THE TEXAS PROSECUTOR

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

Worth the wait

In *Brooks v. State*, the Court of Criminal Appeals (finally!) overrules *Clewis*. Here's what this important decision means for prosecutors.

By Emily Johnson-Liu
Assistant Criminal District Attorney in Collin County

On October 6, in *Brooks v. State*, a majority of the judges on the Court of Criminal Appeals finally agreed to a proposition that the State had been advancing for years: When an appellate court is deciding if the proof at trial was enough to sustain a conviction, it should apply only a single standard of review.[1]

Up until *Brooks*, criminal defendants had been able to challenge the sufficiency of the evidence on federal constitutional grounds ("legal sufficiency," a standard mandated in *Jackson v. Virginia*[2]) but also on grounds of "factual sufficiency," a standard that the court held in *Clewis v. State*[3] was required under Texas law. Under *Clewis*'s factual sufficiency standard and the cases following that decision, an appellate court was supposed to view the evidence offered at trial in a "neutral" light, which meant the court did not have to defer to the jury's credibility and weight determinations, but, confusingly, the court was not supposed to substitute its judgment for that of the jury. Further, even though a rational jury believed all the elements of the offense beyond a reasonable doubt, an appellate court could reverse the conviction and remand for a new trial if the court found the jury's verdict was "clearly wrong" or "manifestly unjust." In fact, the Waco court of appeals had done just that in the lower court's opinion in *Brooks*.[4]

A jury had convicted Brooks of possession of cocaine with intent to deliver, but on appeal, Brooks contested the jury's finding that he had intent to deliver. The evidence showed that Brooks matched the description of a man who police were told was in possession of a handgun. When they approached Brooks, he threw several baggies out of his pocket. The baggies contained two large rocks of crack cocaine weighing 4.72 grams, six ecstasy tablets, and about 3 grams of marijuana. The State's expert testified that 4.72 grams of cocaine was usually a "dealer amount" and could be cut up into 23 or 24 rocks worth about $470, but he acknowledged a person could possess 4.72 grams for personal use. Brooks also had a cell phone and a couple of dollars, but police found no handgun, ledgers, or paraphernalia, either for selling or using, and Brooks was not under the influence of anything.

The State's expert testified that users typically do not hold on to larger amounts of crack; because of their habit, they usually use it as

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Annual Update wrap-up and other news

Thank you to all of our Advisory Committee members who attended the Foundation meeting in South Padre—we appreciate your continued support. We had a great meeting thanks to your input and leadership, and a lot of great ideas came out of it. We will be in touch soon to follow up over the next few months.

By Jennifer Vitera
TDCAF Development Director in Austin

And the winner of the iPad raffle is … Todd Smith, chief investigator in the Lubbock County Criminal District Attorney's Office. Congratulations! A big thank you to all the conference attendees who purchased an iPad raffle ticket in support of the Foundation. We raised close to $1,000 for TDCAF.

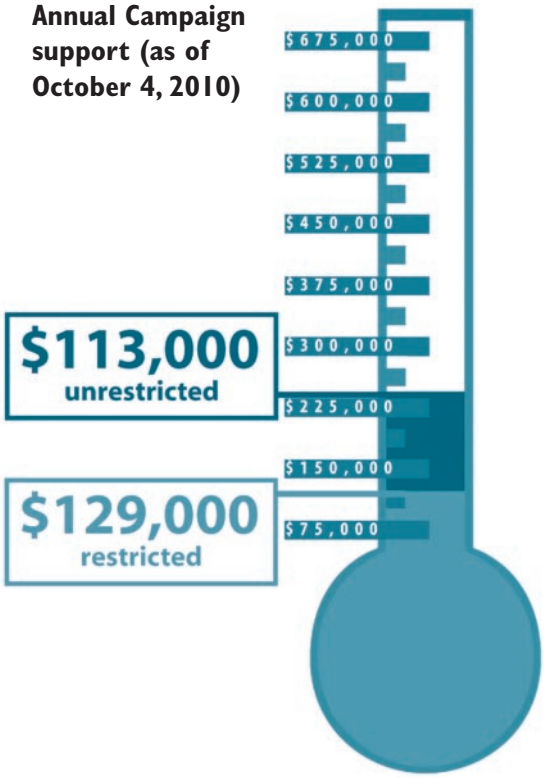
Also, I want to thank the following folks for going out of their way to set up TDCAF introduction meetings in their area over the last few months: Bobby Bland, Yolanda de Leon, Knox Fitzpatrick, Judge Gerald Goodwin, Clyde Herrington, Ed Jones, Judge Susan Reed, and Julie Renken.

Year-end giving

Please consider making a year-end gift to the 2010 Annual Campaign. The Foundation needs your support! (Go to www.tdcaf.org to make a contribution; we've even included a return envelope in this issue for your convenience.) For many members and friends of TDCAA, the end of the year is a traditional time for giving, and the Foundation's fiscal year ends December 31 so you still have time to donate. Gifts to TDCAF not only provide important support for TDCAA programs, but they also yield significant tax savings. Make your gift by December 31 to receive a tax break when you itemize deductions on your 2010 tax return.

Thank you to all of our donors and volunteers who have made this year so successful. We still have time to exceed our fundraising goals for the year with your support! (See the thermometer at left for a snapshot of this year's contributions.)

Annual Campaign support (as of October 4, 2010)



Last reminder for the Annual Campaign

This is the last reminder regarding the two fundraising goals for our membership groups: one for elected prosecutors, and one for investigators, key personnel, and victim assistants. This year we are asking all elected prosecutors to coordinate with prosecutors in their office to raise $500 in unrestricted funds for the Annual Campaign. If all 332 prosecutors donate at this level, the foundation will receive $166,000 in unrestricted funds.

The second fundraising goal involves three of our membership groups (investigators, key personnel, and victim assistance coordinators) who have challenged each other in their fundraising. So far, the investigators are leading the way in the 2010 Annual Campaign Challenge. The Foundation will host a reception for the winning membership group at its scheduled conference in 2011 (Investigator School or the Key Personnel and Victim Services Coordinator Seminar). The winning group will also receive an engraved plaque to be presented at the 2011 Annual Criminal & Civil Law Update, along with recognition in the *Prosecutor* journal and on the TDCAF website. Remember, any amount you give is appreciated.

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

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See page 9 for a list of recent gifts.

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The Annual was big. *Very* big.

If you had to stay back at the office during our Annual Criminal and Civil Law Update in September, you might have felt a little lonely. It seemed, at least to us as we signed in wave after wave of attendees, that most TDCAA members were in the Convention Centre on South Padre Island. It was the second largest annual ever, with 1,044 attendees (eclipsed only by Galveston in 2001—which was shortly after the terrorist attacks of 9/11). The feedback we have gotten has been great, with our first speaker, **Lieutenant Mark Wynn** of the Nashville Police Department speaking on domestic violence, being a real highlight.

By Rob Kepple
TDCAA Executive Director in Austin

I was very proud of the entire TDCAA staff for putting on a great training event, but I want to single out our senior meeting planner, **Manda Helmick**, for the tremendous job she did. You would have never guessed that this was her first annual conference as the lead meeting planner. Under her direction, the conference ran smoothly, and the rest of us stayed on task. Thanks for a job well done!

Priority on Key Personnel training

Three years ago, locating the Key Personnel and Victim Assistance Coordinator Seminar at the historic Camino Real Hotel in El Paso was an exciting idea. We were eager to showcase a city to which we rarely go for major conferences. But in the ensuing years, the economic downturn has sapped many office budgets, and that has affected whether key staffers can travel to El Paso—a city far enough away from most jurisdictions that it requires a flight—for this seminar.

Elected prosecutors know how important that seminar is to their key personnel and victim assistants, and the TDCAA Board wanted to make sure our members could afford to travel to El Paso. At the board meeting at the Annual Update, the board reworked the TDCAA budgets to fund a transportation reimbursement of up to $150. This is the first time that we've been able to offer reimbursement for transportation, but it is worth it to make sure our valued key personnel get the training they need.

And regarding the issue of safety in El Paso, the city remains one of the safest in the country—notwithstanding what you may hear on the national news. I hope to see a whole bunch of you "under the dome" (the Tiffany glass dome in the hotel lobby bar, of course!) in November.

TDCAA elections

The TDCAA membership elected your new Board leadership for the 2011 calendar year at the annual business meeting in South Padre. Come January 2011, under our bylaws, President **Scott Brumley** (CA in Potter County) will become the chairman of the TDCAA Board. **Mike Fouts** (DA in Haskell County) will be your President. I am happy to report that **Lee Hon** (CDA in Polk County) is your President-Elect, and **David Escamilla** (CA in Travis County) was elected the Secretary-Treasurer. **Judge Susan Reed** (CDA in Bexar County) was elected to the Criminal District Attorney At-Large position, and **Jo Anne Bernal** (CA in El Paso County) will be the County Attorney At-Large.

We also have four new regional directors coming on board: In Region 1: **Mark Yarborough** (C&DA in Lamb County); in Region 2: **Jesse Gonzales, Jr.** (DA in Pecos County); Region 4: **Bernard Ammerman** (C&DA in Willacy County); Region 7: **Janice Warder** (DA in Cooke County).

Thanks to some great TDCAA leaders

I want to take time out to thank some folks who will be leaving the TDCAA leadership at the end of the year. We have had the benefit of some great regional leadership these past two years: **Lynn Switzer** (DA in Gray County), **Bobby Bland** (DA in Ector County), **Martha Warner** (DA in Bee County) and **Staley Heatly** (DA in Wilbarger County).

Finally, I want to extend a special thanks to **Barry Macha** (CDA in Wichita County), who at the end of this year will be leaving the Chairman of the Board spot and retiring from the profession. Barry is the quintessential prosecutor: honest as the day is long, passionate for the

victims of crime, dedicated to the job, and loyal to his staff. My enduring memories of Barry will be how he stood tall for the rights of crime victims time and time again at the Texas legislature, often in the face of withering attacks from those who didn't have the best interests of victims of crime in mind. He never faltered. Thank you, my friend, for your leadership.

Victim Services Section open for business

The membership of TDCAA formally created the TDCAA Victim Services Section at the annual business meeting in South Padre last month. I want to thank the members of the Long Range Planning Committee who, five years ago, devised a way that TDCAA could help its members fulfill their mission to support the victims of crime. A list of our first board and a picture of the members can be found on page 10.

The first formal meeting of the Board will be in conjunction with the Key Personnel and Victim Assistance Coordinator Seminar in November in El Paso. It's at that meeting that the hard work of planning and implementing a whole new level of victim services will begin. I am confident we have the right people for the job!

John R. Justice Loan Repayment update

At the Annual conference, you had the opportunity to meet two folks with the Texas Higher Education Coordinating Board (THECB), **Lesa Moller** and **Kammi Contreras**. Lesa and Kammi are running interference for y'all with the federal government in getting the student loan repayment program started in Texas. The application process will start Nov. 15; go to www.hhloans.com/apps/financialaid/tofa.cfm?Kind=LRP to access the online application.

They had a good laugh at the following requirement that will be imposed upon you if you accept the loan repayment: "The Department encourages recipients and sub-recipients to adopt and enforce policies banning employees from text messaging while driving any vehicle during the course of performing work funded by this grant and to establish workplace safety policies and conduct education, awareness, and other outreach to decrease crashes caused by distracted drivers." Another example of your federal government at work!

Human trafficking and Texas prosecutors

In October, TDCAA co-sponsored the First International Conference on Human Trafficking with State Representative Senfronia Thompson, the LBJ School of Public Affairs, and many others. The conference featured a day devoted to panels of federal and Texas prosecutors who discussed the successes and problems with enforcing human trafficking laws in the federal and state systems. Thanks to **David Weeks** (CDA in Walker County), **Ballard Shapleigh** (ADA in El Paso County), **Steve Baldassano** (ADA in Harris County), **Brooke Grona-Robb** (ACDA in Dallas County), and **Kirsta Melton** (ACDA in Bexar County) for their presentations at the seminar. The course materials featured the lead article from the September-October issue of *The Texas Prosecutor* by Brooke, who very carefully set out what changes would make the Texas statutes more effective.

What we learned at the conference, in a nutshell: 1) the numbers on just how big the problem is are still "mushy" (the governor's word, not mine); 2) the feds have the advantage when it comes to international trafficking because they can hold defendants under no-bonds and control the alien status of the victims to avoid deportation; 3) it looks like Texas prosecutors may be best-positioned to prosecute domestic trafficking of underage girls; 4) we are at the formative stages of law enforcement's ability to identify trafficking situations and develop the cases; and 5) investigating and trying a trafficking case is harder than working up and prosecuting a murder case.

There was no question during the conference about Texas prosecutors' readiness and willingness to prosecute human trafficking cases if we get them. Indeed, Kirsta Melton evoked cheers and applause when she staked out some clear prosecutor territory: She refused to apologize to anyone for using everything in her toolbox to get runaway girls who had fallen into the clutches of traffickers off the street, observing that as a prosecutor it was her job to be tough and find a way to bury a trafficker under the jail.

At this point don't feel too badly if you haven't picked up a human trafficking case yet—someone float-

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ed the number 5,000 as the number of human trafficking prosecutions *worldwide*. That is probably another one of those "mushy" numbers, but it gives you an indication that this area of criminal investigation and prosecution is in the early stages of development.

Investigator Scholarship awarded

Congratulations to **Dylan Neal**, who is the 2010 recipient of the Investigator's Section College Scholarship Award. Dylan's father, **Rodney Neal**, has been an investigator for 23 years in Collin County. Dylan is attending Blinn College, where he will be playing baseball and majoring in business and sports marketing. He wanted us to pass along his heartfelt thanks because he was in class while we were at the Annual conference. Good luck, Dylan!

Tarrant County carries the water on a *Skinner* amicus brief

In the last *Texas Prosecutor*, I honored the stand taken by **Lynn Switzer**, our DA in Gray County, in the Henry Skinner death penalty case. As you recall, Skinner as a matter of tactics declined to seek extensive DNA testing of many crime scene items; the testing that *was* done implicated Skinner in the crime. In October Lynn went to the Supreme Court to fend off a §1983 federal civil suit filed against her to force her to do additional testing, notwithstanding that all other courts in all other proceedings had denied Skinner's request. She had no help from her local officials or the attorney general—but it turns out she wasn't entirely by herself.

Many thanks to **Joe Shannon**, CDA in Tarrant County, and his assistants **Russell Freimel** and **Andrea Jacobs**, for drafting and filing an amicus brief in support of Lynn's principled stand. Their brief was joined by **John Bradley** (DA in Williamson County), **Lee Hon** (CDA in Polk County), **Henry Garza** (DA in Bell County), **Scott Brumley** (CA in Potter County), and **Barry Macha** (CDA in Wichita County). The brief was terrific and focused on the well-established post-conviction testing law and procedures afforded worthy convicted inmates under Chapter 64 of the Code of Criminal Procedure. It turns out after an extensive survey of prosecutor offices done by the Task Force on Indigent Defense that relief under Chapter 64 has been provided by our courts, and the fact that Skinner didn't merit such relief should tell us something. To view the full survey results, go to www.courts.state.tx.us/tfid/pdf/DNAPostConvictionReport0910.pdf.

Why didn't TDCAA sign the amicus?

The leadership of TDCAA has always believed that the strength of our organization is that we can serve 332 independently-elected prosecutors and their 5,000 staff members. But as an organization we can't speak for you. Truth is, Texas prosecutors are plenty capable of speaking for themselves, and your voice can be very powerful because it is backed with your knowledge and real-world experience. So by policy TDCAA as an entity will not speak for you but rather will help your voice be heard if you have a mind to speak up.

In practice, that means that if you want the backing of your fellow prosecutors in an amicus or other action, TDCAA will connect you to those folks who are willing to wade into the fight with you. My guess is that most of you would have signed on to the *Skinner* brief had there been time to send the brief out to everyone.

Speaking of representing prosecutors in civil court

You have probably noticed the uptick in civil lawsuits against prosecutors by all sorts of people who aren't getting their way in criminal court. It is not usually a matter of money damages but of folks trying to stop you from doing something or requiring you to do something else. And you may have noticed how your local governing bodies and the attorney general, even when they are statutorily required to represent you, may not step up.

Well, we have some good ideas on this pressing issue. If you have an interest in this—and if you have been in office long enough to be sued once, you surely will—make sure you come to the Elected Prosecutor Course for the opening session on December 1, 2010, here in Austin. Register for the course at www.tdcaa.com/node/6796. ❇

Photos from the Annual Criminal & Civil Law Update in South Padre

"Do good" and other hackneyed platitudes from a lame duck

By C. Scott Brumley
County Attorney
in Potter County

The race has almost been run. The lights are being turned off. The shark is being jumped. Alas, the end of my term as president of this extraordinary association is at hand. And I never got to issue an executive order designating a mascot of our organization. Teddy the TDCAA Tarantula never found much traction or favor with the focus group. So, regrettably, I must leave that task to the capable hands of my successor: the upright, professorial, and indubitable Mike Fouts. Hail to the chief.

As you know, Douglas MacArthur famously quipped that old soldiers never die, they just fade away. In the Texas District and County Attorneys Association, old presidents don't die. They're simply moved to a position where they can wreak greater havoc. As I prepare to make Henry M. Robert roll over in his grave during the coming year, I begin to feel a bit contemplative. (An antacid takes care of that uncomfortable feeling.) Then I ponder what I've learned during the time I've been a member of TDCAA. Much of it has been useful but a bit too mundane to take up column inches. Some of it shouldn't be repeated in print. But some of that institutional information strikes me as worthy of repeating. Thus, as a final didactic (or defiant) act, I offer the following nuggets of wisdom passed to me during my membership in our association. Keep them handy; they may just save your sanity some day.

1 If the defendant's name is Icepick, there's a good chance that deferred will be an inappropriate offer.

2 There is a First Amendment right to operate an S.O.B. in your county. In this context, an S.O.B. is a sexually oriented business. Be that as it may, there is not a First Amendment right to call the judge who rules for that business an S.O.B. in open court.

3 Sometimes the first thing the defense lawyer does is call a press conference. It usually won't be to say nice things about you. At least you can rest a bit easier knowing that being called unprincipled by such a media hound is, as our wise first assistant says, "like being called ugly by a possum."

4 Jurors may be amused if you cross or roll your eyes while another lawyer is speaking. Judges seldom are. And I never am. You know who you are. I wouldn't be so annoyed if you didn't work in the same office as me.

5 If opposing counsel smells like the cologne counter at Dillard's, get everything in writing.

6 When setting a deadline for an officer, clerk, or client to deliver something to you, build in an extra two days' padding. That's not meant to imply that the folks we deal with are mischievously dilatory. It's just that most people are prone to waiting until the very last minute to take care of things, especially things they might find tedious or annoying. According to most folks, there is precious little that is more tedious and annoying than a lawyer's directives. With all of that in mind, if the deadline is for a lawyer (whether opposing counsel or someone in your office), build in an extra two *weeks*' padding.

7 If you, as a prosecutor, don't like a particular law, you have the training and talent to work to change it. If you, as a prosecutor, *like* a particular law, the odds are great that someone with a lot more money and influence than you doesn't like it and will get it changed.

8 Even the most sedate of bosses in a prosecutor's office can become disturbingly draconian about seemingly harmless and insignificant practical jokes. Such as, hypothetically speaking, pasting a photograph of a less-than-sympathetic-to-the-State peer just above a copy of §38.122 of the Penal Code (Falsely Holding Oneself Out as a Lawyer) on the inside of a toilet lid in the office bathroom. Free speech may not be dead, but it has spent some time in the emergency room.

9 If you post a query on the association's website about a legal issue concerning the county's effective tax rate, a volunteer fire district, or venue for some obscure misdemeanor,

you may hear crickets chirping around the state. If you post an item concerning the all-too-wacky things drunks do, bizarre instrumentalities of death or serious bodily injury, nakedness, noodling, or unconventional ways to consume sherry, you may get more than 1,000 replies. That's just another reason why I love this association.

10 Trial success in Texas often is directly proportional to the strength of the advocate's drawl. Follow me on this. Unless I exercise extreme self-restraint, I slip into my natural voice inflection. My Minnesota-born wife refers to it a bit condescendingly as my "hick voice," which she—unsurprisingly—finds loathsome. But, despite my wife's 10,000 lakes wisdom, I've lost more frequently when waxing eruditely than when talking like I'm at a feed store. You may catch more flies with honey than vinegar, but you'll catch even more with cow pies. Good defense lawyers understand this, too. Our jurors may puzzle over the intricacies of necessity and a victim's provocative tendencies, but they're crystal clear on the concept of "he needed killin'."

11 A good judge knows the law and applies it to the facts. A great judge wears boots and applies them to the neck of a lawyer who tries to sneak in little advocacy gems, such as repeatedly referring to the State's lawyer as the "persecutor."

12 Life is just a little jollier if you get the chance to prosecute a possession of an undersized fish case. In that event, as a matter of law, you must refer to the defense's theory as a "fish story" or "stink bait" and scoff at the notion that anyone would buy the defendant's story "hook, line, and sinker." It also helps if the defendant shows up for trial three sheets to the wind. As you should gather, there's never a dull day in a Justice of the Peace court.

13 Using Latin terminology makes you sound so much more scholarly than plain old English. Consider the difference, for example, between "*ipse dixit*" and "because I said so." As an additional benefit, using Latin terminology makes people think you're an arrogant nerd. It's a great club. We meet in the law library and speak eloquently of our love for the law. *Totidem verbis*. ❇

Newsworthy

Prosecutor booklets available for members

We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others who are considering jobs in our field.

Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at wolf@tdcaa .com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

TDCAF News

*Recent gifts to TDCAF**

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First-ever Victim Services Board elected

By Suzanne McDaniel
TDCAA Victim Services Director

History was made at TDCAA's Annual Criminal and Civil Law Update with the election of the new Victim Services Board. The election was the culmination of the association's long-range strategic plan to transition the Victim Assistance Coordinators Committee to the new board with regional representation. Thanks go to the TDCAA board and staff along with the Victim Assistance Coordinator Committee who gave their time and effort.

The TDCAA board president appointed Cyndi Jahn, Director of Victim Services for the Bexar County Criminal District Attorney's Office, as the new VS Board Chair. Cyndi has served that office for 20 years and holds the designation of Certified Legal Assistant and Professional Victim Assistance Coordinator. She manages and coordinates 41 victim advocates within the DA's Office, the largest victim service program of any prosecuting office in the state of Texas.

The board representatives, who are pictured at right, are as follows:

- Laney Dickey, Victim Assistance Coordinator for the County & District Attorney's Office in Lamb County, was elected to represent Region 1. Laney has been the office's VAC for 18 years and was certified by TDCAA as a Professional Victim Assistance Coordinator in 2003.
- Frank Zubia, the Director of the Victim Assistance Program for the District Attorney's Office in El Paso County, is the new member from Region 2. Frank has been a victim advocate for 11 years and has completed training at the National Victim Assistance Academy's Foundation and Leadership Seminars.
- Kathy Dixon is the new Region 3 representative. She has served as a victim assistance coordinator for the District Attorney's Office in Burnet, Llano, Blanco, and San Saba Counties since 2001.
- Christina Segovia, Victim Assistance Coordinator for the County and District Attorney's Office in Bee, Live Oak, and McMullen Counties, is the Region 4 member. She has served victims there for nine years.
- Nancy Holmes Ghigna, the Director of Victim Assistance in the District Attorney's Office in Montgomery County, represents Region 5. Nancy has been with the office since 1994 and became director in 2005. She was certified by TDCAA as a Professional Victim Assistance Coordinator and completed training at the National Victim Assistance Academy. She is also a member of the Texas Crime Victims' Institute Advisory Council.
- Jalayne Robinson, the Victim Assistance Coordinator in the Criminal District Attorney's Office in Wood County, is the Region 6 member. She has worked for that office since 1991.
- Blanca Burciaga, LMSW, is the Director of the Victim Assistance Unit of the Criminal District Attorney's office in Tarrant County. She

The new TDCAA Victim Services Board: (back row) Cyndi Jahn, Chair; Nancy Ghigna, Region 5; Frank Zubia, Region 2; Jill McAfee, Region 8; Jalayne Robinson, Region 6; (front row) Laney Dickey, Region 1; Kathy Dixon, Region 3; and Christine Segovia, Region 4. Inset: Blanca Burciaga, Region 7.

was appointed as the Region 7 representative. She has been with the district attorney's office for more than seven years.

- Jill (Hargrove) McAfee, Director of Victim Services in the District Attorney's Office in Bell County is the Region 8 member. She has been with the office since 1986 and served on the TDCAA Victim Assistance Committee.

The new board represents a wealth of expertise and demographic diversity that will be utilized in developing standards and curricula, planning and providing training, and serving as mentors and points of contact for their regions. Congratulations and welcome! We look forward to a great start.

Children's Advocacy Centers family advocates

This issue of the *Prosecutor* features an article on page 24 about the new position of family advocate in Texas Children's Advocacy Centers (CACs). CACs' multidisciplinary approach offers a perfect example of team building or "playing well together" and is one that I often cite as a model for victim services in general. I was pleased to be a part of their training and learned a lot from the advocates in my workshop.

They asked the hard questions: How does the family advocate work with the VAC? How do they avoid conflicts or duplicating roles? How can they ensure that the victims and their families receive the least traumatic transit from outcry through the medical and legal systems? This article is a result of that training and illustrates how it works for one county and can work for others.

DIVO

Some of you have asked questions about a program called Defense-Initiated Victim Outreach or DIVO. Trainings have been conducted across the state and many of you have been contacted to ask for your participation. If this program is confusing to you, you can only imagine what it must be like for a victim to receive a letter from a defense attorney explaining that an "advocate" will soon contact them.

TDCAA director Rob Kepple wrote about DIVO in a previous issue of *The Prosecutor*; access it online at www.tdcaa.com/node/4810. In this issue Pam Alexander in Lubbock shares one victim's actual experience in dealing with DIVO and the subsequent trauma. Please let us know of your experiences; e-mail me at mcdaniel@tdcaa.com.

Victim assistance grants

Victim of Crime Act (VOCA) funding opportunities will be posted on the Governor's Criminal Justice Division website, www.governor.state.tx.us/cjd, in December 2010. VOCA applications will be posted in January 2011 and due in March.

The Office of the Attorney General (OAG) also offers grant funding opportunities for victim assistance programs and positions in prosecutor's offices. The OAG funding applications will be posted early next spring (February or March 2011). The application deadline for the funding period of September 2011 to August 2012 will be sometime in the summer of 2011. The OAG grants website is www.oag.state.tx.us/victims/grants.shtml.

Victim assistance checklist

Quick reference checklists detailing statutory duties were mailed to all prosecutor coordinators at the end of August. The laminated checklist is also in included in the *Prosecutor Trial Notebook*, which is available for purchase at www.tdcaa.com/publications. The checklist was developed in response to inquiries from newly elected prosecutors needing a summary of their statutory duties.

TDCAA training reports

As this issue goes to press, we have just come back from the TDCAA Annual Criminal & Civil Law Update in South Padre. Not only was the first TDCAA Victim Services Board elected, but the plenary sessions (attended by a record crowd) featured two speakers on issues directly involving victim assistance. Friday morning's workshop and roundtable brought us together to discuss how to meet needs with dwindling resources. The TDCAA parent board also voted to provide financial assistance to staff attending the November Key Personnel & Victim Assistance Coordinator Seminar in El Paso. It was good to see so many of you there, and I am grateful for your comments and feedback.

This year's Elected Prosecutor Conference, December 1–3 in Austin, will feature a workshop on victim services training for small offices. We have gotten many inquiries from prosecutors in smaller jurisdictions who want to know what they can do to improve their response to victims. Please let me know if you have ideas that you would like to share. ❇

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Annual Update wrap-up and other news (cont'd)

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DWI Summit coming up November 12!

TDCAA, in cooperation with the Texas Department of Transportation (TxDOT), Anheuser-Busch Companies, Inc., and the Foundation, is proud to offer Guarding Texas Roadways, our 2010 DWI Summit, which will be broadcast over the Busch Satellite Network to 31 Texas cities (and two other states) on November 12. Register online at www.tdcaa.com.

And thank you to our DWI Summit sponsors!

Thank you to our golf tournament sponsors and participants!

The 2010 Annual Golf Tournament hosted by the Texas District and County Attorneys Foundation (TDCAF) grossed over $12,000 in donations. Thank you to our generous sponsors, donors, and participants—we appreciate your support! Proceeds from the annual event will benefit the 2010 Annual Campaign. ❇

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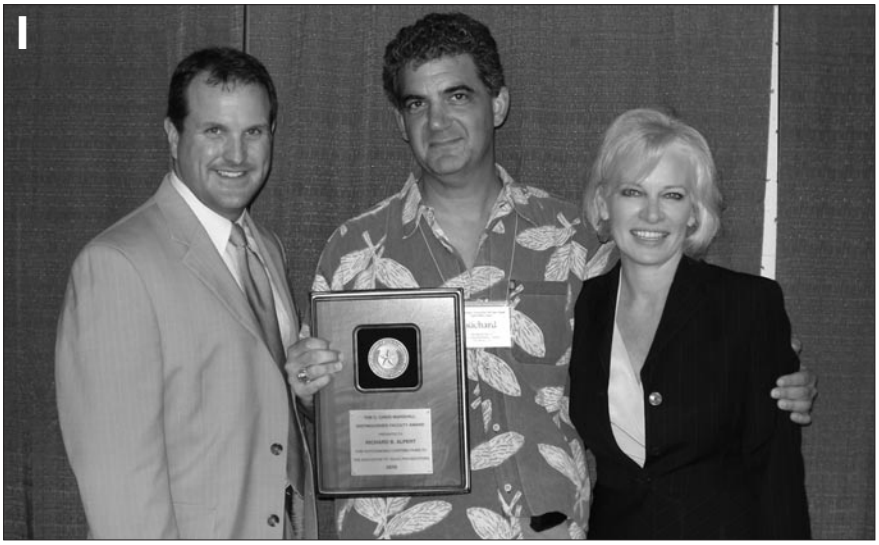
Award winners at the Annual Update



Several awards were given at our Annual Criminal & Civil Law Update in September.

In photo 1, Richard Alpert (center), misdemeanor chief in the Criminal District Attorney's Office in Tarrant County, is congratulated by Erik Nielsen, TDCAA Training Director, and Christy Jack, Training Committee Chair, for winning the C. Chris Marshall Award for outstanding faculty.

In photo 2, Eric Nichols, an assistant attorney general in Austin, accepts the Lone Star Award from C. Scott Brumley, TDCAA President and the County Attorney in Potter County.

In photo 3 are two PCI recipients, John Paul Garza, an investigator with the Hays County Criminal District Attorney's Office, and Charles Brandon Clegg, an investigator with the Collin County Criminal District Attorney's Office.

In photo 4, Oscar Sherell Award winner Maria Hinojosa, an investigator in the Denton County Criminal District Attorney's Office, is pictured with Rob Kepple, TDCAA Executive Director. Congratulations to all of these award winners!

Continued from the front cover

Worth the wait (cont'd)

soon as they get it, and they often carry drug paraphernalia used to smoke the crack. Dealers, on the other hand, do not typically use their own product and will not have crack pipes or other cooking paraphernalia on them. On this evidence, the court of appeals concluded that a jury could believe, beyond a reasonable doubt, that Brooks had the intent to deliver. But a two-judge majority at the court of appeals also concluded that when they viewed the evidence in a neutral light (the standard set out in *Clewis*), the jury's verdict became clearly wrong and manifestly unjust and had to be reversed for a new trial.[5] The Court of Criminal Appeals granted the State's petition for discretionary review to reconsider the standard for factual sufficiency review, as it had in several cases since *Clewis*.

In resolving the case, the court issued three opinions. The lead opinion, authored by Judge Hervey and joined by three other judges, expressly overruled *Clewis*, primarily because the judges found that the court's formulation of the factual sufficiency standard is now indistinguishable from the legal sufficiency standard in *Jackson*. For the judges joining Judge Hervey's opinion, the lack of a distinction between the two standards (which, they argue, both require complete deference to the jury's determination of weight and credibility) raises double jeopardy concerns. The remedy for factually insufficient evidence is retrial, but for legally insufficient evidence, it is acquittal. Without a clear distinction between the two standards, a defendant could be wrongly retried if the reviewing court finds "factual insufficiency" on what is actually legally insufficient evidence.

Judge Cochran joined in Judge Hervey's lead opinion in the case, but she also wrote a concurring opinion of her own that Judge Womack joined. Judge Cochran's concurrence agreed that *Clewis* should be overturned, and she argued that *Clewis* was a failed attempt to incorporate part of the five-zone sufficiency scheme used in civil cases (where the burden is by a preponderance of the evidence) into criminal law (where the burden is beyond a reasonable doubt). The concepts are incompatible and *Clewis* ultimately unworkable. Having discarded factual sufficiency review for assessing sufficiency of the evidence on appeal, both the lead and concurring opinions conclude that the standard set out in *Jackson v. Virginia* for assessing the legal sufficiency of the evidence is the only test.

The dissent

Judge Price authored the dissenting opinion, which was joined by three other judges. Interestingly, these same judges (along with Judge Womack) had formed the majority in *Watson*, where, just four years ago, the court rejected Judge Hervey's and Judge Cochran's arguments that *Clewis* should be overruled.[6] Now in the minority, Judge Price and the remaining judges argued that the distinction between legal and factual sufficiency, while slight, was nonetheless real and did not raise double jeopardy concerns.

Although his opinion is only a dissent, Price did introduce some degree of uncertainty about whether *Brooks* has effectively overruled *Clewis*. Judge Price repeated three times in his dissent that the plurality "purports" to overrule *Clewis*, but he never explained why the decision does not authoritatively overrule *Clewis*. It is certainly true that having garnered only four votes (Hervey, Keller, Keasler, and Cochran), Judge Hervey's lead opinion is a plurality. It does not announce the "opinion" of the court; it announces the "judgment" of the court. And ordinarily, a plurality opinion cannot operate to overrule established precedent.[7] But even if no single opinion states the view of the Court of Criminal Appeals, a majority view may nonetheless be evident from the position taken by the judges. The four judges in Judge Hervey's plurality together with Judge Womack, who joined Judge Cochran's concurrence, all agreed that *Clewis* should be overturned. This constitutes a five-judge majority holding in the case. This was not a case where a plurality stated it was overruling precedent when a majority of the judges on the court were presented with the opportunity to join in that holding and declined to do so. As a result, it seems fairly certain that *Brooks* has effectively overruled *Clewis*.

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Different rationales

The fact that the plurality and concurring opinions focus on different rationales for overruling *Clewis* should not matter. The Court of Criminal Appeals followed United States Supreme Court practice in holding, "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[8] The narrowest opinion must represent a common denominator of the court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.[9] Overruling *Clewis* represents this "common denominator" in the opinions supporting the judgment and embodies the position of a majority of the Court of Criminal Appeals' judges. Even in the rationales, there is significant overlap in Judge Hervey's and Judge Cochran's opinions setting out the numerous problems with *Clewis*. Judge Cochran joined in both opinions, and both opinions favorably reference Judge Cochran's dissenting opinion in *Watson*. With five judges on the Court of Criminal Appeals agreeing that *Clewis* is unworkable, confusing, and internally inconsistent, and with the express statement that *Clewis* is overruled, the intermediate courts of appeals are likely to find *Brooks* controlling on this issue. Indeed, two days after *Brooks*, one court of appeals had already cited *Brooks* as the case that overruled *Clewis*'s factual sufficiency standard.[10]

Because the plurality and concurring opinions were careful to expressly overrule *Clewis*, it is puzzling that neither Judge Hervey's nor Judge Cochran's opinion suggests that the factual sufficiency cases following *Clewis* have been or should be overruled. And yet this must be the case. After *Brooks*, cases that attempted to reformulate *Clewis*'s standard while preserving factual sufficiency review (*Cain*,[11] *Johnson*,[12] and *Watson*,[13] for instance) can no longer be good law.

But factual sufficiency may continue to exist in another context never controlled by *Clewis*. Where the issue on appeal is a jury's rejection of an affirmative defense, where the proof required is a preponderance of the evidence, courts may continue to employ a factual sufficiency review regardless of the decision in *Brooks*.[14]

Possible aftermath

With factual sufficiency for reviewing the elements of the offense consigned "to the dust bin of history," as Judge Cochran puts it, cases that would have been reversed on factual sufficiency grounds will now either be affirmed or found legally insufficient. So *Brooks* could result in an increase in acquittals for legal insufficiency and in a few new writs of habeas corpus.

For those whose convictions were reversed for factual insufficiency and who have been retried and again convicted, Judge Hervey's plurality opinion may inspire a habeas writ on double jeopardy grounds, asserting that the appellate court wrongly found the evidence *factually* insufficient when it was *legally* insufficient. Whether these defendants will ultimately be successful is a different matter. For double jeopardy to even be at issue, the defendant must establish that the evidence in the first trial actually was legally insufficient, and sufficiency of the evidence is ordinarily not challengeable in a state writ of habeas corpus.[15] Further, although the Court of Criminal Appeals has historically been willing to allow defendants to raise double jeopardy claims at any time,[16] it can certainly be argued that the time to raise this particular challenge was when the court of appeals first reversed on factual sufficiency or before retrial by way of pre-trial writ of habeas corpus. The court's decision in *Gonzalez v. State*[17] is some indication that it is now more receptive to the State's forfeiture arguments, even where double jeopardy is concerned. In any case, the *Brooks* decision does not do anything to further the legitimacy of such a claim or give rise to any new claim. Code of Criminal Procedure art 11.07, §4 should bar consideration of this issue for defendants who have already filed at least one prior writ. Judge Hervey's plurality opinion did not set out a new legal basis for a double jeopardy claim based on an appellate court's improper characterization of the evidence as factually insufficient. That argument has been around since the Supreme Court's decision in *Tibbs v. Florida*,[18] even before *Clewis* was decided.

If the cost of overruling *Clewis* is the risk of a rise in legal sufficiency reversals and new challenges on habeas corpus, the potential benefits will make it all worthwhile. Judge Cochran expresses optimism that channeling all sufficiency claims

through the rubric of legal sufficiency will provide greater clarity and less caprice in sufficiency issues.[19] Because all states follow the same standard in *Jackson v. Virginia*, there is already a common body of law setting out criteria and permissible inferences in particular fact scenarios that the parties and courts can use to guide (and rein in) their decisions. And the prospect of more reasoned sufficiency review is a welcome change after so many years trying to reconcile the conflicting and ever-shifting standards of factual sufficiency under *Clewis*. ❇

Endnotes

1 *Brooks v. State*, No. PD-0210-09, 2010 WL 3894613 (Tex. Crim. App. Oct. 6, 2010).

2 443 U.S. 307 (1979).

3 922 S.W.2d 126 (Tex. Crim. App. 1996).

4 *Brooks v. State*, No. 10-07-00309-CR, 2008 WL 4427266 (Tex. App.—Waco 2008, pet. granted).

5 *Brooks*, 2008 WL 4427266, at *5.

6 *Watson v. State*, 204 S.W.3d 404 (Tex. Crim. App. 2006).

7 *Crittenden v. State*, 899 S.W.2d 668, 671 (Tex. Crim. App. 1995).

8 *Haynes v. State*, 273 S.W.3d 183, 186-87 (Tex. Crim. App. 2008) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)); *Carter v. State*, 309 S.W.3d 31, 38 (Tex. Crim. App. 2010).

9 *King v. Palmer*, 950 F.2d 771, 781 (D.C. 1991).

10 *Onick v. State*, 02-09-130-CR, 2010 WL 3928705 (Tex. App.—Fort Worth Oct. 8, 2010, no pet. h.).

11 958 S.W.2d 404 (Tex. Crim. App. 1997).

12 23 S.W.3d 1 (Tex. Crim. App. 2000).

13 204 S.W.3d 404.

14 See Cochran's dissent in *Watson*, 204 S.W.3d at 436-37 (Cochran, J., dissenting).

15 *Ex parte Santana*, 227 S.W.3d 700, 705 (Tex. Crim. App. 1975).

16 See *Ex parte Evans*, 530 S.W.2d 589, 591 (Tex. Crim. App. 1975).

17 *Gonzalez v. State*, 8 S.W.3d 640 (Tex. Crim. App. 2000).

18 457 U.S. 31, 32 (1982).

19 See *Brooks*, 2010 WL 3894613, at *22 n.9 (Cochran, J., concurring).

Create your own parole protest packets

A VAWA grant has enabled the Williamson County District Attorney's Office to teach other victim assistants how to craft their own packets to protest parole for the worst offenders.

History buffs or Francophiles might know that "parole" means "word" in French. As in word of honor, a verbal commitment by one person to another agreeing to do (or not do) something in the future. A promise.

By Irene Odom
Victim Assistance Coordinator in the District Attorney's Office in Williamson County, pictured with
Carter Sneldon
Victim Assistance Coordinator in the District Attorney's Office in Williamson County

In the criminal justice system, parole is the supervised release of a prisoner before he has completed his sentence—taking him on his word that he will abide by the terms of his parole. It is a privilege granted to some offenders whose behavior while incarcerated warrants early release. But there are some—and we all can think of specific criminals we've prosecuted—who should never be granted parole. These prisoners motivate me to create and file parole protest packets with the Texas Board of Pardons and Paroles (BPP).

Back in 2007, I wrote an article for this journal entitled, "A time capsule for future parole hearings." (Find it online at www.tdcaa.com/node/1121.) It was about a task force our elected DA, John Bradley, and I started in our office to keep especially violent criminals in prison; it was comprised of me and a group of volunteers. Three years later we are still producing parole protest packets.

Parole or early release of most inmates is inevitable because Texas prisons are overcrowded. According to the Texas Department of Criminal Justice's 2009 annual report, there were 76,607 parole considerations, 18,554 mandatory release considerations, and 30,389 parole violation cases. That same year, another 2,848 out-of-state parolees were supervised in Texas. The way I see all of these numbers is that we—those of us in prosecutor's offices and those on the parole board—are in this together. The board members need our help in identifying those inmates who do *not* merit parole. They told me so the last time we talked, in fact. And I am offering everyone reading this article a chance to learn how to help—free of charge. (Everyone likes free, right?)

Recovery grant

Last November, after many months of research, training on grant writing, actual grant writing, and a presentation in front of our county commissioners, our office was awarded a VAWA Recovery Act Grant. (When we got the nod, I felt like Rocky Balboa when he made it up the steps of the Philadelphia Museum of Art!) The grant enabled us to cover the salary, benefits, supplies, and travel of a full-time victim assistant. We hired Carter Snelson, who works on nothing but parole protest packets geared toward the Act's specifications—that is, helping the adult female victims of violent crimes.

Carter pulls closed case files, extracts detailed information from them, and attempts contact with victims or families in those cases. He creates a book of information with a full picture of the crime from the victim's perspective. He includes crime scene photos, autopsy reports, news articles, victim statements, and anything that humanizes the victims for the parole board. And because we allocated money for travel, we can train others on how and why they should protest parole, not just for the victim, but also for the safety of the communities in which we live.

Receiving this grant has brought us closer to our community, and it set the foundation for our county commissioners to (when the grant expires) fund a full-time victim assistant position in our office. But most importantly, it is pretty historic that our commissioners recognized the significance of paying someone to make sure that prison sentences are carried out, protecting the victim long after the trial is over. Now *that's* what I'm talkin' about!

I know first-hand how difficult

it is to juggle your regular victim assistance responsibilities with creating these parole protest packets. Even with a team of volunteers (whose numbers dwindled from 14 to seven then to one over the course of a single year), we knew we needed a grant to hire an additional staff member. These packets are so worth it, though! I got a call one day from a woman who worked north of Dallas; her name is Evette. She had Googled how to write a parole protest letter, and my name came up in the search. Her sister had been murdered for insurance money, and the woman who did it was coming up for parole. Evette sent me newspaper articles so I could familiarize myself with the details, and I in turn shared our approach to protest packets. About a month later, she e-mailed to say that the parole board had invited her to appear in person, and one member even walked into the meeting with her protest packet in hand! The murderer was denied parole, and her next eligibility date was set off for a few years—and Evette thanked us profusely for helping her. The feedback I get from victims and their families, when parole is denied after board members view their protest packet, is very rewarding.

Carter and I would love to come to your county and show victim advocates or other staff how to effectively create your own parole protest packets. Training can take up to two hours, and you just supply the room. If you're interested in this training, please contact our office at 512/943-1234 or email us at iodom@wilco.org. ❇

Facing challenges in condemnation proceedings

How to prepare for and avoid two types of challenges in these lawsuits

Few people outside of the courthouse are familiar with prosecutors' duties related to condemnation, incorrectly assuming it must have something to do with criminals. Instead, a prosecutor representing a governmental entity has the burden of proving that it needs private property for a public use and that it negotiated in good faith to acquire the property short of instituting condemnation proceedings. Failure to do so can result in the death penalty for the acquisition, or at least a penalty in the form of delay.

By William T. Higgins
Assistant Criminal District Attorney in Tarrant County

For those who do not practice routinely in the eminent domain arena, all of the procedural requirements for condemning land may seem like a daunting and risky proposition. The starting point is to thoroughly review Chapter 21 of the Texas Property Code. Additionally, other resources provide comprehensive guidance in discussing the entire condemnation procedure.[1] What follows is a more focused discussion on how to prepare for and avoid two types of challenges that landowners sometimes raise once a condemnation proceeding becomes a lawsuit.

"Right to take" challenges

Potentially the biggest obstacle to a successful condemnation proceeding is an affected landowner's meritorious challenge to the government's "right to take" the property in question. Section 21.012(b) of the Texas Property Code provides that the condemnor must include within the condemnation petition the purpose for which the entity intends to use the property. Simply pleading the purpose is not enough to withstand a landowner's "right to take" challenge. If the condemnor is unable to prove that the condemned property is needed for a public purpose, the court will dismiss the proceeding for lack of jurisdiction. The landowner may recover "reasonable and necessary fees for attorneys, appraiser, and photographers and for the other expenses incurred by the property

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owner to the date of the hearing or judgment."[2] And the county will have to start over, regardless of how much time and money the county spent.

To avoid these consequences, there are two elements that a condemnor must be able to prove: 1) that the condemnation is for a "public use" and 2) that the property being condemned is actually needed for that particular public use.[3] The first element is a question of law for the court to decide, whereas the second is a fact issue for the jury to decide.[4]

The "public use" requirement has its genesis in Article I, §17 of the Texas Constitution:

> No person's property shall be taken, damaged, or destroyed for or applied to *public use* without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money. …

Local Government Code §261.001(a) provides counties with specific "public uses" for which a county may use its power of eminent domain: for acquisition of land for jails, courthouses, hospitals, or libraries, "or for another public purpose authorized by law." Likewise, §224.002 of the Transportation Code empowers counties to acquire highway rights-of-way for the state. Additionally, a whole host of other statutes give counties power to condemn land for specific public uses.[5] With all of this statutory guidance, county land acquisitions should unquestionably be for public uses. Nevertheless, a commissioners court must specifically state the actual public use in a court order when authorizing acquisition of land by way of condemnation. Failure to do so can be fatal, as demonstrated in the 2005 case of *Whittington v. City of Austin*.[6]

The City of Austin needed land owned by Whittington to construct a chilling plant for Austin Energy and a parking garage, all to serve the Austin Convention Center. The Austin City Council resolution authorizing the condemnation simply stated that "Lots 1-8 inclusive, Block 38 of the Original City of Austin, in the City of Austin, Travis County, Texas should be acquired for a public use," and the resolution authorized the city attorney to file a condemnation suit "and take other appropriate action to acquire the property." Even though the Austin Court of Appeals recognized that Texas courts "traditionally afford great weight to legislative declarations that a given use of property is a public use," the court ultimately held that this resolution was wholly deficient.

To bolster its position that the taking was for a public use, the city offered the resolution into evidence as well as a whole host of other documents:

- the Austin city charter, establishing that the city is a municipality with the power of eminent domain;
- the condemnation petition, which stated that the city had made a determination to acquire by fee the simple title of Whittington's property for the purpose of building a parking garage for the Austin Convention Center, operated by the Austin Convention Center Department of the City of Austin, as well as for the purpose of operating a cooling plant on the property;
- proof that the Convention Center Department and Austin Energy were city departments;
- documentation of a city-approved proposition for the expansion of the city's Convention Center;
- papers from the condemnation action, including the special commissioners' award, the parties' objections, and a receipt indicating that the city deposited the amount of the special commissioners' award into the registry of the court; and
- lastly, Whittington's responses to requests for admissions.

After reviewing all of this material, the Austin Court of Appeals concluded that none of it proved any legislative determination to condemn Whittington's property for a parking garage or chilling plant. Instead, the summary judgment proof at most established an abstract proposition that a parking garage and chilling plant could be considered a public use under Texas law. Therefore, the appellate court concluded that the city had failed to meet its burden of conclusively establishing that it condemned Whittington's property for a public use.

The lesson for those representing counties in condemnation proceedings is to confirm that the commissioners court order authorizing the condemnation specifically states what the public use is, rather than simply stating that the property is needed for a public use.

Even if a county establishes that there has been a valid legislative

determination that the use is a valid public use, there is still the second element that the county must prove: that the condemnation of the land is necessary to advance or achieve the public use. A condemnor's determination that there is a public *necessity* for taking private property is presumed, unless a statute requires affirmative pleading and proof of that element.[7] To gain this presumption, however, the condemnor "must first establish that its governing board actually made a determination that the particular taking was necessary to advance the ostensible public use"[8] by introducing the commissioners court order denoting the *specific* use of the property into evidence.[9] Is any magic language required? The *Whittington* court reviewed a whole host of cases that examined various scenarios involving public uses and necessities and concluded that legal precedent does not "categorically require the use of magic words such as 'necessary' or 'needed' within a resolution or other instrument manifesting the governing body's actions, *though prudence would perhaps make such language advisable*. To the contrary, it would appear sufficient to prove that the condemnor's governing body made a determination (manifested in some form) that, in substance, condemning a particular property would be *necessary* to advance a specific, identified public use."[10]

If the condemnor establishes that its governing authority made such a determination, the court will presume that the determination of necessity was correct unless the landowner can show that the condemnor acted fraudulently, in bad faith, or arbitrarily.[11] As already mentioned, the character of the condemnor's actions is a fact question that may properly be decided by a jury.

With respect to whether the City of Austin demonstrated a public necessity for acquiring the Whittington property, the court found the city's resolution wholly deficient, explaining that it contained "no determination by the Austin City Council that condemning the Whittingtons' property was necessary to advance a public use, or even what its intended public use is. Nor did the city establish through other means that the Austin City Council made an express determination of necessity. There was no evidence of orders, resolutions, or minutes that might have elaborated on the proceedings underlying [the resolution]."[12]

Additionally, the court rejected the city's efforts to establish a public necessity for taking the property by way of other "affirmative acts," such as offering the condemnation petition and other instruments filed in the proceedings. The appellate court pointed out that pleadings are not competent summary judgment evidence.[13]

A helpful point to remember in defending counties in a "right to take" challenge is that certain conduct by a landowner results in waiver of the challenge. The Texas Supreme Court held in the 1965 case of *State v. Jackson*[14] that "[a]fter an award has been made, and the money deposited in the registry of the court and the landowner has withdrawn the same, he cannot thereafter contend that the taking was unlawful. In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation and at the same time assert that the condemning authority had no right to take his property under the eminent domain power."[15]

In light of this holding, if a landowner challenges the right to take the land in an objection to the special commissioners award or in some other pleading, prosecutors should verify whether he has withdrawn any of the proceeds from the registry of the court. If he has, the "right to take" challenge cannot stand.

Good faith negotiation challenges

A second challenge sometimes raised by landowners is that the condemnor failed to negotiate in good faith for the land's acquisition. The §21.012(b) pleading provisions require a statement that the condemning authority and the property owner were unable to agree on the damages. This pleading provision is a reference to what is commonly known as "good faith negotiations."

Many Texas appellate courts have held that a showing of compliance with the "unable to agree" provision was jurisdictional and that failure to engage in good faith negotiations prior to condemnation rendered the proceedings void.[16] But the Texas Supreme Court's 2004 holding in *Hubenak v. San Jacinto Gas Transmission Co.*[17] rejected this position. Acknowledging that the §21.012 pleading requirements are mandatory, the court nevertheless held that "the trial courts in these consolidated cases had jurisdiction over the con-

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demnation proceedings regardless of whether the condemnors satisfied the requirement that the parties 'are unable to agree on the damages.' We therefore disapprove of those court of appeals decisions that have held or suggested that these statutory requirements are jurisdictional."[18]

If it is mandatory, then what is the remedy when the condemnor fails to meet this statutory requirement? According to the Texas Supreme Court, the remedy is abatement. The court explained, "If a landowner objects in a pleading that there has been no offer, and a trial court finds that the requirement that the parties are 'unable to agree on the damages' has not been met, the trial court should abate the proceedings for a reasonable period of time to allow the condemnor to satisfy the 'unable to agree' requirement. If at the end of a reasonable period of time, the condemnor has not made an offer, the condemnation proceeding should be dismissed."[19]

What actually constitutes a good faith offer? The *Hubenak* court followed precedent and held that only minimal evidence is needed to satisfy the "unable to agree" requirement.[20]Additionally, the court noted that the dollar amount of the offer generally should not be scrutinized. After all, determining market value of the condemned property is the primary purpose of a condemnation proceeding. Therefore, the court reasoned that "[i]t is not necessary to have two trials to reach the ultimate and only determination contemplated by the statute, which is a determination of the value of the property condemned."[21]

Importantly, if a landowner participates in the hearing before the special commissioners, then he waives the right to complain that the condemnor did not make an effort to agree.[22] Likewise, if a landowner does not participate in the special commissioners' hearing but nevertheless withdraws the award from the registry of the court, the landowner waives the right to complain about good faith negotiations.[23]

In addition to the "unable to agree" pleading requirement, a condemnor must also plead that it provided the property owner with the "landowner's bill of rights statement in accordance with §21.0112."[24] The bill of rights statement is prepared by the Texas Attorney General, the substance of which is found at §402.031 of the Texas Government Code. An important requirement for counties is that §21.0112 (b)(2) requires that the statement be included on each county's Internet website if technologically feasible. The statute specifically provides:

> Not later than the seventh day before the date a governmental or private entity with eminent domain authority makes a final offer to a property owner to acquire real property, the entity must send by first-class mail or otherwise provide a landowner's bill of rights statement ... to the last known address of the person whose name the property is listed on the most recent tax roll of any appropriate taxing unit authorized by law to levy property taxes against the property. In addition to the other requirements of this subsection, an entity with eminent domain authority shall provide a copy of the landowner's bill of rights statement to a landowner before or at the same time as the entity first represents in any manner to the landowner that the entity possesses eminent domain authority.[25]

Currently there are no attorney general opinions or caselaw interpreting the application of §21.0112. A question that may arise in future litigation is what happens if a landowner alleges that the bill of rights statement was not delivered before or at the same time as the entity first represented in any manner that the entity possessed eminent domain authority. It is unclear whether providing the statement is a jurisdictional requirement or whether a court would consider it mandatory but not jurisdictional. Arguably, providing the statement relates to the negotiation phase of acquiring property. Therefore, the *Hubenak* court's decision related to good faith negotiations should apply: Failure to provide the bill of rights statement results in an abatement of the proceedings.

But the statement itself provides landowners with a full disclosure of what will happen if an offer is not accepted. Perhaps a landowner may argue that the government's failure to timely provide the statement somehow prejudiced the landowner's rights in a condemnation proceeding, resulting in dismissal of the proceedings on jurisdictional grounds.

Until there is some clarity on the implications of this provision, the wisest course is for those negotiating the purchase of land on counties' behalf to have a landowner's bill of

rights statement handy to deliver at the first contact with an affected landowner.

Conclusion

Successfully representing a county in a condemnation proceeding involves carefully following the procedural requirements in Chapter 21 of the Texas Property Code. The commissioners court order authorizing condemnation should specifically state the public use requiring the acquisition of land and the necessity of acquiring specific land for that use. Doing so will enable a county to withstand jurisdictional attacks under a "right to take" challenge. Likewise, to avoid delays in acquisition of property, county negotiators should make certain to document offers made for the acquisition of land to establish that good faith negotiations took place. To avoid uncertainties about jurisdiction or delays in acquiring property, county negotiators should also make certain to provide the landowner's bill of rights statement to an affected landowner in compliance with §21.0112 of the Property Code. ❇

Endnotes

1 See generally, Madison Rayburn, *Texas Law of Condemnation* (Texas Law Press 1960); Brooks, 35 Tex. Prac. series §9.30, Eminent Domain/Condemnation.

2 Tex. Prop. Code §21.0195(c).

3 *Whittington v. City of Austin*, 174 S.W.3d 889, 896 (Tex. App. — Austin 2005, pet. denied).

4 *Id.*

5 See the list of statutes and specific public uses outlined in Brooks, 35 Tex. Prac. Series §9.30, Eminent Domain/Condemnation. Regarding limitations on the use of eminent domain, Chapter 2206 of the Government Code limits the government's ability to condemn land for private parties or economic development. See Tex. Gov't Code §2206.001.

6 174 S.W.3d 889 (Tex. App. — Austin 2005, pet. denied).

7 *City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 88 (1940).

8 *Whittington*, 174 S.W.3d at 897.

9 *Id* at 900. With regard to a city, the *Whittington* court noted that a "municipal governing body officially expresses itself through its official proceedings, as manifested in orders, resolutions, and minutes." *Id.* By analogy, counties express themselves in a similar fashion.

10 *Id.* at 905 (emphasis added).

11 *Id.* at 898. See also *Coastal Indus. Water Auth. v. Celanese Corp. of America*, 592 S.W.2d 597, 600 (Tex. 1979); *Higginbotham*, 143 S.W.2d at 88; *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 565-66 (Tex. App.—San Antonio 1998, pet. denied); *Bevley v. Tenngasco Gas Gathering Co.*, 638 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1982, writ ref d n.r.e.).

12 *Whittington*, 174 S.W.3d at 904.

13 *Id.* at 905.

14 *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965).

15 *Id.* at 925.

16 See e.g. *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.—Galveston 1948, writ ref'd). See also cases cited in footnote 43 in *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 181 (Tex. 2004).

17 141 S.W.3d 172 (Tex. 2004).

18 *Id.* at 183.

19 *Id.* at 184.

20 *Id.* at 185.

21 *Id.* at 187.

22 See, e.g., *Jones v. City of Mineola*, 203 S.W.2d 1020, 1023 (Tex. Civ. App. —Texarkana 1947, writ ref'd); *Brown v. Lower Colo. River Auth.*, 485 S.W.2d 369, 371 (Tex. Civ. App. — Austin 1972, no writ).

23 *McConnico v. Texas Power & Light Co.*, 335 S.W.2d 397, 400 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.).

24 Tex. Prop. Code §21.012(b)(5). See also *Id* at § 1.0112 (Provision of the Landowner's Bill of Rights).

25 Tex. Prop. Code §21.0112(a).

Family advocates in CACs

Emerging as a more common need in Children's Advocacy Centers (CACs) statewide, family advocates are the liaison between the CAC staff and the victim's family. Here's how the Smith County CAC utilizes this valuable member of its team.

By Becky Cunio
Kids in Court Coordinator
Jason Isham
Lead Therapist and
Margaret McBride
Family Advocate
all at the Children's Advocacy Center (CAC) of Smith County

Children's Advocacy Centers (CAC) were founded on the notion that child victims of crime could go to one location to receive every service they need from a multidisciplinary team (MDT) of experts. These services range from investigation (where they receive a medical evaluation and are interviewed by law enforcement and CPS), to prosecution (where the district or county attorney's office might pursue criminal charges against the perpetrator), to healing (where a mental health professional provides counseling). What they receive depends on their county's resources, the local CAC's organization, and what is available through the local prosecutor's office. In CACs throughout the state, a more and more valuable role is that of the family advocate.

The family advocate (sometimes called the FA) should be the primary contact person between the CAC team and the victim's family. This person is a clearinghouse for information regarding the family; she shares it with all members of the MDT. This team member's responsibilities are broad and vary between CACs but may include data collection; community presentations; general advocacy for the children and families served by the CAC; crisis intervention; facilitation of support groups; client education; medical advocacy (including accompaniment to a medical exam or sexual assault nurse exam); referrals to other social services agencies (including housing, transportation, public assistance, or domestic violence intervention); assistance in certain legal matters, such as obtaining protective orders, case updates, court accompaniment, or court orientation programming; and team facilitation and participation in MDT meetings. As you can see, this jane-of-all-trades can be an invaluable member of the CAC team.

But not all children's advocacy centers employ family advocates. Some utilize volunteers or interns, while other centers may have a full-time position on staff. Others employ advocacy services provided by a victims' services department affiliated with another team member's employer (district attorney's office, police department, or sheriff's department.) Regardless, the family advocate should have training and experience in crisis intervention, case management, and best practices in human services.

Above all, the relationship formed between the advocate and the family is paramount. A family advocate's primary responsibility is to follow up and serve as a safety net for families between the initial investigation and the beginning of legal proceedings. This can be a lengthy period, frequently several months to more than a year, and regular check-ins will ensure that the family has the resources they need and remains engaged in the healing and legal processes. Because the family advocate is involved from the beginning to the end of a case and establishes a relationship with the child victim and her family early on, the advocate becomes a much-needed bridge between them and the investigators and prosecution. The FA becomes familiar with the family dynamics and the challenges the family will face. Because child sexual assault cases are so destructive, the child and non-offending parent may be left without a home, insurance, transportation, or other significant necessities. Research has shown that if a

child has a non-supportive caretaker, the child is more likely to recant; plus, victims and their families who have no support or community resources may move on, either emotionally (by refusing to cooperate with prosecution) or physically (by moving to another home or city without telling anyone), putting both their healing and the case at risk. The family advocate, though, can assist in finding vital resources to rebuild their lives.

The FA and the VAC

Each community is different in how the family advocate interacts with VACs in a prosecutor's office. If a county has both a family advocate and a VAC, the family advocate works with the victim's family until the case is ready for prosecution, then the VAC also steps in. In some cases, both advocates work together throughout the entire process. In those counties where the VAC is unavailable or unable to provide constant personal contact, the family advocate may coordinate victim assistance throughout the prosecution. In other circumstances, the VAC may be the only advocate available to the family.

The CAC of Smith County works very closely with our local district attorney's office and the elected Criminal District Attorney, Matt Bingham. We incorporate both the family advocate and the VAC into our program by employing an additional specialized advocate called the Kids in Court Coordinator (KIC); Becky Cunio holds this position. The KIC functions as a special legal advocate and sometimes works in coordination with the family advocate. She improves coordination and collaboration between the CAC and the DA's office and steps into the case once the DA has made a decision regarding the perpetrator's prosecution. Ours is one of two centers across Texas with this highly specialized role to provide both family and legal advocacy services in conjunction with the prosecutor's VAC to multiple clients simultaneously.

Anyone's interest in learning more about the role of a family advocate at his local CAC should talk with the executive director of the local CAC to see if this position already exists, whether formally or informally. (Maybe the center already has plans to hire a family advocate but is waiting on funding.) Prosecutors can lend advice on how to incorporate the advocates into investigations and prosecutions. Victim assistance coordinators should not feel threatened by the family advocate role—there is plenty of work for all parties involved, and the continuity of supportive advocates will result in better outcomes for crime victims and their families. In developing protocols, the CAC, VAC and prosecutors should communicate what is needed from a family advocate position and also decide who, whether the family advocate or VAC, best fits each role.

The Smith County example

At the CAC of Smith County, our family advocate, Margaret McBride, meets with the protective caregiver during their initial visit to the center while the child is in a forensic interview. At that time, the family advocate explains the forensic interview, various services and programs provided by the CAC, and information about possible behaviors they might expect from the child in the days and weeks ahead.

One recent case illustrates the value of family advocacy services in a trial setting. An 11-year-old child victim (we'll call her Emmy) was sexually abused by her maternal grandfather. Emmy's mother and father were divorced, but both attended the trial, along with her maternal grandmother, paternal grandparents, a maternal aunt, and Emmy's siblings.

Because of her history with the family, Margaret McBride at our CAC was aware of the family's dynamics, such as great conflict between Emmy's parents and between her mother and grandmother. Margaret provided a significant amount of crisis intervention and de-escalated several conflicts during the week of the trial to maintain a positive environment for Emmy.

Even after she testified, she had to stay at the courthouse for four or five days until the guilt-innocence and penalty phases were over. During this time, Margaret provided age-appropriate activities, such as arts and crafts, books, movies, and games, for Emmy to pass the time, as well as drinks and snacks for the family. She also told them where to park and recommended some nearby places to eat lunch—small things, surely, but they made this difficult time easier for Emmy's family.

The defendant had a large crowd of supporters who intimidated Emmy and her family. Margaret immediately recognized this and

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worked with the victim assistance coordinator in the Criminal District Attorney's Office, Sherry Magness, to provide safe passage for the family as they entered and left the courthouse. She contacted everyone each morning before leaving for court to set up a time and place to meet so that they could be accompanied into the courthouse. During child and parent testimony, closing arguments, and sentencing, Margaret and Sherry were both present in the courtroom to provide emotional and psychological support. In the end, the defendant was found guilty of continuous sexual abuse of a child and sentenced to 50 years with no chance of parole. The family stated that the support Margaret provided and knowing that someone cared had relieved so much stress and anxiety that they couldn't have done it without her.

Conclusion

Children's Advocacy Centers were designed to create an effective professional network of intervention and support services for child victims of abuse and their families. Prosecutors, law enforcement, Child Protective Services (CPS), medical professionals, and mental health professionals form a core team to address the needs of these smallest of victims. However, the often overlooked role of family advocate is a worthwhile consideration for prosecutors and MDTs across the state of Texas. The family advocate is able to enrich the team's work as they provide resources and support service that may not be captured by those other disciplines. ❇

Another weapon against impaired driving

Law enforcement and prosecutors in Montgomery County have combined flexible checkpoints and strong officer presence to deter and arrest drunk drivers. Here's how it worked over Labor Day Weekend.

While enhanced enforcement during heavy drinking holidays, such as Labor Day, has some deterrent effect on the number of arrests for driving while intoxicated (DWI), one tool is missing from the Texas enforcement arsenal. That tool, available in the significant majority of other states, is high-visibility sobriety checkpoints. Montgomery County prosecutors and law enforcement joined forces this summer to investigate the effectiveness of checkpoints, and initial results indicate that they can be an effective means to prevent intoxication crimes. This article details the method used in Montgomery County to work within the law and highlight the preliminary results of high-visibility sobriety checkpoints.

By Warren Diepraam
Assistant District Attorney in Montgomery County and NHTSA-NAPC Prosecutor Fellow

Montgomery County has some of the worst DWI numbers in the state. The number of DWIs per 1,000 residents is double that of Harris County, which has been cited as a DWI capital by some.[1] The number of alcohol-involved vehicle fatalities is more than two times higher than the deaths caused by all other weapons,[2] and the number of DWI fatalities is usually three times higher than in counties with a similar population.[3] District Attorney Brett Ligon is attacking the problem on as many fronts as possible by supporting law enforcement with asset forfeiture purchases of modern tools, such as Portable Breath Testing devices, Hawk-Eye HGN (horizontal gaze nystagmus) cameras, a Breath Alcohol Testing mobile unit (or BAT-mobile), increased training, and a host of other new incentives including a very active no-refusal program. Picking up on the admonition of the first Texas District and County Attorneys Association (TDCAA) DWI Summit ("we can, we must, we will do better"), we felt that more could be done.

It was time to consider a new approach, and sobriety checkpoints seemed like one of the next steps in the process. The National Highway Traffic Safety Administration (NHTSA) classifies several different types of checkpoints. Random sobriety checkpoints, for example, have been

deemed unconstitutional by the Texas Court of Criminal Appeals.[4] In fact, the state legislature has attempted to authorize random sobriety checkpoints for the last several sessions and failed. Therefore, we opted for a checkpoint more in line with those found to be proper in at least one Texas case;[5] NHTSA classifies them as "flexible checkpoints,"[6] and they are announced to the public but do not involve random stops.[7] Their stated purposes are raising awareness of the dangers of impaired driving, calling attention to law enforcement, and creating an apprehension of arrest and prosecution, thereby, we hope, altering criminal behavior.

With the help of Andrew James and Tyler Dunman, the assistant Montgomery County DAs who coordinate our no-refusal weekends, we enlisted the participation of two progressive area agencies. Rowdy Hayden and his deputies at Montgomery County Constable Precinct Four have some of the most aggressive anti-DWI programs in the county, and they were more than willing to assist. Additionally, Houston Police Department DWI Liaison Officer Paul Lassalle is well-known in the area for his expertise in DWI enforcement, and he was equally intrigued by the idea.

Our checkpoint was to be staffed with both stationary law enforcement vehicles on the roadway (for high visibility) as well as nearby officers looking for potential impaired drivers. This technique combines the highly visible presence of a checkpoint with the effective enforcement tool of saturation patrols—the best of both worlds. Additionally, we also had the option to relocate should circumstances change. This approach has been used effectively by narcotics officers for years, and there was no reason this tool could not be used in DWI enforcement.

Testing and preparation

While planning our sobriety checkpoints, we decided to quietly conduct a couple of test runs during the summer to note any problems that may arise and to gauge their effectiveness. During these test runs, we used the Houston Police Department BAT-mobile and marked patrol cars from the Splendora Police Department as well as Hayden's agency. The Conroe Police Department also provided a large programmable sign that flashed the words "DWI sobriety checkpoint ahead" as well as "No-refusal DWI weekend." Traffic safety was a primary consideration as was the checkpoint's proximity to problem DWI areas.

The test runs confirmed our suspicions that our checkpoint would find a significant number of DWI suspects. We also learned that traffic patterns move when a checkpoint is in place. For example, on the night of the first test run, the selected roadway was very busy with traffic that appeared to be leaving local bars. However, on the second night, traffic on the same roadway was markedly lighter than the first night although the bars were just as crowded. The bar traffic was taking another route home! We speculated that people in the bar had warned others of the checkpoint the night before, resulting in a traffic transfer on the second night. Through observation, we also learned that many impaired drivers would try their best to avoid the checkpoint: Vehicles stopped in a moving lane of traffic or cut across several lanes to avoid it. Although these people were generally stopped for the traffic violation, it became apparent that setting up our checkpoint on a very busy highway could create a dangerous traffic situation. With these lessons learned, it was time to go full speed ahead for Labor Day, the traditional last day of summer.

We decided to place the checkpoint in Hayden's precinct, a two-way road heavily traveled by people leaving local bars but also by people leaving the drinking establishments of Harris County. The Houston Police Department again provided the BAT-mobile and Officer Lassalle to assist because the chosen location was practically in Houston's Kingwood area. The BAT-mobile was stationed on one side of the roadway as the staging area, and one of Hayden's patrol cars was parked on the other side. Both vehicles had all emergency lights flashing to warn approaching drivers of law enforcement's presence. A portable sign warned motorists of the checkpoint. Because random checkpoints have not been authorized by the legislature, we agreed that officers working the area would stop only traffic violators on the roadway and those who broke laws passing through the checkpoint (by trying to avoid it, etc.). No cars would be stopped on a random basis—but we knew that it would still be effective and a high-profile activity in this part of the state.

Hayden assigned multiple deputies to the checkpoint. Their sole duties were to stick close to the

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checkpoint area, investigating drivers who committed traffic violations (officers stationed at the checkpoint would alert their mobile counterparts to said violations), and to patrol the area for other traffic violators. Additionally, Chief Deputy Barry Welsh was stationed at the checkpoint to keep traffic moving but also to radio suspected DWI drivers to area patrol vehicles. Lassalle would again operate the BAT-mobile while we prepared blood warrants for those who refused a breath test. Judges Kathleen Hamilton, Patrice MacDonald, and Lisa Michalk volunteered their time to review the warrants for probable cause.

Arguably, the most important reason to conduct sobriety checkpoints is to deter DWI, thereby saving lives. Warning the public of the dangers of impaired driving is a key ingredient of our efforts. With this in mind, we again enlisted the assistance of the Texas Department of Transportation (TXDOT) to publish our no-refusal effort by using their flashing highway advisory signs that warned motorists on our highways that this weekend would be a "no refusal holiday." Additionally, our office held a press conference to publicize the event. Media interest was significant, with almost all local outlets featuring this new technique. As well as attending the press conference, some stations conducted live broadcasts from Montgomery County and most followed our office's Twitter feed for updates on the number of stops and arrests. (I am the designated office tweeter. I post notices about how many blood search warrants we issue over a no-refusal weekend, as well as more general tweets on the sentences DWI defendants receive and updated statistics on how many traffic fatalities occur in Texas. As of press time, 679 people follow the office's Twitter feed.) Once the planning stage was complete, it was time to witness the effectiveness of the fully staffed and operational checkpoint station.

Labor Day Weekend

As the first night went on, it soon became apparent that many people had not heeded our warnings to make smart choices about drinking and driving. Numerous drivers committed traffic violations near the checkpoint or in front of Chief Welsh, who radioed a waiting marked patrol car. Lines soon began to form at the BAT-mobile for testing. Officer Lassalle volunteered to perform field sobriety testing for the patrol deputies to ensure their quick return to the streets. He used one of the Hawk-Eye cameras provided by the DA's office to document the impaired drivers' nystagmus. (Two examples of the video a Hawk-Eye camera produces are on the DWI Resource page of our website; they are called "Without Nystagmus" and "With Nystagmus.") Lassalle then offered those who were unable to perform the first round of testing a breath test in the BAT-mobile. Those who failed the breath test were held in the vehicle until transport and booking, while those suspects who refused a breath test were immediately transported to the county jail for a blood draw (if the judge reviewing the warrant found probable cause). Law enforcement was kept busy thanks to the checkpoint and its ability to put officers back on the street with little down time.

Assistant DAs Dunman and James and the participating law enforcement agencies compiled the preliminary numbers each day of the checkpoint. About 50 drivers were stopped for traffic violations, such as driving without insurance or driving with a suspended license. Many of these people had their cars towed because of their failure to obtain valid insurance. Of those people detained for committing a traffic violation, 12 (nearly one in four) were ultimately arrested for DWI. The average breath test results of those brought to the BAT-mobile was 0.16 grams of alcohol per 210 liters of breath—two times the legal level of impairment. If trends in blood testing from other no-refusal campaigns hold true, the blood alcohol concentration (BAC) results will be even higher. What this means in plain language is that on the night of the checkpoint, almost one in four people committing traffic violations was also impaired. Furthermore, these people were on average twice the limit of per se impairment. These intoxicated drivers represented a great danger to the law-abiding citizens of the county, and fortunately, they were removed from our streets due to an innovative use of the current law.

Advice for other checkpoints

If a saturation patrol or "flexible" checkpoint of this type is conducted in your jurisdiction, be prepared to respond immediately to any media inquiries and to assure them that

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DIVO, the ultimate oxymoron

Victim advocates in Lubbock recently encountered defense-initiated victim outreach (DIVO) where a "victim outreach specialist" hired by defense counsel contacted the elderly widow of a murder victim. Here's their advice for others.

It was a smothering, triple-digits July afternoon in 2007, when a retired 73-year-old U.S. Air Force Lt. Colonel, who bravely served our country in Vietnam and came home to victoriously battle the cancerous effects of Agent Orange, slowly pulled into his garage. (For privacy's sake, we'll call him Johnny Smith.) He had been out running errands so he and his wife of 49 years, June (also not her real name) could fly to San Antonio the next day to see their oldest son, Timothy, retire from the Air Force. Timothy had flown in Desert Storm like Johnny had in Vietnam, and their pride was bursting.

By Pam Alexander
Executive Director of Lubbock Victim Assistance Services, Inc.

Johnny walked to his front yard to make sure his American flag was flying when he saw a stranger walking down the street. Being a good Christian man, Johnny offered the man a bottle of water on the sweltering day. Johnny left the young man, Alonzo Lewis, in his garage while he went inside for the water, unaware that Lewis had been smoking crack cocaine since early in the morning and was craving more. Johnny brought the water back out to Lewis in the garage, and after drinking it, the young man pulled out his fixed-blade hunting knife, stabbing Johnny multiple times before stealing his buffalo nickel money clip and walking away. Shortly thereafter, June, who had been in the house putting away groceries, walked into the garage after hearing the commotion, only to discover her husband lying in a pool of blood. She would never celebrate their 50th wedding anniversary with her beloved husband and the father of their five children.

Due to incredibly effective police work, the assailant was apprehended in a very short period of time and kept in jail with a high bond. Lewis was a 29-year-old refugee who moved to Lubbock from Louisiana after Hurricane Katrina. The most disturbing facts of the case came directly from his statement to detectives. He told them that he needed more crack and that he knew the "old man" had money. After he drank the water, Johnny turned his back. Without saying a word, Lewis took out his knife and started stabbing him. Johnny handed him his money clip, but the defendant continued stabbing him more than 35 times. The defendant left and went to work shortly after the crime as if nothing had happened.

The crime dramatically altered June's life. Even with Lewis incarcerated, June triple-locked her doors every night, flinched at sudden noises, and felt the loss of common, everyday security.

As the director of Lubbock Victim Assistance Services, Inc. (LVAS),[1] I was asked by detectives to assist the family. I wanted them to know that the criminal case was in the best possible hands, so I met with them in their home along with Matt Powell, Criminal District Attorney in Lubbock County, Sunshine Stanek, the trial chief, and Tray Payne, the homicide chief. The prosecutors assured the Smiths that it was their job to see that justice would be served and inform them that capital murder charges had been filed. The family was also told that the suspect's history would be checked, even as far back as his elementary school days, to determine whether to seek the death penalty. Although Matt wanted the family's opinion concerning the death versus life determination, he was always firm in his stance that the final decision would be his. I knew this would keep the stress of that choice off the family and place it with the criminal justice system, where it truly belonged. (Though Matt was seeking the death penalty at first, he ended up allowing the defendant to plead to life in prison after taking into account not just the defendant's history but also the Smith family, who were split on their opinion of the death penalty.)

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More hurdles

Being with the family since July 2007, I got to know them all pretty well. Because four of the five adult children live out of state and the one in Texas is nine hours away, I kept in constant contact with June, the widow. She handled the violent event extremely well when all of the children were at her home right after the crime. For several months, the kids took turns staying with her for extended periods, but eventually all of them returned to their lives and checked on their mother with phone calls to her and e-mails to my office. June and I kept in regular contact during this time.

As if mourning the loss of her husband weren't hard enough, June was dealing with other difficulties. Her oldest son and I were fighting a battle with the Veterans Administration (VA) over Johnny's benefits; because he had not died from natural causes or a disease but from a violent, senseless act, his benefits decreased automatically by $2,500 per month. Not only had June lost the love of her life, but she was now facing an economic dilemma! She was in her golden years, a time that should have been spent with her husband traveling and enjoying their retirement, but instead, she was confronted with a mountain of bills. In 2009, she also faced personal health issues that weighed heavily on her.

What is DIVO?

One day in early April 2009—nearly two years since I was acquainted with the Smith family—I received a phone call from a woman I knew from work, a local social worker. In a very short conversation, she talked about a program called DIVO and asked me to meet the next day with the woman who had developed it. It was the first I'd heard of it, and she wasn't calling about the Smith case at all—she simply wanted to discuss this new program. Because of a scheduling problem, we could not meet, but a few days later June would hear from someone regarding DIVO too.

DIVO, for those who are unfamiliar, stands for defense-initiated victim outreach. Type those words into an Internet search engine, and quite a bit of literature pops up. An article in *Champion*, a publication of the National Association of Criminal Defense Lawyers, explains that DIVO "seeks to reduce the trauma to victim-survivors that often results from the adversarial and technical nature of the legal process … by providing a more active role for homicide victim-survivors in death penalty cases without compromising the due process rights of capital defendants."[2] Another article purports that DIVO is "a method of engaging in dialogue with surviving family members" and claims that "the interests of the defense team and the interests of the victims are far from being mutually exclusive. … Victims have questions only the offender can answer. Victims want to be heard not only by the community at large, but specifically by the offender and his or her representatives."[3] These publications urge defense counsel in capital cases to contact victims' families through a trained "victim outreach specialist," who is not a member of the defense team but rather a hired expert, to "respond thoughtfully to queries from survivors and to develop a relationship with the survivors that is comfortable for survivors and guided by the interests and needs of the survivors that the defense is uniquely able to meet."[4] It was started at the federal level in the 1990s and within the past few years has trickled down to a handful of death penalty states. Texas is apparently now one of them.

A few days after the phone conversation with my former colleague, I received a frantic call from June that she had received a letter from the defense team and that it was extremely disturbing to her. I reviewed the letter, which stated that a "victim outreach specialist" would be contacting her; it did not ask *if* this person could contact her, but that June could *expect* a call. The letter stated that the specialist was not a member of the defense team but that the defense paid for her services (with no cost to the victim's family—however, when the capital murder defendant is indigent, DIVO victim specialists are actually paid with county funds to the tune of $75 per hour). The letter upset June considerably. She said, "I *have* a victim specialist, and she is not paid by *his* defense team! How dare they!" She stated emphatically that she did not want to speak to or be contacted by the victim outreach specialist mentioned in the letter. I called the defense attorney, but he was out of town, so I contacted Matt Powell, the CDA, and explained my concerns quite passionately. He, too, fervently expressed his concerns.

I conducted some research on the program to find out everything I could because no one seemed to have much information about DIVO. After researching this program in great detail, I believe that DIVO has the underlying agenda to abolish the death penalty in Texas. For example, one statement in the information I gathered says that "all but death can be adjusted," and DIVO is utilized only in capital cases. By contrast, my opinion (as a victim's advocate) on the death penalty is never discussed; we give our district attorneys the

power to make these decisions and trust them with that.

As I noted already, DIVO charges $75 per hour to county taxpayers to accomplish an anti-death penalty agenda and try to duplicate our services to crime victims—services that we already provide months, if not years, before the defense team's victim specialist comes on the scene. I find it outrageous that DIVO charges this kind of money when victim services funds are cut every year and we are forced to serve more victims with less money.

DIVO enters the picture

Several days later, I received another phone call from June, saying that she received a letter from Stephanie Frogge, the victim outreach person mentioned in the defense attorney's letter. (A copy of this letter is available at www.tdcaa.com; search for DIVO.) June, who was very distressed, asked me not to allow this person in her life. I immediately contacted Ms. Frogge and politely explained the situation and asked her not to contact June. Ms. Frogge told me that she was going to call anyway, despite our protests.

Because my conversation with Ms. Frogge was not enough to stop her call, I called the Attorney General's office, TDCJ's Victim Services, TDCAA, and the Governor's Office to find out how to stop DIVO. They provided information about it and echoed my concerns, but no one could do anything to halt the process. I also met with the public defender's office for capital murder cases, but that office was not handling this case because it had just been set up by Lubbock County. I met with the chief public defender for capital cases to see if he knew

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Another weapon against impaired driving (cont'd)

officers are working well within the law by stopping only traffic violators, not random vehicles. There will be detractors no matter what message is published by the media, and getting out the right message is critical for this sort of an operation. For some agencies, excluding use of the word "checkpoint" in press releases and focusing on the words "saturation patrol area" may generate less hostility—but it will also generate less media attention. If the goal is to deter impaired driving, media focus is important. However, if making a lot of arrests is the goal, media focus is not as critical. Either approach is effective for different reasons, but before using the word "checkpoint," an agency should decide which approach to use considering the nature of politics in that jurisdiction.

In conclusion, the use of this approach proved to be effective in deterring and apprehending dangerous drivers. There was significant attention to the measures Montgomery County law enforcement took to combat the unusually high number of alcohol-related vehicle fatalities in our county. In addition, a significant number of impaired drivers, as well as other serious traffic violators, were removed from local roads, and there have been no DWI fatal crashes involving innocent victims in Montgomery County during these efforts. Furthermore, and for the first time in the history of Lake Conroe, two summers on the lake have passed with no serious alcohol-related crashes or fatalities. Lives are being saved, and people are getting the message. It's been more than worth all of the work. ❇

Endnotes

1 "2009 Take the Wheel Campaign" Mothers Against Drunk Driving.

2 Crime Data—FBI Uniform Crime Reports and TXDOT Crash Record Info System.

3 TXDOT Crash Record Information System from 2005 to 2008.

4 *Holt v. State*, 887 S.W.2d 16 (Tex. Crim. App. 1994).

5 *Johnson v. State*, 833 S.W.2d 320 (Tex. App.—Fort Worth 1992, pet. ref'd).

6 "Innovative Strategies for High Visibility Enforcement: Flexible Checkpoints" NHTSA presentation by Dr. Dereece Smithers, *Lifesavers 2010*, Philadelphia PA.

7 Here's how such checkpoints are different from "sobriety checkpoints": Once an officer observes a traffic violation and makes a DWI detention, he brings the offender to the checkpoint, which is in a public area, where he conducts field sobriety tests.

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anything about DIVO and to get insight on the program to combat this problem. All he told me was that his office had no choice in the matter, that DIVO was simply a resource. Ms. Frogge's letter did state that June was not obligated to accept her services, but she was not willing to take my word that June did not want to speak with her.

About a week later, June was at home playing the piano, trying to relax before leaving for a breast biopsy at the doctor's office, when the phone rang—it was Ms. Frogge, as promised. A few minutes later, June called me, sobbing uncontrollably to the point she could not talk. After several minutes, I was able to get the details. June simply told the caller that she did not wish to speak with her and hung up. However, she was already very upset and felt re-victimized by this call, all in the name of "victim outreach." To add to her trauma, the retired colonel's birthday was the next day, and she was having a really hard time dealing with that memory. Of course, the DIVO "victim outreach specialist" knew nothing about June, her financial troubles, her husband's upcoming birthday, or any of the health issues June and her family had shared with me over the years. I left a very terse message on Ms. Frogge's voicemail that same afternoon, and finally, the attempted contacts from DIVO stopped.

Because the call from the victim outreach specialist was so traumatic for June, I recognized that other victims might have a similar response, so I met with assistant criminal district attorneys Sunshine Stanek and Scott Morris to discuss a strategy for future cases. Prosecutors and victim assistance coordinators who deal with death penalty cases should inform families—once the DA's office files notice that it will seek the death penalty—that someone from DIVO might contact them.

When defense attorneys request permission to use public funds to pay for a victim outreach specialist, prosecutors should object to such an expenditure and explain that the prosecutor's office already provides services to all crime victims. Spending taxpayer money on duplicative efforts is simply wasteful.

I have also developed a form letter telling the defense team that the victim's family does not want to be contacted by DIVO; if the family chooses to sign it, I send it to defense counsel before DIVO has made contact to prevent any calls or letters down the road. This should deter the re-victimization of the family.

If a family does want to talk with the DIVO, the current victim's services coordinator can be a part of that dialogue too. The advocate or her elected prosecutor should contact the defense team to arrange meetings that work with everyone's schedules.

As the director of Lubbock Victim Assistance Services, Inc., I gladly offer my services to district attorney's offices or other agencies that encounter DIVO to help stop re-victimizing our victims' families. My contact information is 806/763-3131 at the office, 806/789-5857 on my cell, and pamalexander@aol.com. ❇

Endnotes

1 Lubbock Victim Assistance Services is a non-profit organization that works closely with law enforcement and prosecutors. We are with the victim and/or victim's families shortly after the crime occurs, during plea hearings or trial, and through the probation, parole process, and even when the defendant is incarnated.

2 Redfield, Terrica L., "The Role of Victim Outreach," *Champion* magazine published by the National Association of Criminal Defense Lawyers, December 2006, page 49.

3 Branham, Mickell and Burr, Richard, "Understanding Defense-Initiated Victim Outreach and why it is essential in defending a capital client," *Hofstra Law Review*, Vol. 36: 1019, page 1023.