brother Thomas, 3½, and sister Mary-Kate, almost 2. Meaghan notes that Sarah feels like she's always been a part of the family. (Awwwww ...)  
 Congratulations on the new Edmonds! ❄



Sarah Jane Edmonds

### Congratulations to Diane and Mark!

Diane Beckham, TDCAA Senior Staff Counsel, wed Mark Warren on October 2 in Austin. Mark is a training specialist for the Texas Association of Counties and works just a block north of the association headquarters. The wedding was a small family affair followed by an intimate, barbecue-filled reception. The highlights were toasts from Diane's and Mark's sons, Alex and Ash (respectively), that managed to be both hilarious and poignant. Congrats to you both on joining together two loving families! ❄



Mark Warren and Diane Beckham

## Rock Band at the Annual



At the Annual Criminal & Civil Update, the Texas District and County Attorneys Foundation sponsored Wednesday night's reception, which included the video game Rock Band. Here are a few photos of the festivities.

## TDCAF holds successful golf tournament



ABOVE: Lew Bechtol, Mike Waldman, Henry Garza, Frank Long, and Nelson Barnes  
BELOW: Mike Bird, Staley Heatly, Jeff Case, and Kristi Bird



*And thank you to our sponsors:*



Convenience Print  
Western National Bank

Rob Kepple  
Saulsbury Family Foundation

At September's Annual Criminal and Civil Law Update, the 2009 Annual Golf Tournament hosted by the Texas District and County Attorneys Foundation (TDCAF) grossed over \$11,000 in donations. Proceeds from the yearly event will benefit just a few of TDCAA's programs, such as:

- specialized training in areas such as DWI, domestic violence, and child sex abuse;
- Prosecutor Trial Skills Course;
- ethics;
- Investigator School;
- technology workshops;
- Elected Prosecutor Conference; and
- comprehensive victim/witness coordinator training, resources, and support.

Along with improving and strengthening TDCAA, TDCAF looks to improve the State of Texas as a whole.

The event was on Wednesday, September 23, at the North Shore Country Club in Portland. We would like to thank the more than 30 participants who braved the rain to support this year's tournament, some of whom are pictured at left. A special thanks to **Nelson Barnes** and **Mike Waldman**, Assistant District Attorneys in Bell County, for organizing the teams, and to R.N. "Bobby" Bland, District Attorney in Ector County, for securing golf tournament donors. ❁

# What would you do if you didn't work in a prosecutor's office?

**Roe Wilson**

*Assistant District Attorney  
in Harris County*

I dream about being either a famous singer or a neurologist, but I can't sing and science is a mystery to me. So, if the Walter Mitty fantasies are discarded, what would I really do if I didn't work in a prosecutor's office?

I would be a forensic psychologist. I've encountered a staggering array of strange behaviors in the death penalty writs I've dealt with over the past 25 years, and the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) has become favorite reading. I particularly like diagnosing myself and people I know. However, I doubt if the defense would want me as an expert witness.

**Josh Hill**

*Assistant District Attorney  
in Harris County*

I would train fighters. I began training in the martial arts when I was 5 years old, started wrestling at 12, and continued training and wrestling through my first year of college. There, I started studying and competing in Brazilian Jiu Jitsu, boxing, and Muay Thai, and I'm still training and learning these arts. I also gained some valuable teaching experience as an assistant wrestling coach while in law school. I enjoy teaching and want to pass along some of the knowledge I've gained over the years.

**Warren Diepraam**

*Assistant District Attorney  
in Montgomery County*

The world of a vehicular crimes prosecutor can sometimes be a lonely place. I don't mind that aspect of prosecution. Frankly, if I weren't a prosecutor, I would be doing something involving solitude anyway, maybe as a surfing instructor on a South African or Costa Rican beach or an animal research scientist back home on the African savannah.

Studying animals and their interactions with each other in a beautiful setting can't be beat. I have been there and experienced Africa at its most beautiful best—the calm and peace that goes along with that setting is very alluring. The same goes for being a surf instructor. Not much beats lying on a surfboard waiting for a good wave to come in, where the only sounds are the waves and the birds.

I would be at home in either place, living in a tent on the plains of Africa or on a beach in the Caribbean, waking to the birds and the calls of the wildlife. Lions, sharks, and other predators don't worry me so much—I guess I deal with them now in court, but the setting is not as picturesque. Plus, the predators in the wild are not nearly as dangerous as the ones we face in our courts or on our streets.

**Lynn Hardaway**

*Assistant District Attorney  
in Harris County*

I would be designing and making jewelry as a full-time job, rather than a sideline. Several years ago, a fellow prosecutor and I took metal-smithing classes from a local jewelry designer, and I learned the basic steps in metal forming, soldering, and stone setting. Since then, I've supplemented my class experience with a lot of trial and error and one trip to the emergency room. I now have a fully-equipped studio and market my jewelry through local boutiques.

**Ed McClees**

*Assistant District Attorney  
in Harris County*

I started my legal career as a plaintiff attorney representing severely injured people and the families of those killed by other people's wrongful actions. I left the civil world to be a prosecutor because I thought that justice can be better achieved when it isn't limited to dollars and cents. If I weren't a prosecutor, I would return to the civil world, even with the mountains of paperwork, because I would still be helping victims of wrongful acts.

*Continued on page 14*

*Continued from page 13*

## **Brent Robbins**

### ***Investigator in the Denton County Criminal District Attorney's Office***

Well, I'd be unemployed, I suppose. Oh, you mean what *other* employment would I attempt to obtain. (Taking phrases so literally means I've been hanging around attorneys too much lately!) I could be a superhero. No—I'm sure I wouldn't look good in the tights. I could work for a state-wide agency funded by Department of Transportation, traveling across Texas teaching cops and prosecutors about DWI-related issues. No, wait, I think that job's already taken. Perhaps a professional poker player! Maybe, but only if I could specifically include certain ADAs from the DFW area and specifically *exclude* certain investigators from Lubbock in the tournaments.

I suppose I could always go back to being a street cop. After my first three months as an investigator with this office, I seriously thought about doing just that because I had learned so much about the Code of Criminal Procedure and courtroom issues (things I'd done as an officer that I shouldn't have done and things I didn't do that I should've) that I would've been 10 times the street cop I had been. But then I remembered working from 7 p.m. to 7 a.m. on Christmas Eve in 28-degree temperatures and directing traffic at crash scenes for hours in August while wearing a ballistic vest. Not sure if I could handle those parts of the job again.

But for the past four years, in addition to my normal duties, I have been teaching police officers. There

is something very rewarding about teaching something new to someone, then seeing the results down the road. When I review cases and see that officers are doing things and asking questions that I know came from one of my classes, it gives me a sense of accomplishment.

I think most police officers joined the profession to change the world and rid their communities of crime. It doesn't take long to realize that there's only so much one cop can do. Having the opportunity to help other officers do their part to fight crime (by doing better investigations, writing better reports, making better cases, etc.) would allow me to continue to affect my little slice of the world. If I couldn't work here, I would head to the nearest police academy and become an instructor.

## **Spence Graham**

### ***Assistant District Attorney in Harris County***

I would be a professor, either of law or maybe even an unrelated topic. I enjoy teaching young prosecutors—teaching is rewarding because it helps students view something about their world in a different light. I'm grateful for the knowledge and wisdom given to us, and I believe that we are responsible for passing it on to future generations.

## **Suzanne Elmilady**

### ***Assistant District Attorney in Harris County***

I would be practicing human rights law and working for a non-governmental organization (NGO) or the United Nations if I weren't a prose-

cutor. Specifically, I would focus on being a civil servant in underdeveloped countries, helping create stable infrastructures with a focus on education and global awareness.

## **Charles E. Orbison**

### ***Appellate Attorney in the Denton County Criminal District Attorney's Office***

I would probably be teaching journalism or law at a college or university. When I became a licensed attorney in 1999, I left my position as a broadcast journalism instructor at Texas Woman's University in Denton. Although I began law school with the idea of practicing or teaching communications law, it didn't take long to develop a strong interest in criminal law, and I had no doubt which side I wanted to represent. As a state's appellate attorney, I can fight the good fight in an area to which I am most suited. It's been a good ride. Maybe someday I will return to the classroom to teach criminal law, but for now, the work keeps me fully challenged and satisfied. There's no other job I'd rather have.

## **Catherine Evans**

### ***Assistant District Attorney in Harris County***

I credit my high school teachers with exposing me to different cultures, concepts, and lifestyles. Teaching high school students would give me the same opportunity to open a new world to teenagers. Prosecutors are always mopping up after the unthinkable happens. We sometimes offer closure and comfort to a family, but that doesn't change what

brought them to the courthouse in the first place. It would be amazing to help guide a student, if only every now and then, toward a different path. ✱

## NEWS WORTHY

### Deadline for scholarship, PCI, and Chuck Dennis awards

Applications for the Investigator Section scholarship, PCI award, and Chuck Dennis award are now online. Look in the newsletter archive under this issue (November–December 2009) on [www.tdcaa.com](http://www.tdcaa.com). The submission deadline for all awards that will be given at the 2010 Investigator School in Odessa is December 1, 2009. ✱

## Alpert wins National Traffic Safety Award

Richard Alpert, an assistant criminal district attorney in Tarrant County, was honored with the National Traffic Safety Award for Prosecutors. It is presented by the National Association of Prosecutor Coordinators (NAPC). Congrats! ✱

*Continued from the front cover*

## *He almost got away with murder (cont'd)*

Upon seeing Viki Lozano in the master bedroom, paramedics chose not to perform lifesaving measures. One described her as being “dead-dead.” She was lying on her back on the side of the bed, her right foot hanging off. Her skin was cold to the touch, pale, and waxy, and her right foot and ankle had obvious lividity. The main two paramedics testified that in their extensive experience with death, she had been dead for at least an hour, probably more like 90 minutes—certainly not the 30 to 45 minutes Lozano claimed to have been gone from the house. Lying next to Viki on the bed was an open gun-cleaning kit, two sheets of newspaper, cleaning supplies, and Bobby Lozano’s 9-mm Glock service weapon covered in oil.

During his 17-year career at the Denton Police Department, Lozano had earned a reputation as a ladies’ man who did not let his marriage interfere with his love life. Perhaps Viki, at her wit’s end over his endless philandering, had killed herself? Maybe she or Lozano had sloppily laid the gun-cleaning kit on the bed to cover up her suicide? Or could her death have actually been a gun-cleaning accident?

Though Lozano had been assigned on-call duty that weekend, he had asked Jeff Wawro to cover his shift so he could take his wife out to celebrate their wedding anniversary, so Wawro had the unenviable task of investigating the death of his coworker’s wife. Lozano’s story was that he had started to clean his Glock but instead decided to go to the tanning salon first. He claimed to have left

the gun on the bed and had declined Viki’s offer to clean it for him.

Word of Viki’s death spread quickly that night, and the house soon filled with officers arriving both in an official capacity and to support Lozano. Family members, too, arrived at the scene fairly quickly. The working officers attempted to balance the need to preserve a possible crime scene while being sensitive to a fellow officer who might have lost his wife to a suicide or accident. Consequently, only the master suite was treated as a possible crime scene; Lozano’s car was not searched or seized, and no systematic search of the rest of the house was ever done, other than to rule out forced entry. No one drove the route to the tanning salon to look for or in trash bins. The department’s gunshot residue kit was out of date, so no sample was taken from Lozano’s hands. He was not brought to the station for questioning or questioned at the scene. Instead, officers heard him tell his story to family and friends over the course of the evening. At 11:00 p.m., almost two hours after the 911 call, the crime scene team entered the bedroom and began taking pictures.

First they took photos of the scene from various angles. Before moving the body or anything on the bed, the team searched for the spent shell casing ejected from the gun, but they could not find it. After Viki’s body was removed, the officers pulled the gun cleaning kit, the newspaper, and other cleaning items to the foot of the bed to look for the casing. Ideally, when an item was removed from its position on the bed, it should be

*Continued on page 16*

*Continued from page 15*

immediately placed into evidence, but in this case, virtually every item was moved to the foot of the bed before it was bagged and placed into evidence.

The search for the casing was more difficult because of the patterned blanket covering the bed; it depicted a tiger with a background of trees and plants. As investigators straightened the blanket's folds, the casing was discovered within the pattern of branches. Photos were immediately taken of the newly discovered casing as it lay; these photos also captured the items that had been moved from their original location to the foot of the bed.

## **Scientific findings**

The Tarrant County Medical Examiner's Office ruled the cause of death was a gunshot wound to the chest, but the manner of death was undetermined. The ME could not conclusively establish whether it was homicide, suicide, or accident.

Deputy Medical Examiner Gary Sisler found that there was an entrance wound almost in the center of Viki's chest. The wound was not contact, but the weapon had been 3 to 6 inches away. There was a shored exit wound on her left side, meaning that that side of her body was against something substantial when she was shot (the mattress). The wound path was down about 3 inches from entrance to exit, and the bullet had torn through her heart, lungs, liver, and spleen before it was stopped by the density of the mattress before it could pass through her pajama top. Dr. Sisler's position was that based on the location and angle of the wound, he could not determine if

she had pulled the trigger or if someone else had.

Viki had gunshot residue on her sleeves, which was consistent with her hands' closeness to the gun as it fired, either by firing the gun herself or holding her hands up in defense. Viki's hands were swabbed for residue, but the control swab came back contaminated, nullifying the test. She also had gunpowder on her right cheek and neck, indicating her head had been turned away from the gun when it was fired into her chest, passing into her left side.

Small fragments of popcorn husks were stuck to both the front and left side of Viki's body. She also had a very small fragment of popcorn in her mouth. She had clearly been eating popcorn in bed, but no popcorn or container thereof was near the bed or anywhere in the bedroom. No one even thought to look for a bowl or bag of popcorn elsewhere in the house the night she died, as none of the officers knew about the husks until weeks later when the lab completed its trace analysis. That snack would become another piece of intriguing evidence.

## **Defendant's statement**

Two days after Viki's death, Bobby Lozano met with Texas Rangers Tracy Murphree and Tony Benny and typed out his written statement detailing what led to Viki's death. Ranger Murphree later described it as the most bizarre statement he had ever received. Lozano painted a picture of a couple devoted to each other and their young son. He detailed their anniversary evening of reminiscing about their good fortune, their return home from dinner, and

falling asleep together after sharing such a wonderful evening. He ignored the fact that he had left his wife alone after dinner to make a midnight visit to his girlfriend. He returned home about 2 a.m.

According to him, he and his wife woke up at 6:00 a.m. the next morning, took their son to the park, and shopped at a local Target. In the evening, he played a computer game for an hour before deciding to clean his gun in preparation for a trip to the gun range the next morning. He claimed to have placed the gun, cleaning supplies, and newspaper on the bed next to his wife, who was watching television, before deciding instead to run up to the salon for a quick tan at 8:15 on a Saturday night. He returned 45 minutes later to find his wife dead on the bed.

## **The marriage**

Viki married Bobby Lozano when she was only 20. During the course of their marriage she longed for a child of her own. Years before her death a coworker at the school where she taught asked her why she and her husband did not have children. Viki silently pulled a photograph of herself as an overweight teenager out of her wallet. She explained that Bobby made her carry this picture around so that she would never forget what she used to look like. She further explained that he did not want her to have children because he feared her gaining weight.

Viki would occasionally reveal similar snippets of information to coworkers. He weighed her. He monitored her food intake. He used calipers to determine her body fat percentage. He dictated her work-



outs, increasing them if she gained any weight. Her adult life she always maintained a very trim figure, but, not surprisingly, suffered from eating disorders over the years. Viki's life was at home, at work, and at the gym with him.

A couple of years after her father died, Viki, Bobby, and Viki's mother, Anna Farrish, pooled resources and built their dream house together. Anna lived very comfortably, the widow of a college professor. Because of her contribution, the family was able to build a half-million-dollar house with a master suite on one side for Viki and Bobby and another suite on the opposite side for Anna.

Over the years Viki pined for a baby and Lozano tried to appease her with pets. Finally, after 15 years of marriage, he acquiesced, and Monty was born on August 15, 2001. She completely adored that baby. Viki returned to her teaching job after her maternity leave but planned on taking the following year off to be a full-time mom.



## The girlfriends

If infidelity were an Olympic event, Bobby Lozano would win the gold. As investigators examined his personal life, it quickly became clear that during the course of the mar-

riage Lozano was consistently unfaithful to Viki and used his position at the police department to meet women. In 2002 Investigator Wawro was able to track down and obtain statements from lovers Lozano met through the Denton Police Department; these included a fellow detective, a college intern, and a witness, defendant, and even a victim in various criminal cases.

The girlfriends described Lozano as largely motivated by money. He had told them that his wife's family was wealthy and that he enjoyed a more comfortable lifestyle because of the marriage—the main reason he would never leave her.

One girlfriend was Cindy, a fellow detective in an unhappy marriage with two young children. What started as a flirtation led to an affair, which blossomed in January and February of 2001. Lozano relentlessly pursued her, giving her daily love letters dripping with descriptions of his breathlessness in her presence, that his heart was “mesmerized” and his soul “enraptured.” A woman with very low self-esteem at that point, she fell for every lie and every cheesy dime-store romance novel line he uttered.

By November 2001 she had filed for divorce from her husband and was completely committed to Lozano. The day Monty was born, Lozano left his wife's side at the hospital to visit Cindy. According to Lozano, he and his wife had agreed they would separate when Monty turned one. Cindy completely believed these lies. By early 2002 Lozano, still living with his wife, was house shopping with Cindy. He had convinced Cindy that he had

approximately \$700,000 secreted away in a Mexican bank account that would be used to buy their own \$500,000 house together. Cindy did not know of the \$750,000 life insurance money he had on his wife.

In February 2002 Lozano described to Cindy that Viki had gone to visit the divorce attorney and had just signed paperwork, but in truth Viki was filling out paperwork to take a leave of absence from work to stay home with their son. She also applied for an additional \$350,000 life insurance policy on herself naming Robert Lozano as the sole beneficiary.

By the summer of 2002, Cindy did not know the truth from the lies. She began questioning whether the divorce and Lozano's plans to move out of the family home were fiction. Putting her detective skills to work, she went to the apartment complex where Lozano had claimed to have rented a place and confirmed that he had in fact reserved an apartment but had not yet moved. On Friday, July 5, 2002, Lozano took her to lunch and asked her to have faith in him, then went home to take Viki out to dinner for their anniversary. Anna Farrish babysat Monty as Viki and Bobby went to Il Sole, a nice Dallas restaurant, for a late reservation. He and Viki were back at home around 11:00 p.m., and Bobby was at Cindy's house by midnight. He left Cindy's bed and returned home around 2:00 a.m.

By 9:00 the next night, his wife was dead, and a few months later, Detective Lozano was indicted for murdering his wife.

*Continued on page 18*

Continued from page 17

## The first look

Leading up to the indictment, then-Lieutenant Lee Howell of the Denton Police Department served as liaison with Viki's mother, Anna Farrish. From their first meeting in August 2002, Farrish was adamant that Viki's death be ruled an accident. She made it clear that any other finding was "unacceptable" and would bring unnecessary shame and embarrassment to her family. She told others that Viki accidentally discharged the gun into her chest when her small dogs jumped onto her bed, startling her.

In an effort to address the inconclusive finding of the Tarrant County Medical Examiner, the District Attorney's Office sought a second opinion on the manner of death. Chief Medical Examiner Edmund Donoghue from Cooke County, Illinois, was in Dallas at a conference. The prosecutors assigned to the original Lozano case met with him at his hotel, armed with photographs of the crime scene for his review. Donoghue indicated that there was insufficient evidence from the photos to conclusively establish manner of death between suicide, homicide, and accident.

The case was originally indicted on December 12, 2002, but dismissed July 14, 2004, due to insufficient evidence to establish a *prima facie* case.

## Worthy of a second look

On September 8, 2008, *Denton Record Chronicle* newspaper reporter Donna Fielder, using information she received from an open records request submitted to the Denton

Police Department, wrote an article about Viki's death, questioning whether Bobby Lozano had gotten away with murder.

By that point Paul Johnson had been elected Denton County Criminal District Attorney. With the new administration came a fresh set of eyes to pull the closed file out of storage to determine if Lozano had, in fact, killed his wife. Johnson assigned the case to us, Cary and Susan Piel, and investigator Jack Grassman. Our initial marching orders were to reopen the case file and determine whether there was sufficient evidence to support a murder charge. After reviewing the boxes of files from storage and speaking to witnesses, we were unanimous in our conclusion that Bobby Lozano had, indeed, gotten away with murder.

One of our initial meetings was with Anna Farrish, Viki's mother. Time had not changed her position. Anna still lived in the same house—with Bobby Lozano. Her former son-in-law now shared the master bedroom with his new wife, Heidi Renee Whitehead Lozano. Anna made it very clear that she was unhappy about the article in the *Denton Record Chronicle*, was opposed to our reopening the case, and would not cooperate with the prosecution.

Our other meetings were with the initial investigation team. We met with Lee Howell first, not knowing what his reaction would be to reopening the Lozano case. We found out that he'd been disappointed that the original case had been dismissed, and he had an uncanny recollection of the facts, given that six years had elapsed since Viki's

death. He was unwavering in his opinion that Lozano was guilty. Though this case did not have one smoking gun—no confession, no conclusive forensic evidence—he felt the pieces added up to only one conclusion.

We also met with Jeff Wawro, former lead investigator. During our first meeting, we addressed a discrepancy we discovered during our review of the evidence. The original case file contained Wawro's sketch of the bed, where he had drawn the exact locations of the body, casing, and gun before they were moved—but not the gun cleaning kit. The items originally on the bed, including the kit, were photographed numerous times before being moved. The cleaning kit was well photographed but its location not measured before it was moved. At the time it was moved, the significance of its exact location was not known.

During our review of the case years later, Cary used the photos to compare the location of the casing with the location of the gun cleaning kit before it was moved. The conclusion was undeniable: The casing had been lying squarely *under* the gun cleaning kit. If the kit had been lying on the bed *before* Viki was shot, how could the casing end up under the kit? Clearly, the kit was placed on the bed after Viki had been shot. The scene had been staged.

Our problem? In computer-generated sketches, Wawro had drawn the casing on the bed separate from the gun cleaning kit—he had drawn the kit in the wrong location. How could this happen? At the crime scene, the casing was not initially

noticed when the blanket was cleared of gun-cleaning items. By the time it was discovered, nobody realized that the kit had been removed from that exact location. The crime scene team had taken pictures from enough angles to establish where the kit had been, but those photos weren't immediately available to them at the scene—but they *were* available to us. After carefully reviewing the photographs, Wawro agreed that his computer-generated drawing was incorrect. (Months later on the stand, he was able to thoroughly explain the discrepancy to the jury.)

## Cindy

Our most anticipated witness interview was with Lozano's former girlfriend, Cindy. Her law enforcement career had ended after Viki's death, and she had stayed with Lozano after he was previously indicted and after that case was dismissed.

Our initial meeting with Cindy lasted hours, as she detailed the course of her relationship with Bobby and the intricate web of lies he told. It was clear that even now, years later, it was somewhat difficult for her to grasp that virtually everything he told her was a lie. Lozano had told her that he attempted to save his wife's life by moving her to the floor and performing CPR, but Cindy did not know that Viki was on the bed, not the floor, when first responders arrived and that none of the paramedics or officers believed Lozano's claims to have performed CPR.

On the day of Viki's funeral she spoke to Lozano for the first time since Viki's death. At that point, she truly did not believe Lozano was

involved, though she feared Viki had killed herself because of the affair. She told him that she would have to notify police of any contact she had with him and that she had told the police everything. "Everything?" Lozano asked. "Even about the 'D'?" Understanding that he meant the divorce, Cindy confirmed that she had told investigators about it. (She and Lozano secretly saw each other during the initial investigation of the first case and during the pendency of the first indictment.)

On the same day, Lozano had given Texas Ranger Tracy Murphree his written account of that weekend, including his claim that he and Viki had gone to sleep after returning from dinner. After speaking with Cindy, Lozano knew he had been caught in a significant lie. Two days later, Lozano's newly hired defense attorney, Rick Hagen, brought a supplement of his original statement to the police department in which Lozano confessed that he had lied about visiting Cindy on the night of his anniversary.

After the first case was dismissed, Lozano was able to collect \$500,000 of the \$1.1 million dollars in life insurance he had on Viki. One policy paid only months after the dismissal. The other policy, the one taken out a few months before her death, was not so willing to pay. Ultimately a settlement was reached whereby the policy's proceeds were deposited in a trust for Monty. According to Cindy, Lozano was quite angry he was not able to collect all the money he felt he was due.

In December 2004, while still living with his mother-in-law and months after the first indictment was

dismissed, Lozano proposed to Cindy. Though she accepted, a wedding never took place; a few months later, the relationship fizzled and they broke up. Though Cindy had suspicions of Lozano's infidelity, she was not able to confirm anything, though Lozano eventually married a woman named Heidi Renee Whitehead—Monty's preschool teacher that year.

## Reindictment

In October 2008 Robert Cruz Lozano was again indicted for the murder of his wife Viki. This time there would be no dismissal. Regardless of family wishes and medical examiner findings, we felt the evidence established that Viki was murdered and that she deserved her day in court.

We let the dust settle on the indictment before we reached out to Anna Farrish again. As the mother of a murder victim, we wanted her to be included in the prosecution. Lisa Osborne, a family violence counselor in our office, contacted Anna to foster some communication. Anna refused any meeting. Lisa asked her if she could share any pictures of Viki with us for use at trial. At that point, we had no live picture to show the jury of this young mother except for her driver's license photo. Anna refused. It was clear, though unexplainable, that Viki's mother was completely aligned with the defendant and would not cooperate in any way.

## Proving by disproving

This trial was about proving Lozano guilty by proving the impossibility or

*Continued on page 20*

*Continued from page 19*

improbability of any other explanation for Viki's death. Forensics alone would not get us there, which is why the manner of death was ruled undetermined. We set out to prove it wasn't an accident, nor was it suicide.

An accident seemed ridiculous. First, the idea that this 36-year-old teacher would clean a gun on the bed in her half-million dollar house seemed nonsensical. Anna was adamant that the master bedroom was where the guns were cleaned in their household and that Viki was the most likely cleaner. For this to have been possible on the day of her death, Viki would not have been cleaning the gun *on* the bed, as much as she would have been cleaning the gun *in* the bed. She died lying on her side with one leg completely under the covers. She would have held the gun 3 to 6 inches away from the center of her chest, at an angle down and to the left, causing the bullet to enter her chest, pass through her heart and other major organs, before exiting her left side. Her face would have been turned away from the gun at the time of the shot. Nothing about the position of her body was consistent with an accidental shooting while cleaning the gun.

Second, there is the popcorn issue. Viki had popcorn husks down the front of her shirt and on her side. She wore loose-fitting flannel pajamas, so if she had been walking around, these popcorn pieces would have fallen out of her top. Instead, the pieces were stuck in her blood under her shirt. It defied logic that she was cleaning the gun eating a handful of popcorn. Plus, the bedroom did not have a bowl, bag, paper towel, or napkin anywhere in

sight, including trash cans, that could have contained popcorn—someone clearly removed it after she died.

Suicide didn't make sense either. One of Viki's legs was lying flush with the mattress, bent at the knee and completely under the covers. The other leg was outside the covers, stretched straight, with her foot touching the ground. Though it was undeniably possible for her to shoot herself, it seemed an unnecessarily awkward position. Her position was more suited for watching television and eating popcorn. Her body was moved after she was shot, though, causing her right foot to dangle off the bed onto the floor. We figure that Lozano rolled her body slightly to clean up the visible popcorn pieces that had spilled when he shot her.

Though we could not call family members to the stand to negate suicide, we called coworkers who were eager to tell us how the year since Monty's birth was the happiest they had ever seen Viki. In the weeks leading up to her death she had talked to others about long-term plans like building a swimming pool, having another child, and staying at home with Monty for several years. She had made short-term plans as well. She continued to teach piano, assigning future lessons and ordering a computer program to help her students write their own music. We even had her longtime hairdresser testify that shortly before her death, Vicki had come in to have her hair done on her normal schedule and secured her next appointment before she left. Even in Lozano's statement, he described her as happy. Suicide

seemed wildly inconsistent with her body position, her frame of mind, and her munching on popcorn in bed.

Further, her friends were adamant that Viki would not have killed herself and left her son unattended in the next room and without a mother. She waited 15 years to have that child; if nothing else, he was her reason to live.

## **The trial**

During opening statements, Cary laid out the evidence for the jury. Before the trial had begun, we pre-admitted a great deal of the evidence by agreement, including virtually all of the crime scene photographs, the gun, and the contents of the gun cleaning kit. This allowed both parties to use the evidence in opening statements without objection or questions regarding admissibility. In opening Cary described the defendant's controlling nature, the affairs, the insurance policy, Viki's body position at the time she was killed, the location of the casing, and the significance of the popcorn.

Rick Hagen then presented his opening statement, focusing on the opinion of the two forensic pathologists, Drs. Sisler and Donoghue, that there was insufficient evidence to establish whether Viki's death was homicide, suicide, or accident. Hagen also explained to the jury that Viki's own mother supported the defendant. His other focus was to discredit how the crime scene was handled. He criticized the Denton Police Department for allowing an unnecessary number of people at the scene, failing to properly preserve it, and failing to properly secure the evi-

dence. Everyone's conclusion at the end of the two very effective opening statements? This was going to be a fight.

Our first witness was previous girlfriend Karen. She described her three-year relationship with the defendant, which began when she was a college intern at the police department. She testified that during the affair she and Lozano had a standing date virtually every Tuesday and Friday nights. She believed he told his wife he was working surveillance or was called out for the SWAT team on those evenings. She told the jury about Lozano's revelation that Viki had cancer and the numerous discussions they had about her painful treatments and her slow demise—all of which was a lie.

The next witness was Cindy. She solemnly described how the affair began in the early part of 2001. For the first year of the relationship Lozano showered her with love letters, which we showed the jury in chronological order. For us, Lozano's letters were pure gold. Many on the jury of 10 women and two men looked absolutely disgusted by Lozano's intricate lies and manipulation preserved in the letters. (The defense had utilized not one but two psychologists to assist with jury selection. After turning in our strikes, we were surprised to see a jury comprised almost entirely of women. If it was a defense strategy, it did not work well.)

Two Denton Police employees, both with very close ties to Lozano, testified about his odd behavior at the house after Viki's death—specifically, he would continually grimace in an apparent attempt to appear as

if he were crying, but there were no actual tears. Both men also gave the same account as Lozano's last words to Viki: "Take care," which he said before the ME wheeled her body out of the house.

Another crucial witness for the State was computer forensic analyst Jim Willingham. Lozano claimed to have been playing a computer game called Mahjong from 7 to 8 that night. Willingham testified that the analysis of the computer revealed that though the game had been accessed, it was not actually played at all. In closing argument we explained that this lost hour was in fact when the murder occurred.

With lead investigator Jeff Wawro on the stand, the jury listened to the 911 call. Wawro used photos to show the jury where Lozano must have been standing as he made the call, in a small office niche adjacent to the master bedroom. During the call Lozano claimed to have set the phone down to check on his wife and later to retrieve his son, but there was no sound of the receiver being placed on the desk. A careful review of the tape showed that he stood in one spot the whole time, only pretending to check on Viki and pick up Monty. In his written statement he claimed to have performed CPR, yet when officers arrived less than five minutes later, he was standing by the front door, holding the child, without a drop of blood on him.

Ranger Tracy Murphree testified that he interviewed Lozano the same day he took the defendant's written statement. In both his oral interview with Murphree and his written statement, Lozano claimed to have found

Viki sitting in bed, bent at the waist, face down. He then claimed to have pushed her so she was lying on her back (the position she was in when the paramedics arrived). Murphree and Dr. Sisler agreed that her body could not have been sitting up at the time of the shooting because of the shored exit wound. Furthermore, though she bled out the entrance wound, she had lost considerably more blood out of the exit wound on her side. This was far more consistent with her lying on her side when she was shot than sitting up. Additionally, Murphree and the paramedics testified that she had lividity in her foot and her back. In Lozano's story, she would not have fallen onto her back until after he pushed her lifeless body. It would have been impossible for lividity to have formed in her back by the time the paramedics arrived four minutes later. Lozano was lying about the position in which he found her body.

## The defense case

We caught a big break as the defense began its case. They brought in a king-size bed to use for demonstrations with their expert, something we had considered but ultimately decided against because of the logistics. Larry Renner, a crime scene reconstruction expert from Sante Fe, New Mexico, rattled off an impressive resume for the first 20 minutes of his testimony. He did well for the defense on direct, testifying that the evidence was consistent with suicide and consistent with accident. At one point the defense had the jurors come down to closely examine the bloody stained bedding. It was a sobering moment in the courtroom

*Continued on page 22*

*Continued from page 21*

as the sheets, covered in Viki's blood, were spread out in the courtroom and emitted a sickening smell. The point was to show dog hairs on the bedding to back up Anna Farrish's theory about the dogs startling Viki into shooting herself.

Renner did not hold up on cross. Cary spent the majority of it lying in the bed, sparring with Renner over the ridiculousness of his assertions. Renner became so defensive that he violated the cardinal rule of testifying and would agree only with assertions made by defense counsel. According to Renner's theories, Viki would have been able to sit up after being shot in the heart, spleen, lung, and spleen. Renner also opined that it was possible for lividity to have formed in her back mere moments after Lozano pushed her lifeless body to a reclining position. By the end of his testimony many in the courtroom, including some jurors, were rolling their eyes at his biased testimony and even laughing out loud at him as Cary acted out Renner's theories on the bed.

The defense then called Anna Farrish. She described Viki, her only daughter, as an overweight, lonely child with friendship issues. In contrast, she described Lozano's impressive physique and seemed to imply that she was surprised that someone like Bobby would end up with her daughter. Though numerous teachers and administrators had previously described Viki as a completely devoted teacher, committing herself to incredibly long hours at the school for the benefit of her students, Anna claimed Viki worked the minimum required hours and asserted that Lozano had helped Viki

by controlling her weight. Her testimony focused on the normalcy of Viki cleaning Lozano's gun in the bedroom, a family history of suicide, and Viki's suicide attempt as a teenager. Her contempt for us was very apparent and she certainly did not come across as a loving, grieving mother.

With her on the stand the defense played home movies of the family. All of the footage was of the baby, Monty. In the hours of footage Lozano, the cameraman, always had the shot focused very tightly on Monty. The movie started with Viki giving Monty his first bath, but only Viki's hands and portions of her face were ever in the picture. There were audible gasps in the courtroom when the film captured Lozano's voice telling his infant son, "Daddy, Daddy—that's the only name you ever need to know. Don't even worry about Mommy." If we had had access to these movies, we would have offered them ourselves in a heartbeat. They were truly a gift from the defense.

Lozano did not testify during the trial. Instead, he sat stone-faced, never showing any emotion. Often during the trial the defense attorneys moved from counsel table to get a better view of exhibits, pictures, or demonstrations. Lozano always repositioned himself, too, usually carrying with him a notepad. Numerous times he was standing next to the State's counsel table looking up at enlarged pictures of his dead wife either at the crime scene or the morgue. Not once did he show any emotion. To an outside observer he would have appeared as another lawyer in the trial instead of the

grieving husband. No doubt jurors noticed his lack of concern or emotion.

## **The verdict**

Seven years and 29 days after her death, a jury needed only five hours of deliberation to convict Robert Lozano of murdering Viki Lozano. In the punishment phase of the trial, sadly we had no family to call on Viki's behalf. The defense called only Lozano's older brother, Frank, also a longtime police officer in Denton County, to ask for a merciful sentence.

The jury gave 45 years. Understandably, his family was devastated at the outcome. Neither Anna Farrish, nor her son David, was present in the courtroom when the sentenced was handed down. Viki's faithful friends were there, though, and they wept with relief that it was finally over and justice had been served.

We do not know what the future holds for Monty, who turned 8 this summer. He still lives at the same house with his grandmother, Anna, and Lozano's new wife, who is the only mother he has ever known.

For us, though the stress and time commitment of trying this case together was extremely difficult on our own family, bringing justice to Viki Lozano, a forgotten victim, was an absolute honor. ✨

# Drawing blood in the jail

Many jurisdictions have found dealing with hospitals for DWI blood search warrants and the newly increased mandatory blood samples to be problematic, expensive, or simply unworkable. This article chronicles Williamson County's use of the local jail's infirmary as a solution.

In January 2007, the Williamson County District Attorney's Office initiated a formal program to use search warrants to obtain blood alcohol levels for all felony DWI cases in the county. Our district and county court judges agreed to be contacted for search warrants on a rotating basis, and we gave a cell phone to the on-call prosecutor so law enforcement could easily contact him or her. Once local peace officers were notified of our availability and assistance with warrants, we began seeing blood test results that were extremely helpful in prosecuting these cases.

Like any other new idea, there were obstacles to overcome. The Department of Public Safety crime labs were the lucky recipients of all these additional blood samples for testing from across the state. Hospitals in various locations and with different parent companies did not have a uniform method to deal with officers who brought DWI suspects in for a blood sample. Hospital administrators had concerns about potential liability for assisting with a blood draw pursuant to a search warrant. At least one group of hospitals in a neighboring county asked its police department not to bring suspects to

emergency rooms for blood draws.



*By Jana K. McCown*  
First Assistant District  
Attorney in Williamson  
County

In our jurisdiction, the process was cumbersome for all involved because the arresting officer was required to contact a prosecutor, obtain the search warrant, locate a judge at home, travel to the judge's location for a signature, then transport the defendant to a hospital for the actual blood draw. Even at its best, the whole scenario generally took a couple of hours. In the latter part of 2007, we began looking for ways to streamline the process to make the timing of the blood draw closer to the time of the traffic stop.

## Working with hospitals

One of the first things we did was request a meeting with the CEO of St. David's Georgetown Hospital because it is the closest to the Williamson County Jail. The administrators very graciously met with our elected DA, John Bradley, and me, and we talked about ways to make the process more efficient. One of the time-consuming things that we persuaded them to eliminate was the initial triage/medical evaluation. Because the DWI suspect was not being admitted as a patient, the hospital agreed that it was unnecessary

to spend its staff's time to perform a medical check-up on these folks, as they weren't there for medical treatment.

Another concern involved the safety of their staff should a suspect become combative. Fortunately this rarely occurs, though it's not unheard-of. My personal theory, however simple, is that when someone is standing there ready to put a needle in my arm, I'm going to hold still so that it doesn't hurt worse!<sup>1</sup>

We also told them that we had begun working on a way to perform most of the blood draws at the jail. The fact that we were trying to find a way to remove them from the process when possible was significant to their willingness to help. Another key factor, in my opinion, was our ability to reassure them that it was the rare case that actually ends up in trial. It's common for medical professionals to be concerned about having to spend time in court or waiting to testify. We assured them that if it ever became necessary, we would do everything in our power to make sure they didn't spend days or even hours waiting to testify. A face-to-face conversation with the hospital folks went a long way when we explained the reasons for this process and listened to their concerns. I believe that most hospitals *want* to be good corporate citizens when given the

*Continued on page 24*

*Continued from page 23*

chance. Who knows better than the local emergency room about the damage that can be inflicted by a drunk driver?

## One person *can* make a difference

In Williamson County, credit goes to a DPS Trooper, Michael Scheffler, who called me one day to ask why blood draws couldn't be done in the jail. Trooper Scheffler had already spoken to the sheriff about training some people to draw blood, and our Sheriff's Office had already sent three medical officers to be trained and certified as phlebotomists. After several conversations with various people, including Clay Abbott at TDCAA, to find out whether and how this might work, we decided to find a way.

The first step was to confirm with the sheriff, James Wilson, his willingness to have this program in the jail and to train additional people in phlebotomy. That was the easy part. (Because Sheriff Wilson is the former director of the Department of Public Safety, it was a no-brainer.) We also discussed where in the jail to have the blood drawn. This was another easy decision. Our jail has an infirmary where the doctors who provide the inmates care conduct their examinations. During a personal visit to the medical area, I observed that it was as clean as any hospital I have visited.

The sheriff's office already employed people with emergency medical treatment (EMT) training and paramedic experience for the infirmary to serve as medical officers. The Transportation Code at the time specifically excluded emergency

medical services personnel from the definition of a "qualified technician" so, even though a paramedic is trained in drawing blood, the sheriff took the extra step of enrolling his medical officers in a specific course on phlebotomy. There is a 32-hour program in Austin on this topic; at the end of the course, the student takes a National Healthcareer Association (NHA) exam to be a "certified phlebotomist." The cost is \$750, and additional study is required every two years to maintain the certification.<sup>2</sup> This training provides the additional assurance that they are acting as a "qualified technician."

I also had a conversation with the jail doctor to be sure that he was comfortable with the program and would be prepared to testify that the location where the blood was drawn was a sanitary place. He pointed out that the jail staff draw blood for any number of medical diagnoses all of the time. Proof that the jail infirmary is a sanitary place would have to be based upon the testimony of various people, and because there is no definition, could be proved with all sorts of information that might help a jury reach that conclusion.

## Establishing the protocol

It was important to have a procedure within the jail before we ever notified other county law enforcement agencies about a phlebotomist's availability at the jail. Lt. Frank Price made sure we understood that while he would attempt to do his scheduling so that a phlebotomist would be available on most shifts, jail standards clearly made the distribution of medications in the jail a priority and sometimes nobody would be

available to draw blood. We let our other agencies know this as well and reminded them that the Sheriff's Office was performing a valuable service. We also told them to remember that the local hospitals could still be used for a blood draw when the jail was unable to accommodate the request.

Written instructions for officers were proposed by the DA's Office and agreed upon by the Sheriff's Office as follows:

1. Call the booking desk (we provide the number) and ask to speak to the supervisor on duty.
2. The supervisor will check with the medical staff to determine if a phlebotomist is available. If not, the officer can take the defendant to an area hospital. If a phlebotomist is available, the officer can proceed to the jail.
3. When at the jail, the defendant will be taken to the medical department to a treatment room for a blood draw.
4. Each department is responsible for bringing and providing its own blood draw kit. (Note: Kits are available through DPS, and most agencies already have some on hand.) The officer must also fill out the blood draw procedure form (in chapter 3 of TDCAA's *DWI Investigation & Prosecution*) and have the phlebotomist sign it.
5. After the blood sample has been obtained, it will be released to the arresting agency.
6. The arresting officer's agency is responsible for submitting the blood sample to the appropriate lab for testing.
7. If there was a search warrant for the blood (no longer required in most felony cases), a copy of the war-



rant should be left with the phlebotomist.

### **And everybody (except the defendant) lived happily ever after**

Since beginning the jail blood draw program on Valentine's Day 2009, the jail phlebotomists have successfully drawn blood in about 40 felony DWIs pursuant to a search warrant. Additional blood draws have been performed when the defendant gave consent. While the program was originally established to handle blood draws for felony DWIs pursuant to search warrants, when the legislature expanded the mandatory blood draw statute effective September 1, 2009, we were in a great posi-

tion to transition to a program where no search warrant was required.

One of the benefits that I didn't anticipate is that occasionally a DWI suspect will consent to a blood draw instead of a breath test. While theoretically that option has always been available, in the 20 years I have been prosecuting, very few blood tests occur because of consent—I suspect that the cost involved in taking a defendant to a hospital for a blood draw was the prohibiting factor. (One of our law enforcement agencies found out the hard way when a suspect consented to a blood draw and the hospital sent the police department a bill because there was not a court order or search warrant.)

Because the program is still less

than a year old, I am sure there will be challenges in the future, and we are prepared to meet those concerns. According to our assistant DAs, to this point, there have been no complaints from the defense bar, and a number of the defendants who have had their blood drawn in the jail have entered guilty pleas. Our law enforcement officers appreciate the availability of a more streamlined process and the medical officers are happy to provide the service. ❄

### **Endnotes**

1 The jail infirmary has a nice chair with arm straps that can be helpful in this situation.

2 It's interesting to note that 15 years ago, hospital phlebotomists didn't have certification programs or any training available other than from on the job.

Advertisement

## **Criminal Forms and Trial Manual (11th Edition) New 2010 pocket part and CD now available!**

**Vols. 7-8, Texas Practice Series  
by Judge Mike McCormick, Judge Tom  
Blackwell, and Betty Blackwell  
© 2009 Thomson/West**



Covering all the latest substantive and procedural changes, this complete trial manual sets out step-by-step procedures for the practice of criminal law by prosecutors, defense attorneys, and trial judges.

In addition to analytical discussion of relevant legislation and applicable case law, you receive criminal forms on a disc designed to save you hours of document preparation time.

- Expert commentary and guidance on the Texas Penal Code and criminal violations codified in other Texas statutes, including the Agriculture Code, Alcoholic Beverage Code, Parks and Wildlife Code, and Health and Safety Code.
- Includes useful tables relating to parole and good conduct time credit, punishments, statutes of limitations, and repealed statutes as well as a Table of Retroactive and Prospective Application.
- Organized and written in a practice-oriented fashion to help you find answers systematically and efficiently.



To order this publication, please call 1-800-328-9352 or visit [www.west.thomson.com/store](http://www.west.thomson.com/store)

# Enforcing restitution

When ordered to pay restitution to victims, some defendants try to declare bankruptcy to avoid it. Here's how to remove that bankruptcy shield and enforce the sentence.

Not long ago, I found myself in a disposition hearing, the punishment phase of a juvenile proceeding. The respondent (what we call a juvenile defendant) owed the victim several thousand dollars for damage he caused to her property. The young man agreed to most of the conditions of probation except for restitution; his mother claimed that she was in bankruptcy and could not pay. This was the first I had heard of her financial situation, and the judge reset the hearing to determine if he could proceed if the respondent's mother was, in fact, bankrupt.



*By Rodolfo Ramirez*  
Assistant District Attorney in Fort Bend County  
Assisted by Elizabeth Dondlinger

## A primer in restitution

I went back to my office to see what, if anything, could be done about getting our victim her money. The respondent's mother had not specified whether she was about to file for bankruptcy, had already filed, or was currently in bankruptcy. (I called the defense attorney to clarify the issue, but I wanted to plan for all contingencies.) I first looked at Family Code §54.041, which states, "The juvenile court ... may order the child or a parent to make full or partial restitution to the victim of the offense. ... This section applies with-

out regard to whether the petition in the case contains a plea for restitution."<sup>1</sup> If this case were in the adult courts, Article 42.037 of the Texas Code of Criminal Procedure would guide us. It notes that in ordering restitution, the court should award the higher amount of either the value of the property on the date of the loss or the value of the property on the date of sentencing.<sup>2</sup> The court may even order the defendant to perform services or make restitution to a person other than the victim or organization with the victim's consent.<sup>3</sup> If there is a dispute regarding the amount of restitution, the burden is on the State to show, by a preponderance of the evidence, the amount of loss.<sup>4</sup> The burden for showing the defendant's financial needs and resources is of course on the defendant.<sup>5</sup> The code also discusses unemancipated minors; if they are unable to pay, they may perform community service, or the court may order the person who supports the minor to pay.<sup>6</sup> A trial court is given broad discretion in ordering restitution; however, there are some restrictions.<sup>7</sup>

## Bankruptcy

My first concern in my case was what would happen if the respondent's

mother had filed for bankruptcy and listed the victim as a creditor—a highly unlikely scenario, but I wanted to cover all of my bases. In *Cabla v. State*,<sup>8</sup> the defendant stole thousands of dollars from victims by promising to perform general contracting work. The defendant then shut his doors, filed Chapter 7 bankruptcy, and claimed all the victims as creditors, discharging their debts. In this case, the court noted the disparate aims of restitution and bankruptcy by saying, "The goal of the bankruptcy system is not to punish, but to allow the honest debtor to restart his financial life."<sup>9</sup> Restitution, however, "was intended to 'adequately compensate the victim of the offense' in the course of punishing the criminal offender."<sup>10</sup> The *Cabla* court goes on to distinguish restitution in discussing *Kelly v. Robinson* by saying, "Restitution is a component of the criminal justice system 'not operated primarily for the benefit of the victim, but for the benefit of society as a whole.'<sup>11</sup> Society is benefitted by punishment, including restitution, that is directly related to the offenses for which a defendant has been charged and convicted."<sup>12</sup>

The court in *Cabla* looked at *Kelly v. United States*, in which the U.S. Supreme Court was faced with whether restitution that has already been ordered can be discharged in a Chapter 7 liquidation of debt,<sup>13</sup> and the Supreme Court ruled that resti-

tution is nondischargeable under Chapter 7.<sup>14</sup> The Bankruptcy Code was amended after *Kelly* to make sure a defendant could not discharge restitution owed to victims in Chapter 13 bankruptcy.<sup>15</sup> This was a great result for my victim against any claim of bankruptcy protection.

After reviewing this precedent, I thought about the second argument that could come: that filing for bankruptcy stays any criminal proceedings. Normally, when a petition is filed in bankruptcy court, other proceedings are stayed.<sup>16</sup> The Bankruptcy Code, however, allows for certain exceptions, including “the commencement or continuation of a criminal action or proceeding against the debtor [and] ... the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s or organization’s police or regulatory power.”<sup>17</sup> Additionally, various Texas courts have taken note of the exception to the staying provision in federal bankruptcy.<sup>18</sup> So long as I made the judge aware of these provisions if it came up, we could proceed as planned. (This issue was never raised in my case, but I was ready for it!)

The next question that came to mind was who had to prove that the defendant/respondent filed a petition in bankruptcy court? I discovered after some searching that the defendant must prove the filing,<sup>21</sup> and the judge noted as much when he asked the respondent’s attorney to provide proof in the courtroom.

So with a memo in hand, I walked down to the clerk’s office and filed my research in writing. After

carefully considering the issue and reviewing the caselaw, the judge sided with us and ordered the full amount of restitution.

It was great to tell the victim that the respondent could not hide behind the bankruptcy law. It is important that when we are faced with laws that are foreign to our normal practice, we strive on to ensure our victims are not left to fend for themselves because financial loss can be just as harmful as physical pain. ✱

## Endnotes

1 Tex. Fam. Code §54.041 (b).

2 Tex. Code Crim. Proc. art. 42.037(b)(1)(B)(i)-(ii).

3 *Id.* at art. 42.037(b)(3).

4 *Id.* at art. 42.037(k).

5 *Id.*

6 *Id.* at art. 42.037p(2)(A)-(B).

7 The amount must be just and supported by a factual basis within the record; the restitution ordered must be only for the offense for which the defendant is criminally responsible; and the restitution ordered must be only for the victim(s) of the offense with which the offender is charged. *Cantrell v. State*, 75 S.W.3d 503, 512 (Tex.App.—Texarkana 2002); see also *Cabla v. State*, 6 S.W.3d 543, 546 (Tex.Crim.App.1999).

8 6 S.W.3d 543.

9 *Id.* at 546.

10 *Id.* at 545.

11 *Kelly v. Robinson*, at 50, 107 S.Ct. 353.

12 *Id.* at 545-46.

13 479 U.S. 36, 38 (1986).

14 *Id.* at 50.

15 6 S.W.3d at 547-48.

16 11 U.S.C. § 362.

17 *Id.* at (b) 1, 4.

18 See *In re Delta Wiese*, 1 S.W.3d 246, 249 (Tex. App.—Corpus Christi 1999); *In re Mona Naguib*, No. 05-04-01010-CV, 2004 WL 2335029, at \*2 (Tex.App.—Dallas Oct. 18, 2004).

19 See *Feinmore v. State*, 716 S.W.2d 672, 674 (Tex.App.—Corpus Christi 1986) (stating, “Although the subjects of a bankruptcy filing by Appellant and whether ordering Appellant to pay restitution violates the automatic stay provisions were discussed in the record, there are no documents from a bankruptcy court in the record proving that Appellant has filed bankruptcy. It is Appellant’s duty to insure that the record contains all materials necessary for appellate review”). See *Franklin v. State*, 693 S.W.2d 420, 431 (Tex.Crim. App.1985) (“mere assertions in a brief not supported by evidence in the record will not be considered on appeal. *Id.*”).

\* Special thanks to C. Yang and A. Herrera.

# A clip-and-save guide to filing deadlines

## *The straightforward stuff*

Filing	Notice	Mandatory?	Explanation
Joinder of offenses	30 days	Mandatory	Several offenses may be joined in a single trial if the offenses arose out of the same criminal episode and the State files written notice not less than 30 days prior to trial. Note that in <i>Sells v. State</i> , 121 S.W.3d 748 (Tex. Crim.App. 2003) the court advised that the 20-day notice requirement applied to any pre-trial hearing where the recorded statement was used in the hearing. Failure to comply with the requirement before the pretrial hearing rendered the exhibits inadmissible at that hearing, but as the State complied with the 20-day requirement with regard to trial, the exhibits were not rendered inadmissible under §3(a)(5) at trial. Texas Penal Code §3.02.
Electronically recorded statement of defendant	20 days	Mandatory	Not later than 20 days prior to the date of the proceeding, the defense must receive a complete copy of the defendant's electronically recorded statement. CCP Art 38.22. §3(a)(5).
Certificate of analysis; chain of custody	20 days	Mandatory	The State or the defense must file the certificate and/or affidavit with the clerk, not later than 20 days prior to trial, and provide a copy to opposing counsel. The opposing party must file written objections not later than 10 days prior to trial, or the certificate or affidavit are admissible in lieu of live testimony. Examples of an appropriate certificate and affidavit are provided in the statutes. CCP Arts. 38.41 & 38.42.
Outcry	14 days	Mandatory	If the child is 12 years or younger, before the 14th day prior to the proceeding, the defense attorney must receive the name of the outcry witness and a summary of the outcry statement. CCP Art. 38.072, §2(b)(1).
Business records affidavit	14 days	Mandatory	(1) the business records and accompanying affidavit must be on file with the clerk; and (2) the defense attorney is to be given notice that the records and affidavit have been filed. TRE 902(10)(a).



*By Philip D. Ray*  
Assistant District Attorney in Williamson County

### Reading between the dicta

The following deadlines are “10 days, but” deadlines, meaning, each of them is best done 10 days prior to trial. But as a trial attorney myself, I recognize that what *should* be done and what actually *is* done rarely intersect. I sprinkled some caselaw into the explanations to launch your research for arguments to the bench should these circumstances arise inside of 10 days before trial. Interestingly enough, most of these statutes relate to each other. If you apply some common sense to what is and isn't fair regarding notice, you're really within the ballpark of the caselaw on every issue. We're not just prosecuting the defendant, we're protecting the conviction on appeal. Dicta suggests that the best policy is to “deliver to the defense a written list of all known incidents which are not explicitly set out in the indictment, but of which the prosecutor is aware and which might become admissible for any reason at any time.”<sup>1</sup> That response seems weighty for a mere advocate, but we are called to be a fiduciary to fundamental principles of fairness by the Supreme Court in *Berger v. United States*.<sup>2</sup>

<b>Filing</b>	<b>Notice</b>	<b>Mandatory?</b>	<b>Explanation</b>
Amendment to indictment	10 Days	Mandatory	An indictment may be amended at any time before the trial date; however, the defense attorney may request 10 days to respond. CCP Art. 28.10(a). Once the jury has been impaneled, the time to amend ends, regardless of when the actual trial on the merits begins. See <i>Hinojosa v. State</i> , 875 S.W.2d 339, 341-42 (Tex.App.—Corpus Christi 1994, no pet.).
404(b) extraneous offense notice	10 days	Suggested	After the defense files a motion requesting 404(b) material and secures a ruling on the motion (see <i>Espinosa</i> , 853 S.W.2d 85) or sends a request to the State asking for 404(b) information, the State must give reasonable notice in advance of trial of its intent to offer evidence of extraneous offenses in its case-in-chief; again, there is no mandatory time limit. Notice given at least 10 days prior to trial will be presumed “reasonable,” and notice should include the date, county, crime, and victim’s name. TRE 404(b).
Art. 37.07 §(3)(g)	10 days	Suggested	Notice requirements under Art. 37.07 are the same as for Rule 404(b). (CCP Art. 37.07 §(3)(g).) However, the courts have held that the notice is timely if provided prior to trial on punishment. Even though 10 days is presumed timely, the Court of Criminal Appeals, relying heavily on <i>Oyler v. Boyles</i> , held that “when a defendant has no defense to the enhancement allegation and has not suggested the need for a continuance in order to prepare one, notice given at the beginning of the punishment phase satisfies the federal constitution.” <i>Villescas v. State</i> , 189 S.W.3d 290, 294 (Tex.Crim.App.2006).
Deadly weapon	10 days	Suggested	Notice of intent to seek an affirmative finding of a deadly weapon must be reasonable (there is no specific mandatory time limit; it has been suggested that this notice be given at least 10 days prior to trial). <i>Byrd v. State</i> , No. 2-07-167-CR, (Tex.App.—Fort Worth, August 29, 2008, pet. ref’d) (not designated for publication). If you end up in a jam for some reason, read <i>Byrd</i> and review the discussion of reasonable notice as the court looks through the relevant cases. Timeliness is not the only deciding factor. The notice must be in writing and reasonably calculated to inform the defendant that the use of a deadly weapon will be a fact issue at the time of prosecution. Whether notice is sufficient is very fact-driven. Two days notice was found insufficient with other factors considered in <i>Randle v. State</i> , No. 01-91-00793-CR (Tex.App.—Houston [1st Dist.] May 5th, 1994, writ ref’d) (not designated for publication). Remember that a deadly weapon notice is most often included as a paragraph on the indictment.
Art. 38.37 extraneous offense	10 days	Suggested	Applicable if any of the following offenses are committed against a child under 17: Chapter 21 Sex Offenses, Chapter 22 Assault Offenses; §25.02 Prohibited Sexual Contact; §43.25 Sexual Performance by Child; or an attempt or conspiracy to commit any of the above offenses. Notwithstanding Rules 404 and 405, Art. 38.37 allows the State to present evidence of extraneous offenses between the defendant and the same victim as in the indictment to show defendant’s state of mind or the defendant and victim’s relationship (the notice requirements are the same as Rule 404(b)). CCP Art. 38.37.
Rule 609(f) impeachment	10 days	Suggested	After timely written request from the defense, the State must give sufficient advance written notice of its intent to use prior convictions for impeachment; again, there is no mandatory time limit, but 10 days prior to trial should be sufficient. TRE 609(f).

*Continued on page 30*

## Help from the IRS on gambling cases

The Internal Revenue Service offers training and support for law enforcement and prosecutors dealing with gambling cases. What follows is an email from IRS agent Joe Kingeter detailing what the agency can offer.

"We are making law enforcement and prosecutors aware of our program and the benefits we can provide. There is federal excise tax of 2 percent of the gross wagers accepted by an illegal bookmaker, specifically for the activities of illegal sports betting and illegal lotteries. Any old or new cases that you may be willing to submit to us would be greatly appreciated. There is no statute of limitation on these cases so it can be several years old. Some of the assistance that we offer are:

- **Training:** We have provided training to numerous law enforcement agencies as well as the FBI in the science of illegal sports betting and how to identify and interpret records, sports wagering theory, etc. I have been authorized to begin planning for a class to be held this spring. Our goal is to teach IRS agents and local law enforcement about sports betting. The IRS will pay the airfare, hotel, and food for those selected to attend.
- **Case support:** trained IRS Excise Agents for any assistance you may need with an ongoing criminal investigation of an illegal bookie.
- **Civil enforcement:** Assess the civil excise tax against any bookmaker whose case you may have (old or new). The tax applies to illegal sports betting and lotteries.
- **Contacts with law enforcement:** Excise Tax has been able to establish contacts with the FBI and numerous law enforcement agencies which we can provide if the need ever arises. We also do outreach presentations to any interested law enforcement agencies.

Please feel free to call me at 410/725-1559 or e-mail joseph.kingeter@irs.gov with any questions regarding our program. I greatly appreciate your time and consideration. ✱

Continued from page 29

### Other notes

When deciding which material to disclose versus saving it for rebuttal, it would behoove each prosecutor to read through the concurring opinion in *Jaubert v. State*<sup>3</sup> by Justice Cochran, whose discussion includes a conversation regarding our duty not to seek a conviction but to see that justice is done, as well as a fine quote from the Supreme Court regarding U.S. Attorneys : "[H]e is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."<sup>4</sup>

For notices of extraneous conduct we have the following language in the title of the notice as well as within the body:

The State hereby gives notice to the Court and to attorneys for the defense that the State intends to offer evidence of other crimes, wrongs and acts in the case-in-chief at the *guilt/innocence* phase in the above-numbered cause. This Notice is given pursuant to Rules 404(b) and 609(f), Texas Rules of Criminal Evidence, and Articles 37.07, § 3(g) and 38.37, § 3, Texas Code of Criminal Procedure.

The State also gives notice to the Court and to counsel for the defense that the State intends to offer evidence of other crimes, wrongs and acts in the case-in-chief at the *punishment* phase in the above-captioned cause. This evidence is to be tendered pursuant to Article 37.07, Section 3 of the Texas Code of Criminal Procedure.

Such other crimes, wrongs or acts that the State intends to introduce in its case-in-chief in the guilt phase and/or punishment phase against <defendant's name>, hereinafter "the defendant," are:

After which, we list out the appropriate acts, convictions, and offenses of the defendant.

You can also choose to add the following language at the end, if you have opened the file to the defense attorney:

The State also gives notice to the defendant and to counsel for the defendant of its intent to offer into evidence, for any purpose, at the guilt/innocence phase and the punishment phase, of every other conviction, crime, wrong and act identified by documents and records contained in the State's files, access to which the defense counsel has had since April 8, 2009.

Witness lists may also include the following language to provide proper notice before trial:

All witnesses listed in this notice may be called at trial to present evidence by the state as expert witnesses pursuant to Texas Rules of Evidence 702, 703, and 705.

Not all witnesses may be subpoenaed by the State. It is the defendant's responsibility to ensure the proper subpoena service and appearance of any and all witnesses he intends to call in his case in chief, rebuttal, or punishment phase(s) of trial. ✱

### Endnotes

<sup>1</sup> *Jaubert v. State*, 74 S.W.3d 1, 4 (Tex.Crim.App. 2002).

<sup>2</sup> 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

<sup>3</sup> 74 S.W.3d 1, 4 (Tex.Crim.App. 2002).

<sup>4</sup> *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

# Are we all on the same page regarding Victim Impact Statements?

Answers to common questions on implementing the legislative requirements for victim impact statements (VISes)

After serving on the legislatively mandated victim impact statement update committee, we see that one thing is clear: Victim assistance coordinators (VACs) throughout the state need guidelines for handling and maintaining Victim Impact Statements (VISes). The Code of Criminal Procedure mandates certain requirements for these statements, and questions arise in how to implement those requirements. Everyone seems to do things differently! Some of the many questions we have heard include:

- Does the prosecutor assigned to the case get a copy?
- Who is allowed to view the confidential portion, and who is not?
- Is the probation department entitled to see the VIS?
- Which part should the judge see and when?
- Who sends the impact statements to the Texas Department of Criminal Justice's Victim Services Division—the office's VAC or the court when it sends commitment papers?
- Does the Victim Witness Division retain a copy? If so, for how long?
- Are we required to use the victim impact statement that the Texas Crime Victims Clearinghouse pub-

lishes every other year, or can we use our own?

- Why must we keep VIS stats?
- This article's purpose is to provide answers to these questions and more.

## The purposes of the VIS

The statement is meant to inform the prosecutor, judge, and Board of Pardons and

*By Cyndi Jahn*  
Victim Assistance Coordinator  
in the Bexar County Criminal  
District Attorney's Office  
*and Chris Jenkins*  
Victim Assistance Coordinator  
in the Dallas County Criminal  
District Attorney's Office

Paroles (BPP) of the impact of a violent crime upon the victim or the victim's family. The confidential contact portion of the statement (also known as the Victim Information Sheet) is used by the prosecutor to locate the victim as needed before trial and by TDCJ's Victim Services Division and the BPP for various notifications, including those pertaining to parole proceedings. Article 56.03(e) of the Code of Criminal Procedure states that the VIS should be given to the community supervision and corrections department whenever the court sentences the defendant to probation. In addition, if the defendant requests it, the court shall permit the defendant or his attorney to view the VIS, *excluding* the victim's name, address, and telephone numbers. It is extremely important to remember to *remove the*

*confidential portion of the VIS* from the copy provided to the judge before sentencing.

After sentencing, the court should attach the VIS to the defendant's commitment papers. These are the same commitment papers that folks from the Victim Services Division look through daily for VISes so that victims and family members can be added to TDCJ's notification database. That means that the confidential portion of the VIS must be re-attached before the commitment papers are sent to the prison, but how to do that? We figure that asking 200 VACs will net close to a hundred different answers. Most victim assistants, though, re-attach the contact page and send it, along with the impact portion, to TDCJ themselves. How these statements get to TDCJ is not as important as ensuring that the judge sees only the impact portion and that *both* portions are sent to TDCJ after the offender arrives there. That is our job, to ensure the victim's information is seen only by those allowed to view it and that it is sent to the appropriate agency at the appropriate time. Obviously, follow-up on our part is essential.

## In the prosecutors' office

Counties vary in other ways. Once the prosecutors' office receives the victim's statement, most counties

*Continued on page 32*

*Continued from page 31*

make one copy for the prosecutors and one for the court (which, as stated earlier, is separated from the confidential portion). Many VACs retain a copy or the original for their records, but that begs the question of how long these statements should be kept. To answer that, it's important to know why we retain a copy. Most importantly, the VIS is used for victim notification of future court events. If your office's victim division is solely responsible for notifying victims of all court settings, including appellate proceedings, and you do not have a database in which to enter this information, then you should probably keep the VIS until all appeals are exhausted, at which time it can be destroyed. Keep in mind that the BPP will have its own copy, as will the prosecutors' case file, so it won't be necessary to keep the original indefinitely. Most offices maintain a records retention policy that may provide guidance here.

The Texas Crime Victims Clearinghouse is required to publish a new Victim Impact Statement every two years. (A copy is at [www.tdcaa.com](http://www.tdcaa.com) as well as [www.tdcj.state.tx.us/victim/victim-clearinghs.htm](http://www.tdcj.state.tx.us/victim/victim-clearinghs.htm).) The goal of the update committee was to shorten the VIS and to reduce the different types of VISes available. After several meetings and lots of hard work from the committee members and clearinghouse staff, we now have one universal version of the VIS for both homicide and non-homicide cases. We know that many offices use their own versions of this statement, but we encourage everyone to adopt this new one. It is very difficult for TDCJ's Victim Services staff to recognize each county's ver-

sion, especially when looking through hundreds of pen packets every week. Of course, individual offices can add or remove any questions to make it apply more specifically to your county; just remember that the VIS must still meet code requirements.

Finally, why do we keep VIS stats? The Code of Criminal Procedure, again, requires that the BPP, Adult Probation Commission, and Texas Crime Victims Clearinghouse develop a form to record victim statistics. It also states that we are required to return the completed forms at intervals mandated by the VIS committee—and beginning next year, the intervals will be quarterly. (Again, a copy of this form is at [www.tdcaa.com](http://www.tdcaa.com) as well as [www.tdcj.state.tx.us/victim/victim-clearinghs.htm](http://www.tdcj.state.tx.us/victim/victim-clearinghs.htm).) These reports allow the clearinghouse to fulfill its responsibility of ensuring that we are doing our jobs to the best of our abilities.

We understand that most victim coordinators already have plenty of work without taking on additional responsibilities; however, maybe we can look upon this as an opportunity to evaluate and tweak our office's victim program as needed. Is some of your information outdated? Could you find a way to use the new Victim Impact Statement? Is there a more efficient way to fulfill our VAC responsibilities? Remember, we are all here to help each other. If you have questions about whether your office meets the statutory requirements, don't hesitate to call one of us or another VAC elsewhere in the state. We're all here for the same purpose, to ensure victims are afforded their rights as mandated by the law.

Please feel free to contact Cyndi Jahn (210/335-2733 or [cjahn@co.bexar.tx.us](mailto:cjahn@co.bexar.tx.us)) or Chris Jenkins (214/653-3838 or [cjenkins@dallascounty.org](mailto:cjenkins@dallascounty.org)). If we don't have the answer, we will do our best to find it for you. ❁



# A stormy childhood, now calm

A courageous girl survived Hurricane Katrina and years of sexual abuse by her own father. How Wichita County prosecutors tried him and won four consecutive life sentences against him.

In 2005, the Layer family lived in the Gulf Coast city of Bay St. Louis, Mississippi. Jon Layer and his wife, Lucy, had three children. The baby of the family, Amanda (some names have been changed to protect the identities of victims), was a sweet, 10-year-old girl in the fifth grade. She was a year younger than her sister and six years younger than her brother. Even though the Layers didn't have much in the way of material possessions, Amanda's childhood was normal in many ways. But on the inside, she lived with the darkest of secrets. For as long as she could remember, her father had molested her daily.

Lucy met Jon in a suburb of New Orleans in 1988 when she was 15 years old. He was 23, and she looked to him to help her cope with her own demons, which stemmed from years of sexual abuse at the hands of her own father. Little did she know that the cycle of sexual abuse would live on through the new man in her life to whom she clung for emotional support.

## Hurricane Katrina

In August 2005, Hurricane Katrina struck land. Thousands of families, including the Layers, were left homeless after the deadly winds subsided.



*By Ben Hoover*  
Assistant Criminal  
District Attorney in  
Wichita County

Luckily, the Layers had relatives in Keller, Texas, who opened their home to the displaced family. Jon, Lucy, and the three kids stayed in Keller for several months until they moved back to Mississippi to live in a FEMA trailer. They lived in FEMA housing for several months until they moved in with another set of relatives in Wichita Falls. During this almost two-year period of upheaval and instability, Amanda continued to endure daily sexual abuse. Every place

the family lived, her father found an opportunity to violate her. Like so many sexual predators, he became bolder and would even molest Amanda while other children were sleeping in the same bedroom. On one occasion in Keller, Lucy walked in and found Layer fondling their daughter on the couch. Lucy was alarmed, but she still did nothing to report what she discovered. All the while, Amanda came to accept the belief that no one would rescue her from the nightmare.

## Outcry

As a 12-year-old seventh grader in Wichita Falls, Amanda seemed to be doing well in school. However, the weight of the abuse was heavy, and it caused stress and constant stomachaches. At the end of the school year in 2008, she confided in a friend

about the sexual abuse, and the friend insisted that Amanda tell the school counselor. The counselor immediately notified CPS, and an investigation ensued.

Later that day, Detective Alan Killingsworth of the Wichita Falls Police Department arrived at the junior high to investigate the allegation of sexual assault. After speaking with the counselor and school administrators, Killingsworth decided to take the girls to the child advocacy center (CAC) to perform forensic interviews. As he escorted Amanda and her sister out to his car, one of the girls pointed to a vehicle in the parking lot and said it was their dad who was there to pick them up. Before Killingsworth could confront Layer, he fled the parking lot and drove away, parking his car at a nearby grocery store and walking the few remaining blocks home. At that point, no one had told Layer about the accusations.

Meanwhile, Amanda and her sister were both interviewed at Patsy's House, the CAC. During the interview, Amanda wrote a letter in crayon explaining that she had held onto a secret but could not hold it any longer. In the letter, she apologized for telling on her father and expressed her own guilt for being unable to keep it inside. Amanda mustered the courage to give a full disclosure of countless acts of sexual abuse. However, her sister made no such allegations. It became clear that

*Continued on page 34*

*Continued from page 33*

Layer had singled out Amanda as the object of his deviate sexual desires. She disclosed acts of sexual abuse that occurred in Wichita Falls, Keller, and Mississippi. She told of how her father fondled her genitals and performed oral sex on her in bed before school. Additionally, he would attempt to perform both vaginal and anal penetration, but she would resist by pushing him away. He even tried to engage her in oral sex by forcing her head down to his crotch. She said that her father owned different vibrators that he would use on her. She was able to identify four particular incidents that had occurred within the prior month in Wichita Falls. Three of the acts involved digital penetration and another was oral sex by her father. Amanda found it difficult to identify individual acts of abuse because her entire life had become one long string of abuses. It was what defined her childhood.

### **Corroboration**

Later that afternoon, Detective Killingsworth traveled to the Layer residence. As expected, Jon was not home, but Lucy was. While officers executed a search warrant inside the modest house shared by two families, Killingsworth interviewed Lucy and discovered the dark world of Jon Layer. In the midst of the sudden stress and excitement, Lucy told all. She described Layer as a controlling husband and father who demanded much from his family. Lucy described him as being verbally and physically abusive and “sexually off-the-wall.” During sex, he would choke her and force objects inside of her. He demanded sex from her twice daily and would be angered if

she did not comply. She told of a time when he manufactured a sexual device from power tools and used it against her will. On another occasion, he forced her and a female cousin to engage in sex acts. One of the most disturbing details she disclosed was that she complied with her husband’s demands so that he would not go to the children for sex. A clear picture of Jon Layer as a manipulator with strong sexual desires that were satisfied at the expense of others was emerging.

### **The recantation**

Within days of the outcry, Layer was behind bars. From that point on, a hurricane-like force moved into Amanda’s life causing great pressure and distress. She quickly realized her siblings blamed her for what happened to their father. Lucy continued to have regular contact with her husband by writing letters, making phone calls, and visiting him in jail. Within three months of the initial outcry, Amanda recanted. She wrote a short, handwritten statement saying that she made it up because he wouldn’t let her go to a school dance. The note consisted of a few jumbled sentences explaining her reason for the allegations.

### **The trial**

Jon Layer was charged with four counts of aggravated sexual assault of a child. We chose not to charge him with continuous sexual abuse because, during her outcry, Amanda disclosed four specific acts of sexual abuse in Wichita County. Based on the timeframes she gave, we believed that all four occurred within 30 days. At the time, the continuous sexual abuse statute was still new, and we

didn’t want to create an appealable issue if it wasn’t necessary by alleging acts that occurred in other jurisdictions. Additionally, if Layer were convicted of aggravated sexual assault, we expected the sentences would be stacked.

Our biggest fear at trial was that Amanda would be unable to face her father in court and testify about the abuse. Additionally, the defense could impeach her based on her recantation. Even if Amanda were unable or unwilling to testify, the outcry statute would allow us only to call the forensic interviewer to testify about two of the four counts that occurred days before Amanda’s 13th birthday. We waited until a couple of weeks before trial to meet with her. Until that point, we didn’t know whether she would be willing to talk about the abuse. We assured her that her only job was to tell the truth and that she was not responsible for all of the bad things that happened as a result of her testimony. Despite much trepidation, she admitted the allegations were true.

On the second morning of trial, we brought her into the courtroom to tell her story. The atmosphere intensified when Amanda sat down to face her father. Several of the jurors shed tears during her testimony as she shared her sordid memories of the abuse. She courageously answered the questions and provided the details that no child should ever have to disclose. Amanda told the story of how her family waited out the floodwaters of Katrina in their attic as they feared for their lives. She told about the first time that her daddy ever touched her inappropriately. They were on their way to preschool and she remembered being

stopped at an intersection near a Burger King as it occurred. Another time, he assaulted her and then called her a “good girl” when it was over. During another act of abuse, she remembered feeling her father’s cold hands against her skin as he fondled her. These important details emerged as snapshots of this little girl’s life. We repeated that imagery during closing arguments to help jury members understand why it was difficult to tell of the abuse in a concise narrative. Amanda remembered bits and pieces of her life, just like a photo album filled with snapshots. Even though she was shy and reserved, Amanda did a great job of answering the questions that were asked.

To explain the recantation, we called Dr. William Carter of Waco. Dr. Carter is a psychologist specializing in sexual abuse of children and has testified frequently as an expert in the field. He educated the jury on many of the complicated dynamics surrounding such cases. He explained that in a situation like Amanda’s, she would feel responsible for all of the negative effects that stemmed from the outcry. Additionally, he explained that before the outcry, she had likely accepted her role as the victim because she saw no feasible way out of the situation. Amanda knew that her mother was not a safe outlet because she was also under her father’s powerful control. Dr. Carter’s testimony proved invaluable.

Lucy Layer took the stand and was questioned about her husband’s strange behavior on the day of the outcry. She reluctantly admitted that her husband came home without the

girls and then left the house shortly thereafter. He remained in hiding for several days until he submitted to a voluntary interview at the police department. When Lucy tried to protect her husband at trial by downplaying his actions, we used her previous sworn testimony and the recorded statement she made to Detective Killingsworth for impeachment. She was reluctant to admit that she had once caught her husband in a suspicious situation with Amanda when they lived in Keller. When confronted, she also admitted that her daughter had a good reputation for truth-telling. It was important for the jury to see the family dynamics that spurred Amanda’s recantation.

One of the most damning pieces of evidence came from one of the defendant’s own family members. Kitten Hotard was the cousin who had been forced to engage in sexual acts with both Lucy and Jon. Kitten testified that sometime around Christmas 2000, she was staying at the Layers’ home in Mississippi. One evening, they were sitting around drinking when Layer made a statement that was burned into her mind. He said that he had named Amanda after a porn star so he could “lay her later.” (Detective Killingsworth researched and confirmed the existence of the porn star after whom Layer had named his daughter.) This evidence provided the jury with a glimpse into the mind of a sexual predator. The defendant made that statement when his daughter was 5 years old, which showed his forethought and sexual depravity.

## The open door

During cross-examination of the State’s witnesses, the defense attempted to prove that Amanda was fabricating the allegations. In the defendant’s recorded statement at the police department, he recited a story explaining that he was strict on Amanda and would not let her go to a school dance or a camp that she wanted to attend, which the girl later used as reasons that she lied about the sexual abuse. Additionally, during cross-examination, the defense argued that Layer did not have the opportunity to molest his daughter because so many people lived in the house. This defense of fabrication and lack of opportunity opened the door for us to prove up an extraneous offense to show Layer had molested another girl under similar circumstances.

In 1986, Layer lived outside of New Orleans in the community of Kenner. He was dating a girl named Laura who occasionally worked as a babysitter. One day, Laura was watching a 6-year-old girl named Kimberly. During a moment when Laura was in another room, Layer seized an opportunity to touch Kimberly inappropriately. The incident was reported to the police, and Layer pleaded guilty to attempted indecent behavior with a juvenile.

We tracked her down by obtaining the Kenner Police Department’s files from 1986. Our investigator, Greg Young, called her in Louisiana, reopening a chapter of Kimberly’s life that had long been closed. She was initially hesitant to re-visit the traumatic events, but she realized the importance of helping in any way possible and agreed to testify.

*Continued on back cover*

# Texas District & County Attorneys Association

505 W. 12th St., Ste. 100

Austin, TX 78701

PRSRT STD  
US POSTAGE PAID  
PERMIT NO. 2071  
AUSTIN, TEXAS

RETURN SERVICE REQUESTED

*Continued from page 35*

We called Kimberly, now 29, to testify about her memory of the event to rebut the defensive theories of fabrication and lack of opportunity. She wasn't able to identify the defendant, but she knew the man who molested her was named Jon Layer. The defendant stipulated that he was the same person who was at the babysitter's house with Kimberly to keep us from introducing the previous indecency judgment. (We later offered the judgment during punishment.) Kimberly gave a tearful account of what happened to her as a little girl and rebutted the defensive claims.

## **Punishment**

It took the jury less than an hour to find the defendant guilty of all four counts. We re-called Kimberly to the stand to ask her a single question: "Have you ever forgotten what happened to you?"

"No," she said matter-of-factly.

The Louisiana judgment for the offense of attempted indecent behavior with a juvenile was offered. The range of punishment for the offenses against Amanda was up to 99 years or life instead of mandatory life because the prior conviction was an inchoate offense. (The "one-strike" sex offend-

er enhancement in Texas would require the conviction be for indecency with a child by contact or its Louisiana equivalent. Because the prior was "attempted," the enhancement didn't apply.)

After only 18 minutes, the jury returned with a clear message to those who molest children: Layer was sentenced to life in prison on each of the four counts, and Judge Mark T. Price stacked the sentences. During the trial, a verse from Matthew 18 kept coming back to me: "But whoso shall cause one of these little ones who believe in Me to fall, it were better for him that a millstone were hung about his neck, and that he were drowned in the depth of the sea." (Another prosecutor had used it during cross in a sexual assault case two weeks prior.) The jury didn't have the option of a millstone, but four stacked life sentences were the next best thing.

## **A little redemption**

The Friday afternoon before trial, I had a conversation with Laura, the defendant's former girlfriend who now lives in rural Pennsylvania. I told her I had a difficult question for her and inquired if Layer had ever sexually assaulted her in the past. After

breaking down in tears, she disclosed that he had sexually assaulted her over 20 years ago in Louisiana. She said she had never told anyone before now, and it had haunted her ever since. I assured her that I would call her back after the trial to report the outcome.

The following Friday, I made a phone call to Pennsylvania. Laura was overjoyed to learn that Layer was finally going to prison. She said that the entire experience changed her life and that she felt a new freedom. She admitted that the trauma of her own experience had caused her to be an overprotective mother; however, because Layer was now behind bars, she felt like everything would be OK.

I spoke with Amanda's mother several weeks ago and they seem to be doing well. They were going to stay in Wichita Falls but change their last name. The story of the trial was highly publicized, and someone even asked Lucy if she was related to that "guy on the news." I encouraged her to take Amanda back to the CAC for counseling, but I don't think she ever did. One of our prosecutors had a lot of girl's clothes that she donated to Amanda. She is repeating eighth grade this year. ❀