THE TEXAS PROSECUTOR

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

Harris County goes to Washington

Attorneys from the DA's office in Houston argued a Fifth Amendment case before the Supreme Court of the United States—and they now share the story with their Texas colleagues.

By Alan Curry
Assistant District Attorney in Harris County

On the morning of April 17, 2013, in a crowded courtroom, I got up from my chair, stepped to a podium a few inches to my left, looked directly at Chief Justice John Roberts, and said, "Mr. Chief Justice, and may it please the court."

I have been a prosecutor for almost 25 years and have prosecuted approximately 2,000 cases during that time. I have presented oral argument countless times before appellate courts in Texas. But never did I imagine that I would be able to present oral argument before the Supreme Court of the United States. It was a thrilling experience—and a little terrifying as well.

About the case

Like any other criminal case, this story begins with a crime, and, in this situation, a particularly violent one. On the morning of December 18, 1992, two brothers were shot and killed in their Houston home, and police recovered six shotgun shell casings at the scene. The investigation led police to the defendant, Geno Salinas, so officers went to the defendant's residence to talk with him. The defendant agreed to hand over his shotgun for ballistics testing and to accompany police to the station for questioning. The police questioned the defendant for a little

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The Harris County trial team in front of the United States Supreme Court. From L to R: David Newell, ADA in Harris County; Andrea Kelley, intern in Harris County (now an assistant CDA in Galveston County); Carol Cameron and Alan Curry, both ADAs in Harris County; the late Mike Anderson, DA in Harris County; and Eric Kugler, ADA in Harris County.

Joining the Giving Tree Net-

At the Annual Criminal and Civil Law Update in September, we announced the launch of our partnership with the Giving Tree Network. You have probably seen the logo and portal on many of the TDCAA website pages, including the front page. It is a great way to support the Foundation—without actually having to write a check!

By Rob Kepple
TDCAA Executive Director in Austin

Here is how it works. Most online stores offer incentives averaging 6 percent of a sale to websites that direct traffic to their online shopping experiences. It is called "affiliate marketing." But most of those incentives go un-collected because no one is directing people to particular sites for their online shopping. If the incentives were captured, it would add up to about $254 dollars per person per year. (The average U.S. household will spend $4,500 shopping online this year.)

We have partnered with a new company that helps nonprofit organizations like our Foundation to capture those incentives. Quite simply, we need to start our shopping though one of the Giving Tree portals on the TDCAA website, or go to www.shopTDCAA.com to pick the store or stores you want to shop at. The incentive is recorded, collected, and sent to the Foundation.

Imagine how these incentives could add up for a large membership organization like TDCAA, which today has more than 5,800 members. If you just remember to start your shopping at www.shopTDCAA.com, the Foundation could really benefit.

Don't see a store that you would like to have on the site? Go to our homepage at www.tdcaa.com and click on the box at the bottom to send the folks at the Giving Tree Network your suggestions. They are constantly adding stores to the site and would be happy to include your favorite!

Two recent benefits

The promise of our Foundation is that training and services for Texas prosecutors will continue to have support even in today's atmosphere of continually diminishing government funding. The Foundation has been able to support significant trainings and publications, as well as appellate and victim support services. The need will only grow as our profession does.

The last few months have been a busy one for the Foundation. It paid for the Advanced Appellate Advocacy Course at the Baylor School of Law in Waco in August. In addition, last month every prosecutor and staff member received a new Quick Penal Code Reference "cheat sheet." These laminated sheets continue to be in high demand, so it was a great deal for the Foundation to make sure everyone got one.

Texas Prosecutors Society

In 2011 the Foundation Board created the Texas Prosecutors Society with a two-fold purpose: to recognize prosecutors who have demonstrated devotion to the profession, and to plant the seeds of what will someday be a solid endowment for the work of TDCAA. A potential member of the society is asked to make a commitment of $2,500 over 10 years, with 100 percent of the money going directly to the endowment fund. To give you an idea of how such a program can grow, I should note that the Texas Bar Foundation started 45 years ago, and now it funds dozens of legal programs and projects every year.

As this edition of *The Texas Prosecutor* goes to press, there are 100 members of the Texas Prosecutors Society. The first 106 members will be designated and honored as the Founding Fellows; the number 106 represents how many years TDCAA had been in existence when the society was established. If you have an invitation to the Texas Prosecutors Society sitting on your desk as you read this, you may get one of the last Founding Fellow spots if you are quick to join!

Make that 101

In September we lost Mike Anderson, the Harris County District Attorney, to cancer. Mike had just begun his service as the elected district attorney, and by all accounts was going to make a fine leader of his office, the Harris County criminal justice community, and our statewide community of prosecutors.

When I served as an assistant DA in Houston, I had the privilege

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of having Mike as my court chief. It was a tremendous learning experience for me, and it left no doubt in my mind that Mike was one of the finest prosecutors in Texas.

So as a matter of personal privilege, I have nominated Mike Anderson for membership in the Texas Prosecutors Society. Thus, he will be honored as a Founding Fellow—along with legendary Harris County DAs Carol Vance and John B. Holmes Jr., by the way.

But I didn't do it alone. I am honored that a number of prosecutors and former prosecutors wanted to join in the effort to secure this posthumous honor for our friend and colleague, and we made substantial contributions to the Texas Prosecutors Society endowment in Mike's honor and memory. Those who participated are listed in the box below. Thank you. ❇

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EXECUTIVE DIRECTOR'S REPORT

The best and biggest Annual ever?

By all accounts we had one of our best annual gatherings in recent memory in Galveston. Perhaps the biggest too—over 1,000 members attended. The city really pulled out the stops for us, and the new convention center was first-rate. I would like to give a special thanks to **Patrick Kinghorn**, a veteran meeting planner who stepped in to help us while **Manda Herzing** was on maternity leave. He did an outstanding job. We have heard from y'all loud and clear—we will be going back to Galveston!

By Rob Kepple
TDCAA Executive Director in Austin

Into the lions' den

The keynote speaker at the Annual was **Michael Morton**, a man who had spent 25 years in prison after having been wrongfully convicted of his wife's murder in Williamson County back in the 1980s. His story has been the subject of TV news shows, articles in *Texas Monthly* magazine, and a documentary aired at the South By Southwest Film Festival last year. As you may know, the prosecutor who tried the case has faced a court of inquiry and is now going through State Bar disciplinary proceedings and criminal charges stemming from allegations of *Brady* violations.

Not your ordinary "pep talk" type of keynote, I know. If you were uncertain that asking Mr. Morton to speak was a good idea, just imagine Mr. Morton's uncertainty at the prospect of speaking to 1,000 prosecutors. I can't imagine a prosecutor would make his Christmas card list—but he was one of the most gracious guests we have ever had. We needed to hear from him if we as a profession are to make good on our commitment to examine how we do our business. And Mr. Morton has made it clear that he is not interested in revenge, but rather in meaningful changes that would make it less likely that an innocent person like him would be convicted.

Mr. Morton's talk was outstanding, and by your reviews was a most welcome insight into our profession from another perspective. I thought that one of Mr. Morton's first observations was on point: Looking around the room, he observed that he was no Daniel (the well-known biblical figure who faced a den of lions rather than worship someone other than the Lord), but that he was nevertheless among lions. At more than one point he reminded us that we were the good guys. He does not believe that a prosecutor would deliberately seek to convict an innocent man, but he invited us to think

about a few things. First, the notion that temptation can be a powerful thing. Second, what if you were convinced of a defendant's guilt? Third, how certain are you that you are always right? Like a Sleep Number bed, he asked us to think about our personal percentage: 98 percent? 95? 90? Powerful questions, and we got the point.

Welcome to new DAs

Please extend a welcome to two new Texas prosecutors. First, **Tanya Ahlschwede** has been appointed to serve as the district attorney for the new 452nd Judicial District, serving Edwards, Kimble, McCulloch, Mason, and Menard Counties. Second, **Devon Anderson** has been appointed to serve as the Harris County District Attorney. For both of these district attorneys, prosecution runs in the family: Tanya's husband, Allen, serves as the Kimble County Attorney, and Devon was appointed following the passing of her husband, Mike, the Harris County District Attorney. Both Tanya and Devon have served as assistant district attorneys, so they have hit the ground running. Congratulations to both.

TDCAA leadership report

Our Annual Business Meeting was held in Galveston in conjunction with the Annual Conference. Here are the results of the elections of TDCAA leadership for 2014 (at right).

I want to say thanks to some very hard-working board members who will be leaving the board at the end of the year: **Clint Griffin** (CA in Eldorado); **Brett Ligon** (DA in Conroe); **Mike Jimerson** (C&DA in Henderson); and **Sherri Tibbe** (CDA in San Marcos).

Finally, I want to extend a very special thanks to **Lee Hon** (CDA in Livingston), who will be leaving his post as Chairman of the Board at the end of the year. Lee has led the association through the tough process of self-examination that led to the production of the report "Setting the Record Straight on Prosecutorial Misconduct." The report not only corrected the record on allegations of widespread misconduct, but also it gave us a path to follow to make enduring improvements in our profession. Well done, Lee.

"Cold Justice" airs

By now many of you have watched the new TNT series, "Cold Justice," which airs on Tuesday evenings. The show stars **Kelly Siegler**, a former Harris County ADA, and **Johnny Bonds**, a former Harris County DA Investigator. **Mike Sheppard**, our DA in Goliad, has written a very interesting article about the show from the perspective of the local DA; it's on page 54.

As the show is in its first season, it is fair to say that many folks had questions about how a cold case could be effectively and properly handled in the context of reality TV. After all, we have witnessed the legal disaster that was "To Catch a Predator," a show where TV folks lured would-be sex offenders to a make-believe date with an underage girl. Fun cinema, I suppose, but any prosecution of the cases was a pure afterthought, and law enforcement was eventually embarrassed by their participation in the show.

The first few "Cold Justice" episodes appear to have addressed the balance between the need to properly investigate and solve a crime and provide compelling drama for television. As Mike observed, it is clear that Kelly, Johnny, and company go out of their way to honor the work of the local law enforcement folks who have hit a brick wall on a case. It appears that in these cases what is needed is not some surprise new DNA evidence or recanting witnesses, but a fresh set of eyes and attention to missed details to sew up the case. There are no dramatic (and let's admit it, corny) re-enactments, just a laborious review of what evidence has been collected. When you watch the show, you are likely to recognize a lot of things that you would do when putting a case together.

The big issue, as you will read in Mike Sheppard's article, is whether a case solved on national television can subsequently be fairly tried in a court of law. The premier show in September was not television's finest hour in that department. The reinvestigation of a case in

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Cuero ended in a murder indictment and a trial setting, but the producers decided to air the show about this case a week before the trial, making it impossible to pick an impartial jury that week. Let's hope that a show airing the week before trial won't happen again, but it is likely that if a case is indeed solved, indicted, and set for trial, a "Cold Justice" episode about it will have aired sometime before the case goes to court.

So Mike's article raises a good question: Are you willing to seek help to solve a cold case if it means you may have some trouble later getting a jury? We will see how this plays out with future episodes. In any event, you might want to call Mike if you have a cold case and are considering asking the show for assistance.

A case to watch

Warren Diepraam, an assistant DA in Conroe, has garnered a national reputation as a prosecutor dedicated to combating DWI. He has done so by training—and also by not being afraid to test the limits of the law.

A case Warren is prosecuting now is worth watching. In *State v. Duran*, Warren is trying a man at a bar who bought drinks for a woman who later killed and maimed people in a DWI crash. He is not seeking to prosecute Duran for the intoxication manslaughter, but rather for the unlawful sale of alcohol to an intoxicated person. Duran was not the bartender that night, just another bar patron, but the circumstances may show that he knew that the woman at the bar was very intoxicated and he continued to buy her drinks, making him a party to that misdemeanor offense. This may be a fairly uncommon set of provable facts, but if the prosecution is successful it opens the door to a way in which people who are responsible for knowingly (or intentionally!) getting people drunk can also be held responsible for the devastation that is the predictable result of their conduct.

Dusting off the Texas Lawyer's Creed

Our newer prosecutors may have heard of this, but many of us have long ago forgotten about the Texas Lawyer's Creed. Quite simply, it is a non-binding affirmation that lawyers' conduct should be characterized by honesty, candor, and fairness. Lawyers should, in short, play nice. Think Atticus Finch in *To Kill a Mockingbird*, and you are on the right track.

I expect you will hear more about the creed in the near future because the State Bar is going to be making a push to remind Texas lawyers of the lofty aspirations of our profession. Here is where you can find it: www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides/EthicsResources/Lawyers-Creed.pdf.

Answer to last month's ethical pop quiz

In the last edition of *The Texas Prosecutor*, I posed an ethics question for you to ponder and invited you to send me your thoughts on the matter. Here was the situation: You are prosecuting a murder case, and shortly before trial the defense has identified two women who will alibi the defendant. You smell a rat, so you create a false identity on Facebook as the defendant's girlfriend and baby mama and interact with the two prospective defense witnesses. After your Facebook interaction, the witnesses reverse themselves and profess that they won't lie for the defendant.

Your thoughts came through pretty clearly, that it was a bad idea for the prosecutor on the case to engage prospective witnesses like this. What really troubled a lot of folks is that the prosecutor in the hypothetical added in some facts beyond simply knowing the defendant (the creative detail of a baby could be viewed as dissuading even truthful alibi witnesses from wanting to help the defendant).

This hypothetical, of course, isn't made up. It came from a story out of Ohio that went national. (To read the story on the case, go here: www.cleveland.com/metro/index.ssf/2013/06/cuyahoga_county_prosecutor_fir.html.) It appears that the prosecutor, faced with a time crunch, no police help, and a serious case, decided to see if he could dent what he believed to be the stories of two untruthful witnesses. The prosecutor lamented the fact that the police had not done this work and was very worried for the victims of this crime if the deceitful alibi prevailed. But the case may serve as a good lesson for what is expected from the public prosecutor. ❇

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Photos from our Annual Criminal & Civil Law Update in Galveston

Awards given at our Annual Update


photo 1


photo 2


photo 3


photo 4


photo 5

Photo 1: *David Weeks (at left), CDA in Walker County, was named the State Bar Prosecutor of the Year. He is pictured with Rene Peña, TDCAA President-Elect, at right.* ***Photo 2:*** *Lee Hon, TDCAA Chair of the Board (on the right), presented David Escamilla (at left), TDCAA President, with the President's Plaque.* ***Photo 3:*** *The C. Chris Marshall Award for Distinguished Faculty was given to David Newell (at left), an assistant district attorney in Harris County. He is pictured with Jo Anne Linzer, Chair of the Training Committee.* ***Photo 4:*** *Wayne Springer (at right) was honored with the Oscar Sherell Award (Investigator Section) at the Annual, which is given to those with exemplary service to TDCAA. He is pictured with Terry Vogel, DA's investigator in Moore County (at left).* ***Photo 5:*** *The Kaufman County Criminal District Attorney's Office, represented by CDA Erleigh Norville Wiley (at right), was honored with the Lone Star Prosecutor Award, which goes to prosecutors "in the trenches" who represent the State well. Staley Heatly, TDCAA Secretary/Treasurer of the Board (at left), presented Wiley with the award.*

Reflecting on 2013, looking toward 2014

By David Escamilla
County Attorney in Travis County

Where did the time go? This column marks my last as President of TDCAA. And while our Government Relations guru, Shannon Edmonds, likely disagrees—what with the Texas Legislature refusing to promptly conclude its business and depart Austin on schedule—from my vantage point this year has just flown by.

As I reflect back to this time last year I recall the excitement I possessed to accomplish so much during this year. Realistically, and like most of us recognize from our day jobs, spare time is a rare luxury. Don't get me wrong; we remained very busy and productive. There is just never enough time to get everything done. Our progress was best exemplified by our strong and successful efforts in the Texas Legislature to guard against unnecessary harm.

Our President-Elect Rene Peña, 81st Judicial District Attorney, will take the reins in January, and I can already predict that he will oversee a very productive year for TDCAA. He has hit the ground running with his prior work as chair of the Border Prosecution Unit. The unit includes 16 prosecution offices from El Paso to Brownsville and represents 44 counties along the Texas-Mexico border. In partnership with the Texas Department of Public Safety, the unit works to develop protocol for handling border cases. It is also involved in joint training exercises for prosecutors and law enforcement agencies.

And entering the batter's box as our new President-Elect is 46th Judicial District Attorney Staley Heatley. Both seasoned TDCAA veterans, Rene and Staley are well positioned to effectively lead us over the next few years.

It has truly been an honor and pleasure to serve as President of TDCAA in 2013. But I'm not going very far away. From here, I will move on to assume the duties of Chairman of the Board from outgoing Chair Lee Hon. Lee has been a tremendous asset to our organization, leading our effort to prepare and publish the report, "Setting the Record Straight on Prosecutorial Misconduct."

As described on the TDCAA website, "This report is the result of more than eight months of research and careful examination by TDCAA's Training Subcommittee on Emerging Issues, whose findings and recommendations for preventing wrongful convictions attributed to prosecutorial misconduct while ensuring professional and independent prosecution in Texas have been adopted by TDCAA's Board of Directors and are included in the report." The report served as an important resource to guide our efforts in responding to legislative proposals concerning prosecutor misconduct, *Brady*-related issues, and prosecutorial immunity. The report, which is still available on the TDCAA website, included 10 findings and recommendations to guide the association in the implementation of training and policies for the benefit of prosecution in Texas. These recommendations were approved and adopted by the TDCAA Board of Directors on August 31, 2012.

One finding in the report, citing the small number of cases involving actual prosecutor misconduct, identified that "the central issue is often inadequate disclosure of exculpatory or impeaching information." The report went on to recommend that "TDCAA should expand its *Brady* training beyond trial court prosecutors to meet the needs of other discrete groups within its membership, such as experienced elected prosecutors; newly elected prosecutors; mid-level supervisors; new/inexperienced prosecutors; and non-lawyer staff and investigators." And while the vast majority of Texas prosecutor offices maintained open file systems, the report recommended that our association "should provide more training on the pros and cons of open-file and closed-file discovery policies and the *Brady* issues that apply to each situation." The report went further to recommend that TDCAA work to promulgate and provide resources, including forms and training manuals, to its membership to assist in implementation of effective Brady compliance policies.

Fortunately for us, training is a hallmark of our association's service to its membership. TDCAA's train-

ing is recognized as first-rate among our peers and is the first priority listed in our mission description: "producing comprehensive continuing legal education courses for prosecutors, their investigators, and key personnel."

Currently, TDCAA is working with prosecutors to implement office policies and procedures to comply with the new discovery requirements of the Michael Morton Act (Senate Bill 1611). The act becomes effective this January 1, 2014, and will apply only to offenses transpiring on or after that date (although several offices have decided to implement the new procedures on that date regardless of the actual offense date). Prosecutor offices across our state have been assisting and cooperating with each other to share best practices and other strategies to meet the new law's requirements. I've been personally impressed with the dedication and commitment displayed by Texas prosecutors so far to do the right thing.

And next year TDCAA will initiate significant efforts to follow through on the recommendations from the "Setting the Record Straight" report. TDCAA leadership, staff, and volunteers from prosecutor offices across the state are working to design and deliver to our membership the training referenced in the report and statutorily required under House Bill 1847. This training will include live presentations beginning with the Elected Prosecutor Conference in December, as well as a distance-learning component so that everyone has an opportunity to receive this training by the end of 2014 as required.

TDCAA will also be rolling out management training designed to assist prosecutor offices, large and small, with recommended practices to best handle the varied administrative duties and issues encountered in our day-to-day work life. This training will also begin at the December Elected Prosecutor Conference and then will be provided at other selected dates in 2014.

Again, it has been a wonderful experience to serve as TDCAA President this past year, and I leave the position knowing that our leadership and association staff is dedicated to serving Texas prosecutors and their personnel to better protect the people of Texas. TDCAA is an effective organization that works best when prosecutors, their investigators, victim assistance coordinators, and key personnel from our diverse offices come together to share concerns and solutions relating to the legal and policy issues that we encounter regularly. As some of us move on to other priorities and responsibilities, more are needed to take their place. I hope that you will engage with us to maintain the momentum we've started at TDCAA. We'll be keeping an eye out for you. ❇

Law & Order Awards

After each regular legislative session, TDCAA's Board of Directors bestows Law & Order Awards upon certain state legislators in recognition of their work on criminal justice issues. Three out of a possible 182 legislators, made the cut.

TOP PHOTO: *State Rep. Stefani Carter (R-Dallas, at center) was recognized with the Law & Order Award during our Legislative Update in Dallas. Rep. Carter, a former prosecutor in the Collin County Criminal District Attorney's Office, served as Vice-Chairwoman of the House Criminal Jurisprudence Committee during the 83rd Regular Session. She is currently a candidate for an open seat on the Texas Railroad Commission. Pictured with her are (from L to R): Shannon Edmonds, TDCAA Director of Governmental Relations; Kenda Culpepper, Rockwall County Criminal DA; Rep. Carter; Craig Watkins, Dallas County Criminal DA; and Heath Harris, First Asst. Criminal DA in Dallas.* ***MIDDLE PHOTO:*** *State Rep. Joe Moody (D-El Paso, at left) was recognized with the Law & Order Award during our Legislative Update in El Paso. The award was presented by TDCAA Executive Director Rob Kepple (at right). Rep. Moody, a former prosecutor in the El Paso County District Attorney's Office and former recipient of our Freshman of the Year Award, was instrumental in passing several bills supported by prosecutors during the 83rd Regular Session.* ***BOTTOM PHOTO:*** *State Senator Joan Huffman (R-Houston, center) was recognized with the Law & Order Award during our Annual Criminal and Civil Law Update in Galveston. The award was presented by Lee Hon (right), Polk County Criminal DA and chairman of TDCAA's Board, shown here with Senator Huffman and TDCAA Director of Governmental Relations Shannon Edmonds (left). Senator Huffman previously worked in the Harris County DA's Office and is also a former district judge; she served as Vice-Chairwoman of the Senate Criminal Justice Committee and was a key defender of prosecutors' and crime victims' interests at the 83rd Legislature. She is the first legislator to receive this award in consecutive sessions.*

Two members honored

Jaime Esparza wins national recognition for DV work

Jaime Esparza, the 34th Judicial District Attorney in El Paso County, has been honored with the 2013 Paul H. Chapman Award for his work on behalf of crime victims. The award from the Foundation for Improvement of Justice is given each year to a select few from around the nation, and it recognizes and rewards individuals or organizations whose innovative programs and work have made improvements in the various systems of justice.

Esparza received his award at the Foundation's 28th awards banquet on Saturday, September 28 at the Four Seasons Hotel in Atlanta (he is pictured below).

Jaime was honored for creating an innovative, first-in-the-nation program called 24-Hour Contact, which is meant to move family violence crimes more quickly and efficiently through the criminal justice system and to hold family violence offenders accountable for their acts of criminal violence. Within 24 hours of an arrest, a victim advocate and an investigator will visit the victim with the sole purpose of assessing her well-being and offering information on resources. Within the 24-hour period, critical evidence is collected: photographs from the visit, the 911 call, a video from police dispatched to the scene, criminal history of the offender—in essence the DA's office is ready to go to trial within 24 hours of the crime. Most importantly, the victim receives an in-person visit to offer care and information to know she is supported by the justice system.

The Foundation for Improvement of Justice Inc., is a private, nonprofit organization founded in 1984 for the purpose of improving local, state, and federal systems of justice within the United States of America. Each year, the foundation accepts nominations for the Paul H. Chapman award. Winners receive a check for $10,000, the Paul H. Chapman medal, a Commendation Bar Pin, a certificate of appreciation, and an invitation to an awards banquet. Read more about the nomination process and the work of the founda-

Bill Swaim honored by MADD

On September 20, the Mothers Against Drunk Driving Texas State Office (MADD) held its Third Annual Law Enforcement Recognition Awards Ceremony in Austin. This event recognized efforts of Travis County law enforcement to make Central Texas roads and waterways safe from drunk drivers. MADD honored officials in several categories for their leadership, work with youth in the community, and enforcement of DWI and BWI law.

Bill Swaim, an assistant county attorney in Travis County, took home the Prosecutor Service Award, which is given to a prosecutor who goes above and beyond when prosecuting DWI cases. Swaim deals specifically with multiple pending DWI cases, tracking all such cases to make sure they are consistent across all Travis County criminal courts. He is pictured above with Angela Cotton Tidwell, a MADD representative. Congratulations, Bill! ❊

If the jurors are blind to a defendant's shackles, so is the Constitution

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

Every day in courtrooms around the state, judges decide how they will balance the importance of maintaining security in their courtrooms against the interests of criminal defendants when tried before a jury, free of restraints, manacles, or shackles. Some judges opt to routinely shackle defendants who are in jail awaiting trial, regardless of the threat posed by the particular defendant. The Court of Criminal Appeals recently considered a case, *Bell v. State*,[1] where the trial judge may have been doing just that. Ultimately, the court delivered a nuanced decision, finding that routine shackling—while still error—is not constitutional error unless the jury is actually aware that the defendant is shackled.

The facts of the case

Vaughn Bell was on trial for possessing between 1 and 4 grams of ecstasy.[2] The facts of the offense were fairly typical for a drug case: An officer stopped the car Bell was riding in and eventually found marijuana residue and a bottle of pills nearest to Bell. He opted for a jury trial, and over a lunch break during the trial, the judge ordered that Bell be shackled. The defense attorney countered that there was no need to restrain Bell because, as far as the attorney recalled, he had no history of fleeing or escaping, and there were two bailiffs in the courtroom who could provide security. The judge responded that the bailiff was responsible for the jury, not Bell, and added, "Everybody who is in custody has the same necessity of restraint."[3]

The defense was also concerned that it would undermine the presumption of innocence if the jury were to see the chain running between Bell's ankles and that if he moved, the jury would hear the chain rattle and suspect that Bell had "done something that got him chained up."[4] The prosecutor had the bailiff sit in various seats in the jury box to determine what the jury could see. The bailiff reported that Bell's pants covered up the cuffs and chains so that they were not visible. The judge added that several briefcases had been positioned to shield the restraints from view and that Bell should be careful about moving his legs. He would also have breaks to stretch his legs.[5] For the rest of trial, no one said anything more about the chains. As a result, it was not clear if the jurors were even aware that Bell had been restrained.

Bell's first appeal

On appeal, Bell argued his conviction should be reversed because he had been shackled without proper justification. The intermediate court of appeals looked to the leading United States Supreme Court decision on shackling: *Deck v. Missouri*.[6] In *Deck*, the Supreme Court reiterated that the law has long forbidden the practice of routinely using visible shackles in front of a jury. While that right to remain free of visible chains has a constitutional aspect to it, it is not absolute. Visible shackling will not offend the constitution provided it is justified by a special need specific to the defendant on trial.[7] Based on the rule in *Deck*, the court of appeals found that it was error of a constitutional magnitude for the judge to order Bell restrained without articulating a need for shackling specific to him. Nevertheless, the court of appeals ruled that the error was harmless in Bell's case, particularly as there was no indication that the jury was ever aware of the shackles.[8]

The Court of Criminal Appeals alters the kind of error involved

Bell appealed to the Court of Criminal Appeals and argued that Texas should follow the approach of the Fifth Circuit Court of Appeals, which *presumes* that restraints will be visible to the jury and puts the onus on prosecutors to prove otherwise.[9] The Court of Criminal Appeals not only rejected that approach, but it also went one step further: The court held that unless a jury was aware of the shackles, there were no constitutional implications to shackling a defendant without cause. In short, it removed any unconstitutional taint associated with routinely shackling

defendants in every case—as long as no jurors were aware of the restraints. The court held that due process was implicated only when the jury could see the restraints; it was not the mere shackling alone but the *jury's perception* of the shackles that led to constitutional error.[10] The court ruled that only where there is "a reasonable probability that the jury was aware of the defendant's shackles" will there be constitutional error.[11] And in Bell's case, no such reasonable probability existed.

But it's still error, just not constitutional error

Although the court removed the unconstitutional taint from routine shackling, it still held that it was error (just not *constitutional* error) to shackle defendants without justification. The difference is sometimes subtle, but with constitutional error, an appellate court applies a more rigorous test to determine if the error is harmless.[12] So one potential effect of the decision in *Bell* is that by lowering the category of error to non-constitutional error, fewer cases involving shackling will be reversed on appeal. There is a danger that after *Bell*, some judges will believe the court is quietly condoning the practice of routinely shackling defendants, but with some strongly worded language in the *Bell* decision, the Court of Criminal Appeals may be hoping to shame trial judges into giving up this practice.

A "distasteful" practice

Now that more than eight years have passed since the Supreme Court issued its decision in *Deck*, the *Bell* case provides a good reminder of best practices when it comes to the decision to shackle. Whether to restrain a defendant is supposed to be made on a case-by-case basis. In any given case, it may be justified by three basic categories of concerns: 1) ensuring physical safety and security in the courtroom; 2) preventing escape; and 3) maintaining courtroom decorum. But the justification still must be specifically tailored to the defendant on trial. Circumstances that are sufficiently particularized so as to justify shackling include a defendant's:

- history of possessing makeshift weapons in jail while awaiting trial,
- prior attack on a courtroom participant,[13]
- repeated courtroom outbursts; or
- history of escapes and expressed wish to die rather than be incarcerated.[14]

Examples would *not* include courtroom set-up or the number of available security personnel. These latter circumstances are not particular to the defendant on trial, and if they were considered sufficient, such circumstances would permit shackling of every defendant in every trial. While not unconstitutional (as long as the shackles stay hidden), shackling every defendant in every case still violates common law. But this may have been just what the judge in Bell's case was doing—routinely shackling defendants in custody as a matter of course. The Court of Criminal Appeals condemned such a procedure, calling it "a distasteful practice '[reminiscent] of an era when the accused was brought from prison to the courtroom in chains, unkempt and wearing (at best) prison attire, following which he was exposed to a jury in the worst possible light.'"[15] If the shame of carrying out ill-regarded and unseemly practices is not enough to discourage a trial judge from routinely shackling defendants, there is also the ever-present risk that a slip-up exposes the restraints for the jury to see, suddenly transforming what was ordinary error into constitutional error. While an inadvertent exposure could occur even where shackling is justified (because judges should make every effort to prevent the jury from seeing the defendant in shackles in every case), the constitutional violation will be greater where there was no justification for shackling the defendant in the first place.

What can a prosecutor do?

Judges do not always allow prosecutors input in the process of deciding whether a defendant should be shackled. But where they are allowed input at this early stage, prosecutors can often protect their cases by articulating on the record a particularized need for restraining the defendant on trial. Prosecutors may have access to criminal history information that judges do not, including a defendant's prior violent offenses or escape attempts. DA's investigators or victim assistance coordinators may learn from our witnesses that the defendant has been making retaliatory threats toward them. The jailers who house and transport inmates are another good source of information, as defendants' jail mail or jail phone calls sometimes document threats to courtroom participants. Also, some jails use classification systems to

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How to host a Tree of Angels in your community

The Tree of Angels is a meaningful Christmas program specifically held in memory and support of victims of violent crime. The Tree of Angels allows a community to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime.

This special event honors and supports surviving victims and victims' families by making it possible for loved ones to bring an angel ornament to place on a Christmas tree. The first program was implemented in December 1991 by People Against Violent Crime (PAVC) in Austin. Over the past 22 years the Tree of Angels has become a memorable tradition observed in many communities, providing comfort, hope, support, and healing.

A how-to guide is available electronically on how to establish a Tree of Angels ceremony in your community. The Tree of Angels is a registered trademark of PAVC and we are extremely sensitive to ensuring that the original meaning and purpose of the Tree of Angels continues and is not distorted in any way. For this reason, PAVC asks that if your city or county is interested in receiving a copy of the how-to guide, please complete a basic informational form on the website http://treeofangels.org/index.html. After the form is completed electronically and submitted back to PAVC, you will receive instructions on how to download the how-to guide. Once you receive confirmation and are provided with the instructions, you will be able to download the guide.

Please do not share it to avoid unauthorized use or distribution of the material. If you have any questions regarding the how-to guide, contact Carol Tompkins at PAVC at 512/837-7282, or e-mail her at carol@peopleagainstviolentcrime.org. ❊

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assess an inmate's individual risk, which can add to, though likely cannot supplant, the judge's own assessment of risk.

If the judge routinely shackles defendants despite entreaties from the local prosecutor's office to exercise more discretion, pay close attention to what the defense attorney says on the record about the restraints, and correct any inaccuracies. If the defense objects to the defendant having to wear a belly chain because it will be visible to jurors, see if the restraint can be worn underneath the defendant's clothing, and document for the record that the restraint is not visible. In case of a conflict, ask for a fact-finding from the judge that the restraints are not visible to the jury. If the defense complains that a few briefcases fail to completely hide the defendant's ankle restraints, securely attach a table skirt around both counsel tables. Then, like the prosecutor in *Bell*, ask the bailiff to verify that the restraints will not seen by the jury. And if the defense attorney keeps referring to the defendant's "leg irons" when they are actually entirely coated with polyurethane so they are silent, document that for the record, too.

As with a lot of trial errors, prosecutors alone cannot prevent shackling error from developing into an error of constitutional dimension. A lot of that will depend on the judge and fortune. Still, it is reassuring to know that a hard-won conviction is unlikely to be reversed for shackling error when there was only an off chance that a juror may have known about it. ❊

Endnotes

1 *Bell v. State*, No. PD-0087-12, 2013 WL 5221060 (Tex. Crim. App. Sept. 18, 2013).

2 *Bell v. State*, 356 S.W.3d 528 n.1 (Tex. App.—Texarkana 2011, pet. granted).

3 *Bell*, 2013 WL 5221060, at *1.

4 *Bell*, 356 S.W.3d 533 n.6.

5 *Bell*, 2013 WL 5221060, at *1.

6 544 U.S. 622 (2005).

7 *Id.* at 626-29.

8 356 S.W.3d at 537-39.

9 2013 WL 5221060, at *3.

10 2013 WL 5221060, at *2.

11 2013 WL 5221060, at *3.

12 *Id.*; Tex. R. App. P. 44.2(a) & (b).

13 *Culverhouse v. State*, 755 S.W.2d 856, 860 (Tex. Crim. App. 1988).

14 *Jacobs v. State*, 787 S.W.2d 397, 407 (Tex. Crim. App. 1990).

15 2013 WL 5221060, at *3 (quoting *United States v. Brantley*, 342 Fed.Appx. 762, 770 (3rd Cir. 2009)).

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Harris County goes to Washington (cont'd)

less than one hour, and during that time, the defendant answered almost all of the officers' questions.

But when the defendant was asked whether his shotgun would match the shells recovered at the scene of the murder, Salinas did not verbally respond. Instead, he looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up. Then he answered more of the officers' questions.

After his statement, the defendant was arrested on unrelated traffic warrants, but he was later released when prosecutors believed that they did not yet have enough evidence to charge him. By the time authorities obtained enough evidence, he had fled. The defendant was not located until 2007 when officers found him living under a false name.

Salinas's first trial for murder ended in a mistrial, so the State retried him in 2009. During this second trial, prosecutors used the defendant's reaction to the officer's question as evidence of his guilt. The jury found the defendant guilty, and he received a 20-year sentence. The defendant appealed his murder conviction, and that is where I and my attorneys in the appellate division stepped in.

The road to Washington

On appeal, the defendant challenged the admissibility and use of his pre-arrest silence as a violation of his Fifth Amendment rights. I am chief of the appellate division, and I recognized the novelty of the issue, so I assigned the appeal to one of our more experienced appellate prosecutors, Carol Cameron. Even though the issue was novel, none of us anticipated that we were beginning down a road toward the United States Supreme Court.

As expected, the Fourteenth Court of Appeals in Houston rejected the defendant's Fifth Amendment claim and affirmed his conviction.[1] Likewise, the Texas Court of Criminal Appeals rejected the defendant's Fifth Amendment claim and affirmed the defendant's conviction.[2] Both Texas courts recognized that there was a split of authority across the nation concerning the admissibility of a defendant's pre-arrest, pre-*Miranda* silence, but they felt the stronger weight of authority supported the holding that such a defendant's Fifth Amendment rights would not be violated because he was not under arrest at the time that he did not answer a question.

Neal Davis, a well-known Houston criminal defense attorney, had represented the defendant throughout the appellate process in Texas. But shortly after the Court of Criminal Appeals had issued its ruling, Jeff Fisher contacted us, stated that he was now representing the defendant, and informed us that he would be filing a petition for a writ of certiorari. Jeff Fisher is a well-known litigator before the United States Supreme Court, and he is co-director of the Supreme Court Litigation Clinic at Stanford University. Mr. Fisher has argued before the Supreme Court more than 20 times, and he has proven to be very successful throughout his career before the high court. He predicted to us that the court would grant certiorari in the case. Even so, we did not at this stage believe the Supreme Court was poised to take the case—it is still uncommonly rare for the court to grant a petition for a writ of certiorari. We receive numerous such petitions each year, and they have always been denied, even when the court had requested the State file a response.

It was clear that this case was going to be a little different when we received a request from the National Association of Criminal Defense Lawyers to file an amicus brief in support of the defendant's petition for a writ of certiorari. But we still did not believe the court would grant the petition. The court had refused to grant similar petitions in other cases in which the same or similar Fifth Amendment claims had been raised. We did not feel the issue of the admissibility of a defendant's silence had been sufficiently raised in the case because our defendant had not really been silent. He had merely failed to answer only one question in a series of other questions that he freely answered. And the defendant certainly had not invoked his right to remain silent in any way.

On October 11, 2012, when the Supreme Court requested that we file a response to the defendant's petition for a writ of certiorari, that was the first indication that the court was taking a greater interest in the

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case. Nevertheless, in December 2012, when Carol Cameron filed our brief in opposition to the defendant's petition, we still believed there was a good chance the court would deny the defendant's petition.

All of that changed when, on January 11, 2013, the Supreme Court granted the defendant's petition. It was clear at that time that the court would order briefing from the parties and the case would be set for oral argument before the court in a just a few short months. We had contacted Carmen Mitchell, a former Harris County appellate prosecutor who is now Deputy Chief of the Appellate Division for the United States Attorney's Office in the Southern District of Texas. She and her colleagues suggested that we contact the Office of the Solicitor General with the Texas Attorney General's Office because those attorneys have significant experience before the United States Supreme Court. That proved to be a very wise suggestion because two attorneys with that office, Andy Oldham and Adam Aston, offered their assistance, which proved to be invaluable.

But our office was still faced with a number of choices—the most pressing of which was which attorneys would represent the State of Texas before the Supreme Court and which attorney would argue the case? Briefing a case before the Supreme Court is far too large a task for only one attorney to handle, and whoever argued the case would be arguing against Jeff Fisher, one of the more experienced Supreme Court litigators. Within a few days, the late Mike Anderson, the Harris County District Attorney at the time, made the decision that I should handle the argument and Carol Cameron would write the brief. We brought in Eric Kugler and David Newell, two other attorneys in the appellate division, to help write the brief, and the office let us bring in Andrea Kelley, an intern, to assist with the legal research for the case.[3]

Though I'd never argued before the high court before, it has long been the policy of the Harris County District Attorney's Office to represent the State of Texas on direct appeal before the United States Supreme Court. Because that is the case in our county, I and several other attorneys in the appellate division have been licensed to practice before the United States Supreme Court. Getting licensed to practice before the court is a relatively simple process: paying a relatively small fee and getting sponsors who are already licensed.

I was nervous and excited about the prospect of presenting oral argument before the United States Supreme Court. And I was very proud that Mike had the confidence in me and our division and proud that we were going to have the opportunity to represent Texas before the highest court in the land. I am not sure that, at that particular time, I was yet overwhelmed by the task in front of us. But I soon would be. For the next three months or more, these four attorneys would be working on nothing more than the case of *Genovevo Salinas v. The State of Texas*, while the other 11 attorneys in the appellate division handled the rest of the heavy workload.

Scott Durfee, one of our most knowledgeable attorneys, suggested that we reach out to Erin Busby, an attorney who had clerked at the Supreme Court and who also was a member of the faculty for the Supreme Court Clinic at the University of Texas. I also contacted David Gunn, a friend and one of the best civil appellate attorneys in Texas, and he directed me to Josh Blackman, a professor at South Texas College of Law and President of the Harlan Institute, and Will Consovoy, an experienced Washington D.C., litigator and co-director of the Supreme Court Clinic at George Mason University School of Law. At Erin Busby's and David Gunn's suggestion, I also contacted David Frederick, who is also on the faculty of the Supreme Court Clinic at the University of Texas and who has literally written the book on oral advocacy before the United States Supreme Court.[4] All of these individuals proved to be absolutely crucial in helping prepare our brief before the Supreme Court and in helping me prepare for the oral argument.

The petitioner's brief was filed on February 20, 2013, and our brief was filed on March 22, less than a month before the oral argument on April 17. Throughout the past few weeks, I had been reading and re-reading Fifth Amendment caselaw and meeting with our attorneys on the best strategies to take in the brief and during oral argument. One of the key factors in helping a party present a case to the United States Supreme Court is the request for amicus briefs. Amicus briefs focus the court on particular aspects of a party's argument that the party may not be able to emphasize as well in its own brief. The petitioner certainly had his amicus briefs in support of his position: from the American Civil Liberties Union, American Board

of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, Cato Institute, and Rutherford Institute. But we had several amicus briefs in support of our position as well: the Illinois Attorney General on behalf of several other states across the nation that joined our position, the Criminal Justice Legal Foundation, and Wayne County, Michigan.[5]

Perhaps the most important amicus brief in support of our position was that filed by the United States, Solicitor General, a part of the Department of Justice. Filing that brief meant that the United States would be arguing with us in support of our position. Believe me, if you are presenting oral argument before the United States Supreme Court and the United States wants to argue in support of your position, your answer to that assistance is a resounding "Yes." I kept in close contact with Jenny Notz with the Illinois Attorney General's Office and Ginger Anders, Assistant to the Solicitor General with the Department of Justice. Ms. Anders herself had already argued several times before the Supreme Court, and her assistance proved to be invaluable. After conferring with these attorneys and amongst ourselves, we had decided upon the best approach to take during the oral argument: Absent an invocation of his Fifth Amendment privilege against self-incrimination, a defendant's failure to answer a question during an otherwise voluntary, non-custodial interview with the police was not protected by the Fifth Amendment. Such a failure to answer should be admissible against him, especially when, as in this case, the defendant accompanied his failure to answer with non-verbal conduct revealing his guilty conscience in reaction to the officer's questioning. A jury should have the right to hear such evidence without violating the defendant's constitutional rights.

Preparing with moots

The most important factor in getting ready for an argument before the Supreme Court is the moot court arguments. Moots are practice arguments in which several attorneys grill you at length about the facts of the case and the law. Supreme Court moots are not easy. Professor Blackman helped get the first moot together just a couple of weeks before the scheduled argument on April 17, and that first moot was attended by Mr. Oldham, Mr. Aston, Professor Busby, and other attorneys, many of whom had themselves argued before or worked for the Supreme Court. This first moot was long, about an hour and a half. In their questioning, they pushed me to the limits of our argument. It was some of the toughest questioning I have ever faced—but it was extremely valuable. Many of my attorneys took notes at this moot, and we went over those notes and a videotaped recording of the moot over the next few days. A few days later, the second moot was held at the offices of the United States Attorney in Houston. Carmen Mitchell helped put this moot together. The questioning was more relaxed at this moot, but it was still quite difficult.

My next moots were in the Washington D.C., area a week before the scheduled argument. One was before Will Consovoy and several other attorneys at George Mason University, and the second moot was on the last day of the week before the National Association of Attorneys General. As difficult as my preparation had been over the past few months, and as difficult as the previous moots had been, this last moot was by far the toughest. These attorneys at NAAG were experienced Supreme Court litigators, and each of them clearly had great difficulty with our argument. They found the petitioner's argument to be much easier to apply (just do not use a defendant's silence against him), and they urged that, even though we had a lot of Supreme Court law on our side, the justices would want to know why they should not adopt the petitioner's argument, which was much easier to apply and much easier to understand.

By this time, my confidence had been drained—though I was well-prepared. And I met with Carol Cameron, Eric Kugler, and David Newell that weekend to discuss our final strategies for the argument. We strongly believed in our argument and the best way to approach the case. But the difficult questioning in the moots had left me doubting whether the justices would agree with our position, and I was exhausted. There were so many questions the justices could ask me that would take me away from our argument. On Monday morning, I watched two oral arguments at the Supreme Court to get used to the venue and the questioning. The questioning at those arguments was lengthy and strenuous, as it usually is. On the following day and a half, we all met again, and I talked with Ginger Anders about the moots in which

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she had participated to get ready for her portion of the argument. After Jeff Fisher argued for the petitioner, I would argue for 20 minutes, and Ms. Anders would argue for 10 minutes.

At the SCOTUS

Surprisingly, the courtroom at the United States Supreme Court is smaller than you might imagine. It is awe-inspiring, but much smaller, and much, much more crowded than any other appellate courtroom. The tables where the attorneys sit are just a couple of feet from where the justices sit, and the podium from which an attorney argues is directly in between those two tables. If both persons were so inclined, the attorney arguing at the podium could lean forward and shake Chief Justice Roberts' hand (assuming that he also leaned forward a little). When you argue at the podium, you are essentially at eye level with the other justices. The seating by the attorney/spectators and reserved seating is all around you, so that when an attorney stands up to argue before the court, he is not far from anyone else in the courtroom. Rather, he is standing up in a crowd of people to present his argument.

On the morning of the argument, I was more nervous than I have ever been before an oral argument (and I have argued a couple of hundred times or so). An attorney arguing before the court can walk past all of the lines outside the Supreme Court building and go directly to the waiting room for the attorneys. Mike Anderson and I walked into the building and into that room together, and it was clear very quickly that, even as experienced as we were in Texas, we were rookies among several veterans. Jeff Fisher had an entourage with him, and it was clear that everyone knew who he was. After we entered the courtroom for the oral arguments, we first listened to an argument in which the United States was involved. I watched just a few feet away from me as Michael Dreeben, the Deputy Solicitor General for the United States, argued a very, very complex case, both factually and legally. He was pummeled with questions from the justices, and he answered all of them extremely well—and he brought no notes to the podium.

After the first case had been presented, it was our turn. Jeff Fisher argued first, and the justices pummeled him with questions as well. He stuck to his position throughout, and he argued very well. His position was simple: The Fifth Amendment prohibited the prosecution from using a defendant's silence against him at his criminal trial, even if that silence occurred during a non-custodial interview with the police. When the officer asked the defendant an incriminating question, according to Mr. Fisher, the defendant was faced with an impossible choice: incriminate himself by talking or incriminate himself by remaining silent. But Mr. Fisher's argument was not an easy argument. He was repeatedly interrupted with very difficult questions.

And my portion of the argument was equally difficult, if not more so. After I got up to present our argument, I brought only a few notes to the podium, but I would not really need them. I frankly never had much time to refer to them. After a few introductory words, Justice Sotomayor relentlessly questioned me, and I spent the next 20 minutes answering questions from almost all of the justices, but most from the two justices at either far end of the bench—Justices Sotomayor and Kagan. I was interrupted so much and asked so many questions, that I did not feel like I had said much of anything. But the moots had prepared me for that, and I was not asked any question I was not expecting. We had feared the justices might question me about several collateral issues that would take us away from our argument, but they never did. It was clear they were concerned only with the Fifth Amendment issue that was before them.

After the argument was over—after Ginger Anders had presented her argument, and after Jeff Fisher had concluded with a short rebuttal—I felt horrible, like I had not said anything. Everyone said that I had done a wonderful job, and they were clearly in a mood to celebrate. It was not until I got a chance to read and listen to the argument that I felt better about the job that I had done.[6] I felt even better several weeks later on June 17, when the United States Supreme Court handed down its decision.[7] In an opinion written by Justice Alito, the court had done precisely what we had hoped that they would: It held that, to prevent the prosecution from using his pre-arrest silence against him, a defendant must do more than merely remain silent. He must invoke his Fifth Amendment right against compelled self-incrimination. In this case, the defendant had not done that, so we were free to use his silence against him.

This has been a tremendous success for the Harris County District Attorney's Office, the State of Texas, and for prosecutors and law enforcement in general. It has been a rewarding experience for me and my attorneys. I cannot tell you how proud I am of the work they have done. Our briefing was excellent, and the various lawyers and organizations did a wonderful job in helping me get prepared for the argument. Our office, through Mike Anderson and our first assistant, Belinda Hill, provided wonderful support to us. It is now my firm belief that *any* well-prepared, well-supported, experienced appellate litigator can present a case before the United States Supreme Court, even if that litigator is a local prosecutor. I am very glad that I got a chance to do this. Lisa McMinn, the State Prosecuting Attorney, recently asked me if I would do it again. "In a second," I replied. ❇

Endnotes

1 *Salinas v. State*, 368 S.W.3d 550 (Tex. App.—Houston [14th Dist.] 2011, pet. granted).

2 *Salinas v. State*, 369 S.W.3d 176 (Tex. Crim. App. 2012).

3 Andrea Kelley is now a prosecutor with the Galveston County Criminal District Attorney's Office.

4 Frederick, David, C., Supreme Court and Appellate Advocacy (Thomson West 2002).

5 You can find all of these amicus briefs and more on SCOTUS Blog, the best resource for litigation at the Supreme Court, at www.scotusblog.com/case-files/cases/salinas-v-texas.

6 You can read and listen to the argument as well at www.oyez.org/cases/2010-2019/2012/2012_12_246. Oyez.org is a project of the Chicago-Kent College of Law, and it is an excellent source for arguments before the Supreme Court.

7 *Salinas v. Texas*, 133 S.Ct. 2174 (2013).

A beginner's guide to involuntary commitments

A primer on both criminal and civil commitments for patients or defendants with mental health issues

By Bradford Crockard
Assistant District Attorney in Harris County

A couple of months ago, a 911 dispatcher in Houston received a call from an employee of an insurance company who said that, while on the phone with a customer, whom we'll call John (not his real name) she received some alarming information. John was despondent and planned to run out onto Interstate-10 to kill himself. The insurance-company employee was worried that the man was suicidal and wanted someone to check on him.

The dispatcher sent Houston Police Department (HPD) officers to the scene, which was a dilapidated residence just outside downtown Houston. There, patrol officers encountered a man lying on a mattress surrounded by food wrappers, trash, and bottles of King Cobra malt liquor. When asked by the responding officer if he had told someone that he planned to kill himself, John admitted that he had. He then became irate, accusing the officers of trying to arrest him for simply asking for help. He began yelling at one officer for keeping her hand near her holstered weapon.

The responding officers decided to contact HPD's Crisis Intervention Response Team, a group of specially trained officers who ride with clinicians from the local mental health authority. When the closest available unit arrived at the scene, the CIRT officer began talking to John casually, even joking with him. Eventually, he calmed down and began to discuss his situation reasonably. She asked about his mental health history; he had recently been diagnosed with bipolar disorder and prescribed Depakote. She asked if he had been taking the meds as prescribed, and he replied that he had not. He said that he did not have a ride to get to a clinic and that he received only $700 in Social Security disability benefits per month. He paid $250 a month to stay in the room he called home and the rest he spent on food and clothes. She asked about the King Cobras, and he said that he drank about two a day, but then admitted he was drinking them pretty much all day and night. When she asked why, he said that he was depressed that he had no friends or family and that he could not sleep; he had nightmares that woke him up every night.

She asked about his criminal history, and John said that he was on parole from an aggravated assault that he had committed 10 years ear-

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lier (which she and the officers already knew before approaching the house). She asked if he wanted help and he said yes—he was suicidal. She asked if he would go with her to the hospital, and he agreed. After helping him up, the CIRT officer put him in handcuffs. He was then placed in the back of the patrol car and taken to the nearest inpatient facility, the Neuro-Psychiatric Center of Harris County. Upon arrival, the officer prepared a Peace Officer's Application for Detention. Under oath, she stated that she had reason to believe that John was mentally ill and posed a substantial risk of harm to himself or others; specifically, the officer stated that the patient had been threatening to run out into traffic. The officer affirmed that immediate restraint was necessary to prevent an imminent risk. John was then admitted to the Neuro-Psychiatric Center pending forthcoming commitment proceedings.

The above situation happens on a daily basis throughout Texas and begins the process of involuntary commitment. Of course, the situation plays out differently in each county. Most will not have inpatient psychiatric hospitals or crisis intervention teams. For example, if the above had occurred in Kleberg County, the patient would be transported by the responding officer to Christus Spohn, the only hospital in Kingsville. If a social worker believed it was necessary, he would be taken by a peace officer to the nearest inpatient facility, Rio Grande State Hospital in Harlingen, or even San Antonio State Hospital, a three-hour drive from Kingsville.

Types of hearings

This article will provide an introduction to the primary types of hearings a prosecutor may encounter under the Mental Health Code. It will then discuss that code as it pertains to commitments in the Code of Criminal Procedure.

The Mental Health Code is contained in Title 7, Subtitle C of the Health & Safety Code. Of particular relevance to a county or district attorney handling involuntary commitment hearings is Subchapter 574, which relates to court-ordered mental health services.

Probable cause hearing

Within 72 hours of being detained, a patient is entitled to a probable cause hearing, governed by §574.025 of the Health & Safety Code. The State's evidence at this stage will be one certificate of medical examination as well as a supporting affidavit, executed by the affiant who swore out the Application for Detention (the CIRT officer in the above situation).[1] The affiant need not be a peace officer; any adult may apply for emergency detention.[2]

A medical certificate is a sworn statement executed by a physician. Medical certificates are crucial to the State in any commitment hearing. At the probable cause hearing, the State may prove its case based solely on the medical certificate if there is no objection.[3] The criteria for medical certificates are set forth in §§574.009 and 574.011. A medical certificate is executed by a physician (not a psychologist) who has examined the patient within the previous 30 days. Fortunately, most inpatient psychiatric facilities are familiar with the form and function of medical certificates. Basically, the physician will swear to whether, as a result of mental illness, the patient is likely to cause serious harm to self; is likely to cause serious harm to others; or is suffering severe distress, experiencing substantial deterioration, and is not able to make a rational and informed decision as to whether to submit to treatment.[4] At the probable cause hearing, only the first two criteria (harm to self or others) are relevant.[5]

The court must appoint an attorney *ad litem* to represent the patient.[6] A magistrate or justice of the peace will usually preside over the hearing, which is not on the record. Often, the patient will testify on his own behalf; friends or family members may also testify. At the hearing, the magistrate may sign an order for continued detention if he finds that the patient presents a substantial risk of harm to himself or others to the extent that he cannot remain at liberty. Otherwise, if the magistrate does not make these findings, the patient will be released, pending the final hearing. The text of the court's order is laid out, word for word, in §574.026.

Final hearing

Under §574.005, the final hearing must be set within 14 days of the date of the application. The date for the hearing will already be set at the time of the probable cause hearing. The court may grant continuances, but the hearing must be held within 30 days of the filing of the application. The hearing is generally subject to the Texas Rules of Evidence. The patient is entitled to be present and

to a jury trial, but both can be waived in writing by the patient or his attorney. The hearing is on the record. The burden is on the State to prove all elements by clear and convincing evidence. The hearing must be open to the public, unless the defense attorney requests (and the judge finds good cause for) a closed hearing. Unlike the probable cause hearing, two medical certificates are required, each executed within 30 days of the hearing.

The prosecutor's goal at this stage is an order for temporary mental health services under §574.034. To order this inpatient commitment, the judge must find by clear and convincing evidence that the patient is mentally ill and as a result, is likely to cause serious harm to self; is likely to cause serious harm to others; or, unlike the standard in probable cause hearings, fits the third criteria, commonly referred to as the "deterioration standard." This third criteria applies to a patient who is experiencing severe and abnormal distress, experiencing substantial deterioration of his ability to function independently, and is unable to make a rational and informed decision as to whether or not to submit to treatment. This order expires after 90 days and may not specify a shorter period.[7]

These hearings normally proceed as follows: The judge swears in the patient and advises him of the basic rules, such as no interrupting. The State's attorney will introduce the medical certificates, as well as whatever other relevant documentation is in the file. (The judge will already have these documents, so there is no need to formally introduce them into evidence.) The State will put on a doctor, ideally the treating physician, to establish the elements mentioned above. The *ad litem* will then cross the witness. Normally, the questions will pertain to concerns such as side effects of medication and religious objections to treatment. The *ad litem* may attempt to impeach the expert by asking questions such as: Did you talk to the patient's previous primary care doctor? How many times have you seen this patient? What is the patient's prognosis without treatment? Could this behavior be attributed to something other than mental illness? Does this behavior cause a substantial risk of harm?

The State will then call a fact witness. This witness could be a social worker at the facility who is familiar with the patient or the affiant who originally swore out the order for emergency detention. The prosecutor should be cautious when questioning the affiant, as it may be a friend or family member of the patient and may be the patient's primary means of support upon discharge.

The *ad litem* will usually call the patient, who will want to testify. He will usually keep the direct examination relatively short, especially if the patient is symptomatic. On cross-examination, the State's attorney will want to prove issues that support commitment rather than discharge. For example, the patient does not have a job, a place to live, or family members with whom to live.

Forced-medication hearings

Another type of hearing a prosecutor may encounter is on an order to authorize psychoactive medication. These are governed by Subchapter G of the Mental Health Code, specifically §574.106, and possibly Chapter 46B of the Code of Criminal Procedure.

These hearings are triggered when a physician files an application in a probate court to authorize the administration of psychoactive medications. According to §574.104, a treating physician may, on behalf of the State, file an application when he believes that the patient lacks the capacity to make a decision regarding medication, which is the proper course of treatment, while the patient is under an order for mental health services. A physician may also file an application when the patient is refusing to take the meds voluntarily, "verbally or by other indication." The statute goes on to mandate that the physician must specify which medications he wants compelled, as well as the patient's diagnosis. He must then propose a method for administering the meds and, "if the method is not customary, an explanation justifying the departure from customary methods."

Finally, the statute holds that the application for forced meds is separate from the application for court-ordered services, but that both hearings may be held at the same time. If not, the hearing must be held within 30 days of the filing of the application. One continuance may be granted on the motion of either party, but any more may be granted

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only with the agreement of the parties.

To proceed to the hearing, the patient must be under an order to receive inpatient mental health services or be in custody awaiting trial in a criminal proceeding after being ordered to receive inpatient mental health services in the previous six months.[8] For example, this would apply to a defendant who was committed for competency restoration under Art. 46B.073 of the Code of Criminal Procedure.

The doctor should always testify at the forced-meds hearing. Practically speaking, these hearings should be very brief, with the attorney only satisfying the elements. In addition to the normal battery of questions, a recent case has added the necessity for an additional question. *State for the Best Interests of KM* requires the State's attorney to ask: "Why do you believe that the patient lacked the capacity to make a rational decision regarding the administration of psychoactive medication?"[9] After the hearing, the court may order forced medications if the State proves, by clear and convincing evidence, that the patient lacks the capacity to make a decision and that it is in the patient's best interests.[10]

The forced-meds issue may also arise for criminal prosecutors. Article 46B.086 of the Code of Criminal Procedure applies to defendants who have been committed for competency restoration (those determined to be incompetent, are in a correctional facility awaiting transfer to or in an inpatient facility, or are back in custody following competency restoration treatment). The criminal court will be involved in forced meds only if the facility has tried to get an order through Health and Safety Code §574.106 but the petition has been denied by a probate court, usually because more than six months have passed since the signing of the most recent commitment order. The facility is then to notify the criminal court immediately. The court must, within one business day, notify the prosecutor and defense counsel. The State then has 15 days to file a motion to compel medication. Once notice of the motion has been provided, the State has 10 days to conduct the hearing and persuade the judge to sign the order.

The State must have the testimony of two physicians, one of whom is responsible for prescribing the medication. Only one physician is required to testify, which suggests that medical certificates are necessary. The court must find by clear and convincing evidence that the meds are medically appropriate and in the patient's best interest and that the harmful side effects do not outweigh the benefit. The State must prove that it has a clear and compelling interest in maintaining the defendant's competency, that there are no less-invasive means, and that the meds will not unduly prejudice the defendant's rights or use of defensive trial theories.[11]

Hearings on an order for extended mental health services

Finally, a State's attorney may ask a court to issue an order for extended mental health services.[12] Unlike orders for temporary mental health services, these orders expire after one year. The hearing must include live testimony, unlike temporary commitments, which can be ordered solely based on the medical certificates. More importantly, this commitment applies only to a patient who has received court-ordered inpatient services for at least 30 days in the previous 12 months, either under the Mental Health Code or Chapter 46B of the Code of Criminal Procedure, which governs incompetent defendants. Practically speaking, this type of order is rare in probate courts, as most patients will be discharged within 60 days of commitment. However, the statute becomes relevant as it applies to hearings on criminal commitments.[13]

Criminal commitments

In the Code of Criminal Procedure, the procedures for mental health commitments are laid out in Chapters 46B, Incompetency, and 46C, Insanity.

The first kind of 46B commitment is the Art. 46B.073 commitment for restoration of competency. Normally, these hearings will be agreed upon by each party and a formal hearing will not be necessary.[14] However, if one party is contesting competency and the other disagrees, there will be a court trial, unless one party requests a jury under Art. 46B.051. This trial is similar to a trial on the merits, with only the fact-finder determining whether the defendant is competent to stand trial. The burden is on the party opposing competency to prove by a preponderance of the evidence that the defendant is not competent to stand trial.[15]

Similar to the initial competency proceedings, the issue of sanity can be resolved in front of the judge or a jury.[16] However, insanity is an affirmative defense that is determined during the trial of the charged offense itself, rather than as a pre-trial proceeding like competency.[17] Therefore, unlike initial competency determinations, the burden shifts to the defense to prove insanity by a preponderance of the evidence, once the State has proven each element of its case in chief beyond a reasonable doubt.[18]

After the initial commitment under Chapter 46B or 46C, the Code of Criminal Procedure refers to the Health & Safety Code to govern hearings on extended commitments. For guidelines governing the hearings' forms, the prosecutor should refer back to H&S §574.031. Because these hearings will be for extended commitments, the heightened requirements of H&S §574.035 should be observed. Also, hearings under CCP Art. 46C.256 for 180-day recommitment on Not Guilty by Reason of Insanity (NGRI) cases consider only the dangerousness, not the deterioration, standard.[19]

The final NGRI inpatient commitment order is the one-year order governed by CCP Art. 46C.261. This statute does not reference the Health & Safety Code. This hearing requires only one medical certificate and allows the court to make its finding solely on the certificate as well as a detailed request for renewal, which is generally provided in advance by the state hospital to which the patient has been committed. The burden is on the State to establish by clear and convincing evidence that continued mandatory supervision and treatment are appropriate. These orders expire after one year.[20] A patient may not be committed, nor may he be ordered to receive outpatient treatment, for a cumulative period that exceeds the maximum term provided by law for the offense for which the acquitted person was tried.[21]

Conclusion

The prosecutor who handles involuntarily commitments should prepare the same way as for any other contested hearing: Observe one if possible. Make a checklist to ensure all elements are met. Meet with all witnesses beforehand.

Ideally, the patient at the beginning of this article will eventually be treated in the community as a productive citizen. Patients committed involuntarily through a probate court will not go to jail or prison; the most restrictive setting they will encounter is a state hospital, which is designed to be a therapeutic community. The Mental Health Code is designed to place these patients in the least restrictive setting, with an eye toward protecting the community as well as themselves. ❇

Endnotes

1 Tex. Health & Safety Code §573.002.

2 Tex. Health & Safety Code §573.011.

3 Tex. Health & Safety Code §574.025.

4 Tex. Health & Safety Code §574.011.

5 Tex. Health & Safety Code §574.025.

6 Tex. Health & Safety Code §574.003.

7 Tex. Health & Safety Code §§574.031 and 574.034.

8 Tex. Health & Safety Code §574.104 and .106.

9 No. 12-12-00267-CV, 2013 WL 3377407 (Tex.App.—Tyler, July 3, 2103, no pet.h.).

10 Tex. Health & Safety Code §574.106.

11 Tex. Code Crim. Proc. art. 46B.086.

12 Tex. Health & Safety Code §574.035.

13 Tex. Health & Safety Code §574.035.

14 Tex. Code Crim. Proc. art. 46B.054.

15 Tex. Code Crim. Proc. art. 46B.003.

16 Tex. Code Crim. Proc. arts. 46C.151, 46C.152.

17 Tex. Pen. Code §8.01.

18 Tex. Code Crim. Proc. art. 46C.153.

19 Tex. Code Crim. Proc. art. 46C.256.

20 Tex. Code Crim. Proc. art. 46C.261.

21 Tex. Code Crim. Proc. art. 46C.002.

An iPad for every agency

A DA's office bought 30 iPads for local law enforcement to make getting search warrants for blood easier on peace officers and judges—and everyone's raving about it. Here's how the program works.

By David Smith
Assistant Criminal District Attorney in Brazoria County

It was a beautiful Friday in Brazoria County when I checked TDCAA's weekly caselaw update, and there it was: a case out of Missouri that would affect DWI cases everywhere.

Missouri vs. McNeely[1] has been the subject of discussion in many prosecutor's offices, online chat boards, and as expected, defense attorney motions to suppress. (This journal has covered it too; see the May–June and July–August 2013 issues to read what W. Clay Abbott, TDCAA's DWI Resource Prosecutor, has to say about the case.) The gravamen of *McNeely* is that absent exigent circumstances, a blood draw of a DWI suspect should be done pursuant to either consent or a search warrant. The Supreme Court further concluded inevitable dissipation of alcohol in blood alone does not constitute an automatic (or *per se*) exigency to support a warrantless blood test during a DWI investigation. The court didn't address whether our state's mandatory blood draw statutes for felony driving while intoxicated and car crash cases were constitutional or not. (But see the recent 14th Court of Appeals [Houston] decision in *Douds v. State*, which is summarized in TDCAA's weekly case summaries from the week of October 18, or read the opinion at www.tdcaa.com/dwi/index.html.)

So how does a prosecutor, or officer for that matter, resolve the mandatory blood draw requirement in Transportation Code §724.012(b) in light of *McNeely*?

After *McNeely* was handed down, I began receiving phone calls from heads of our local law enforcement agencies regarding how felony driving while intoxicated cases (and the blood draws that once went along with them) should be handled. I went to our elected Criminal District Attorney, Jeri Yenne, to discuss the issue. We considered the most nightmarish scenario: a collision where a victim was injured or killed; where the suspect performed no standardized field sobriety tests due to injuries; where the hospital either did not take or did not preserve a blood sample; and where the mandatory blood sample was suppressed. What evidence would be left to see that justice is done and the defendant held accountable? Would a potential felony murderer be set free from lack of evidence?

Yes, this is a worst-case scenario, but we as prosecutors know that these things do happen. With the community's safety of paramount importance, it was not worth the risk that such a scenario might happen—not if we could help it. We did not want even the slightest chance that a judge would rule pre-trial that a blood sample should be suppressed due to *McNeely*, so we finally decided that law enforcement must apply for a search warrant for a blood sample from every person suspected of felony DWI and in collision cases in Brazoria County (unless the suspect gave consent to draw his blood).

Avoiding the nightmare

Now that the decision was made, we had to coordinate how to effectively and efficiently accomplish this mandate (no matter what course our office took, an increased and streamlined ability to get search warrants in DWI investigations was central to the response). We are extremely fortunate in our county that we have judges willing and able to review a search warrant application for a probable cause determination no matter the time of day. We discussed our intentions with the judges and gave them a heads-up that they would see an increase of search warrant applications due to our new felony-DWI policy.

We then had to recommend to the police how to handle the increased number of warrant requests they would be doing for

DWIs. Pre-*McNeely*, the standard after-hours procedure was for investigating officers to draft a search warrant and call the closest judge to meet at the hospital for review of the warrant. Because most of our judges live near the county seat in Angleton, they were frequently the ones called. We wanted to put a system in place where judges did not have to travel to the hospital for each warrant request, as well as to spread the on-call duties among all the county's judges. Additionally, we wanted to reduce the time the officer had to wait for dispatch to find a judge—all while the intoxicating substance was metabolizing and dissipating in a suspect's system.

Presiding Judge Pat Sebesta encouraged using an electronic means to communicate with the officer and for transmission of the search warrant back and forth. Fax machines have been in existence for decades, and *Clay v. State*,[2] decided in January 2013, clearly said that an officer need not swear to the warrant in the magistrate's physical presence. The warrant in *Clay* was faxed between the judge and officer, and there was testimony at the trial court level that the judge and officer recognized each other's voices over the phone, which probably helped save the case for the State. In our large county, made up of more than 20 police agencies, it isn't feasible that every judge and police officer would know one another. Judges and police needed a means to *see* one another so the judge could swear the officer to an approved warrant. They also needed a means to transmit the warrant back and forth without being tied down to a particular location.

The iPad solution

We knew we wanted the judge and officer to see one another when the officer was being sworn, but we also needed a method for the warrant to be transmitted without a person having to be near a computer or fax machine. We looked at using signature pads, which could be connected to a computer so that all parties could sign by electronic means, but they proved untenable with the large number of police agencies, all with their own IT rules and non-standardized computer systems. We would have had to check with 23 different agencies to confirm that such a program was doable, as well as confirm that each department's computers were updated enough to handle the technology of web cameras and signature pads, which required two open USB ports in each computer. And we still had the problem of officers and judges being tied down to their respective computers. Signature pads were not the answer.

I wanted judges to be able to swear an officer and sign a warrant from anywhere—anywhere they would normally be at the close of regular business. They should be able to take their children or grandchildren to the park or a baseball game without concern of what they would do if they were called upon to review a warrant.

I have been using my own iPad at work since March 2012. I conduct voir dire from it, carry my caselaw on the Westlaw Next app, and have all of my calendaring on it as well. I have found it to be a very reliable, proven prosecutorial tool. While we considered Skype (an Internet-based video-conference application) for getting these warrants, I noticed that it tends to be temperamental, that the video feed can be choppy at times. On the other hand, Apple's FaceTime application on the iPad—where people can talk to each other "face to face" by using the tablet's built-in camera—was generally crystal-clear and reliable. Apple software is intuitive; people who have never touched an iPad can pick one up and use it. And Apple's platform is closed, meaning that Apple screens every app and doesn't allow for modification to the operating system—it takes a very skilled user to "jailbreak"[3] it. With the iPad, we would have significant uptime (the time when the iPad is operational and not needing to be updated or taken out of service for repair) and no "blue screens of death"—which every Windows user has at some point encountered on his own computer. We decided to buy an iPad for every law enforcement agency in the jurisdiction.

DA Investigator Gary Epps helped me find an incredible volume deal of iPad 2s at Microcenter in Houston. Microcenter offered us the best price for our purchase of 30 brand-new iPads at $349 each, a savings of $50 an iPad compared to retail rates. The AppleCare[4] warranties for each iPad were $99 each. We also bought Griffin Survivor cases for $38 each, while the retail price of these cases is $99. The iPads and accessories were purchased with forfeiture funds. Every single police agency that handles the investigation of DWIs in our county received at least one iPad. Some agencies, such as the sheriff's office and DPS, have

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multiple zones around the county and therefore needed more than one. Total cost—$12,172. This number reflects an extreme value to law enforcement, and more importantly, the safety of the public. The community deserves to have dangerous intoxicated drivers held accountable for their actions. The iPad program helps to limit the chances a suspect's blood is suppressed and decreases the time between arrest and the point where a judge can review a search warrant. While this is an investment, there is no pricetag that can be placed on the increased safety of the community the iPad program provides.

The judges' iPads had to be purchased by the county, as current state law prohibits the DA from purchasing such items for judges. Only two iPads were needed for the judges. The cost to the county was approximately $700, and the monthly cellular fee is $60 total. The judges' iPads are the cellular/WiFi models, meaning that they operate both through WiFi as well as on cellular networks, a more expensive option than the WiFi-only versions. (The county pays the monthly service fee for the judges' iPads to have cellular connectivity, while the police iPads we purchased are WiFi-only models and require no monthly fee.) The on-call judge and backup on-call judges' iPads would allow each respective judge to be anywhere and to be reachable for the review of a warrant, whereas the officers must be in an area with available WiFi.

Every week, there is always an on-call and backup on-call judge available for this program (hence the two judge iPads). At the end of the week, the next on-call and backup on-call judge get the on call bag consisting of the respective iPad and on call phone. The judges have worked out their on-call schedules for the next two years, and we are appreciative they wanted to have the backup redundancy in place with two on-call judges during non-business hours. If neither judge is available, the on-call ADA will find the closest judge to the officer, and the warrant application will take place the old-fashioned way. Officers have also appreciated the on-call judge system because they don't have to wait for dispatch to locate and contact an available judge.

iPad apps and software

The iPad was by far the most appealing option, and not just because of its ease of use, uptime, and FaceTime application. The iPad allows the officer to write the warrant anywhere, needing to connect to WiFi only for FaceTime conferencing and transmittal of the warrant. WiFi access is available at nearly every police department and at area hospitals. Judges could be at a restaurant, for example, and still be available to review a warrant without having to hurry home to a fax machine. Moreover, judges are no longer required to leave their homes in the middle of the night to drive to the hospital.

From a blood search warrant we had been using in Microsoft Word, I created an editable PDF using Adobe Acrobat Professional XI. Such a document includes boxes for various parts of the warrant that an officer can check, and the defendant's name and other identifiers need to be input only once—the document will then automatically fill in the proper fields where this information is required. The search warrant PDF was uploaded to our county website and is accessible to anyone who knows the web address. The blank search warrant can then be saved to each agency's iPad so it's ready and available roadside.

The next step was to select the apps that would be used for this program. FaceTime, which comes free with the iPad, was our choice for the judge swearing the officer to an approved search warrant. I chose the Adobe Reader[5] app for filling in the warrant and signing it (using one's finger or a stylus). Adobe Reader also allows the judge to "flatten," or lock, the PDF once she signs, preventing any accidental changes to the warrant. We created iCloud email accounts for each police agency and saved all these contacts in the judges' iPads so the judges can easily use FaceTime with an officer without having to look up the right email address.

Server software

We then were simply going to "lock" the police iPads to prevent any further modification, such as preventing App Store game downloads and new account creation, then hand them out to the police agencies. The problem with this approach is that apps are updated frequently, and any lost or stolen iPads could not be tracked down. The solution was to have all of the police iPads connected to a Mobile Device Management (MDM) server.

Many MDM server hardware packages involve an initial payment of thousands of dollars for the server

hardware, plus a licensing fee of $50–$100 per iPad each year. We would also have had to handle the server's maintenance. I was doing further research for a more cost-effective MDM server when I discovered that the one of the county school districts use the Cisco Meraki MDM cloud server. It comes highly recommended.

The Cisco Meraki MDM server is free, and its website indicates the intention to always keep it free. They make money when a purchaser chooses wireless access points and other web analytics hardware (but none of those are necessary for this program). We simply had to create a profile and submit an application to Apple (again all free) to get "push"[6] service clearance, then download the server profile to each iPad. The profile is a file containing all predetermined settings by the network administrator (in this case, me). It would be extremely time-consuming to attempt to set up 30 iPads individually, while at the same time making sure none of the settings were input incorrectly.

The best way to set up the iPads was to use the free Apple Configurator App on an iMac or Mac laptop. All the preset restrictions (such as the apps, inability to download or delete apps, and other settings) are chosen in the Apple Configurator app. The Cisco Meraki profile file is saved with these choices, and when an iPad is connected to the computer running the Configurator, the program automatically configures each iPad.

The Meraki MDM also allowed me to create a web clip, which is a button that appears on the iPad home screen. When an officer clicks this button, it brings up the website for our blood search warrant so the officer doesn't have to type in the web address. This is preferred because whenever we make updates to the search warrant and the officer clicks this web app button, the newest version of the search warrant appears on the screen for the officer to edit. Not only does the server profile from Cisco allow for the administrator to choose the apps on the iPad, but it also enables the administrator to "push out" app updates to all the iPads. (Going to 23 different police agencies to do so would be a huge time investment, so this option saves me a lot of headache.) It also enables the network administrator to track the iPad should it ever get lost.

Training

While the iPad is very user-friendly, the intricacies of this new process required a 30-minute training session for the various departments in the county, which I provided. I created a Keynote presentation on my iPad and showed the officers each step of the process using a projector connected to the tablet. Police at these sessions took to the system quickly. I also met with each judge one-on-one because they had to interact with the process differently from the officers. I gave both the officers and judges a handout with the step-by-step procedures as a quick reference on how to review, sign if appropriate, and send the warrant via email. For our numerous police agencies, it took a total of two weeks to train most of the officers.

The iPad warrant process

When an officer conducts a DWI investigation and has probable cause to believe a suspect committed a felony DWI, the officer will ask for consent for the blood draw. If the suspect gives consent, there is no need to apply for a search warrant.

If the suspect does not consent, the officer turns on the iPad, fills out the warrant, and sends it to the on-call judge's email address. He will then call that judge to let him know a warrant was sent. The judge reviews the warrant for a probable cause determination. The judge then initiates a FaceTime video call with the officer. If probable cause exists, the judge swears the officer to the warrant. The FaceTime call is disconnected, and the officer signs the search warrant. He then emails the warrant to the judge. The judge signs the warrant, "flattens" (i.e., locks) the PDF, and emails it back to the officer. The officer can then log into his Apple iCloud account to print the signed warrant, or he can take the iPad to the blood draw location and show the statutorily authorized blood draw order from the judge to the qualified technician. Within 24 to 48 hours, the officer will submit the search warrant and return it to the county or district clerk's office accordingly.

(Please note another option for swearing to a search warrant affidavit [from W. Clay Abbott, TDCAA's DWI Resource Prosecutor]. You can have the officer swear to the affidavit in front of someone authorized to take oaths [say, a notary or another peace officer] and then send it to the magistrate as a final sworn affidavit. [Sometimes this is called "pre-swearing" an affidavit.] In such a situation, it is vital to fill in the jurat

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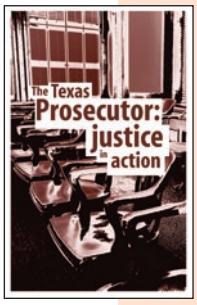
Electronic versions of the CCP and PC available

Two of TDCAA's code books, the 2013–15 Code of Criminal Procedure and Penal Code, are now available for purchase from Apple, Amazon, and Barnes & Noble (for iPads, Kindles, and Nooks, respectively). Because of fewer space limitations in electronic publishing, these two codes include both strikethrough-underline text to show the most recent legislative changes and annotations. Note, however, that these books contain single codes—just the Penal Code and Code of Criminal Procedure—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only 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 sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

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[where the notary signs and seals the document] and to make clear who took the oath and why he or she has legal authority to take the oath. Depending on local resources, pre-swearing affidavits might be a more helpful method.)

Feedback

The judges are firm believers in the iPad program. For the officers, time is saved in connecting with a judge to review the warrant, and judges appreciate the mobility the iPad offers them when they are on call.

At first, there were some requests from police agencies to increase the size of the narrative section of the warrant, so I updated it and refreshed it on the county website within 30 minutes of this request so the new version was almost immediately available—and automatically updated on every agency's iPad. If these warrants had been paper printouts or digital files on CDs, we would have had to create new disks and handouts for every update. The process we created saves money and allows for an immediate fix.

Overall, the police are very happy with the program. It is important to ensure that the officers who investigate DWIs attend the training session in the use of the iPad for search warrants. The officers who attended our training tended to encounter no issues with the program whereas officers who were unable to attend a session had to make a call to me in the middle of the night for some clarification in a process or two (which I am happy to assist with).

There is an initial investment required in the purchase of iPads for this program. However, the time and cost savings in the long run are easily recouped—we can even see that the program could be expanded from felony DWIs to other search warrants down the road. There is a small learning curve for users who have never operated an iPad before, but a short hands-on training and practice session generally affords the user confidence in using the program.

If you have any questions about how this program was set up or what settings are recommended, please do not hesitate to contact me at 979/864-1230 or davids@brazoria-county.com. ❇

Endnotes

1 *Missouri v. McNeely*, 133 S. Ct. 832 (2013).

2 391 S.W.3d 94 (Tex. Crim. App. 2013).

3 "Jailbreaking" means modifying the operating system to remove Apple-imposed restrictions and install apps by means other than the Apple App Store.

4 AppleCare warranties cover manufacturer defects and two accidental damages to the iPad for two years from the purchase date. Accidental damage has a deductible of $50, while manufacturer defects have a $0 deductible.

5 The PDF viewer that comes installed on iPads is called QuickLook, and it is a decent program for viewing flattened and/or simple PDFs, but it's not a good viewer for a detailed search warrant PDF. Adobe Reader renders the search warrant properly.

6 Automatic updates for apps and other preferences are "pushed" to the iPad with no input from the user.

Children's Advocacy Centers at 25 years

Many young prosecutors don't remember what it was like to try child-abuse cases in the days before CACs. Here's a refresher on where we've come from, where we are, and what the future holds for these important components of seeking justice for the youngest victims of crime.

By Joy Rauls
Executive Director,
Children's Advocacy
Centers of Texas, Inc.

Shelby made an outcry of abuse at the age of 15. For 10 years she had suffered emotional, physical, and sexual abuse at her father's hands. But on October 22, 2010, when her father dropped her off at school, Shelby knew when she closed the car door that this would be the last time she saw him. Today, she was going to tell.

It took every ounce of courage she had to walk into the counselor's office and lay down this burden. When she found that all of the counselors were in a staff meeting, she almost turned and walked back out—but she was determined; she had come this far. She walked over to a teacher who just happened to be in the counselor's office and told her about the abuse. The teacher reported it to authorities, and the investigators assigned to the case brought Shelby to the Bridge Children's Advocacy Center (CAC) in Amarillo.

Shelby received a forensic interview and had a medical evaluation at the CAC. The multidisciplinary team (MDT) at the center also arranged for her to participate in a one-party consent call with her father which was recorded by law enforcement. This evidence proved to be instrumental to the outcome of the case. Her father pled guilty to 14 counts of aggravated sexual assault with 40 years on each, and six counts of sexual assault with 20 years on each. The sentences are running concurrently. Because Shelby's mother had not been in the picture since Shelby was 3 years old, the teenager was ultimately placed with an aunt and uncle (whom she now calls Mom and Dad) and received counseling through the CAC, which was very successful. In fact, in 2011, Shelby's counselor set up a meeting with The Bridge MDT members because Shelby wanted to personally thank each of them and encourage everyone who works these cases to know that they do make a difference.

What is a CAC?

Since the incorporation of our state association, Children's Advocacy Centers of Texas (CACTX), over half a million children like Shelby have walked through the doors of a Texas CAC. Our work is done through a network of 68 member centers which represent an official service area of 172 Texas counties. Annually, these programs serve almost 40,000 children each year, 75 percent of whom are involved in child sexual assault cases. Each center has core services and standards, as prescribed by the Texas Family Code, but each is customized to reflect the unique needs and culture of its area. Nationally, there are over 750 CACs, with at least one in every state.

The Bridge CAC was the first children's advocacy center in Texas (and is on the verge of turning 25 years old). With our own organization about to celebrate 20 years, we are excited to have this generous opportunity to reach out to one of our most critical partners and allies: Texas prosecutors. This article is meant to be a reflection of where we've been, a "state of the union" on where we are now, and an invitation to help us consider what's next.

Our shared history

Each year, our network of 68 CACs partners with more than 200 district and county attorney's offices. But the truth of the matter is, our special relationship with prosecutors goes much deeper than the interagency agreements signed between our centers and your offices.

The history of the Texas network is as closely aligned with prosecutors as the development of the CAC model itself. In 1985, former U.S. Congressman and then-District Attorney Bud Cramer developed the

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vision for the CAC model and opened the first center in Huntsville, Alabama. In a recent article for *Roll Call* magazine, Cramer explains the frustration he felt prosecuting a child abuse case in the 1980s. During an interview with a young victim, her grandmother asked Cramer why her granddaughter had to give her statement once again when she had already spoken to 11 other professionals. She wanted to know why he couldn't coordinate things with his colleagues. As many of you may remember, this lack of coordination not only created further trauma to child victims, but it also proved detrimental to the successful outcome of these difficult cases.

Not unlike Congressman Cramer, during the 1980s and '90s many prosecutors in Texas were searching to find a better way to successfully work crimes against children cases, particularly those involving child sexual assault. A series of high-profile cases shined a light on failures within our justice system, and a national conversation about this issue began. Child victims' names you may recognize—Jacob Wetterling, Adam Walsh, Ashley Estell, and Christopher Woehlers—spurred necessary change at one end of the spectrum. However, on the other end, there was Kelly Michaels, the McMartins, and the Little Rascals daycare case where wrongful convictions resulted from bad evidence obtained through poor interviews. These high-profile, high-stakes cases had policy-makers and frontline professionals looking for better ways to do this work, keep kids safe, and ensure justice.

Harsher penalties for sexual predators were passed, the sex offender registry was expanded, and word spread about the success of the CAC model. In Texas, concerned community members partnered with prosecutors, law enforcement, Child Protective Services (CPS), and medical/mental health professionals to develop the first few CACs. In a brief 10-year period (1995–2005), 46 more CACs opened their doors for services. It is no secret that Texas prosecutors, more often than not, served as the driving force during this era of rapid growth. It is a trend that continues today.

While the laws and processes surrounding these cases have evolved over the years, the drive to develop a CAC today remains the same as it did for Congressman Cramer in 1985 and for the many Texas prosecutors who led the charge in their own communities. In short, these abuse cases with child victims are difficult. They are unlike any other that come across your desk and often present seemingly insurmountable challenges. Arguably the success of this model, and the reason it has grown so quickly in 25 short years, is because each required service and component was specifically developed in response to these challenges. From the child-friendly facility to the video-recorded forensic interview and team case staffing, this model works because it was intentionally designed to do so.

Additionally, the CAC model is centered on the notion of systemic change. By partnering with the various entities involved in the system, we are better positioned to help these young victims as we change the process from the inside out. Our goal is to modify a justice system built for adults into one that contemplates, through each step of the way, the unique perspective and attributes of a child victim or witness. As the only nonprofit to play a role in the investigation of child-abuse cases, our approach often looks different from other worthy organizations assisting victims. We play an intentionally neutral role in these cases to ensure the integrity of our forensic interviews, but also to facilitate coordination among investigators and prosecutors to seek good outcomes for both the case and the child. Last year our network signed interagency agreements with more than 800 law enforcement jurisdictions, 200-plus district and county attorney offices, and every CPS region in the state.

Where we are today

While we are fortunate in Texas to have a well-developed network of CACs, our mission is far from accomplished. With the oldest CAC in Texas just shy of 25 years old we are, comparatively speaking, a young model moving through what we could classify as our teenage years. Not only do we need to expand the breadth of our services—there are still 82 counties outside of the official service area of a CAC—but we must also look at how to expand the depth of our services.

This is why I am writing this article today and why I am so grateful to TDCAA for its inclusion. There is still much work to be done in making Texas a safer place for kids and ensuring that these victims receive both justice and healing. But if we are to be successful in the next

25 years, we are going to need the continued support, guidance, creativity, and momentum of one of our longest-standing allies, Texas prosecutors.

As with any movement, we are hitting a juncture of transition. As district attorneys retire, founding CAC directors move on, and our network puts on a new face, we have to keep fueled with the same energy and commitment that got us where we are today.

Not unlike other movements working for change, over the years our greatest spokespersons have been those who can articulate what it was like to work these cases *before* the CAC model, before multidisciplinary teams and joint investigations, and before recorded forensic interviews conducted by trained professionals in child-friendly facilities. Our survival and ability to thrive rests in the next generation's acknowledgement and understanding of the past and willingness to embrace the change necessary for growth.

What's next?

People often ask us "what's next?" for our model and network. The truth of the matter is that, in large part, the answer rests with you, Texas prosecutors. As a team-based model, our work must be responsive to the needs and challenges encountered by our agency partners. We must adapt and expand our services as *your* work changes. As such, part of the impetus for this article is to encourage you to play a leadership role with your local CAC. Each center is required by statute to have representation on its board of directors by prosecution, law enforcement, and CPS, the purpose of which is to ensure that agency partners have the ability to share their needs and provide input at a governance level.

Additionally, there are still 82 Texas counties outside of our official service area. While these counties are able to access courtesy services, children in these counties are not receiving the full array of CAC services as prescribed in the Texas Family Code. Typically, courtesy services involve a forensic interview at a neighboring CAC, but not a multidisciplinary team case staffing, mental health services for the child and non-offending caregiver, or family advocacy and support. If you are in one of the 82 counties not officially served by a CAC but are interested in making the full array of comprehensive services available to your community, reach out to CACTX to guide you through the process.

There are two different ways to become part of an official CAC service area:

Join an existing CAC. If your county is adjacent to the official service area of an existing CAC, you can work with that center to become part of its service area. This is where the majority of growth will come in the next few years. Due to sparse population, rural composition, and/or socio-economic factors, most of these counties are unlikely to establish and maintain an independent CAC. This year, three new counties were added to our network by joining an existing CAC: Sabine County joined the East Texas Alliance for Children in Lufkin, San Augustine County joined the Shelby County CAC in Center, and Lavaca County joined Norma's House in Gonzales.

Start a new CAC. All centers in Texas are 501(c)(3) non-profit organizations. (To start a new CAC, a new non-profit will need to be formed or an existing non-profit will need to add a CAC program. For more information on how to begin this process, contact us at 512/258-9920 or email our program director, Catherine Bass, at cbass@cactx.org or me at jrauls@cactx.org.) This year, two new CACs were added to our network: Children's Alliance Center for Palo Pinto County and Children's Alliance of South Texas in Floresville, serving Atascosa, Wilson, Frio, Karnes, and LaSalle Counties.

Prosecutors can also play a key role by serving as a voice for the CAC and the issue of child abuse within their communities. The CAC model can be confusing and the topic disturbing. Due to our role in the investigation, CACs often maintain a low profile in their communities. As a result, this population of victims and the center itself often go unnoticed or misunderstood. One of the strongest attributes we have is our relationship with our agency partners, and your voice can help the CAC to establish credibility in the community.

Finally, prosecutor involvement and leadership on the multidisciplinary team is critical to a well-executed team investigation. While the benefits to a team approach are well-known, bringing together law enforcement, CPS, and medical and mental health professionals for collaboration is still difficult. With each discipline coming to the table with a different mandate, managing rela-

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tionships can be challenging. It is often the case that our strongest teams—the ones that share information and work fastidiously to ensure that the child's needs are at the forefront—have strong leadership from prosecution. If you are an elected DA or division head and cannot serve on the MDT yourself, consider assigning a specific prosecutor to serve on the team to ensure that a consistent voice from your office is providing guidance on these cases.

Our areas of focus

Of course, at CACTX we also have some ideas about where our network needs to head next. Here's a look at our future goals:

- **Improving mental health services for CAC clients.** Did you know that CACs are the sole provider of therapeutic recovery services for the majority of children impacted by sexual abuse? Over 80 percent of these cases will be closed by CPS once a determination of abuse is made. Therefore, these children will not go into foster care or family-based safety services where the State will provide mental health services through a Medicaid provider. Many of these children at our centers present with symptoms of extremely high trauma and depression, some of whom will actually qualify for a diagnosis of post-traumatic stress disorder. As such, CACTX is committing substantial resources over the next two years to ensure that our clinicians are skilled in treatment modalities that are evidence-based and proven to work. Additionally, we will continue to fight for the financial support required to comprehensively serve these victims.
- **Increasing access to medical evaluations.** Nationally, 34 percent of alleged victims of child sexual abuse who receive a forensic interview also receive a medical evaluation. In Texas, the average is 21 percent and in rural communities it is 8. Multiple factors have led to this disparity, including a lack of qualified providers to conduct these exams, funding to pay for them, and knowledge of the importance of the medical exam, even when there may be no physical evidence. CACTX just completed a statewide research project that identified barriers in accessing medical evaluations. In the next two years, we will address these barriers by rolling out comprehensive training and technical assistance. Interestingly, we have found that medical exams are requested by investigators more frequently in counties where prosecutors emphasize the importance of medical evaluation.
- **Developing family advocacy services.** Our goal through family advocacy is to ensure a continuum of care from initial investigation through prosecution and recovery. Family advocates exist to provide the family support, referrals for mental health services, and access to other social services and community resources. Child abuse, particularly sexual abuse, can dramatically alter household dynamics once a report is made and an investigation begins. Children must have support at home if they are to successfully move through the justice system. By ensuring the family's basic needs are met, we hope to bring stability to the home during this time of crisis.
- **Access to justice for the most vulnerable.** We identify the "most vulnerable" as children with disabilities, human trafficking victims, very young children, children with diverse cultural backgrounds, and children who have suffered extreme trauma. This summer we were proud to unveil a new Multi-Session Forensic Interview (MSFI) protocol at the TDCAA Crimes Against Children Conference. MSFI is an interviewing approach that spreads one interview out over multiple sessions. The purpose of this method is to provide certain categories of child victims additional time to make disclosures. Similar approaches have been proven to elicit 25 percent more information. If we cannot properly modify our services to meet these children where they are, we are ultimately denying this population access to justice. Training on this approach will roll out in December 2013.
- **Expanding services to additional categories of children.** As our model has come of age, agency partners are realizing that the CAC model can assist victims in addition to those who have suffered sexual abuse. In our FY 2013 data, child witnesses to violent crime represented the highest growth category for first time services/interviews—a trend we believe will continue.
- **Keeping forensic interview techniques at the forefront.** Each year we do a comprehensive review of our forensic interview curriculum to ensure it reflects the latest research in child development, memory, and suggestibility. The field of forensic interviewing has become more established over the last 25 years, but it is still relatively new. As we learn more about how children make disclo-

sures, we must adapt our approach. Providing non-leading, legally defensible interviews is critical to the integrity of these cases and ultimately the interests of justice.

Thank you

On September 1, 2013, two new CACs opened in Texas expanding our service footprint to 172 counties. In both communities the district attorney's office played a key leadership role in building community support, bringing together investigative partners, and lending credibility and momentum to the effort. On behalf of the 40,000 children served annually by our network and the hundreds more who will now have access through these new CACs, we are grateful to Texas prosecutors for their commitment. Our state is home to more CACs than any other state in the nation and our organization, the Texas chapter, is larger and more developed than our 49 counterparts. Thank you for making Texas No. 1 in the nation within the CAC movement. ❇

Restitution without

An overview of how restitution works in the criminal justice system and an attempt to clear up some myths and misconceptions

I don't always get to collect restitution, but when I do, it makes my crime victims happy. The first time a crime victim called to thank me was when she received a $500 restitution check. She was a victim of a criminal mischief case where we were able to order the defendant, her ex-boyfriend, to pay restitution for slashing her tires as a part of his plea. That $500 was what the victim made in a week, and the money helped her repay the loan she had taken out to buy new tires.

By Abdul Rahman Farukhi
Assistant District Attorney in Fort Bend County

If you're a newer prosecutor, chances are that you handle this type of crime on a daily basis. We know that when we get restitution for our victims, we not only help make them whole but also show them that the criminal justice system actually works. Restitution also benefits defendants because it forces them to recognize the costs associated with their crimes.

Who can receive restitution?

In Texas, a crime victim has a constitutional right to restitution.[1] If the victim suffered property loss or personal injury as a result of the defendant's actions, then the defendant is responsible for paying restitution for any expenses incurred as a result of those crimes.[2]

However, the law defines victims somewhat narrowly. For example, a court held that counseling expenses for the mother and daughter of a robbery victim were improperly ordered because the women were not direct victims of the crime.[3] Also, police departments are not considered victims for purposes of the restitution statute when they spend money to investigate crimes;[4] however, reimbursement can be ordered as a condition of community supervision for a number of costs, such as drug testing.[5] (For a more comprehensive discussion on the authorized financial payments allowed by statute, seek out a copy of *The Perfect Plea* by John Bradley.)

It is helpful to consider how restitution is related to the crime committed. In *Gordon*, the Court of Criminal Appeals overturned a trial court's order to make a police officer pay the victim's funeral expenses as restitution after the officer was acquitted of homicide but convicted of assault in the death of a suspect he had in custody.[6] However, funeral expenses would be authorized in cases where death is a consequence of the crime.[7] (If the victim is deceased

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and is owed restitution, that amount is paid to the victim's estate.[8])

Sometimes unreported crime victims emerge during the course of investigating a defendant's current crime. Given that so many cases are handled through pleas, it is a good practice to get the defendant to agree to the list of victims and the amounts owed to each.[9] The power of plea-bargaining allows prosecutors to get restitution for victims as long as there is some basis in the record at the time of the plea.[10] If a case involves several victims and there is no plea agreement, then prosecutors will need to adjudicate the defendant for every victim for whom they intend to collect restitution.[11]

Third parties are eligible

The Code of Criminal Procedure also allows the court to order the defendant to reimburse third parties for payments made to victims.[12] Eligible third parties include insurance companies as well as the Crime Victim's Compensation (CVC) fund. Prosecutors can get a statement of what CVC paid to a particular victim by checking with the victim assistance coordinator or contacting the Texas Attorney General's office by email at crimevictims@texasattorneygeneral.gov or by phone at 800/983-9933.

Some defense attorneys and judges are under the impression that a victim's out-of-pocket expenses are the only ones eligible for reimbursement, such as co-pays and deductibles, but that is not correct. Third parties who paid the victim's bills, such as hospitals and insurance companies, can receive restitution.[13] Once a prosecutor verifies the amounts paid by CVC or insurance companies, the court or the prosecutor can prepare a judgment or restitution order which states the entity that is owed restitution and the amount to be paid. Legally speaking, restitution payable to an entity such as CVC or an insurance company is no different from ordering restitution payable to a person; however, a prosecutor should include reference to any claim numbers so that the money ends up in the correct account.

How is the amount determined?

Ideally, restitution should not be disputed if prosecutors have written estimates of projected expenses or receipts of expenses the victim has paid. These receipts are often submitted as a part of the police report or submitted to the victim assistance coordinator in your office. If you do not have these receipts, you can ask the victim directly for this documentation. The best practice is to have your intake division request receipts prior to filing the case because it gives the best record of the value of the loss near the time of the incident. If there is a dispute about the amount of restitution owed, the prosecuting attorney has to prove the amount, and the burden is by a preponderance of the evidence.[14] There must be a factual basis to support the restitution amount.[15] A pre-sentence investigation report detailing restitution amounts is admissible, as is the testimony of anyone with personal knowledge regarding the restitution values.[16] Of course, parties can stipulate to the value of restitution as a part of the plea, and if the parties agree to a restitution amount, the court will find the stated amount has sufficient factual basis.[17]

When the court orders restitution, the court should award the higher amount of either the value of the property on the date of the loss or the value of the property on the date of sentencing.[18] Unlike civil cases, there is no need for the victim to prove the expenses were reasonable as long as there is sufficient factual evidence in the record that the expense was incurred.[19]

I have come across defense attorneys who have argued that restitution is limited by the amount of loss described by the indictment—that's simply not correct.[20] Restitution is limited only by the evidence used to support the amount requested. The victim is also entitled to the full amount of restitution, despite a civil settlement for similar injuries, when it is likely there will be future medical expenses incurred.[21]

Be aware that it is within the court's discretion to order complete restitution, partial restitution, or no restitution to a victim.[22] If judges do not order restitution or order partial restitution, they must state their reasons on the record.

Ordering restitution

Restitution can be ordered by the court in any case where the defendant is sentenced to jail, prison, or probation. To be effective, the restitution order should be a part of the court's judgment, and the judgment should contain the amount of restitution as well as the name and address of the victim or agency that

will send payments to the victim.[23]

Restitution must be orally pronounced at the time of sentencing or it does not become part of the sentence and as a result, is unenforceable.[24] Restitution cannot be later added to the written judgment of conviction unless it was previously a part of the oral pronouncement of sentence.[25] Even if the defendant is on probation, the trial court cannot modify an existing probation to add restitution later.[26]

One issue I encountered as a misdemeanor prosecutor was that judges would orally pronounce at sentencing, "And you shall pay restitution in the amount to be determined by the probation department." Though the probation department may assist with collecting restitution, it is not permitted to determine the restitution amount or the payment schedule after the plea—the judge needs to order these matters at the time of sentencing.[27]

Fortunately, if restitution is ordered but the amount or terms are not factually supported, the correct procedure is to remand the case back to the trial court for a restitution hearing.[28] The defendant is *not* entitled to a new sentencing hearing; rather, the purpose is to give the prosecution a second opportunity to establish the factual basis for the restitution amount.[29] In practice, such a re-hearing rarely happens because restitution is negotiated as a condition of the plea and I always get the defendant to stipulate to the restitution and waive his right to appeal as a part of the plea. The only times I have had to participate in a rehearing on restitution was when the court ordered restitution be paid to a person not eligible to receive it. It is significantly easier to do the restitution correctly the first time around because witnesses become unavailable as time goes on.

What if the defendant can't pay?

Many prosecutors will not order restitution in jail or prison cases thinking there is no way the defendant can pay while sitting in a cell. While it's true that the defendant can claim an inability to pay, restitution should still be ordered.

Prosecutors often face pressure to drop restitution from a court order whenever any significant amount of restitution is involved, especially in cases involving jail time. Judges and defense attorneys may point to the Code of Criminal Procedure, which states that "the imposition of the order [of restitution] may not unduly complicate or prolong the sentencing process."[30] However, this statement has been interpreted by the Court of Criminal Appeals to mean that restitution is part of the sentencing process and "implies that restitution is imposed as part of the original sentence, and that the sentence is not complete until restitution is imposed."[31] In other words, this language covers situations where sentencing is suspended until a restitution hearing is held. By the way, it is permissible to hold the restitution hearing on another date as long as the parties are aware that sentencing will not be complete until the restitution hearing is held.[32]

As long as the restitution is ordered, it can theoretically follow the defendant indefinitely. Note that bankruptcy does not discharge restitution obligations.[33] Even if a defendant is sent to prison, as long as the Texas Department of Criminal Justice (TDCJ) receives a court order for restitution, authorities there can take money from the inmate's account.[34] If the defendant is released on parole, the Board of Pardons and Paroles is required to impose as a condition of release any unpaid restitution amount originally set by the trial court.[35]

If a juvenile needs to pay restitution, he too can be ordered to pay. Juveniles who are unemancipated minors and unable to pay may perform community service to cover the debt, or the court may order the parents or persons who support the juvenile to pay.[36]

In some cases, restitution can be collected through liens on property owned by the defendant at the time of the order as well as any property acquired afterwards.[37] For a $5 filing fee, the Code of Criminal Procedure permits liens to be filed on the defendant's property. Once perfected, the lien entitles victims to foreclose on the defendant for lack of payment. The lien lasts 10 years and can be renewed. A victim, the victim's attorney, or even the prosecutor may file a lien on any interest in real property, any interest in tangible or intangible personal property, or any interest in a motor vehicle owned by a person convicted of a crime to secure payment of restitution.[38] (I've never filed a restitution lien, nor had any of the prosecutors I talked to in my office, including some who have practiced for 30 years or more. But it's definitely an option for the motivated prosecutor.) Therefore, it's

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important to seek the full amount of restitution supported by the evidence. Though a court must consider the defendant's ability to pay in probation cases, it is not required to limit restitution to an amount the defendant can presently afford.[39]

Conclusion

We can put victims first by making defendants pay restitution. After speaking to victims and victim assistance coordinators in my county, I've learned that crime victims get some closure and satisfaction just by knowing the restitution was ordered, even if it may not ever be received. Though everyone agrees restitution is important, it's not something we think about unless something goes wrong, such as the defendant contesting the restitution condition in his probation as invalid, and by the appellate stage, it may be too late to fix. By understanding how restitution works in practice, we ensure our victims have the best chance in recovering the money they deserve. ❇

Endnotes

1 Texas Const. art. I, §30.

2 Tex. Code Crim. Proc. art 42.037.

3 See *Lemos v. State*, 27 S.W.3d 42, 49 (Tex. App.—San Antonio 2000, pet. ref'd).

4 *Uresti v. State*, 98 S.W.3d 321, 338 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("expenses incurred by the Houston Police Department in its investigation of appellant were not sustained as the result of being the victim of a crime").

5 Tex. Code Crim. Proc. art. 42.12(a)(19) ("Reimburse a law enforcement agency for the analysis, storage, or disposal of raw materials, controlled substances, chemical precursors, drug paraphernalia, or other materials seized in connection with the offense").

6 *Gordon v. State*, 707 S.W.2d 626, 629-30 (Tex. Crim. App. 1986) ("a finding to order appellant to pay the expenses occasioned by that death would be a denial of due process, tantamount to penalizing appellant for an offense of which he was acquitted").

7 *Lemos*, 27 S.W.3d at 46 ("the death of an aggravated robbery victim is a consequence of aggravated robbery for which the defendant is criminally responsible").

8 Tex. Code Crim. Proc. art. 42.037(d).

9 *Campbell v. State*, 5 S.W.3d 693 (Tex. Crim. App. 1999) ("Here the appellant stipulated to a list of his victims and the amounts that he had stolen from them. There is no dispute that the appellant was criminally responsible for the thefts to which he pleaded no contest").

10 *Martin v. State*, 874 S.W.2d 674, 679-80 (Tex. Crim. App. 1994) ("We do not intend that this opinion prevents an award of restitution to the extent agreed upon by the parties in a plea agreement, so long as the amounts agreed to and the persons to whom restitution is to be paid under the agreement have a factual basis in the record and are just."); see also Tex. Penal Code §12.45 ("A person may, with the consent of the attorney for the State, admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses of which he stands adjudged guilty").

11 *Ex parte Lewis*, 892 S.W.2d 4, 6 (Tex. Crim. App. 1994) ("the Legislature intended to limit the discretion of the trial court in ordering restitution payments and accordingly limited restitution to the victim of the offense for which the defendant was convicted").

12 Tex. Code Crim. Proc. art. 42.037.

13 Tex. Code Crim. Proc. art. 42.037(f); *Flores v. State*, 513 S.W.2d 66, 69 (Tex. Crim. App. 1974) (affirming restitution order to insurance company that paid medical expenses).

14 Tex. Code Crim. Proc. art. 42.037(k).

15 *Campbell v. State*, 5 S.W.3d 693 (Tex. Crim. App. 1999).

16 *Id.*

17 *Jackson v. State*, 720 S.W.2d 153 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd).

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

19 *In the Matter of J.R.*, 907 S.W.2d 107 (Tex. App.—Austin 1995, no pet.) (holding that as long as there was proof of the amount of expense incurred, there was no need for an affidavit stating the expenses were reasonable).

20 *Campbell v. State*, 5 S.W.3d 693 (Tex. Crim. App. 1999) (rejecting the appellant's argument that the amount of restitution that can be ordered for a theft conviction is restricted by the upper limit of the property-value range of theft).

21 *Urias v. State*, 987 S.W.2d 613 (Tex. App.—Austin 1999, no pet).

22 Tex. Code Crim. Proc. art. 42.037(a).

23 Tex. Code Crim. Proc. art. 42.01, §1(25).

24 Tex. Code Crim. Proc. art. 42.03, §1(a) ("sentence shall be pronounced in the defendant's presence").

25 See *Sauceda v. State*, 309 S.W.3d 767, 769 (Tex. App.—Amarillo 2010, pet. ref'd).

26 See *Bailey v. State*, 160 S.W.3d 11, 16–18 (Tex. Crim. App. 2004) (Cochran, J., concurring) ("The trial court may not, however, alter or modify the terms and conditions of probation to add a restitution order which was never made orally in open court and in the defendant's presence at the sentencing hearing").

27 See *Cox v. State*, 445 S.W.2d 200, 201 (Tex. Crim. App. 1969); *Simpson v. State*, 772 S.W.2d 276, 280 (Tex. App.—Amarillo 1989, no pet).

28 See *Barton v. State*, 21 S.W.3d 287, 290 (Tex. Crim. App. 2000).

29 *Beedy v. State*, 250 S.W.3d 107, 112–13 (Tex. Crim. App. 2008).

30 Tex. Code Crim. Proc. art. 42.037(e).

31 *Bailey v. State*, 160 S.W.3d 11, 15 (Tex. Crim. App. 2004).

32 See *Id.*

33 *Cabla v. State*, 6 S.W.3d 543, 546 (Tex. Crim. App. 1999); also see Rudy Ramirez & Elizabeth Dondlinger, "Enforcing Restitution," in *The Prosecutor*, Vol. 39 No. 6 (2009).

34 See Tex. Gov't Code §501.014(e).

35 Tex. Code Crim. Proc. art. 42.037(h).

36 Tex. Code Crim. Proc. art. 42.037(p)(2)(A)-(B).

Significant changes from the DSM-IV to the DSM-5

Some issues important to prosecution and criminal cases about what changed in this manual

By Shelly Yeatts
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After a 14-year revision process, the American Psychiatric Association (APA) published the fifth edition of its Diagnostic and Statistical Manual of Mental Disorders last May.[1] The APA manuals are commonly considered the authoritative source in the mental health community on the criteria for diagnosing and classifying mental disorders.[2] The latest manual, titled the "DSM-5" (they dropped the Roman numerals), is 947 pages and contains over 300 diagnoses. It replaces the DSM-IV, published in 1994, and the DSM-IV-TR (Text Revision), published in 2000.[3]

Although previous versions of the manual were widely accepted, the DSM-5 has been the target of considerable criticism and controversy. The APA task force developed this version's content primarily in closed-door committees and required participants to sign non-disclosure agreements.[4] A higher percentage of committee members than in previous revisions—about 70 percent—had ties to the pharmaceutical industry.[5] In addition, the APA rejected proposals by other mental health professional associations for independent review of the revisions.[6]

Criticism of the development process has been followed by some vehement attacks on the content of the final, published DSM-5.[7] An overriding issue in the new manual is its expansion of disorders and reduced thresholds for diagnoses, primarily in the mild psychiatric disorders.[8]

Mental health issues arise frequently in criminal cases, including when prosecutors must consider a defendant's competency, sanity, eligibility for a death sentence, and intent. Mental health issues also are often relevant to punishment evidence, a defendant's mitigation case, and expert testimony. The APA's expansion of disorders and lowered thresholds for diagnoses may result in an increase in the prevalence of mental health issues raised in criminal cases.

Aside from controversy within the mental health industry over this manual, there has always been a disconnect between the manual's primary purpose—diagnosis in the mental health setting—and its use in the courtroom. There is a substantial volume of commentary available on abuses and misuses in applying the Diagnostic and Statistical Manual in the criminal context, by both lawyers and mental health clinicians.[9]

It will take time for the changes

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37 Tex. Code Crim. Proc. arts. 42.22, 56.01 (restitution liens can be filed for victims of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or to whomever has suffered personal injury or death as a result of the criminal conduct of another).

38 43 Tex. Admin. Code §217.7.

39 *Pennington v. State*, 902 S.W.2d 752, 754 (Tex. App.—Fort Worth 1995, pet. ref'd) ("The language [of Tex. Code. Crim. Proc. art. 42.12] does not mandate that the payments be within the financial means of the probationers").

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in the DSM-5 to be absorbed and applied in the mental health arena, and more time for the impact to spill over into courtrooms and caselaw. Only time and input from testifying psychiatrists and psychologists will ultimately reveal how the changes will impact criminal cases; meanwhile, this article discusses some issues for prosecutors to be aware of regarding the new manual.

New warning for forensic use

The new manual contains a prominently placed one-page "Cautionary Statement for Forensic Use of DSM-5."[10] This warning acknowledges that the DSM-5 will be used by courts and attorneys in "assessing the forensic consequences of mental disorders" even though it was not developed to meet the technical needs of the courts and legal professionals. The APA now cautions that "use of the DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings." It contains a helpful statement for prosecutors:

> In most situations the clinical diagnosis of a DSM-5 mental disorder such as intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability).

"Intellectual disability" (the new MR)

The term mental retardation, used in the DSM-IV, has been replaced with the term "intellectual disability (intellectual developmental disorder)," or "ID," because the term intellectual disability is now commonly used in the medical and educational fields.[11] More important than the updated label, however, is that the DSM-5 provides a more fluid and malleable criteria for the disorder. Due to changes in ID, the criteria clinicians will use to diagnose ID and Texas' legal definition (of mental retardation) differ.

The DSM-5 defines ID as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains."[12] The DSM-IV, on the other hand, defined a person as mentally retarded if he exhibited significantly subaverage general intellectual functioning (an IQ of about 70 or below) accompanied by significant limitations in adaptive functioning, with onset before age 18.[13]

The DSM-5 expands the spectrum of those eligible for an ID diagnosis by removing full-scale IQ scores from the diagnostic criteria[14] and shifting the focus of severity to adaptive deficits. The APA comments, however, that like mental retardation in the DSM-IV, ID continues to require assessment of both cognitive capacity (IQ) and adaptive functioning.[15]

The first (of three) criteria for ID in the DSM-5 requires "deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intellectual intelligence testing."[16] Previously, the DSM-IV required "significantly subaverage intellectual functioning" of "an IQ of approximately 70 or below on an individually administered IQ test."[17]

Although analysis of IQ has not been completely removed from the diagnostic determination of ID, its importance has been greatly reduced.[18] This change will likely increase ammunition for those death row or death-eligible inmates whose IQs are between 70 and 80, or in the borderline intellectual range.[19]

The APA explicitly comments on this change, noting its particular impact in forensic cases:

> By removing IQ test scores from the diagnostic criteria, but still including them in the text description of intellectual disability, DSM-5 ensures that they are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels. This is especially important in forensic cases.[20]

The DSM-5 does indicate in the ID "Diagnostic Features" section that individuals with intellectual disability have IQ scores of approximately two standard deviations or more below the population mean with a margin for measurement error of five points, or an IQ of 65 to 75.[21] The DSM-5 states that factors that may affect test scores include practice effects and the "Flynn effect" (i.e., overly high scores due to out-of-date test norms).

The APA also altered the second criteria for ID—the adaptive functioning requirement. Adaptive functioning is how well a person meets community standards of personal independence and social responsibil-

ity in comparison to others of similar age and sociocultural background.

The DSM-IV required deficits or impairments in adaptive functioning in at least *two* of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.[22] ID requires adaptive deficits which limit functioning in "*one* or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community."[23] Thus, the DSM-5 requires deficits in only one of three broadly designated domains, whereas the DSM-IV required deficits in at least two of 11 narrower skill areas.[24] The APA notes adaptive functioning may be difficult to assess in a controlled setting, such as prison, and examiners should obtain information reflecting functioning outside prison.[25]

For mental retardation in the DSM-IV, severity was determined by IQ score.[26] In the DSM-5, severity (mild, moderate, severe, or profound) is now determined by adaptive functioning[27]—a major change consistent with the greater reliance on adaptive functioning and the reduced role of IQ. A clinician now determines severity by analyzing adaptive functioning in the three domains: conceptual or academic, social, and practical.[28] The DSM-5 contains a detailed chart providing examples of skills for each severity level.[29]

The APA slightly altered the third and final criteria, replacing the specific age requirement of onset before age 18 with the more general requirement that ID manifest itself during the "developmental period."[30]

In the "Associated Features Supporting Diagnosis" section, which lists characteristics that an intellectually disabled individual may have—such as poor social judgment, inability to assess risk, gullibility, and other factors—the APA indicates the associated features "can be important in criminal cases, including *Atkins*-type hearings involving the death penalty."[31] Keep in mind that the DSM-5's criterion for ID is not the law in Texas and should not be applied without the Court of Criminal Appeals weighing in on the issue.

While the Supreme Court of the United States in *Atkins v. Virginia* held that executing the mentally retarded violates the Eighth Amendment, the court elected not to provide a uniform definition of or criteria for mental retardation—instead leaving the task to the individual states.[32] In 2004, the Texas Court of Criminal Appeals set "temporary" guidelines in *Ex parte Briseno*, but the legislature has never passed a statute establishing guidelines for determining mental retardation (in a death penalty case). Accordingly, mental retardation is defined under *Briseno* and the cases that follow as 1) significantly subaverage general intellectual functioning, 2) accompanied by related limitations in adaptive functioning, 3) the onset of which occurs prior to age 18.[33]

In defining mental retardation, the *Briseno* Court relied on the American Association of Mental Retardation (AAMR) (now known as the American Association on Intellectual and Developmental Disabilities) and the Texas Health and Safety Code.[34] The court used the DSM-IV to define significantly subaverage intellectual functioning as an IQ of about 70 or below.[35] The court also developed its own seven evidentiary factors, called the *Briseno* factors, to aid in a determination of MR.[36]

The courts have noted over the years that the determination of mental retardation in a death penalty case differs from the determination in other settings, for example in the schools or for social services.[37] The DSM-5 widens this gap. *Briseno*'s definition of mental retardation was quite similar to DSM-IV criteria. Now, the DSM-5—which the average clinician would expect to apply—differs from the criteria set out in Texas law. Prosecutors will need to review and discuss these differences with their own experts and cross-examine defense experts who diagnose a defendant with ID under the DSM-5 guidelines without considering the legal standard.

Posttraumatic Stress Disorder (PTSD)

PTSD, previously considered an anxiety disorder, is categorized in the DSM-5 as a trauma and stressor-related disorder.[38] Generally, the APA has broadened PTSD's criteria,[39] which may increase its use by criminal defendants. Prosecutors should keep in mind, however, that PTSD is relevant not only to defendants, but also to sexual assault victims and to those exposed to violent crime, including family members and first responders.

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To be diagnosed with PTSD under the DSM-5, a person must have been exposed to actual or threatened death, serious injury, or sexual assault, by 1) directly experiencing a traumatic event personally, 2) witnessing a traumatic event as it happened to someone else, 3) learning a close relative or friend experienced a violent or accidental traumatic event, or 4) experiencing repeated or extreme exposure to aversive details of a traumatic event.[40] The DSM-5 specifically provides examples of the last method of exposure to include first responders who collect human remains and police officers who are repeatedly exposed to details of child abuse. To meet diagnostic criteria for PTSD, any exposure must cause clinically significant distress or impairment in the person's social interactions, capacity to work, or other important area of functioning.[41] Like the DSM-IV, the DSM-5 requires only that the distress from PTSD continue for more than one month.[42]

The DSM-5 no longer requires an emotional reaction of intense fear, helplessness, or horror to the triggering event, as in the DSM-IV.[43] This is because research since PTSD was first included in the DSM-III shows that individuals may have responses grounded in emotions other than fear, such as dysphoria (sadness) or anhedonia (lack of pleasure or enjoyment in things), or no emotional reaction at all (as in the case of professionals who are trained to respond to traumatic events).[44]

The third method of exposure—learning that someone close suffered a traumatic event—is more expansive than in the DSM-IV and open to abuse.[45] Whereas a prior check on PTSD involved limiting it to individuals with more direct exposure, this expansion increases the number of individuals who may feign PTSD symptoms, which can be mostly subjective, to gain a diagnosis.

Substance use disorder

Unlike the DSM-IV, the DSM-5 does not separate the diagnoses of substance abuse and substance dependence; instead, criteria for these two have been combined for a single diagnosis of substance use.[46] In the DSM-IV, abuse and dependence differed in that abuse was an early or mild phase and dependence was a more severe manifestation; this distinction has been eliminated.[47]

A use disorder should be diagnosed for each substance abused—such as alcohol use disorder, stimulant use disorder, etc.[48] The severity of a substance use disorder is indicated on a sliding scale of mild, moderate, or severe, depending on the number of symptom criteria on the list that are relevant to the individual.[49] Although the diagnosis of substance abuse previously required only one symptom, mild substance use disorder in the DSM-5 requires two to three from a list of 11 possible symptoms.[50] Compared to the prior list of symptoms in the DSM-IV, "drug craving" has been added and "recurrent legal problems" eliminated.[51]

Mild Neurocognitive Disorder

There are now two categories under a neurocognitive disorder umbrella: major and minor.[52] The former DSM-IV diagnoses of dementia and amnestic disorder are subsumed in the DSM-5 under the diagnosis of major neurocognitive disorder; in addition, the DSM-5 recognizes a new, less-severe level of cognitive impairment called mild neurocognitive disorder.[53] According to the APA, recognition of mild neurocognitive disorder supports early detection and treatment of cognitive decline before deficits become more pronounced and progress to major neurocognitive disorder, or dementia.[54] The DSM-5 includes separate criteria for various subtypes of major or mild neurocognitive disorder, including traumatic brain injury neurocognitive disorder, substance/medication-induced neurocognitive disorder, frontotemporal neurocognitive disorder, and others.[55]

Although criticism in the mental health field about mild neurocognitive disorder is that it pathologizes slight but normal memory problems related to aging and gives those having "senior moments" a psychiatric diagnosis,[56] in the criminal context there should be a concern that defense experts will use this label for defendants who did not previously meet criteria for a neurologically based diagnosis.

Criticism and notes

A particularly outspoken critic of the DSM-5 has been Dr. Allen Frances, chair of the task force that developed the DSM-IV, who predicts the DSM-5 may lead to "massive over-diagnosis and harmful over-medication."[57] But Dr. Frances has been only one of many critics. The National Institute of Mental Health (NIMH) and the APA came to log-

gerheads about the DSM-5 and its changes. Shortly before the DSM-5's release, the NIMH, which administers federal grants for research in mental illness, announced it would no longer use the DSM diagnoses for its funded studies; instead it will rely on its own new classification system.[58]

This version of the DSM, like previous versions, may suffer from what clinicians call a "lack of validity" and "inter-rater reliability," relating to whether multiple clinicians could examine one individual and make the same diagnosis.[59] Prosecutors should keep in mind that every mental health evaluation and diagnosis is based on subjective interpretation (the clinician's opinion) of an objective set of facts and circumstances (the individual and his mental characteristics).

One of the purposes of the DSM has always been to assign diagnostic codes to disorders so that physicians and hospitals can bill insurance companies. Application and use in the courtroom take the manual far afield from this basic function. Also, the legal community should understand that in addition to its relationship to medical billing, one of the chief purposes of the manual is to facilitate care for and treatment of the mentally ill. For this reason, mental health practitioners may view the diagnoses as inclusive, allowing individuals who might be considered on the border of a disorder to receive treatment. This inclusiveness may or may not be consistent with a prosecutor's and the criminal justice system's goals, depending on the circumstances.

Will the changes in the DSM-5 spill over into criminal cases? Will controversy surrounding the DSM-5 impact the manual's credibility and use? Or will the current version of the manual continue to be considered, by testifying experts, as the bible of the mental health industry? Only time—and future court decisions—will tell. ❇

Endnotes

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8 See, e.g., Michael Castillo, Debate over psychiatry bible DSM-5 grows days before release, CBS News (May 15, 2013), www.cbsnews.com/8301-204_162-57584600/debate-over-psychiatry-bible-dsm-5-grows-days-before-release; Susan Krauss Whitbourne, What the DSM-5 Changes Mean for You, *Psychology Today* (May 4, 2013), www.psychologytoday.com/blog/fulfillment-any-age/201305/what-the-dsm-5-changes-mean-you.

9 See, e.g., Allen Francis, The Forensic Risks of DSM-V and How to Avoid Them, *Journal of the Am. Acad. of Psychiatry and the Law* 38: 11-14 (2010).

10 DSM-5, at 25. The DSM-IV contained similar but milder and less prominently placed comments. See DSM-IV-TR, at xxxii-xxxiii (Use of DSM-IV in Forensic Settings) and xxxvii (Cautionary Statement).

11 DSM-5, at 33; American Psychiatric Association, Highlights of Changes from the DSM-IV-TR to DSM-5 (2013), www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf; Whitbourne, supra note 8.

12 DSM-5, at 33.

13 DSM-IV-TR, at 41.

14 The "Diagnostic Criteria" is the "meat and bones" of a diagnosis—a sort of checklist of the factors required. The APA then explains and expands on the diagnostic criteria in the "Diagnostic Features" discussion portion of the text.

15 American Psychiatric Association, Highlights of Changes from the DSM-IV-TR to DSM-5, supra note 11; DSM-5, at 37.

16 DSM-5, at 33.

17 DSM-IV-TR, at 49.

18 Mark Moran, DSM-5 Provides New Take on Neurodevelopment Disorders, Psychiatry Online Psychiatric News (Jan. 18, 2013), http://psychnews.psychiatryonline.org/newsarticle.aspx?articleid=1558424 (stating that the DSM-5 criteria

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for ID move away from relying exclusively on IQ scores to using additional measures of adaptive functioning).

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27 DSM-5, at 33.

28 *Id.* at 33, 37.

29 *Id.* at 34-36.

30 *Id.* at 33.

31 DSM-5, at 38.

32 *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ex parte Briseno*, 135 S.W.3d 1, 4-5 (2004).

33 *Briseno*, 135 S.W.3d at 7-8.

34 *Id.* (citing AAMR, Mental Retardation: Definition, Classification, and Systems of Support 5 (9th ed. 1992) and Tex. Health & Safety Code §591.003(13)).

35 *Id.* at 7 n.24, 14. The Court of Criminal Appeals has since confirmed that an IQ score of 70 or below represents "a rough ceiling, above which a finding of mental retardation in the capital context is precluded." *Ex parte Hearn*, 310 S.W.3d 424, 430 (Tex. Crim. App. 2010).

36 *Briseno*, 135 S.W.3d at 8-9; *Gallo v. State*, 239 S.W.3d 757, 776-77 (Tex. Crim. App. 2007).

37 See, e.g., *Chester v. Thaler*, 666 F.3d 340, 343, 346 (5th Cir. 2011).

38 American Psychiatric Association, Posttraumatic Stress Disorder (2013), www.dsm5.org/Documents/PTSD%20Fact%20Sheet.pdf.

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41 Posttraumatic Stress Disorder, supra note 40; DSM-5, at 272.

42 DSM-5, at 272; DSM-IV, at 468.

43 Posttraumatic Stress Disorder, supra note 40; DSM-5, at 274; DSM-IV, at 467.

44 Mark Moran, Trauma Disorder Criteria Reflect Variability of Response to Events, *Psychiatric News*, American Psychiatric Association (March 1, 2013), http://psychnews.psychiatryonline.org/ newsArticle.aspx?articleid=1659600.

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47 Substance-Related and Addictive Disorders, supra note 49.

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50 DSM-5, at 484; Substance-Related and Addictive Disorders, supra note 49.

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52 DSM-5, at 602-611.

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54 American Psychiatric Association, Mild Neurocognitive Disorder (2013), www.dsm5.org/Documents/Mild%20Neurocognitive%20Disorder%20Fact%20Sheet.pdf.

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Grand jury: where the community meets the law

A primer on grand juries and the role prosecutors play in the process

It was a day like any other day. My messy desk gave the illusion that more work was being done than actually was, people were stopping by to talk, and emails were interrupting as they annoyingly do. Then it happened.

By John L. Brewer
Assistant District Attorney in Harris County

Often people say they have a premonition before things like this happen to them. Some people, like me, just walk into them blindly. "It" was an email inviting me to write an article about grand juries. My initial reaction, usually the right one, was to reply, "Brewer died recently in a horrible incident on one of the elevators in the Harris County Criminal Justice Center; therefore, he is not be available to help." I'm a trial lawyer; I don't write—not anything for publication, anyway.

But I reconsidered because, well, I do know a little about this stuff. Grand juries are what I do every day at the Harris County District Attorney's Office as the Division Chief of Grand Jury. So here is my primer on grand juries and the role we prosecutors play in the process.

Are there specific statutes about grand juries?

Yes, actually. If you find yourself in need of actual legal authority about grand juries, go to chapters 19 and 20 of the Code of Criminal Procedure. Chapter 19 tells a district court judge how to "get him or herself" a grand jury and chapter 20 tells how the grand jury works once there is one.

What is a grand jury?

A grand jury is a group of 12 people who meet the qualifications set out in Art. 19.08 of the CCP. They must be citizens of the county in which the grand jury sits, able to read and write, not under indictment, etc. Pretty basic stuff—much like the citizens we want on our trial (petit) jury, we are looking for good, decent folks.

But Art. 19.06 suggests the court consider additional factors when starting the selection process: that those chosen "represent a broad cross-section of the population of the county, considering the factors of race, sex, and age." It is a very rare occasion that the law mandates that we take into account things like race, gender, and age when selecting a group of citizens to serve in the criminal justice system. Obviously, the idea is to have a grand jury made up of people from a variety of backgrounds representing the entire county in which it sits.

Every felony case that goes to trial or pleads must be indicted by a grand jury unless the defendant chooses to waive indictment and proceed per the Texas Constitution.

The most common role of the grand jury is to listen to the facts of a case and determine if probable cause exists for the charges alleged against the defendant. The grand jury is also an investigative body. It can assist the district attorney's office in uncovering evidence to support charging a particular defendant with a crime, or it can choose to independently investigate matters brought to its attention.[1]

How is a grand jury selected?

A district court judge may use one of two methods to select grand jurors, and they are both found in Art. 19.01.

The first method allows the judge to appoint no fewer than two or more than five jury commissioners to assist the court by recruiting people who are willing to serve. The commissioners must be qualified per Art. 19.01(a) and sworn in per Art. 19.03. Of course they must be able to read and write but, interestingly, they also must be "*intelligent* citizens of the county" and residents of "different portions of the county." The commissioners are sworn with the expectation that they will then supply the court with 15 to 40 qualified potential grand jurors. It is actually the commissioners, not the court, who are instructed "to the extent possible" to consider race, gender, and age to have a group of potential grand jurors who represent a broad cross-section of the community.

The second method of selecting a grand jury is basically what prosecutors would recognize as voir dire. The judge can have a group of 20 to 125 prospective grand jurors, an

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array, brought in for questioning regarding qualifications and willingness to serve.

Once an array of citizens has been provided to the court via either of these methods, the court will have them swear an oath to tell the truth and then question them. The judge must be satisfied each person meets the qualifications spelled out in Arts. 19.08 and 19.23. Given the emphasis on diversity included in the CCP, regardless of the selection method, when the judge makes his final selections, the panel should represent a wide cross-section of citizens from throughout the county. The court is to select 12 grand jurors and up to two alternates and choose from among them a foreman. The court then administers the oath included in Art 19.34. (In Harris County we swear the alternates separately from the 12 regular grand jurors.) Voila! You have yourself a grand jury.

For those non-civic minded souls who want to escape the opportunity to serve their county, see Art. 19.25 for a list of acceptable excuses not to serve, even if someone is otherwise qualified.

How many grand jurors must be present to function?

Art 19.40 says a quorum of nine grand jurors must be present to discharge any duty given the grand jury. Also nine grand jurors must vote to "true bill" or indict a case. Failure to get nine votes will result in a no-bill. If only nine grand jurors are present, be certain that the case is strong enough to ensure a true bill if that is what you are seeking.

How is information presented to the grand jury?

In the vast majority of cases here in Harris County, the prosecutor simply recites the relevant facts to the grand jury so the jurors can decide if probable cause exists to indict the defendant. Evidence may also be presented to the grand jury via documents or testimony from witnesses, including the accused. The CCP requires that all testimony before the grand jury *by the accused* be recorded,[2] but the better practice may be to record *all* testimony before the grand jury. Before any grand jury testimony can be released to the defense, particularized need must be shown and the court would then order the release of the testimony.[3]

What happens in the grand jury room?

Only certain people are allowed in the room with the grand jury *when facts are being presented or when testimony is being given.* Given the secret nature of the proceedings, the list in the code pretty much makes sense: grand jurors, the prosecutor, the witness or accused, an interpreter if needed, a person to record the proceedings (usually a stenographer), and the bailiffs. Notice that your intern, boyfriend, and mother-in-law are not on the list, even if they think it would be really cool to sit in. The only other person statutorily allowed in the room during presentation is a witness who may assist the prosecutor in examining other witnesses. Typically this is an expert or an investigator who might have information the prosecutor needs to effectively question a witness. But be careful who asks the questions! The code restricts who can play Tomás de Torquemada; only the representative of the State or the grand jurors can actually ask questions of the witness or the accused.

After the questioning is over, everyone but the grand jurors vacate so they can deliberate probable cause in private. Although just about everything concerning a grand jury investigation is secret, deliberation is the most secret. Many errors in the grand jury process can be considered "technical" in nature and therefore will be subject to harm analysis upon appeal.[4] Having someone besides the jurors in the room *during grand jury deliberation* will result in your case being reversed and having to try it again.[5]

Are there special procedures for testimony by a witness or the accused?

Yes. If a witness is going to give testimony, then she must be sworn in using the oath in CCP Art. 20.16 mandating that she tell the truth and keep secret any matter about which she was questioned or which she observed. If that secrecy is violated, the witness can be found in contempt and fined $500 and/or imprisoned for up to six months.

If the accused testifies, then Art. 20.17 controls the process. Along with providing the accused a written copy of the admonishments in Art. 20.17, similar to the *Miranda* warnings, the accused must be given an opportunity to consult with a lawyer

if he so desires. Of course if he cannot afford a lawyer, he can ask the court to appoint one.

Before questioning starts, the accused must be told by the grand jury what he is suspected of and where and when it occurred. It seems best to just add this to the written admonishments the State must provide anyway under Art. 20.17. At no time is the defense attorney allowed in the grand jury room, though the accused should be allowed an opportunity to consult with the attorney during questioning if he desires. The attorney can wait in the hallway and the witness may step in and out of the grand jury room to consult. If that gets too tedious, the grand jury can certainly terminate the questioning and just vote based on what they have heard. That usually doesn't go too well for the accused.

For what can the grand jury actually indict the accused?

In most circumstances we prosecutors have a charge in mind when we present a case to the grand jury. Regardless of what we expect, the grand jury can no-bill a case or return a true-bill if probable cause exists for any offense they think applies, including a lessor charge or a misdemeanor.

What is the prosecutor's role?

Clearly our role is to inform the grand jury when criminality is afoot in our jurisdictions and provide it with the details necessary to true-bill or no-bill a case. But the prosecutor's role when dealing with grand juries goes much farther. Statutorily, CCP Art. 20.05 tells us that the grand jury can request our assistance and "ask advice upon any matter of law or upon any question arising respecting the proper discharge of their duties." Because a grand jury is typically composed of regular (usually non-lawyer) citizens, they oftentimes need advice regarding the law.

On occasion, a grand jury will look to the prosecutor for guidance regarding its decisions. Although most prosecutors steer away from flat-out telling the grand jury what they think should be done (i.e., "Please no-bill this case"), there doesn't seem to be any admonition in the code stopping us. I think the real reason is wariness on the part of the prosecutor to be seen as controlling the grand jury or infringing upon its independence. Such straightforward requests from a prosecutor can often upset the sensibilities of a grand jury, resulting in questions like, "Why are you using us to get rid of the case? Why didn't you dismiss it?" The reality is that we may be "allowing" them to dispose of a case that ultimately we would have to dismiss. Is that OK, or should we be taking the responsibility and filling out the *nolle* ourselves? I can say that I have done both many a time. It seems to me that both prosecutors and grand juries have the responsibility of disposing of "bad" cases. Their responsibility starts at determining if probable cause exists but also includes a healthy dash of "how do we feel about this particular case in our county?"

What to do with evidence that favors the defendant

Obviously taking cases to a grand jury is not an adversarial proceeding because the defense attorney is not allowed in the room. Because it is not adversarial, appearing before the grand jury is another one of those times where prosecutors need to play the roles of both prosecutor and defense attorney. Being fair in the grand jury room definitely includes informing the grand jury of things exculpatory and mitigating. The goal is to give the grand jury a complete picture of *all* the relevant facts, good and bad. After all, these are facts the State may have to deal with at trial, and this is probably our first chance to see how a "jury" responds to them. If the grand jury is uncomfortable with the case, you better believe the prosecution will have issues at trial. For a short discussion of the split in Texas caselaw on the necessity to present exculpatory evidence to the grand jury see *In re Grand Jury Proceedings*.[6]

What we should *not* address in the grand jury room

Issues that are irrelevant or purely meant to prejudice the accused should not be relayed to the grand jury. Also, be careful that any paperwork grand jurors receive before voting does not contain such things. Information such as race and criminal history typically is not relevant to determining probable cause.

But like any good, simple rule, there is always an exception. Criminal history can be relevant when it is jurisdictional (e.g., theft 3rd or DWI

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3rd). Criminal history can also be relevant when the accused has engaged in a crime that fits a pattern from his past. The fact that an accused has stolen cars in the past may not be information prosecutors need to pass on to the grand jury in an auto-theft case, but the fact that the accused has previously used a knife to kill two people, making the same claim of self-defense as in your murder case, I believe is relevant. Of course the grand jury can always decide to ask about criminal history. If they do, prosecutors have two choices, to tell them or not, but if you do, make sure they know they should not use that information to determine probable cause in your case.

Should I encourage the grand jury to hear witnesses?

The answer is always yes if the witness is the accused! Grand-jury testimony is an unprecedented opportunity to ask the defendant any questions, including about his defenses, who helped him, to whom he has told his story, who his witnesses are, what he did with the evidence, what he did in the two weeks between the crime and his arrest, and anything else we can think of. You may even get information that allows you to obtain a search warrant. Remember, a prosecutor's job in grand jury is not to refute what the defendant says, but to gather information, including material that may be of use against the defendant in trial.

When a prosecutor is considering putting a witness other than the defendant before the grand jury, the question is a little more complicated. The State certainly can use the grand jury to "tie down" a witness's testimony. If you're not sure what the testimony will be, then it's best to find out now. If you already know what the story is—and let's hope it has been written down or recorded—then it might be unnecessary. Also note that though a defense attorney has to show "particularized need" to obtain grand-jury testimony, that decision is up to the judge.

How secret are grand jury proceedings?

Secret enough to cost a violator $500 and 30 days in jail! The code tells us that the "proceedings of the grand jury shall be secret." Provisions are made in Art. 20.02(c) for prosecutors to share information obtained via the grand jury with another grand jury, a law enforcement agency, or another prosecutor when they need their assistance with the case. The code also says when a prosecutor does share such information, she should also admonish the recipients that they must keep it secret. It is not required, but if you are sharing grand jury transcripts or other information obtained via the grand jury process with other another law enforcement agency, it may be advisable to obtain a court order allowing the release. When you release the information, have the recipient sign an acknowledgement that she has been admonished to keep the information secret.

Wrapping up

Of course there is much more to the grand jury process than I can put in an article, but I hope this information gives readers a place to start. Look closely at Chapters 19 and 20 to find answers to any other questions. If not, I'm happy to help, and maybe we can figure it out together. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 19.34.

2 Tex. Code Crim. Proc. art. 20.012.

3 Tex. Code Crim. Proc. art. 20.02(d)(e).

4 *Mason v. State*, 322 S.W.3d 251 (Tex. Crim. App. 2010).

5 *Ray v. State*, 561 S.W.2d 480 (Tex. Crim. App. 1977).

6 198. GJ.20, 129 S.W.3d 140 (2003).

Myths about protective orders

Putting to rest some common misconceptions about these important tools in prosecutors' toolboxes for fighting family violence

Over the years we in the Tarrant County Criminal District Attorney's Protective Order Unit have heard a wide range of interpretations from applicants, attorneys, police officers, the average person on the street, and even some judges regarding what a protective order is, how it works, what it can and can't do, when it works and doesn't work, and who can and can't request one.

By Kristine Soulé (left) and Cynthia Gustafson
Assistant Criminal District Attorneys in Tarrant County

Some of those ideas are funny, some are seriously misguided, and others are just flat-out wrong. For example: "A protective order is a magical forcefield that surrounds me with an impenetrable bubble of protection every waking moment. If my abuser so much as glances in my direction, the police will arrest him!" (Yes, we said "him" because approximately 95 to 97 percent of the reported family violence cases involve male-on-female violence.) Sadly, there is no magic bubble, even though it would be really cool.

Another (false) example: "If you want to get the advantage in your divorce and/or SAPCR [Suits Affecting the Parent-Child Relationship] case, getting a protective order is the way to go." A protective order is not a substitute or shortcut for other legal remedies, such as modifying existing custody orders, property division, or evictions, although a protective order (often abbreviated PO) can be drafted to address specific issues involving children and property when appropriate. A protective order does not prohibit the applicant and respondent from coparenting in an appropriate and healthy manner, and it won't keep them from reconciling.

And a third example: "Protective orders don't fix anything. It's just a piece of paper." That's kind of true—it is a "piece of paper," but it's a piece of paper with punch, thanks to the criminal consequences attached to violations of the order. At its best, a protective order can be as an effective tool to de-escalate situations where the pattern of violence is increasing in frequency and severity, giving the applicant the opportunity to safely leave the situation before the violence gets worse.

We can't cover every protective order myth or misconception we've come across, but these are our Top 6 myths we'd most like to bust.

Myth 1: Restraining orders and protective orders are essentially the same thing.

Nope. Restraining orders, as referred to within the context of the Texas Family Code, are actually either temporary restraining orders (TROs) or injunctions. TROs generally contain boilerplate language and are filed together with either a Petition for Divorce[1] or Suits Affecting the Parent-Child Relationship[2] and contain a long list of prohibitions against the adverse party for the preservation of the property and the protection of the parties, which include threatening or harassing the applicant (even by telephone), damaging her property, causing her or her children bodily injury, and similar behavior.

Violations of these prohibitions are not criminally enforceable, and there are no specified or automatic civil remedies that the affected party can seek without returning to court under a motion to enforce or contempt action, and those remedies are available under only limited circumstances. A violation of any of the sections referring to harassment or threats does not automatically give rise to a criminal investigation, although those instances can be used to support a criminal complaint involving harassment or terroristic threats where appropriate.

A protective order, on the other hand, does provide a more immediate remedy for the injured party by way of the criminal offense Violation of Protective Order, which can be enhanced to a felony depending on the circumstances.[3]

Additionally, the prohibition language in a protective order can be altered to fit the type of protective

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order being sought. The "traditional" family violence protective order language is found in Family Code Title 4, Ch. 85. Under §85.022, where the court finds that family violence occurred and is likely to occur in the future, the respondent is prohibited from a host of activities, including committing family violence, communicating with or threatening the applicant or family member, going near her residence or workplace, possessing a firearm, or harming a pet.

Chapter 7A of the Texas Code of Criminal Procedure offers Title 4-type protective order language for victims of sexual assault, sexual abuse, stalking, or trafficking. Unlike Title 4, the prohibitions in Chapter 7A require that the court find only "whether there are reasonable grounds to believe that the applicant is the victim of sexual assault or abuse, stalking, or trafficking." The adverse party is prohibited from similar activities as in Title 4, along with communicating directly or indirectly with the applicant or any member of her family or household in a threatening or harassing manner and doing anything to harass, annoy, alarm, abuse, torment, or embarrass the applicant.

Protective orders can also address situations involving serious bodily injury inflicted on the applicant by the abuser or, in cases where two or more protective orders have been obtained against the same abuser, by requesting that the duration of the protective order be extended beyond the general two years.[4] This section allows for some creativity setting the length of time the protective order will remain valid and enforceable. In those types of situations, the benefit for the applicant with an extended duration, say 50 years, is that the applicant is truly able to work on putting the situation and abuser behind her and work on her recovery, as opposed to having to deal with the issue again and again when the protective order expires, especially if the abuser displays an inclination toward repeated, unwanted contact with the victim.

Cynthia's personal favorite is a 50-year "No Contact of Any Kind, *ever*" protective order obtained for a young child who very likely witnessed the murder of his mother at the hands of her abuser. Getting that protective order didn't change the situation for the young woman's family, but together with the subsequent orders in the separately filed SAPCR case, it was as close to surrounding that child with a "magic bubble of protection" as we could get, and it helped the family take a few steps past the tragedy of losing their loved one.

Myth 2: Undocumented people can't request a protective order. If they do, ICE will be contacted, and they will be deported.

False. An undocumented individual who has grounds to request a protective order will not be deported solely on the basis of her request for a protective order. The Family Code provides definitions for dating violence and what constitutes a family, household, member of a household, and family violence and does not differentiate with regard to the victim's citizenship status.

Re-victimization is potentially higher for immigrant victims and undocumented individuals. In those cases, the victim may not have any understanding of her legal rights to seek protection from her abuser, and she may believe that she is at risk for deportation if she seeks assistance from the police or other government agencies.

If victims know their legal rights, what a protective order is, how to request one, and how it can be used to provide safety and security, the risk of re-victimization is reduced. The VAWA Reauthorization of 2013 included several key improvements to VAWA protections for immigrant victims. Among other improvements, 1) children of victims who are eligible for a U-visa will not lose eligibility if they turn 21 during the adjudication process; and 2) it improves the U-visa provision by including stalking in the list of covered offenses, includes a civil rights provisions that guarantees consistent application of civil rights protections to all VAWA programs, and ensures that no victims can be denied services based on race, color, religion, national origin, sex, gender identity, sexual orientation, or disability.[5]

Myth 3: A victim who is still in a relationship with, still living with, or married to her abuser cannot request a PO.

Wrong, wrong, wrong. Wrong. An adult member of a dating relationship or marriage may file for a protective order.[6] With regard to family violence under §71.004(3), an application for a protective order to protect the applicant may be filed by a

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Legislative changes to the Texas Family Code and Code of Criminal Procedure

By Kristine Soulé and Cynthia Gustafson
Assistant Criminal District Attorneys in Tarrant County

FC §81.0075: Intends to clarify that there is no conflict of interest when a prosecutor representing TDFPS in an action involving the victim also represents that same victim in a preceding, concurrent, or subsequent protective order (PO) suit. However, this is subject to the Texas Disciplinary Rules of Professional Conduct and does not cure any ethical conflicts that may arise in these situations.

FC §82.003: Increases the available venue locations for a protective order to include the county where the alleged family violence occurred. Victims are no longer limited to only the county where they or the respondent reside.

FC §§82.004 and 85.042(a): §82.004 requires that an application for a protective order include whether an applicant is receiving services from the Title IV-D agency in connection with a child-support case and, if known, the agency case number for each open case. §85.042(a) requires the clerk of the court to send a copy of the PO to the Title IV-D agency. There is no requirement that the respondent is a party to the child support case, and there is no exception made if the respondent is not a party. If known, this information is required regardless of the respondent's involvement in the child-support case.

FC §§85.021(1)(C) and 85.022(b)(7): In 2011, the Legislature gave courts the authority in §85.021(1)(C) to prohibit a respondent from removing a pet, companion animal, or assistance animal from the possession of a party protected by a PO. Additionally §85.022(b)(7) gave courts authority to prohibit a respondent from harming, threatening, or interfering with the care, custody, or control of a pet or assistance animal belonging to a person protected by a protective order. The changes made in 2013 clarify that an animal is included whether it is possessed by or in the actual or constructive care of the person protected by the protective order, addressing situations where the applicant has left the animal to escape the abuse.

FC §85.042(a-1): Revises the requirement on the clerk to provide a copy of the protective order to the staff judge advocate or provost marshal if the respondent is a member of the military in an active-duty status to make it conditioned on the applicant or applicant's attorney providing the applicable mailing address.

CCP art. 7A.01(a)(2): Removes the limitation on eligibility for a protective order to only certain victims of trafficking, adding victims trafficked for forced labor or services.

CCP art. 7A.01(a)(3): Reduces the victim's age from younger than 18 to younger than 17 for a parent's or guardian's applications on behalf of victims of sexual assault, sexual abuse, or stalking.

CCP art. 7A.01(a)(4): Sets the victim's age to younger than 18 for a parent or guardian to file an application on behalf of victims of trafficking of persons and compelling prostitution.

CCP art. 7A.01(b): Increases the available venue locations for filing a protective order to include any county in which an element of the alleged offense occurred or any court with jurisdiction over a family violence protective order involving the same parties.

CCP art. 7A.05(a)(2)(A)(ii): Authorizes the court, upon a finding of good cause, to prohibit the respondent from communicating in any manner with the applicant or any member of the applicant's family or household except through the applicant's attorney or a person designated by the court.

CCP art. 7A.07(b): Amends when a victim or her parent or guardian can apply to rescind a protective order; applies to a victim of sexual assault, sexual abuse, or stalking who is 17 or older; a parent or guardian acting on behalf of a victim who is younger than 17; a victim of trafficking persons or compelling prostitution; or a parent or guardian acting on behalf of a victim who is younger than 18.

CCP Chapter 7B was repealed and merged with Ch. 7A.

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member of the dating relationship, regardless of whether the member is an adult or a child.

It is important to note that victims are generally at their most vulnerable and at the highest risk of serious bodily harm or death when they are taking steps to separate themselves from their abusers. Safety planning with a victim who is reaching out for assistance in leaving an abusive relationship but still living with or in a relationship with an abuser is critical. Therefore, when a victim is actively seeking assistance, such as a protective order, and she is still living with the abuser, it bears consideration, for the victim's safety, to ensure that the she is away from the residence and the abuser *before* an application for the protective order is filed and service is attempted on the abuser. In situations where it is appropriate to seek a "kick-out" order with the temporary *ex parte* protective order,[7] effectively removing the alleged offender from the residence immediately, best practices (with a dash of common sense) say that it is *probably* not the best idea to have the angry abuser served with the document that will very likely ignite his wrath while the victim (and most likely children) are in close proximity.

Myth 4: Victims who have never reported abuse to police (or who have no proof of abuse) cannot get a protective order. (No photos, witnesses, or hospital records = no PO.)

Not necessarily. Many of the victims seeking a protective order for family violence, stalking, or sexual assault have hidden their abuse and never reported or collected evidence of it. There is no requirement in the Family Code or Code of Criminal Procedure that an applicant provide corroborating evidence. An applicant's testimony alleging the respondent's violence is sufficient to support issuance of the order, despite the absence of police records or other evidence corroborating the applicant's allegations.[8]

And while corroborating evidence is not required, working with the applicant may help identify other sources of evidence, such as social media, text messages, emails, and voicemail messages.

Myth 5: Someone can get a protective order only if the abuser has been physically violent.

Not true. The definitions of both "family violence" and "dating violence" include *threats* that reasonably place the applicant "in fear of imminent physical harm, bodily injury, assault, or sexual assault."[9] Stalking occurs when a respondent engages in behaviors towards a victim who feels *reasonable fear of bodily injury or death to self or to a family or household member or damage to property because of those actions.*[10] Victims are encouraged to seek help before the abuser physically harms them, and the code ensures that these victims are not penalized for "getting away."

Myth 6: Someone who completed or filed an Affidavit of Non-Prosecution (ANP) in a criminal case can't get a PO.

Again, not true. The reasons why a victim does not want to proceed with or participate in criminal prosecution are as numerous and varied as the victims and their situations. The criminal justice system is time-consuming, intimidating, daunting, and frustrating even when there is no relationship between the victim and abuser. While an ANP presents a challenge, it is not an insurmountable one.

In the best situation the ANP contains only boilerplate language stating the applicant does not want the respondent prosecuted, so the applicant's credibility does not require rehabilitation if the ANP does not contain contradictory statements. In the worst case scenario, the applicant has recanted or changed her story, and rehabilitating her credibility can be achieved by establishing why she recanted and what has changed since she signed the ANP.

Most individuals who find themselves in abusive, intimate partner relationships do not begin those relationships with the idea that they will be abused by their partner or that they would ever stay in a relationship that is abusive. Many victims remain because they are unable to leave, either for emotional reasons—they love the abuser and believe the abuser loves them and will change, given time and the right incentives—or for financial and family reasons. Very often, victims feel incredible shame for "allowing" the situation to exist and take personal responsibility for the abuser's actions: If only she acted or behaved better or done what the abuser wanted, he wouldn't have acted out toward her in the aggressive or abusive manner.

In situations where the victim is

financially dependent on the abuser, the victim may simply not be able to pick up and walk away, especially if there are children to consider, and most definitely if it means the victim will need to leave children behind to get away. In cases such as these, the victim will most often remain in the abusive situation. When a victim is able to get away and address the immediate concerns of food, shelter, and safety, the opportunity and probability for re-victimization by the abuser is high if the victim does not know how to keep the abuser away. She may not have the means or opportunity to obtain a protective order or have the knowledge that such an option is available at no cost. Family violence victims are frequently re-victimized because they are unable to prohibit an abuser from going to their home or place of business, committing acts of family violence, threatening or harassing them, and possessing a firearm.

Conclusion

According to data collected by the Texas Council on Family Violence (TCFV), the estimated number of deaths linked to the victim's intimate partner, boyfriend, or ex-boyfriend that directly resulted from or were related to family violence incidents in 2008 was 136. Estimated intimate partner-related deaths rose in 2010, up to an estimated 146 for the state. In 2011, the TCFV added another component to the data collected: collateral deaths. Collateral deaths include those individuals—friends, coworkers, other family members, and children—who happened to be present at the time of the family violence-related incident when the intended victim was either killed or wounded. The statewide number of estimated intimate partner-related deaths in 2011 was 102, plus an additional 26 collateral deaths. Family violence remains a recurring, impactful, and far-reaching problem for Texas.

For some of you, this information is old-hat. For others, it may be a whole new world. Either way, looking at how the discussion about protecting victims in Texas and the rest of the country has grown and changed over the past 50 years, we strive to keep the conversation going because everyone deserves to live a life free of abuse. ❇

Endnotes

1 Tex. Fam. Code §§6.501 and 6.502.

2 Tex. Fam. Code §105.001.

3 Tex. Penal Code §25.07, §25.07(g).

4 Tex. Fam. Code §85.025.

5http://now.org/issues/violence/VAWA-Fact-SheetFeb2013.pdf.

6 Tex. Fam. Code §82.002.

7 Tex. Fam. Code §83.006.

8 See *Amir-Sharif v. Hawkins*, 246 S.W.3d 267, 272 (Tex. App.—Dallas 2007, pet. dism'd w.o.j.); *Maki v. Anderson*, 2013 WL 4121229, *7 (Tex.App. —Fort Worth 2013).

9 Tex Fam. Code §§71.004(1), .0021(a)(2) (emphasis added).

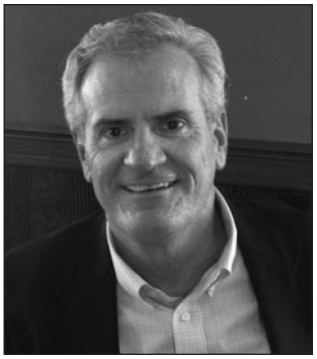
10 Tex. Penal Code §42.072 (emphasis added).

Forms for scholarship and awards now online

Applications for the Investigator Section scholarship, PCI certificate, and Chuck Dennis Award are now online at www.tdcaa.com. (Search for any one of those terms to find them.) Applications are due December 1, and each form includes the information on what's required to apply. ❇

Lukewarm justice

A cold case in Cuero becomes the subject of a reality TV show investigating old cases in small towns across the country.



By Michael A. Sheppard
District Attorney in DeWitt County

On January 6, 2001, at 5:15 in the afternoon—just 20 minutes before she was due to leave her abusive boyfriend and return to Arkansas with her two children—Pam Shelly was shot one time in the head in the bathroom that she shared with her boyfriend, Ronnie Hendrick.

The case was written off initially as a suicide, but 12 years later on September 10, 2013, Hendrick pled guilty to murder and went to the pen for 22 years. This is the story of what happened between those two dates and how that cold case, with the assistance of Hollywood, was cracked. It is also the story of how difficult it became to pick a jury and try the case (because Hollywood apparently didn't care about that part).

The day Pam was shot, she was 800 miles from her home and family in Arkansas. She and her two children, Kayla, age 12, and Dustin, 9, were living with her boyfriend, Ronnie Hendrick. They lived out on rural property in DeWitt County just a mile from Ronnie's mother and stepfather. Ronnie had moved Pam down from Arkansas the previous August, and she had been in Texas only about five months.

Pam's "suicide attempt" was called in to 911 by Ronnie's stepfather. When police arrived, EMS units were pulling away with a still-breathing Pam in the back and Ronnie in the cab of the ambulance, directing EMS personnel to the hospital. The home Pam shared with Ronnie was in the middle of nowhere, and EMS had come from Yorktown. They needed help finding the shortest route to Cuero, which was about 20 minutes away, and Ronnie graciously volunteered to direct the driver so that when sheriff's deputies arrived, Ronnie was nowhere to be found. They could not speak with him or perform a gunshot residue test.

Twelve years later, the first responders all remember that they must have arrived at the scene believing that the shooting was self-inflicted because they did not recall the adrenaline that would have been associated with responding to a shooting of unknown origin. The recordings that would have told us exactly how this shooting was dispatched were, of course, long gone by the time we started preparing for trial. Officers took photos and found a gun (a 32-caliber revolver) and holster on the bathroom counter—consistent with suicide. A slug and bloodstains were found on the floor.

Looking back, it is remarkable to me to realize the impact that the initial arrival on scene can have on officers. In this case, Hendrick's family—his mother, stepfather, and two brothers—were the only adults present when officers arrived. Twelve-year-old Kayla and 9-year-old Dustin were ignored, and all officers heard was Ronnie's side of the story. There was no one at that scene looking out for Pam.

Hendrick's family filled officers' ears with stories of how Pam was suicidal—she loved Ronnie but had to return to Arkansas because her daughter was unhappy, and this pushed her over the edge. They told officers that Pam had a family history of suicide and that her sister had killed herself. All of this was untrue, but officers had no way of knowing that without further investigation. The family blamed young Kayla for Pam's attempted suicide, claiming that she was a difficult child.

In preparing for trial 12 years later, the State had established a timeline that would have shown, through circumstantial evidence and the earlier statements of Hendrick's family, that there was a delay of over an hour from the time Pam was shot until when EMS was called—ample time to get stories straight, arrange a crime scene, and the like. Officers did not know that at the time.

Pam was life-flighted to San Antonio. Officers took a statement

from Hendrick later that night in which he claimed he was outside when he heard the shot and he ran in and found Pam on the floor of the bathroom. He claimed that she was depressed about leaving and returning to Arkansas, but she had to go or she would lose her children. This later proved to be a lie; Pam was in no danger of losing her children. Apparently Hendrick had not thought about the obvious inconsistency between Pam leaving him because she didn't want to lose her children and her killing herself, thereby insuring that she would never see them again. Unfortunately, no one else seized on that inconsistency at the time either.

Pam died in San Antonio, and an autopsy was done. The medical examiner was provided the slanted information from the scene about Pam being a troubled and unhappy soul and her boyfriend's claim that it was a suicide. The ME also observed that the gunshot was a contact wound to the right temple area traveling front to back, down to up and right to left—a classic suicide wound. The autopsy finding was that Pam's death was a suicide.

Officers were not entirely through with Ronnie Hendrick even after the ME report. They wanted him to take a polygraph, and he agreed. The test was set up on at least two separate occasions, and both times Ronnie failed to show. Soon, within weeks of Pam's death, Hendrick was nowhere to be found.

The case languished. Pam had no local friends or family to dispute the suicide theory or to push law enforcement to pursue the case.

Enter Carl Bowen

In 2008, seven years after the shooting, Carl Bowen was a newly minted investigator for DeWitt County Sheriff Jody Zavesky. Jody had not been sheriff back in 2001, but Carl had been on the force back then, and though it hadn't been his case, he knew about it. It bugged Carl that Hendrick had not been polygraphed and that he had disappeared after Pam's shooting. Carl had harbored doubts about Ronnie's stories all these years, and now he was in a position to do something about it. Carl approached Sheriff Zavesky about opening the cold case. To the sheriff's great credit he consented to re-opening it in spite of the fact that the department had a large number of pending active cases. Carl and Jody deserve tremendous praise for taking on the burden of a cold case motivated purely by their own internal desire to see justice done. There was no political pressure on them, just the nagging feeling that something was not right.

Opportunity dropped in Carl's lap in the summer of 2008 when Ronnie Hendrick arrived at the DeWitt County Jail. Hendrick was charged with domestic abuse, beating up a woman that he was living with. Carl also soon discovered where he had been during the years since Pam's "suicide": He had gone to South Dakota and gotten himself thrown into the penitentiary there for felony DWI. Alarms went off in Carl's head as he realized that Hendrick was a serial abuser of alcohol and women and he had gotten as far from DeWitt County as he could immediately after Pam's death.

Carl approached Ronnie in his cell and got him to agree to a polygraph. Hendrick did so with predictable results: The test indicated deception, and he asserted his right to counsel when the polygrapher sought to question him after the examination. After the polygraph, he admitted to four different witnesses that he had lied to officers originally. He still denied killing Pam, but now he claimed that he was in the room with her when she killed herself, a significant change from his earlier story of having been outside.

In addition to Ronnie's change of story, Carl spoke with a number of witnesses in Arkansas, including Pam's children, Kayla and Dustin, and uncovered a lot of circumstantial evidence that would help in disproving suicide.

Bringing the case to me

I am the elected district attorney for the 24th Judicial District, which includes DeWitt, Goliad, and Refugio Counties. The summer of 2008 was the first time I became acquainted with the shooting of Pam Shelley. I was the district attorney back in 2001 when she died, but I did not recall ever hearing about the case as nothing was brought to our office at that time. Pam was a newcomer to our county and she was living in a lonely and rural area at the time of her death. Her children were attending school in the neighboring community of Yorktown, she had not been in DeWitt County long enough to have made many friends, and she had no family here. I had vague recollections of having heard about the "suicide," but I could not recall specifics.

Carl brought the case to me in

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2008, and I was very impressed with his zeal and desire to get to the bottom of the case. Nevertheless, I rejected it. After reviewing it with a couple of my senior assistants, we did not believe that it was a makeable case, especially in view of the medical examiner's report and the fact that the wound was a contact wound and so consistent with classic suicide.

"Cold Justice" comes in

The case would have probably died on the vine had Carl Bowen not come to me in 2012 with an odd proposal. He said that he had seen a solicitation of some sort in which television producers were looking for cold cases and promising to help solve them for a new TV show. He told me that he wanted to contact them regarding the Pam Shelley shooting, and he asked for my blessing before he did so.

I distinctly recall my thinking at the time. I didn't believe that the involvement of Hollywood types would help the case, but I could not think of any reason not to agree to it. If they failed to uncover any additional evidence, then no harm done. If they found something new, then great. We all believed in our hearts that Ronnie had killed Pam so there was no reason not to turn over every stone possible to prove it.

As for the prospect of any of this ultimately appearing on television, I didn't think that there was any real chance of that happening. Although I am far from an expert on the production of TV shows, I know that countless pilots are filmed but never see the light of day. I never in a million years expected that this case would follow the course that it did and that in 12 months' time I would be watching myself on television analyzing the evidence the week before I was scheduled to pick a jury in the very same case.

Carl contacted "Cold Justice," and they jumped right in. The show, whose first season is now airing on TNT, was just an idea at the time but apparently it was a good one. The premise is that former Harris County ADA Kelly Siegler and a former crime scene investigator from Las Vegas, Yolanda McClary, come in and help under-staffed and under-budgeted law enforcement agencies work cold cases. I knew of Kelly Siegler by reputation as a tough, smart, aggressive, and talented prosecutor who had successfully prosecuted scores of high-profile crimes in Harris County. I was happy to have her input and pick her brain for ideas as to how to make this case.

Carl assured me that it was not the intent of the show to take over the trial of criminal cases; rather, Kelly and Yolanda simply developed evidence and left it to the locals to take any resulting case through the justice system.

"Cold Justice" had set aside a week in June for filming and working, and I started to get a bit uneasy. What if it *did* get on TV? What if they tried to make us look like rubes? What if the result is embarrassing for the locals? I am no public relations expert, but I have dealt with the press enough to know that stories are manipulated to make them interesting and the truth can sometimes be blurred. Would Hollywood think it more interesting to paint a small sheriff's office and DA's office as right out of Mayberry, with all of us sitting around and scratching our heads while slick, big-city experts arrive to save the day? In the end I realized that Carl was right: We had to shelve our pride in the interest of justice and give this thing a chance to succeed or fail because larger issues were at stake—namely, bringing Pam Shelley's murderer to justice.

The folks from the show arrived and got to work. I was only peripherally involved at the time, but I realized later that part of Kelly Siegler's reputation was built on a foundation of hard work. She and the rest of the team interviewed witnesses, went to the crime scene, and worked ceaselessly during the time they were here. They provided the sheriff's office with access to the latest and greatest high-tech scientific evidence with a stunningly quick turnaround rate. For example, the gun was sent off to be evaluated for touch DNA which, I'm told, could tell us the DNA profile of anyone who'd handled the gun. They sent the slug to ballistics to match it to the weapon, and they sent off a bloody T-shirt from the laundry hamper off to be DNA-tested. They also did computer modeling of the scene of the shooting. It is amazing that all of this evidence was still available for testing. I don't know how long the DeWitt sheriff's office intended to hold on to the evidence taken from the scene, but clearly there were nagging doubts about the case that kept anyone from getting rid of the evidence.

They were filming all the while. I watched out my window as they took footage of Carl walking from his patrol car into the sheriff's office.

I couldn't help but think that Carl had cleaned up particularly well for his week in the limelight: every hair in place, pressed uniform, and a jaunty step.

Unfortunately, all of the scientific evidence resulted in a dead end. There was no touch DNA on the gun, and the DNA on the shirt was Pam's, which we suspected all along and it really did not help. The computer modeling was interesting but far from significant, and the slug did come back to the revolver, but that had never really been an issue.

They ran down Pam's medical history and determined that contrary to stories told by Hendrick's family, Pam had no history of depression and had not been treated for any mental illness. Pam had seizures and was on medication for that, but even withholding the seizure medication would not typically result in depression, so that was helpful information.

Kelly, talented prosecutor that she is, did a great job of boiling down all the evidence. She drew up a list of evidence that supported the theory of suicide and evidence that supported the theory of murder. As they worked through the week, the team ticked off "evidence" supporting suicide that they had successfully disproved: for example, that Pam was on anti-depressants, that there had been a number of suicides in her family, and so forth—they were all debunked. They also made a list of items supporting murder, including a number of serious assaults Hendrick committed against other women before and after Pam's death. During one such act he nearly killed an earlier partner in an assault that was eerily similar to the circumstances leading up to Pam's death.

Johnny Bonds, a talented interviewer formerly with the Houston Police Department and Harris County DA's Office, came down and took a number of statements including one from the defendant who was incarcerated (again) at the time.

After about a week, their work was done.

My turn in front of the camera

At the end of the show's time in Cuero, it was my turn to be in the spotlight. They wanted to film Carl and Kelly bringing the case to me. They hoped to capture me accepting the case for presentation to the grand jury, although I knew that there was slim chance that I would make that decision quickly.

Now I really got uneasy. Don't get me wrong: I'm a politician—I'm not camera-shy. Having someone film me in the performance of my sworn duty, however, was a new experience and I was nervous about it. I've never been a fan of reality TV and I'm proud to say that other than the first episode of "Cold Justice," I really don't watch it. OK, the occasional episode of "Pawn Stars" with my dad, "Dog the Bounty Hunter" with my crazy daughters, and sometimes I sit mesmerized by "Swamp People" just trying to figure out what they are saying. I can't stand the Kardashians, but with a teenage daughter their show has been on the television in my home countless times in spite of my stern admonition that it would turn my daughter's brain to mush.

Before the cameras came into my office, I wondered what would be expected of me. Would they want to script the scene? Would they suggest that I say something in particular? Would they like for me to throw files and scream and shout and go all "Hell's Kitchen" (another show I do not watch) on Carl and Kelly? Not that I ever would have, but I was curious. I got a haircut, put on my go-to meeting suit, and waited for Carl, Kelly, and the cameras.

My instructions from the show's producers were simple: Treat this meeting just as if the cameras were not there. That was it. I've done enough intake that it was fairly easy to ignore the cameras as I listened to their explanation of the case. Carl and Kelly did a good job of presenting the case to me. I pretty much forgot about the cameras except I probably tried a bit harder than I typically would have to avoid bad jokes, bad posture, stupid questions, and the like. And I probably looked a bit more pensive than I would typically look but otherwise, what they showed on the show is pretty much the way I intake serious cases.

I was interested in weaknesses, not strengths, and one of the most glaring weaknesses in their theory was that the gunshot was a contact wound. The problem, of course, with contact wounds is that it is hard to get a gun barrel up against the temple of an unwilling victim. You can get close, but their natural reaction (to pull away) makes contact difficult. Carl and Kelly shared their theory about that and it seemed plausible. They hypothesized that Ronnie crept up on Pam while she was in the bathroom looking in the

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mirror. If she turned just before the gun made contact, her wound would be consistent with that scenario. Later, after learning the details of how Hendrick had abused other women in his life, I developed my own theory about it, which was that he did not sneak up on Pam and shoot her but that he tried to take control of the situation by frightening her and he held the gun up against her head while he tried to convince her not to leave. If a victim is frightened enough, it is perfectly plausible that she will hold still and not fight, hoping that the danger will soon pass. In this case Hendrick chose to shoot.

Those of you who watched the show no doubt noticed that I did not say that I was accepting or rejecting the case on camera. I wanted to take my time. Anti-climactic and lame drama, maybe, but more in line with my duty to do justice than just blurting out a decision, even as exciting as that might have been.

What finally sold me on taking the case is something viewers did not see on the program. It involved even more work by Carl Bowen, and it finally tipped me over the edge. A few weeks after filming, Carl found Pam's ex-husband, Jessie, who was incarcerated in a Texas prison. Jessie told Carl that he had spoken with Pam and Hendrick the day that she was scheduled to come home (the very day she was shot). Pam and Jessie were going to get back together. Jessie was Kayla's dad, and the family was going to be reunited. According to Jessie, Hendrick grabbed the phone from Pam and told Jessie that the only way Pam would be coming back to Arkansas was in a pine box. Shocking evidence, indeed—Hendrick's threat to kill Pam on the very day she died. We polygraphed Jessie and he passed with flying colors, and I agreed to take the case to a grand jury.

The only explanation I can come up with for Jessie not telling us about any of this before is that his run-ins with the law had institutionalized him to a point that he did not trust the police, nor did he believe in reaching out to law enforcement.

Indictment, trial, and TNT

We indicted Ronnie Hendrick in November 2012. His trial date was set for early September 2013. He cooled his heels in the pen for a revoked probation while waiting for trial.

In mid-summer Carl called me with some troubling news. "Cold Justice" was going to run the show on Pam Shelley's murder as its premiere episode on September 3—just six days before we were scheduled to try Hendrick. We had a special setting and were bringing in witnesses from all over; virtually every witness was coming in from out of town. And I could not try the case earlier, at least not as effectively as I could in September. Carl agreed to call his contacts at "Cold Justice," confident that they would agree to run a different episode as the premiere. All we needed was two weeks. If they could wait on broadcasting that particular episode for just two weeks, they might even be able to report that Hendrick had been convicted and sentenced—a very satisfying ending.

In late summer Carl called and said that he had some bad news. TNT was going to run the show on Pam as its first episode, and they refused to re-schedule the date. I was beyond frustrated. It was now going to be difficult if not impossible to pick a jury. I still held out some hope, though, and told Carl not to lose faith. "It's on at 9:00 p.m. on a Tuesday on TNT," I told him. "How many people are going to watch that? Probably not many."

Boy, was I wrong. I thought that as long as the local media didn't run stories telling folks that Cuero was going to be on a national show, we would probably be OK. But I realized real trouble was brewing in late July and early August when people started telling me that they saw me, or someone who looked a lot like me, on television. I had not seen the promos but apparently, the show was being heavily promoted on more than one channel. It did not mention Cuero or DeWitt County but the ads clearly showed Carl and me, and people started to notice.

A week and a half before trial our local paper ran a story about the murder trial. That was no big deal—standard operating procedure—but the reporter wrote extensively about "Cold Justice" and the fact that the show would be aired September 3. I was sick. At this point we had hundreds of man-hours invested in the case, witnesses coming from all over the place, and the very real prospect that we were not going to seat a jury. The defense attorney called me, agitated about all the press, and made it clear he would seek a change of venue. All I could do was say I understood the position he was in.

On the day of trial, Judge Skipper Koetter made what I think was a

wise decision. He qualified the jury and then asked the veniremen to hold up their hands if they had seen the show. Fully one-third of the panel raised their hands.

One last hope: If the show didn't cause them to form an opinion as to guilt or innocence, I might still get a jury. No such luck. As the predominantly female group of TNT watchers came one by one to the bench, they were sent one by one out of the courtroom when they admitted that they thought Hendrick was guilty. (Interestingly, one man came up and said he had made up his mind and he didn't think the defendant did it. Make of that what you will, fellow voir dirists.) A mistrial was declared. We were probably going to have to change venue. The question was where do we go? "Cold Justice" is a national show. The judge reset the case to June 2014 to be tried again in Cuero with the vague understanding that venue might be changed in the meantime. The hope was that by June the shock value of the show would have worn off and we could maybe pick a jury.

In the meantime I spoke with Hendrick's attorney. When I realized we were not going to get a jury, I made this pitch to him: "OK, we can't get a jury today, but we will get one someday and the jury is going to hear everything that was on 'Cold Justice' plus about 50 percent more. Every person who saw 'Cold Justice' (except for the one guy) thinks Ronnie did it. A jury is going to think the same thing. I realize that there was no defense attorney on the show, but the facts are the facts and there is only so much that can be done with them." Ultimately Hendrick pled to murder and 22 years in the pen. He did this the day after the mistrial.

Twenty-two years is not enough time for the brutal murder of Pam Shelley. DeWitt County is a tough law-and-order county. If a jury had convicted him here, Hendrick would in all probability have gotten life or 99 years. Nevertheless, Pam's family was OK with the deal; they all understood that picking a jury any time soon was going to be difficult. I think it was the right thing to do, all things considered.

Conclusion

Prosecutors now contact me from time to time about "Cold Justice" and my thoughts about working with the show. I must say everyone I met was professional, courteous, and immensely helpful. I thought that they were fair in their portrayals of the locals, and they treated us respectfully. My Mayberry fears were unfounded.

I had tremendous respect for Kelly Siegler based on her reputation before I met her, and meeting her and seeing her in action reinforced that feeling. She is a good person and a damn good lawyer.

Personally, I believe that Carl Bowen cracked the Pam Shelley case with good old-fashioned hard work, but having the expert eyes of the "Cold Justice" professionals look at the case was truly helpful. Everything about the experience was positive—except for the most important part.

When we needed the show's producers to do something that would have insured that justice was done, to delay this particular episode's broadcast—both for Pam Shelley and for Ronnie Hendrick—they said no. When the rubber met the road, when we were down to the licklog, when it was time to fish or cut bait, when they needed to put their money where their mouth was, they didn't care if Hendrick was tried or not. "Justice" was out the window and "cold" was all that remained.

I believe that the folks on the ground, so to speak—Kelly, Yolanda, Johnny, *et al*—are hard-charging professionals who really care about justice and really want to help. Clearly, as the decision process moves upstream to those who are deciding programming, that mindset changes dramatically. The refusal of the Powers That Be to do what they could to insure that Ronnie Hendrick (and Pam) got a fair trial speaks volumes about what a prosecutor will be up against once the decision-making process gets in the hands of the higher-ups.

My advice? Tread with caution and get assurances in writing if you decide to use the "Cold Justice" team. If your case makes the show, you need to give serious consideration to how you are going to pick a jury and who will be left on your panel. ❇

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