
THE TEXAS PROSECUTOR

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Texas District & County Attorneys Association

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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

Prosecuting the drugged driver

Strategies for justice in the new world of non-alcohol intoxication offenses

A day at the beach! Fun in the sun! On March 19, 2010, Chris and Christina Brown and their three children set out to enjoy one of the last days of spring break. The children were Christina's but Chris had raised them as his own. This would be a beautiful day to travel from their home near Katy to soak up the sun at Surfside Beach in Brazoria County. The eldest of these three children, Nicole King, age 14, was really excited to see her friends and spend time with her brother David, 13, and sister Alyssa, 12. The

family had a cookout and the children played in the water. At 4:30 that afternoon, it was time to leave, but Nicole asked to stay with some of her friends. Christina reminded her that she still had homework to finish and that she would see her friends at school in a few days.

The car was packed up and the family headed north on Highway 288. Chris was driving and Christina was in the passenger seat. Alyssa sat in the back middle seat between Nicole and David. It was going to be a long drive back and the kids were getting hungry and thirsty, so just north of Angleton, near FM 523, Chris pulled over completely onto the shoulder and parked. He got out and walked toward the trunk of the car. As he was nearing the trunk, he saw it.

It was only at this point that Chris saw what so many others along Highway 288 had already seen. At least five separate calls to 911 were placed by people traveling on 288. All of the 911 calls were the same: An F-150 truck was veering across all lanes of the highway. At times it would go very slowly and impede

traffic, while other times it would zoom and weave by cars at speeds in excess of 85 miles per hour. A group of college students, also coming back from the beach, was one of the 911 callers. On the recording, one of them can be heard telling the operator, “He’s going to kill someone! He’s going to kill someone!” Then, the sound of the collision could be heard on the tape. The 911 caller screamed, “Oh my God, he just killed somebody!”

The northbound F-150 truck had veered out of its lane and entered the lane closest to the shoulder on the northbound lanes of travel, then drove along the shoulder. Chris Brown, seeing the truck barreling toward his car with his family inside, frantically waved his arms and screamed with all his might, but the driver kept speeding towards him and his family. There was no time to get in his car and move it. Chris kept desperately waving his arms and yelling, trying to get the driver’s attention, until

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By David A.K. Smith
pictured with
Jessica Pulcher
Assistant Criminal
District Attorneys in
Brazoria County

Founding Fellows of the Texas Prosecutors Society

The foundation is kicking off its campaign to establish a select group of supporters we're calling the Founding Fellows. Our Fellows will be part of our new membership group called the Texas Prosecutors Society. We have hand-selected 106 prosecutors and alumni from across the state whom we want to honor by including as a founding member.



By Jennifer Vitera
TDCAF Development
Director in Austin

Golf tournament and silent auction at the Annual

The 2011 Annual Golf Tournament hosted by the Texas District and County Attorneys Foundation grossed over \$14,000 in donations. Thank you to our generous sponsors, donors, and participants—we appreciate your support!

Special thanks to Nelson Barnes and Mike Waldman, assistant DAs in Bell County, for their invaluable help with the tournament. (See below for a couple of photos from the tourney.) Proceeds from this annual event will benefit the 2011 Annual Campaign.



We want to thank all of our silent auction donors and committee volunteers for their support this year. We raised over \$3,000 in donations

in this year's silent auction. Thanks, too, to all of our TDCAF Board and Advisory Committee members who attended the foundation meeting in Corpus Christi; we appreciate your continued support. We had a great meeting thanks to your input and leadership—we had a lot of great ideas come out of the meeting, and we will be in touch soon to follow up on these over the next few months.

Why do I give?

There are many reasons to give, and we're making it easy by including a giving envelope in this issue. Please consider filling it out and returning it with a donation. For additional reasons you should consider supporting your foundation or to take a look at the brochure, visit www.tdcdf.org

“Training for prosecutors and investigators must be unique and job-specific. The only organization that understands our situation and our needs is TDCAA, and the foundation is what enables TDCAA to meet our needs. TDCAA’s outstanding training, personnel, and services cannot survive these hard economic times without the foundation. Now is the time, and your support is the difference!” —Melissa Hightower, County Attorney’s Investigator in Williamson County



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*Founding
Fellows*

(The number 106 signifies the number of years TDCAA has been in existence.) We will be sending invitations out within the next month. Once we establish our 106 Founding Fellows, every year we will invite another class of members to join the Texas Prosecutors Society.

We are asking the Founding Fellows to commit \$250 a year for 10 years or a one-time gift of \$2,500. Of course we accept larger pledges; one of our generous board members pledged \$10,000. The purpose of the Founding Fellows program is to gather proceeds to establish a permanent endowment for the foundation.

Our Founding Fellows will be recognized at the board dinner at the Annual Criminal & Civil Law Update next September, and we plan to host a special cocktail reception annually to recognize new members.

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Annual Campaign needs your support!

The foundation is committed to continuing and improving the excellence TDCAA provides in educating and training Texas prosecutors, law enforcement, and key personnel. This year featured our second Annual Campaign membership fundraising challenge, and it looks like our investigators are in the lead again this year. But there is still time to contribute, so please give!

Three of our membership groups (investigators, key personnel, and victim assistance coordinators) have stepped up to challenge each other in their fundraising efforts. We will track the results based on dollars raised compared to percentage of membership in each of these groups. Congratulations to the Investigator Section for winning the 2010 Annual Campaign challenge. Board members Charlie Vela and Terry Vogel, pictured below, picked up the award at September's Annual conference.



From elected prosecutors, we are asking for 100-percent support from all 333 electeds across the state, either through a personal unrestricted gift or a restricted gift to the Annual Campaign. You can make a pledge that can be paid out through December 31, 2011. Please take a look at the brochure we mailed you for more information.

PowerPoint for the Courtroom

Here's your chance to polish your courtroom presentation skills while supporting the foundation! This CD walks through almost every element of PowerPoint, from creating slides to importing and editing video clips. It's a must-have for every office, and it's only \$25! Please visit our website, www.tdcdf.org, for details.



Leadership Texas Update

I had the privilege of meeting with my Leadership Texas group in Austin last month to hear an update on the State of Education in Texas. We toured the capitol and had the privilege of hearing an update on what the Legislature has done for and to public education from Florence Shapiro, Chair of the Senate Committee on Education, and Alma Allen, committee member. ✱

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A few characters I've met through TDCAA

I just returned from the Annual Criminal and Civil Law update and, might I add, it was fantastic, as per the custom of TDCAA and Training Director Erik Nielsen—top notch. While I picked up some tidbits I will implement into the prosecution of cases, I also had a magnificent time.

Each time I receive a notice from Sarah Wolf, our outstanding editor of *The Prosecutor*, that I need to submit an article, I contemplate something substantive and of a serious nature. I try and try, but nothing comes to mind. That ain't my style.

I have written in a previous article about the friendships I have developed through my involvement with TDCAA. I insist on living on the sunny

side of life. I don't take myself or life too seriously, and I gravitate toward people who share my view of the world. On too many occasions to count I have responded to a downer with the classic line from *Stripes*, "Lighten up, Francis." Now that you know not to expect anything of significance from this or any other writing of mine, I want to share with you some great memories from TDCAA events past. For the more intellectual crowd, those who long for something deeper, don't fret—help is on the way! Lee Hon, our esteemed President Elect, will undoubtedly wow you with subjects more polished and mature than mine, but for the moment sit back and enjoy the ride.

I recently reflected on a few of the many characters, personalities, and friends I have had the immense pleasure of interacting with during my association with TDCAA. Here is an affectionate—but by no means complete—list of some favorites.

Jim Kuboviak, retired County Attorney in Brazos County

If you don't know Kuboviak, you are missing a treat. It could be my affec-

tion for him stems from the fact that he is as large and loud as I—we are kindred spirits, I suppose. How many meetings have I been in with Jim and heard his booming voice shout something extraordinarily funny?

Years ago at a meeting in Austin, we were scheduled to eat at a restaurant on Town

Lake, and we were going to leave the hotel and were arranging rides. Jim said he could take 10 or so with him. At this point I was doing a little math (yeah, I was using my fingers) and thinking, "Ten people? I don't think so." Admittedly, most sensible people at this juncture would look for alternative transportation, but not me. I was thinking, I have got to see this, so I immediately said I was going with Kuboviak. Five or six other adventurous souls agreed that they would ride with Jim (still well under Jim's limit), and he walked off to get his car while we waited under the awning at the hotel. I peered off into the distance and see headlights and something large approaching. Here came Kuboviak, and he was driving a

camper. Seriously! I mean, who brings a camper to Austin for a meeting at TDCAA? So we loaded up and headed off to the restaurant with big Jim spinning yarns and negotiating the big rig through traffic. I felt like Cousin Eddie in *Christmas Vacation*, and I mean that with great affection for Cousin Eddie. Admittedly we were in for a short 10-minute ride, but Kuboviak indulged me by allowing me to take a nap on the way. He did refuse to find me a blanket, though.

Bill Smith, District Judge for the 110th Judicial District and former County Attorney in Briscoe County, and Mike Criswell, County Attorney in Swisher County

Spend a little time with Bill Smith and I guarantee you are going to enjoy yourself. Criswell—well, he is Ed McMahon to Smith's Johnny Carson. Not the headliner but a vital component of the act. When we had the hurricane Annual in Corpus a few years ago, there was a mandatory evacuation. To make a long story short, to avoid riding out the storm in a random Corpus Christi elementary school gymnasium, as appealing as that sounds, I elected to make my way north and west with Bill Smith, Criswell, and Heath Hemphill, the Coleman County District Attorney. Criswell and myself are dedicated Red Raiders while Bill and Heath are Aggies. Heath agreed we could ride with him only if we would detour through College Station to see the Aggies play Texas State. Not seeing any good options and in keeping with my sense for adventure, I

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By Mike Fouts
District Attorney in
Haskell, Stonewall, Kent,
and Throckmorton
Counties

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agreed. This plan was hatched at about three Wednesday afternoon. Our plan was to leave early Thursday morning for what we would call Heath and Bill's pilgrimage to College Station, their virtual Mecca.

Not having much to do Wednesday evening, we took the opportunity to take in a little greyhound racing at the Corpus Christi dog track. One might think that a Category Five hurricane bearing down upon a city would not have a significant impact on people's desire to go to the dog track and enjoy some gambling ... well, one would be wrong. If I tell you there were only six people at the dog track, I mean there were only six people at the dog track. I can't overemphasize enough how the odds are affected by placing a two-dollar bet when only six people are betting.

We woke up the next morning and headed for Aggieland. We made it to Victoria when we hit the traffic. It took five hours to go 30 miles, and I tell you I ran out of Slim Jims two hours into the trip. Thanks to some West Texas resourcefulness, we found a farm-to-market road and left the traffic behind for Aggieland. Five hours in a traffic jam might be too long to have two obnoxious Red Raiders abuse two Aggies from the back seat. I personally don't think it is too long, but when they kicked me out and told me to walk, obviously there was a difference of opinion. A few "OK, I'll take that part back"s and we were good again, and as far as I know we all remain good friends to this day.

Karaoke World Championships

My advice to those of the "Keep

Austin Weird" persuasion: Don't expend too much effort keeping Austin weird; it is doing a fine job by itself. I made some reference in another column regarding our fine capital city. I don't want to imply I don't like Austin—I do, I love Austin—it's just that when I am there, like Dorothy, I am keenly aware that we're not in Kansas anymore.

Last year at the Elected Prosecutor Conference, after a nice dinner, a few fellow prosecutors and I took the opportunity to attend TDCAA Meeting Planner Manda Helmick's participation in the finals of the world championship of karaoke. The venue, a dank, cave-like setting on the banks of the Colorado River, only added to the acts. When our group entered, we were met by the entire family Von Trapp about to go on stage in full regalia. That was the opening act, and it only got stranger from there.

Many, if not all of my group, showed a look of apprehension at the occasion, and had I not been a bit of a Renaissance man I would have undoubtedly been unable to comfort and reassure them that everything would be all right. We enjoyed many performances that frankly you would be unlikely to see in my part of the state, but hey, it was an adventure. And I am more well-rounded for the experience.

I have only touched on a few of the characters and experiences I have had and look forward to many other adventures with TDCAA and encountering new friends and acquaintances along the way. ❁

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the foundation**

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* received between August 2 and September 15, 2011

And the winners are ...

The membership of TDCAA, through its Board of Directors and Nominations Committee, had the chance to honor its own at the opening ceremonies of the Annual Criminal and Civil Law Update in Corpus.

Congratulations to **Mary Green**, an Assistant Criminal District Attorney in Bexar County, who was honored as the 2011 State Bar Criminal Justice Section Prosecutor of the Year. For over a decade Mary has led the state's prosecution efforts against a

serious gang threat in her community. She has sent a general in the Mexican Mafia to Death Row, successfully prosecuted multiple murder cases against Texas Syndicate members for the notorious French Street massacre, and worked with federal prosecutors as a cross-designated assistant United States attorney to break up organized crime. Through all of this, she's endured intimidation and continued threats to her own safety to make her community safe.

In a surprise award, **A.P. Merrillat**, an investigator with the Special Prosecution Unit in Huntsville, was honored with the C. Chris Marshall Award for Distinguished Faculty. A.P. has been a tremendous asset to other prosecutors in TDCAA training efforts, perhaps overshadowed only by his TDCAA user forum postings related to the banjo.

Members of TDCAA honored the former CDA in Wichita County,

Barry Macha, with the Oscar Sherrill Award for service to the association. Barry served as a board member and president of TDCAA, but he also took the position as the "front man" for prosecutors in many venues, from the Governor's Criminal



By Rob Kepple
TDCAA Executive
Director in Austin

Justice Task Force in the decade-long legislative struggle over the journalist shield law. Barry always had the best interests of prosecutors and TDCAA in mind and still does in his new role as general counsel for Midwestern State University.

This year the Nominations Committee elected to honor two prosecutors with the Lone Star Prosecutor Award. This award is reserved for those prosecutors who distinguish themselves in their dedication to their profession. The first is **Robert Lowell Thompson**, the CDA in Navarro County. The Nominations Committee wanted to recognize Lowell for his decision to appear on behalf of the State of Texas in a court of inquiry proceeding called by a district judge in Austin in relation to the much-publicized Willingham arson case. You might think that sounds like no big deal, but although Lowell was served in the court of inquiry case, the truth is that no one involved with the proceeding in Austin much wanted anyone from the State to appear. As unpopular as it may have been to the gathering crowd in Austin, Lowell made the decision that an attorney for the State should appear and, without

necessarily getting involved in the merits of the proceeding, ask that the laws regarding courts of inquiry be followed. Sometime just announcing "State's ready" can be a courageous act, and the Nominations Committee wished to recognize Lowell for his dedication to the job in the face of certain criticism.

As an aside, I want to acknowledge the Nomination Committee's work here. It would have been easy to take a pass on this award just because of the controversy surrounding the Willingham case, but the committee chose to recognize a prosecutor—not because of any particular position or stake in the matter's ultimate resolution, but simply because that prosecutor was willing to stand up and answer ready for the State when it looked like no one else could and when there were plenty of folks hoping he'd just stay home.

That is something I continue to admire about the prosecutors of Texas. It is safe to say that Texas prosecutors don't always agree on how cases should be handled, but we do agree that a prosecutor should have the freedom and fortitude to follow the law, even if that leads into unpopular territory. Indeed, the action of the Nominations Committee is not without precedent: In 1991 a Travis County DA by the name of **Ronnie Earle** had the temerity to seek an indictment of the sitting Speaker of the House. During a legislative session, no less. The reaction of the TDCAA Board of Directors to the swirl of controversy over the prosecution? They appointed Ronnie Earle to a vacant spot on the board.

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Last but not least

The second Lone Star Award winner is **George Nachtigall**, a former (now retired) Assistant County Attorney in Harris County. Since 2001 the state has provided longevity pay for assistant prosecutors, a very successful program that has helped folks stay in the profession and serve the public. What you probably don't know is that a lawsuit challenging the funding mechanism of the longevity pay system has been bubbling in a Harris County district court for about the last 10 years. And in that time, George has quietly been representing your interests in that important lawsuit. What I really like about George's dedication to the defense was that, when the lawsuit was first filed, assistants county attorneys—like George—didn't even receive longevity pay benefits. The change to the law that included all assistant prosecutors was not made until after George had put his shoulder to the wheel. Nonetheless, George recognized the need for the program for the good of the profession and did an excellent job representing your interests (the job is being ably continued today by **Vince Ryan**, County Attorney in Harris County). A personal thanks from me, George, for your dedication to preserving a program prosecutors worked so hard to create. And for not busting my chops when I called to ask for your help on this 10 years ago—after I explained how assistant county attorneys weren't yet in the program!

More hardware for a Texas prosecutor

On October 28 **Craig Watkins**,

Criminal District Attorney in Dallas County, was recognized on the national level by the American Bar Association Criminal Justice Section. He was presented with the Norm Maleng Minister of Justice Award, which is bestowed each year to a prosecutor in memory of the legendary Seattle DA who served for four decades. The ABA Criminal Justice Section honored Craig for his commitment to the pursuit of justice, working in tough economic times to prioritize the prosecution of the most serious wrongdoers, and addressing the underlying causes of criminal conduct. Congratulations, Craig.

TDCAA leadership for 2012

At the TDCAA Annual Business Meeting last month, the membership elected officers and directors for 2012. According to the by-laws, **Mike Fouts** (DA in Haskell County) will become the Chairman of the Board and **Lee Hon** (CDA in Polk County) will become President. The membership filled the other leadership positions as follows: **David Escamilla** (CA in Travis County) as President-Elect; **Rene Pena** (DA in Atascosa County) as Secretary-Treasurer; **Staley Heatly** (DA in Wilbarger County) as District Attorney at Large; **Jack Choate** (ACDA in Walker County), Assistant Prosecutor at Large; **Clint Griffin** (CA in Schleicher County), Region 3 Director; **Brett Ligon** (DA in Montgomery County), Region 5 Director; **Sherri Tibbe** (CDA in Hays County), Region 8 Director; and **Mike Jimerison** (DA in Rusk County), Region 6 Director.

Thanks for your service

It has been a busy year for those folks finishing their service in TDCAA leadership. First, I'd like make sure you know how much **C. Scott Brumley** (CA in Potter County) has put into his service. Scott will finish his formal service as the Chairman of the Board in December. We have steered a true course with his hand on the wheel, and TDCAA has continued to grow in services to our members during his tenure. Fortunately, we still have his phone number in the directory.

In addition, I'd like to thank our other directors who have spent a ton of time in your service in the last couple years. Thanks to: **Larry Allison** (C&DA in Lampasas County); **Eddie Arredondo** (CA in Burnet County); **Henry Garza** (DA in Bell County); **Doug Lowe** (CDA in Anderson County); and **Terri Moore** (ACDA in Dallas County). Y'all have done outstanding work in keeping the association moving forward.

New U.S. Attorneys sworn in

It's official: Texas now has its four United States Attorneys confirmed and on the job. Congratulations to **Malcolm Bales** in the Eastern District, **Kenneth Magidson** in the Southern District, **Robert Pitman** in the Western District, and **Sarah Saldana** in the Northern District. I know Texas state prosecutors are looking forward to working with you. ✨

Not just for victim assistance coordinators!

While the Texas Code of Criminal Procedure requires that a prosecutor designate someone to serve as a victim assistance coordinator, in reality, everyone in the office—from the person who first answers the phone to the staffer sending the pen packet—is integral in providing victim services. That’s why we call this column Victim Services Update; it’s not just for victim assistance coordinators anymore.



By Suzanne McDaniel
TDCAA Victim Services Director in Austin

two prosecutors and a victim assistance coordinator to deal with an increasing number of family violence cases. Changes in legislation about the classification of family violence offenses affect how such cases are now tried, says John Bradley, district attorney in Williamson County.

In the past five to six years, state legislation changed many offenses from misdemeanors to felonies. A person’s first family violence charge is a misdemeanor, for instance, and his second is a felony. Bradley says those changes forced his office to adapt. “Our biggest single caseload used to be either drugs or DWIs, but now that’s being counterbalanced with these family violence cases, so we felt like we needed special training and extra support to prosecute these,” Bradley told KUT News recently.

Part of that support comes from a victim assistance program headed by Wanda Ivicic. One of her duties is to make contact with victims within 24 hours of their crime being reported. “A lot of times, whenever a victim of domestic violence reports her abuser, there is a very small window where you can get in there and explain to her what her options are and what resources are out there available to her, in order for her to get over those hurdles that she may have to jump to leave her abuser,” Ivicic said.

Bradley hopes the program will help save the county money by breaking the cycle of violence, but it

will take time to see results. Williamson County had 663 reported cases of family violence in the first eight months of 2011.

El Paso County District Attorney Jaime Esparza’s family violence program has also inspired spin-offs by the District Attorney’s Offices in both Bee and Wood Counties. Bell County is announcing a new collaborative program that also grew from the El Paso model and the collaborative two-year effort of the Bell County Family Violence Task Force (centex.taskforce.com). The Bell County program will begin accepting applications for volunteer training in the next month.

Serving victims of family violence, sexual assault, and stalking in rural counties, the goal of the RIO Project (Rural Intervention & Outreach) is to enhance the capacity to assist victims while providing leadership in changing attitudes, policies, and practices through rural law enforcement training programs, community education, and crisis intervention services to promote justice and healing for all victims of domestic violence, dating violence, sexual assault and stalking.

The rural pilot program collaboratively designed by the Lubbock Rape Crisis Center (LRCC) and Women’s Protective Services (WPS), works cooperatively with West Texas Forensic Nurse Staffing, South Plains Rural Health Services, South Plains Association of Government Regional Law Enforcement Training Academy, Levelland Police Department, Hockley County Sheriff’s Department, and the Hockley County District Attorney’s office.

TDCAA Annual Update

We had a record number of coordinators in attendance at our annual meeting in Corpus. It was great to greet old friends and meet new ones. It was also enlightening to witness the number of investigators, key personnel, and prosecutors attending the victim assistance track. We all learn so much from one another’s perspective, and providing interactive workshops allows this opportunity. Our VACs also learned from workshops held in the prosecutor, investigator, and management tracks. I’ve learned that there’s no single answer to improving victim services, and this is true especially for family violence victims.

Family violence programs

There are several family violence initiatives across the state that we want to tell you about.

The Williamson County District Attorney’s Office recently hired

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PCI application and scholarship deadlines December 1

The deadline for applying for the PCI award and the Investigator Section scholarship is December 1.

Applications for both are online at www.tdcaa.com; search for "PCI" or "scholarship" or simply look in the Journal Archive under this issue's stories. ❄

A note about death notices

The *Texas Prosecutor* journal will begin accepting information to publish notices of the deaths of current, former, and retired TDCAA members on a regular basis. Such notices must come from a Texas prosecutor's office, should be fewer than 500 words, can include a photo, and should be emailed to the editor at wolf@tdcaa.com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❄

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The RIO pilot site is centrally located in Hockley County, 45 miles west of Lubbock. The program will serve Bailey, Cochran, Crosby, Dawson, Dickens, Floyd, Garza, Hockley, King, Lynn, Terry, and Yoakum Counties and offers 24-hour domestic violence and sexual assault crisis hotlines, sexual assault medical accompaniment, law enforcement accompaniment, judicial accompaniment, domestic violence and sexual assault crisis intervention, follow-up and referral, counseling, legal advocacy services, law enforcement training, medical training for forensic evidence collection, access to sexual assault forensic medical examinations performed by a Sexual Assault Nurse Examiner (SANE), establishment of a Sexual Assault Response Team (SART), and community education on prevention and awareness of both domestic violence and sexual assault.

Please let us know more about what is working and what's not in your community so that we can share it with others.

New TDCAA Victim Services Board member

The new Region 2 Victim Services Board Member is Kara Welch, Victim Assistance Coordinator for the Midland County District Attorney's Office. Kara has been the VAC for eight years and is certified as a Professional Victim Assistance Coordinator through TDCAA. Previously she worked for Gaines County and

Midland Probation Office. Welcome on board, Kara!

National Crime Victim Rights Week

The next National Crime Victims' Rights Week will be observed April 22–28, 2012. The theme for NCVRW 2012 is "Extending the Vision: Reaching Every Victim," and the theme colors are blue and black.

Sign up for the NCVRW mailing list by December 16 to receive a complimentary hard copy of the 2012 Resource Guide and theme poster, announcements about the online availability of both, and details about the National Crime Victims' Services Awards Ceremony at <http://ovc.ncjrs.gov/ncvrw>. The resource guide is available in both English and Spanish and contains valuable statistics, timelines, and landmarks in victims' rights history, sample proclamations, speeches, and public service messages as well as answers to frequently asked questions and information on how to work with media and maximize communication and awareness.

Looking forward to seeing more of you at our upcoming Key Personnel and Victim Assistance Coordinator Seminar in Houston November 2–4. As always, your ideas and suggestions for training, articles, and programs are welcomed. We really appreciate knowing what the hot topics are in your office so that we can share them with others. Please write to mcDaniel@tdcaa.com. ❄

Photos from our Annual Criminal & Civil Law Update in Corpus Christi



Law & Order Award winners



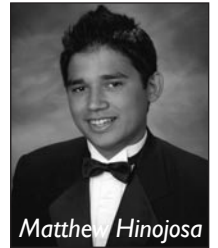
Rep. Jose Aliseda (R-Beeville) was recognized with TDCAA's Freshman Legislator of the Year Award prior to TDCAA's Legislative Update in Corpus Christi. The award was presented by TDCAA's Director of Governmental Relations, Shannon Edmonds (left), and 156th District Attorney Martha Warner (right). Rep. Aliseda, a former Bee County Attorney, has announced his intention to succeed Warner upon her retirement at the end of her current term.



Rep. Todd Hunter (R-Corpus Christi), Chairman of the House Calendars Committee, was on hand at TDCAA's Annual Civil and Criminal Law Update to welcome the attendees and receive a Law & Order Award for his work on criminal justice and public safety issues. Pictured at the presentation are (from left to right) Assistant Bexar County Criminal District Attorney Katrina Daniels, Nueces County District Attorney Mark Skurka, Chairman Hunter, and TDCAA Director of Governmental Relations Shannon Edmonds. ❄️

Matthew Hinojosa awarded Investigator Section scholarship

Matthew Hinojosa, son of Maria Hinojosa, criminal district attorney's investigator in Denton County, received the Investigator Section scholarship. Matthew was unable to attend the Annual conference but sent along this note of his appreciation:



"I am truly honored to have been selected to receive the TDCAA Investigator Section scholarship for September 2011. I know this award is not an easy one to receive as there are always numerous qualified applicants. I would like to thank everyone who had a role in the selection process, the Investigator Section for providing the funds, and the TDCAA organization as a whole. I will use the scholarship money to assist me in pursuing my dream of becoming an attorney." ❄️

Other award winners and honorees from the Annual conference



CLOCKWISE FROM TOP LEFT: Barry Macha (at left), former Criminal District Attorney in Wichita County, received the Oscar Sherrell Award from Lee Hon, TDCAA Board President-Elect. A.P. Merrillat, second from right, an investigator with the Special Prosecution Unit (SPU), was honored with the C. Chris Marshall Award For Distinguished Faculty; he is pictured with Erik Nielsen, TDCAA Training Director; Jack Choate, TDCAA Training Committee Chair; and Gina DeBottis Metts, Executive Director of the SPU. George Nachtigall, former Assistant County Attorney in Harris County, was one of two winners of the Lone Star Award, which was presented by Kathy Braddock, Assistant District Attorney in Harris County. The other Lone Star Award honoree was Lowell Thompson (at left), Criminal District Attorney in Navarro County, who is pictured with Mike Fouts, TDCAA President. And Mary Green (at left), Assistant Criminal District Attorney in Bexar County, was named Prosecutor of the Year; she is pictured with Judge Susan Reed, Criminal District Attorney in Bexar County.

Special unanimity instruction from *Cosio v. State*

There are some cases where, in theory, the State could charge the defendant with two, four, 12, or even 20 instances of precisely the same conduct: the defendant who repeatedly molested his step-daughter, the husband who repeatedly hit his wife, or the drug dealer who made multiple trades in a single day.



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

While prosecutors may have the evidence to support a 12- or 20-count indictment, we exercise prosecutorial restraint and charge fewer counts than we can prove. Or sometimes, we discover during trial that the defendant committed the identical offense sometime before and it was never charged. Or the victim, during an interview, describes the way things usually happened, the pattern that played out many times: “He would do this” or “He would do that.” She recounts how the defendant did this to her “a lot,” and not just on June 3, 2010, as you’ve alleged, but many other times, too. At this point, these other times are not extraneous offenses.¹ The “on or about” language in the indictment means that any of these separate instances constitute proof of the charged offense. As long as these separate instances fall within the statute of limitations, they all could constitute the offense for which the defendant is on trial. If the defense wants

to, they can force the State to elect: They can make the prosecutors choose on which of these instances we will rely for a conviction.² But even if the defense does not ask for an election, there is still a potential problem, one that would not be present if the prosecutors were seeking a verdict for every time the defendant committed the offense.

The potential problem is that with evidence of separate crimes, jurors may not all agree on exactly which counts they are convicting the defendant. Sure, they all agree on the bottom line—the defendant committed a sexual assault (or whatever crime the State has alleged), but the jurors may have in mind very different instances, and they may be in sharp dispute about which instances the State proved beyond a reasonable doubt.

Enter *Cosio v. State*.³ In this recent case, the Court of Criminal Appeals held that a non-unanimous verdict may occur when the State charges an offense and the proof at trial shows the defendant committed that charged offense on multiple—but separate—occasions. Further, the court reaffirmed that even without a defense request for the State to elect, the trial court must still ensure that the jury is unanimous about a particular incident.⁴ There has to be a special unanimity instruction in the jury charge informing the jury

that, in order to convict, jurors must all agree on at least one particular incident.

The jury charge in *Cosio* was erroneous because it failed to include such an instruction. *Cosio* had been sexually abusing a girlfriend’s daughter over a number of years. The State charged him with two counts of aggravated sexual assault of a child and two counts of indecency with a child. The victim testified about four different episodes—in the shower, in her mother’s bedroom, on the way to and from a Burger King, and after the defendant showed her pornography. But when the appellate courts tried to match up the trial testimony to the State’s allegations, there was not a one-to-one match. For both aggravated sexual assault counts, the State offered proof of more instances than it had alleged. The victim testified that the defendant made her perform oral sex on him during the episode in her mom’s bedroom and on a different time on the way to Burger King. She also testified that intercourse happened both in her mom’s bedroom and at a different time after the defendant showed her pornography. (See the chart below.)

	Count 1 ASAC oral sex	Count 2 ASAC intercourse
Bedroom	X	X
Burger King	X	
Pornography		X

For the oral sex allegation, there was evidence of two separate instances of conduct, both of which constituted the specific offense charged. The same was true of the allegation of aggravated sexual assault by intercourse: There was evidence of two distinct instances, both of which would establish the one charged offense. Texas law, the Court of Criminal Appeals explained, requires a unanimous verdict, which means that the jury must “agree upon a single and discrete incident that would constitute the commission of the offense alleged.”⁵ It was already the law that each act of intercourse is a separate and distinct offense, requiring the State to elect at the close of its case-in-chief on which act it would rely for a conviction, if requested by the defense.⁶ So *Cosio* just took this one step further. Where the proof at trial is of multiple instances of intercourse (or other sexual misconduct) for any single allegation, a specific jury instruction is required to eliminate the risk that the jurors would convict without unanimous agreement that any of the incidents occurred.

The general unanimity instruction is not enough

Although *Cosio*’s jury was given the usual instruction of “Your verdict must be unanimous,” the court found this was not sufficient because jurors could think it required unanimity only about the particular statutory violation the defendant had committed. The court also rejected the argument that *Cosio* waived his right to the special unanimity instruction by failing to

request the State to elect. Although one of the purposes of election is to ensure a unanimous verdict (because it limits the jury’s deliberation to a single incident of the State’s choosing), the court reasoned that “guaranteeing unanimity is ultimately the responsibility of the trial judge because the trial judge must instruct the jury on the law applicable to the case.”⁷

What should the instruction say?

The court did not propose model language for a special unanimity instruction, but it did state that the instruction should not refer to any specific evidence in the case, presumably to not constitute a comment on the weight of the evidence. The court also stated that the instruction should permit the jury to return a general verdict. Submitting the incidents individually so the jury can return separate verdicts on them would not be permissible, perhaps because to do otherwise would violate the requirement of general verdicts in criminal cases.⁸ One possible instruction might be something like this:

The State has presented evidence of more than one incident to prove that the defendant committed this offense/count. You must not find the defendant guilty of this offense/count unless you all agree on which incident or incidents occurred beyond a reasonable doubt. You need not all agree on every incident, as long as there is one incident on which all the jurors are unanimous.

How does *Cosio* fit into other Texas unanimity cases?

The holding in *Cosio* and the requirement of a special unanimity instruction applies to cases where the defendant has committed the identical offense more times than for which the State is seeking a conviction. It applies to the repeated violation of the identical penal code section or subsection in the identical way alleged in the indictment or information. *Cosio* does not address the more difficult situations where unanimity issues can arise, say, when the jury charge expressly gives the jury a choice of convicting the defendant if he did X *or* Y. For example, a charge in a capital murder case may authorize a conviction if the jury finds that the defendant committed murder in the course of sexual assault *or* robbery.⁹ Juror unanimity about the particular manner and means of committing the single offense of capital murder is not required, and *Cosio* doesn’t change this.

On the other hand, juror unanimity *is* required where the alternatives given to a jury are distinct offenses in themselves. In the extreme example, the legislature cannot create a generic umbrella offense called “Crime” and permit some jurors to believe the defendant committed embezzlement, others to believe the defendant committed littering, and still others to believe he committed murder.¹⁰ In Texas, the jury cannot convict a defendant for credit card abuse and disagree about whether he stole the credit card, received a stolen credit card, or

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fraudulently presented a credit card.¹¹ Likewise, in indecency cases, touching the child's breast is a discrete offense from touching the child's genitals, even though both constitute a violation of the same penal code subsection.¹² As a result, where the evidence shows the defendant touched both the child's breast and her genitals and the State is seeking only one conviction, the jury charge must instruct the jury to be unanimous about which discrete offense (breast or genitals) the defendant committed.¹³

Cosio does not help identify in future cases which of these alternatives are merely manner and means of committing one offense and which are multiple offenses that require juror unanimity for a conviction. *Cosio* presents a much simpler situation. With repeated commission of the same precise conduct separated by months (if not years), it follows that these are necessarily distinct crimes, not merely alternative theories or manners and means of committing the same crime. So where the State seeks only one conviction for these multiple occurrences (one conviction either for the instance of oral sex in the bedroom *or* for the instance of oral sex on the way to Burger King), the jury charge must instruct jurors to be unanimous about at least one of those occurrences.

What about continuous sexual abuse?

Even where a case involves multiple commissions of the same precise offense, there are three situations where no special unanimity instruction is required. In fact, trouble with

the unanimity issue is the whole reason continuous offenses were created! First, if the State's election has already narrowed the jury's deliberation to a single incident for each crime charged, there is no danger of a non-unanimous verdict, and thus no special unanimity instruction is needed. Second, if the State has alleged continuous sexual abuse of a young child or continuous violence against the family, non-unanimity is specifically allowed as long as each juror is convinced that the defendant committed the required number of offenses during the relevant time period.¹⁴ Third, a special unanimity instruction is not re-quired where the multiple instances of the same crime were committed "by one continuous act of force and threats that are part and parcel of the same criminal transaction."¹⁵ But this exception has a fairly narrow application because in the typical case, repeated instances of the crime are usually separated by more than a few hours and often span months and years.¹⁶ In the typical case, where there is proof at trial of more instances of the offense than the State is seeking a conviction for, then the jury should be given a special unanimity instruction.

Is there really any danger of a non-unanimous verdict?

The court in *Cosio* ultimately decided that while the jury should have been instructed on unanimity as to a particular incident, the error was harmless. In future cases, however, the standard of assessing harm varies, depending on whether and how precisely the defense urges an objection

in the trial court. As with all jury charge issues, the failure to object at trial does not preclude appellate review; it just makes the harm standard "egregious" instead of simply "some harm."¹⁷ This is what happened in *Cosio*, and the Court of Criminal Appeals ultimately found that the lack of a special unanimity instruction did not rise to the level of egregious harm.

But where the defendant raises the issue at trial and references the Texas constitutional requirement for a unanimous verdict, the constitutional harm standard applies, and the conviction must be reversed unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction.¹⁸ In most cases, a special unanimity instruction is not going to increase the chances of acquittal or mistrial. Consequently, the best practice is to be aware of the issue and include the instruction in the charge wherever there is proof of more occurrences of the crime than the State has alleged.

***Cosio's* confusing part**

Cosio appears straightforward until the discussion of counts three and four, involving indecency with a child. As a legal sufficiency matter, the court of appeals held that there was not enough evidence to support two convictions for indecency by touching the victim's genitals. The victim testified about only one incident where the defendant touched her genitals with his hand: during the shower episode. But as the intermediate court of appeals noticed, every act of intercourse also necessarily constitutes the type of indecency alleged here (touching the victim's

genitals with an unspecified body part).¹⁹ But for reasons that are not clear, the court did not then find that the jury could consider one of the acts of intercourse (such as in the bedroom episode) to constitute the missing indecency. It would not have violated double jeopardy for the jury to find one of the acts of intercourse constituted indecency because the State offered proof of two acts of intercourse and needed only one to establish its single aggravated sexual assault of a child (by intercourse) count.²⁰ Thus, it appears that the evidence is actually legally sufficient to support all four counts, as shown in the chart below.

	Count 1 ASAC oral sex	Count 2 ASAC intercourse	Count 3 indecency touch genitals	Count 4 indecency touch genitals
Shower			X	
Bedroom	X	⊗ →		X
Burger King	X			
Pornography		X		

The sufficiency issue was not before the Court of Criminal Appeals, but it does seem to change the analysis. With only one incident alleged for every conviction sought, there is no danger in Count Two, above, that some jurors might believe only the bedroom incident occurred and others believe only the pornography incident occurred. Instead, the danger is that some jurors might believe the bedroom instance was an indecency and the pornography instance was an aggravated assault, and other jurors the exact opposite. And perhaps the right to a unanimous jury verdict does not require agreement to that degree.

The sufficiency issue aside, the Court of Criminal Appeals' analysis of the remaining indecency count is perplexing and seems to conjure up phantom offenses to warrant use of the special unanimity instruction. If we ignore that intercourse can constitute indecency, there were not multiple instances of indecent touching—indeed the court of appeals had already found one incident too few and reversed for legal insufficiency on one of the indecency counts. But, as both courts reasoned, by virtue of the fact that the greater offense in Count Two (aggravated sexual assault by intercourse) could constitute the lesser offense

alleged in Count Three (indecency by touching the child's genitals), there were actually multiple incidents of indecency, warranting a special unanimity instruction, as in the chart at right.

This conclusion has complicated matters significantly. For whenever one allegation could be subsumed within another, there arises the potential that the jury could consider proof of the greater (aggravated sexual assault of a child) as a multiple instance of the lesser (indecency). Thus, a special unanimous verdict instruction must be given, even where the State is seeking only one

conviction for every offense described by the evidence. Imagine a simple case where the State alleges two counts (aggravated sexual assault of a child by vaginal intercourse and indecency with a child by contacting the victim's genitals) and the victim testifies to two different incidents: one where the defendant had intercourse with her and another where he touched her genitals with his hand. Even in this straightforward case, where it would seem a special unanimous verdict instruction would not be warranted, *Cosio* may instruct otherwise. The silver lining is that, in this situation, the defense is highly unlikely to request such an instruction or notice the issue on appeal, and even then, any error is almost always going to be harmless. ❄

Endnotes

1 See *Rodriguez v. State*, 104 S.W.3d 87, 91 (Tex. Crim. App. 2003); *Rankin v. State*, 953 S.W.2d 740, 741 (Tex. Crim. App. 1996) (defining an extraneous offense as any act of misconduct that is not shown in the charging papers).

2 Once the State rests, the trial court is required to order a requested election; the trial court has

	Count 1 ASAC oral sex	Count 2 ASAC intercourse	Count 3 indecency touch genitals
Shower			X
Bedroom	X	⊗ - - - - ->	X
Burger King	X		
Pornography		⊗ - - - - ->	X

discretion to order the State to elect at any time prior to that. *O'Neal v. State*, 746 S.W.2d 769, 772 (Tex. Crim. App. 1988). For an excellent article on jury unanimity and election before *Cosio v. State*, read Holly Taylor's "Counts, paragraphs, and jury unanimity" from the November-December 2008 issue of *The Texas Prosecutor*, Vol. 38, No. 6 (available online at www.tdcaa.com/node/3504).

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3 *Cosio v. State*, No. PD-1435-10, 2011 WL 4436487 (Tex. Crim. App. Sept. 14, 2011).

4 *Cosio*, 2011 WL 4436487, at *6 (reaffirming *Ngo v. State*, 175 S.W.3d 738, 748 (Tex. Crim. App. 2005)).

5 *Cosio*, 2011 WL 4436487, at *3.

6 *O'Neal*, 746 S.W.2d at 771.

7 *Cosio*, 2011 WL 4436487, at *7.

8 See Tex. Code Crim. Proc. art. 37.07(1)(a).

9 *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991).

10 *Schad v. Arizona*, 501 U.S. 624, 633 (1991).

11 *Ngo v. State*, 175 S.W.3d 738, 747 (Tex. Crim. App. 2005).

12 *Francis v. State*, 36 S.W.3d 121, 124-25 (Tex. Crim. App. 2000).

13 *Id.*

14 Tex. Penal Code §21.02(d) (continuous sexual abuse of a young child); §25.11(d)(continuous violence against the family).

15 *Phillips v. State*, 193 S.W.3d 904, 911 (Tex. Crim. App. 2006) (citing *Steele v. State*, 523 S.W.2d 685 (Tex. Crim. App. 1975)).

16 *Id.*

17 *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984), superseded on other grounds by rule as stated in *Rodriguez v. State*, 758 S.W.2d 787 (Tex. Crim. App. 1988).

18 Tex. R. App. P. 44.2(a).

19 *Cosio v. State*, 318 S.W.3d 917, 921 (Tex. App.—Corpus Christi 2010) (citing *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004)).

20 *Williams v. State*, 170 Tex. Crim. 593, 594, 342 S.W.2d 581, 582 (1960) (accused cannot complain that he was charged, tried, or convicted for a lesser included offense rather than the higher or greater offense).

Prosecuting the drugged driver (cont'd)

Continued from the front cover

the last possible second when Chris dove out of the way and into the ditch to the east of his car. The truck slammed into the left rear of Chris' Toyota Camry where Nicole was seated. The force of the collision pushed the Camry northbound and into the ditch and turned the car around to face south. The all-wheel-drive truck, after colliding with the Camry, actually drove over the car, rolled, and entered the same ditch, finally ending up on its side and facing west.

Chris looked at what was left of his car and could not comprehend what had just happened. He struggled over to his Camry and looked inside. He could hear screaming from Christina, David, and Alyssa, but Nicole looked like she was sleeping. David and Alyssa were trapped in the car and couldn't get their seatbelts off. Several Good Samaritans saw the explosive collision and stopped to render aid. We found out later that Christina's back was injured, but she couldn't feel the pain yet. David had closed-head and brain trauma, severe facial trauma, including jaw and eye injuries, a femur fracture, and acute blood loss. Alyssa's injuries included massive head trauma, multiple jaw fractures, and a collarbone fracture. Nicole was silent. The back left side of the Camry, where she was sitting, was nonexistent. The family was praying that at worst, Nicole had a concussion. They did not yet know what fate befell her.

Angleton EMS and Fire Departments arrived within minutes and were able to extricate David. Alyssa was sitting outside with a passerby. She could only look at what was left of her family—she needed to cry so badly but could not, due to her broken jaw. Angleton police and Department of Public Safety troopers arrived and began their investigation. All of the northbound lanes of Highway 288 were shut down, and multiple Life Flight helicopters were activated. Having already assessed Nicole—she was deceased—EMS was working on David and Alyssa. Christina was pleading for EMS to help Nicole because no one had talked with her about her daughter. One of the first responders knew it was time and placed a white sheet over the teenager. The cold, unrelenting realization of what this act meant began to creep into the souls of Christina and Chris. Chris' legs gave out and he collapsed, completely overwhelmed.

The investigation

DPS Trooper Bo Stallman was the lead crash investigator and had his hands full with the scene. The crime scene, to the untrained, would have looked like chaos, but Trooper Stallman remained calm and began his collision investigation. He knew that this was a death investigation and that additionally two children and one adult were seriously injured. It did not take him long to determine the driver of the F-150 was Jeffrey

Alec Thomas, age 23. Thomas had climbed out of his truck and walked to the Camry. The Good Samaritans all reported that something was “off” about Thomas and that he appeared as if he were “on something.” He attempted to pick up pieces of debris from the collision and kept demanding a bandage from EMS and police for his one visible injury—a small cut to his hand.

Trooper Stallman had spoken with Thomas and could not smell any alcohol on his breath. However, Thomas was acting suspiciously, as if he had something in his system that was affecting his normal mental and physical faculties. Thomas kept repeating that he had come from college in Lubbock to see his parents in Sugar Land and that he was now in Sugar Land when in fact, he was in a completely separate county from where he thought he was. His speech was very slurred, and he kept stating a car had hit him and pushed him into the Camry. Stallman saw no damage to the back of Thomas’ truck to indicate that was true. Thomas then changed his story to say he was leaning over to get a CD at the time of the “accident.” This “accident” was looking like no accident to Stallman.

Thomas kept asking to make a phone call to his dad, so Angleton police officer Brian Hoskins took Thomas to his patrol car and turned on the dash microphone to begin recording. Hoskins dialed Thomas’ dad’s phone number and put the call on speakerphone. Thomas relayed his version of the collision to his dad, then his dad asked if there was anything in Thomas’ vehicle.

Thomas said no, that there were no witnesses and that “it’s all good.”

The phone call ended and Hoskins escorted Thomas back to Trooper Stallman. Trooper Stallman began administering the standardized field sobriety tests to Thomas on video. Thomas failed all portions of the tests, including losing his balance and stumbling during the Walk-and-Turn. Stallman placed Thomas under arrest and went through the DIC-24, requesting a mandatory blood specimen. Thomas refused because he said he was not drunk. Stallman had to complete his investigation, so he asked fellow Trooper Strawn take Thomas to get his blood drawn. Strawn turned on his dashcam recorder, Mirandized Thomas, and talked with him on the way to the blood draw.

Thomas slurred his speech and was very talkative and repetitious in his questions and answers. He kept asking if Trooper Strawn could just take him home because he had to be back at Texas Tech next week. Strawn asked Thomas if he knew that he had killed a girl. At first, Thomas appeared distraught on video, but then told Strawn that his life couldn’t get interrupted right now and that he had to be back at school. Thomas also told Strawn that he had purchased some “bars” (alprazolam) from a friend at 3:30 earlier that afternoon and had taken them all. He also said he had not taken his Adderall, which is medication for attention deficit disorder.

After the blood draw, Thomas was transported to the county jail where he called his mother. He explained to his mom his version of the collision, that he was on “bars,” and that he had them in his system. He confirmed these facts again the

next morning to Trooper Strawn in a subsequent recorded and Mirandized interview.

Brazoria County District Attorney Investigator Vicki Kraemer was instrumental in backtracking the events leading up to the collision. She had discovered that Thomas had gotten a haircut in Lake Jackson right after he bought the alprazolam from his friend. Kraemer located the hair-cutter, who stated Thomas would not sit still in her barber chair. He admitted to smoking marijuana and asked her to pop a pimple on the back of his head. The hair-cutter told Kramer that Thomas was “on something.”

The charges

The blood results (which will be discussed later), data recorder information, mechanical inspection of the F-150, witness statements, and more, were all collected. Thomas was indicted for intoxication manslaughter in one cause number, two counts of intoxication assault in a second cause number, and a third case of intoxication assault. The files then landed on my desk.

I set up the first of four banker’s boxes of evidence and drafted subpoenas for every person named in Stallman’s report. I then went through all of Thomas’ car insurance records. He had approximately 20 reported incidents, including a collision a year before where he had hit a car in San Antonio on a major freeway, causing it to collide with another car and flipping the trailer that the third car was pulling. San Antonio police found marijuana and alprazolam on Thomas’ person, he was charged appropriately, and he got out on bond. Just a week before the wreck

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that killed Nicole and injured her family, Thomas had struck a car in Sugar Land. (All officers and injured parties in that collision were subpoenaed for punishment.) Thomas had never before been convicted of a felony.

The evidence-gathering process was exhaustive. We looked in every nook and cranny of Thomas' life. Investigator Kraemer had pulled not only the Class C history (an often overlooked tool in such cases), but also the offense reports and tickets associated with them. Thomas' past included 10 speeding citations, nine collisions involving a vehicle he was driving, and an administrative citation for throwing a television down a stairwell at his college. It was very interesting to realize the underlying facts associated with cases at the low end of the criminal spectrum of Thomas' history. School records for Thomas and the injured children, as well as copies of the medical records of all parties, and Thomas' prior vehicle claims filled banker boxes two, three, and four after they were filed with the clerk.

The electronic frontier of priceless information

In this digital age, we all hear stories of people posting things on Facebook, MySpace, and Twitter that they later regret. Thomas was no exception. While I generally search these sites for defendants in my cases (and witnesses too!), the grand jury prosecutors had already printed out Thomas' MySpace page where he had updated his status on April 16, 2010, just over one month since he had killed Nicole King. Thomas

posted the following: "Im [sic] a beer drinking sob that likes to have a good time. Partying on week days is a favorite past time, although im [sic] trying to cut back. Im [sic] at Texas Tech but who know where ill [sic] be in a week, thats [sic] how i [sic] am. ..." Needless to say, the custodian of records for MySpace was subpoenaed, as were Thomas' "friends" to authenticate that this page was his. That very night, Thomas took down his MySpace page, but it was too late.

The experts

Joe Hinton and Monte Highsmith of Joe Hinton and Associates of Houston were the collision reconstruction analysts. These two gentlemen have testified as experts for the State, defense, private insurance companies, and plaintiffs in accident and collision reconstruction. They do not have an agenda except for discovering the truth and putting their fancy words such as coefficients of friction, lateral yaw, and drag factors in very easy-to-understand presentations. They are very good at explaining to juries how a collision occurred in ways that are easy to follow. Their analysis of Thomas' wreck: This was no accident. Thomas was going approximately 80 miles per hour when he crashed his truck into the Camry. Thomas did not apply his brakes or attempt to correct his driving on the shoulder.

We relied on renowned forensic toxicologist Dr. Sarah Kerrigan of the Sam Houston State Regional Crime Lab in The Woodlands. Dr. Kerrigan is extremely knowledgeable and is one of the best in her field of forensic toxicology. At our request,

she had her lab run a full panel on Thomas' blood sample. His blood contained 109 nanograms of alprazolam per milliliter. A metabolite of marijuana was also discovered in Thomas' blood. My first question to Dr. Kerrigan was, of course, "Was Thomas intoxicated?"

Throughout my misdemeanor and felony career to this point, my DWI cases involved alcohol or alcohol-drug combinations. I never had a pure drug intoxication case that involved the death of a child. Dr. Kerrigan was excellent at explaining there is no *per se* intoxication of drugs. Drugs are not eliminated from the body in a linear manner like alcohol is. The dosage, the personal idiosyncrasies of a given person's body, and whether the defendant is a chronic or naïve user of a drug, are just some of the ways drugs can affect a person's normal mental or physical faculties. Kerrigan explained that Thomas' dose was at the upper range of "therapeutic" for a person with extreme panic disorder or anxiety. She quickly followed with an explanation that if a person is at a "therapeutic" dose of this drug, then by definition, he generally doesn't have his normal mental or physical faculties because the drug is at a sufficient level where its intended effects (or rather side effects) are present in the body.

Thomas' behavior and demeanor at the crash site as well as before and after show he was impaired and did not have his normal mental or physical faculties; his behavior was consistent with a person affected by a central nervous system depressant. What concerned us was that no expert could say, "Jeff

Thomas was intoxicated on alprazolam.” Dr. Kerrigan explained that no reputable expert could ever testify to that statement when intoxication was due to drugs because experts are limited in stating whether a person’s behavior—gleaned from videos, reports, and witness statements—is consistent with intoxication on a stimulant, depressant, or hallucinogenic. The quantitative lab results allow the expert to further complete her expert opinion statement: “The defendant’s behavior is consistent with intoxication of (stimulant/depressant/hallucinogenic) of which drug X (which was found in the defendant’s system) is a member of that specific class of drug.”

With alcohol, hundreds of studies have determined at what blood alcohol concentration (BAC) every person loses his normal mental and physical faculties. Because there are so many legal and illegal drugs that can impair, similar studies have not been done. This is why there is no *per se* drug intoxication level and no *per se* drug intoxication law; it’s also the reason that toxicologists cannot give a definitive answer to the question, “At X level of Y drug, had the defendant lost his mental and physical faculties?”

We knew we needed to go even further and have a Drug Recognition Expert (DRE) review the facts and evaluate if Thomas’ behavior was consistent with intoxication. No officers on scene were DRE-certified, and consequently no DRE testing was performed on Thomas. We relied on Josh Bruegger of the Pasadena Police Department, as well as Paul LaSalle of the Houston Police

Department, to do DRE reconstruction. They analyzed all the facts and recordings and concluded Thomas’ behavior was indeed consistent with intoxication due to ingestion of a central nervous system depressant, such as alprazolam.

The plea process and defensive theories

There were no issues in proving the identity of the defendant, or the injuries to David, Alyssa, or Christina. It was also clear that Nicole King was dead because of Thomas. The whole issue became proving Thomas was intoxicated and, by reason of that intoxication, caused these injuries. The Thomas family hired an excellent attorney for their son, and he came at us as expected, asking for mercy for a host of reasons: The drug in his system was a therapeutic dose; it was prescribed, not an illegal substance like cocaine or heroin (though there was no evidence of Thomas ever being prescribed alprazolam); Thomas hadn’t taken his ADD medicine; he was leaning over to get a CD; and he’s just a kid—give him probation and a low pen time number.

However, due to the hard work of the police, very patient experts with whom we had meetings, and collection of evidence, the life story of Jeff Thomas allowed us to be handily prepared to prove Thomas’ drug intoxication and refute defensive theories. The ever-open door to the office of our elected DA, Jeri Yenne, was instrumental as we fought for justice in preparing this case. My co-prosecutor Jessica Pulcher was an excellent second chair who kept my course through this

case true and steady.

David and Alyssa had endured multiple surgeries since that fateful day of March 19, 2010. Christina Brown stated in a local newspaper that her children still needed more surgeries and would never be the same. Their daughter Nicole was stolen from them at such a young age by the selfish actions of Jeffrey Thomas. Nicole was very active in her church and school, and Christina told me one of Nicole’s dreams was to serve as a translator at the United Nations. Getting a driver’s license, picking a prom dress, graduating college, getting married, and giving her parents grandchildren would now never happen. David told me that every day he looks in the mirror and sees the large scar on his face, he is forced to remember what happened to his sister. If he could have changed places with her, he would have done so in a heartbeat. What is justice for a family torn apart by an intoxicated driver?

Thomas hired an additional defense attorney. I assume that because Thomas told his bond supervision officer that he wasn’t setting foot in prison and that any jury would walk him, he didn’t like our first plea offer of 15 years in TDCJ with a deadly weapon finding on the intoxication manslaughter, with 10 years of probation to be served consecutively for the intoxication assaults. We felt comfortable we had made a fair offer, which ultimately was rejected. Again, it seemed like we were headed for trial.

Heading to trial

Seventeen months of evidence-gathering and trial preparation were cul-

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minating with Thomas' criminal trial in August 2011. At the eleventh hour, defense counsel approached us and wanted another offer. The State, in exchange for waiver of appeal in all causes, offered Thomas 10 years in prison with an affirmative finding of a deadly weapon, with one count of intoxication assault to be served 10 years in TDCJ probated for 10 years. As part of the plea negotiations, the indictment with two counts of intoxication assault was amended to add two counts of aggravated assault with a deadly weapon. We abandoned the initial counts of intoxicated assault. To this indictment, Thomas was offered a 10-year deferred adjudication community supervision which, if revoked, could mean up to 20 years in prison on top of the original 10 years on the intoxication manslaughter indictment.

The terms of the community supervisions included: standard DWI intoxication felony conditions, 200 hours of community service, no early termination, all probations to run concurrently with each other but stacked on the prison sentence, an affirmative finding of deadly weapon on the deferred aggravated assault counts, and \$55 a month to Katy Students Against Destructive Decisions (SADD, formerly Students Against Drunk Driving). Additionally, Thomas must speak to Katy SADD and serve seven days in the Brazoria County jail every March he is on probation, and he must maintain a roadside memorial for Nicole King at the location of the collision. Thomas can't operate any vehicle without court approval, and he must carry a picture of Nicole King at all times to remind him of what he did;

he must also show his community supervision officer he is complying with this requirement at any time.

The new danger of drugged drivers

Ultimately, Thomas accepted our offer. Ten years with an affirmative deadly weapon finding is a significant amount of prison time for an intoxicated manslaughter conviction, especially for a defendant who was probation-eligible. Coupled with his cumulated probations and the possibility of going back to prison for 20 more years, this guaranteed the Brown family the result we mutually desired.

We encountered many difficulties in preparing for this trial. When it is so easy to obtain a "prescription" drug, why risk being caught with cocaine or heroin? A police officer is capable of stating a person is intoxicated by alcohol, but no one, not even toxicology experts, can state a defendant is intoxicated by a drug, only that his behavior is consistent with intoxication. If the observational evidence leading up to the collision and at the scene weren't available, we would have had to potentially amend the charges to just manslaughter or aggravated assault—and the *mens rea* of "reckless" could have encouraged a jury to lean toward probation for this young offender.

My hope from this case—and Brazoria County District Attorney Jeri Yenne shares it—is that our fellow citizens understand that there are increasing fatalities caused by drivers under the influence of drugs. Drivers should realize that even if

they are taking medication prescribed by a licensed physician, any drug can cause them to be impaired and therefore incapable of safe driving. The choice to drive while impaired is perhaps one of the most selfish people can make, and when they choose to do so, they are setting a course for catastrophic consequences. In a split second, the lives of two families were drastically altered: The Thomas family lost their son to prison for 10 years, and the Brown family lost their beloved

Editor's note: In December, every prosecutor in Texas will receive six laminated sheets on forensic evidence topics, including drugged driving. TDCAA is grateful to the Texas Department of Transportation (TxDoT) for supplying grant funds to help pay for this project. Watch the TDCAA website for more information on the forensic evidence project.

Nicole forever. ❁

An exciting makeover for the Victim Impact Statement (VIS) Quarterly Activity Report

Expect to see some changes to this report in the months to come.

In the last issue of *The Texas Prosecutor* journal, the origin and purpose behind the Victim Impact Statement (VIS) Quarterly Activity Report was discussed in detail, including the fact that it is revised every two years following the legislative session. Many changes have been made to the VIS Quarterly Activity Report as a result of the most recent VIS Revision Committee. The committee's goal was to make it more user-friendly to victim assistance coordinators (VACs). By accomplishing this task, TDCJ Victim Services Division believes it will improve the accuracy of the statistics collected from the report.



By Kristi Heiman

Program Specialist in the TDCJ Victim Services Division

The Texas Crime Victim Clearinghouse, the organization with statutory responsibility for collecting the report, has been receiving suggestions all year long on ways it can be improved. We listened and made note of all the concerns because we knew that problems with the report equate to problems with the statistics our office collects. There were certain issues we heard time and time again. For instance, victim assistance coordinators told us that the offense titles listed on the report in Section 3 were too detailed and that many of the offense titles they use in their counties didn't match up with the titles listed on the report. This issue was a big concern to us. When a VIS went

out for an offense that wasn't listed on the VIS Quarterly Activity Report, was it being excluded from the report, or was it being put into another category, which would cause

a misrepresentation of the numbers in that particular category? Victim coordinators consistently suggested that we make the offense titles more general so offenses match up more precisely with the offense titles used in charging documents in each of their counties.

Another concern was that we were asking VACs to report

on information that they did not have. In Section 2, the report asks for the following information:

- How many Victim Impact Statements were sent in pen packets to the TDCJ Correctional Institutions Division?
- How many Victim Impact Statements were sent with court records to the Texas Youth Commission?
- How many Victim Impact Statements were sent to your local Community Supervision and Corrections Department?

In our discussions with VACs, we learned that many of them have no way of knowing what happens to the VIS once it leaves their office for court. They often are not aware of

the disposition of the case, and to whom, if anyone, the VIS gets forwarded, making it impossible for them to provide an accurate number on the report.

Changes to the report

During the revision committee meetings, it was extremely helpful to have a variety of VACs from both large and small counties provide input on this topic. As a result, we made significant changes so the report is more user-friendly and accurate.

Among the changes, we eliminated in Section 2 the items asking for the number of VISes sent in pen packets to the Texas Youth Commission and to local community supervision and corrections departments. Victim assistance coordinators are now asked to provide only the following information:

- How many Victim Impact Statements did your office provide to victims during the month?
- How many completed Victim Impact Statements did your office receive during the month?

More monumental changes were made in Section 3, which asks for information regarding VISes provided to victims for certain offenses. The "Types of Offenses" were changed to be more general so as to better fit the offenses being charged by the many prosecutors' offices in Texas. The changes include adding Robbery, Kidnapping, Trafficking of

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Persons, and Property Crimes. For sexual assault offenses, there is now a category titled Sexual Assault and a different category for Sexual Offenses Against a Child. Intoxication offenses will now be in one category, Intoxication Assault/Intoxication Manslaughter. Committee members agreed that these changes will make the task of completing this report much less daunting than before.

Other changes to the VIS Quarterly Activity Report include a new reporting period beginning in September 2011. The report will still be collected on a quarterly basis; however, the months that the report is collected have changed. The previous reporting period was based on a calendar year (January to December). Because TDCJ Victim Services Division compiles statistics on a fiscal year basis (September to August), the change in the reporting period will allow the statistics collected to be consistent with other information made available to the legislature. Previously, the due dates were the 15th of January, April, July, and October. The new reporting period sets the due dates as the 15th of December, March, June, and September.

Our hope for the changes

As you read through the many improvements that were made to this report, you may ask yourself, what do we hope this new and revised report will accomplish? By far, we hope this new report will make it easier for VACs to complete. Victim assistance coordinators play such an important role for victims in the criminal justice process, and it is important that this report not be a

huge, time-consuming project when that time can be better spent assisting victims. Also, it is important that TDCJ Victim Services collects accurate statistics. By asking coordinators to report only information that they have access to, we increase the accuracy of the statistics submitted.

Finally, we want VACs to know that we value their suggestions and input. Getting the Victim Impact Statement through the criminal justice process is an extraordinary team effort that takes place within each judicial district. It is important that victim assistance coordinators know that we support the hard work they do on a daily basis, and that if there is something we can do to make it easier, we are happy to take those ideas into consideration. As a result of the collaborative efforts that went into creating this new report, we are confident that it will be a positive step in gaining a better understanding of the role the Victim Impact Statement is playing across the state.

An email containing the new VIS Quarterly Activity Report went out to VACs in late September, and it is also available at www.tdcj.state.tx.us by clicking on Victim Services Division. ❄

E-books are coming!

TDCAA announces the launch of two new e-books, now available for purchase on Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both ~~strike~~underline text to show the 2011 changes *and* annotations. Note, however, that these books contain single codes—just the Penal Code (2011–13; \$20) and Code of Criminal Procedure (2011–13; \$25)—rather than all codes included in the print version of TDCAA’s code books. Also note that the e-books can only be purchased from the retailers. TDCAA is not directly selling e-book files. ❄

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 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. ❄



New statutory protections for videotaped interviews of child victims

In response to *In re District Attorney's Office of the 25th Judicial District*, the Texas Legislature amended the law to protect these recorded interviews.

In March 2011, the Court of Criminal Appeals denied the State mandamus relief and upheld a trial court's order requiring the State to make a copy of a child victim's videotaped forensic interview from the local Children's Advocacy Center (CAC) for the defense. After a pointed dissent from Presiding Judge Keller, the 82nd Legislature acted quickly by amending both Article 39.15 of the Code of Criminal Procedure and §264.408 of the Family Code. Under both of the new provisions, the defense is allowed reasonable access to a videotaped CAC interview, but a trial court cannot order the State to provide the defense a copy of the video.



By Darin Darby
Assistant Attorney General, Criminal Prosecutions Division, and
Rebecca Lively
Chief Prosecutor, County Court No. 5, Criminal District Attorney's Office in Denton County

The old-fashioned way

Prior to recent judicial and legislative action, the procedure for protecting against the prospect of having to actually provide the defense a copy of a child victim's CAC videotaped interview was often accomplished under the broad scope of §261.201 in conjunction with §264.408 of the

Court of Texas Family Code. Under these sections, the CAC video, as a part of an investigation of a report of child abuse or neglect, is "confidential [and] not subject to public release." Statutorily, a court could order disclosure and release of items, including "videotapes," only on motion of a party or upon the court's own motion, notice of a hearing, a hearing, and upon specific court findings after a hearing.¹

Besides §§261.201 and 264.408, the State could also rely on caselaw to protect against having to provide a copy of a child victim's CAC videotaped statement to the defense. Specifically, in *Dickens v. Court of Appeals*, the Court of Criminal Appeals held that the trial court acted within its discretion by denying the defense a copy of a CAC video "since all three defense attorneys and the expert witness have already viewed the videotape" after the State provided the defense reasonable access to the video.²

As a practical matter, most prosecutors did exactly what the district attorney did in *In re District Attor-*

ney's Office: The prosecutor informed defense counsel of the CAC video and invited defense counsel and any defense expert to view the video at a mutually agreeable time at the prosecutor's office. If, however, the defense demanded its own copy of the video, the prosecutor would object and cite §261.201 as the basis. It has been the authors' experience that this system worked fairly and efficiently. Rarely would a defense attorney who had been given adequate access to view the CAC video demand his own copy.

Case background

The dispute arose out of a continuous sexual abuse of a child case. Despite the fact that the State made the interview video available for viewing by defense counsel, the defense sought to have the trial court order the State to provide the defense a copy of the video citing the standard discovery provision, Art. 39.14(a) of the Code of Criminal Procedure. Notwithstanding the State's objections, the trial court granted the defense motion and required the State to make a copy of the CAC video and hand it over to the defense.

On writ of mandamus to the Court of Criminal Appeals, the court held that the defense was entitled to a copy of the video under Art. 39.14(a). Absent any caselaw or statutory analysis from competing

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statutes, the court reasoned that under Art. 39.14(a)'s plain terms, the State should be required to provide the defense a copy of the video and that doing such was "a task both easy and inexpensive" and "reasonable."³

Presiding Judge Keller argued in her dissent that what may seem so "reasonable" in this case may not always be so.⁴ She explained that what may be only one video in this case could multiply into something burdensome, broad, and extensive in another case.⁵ Presiding Judge Keller also asserted that the scope of Art. 39.14 did not necessarily include the video statement because the child victim's CAC interview could be considered a written witness statement—specifically exempt from discovery under Art. 39.14(a).⁶ Presiding Judge Keller also noted that this issue was unsettled.⁷

The legislative fix

Shortly after the Court of Criminal Appeals decided *In re District Attorney's Office*, the legislature amended both the Code of Criminal Procedure and the Family Code to ensure the defense fair access to a CAC video, but at the same time, make clear that a court could not compel the State to copy or reproduce a child victim's videotaped interview for the defense.

First, the Legislature amended a specific provision of the Code of Criminal Procedure. Article 39.15 is now entitled "Discovery Of Evidence Depicting Or Describing Abuse Of Or Sexual Conduct By Child Or Minor." Prior to amendment, the statute dealt more specifically with discovery of evidence

depicting child pornography. Subsection (c) of Article 39.15 states that:

A court shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce any property or material described by Subsection (a), provided the State makes the property or material reasonably available to the defendant.

After *In re District Attorney's Office*, the legislature added Subsection (a)(3) to include video recordings of forensic interviews of children. Therefore, so long as the prosecutor makes the video reasonably available to the defense for viewing, Subsection (c)'s prohibition on defense requests for a copy of the video applies to CAC videos.

Second, the legislature amended §264.408 of the Texas Family Code. By adding Subsection (d-1), lawmakers made clear that while the videotaped interview was subject to production by making it reasonably available for defendants and their experts to view under Article 39.15's discovery provisions, courts "shall deny any request by a defendant to copy, photograph, duplicate, or otherwise reproduce" a CAC video.

Given the strength of the "shalls" in these two new provisions, an old-fashioned hearing under §261.201 of the Family Code will most likely not be required. However, the careful prosecutor may want to demand such a hearing if the trial court seems inclined to read past the new laws protecting CAC videos. Certainly, mandamus relief would be appropriate—and the outcome of *In re District Attorney* would be different—if a trial court ordered the State to provide the defense a copy of a

CAC video after these two amendments. As far as prosecutors voluntarily providing a copy of CAC videos to the defense, the legislature's expectations are clear: The State must provide reasonable access to CAC videos, but otherwise, we should not, and most likely cannot, voluntarily provide a copy to the defense. Regardless, prosecutors should be mindful that the duty to reveal and provide *Brady* material supersedes code requirements.⁸

Back to business as usual

The legislature's response to *In re District Attorney's Office* really did not change the way most prosecutors and most defense attorneys already operated; the prosecutor notified defense counsel of the existence of the CAC video and then allowed defense counsel (and any designated defense experts) to view the video at a mutually agreeable time. The system worked well. Rarely did defense counsel demand, in addition to reasonable access to the video, a copy of the videotape. Following the legislative reaction to *In re District Attorney's Office*, a trial court cannot grant a defendant's demand for a copy of the videotape and the reasonable access, that was typically provided as a courtesy to defense counsel, is now expressly required. Most folks, on both sides of the docket, should be satisfied, and we are back to business as usual. ✱

Endnotes

¹ Tex. Fam. Code §261.201.

² *Dickens v. Ct. App. 2nd Sup. Jud. Dist.*, 727 S.W.2d 542, 553 (Tex. Crim. App. 1987); see also *Coachman v. State*, 692 S.W.2d 940, 945 (Tex. App.—Houston [1st Dist.] 1985, pet. ref'd).

Working with male crime victims

Our culture tells men that they shouldn't cry or express grief, even when such emotion is completely normal and appropriate. Thus, victim assistance coordinators must handle male victims of crime somewhat differently.

Not long ago we went to trial on an aggravated assault case. The victim was a sweet, quiet, 21-year-old man who had immigrated to the U.S. as a child with his family. We got to know Miguel (not his real name) and his family well during the course of the case and in preparation for trial. He had monumental challenges, including unsupportive family members who were being pressed by the defendant not to cooperate with the prosecution. He had immigration and poverty issues, no transportation, and a history of family substance abuse from which he was trying to free himself—all in addition to the trauma of an assault that nearly killed him. In spite of all these issues, Miguel was compassionate, good-natured, loving, and forgiving with his family.

One family member, his aunt Mary (not her real name), was genuinely concerned for him. They had

been very close during his childhood, and she told me Miguel was not himself since the assault. She hoped I could convince him to see a counselor. I had several conversations with him about his emotional health and the impact of this trauma. During each talk, he would smile and assure me he was doing well—getting better, in fact! He was starting a new job, and his immigration attorney and I were making progress on his visa. I remember feeling uneasy about his mental health, although in our conversations he always maintained that he was doing fine. I sent a list of counselors in the Houston area to his immigration attorney, hoping that Miguel might be more revealing and receptive to help offered by a man.

Three months after the trial, I received a voicemail from his aunt. She was frantic, screaming that Miguel had taken his life the day before, and she begged me to call her. What she told me was just what I'd feared: Miguel had grown



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3 *In re Dist. Attorney's Office*, 2011 WL 1235027.

4 *Id.* (Keller, P.J., dissenting).

5 *Id.*

6 *Id.*

7 *Id.* (citing *In re State ex. rel Rosenthal*, No. 14-02-00306-CV, 2002 WL 730786 (Tex. App.—Houston [14th Dist.] Apr. 25, 2002, no pet.) (mem. op., not designated for publication).

8 See Edward L. Wilkinson, *Legal Ethics & Texas Criminal Law, Prosecution, and Defense* 275-76 (TDCAA 2006); see also *Strickler v. Green*, 527 U.S. 263 (1999).

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increasingly depressed, his family continued to be unsupportive, and he had asked his aunt probing questions about another family member who had committed suicide. I was devastated at the thought of him in so much pain but unwilling to ask for help. I questioned my time with him, remembering my gut instinct that things were not right. I thought about my attempts to engage him. What else could I have done for someone who would not let me in?

How men are treated differently

The role of a victim service provider is a challenging one in many ways, and I most often feel perplexed in my work with young men. My clients aren't voluntarily seeking my services but rather are compelled to visit our office by circumstances often out of their control. They may or may not feel traumatized by the precipitating event, but trauma is rarely their motivation for interacting with victim services in a district attorney's office. As I'm guiding victims through the criminal justice system or preparing them for trial, I attempt to engage them in a discussion of how the trauma has impacted them. I assess for and provide any additional support they need to help with their healing. Female victims almost universally open up and discuss the emotional, spiritual, and physical impact of the crime and accept my support or counseling referrals, but men have been much more challenging. There are exceptions, of course, but in most cases they only give me a small peek at their pain—yes, this has been hard,

and yes, they feel very angry. But beyond that I typically hear what I heard from Miguel: "I'm fine."

Women have made monumental progress moving beyond prescribed gender roles in the last several decades, but men continue to be constrained. Society perpetuates the message that emotional vulnerability in men is a weakness, that men should be strong and self-reliant. Anger is acceptable because it has a very masculine energy, so men are socialized to hide vulnerability and to channel emotions through anger or to deny emotions altogether. This is tragically limiting when victims are trying to process trauma.

I once heard the sound of a car crash near my apartment and went outside to see if someone might need help. Several bystanders were already at the scene, comforting a mother who was wailing and kneeling beside a young girl, who was lying on the ground with a bleeding head injury. Standing about 10 feet away was a boy who looked about 8 years old and who was obviously with the family. He was frozen and standing by himself, so I approached him. He was trembling and as I spoke to him, tears rolled down his face. I could imagine how terrified he was, seeing his sister injured and his mother so beside herself with fear for her daughter that she completely forgot his presence.

As I sat with him waiting for the ambulance, an older woman bystander walked up to the little boy and said, "Stop crying now—you need to be strong for them. You're a big boy." I wanted to say, "She's wrong! You're scared and that's normal! If you need to cry, cry. I'll stay

with you." But the woman was standing near and I didn't want to contradict her. I wish I had, though, because one of the greatest tragedies in that situation was the message that boy received. He learned that even if your sister is lying in the street bleeding, he wasn't allowed to feel anything other than stoicism, because that's what others needed from him.

Best practices for men

After Miguel's death, I've thought about what I could have done differently and how I might adjust my approach in working with men in trauma. I've considered my cases where I have a very successful relationship with the victims and also cases in which I felt the victim shut down, in order to gather and implement my own best practices. I doubt I can change years of social programming, but I can model, encourage, and create a safe space for exploring vulnerability and for real healing.

My current best practices include:

- providing education around trauma and its aftermath and exploring victims' coping skills. Find out their usual means of handling challenges and encourage them to apply their coping skills in this situation. Help them develop their additional ways of coping;
- helping victims engage their support system. Assess their supportive relationships, and discuss to whom they can turn when they need help or someone to talk to. If they're interested, include members of their support system in your work together. I encourage victims to bring a

friend or family member to our meetings or to court;

- If the family of the victim is also working with you, they can be a good source of collateral information. While confidentiality limits what you can share, the family will often discuss how they think the victim is doing and whether they have any concerns. Educate them about red flags and teach them ways to support the victim or seek help if needed;
- providing the victim with a list of resources for counseling, support groups, and online information and support;
- actively assessing for suicidal thoughts and knowing how to intervene appropriately;
- providing material to the victim on a range of trauma-related topics. I find printable material on the internet, copy it from workbooks, or create it myself; and
- seeking support and consultation for yourself when you feel uncertain.

Would some other creative approach have helped me reach Miguel? I look back at my notes and see many attempts from me, his immigration attorney, and his aunt. Miguel's decision was his own to make and no matter how creative, insightful, and out of the box I could have been, it may never have changed the outcome.

For all the young men and other victims we work with, we do our best to assess, provide resources, engage, and counsel, but the decision to accept the help offered is entirely in their hands. This is challenging to remember when we feel unease or fear that our client is in distress but

not ready to resolve that distress.

I attended Miguel's funeral, and it was shocking to see him in the casket. I battled many emotions as the family gathered around him, crying, praying, and cradling his body. They expressed tremendous gratitude that I'd come to pay respect to him, and as I said goodbye, his sister pulled me aside. She thanked me for all I did and hugged me. She told me that Miguel had a special place in his heart for me and for the prosecutors who worked with him, that we had been very kind when he was having such a hard time.

This is how it goes with victim services, isn't it? Some cases you pour your heart and soul into and the reward is tangible and great. You find a homeless victim a place to live; you help another victim apply for crime victim's compensation to reimburse \$5,000 for lost wages; another victim hugs you and says, "You saved my life—I don't know what I would have done without you!" Then there are other cases that end badly, like Miguel's. Through his sister, though, I heard his appreciation for our work together: "My life was brutal, but somewhere in that path I met you, and you cared about me." That is something. ✨

Meeting attacks on forensic science through TDCAA's Forensic Evidence Project

Be on the lookout for help from the association on countering challenges to forensic science in the courtroom.

In 2009, the National Academy of Sciences (NAS) issued a federal government-mandated report on the status of forensic science in the United States.¹ The report has been presented through the media as critical in some respect of nearly every forensic science except DNA testing. To provide Texas prosecutors with accurate and timely research and information to understand and meet these new challenges, the Texas District and County Attorneys Association (TDCAA) has started a Forensic Evidence Project. This article will give prosecutors an introduction to the work of that project and provide an example of the work product that will soon help prosecutors in the courtroom.

During meetings to update the strategic long-term plan for TDCAA, prosecutors indicated that they need help in dealing with the growing attacks on the use of forensic evidence in the courtroom. Many of the concerns stemmed from specific problems that have developed in Texas crime labs. However, many of the concerns arose from the national attention to the subject created by the issuance of the NAS report and its subsequent media attention. At



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Bradley*
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in Williamson
County

the invitation of TDCAA, a group of prosecutors² joined the Forensic Evidence Project and began working on the creation of single-page, two-sided summaries on how to handle forensic science challenges for several specific subjects.

For example, I was assigned to develop a sheet on the subject of fingerprint comparison. The goal was to summarize the purpose, process, and modern challenges to using an expert witness to provide testimony regarding fingerprint evidence. So, what could be so controversial about a forensic science that has been in use for over 100 years?

Fingerprint identification is a field of forensic science that uses an expert witness to visually identify the unique characteristics associated with a latent fingerprint left at a crime scene or deliberately placed on a document or in a database. The expert then compares that latent print to a known print obtained from an individual to determine whether the individual was the source of the latent print.

Each print, whether it comes from the finger, palm, toe, or sole of the foot, contains unique patterns of ridged skin. Those patterns are often transferred to a surface when a finger deposits oil, blood, sweat or ink onto the surface. The pattern can later be

collected through photography or various other techniques for collecting a latent print.

The expert relies on a process called the acronym-named ACE-V method (Analysis, Comparison, Evaluation, and Verification) when conducting the comparison between a latent and known print. This process has been recognized by numerous courts as a reliable method for conducting a fingerprint comparison and coming to a conclusion as to whether a particular individual was the source of a latent print.

The NAS report included a discussion of fingerprint comparison and identified several issues of concern.³ Subsequently, in several cases throughout the United States, criminal defendants attempted to exclude fingerprint comparison testimony as unreliable by simply referencing the NAS report. However, several courts, after conducting an extensive review of the report and listening to substantial testimony on the subject, have concluded that fingerprint comparison is reliable and admissible.⁴

In another high-profile attack on the field of fingerprint comparison, a criminal defendant suggested that an FBI report⁵ on the misuse of fingerprint evidence in a Madrid bombing case provided support for the exclusion of fingerprint comparison evidence in criminal cases. However, an exhaustive review of that report in a federal court hearing resulted in the

conclusion that fingerprint comparison is a reliable and admissible forensic field.⁶

Frankly, the field of fingerprint comparison is so well-known and accepted in Texas courts that a trial judge may take judicial notice of the reliability of the field and the ACE-V method for making a comparison.⁷ Nevertheless, the expert witness still must provide proof that the ACE-V method was properly applied in a particular case before such evidence is ultimately admissible.

In choosing an expert to conduct a fingerprint comparison and testify in court, Texas prosecutors should be aware that there is no single certifying process for identifying who is a proper expert. Indeed, the field of fingerprint analysis is not subject to the statutory requirement that it be conducted only in an accredited laboratory.⁸ The prosecutor should make sure, though, that the fingerprint examiner has sufficient training and experience to qualify as an expert.⁹

The fingerprint identification community has not specified a uniform number of points of comparison that are necessary to establish a match between a latent and known print. The number is left to the judgment of the experienced examiner and depends on the quality and size of the available prints.¹⁰ However, specific standards for reaching a conclusion have been established by the Scientific Working Group on Friction Ridge Analysis, Study, and Technology (SWGFRASST).¹¹

In conclusion, in December Texas prosecutors will receive six single sheet summaries of forensic

fields, helping them address challenges in the courtroom. This is just the beginning for TDCAA. Please send us your suggestions for additional forensic information. We all need to work harder to make sure we present solid forensic evidence during a trial. ✱

Endnotes

1 Any prosecutor may read the report online or purchase the report in hardback, but a free download in PDF format is available at www.nap.edu/catalog.php?record_id=12589. A shorter executive summary is also available. Every prosecutor should take the time to read the report.

2 The prosecutors included: John Bradley (Williamson County DA, fingerprint analysis), Alan Curry (Harris County Assistant DA, eyewitness identification), Lindsey Roberts (Williamson County Assistant DA, collision reconstruction), Richard Alpert (Tarrant County Assistant DA, blood alcohol testing), Lance Long (Harris County Assistant DA, DNA testing), and Warren Diepraam (Montgomery County Assistant DA, drug toxicology).

3 National Research Council, *Strengthening Forensic Science in the United States, A Path Forward*, pp. 102-04, 136-45 (2009).

4 *Commonwealth v. Gambora*, 933 N.E.2d 50 (Mass. 2010); *Johnston v. State*, 27 So.3d 11 (Fla. 2010); *United States v. Rose*, 672 Supp. 2d 723 (D. Md. 2009); see also Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification after the NAS Report, 2010 *Utah L. Rev.* 267 (2010).

5 For a downloadable PDF of the report, go to: www.justice.gov/oig/special/s0601/exec.pdf.

6 *United States v. Rose*, 672 F.Supp.2d 273 (D. Md. 2009).

7 *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim. App. 2003). For an example of such judicial notice, see *Moore v. State*, 109 S.W.3d 537 (Tex. App.—Tyler 2001).

8 See Tex. Code Crim. Pro. art. 38.35(a)(4)(A); Tex. Admin. Code, Title 37, Part 1, Chapter 28, Rule 28.146(1)(b).

9 *Mouton v. State*, 892 S.W.2d 234 (Tex. App.—Beaumont 1995, pet. ref'd); *Sepeda v. State*, 2009 Tex. App. LEXIS 9234 (Tex. App.—Amarillo 2009,

pet. ref'd) (not for publication).

10 *United States v. Haward*, 117 F.Supp.2d 248 (D. Ind. 2000).

11 For details on those standards, go to www.swgfrast.org.

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