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

'A good and faithful brother'

Tarrant County prosecutors tried a dangerous leader of the Aryan Brotherhood of Texas under the drug kingpin statute—with no weapon, physical evidence, or sympathetic witnesses.

By Joshua D. Ross and Allenna D. Bangs
Assistant Criminal District Attorneys in Tarrant County

In 2011, multiple law enforcement agencies in the Dallas–Fort Worth area made more than 70 arrests in an effort to disrupt and dismantle the Aryan Brotherhood of Texas (ABT) in our area. These arrests led to multiple indictments and the imprisonment of many in the ABT's leadership echelon in the free world, leaving the ABT (a highly structured prison gang) without leadership in Dallas and Tarrant Counties. Outside of prison, the ABT is routinely involved in high-level narcotic trafficking, illegal gun possession and sales, theft, fraud, and acts of violence. The targets of their most violent crimes are often women, other ABT members, and rival gang members, so this gang is just as dangerous outside prison as it is inside.

Through continued surveillance of many known ABT affiliates, agents with Homeland Security, Fort Worth Police Intelligence, and other law enforcement discovered that the highest-ranking members of the ABT, known as The Wheel, had designated James Lemarc Byrd to come to the DFW area to reorganize members on the "outside." Byrd, an Outside Major within the Brotherhood (the highest-held position outside of prison) was to be paroled from federal prison in November 2013. He was a multiple-time felon and documented member of the ABT who held ranking positions within the many federal prisons where he'd spent time.

He was released to a halfway house just outside of downtown Fort Worth as planned. The Bureau of Prisons (BOP) informed local, state, and federal law enforcement agencies that Byrd was someone to watch out for, and by March of 2014, just five months after his release, he would be back in federal custody for violating his supervised release.

When Byrd was released from prison in November 2013, he promptly put together a roster of "good and loyal" ABT members on the outside. During the months after his release, Byrd alternated between houses in Wichita Falls and Fort Worth. Wichita Falls police and DPS began separate investigations into his narcotics trafficking in their areas, and letters designating his plans and goals were found when

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Annual conference wrap-up

We had a great crowd of 881 at the American Bank Center in Corpus Christi for our Annual Criminal and Civil Law Update in September. By all accounts the training sessions were great. I'd like to thank **Kathy Braddock**, an Assistant DA in Harris County and our Training Committee Chair, and all of the Training Committee members, for developing the tracks.

By Rob Kepple
TDCAA Executive Director in Austin

And a huge thank you to **Manda Herzing**, our TDCAA Meeting Planner, and **Patrick Kinghorn**, our Assistant Meeting Planner, for putting together a smooth event. And Patrick, I need to pass along the compliments I got about the band on the *U.S.S. Lexington* Thursday evening—outstanding!

Please be sure to always respond to our speaker evaluation emails. We take your comments very seriously, and we need your input to continue to improve our training.

Prosecutor of the Year

The 2015 State Bar Criminal Justice Section Prosecutor of the Year is **Jennifer Tharp**, CDA in Comal County. **Jaime Esparza**, District Attorney in El Paso, Hudspeth, and Culberson Counties, presented the award at the Annual. (Jennifer and Jaime are pictured at right.) Jennifer is very deserving of this honor. She has proven to be a tireless advocate for change in domestic violence prosecution, having worked with the Texas Council on Family Violence in statewide training efforts, and provided key legislative support for the newly enacted Article 38.371 of the Code of Criminal Procedure, which expands the evidence available to the trier of fact in DV cases.

But perhaps most important is her courageous stand to support the rule of law in her own courthouse. Every now and again a newly elected prosecutor must make the decision to go toe-to-toe with judges who ignore the law to impose their personal visions of justice. It is a tough decision to make, but we know that once you make that decision, you are "all in." Jennifer was forced into that position, and she had the courage to take on the fight for the rule of law—and the legal horsepower to win.[1] Jennifer has provided some great caselaw upon which prosecutors can rely. So congratulations to a courageous and independent prosecutor!

Lone Star Prosecutor Awards

In the May–June 2015 edition of *The Texas Prosecutor* journal, we highlighted the prosecution of Eric Williams for the killing of **Mark Hasse, Mike McLelland**, and **Cynthia McLelland**. The murder of two Texas prosecutors sent shockwaves through our profession nationwide. I know that we all slept better knowing that **Bill Wirskye** and **Toby Shook**, two former Assistant Criminal District Attorneys in Dallas County, were appointed to handle that death penalty case as special prosecutors. The trial itself took place in Rockwall County, and Bill and Toby put together a fine team to get the job done.

It is with great pleasure that the TDCAA Nominations Committee and the TDCAA Board of Directors announced the 2015 Lone Star Prosecutor Award winners: the entire team who worked to seek justice in that case. They are (in alphabetical order):

Miles Brissette (former ACDA in Tarrant County)
Kenda Culpepper (CDA in Rockwall County)
Tom D'Amore (former ACDA in Dallas County)
Danny Nutt (Tarrant County CDA's Office)
Mark Porter (Tarrant County CDA's Office)
John Rolater (ACDA in Collin County)
Damita Sangermano (ACDA in Rockwall County)
Toby Shook (former ACDA in Dallas County)
Jerri Sims (AUSA in the Northern District of Texas and former ACDA in Dallas County)
Lisa Smith (ACDA in Dallas County)
Rhona Wedderien (Tarrant County CDA's Office)
Bill Wirskye (ACDA in Collin County)

To make sure these folks get the recognition they deserve, a formal presentation of their award will be made at the winter meeting of the North Texas Crime Commission. Thanks to all of you.

Prosecutors representing

Congratulations to **Devon Anderson**, DA in Harris County, on her appointment by **Governor Greg Abbott** to the Task Force on Improving Outcomes for Juveniles Adjudicated of Sexual Offenses. In addition, Governor Abbott designated Devon as the Presiding Officer of the 13-member panel, made up of law enforcement officials, legal experts, and juvenile specialists from around the state. The task force is charged with issuing policy recommendations to improve outcomes for juvenile sex offenders by studying the adjudication and disposition process and the rehabilitative programming and services available to those youthful offenders. Good luck!

Thanks to Quinell Blake, and welcome to Kelli Enderli

Next time you call TDCAA, you will likely have the pleasure of talking to our new receptionist, **Kelli Enderli**. Kelli comes to us from the world of televised sports, having worked behind the scenes at the Fox Sports Television Network. Kelli's a terrific addition to the TDCAA family, so please welcome her.

I'd be remiss if I didn't also thank **Quinell Blake**, our former receptionist, who after a long career in telephone customer service (including decades as a telephone customer service specialist with major phone companies), finally hung up the phone and took the retirement job of her dreams right by her house: school crossing guard. Congratulations, Q!

The newest theory on "over-incarceration"

Many of you recall that in the '90s the prison-overcrowding problem was initially blamed on prosecutors. The claim at the time was that we were filling prisons with sock thieves and hot-check writers. Thankfully, **Dr. Tony Fabelo** at the Criminal Justice Policy Council, did a groundbreaking study of exactly who was going to prison, for what crimes, and for how long. This revolutionary study, now replicated nationwide, showed that decisions on who was going to the pen were rational. (Indeed, we are still looking for that mythical sock thief in the big house.) Based on the Policy Council's study, Texas rewrote the Penal Code in 1993, diverted 47 percent of the folks eligible for pen time to state jails (mostly drug and property offenders), and beefed up capacity for violent offenders.

We know that the crime rate has consistently fallen in the last decade, and now that folks are feeling safer and money is tight, advocates are calling for a sharp reduction in the size of prisons across the board. The argument is that "a broken system" has led to "over-incarceration."

And as if to prove that nothing is new, the *New York Times* newspaper recently printed an opinion piece by **David Brooks**, a noted journalist, who argues that a law professor has discovered "the real roots of mass incarceration": prosecutors. You can read the article here: http://www.nytimes.com/2015/09/29/opinion/david-brooks-the-prison-problem.html.

Professor John Pfaff in a law review article titled, "The Macro and Micro Causes of Prison Growth," argues that simple math reveals the real reason prisons have grown: 20 years ago prosecutors brought felony charges against one in three arrestees. Today, we are bringing charges against two of three arrestees. (A PDF of Pfaff's article is on our website at www.tdcaa.com; look for this column in this issue.) It's as simple as that: We have gotten more "aggressive" in prosecuting violent criminals.

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News Worthy

Prosecutor booklets available for members

We at the association offer to our members a 12-page booklet 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 email 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. ❇

*Recent gifts to the Foundation**

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* gifts received between August 7 and October 2, 2015 ❇

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My first reaction is to say, "Thanks," as it is good to be appreciated for doing your job well. But I don't think it was meant as a compliment.

Phaff is quick to note that this is still a theory, and he has no evidence as of yet to back his claim. It would be very interesting to take this theory and see how it plays out in the Texas experience. The *Times* said that prosecutors have become "more aggressive," but think about that for a second—doesn't that just mean that prosecutors have gotten better by a third? After all, it's not like 2015 prosecutors, getting bored towards the middle of the week for the lack of crime in their jurisdictions, go out and find people to prosecute, people we wouldn't have touched back in 1995. We are still just prosecuting the cases that come to us. And as far as this vague notion that full prisons are somehow bad, Texas prosecutors are not out of step with the Texas Legislature or the general public—the Legislature has consistently increased punishments for violent crime over the last 20 years, and last time I checked Texas juries were not balking at handing down stiff sentences to violent offenders.

So what if a study of Texas indeed shows that prosecutors have gotten better at securing convictions and pen time? What then? At some point in this discussion about "over-incarceration," we will have a discussion about what drives big prison numbers. It's the elephant in the room. The only way any huge reduction in the size of the prison system occurs is if the state slashes time served for violent offenders—the bad guys you are sending to the pen—with the blessing of the Legislature, juries, and the general public. That is going to be a tough conversation. ❇

Endnote

1 *In re Tharp*; 2012 Lexis 6698 (Tex. App.—Austin August 9, 2012)(district court abused discretion in over-broad discovery order); *In re Tharp*, 351 S.W.3d 598 (Tex. App.—Austin 2011)(district court abused discretion in authorizing cash deposit bonds); *In re State ex rel. Tharp*, 393 S.W. 3d 731 (Tex. Crim. App. 2012)(district court erred by discharging a jury after a guilty plea to the jury and assessing punishment); *State v. Villareal*, 418 S.W.3d 920 (Tex. App.—Austin 2013)(district court abused discretion in accepting an open plea, then finding guilt on a charge not in the indictment and granting deferred adjudication).

On becoming a small-town prosecutor

My jurisdiction is big. I mean, really big. In fact, when you add my three counties together, the area is bigger than Rhode Island. Granted, Rhode Island is pretty small, but it is a *state* after all.

The *population* of my district, on the other hand, is pretty small. Well, it's very small. How small? You could easily fit the entire population of my three counties into the American Airlines Center to watch a Dallas Mavericks game. That's small for square mileage the size of Rhode Island.

By Staley Heatly
District Attorney in Wilbarger, Hardeman, and Foard Counties

As a rural prosecutor, I encounter a number of interesting issues that prosecutors in bigger jurisdictions generally do not have to deal with. For example, a couple of years ago I coached my son's soccer team. When I reviewed the team roster, I discovered that I had previously sent two of the eight players' fathers to prison. That made player drop-off and pick-up a little awkward. And last season, I coached my son's baseball team while there was an outstanding motion to revoke one player's father through the whole season. The father was on the lam and never showed up for a game. And eating in restaurants is always a treat for a rural prosecutor. It's hard to explain the feeling you get when the cook comes out of the back and says, "How'd that taste?"—and you recognize him from putting him on felony probation the previous week. Ack!

But being a rural prosecutor has its perks. The commute is great. My office is a mile and a half from my front door and the drive never takes more than five minutes. My wife, Meg, and I also have plenty of room for four kids, a big garden, and over a dozen hens in our two-acre yard. And rural prosecutors get to handle some unusual cases. (Despite the sparse population in my district, there is always something interesting going on.) Over the last few years I have prosecuted oil theft, cattle theft, theft of copper rolls from the power plant, taking of wildlife resources (e.g., illegal deer hunting), tractor theft, antique tractor theft, theft of hay, and theft of anhydrous ammonia tanks. The people who stole the anhydrous were Aryan Circle members from Fort Worth, and they were hoping to have enough chemical to manufacture meth for a couple of years. Instead, they all went to prison.

Whenever I give a presentation at a conference, I enjoy telling the audience that I am the top prosecutor in my office. I also tell them that I am the head of grand jury intake, the appellate section, the trial section, and the special crimes unit … before finally revealing that I am the *only* lawyer in the office. That almost always gets a chuckle.

I never planned on being a small-town prosecutor, but fortunately everything worked out just right. It involves a few twists and turns that include Mardi Gras, the Old Ebbitt Grill, the Peace Corps, an Achuar Indian, and a fruit bat, and it concludes with Chuck Norris.

The first break

After my second year of law school at Tulane in New Orleans, I worked at a summer job in Houston. The firm was top-notch and I liked the people, enough so that I accepted a job there at the start of my third year to work in corporate finance after law school. (And if that had actually happened, I would never have risen to the glorious heights of rural prosecution.) Fortunately, I had a change of heart during Mardi Gras that March. My roommate's brother, a lawyer at a big firm in Washington D.C., came down for a few days of rest and relaxation. As we hung out at Pat O'Brien's Piano Bar, he extolled the virtues of life in D.C. He was on the recruiting committee of his firm and wanted to know if I would be interested in flying up for an interview. Within a month I had a new job in our nation's capital.

After I had been in D.C. for a few months, a colleague arranged a happy hour meet-and-greet with some of her law school friends at the Old Ebbitt Grill. That is where I met Meg—we were engaged five months later and married a year later in Charlottesville, Virginia.

After a couple of years in "big law," I decided that I was ready for a change. Corporate finance, mergers, and acquisitions just aren't as exciting as it seems. (I guess they don't even *seem* exciting, do they?) My job involved a lot of desk time reviewing

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and preparing documents like SEC filings, confidentiality agreements, and merger agreements. I also did due diligence on merger targets, which involves spending a lot of time reviewing corporate documents in small rooms. If you are getting bored just reading about it, imagine what it was like to do for three years.

In 2002, Meg and I decided to do something completely different. We left our jobs in Washington, D.C., and joined the Peace Corps. We asked to be placed in Latin America, but our first offer was to serve in Bulgaria. Fortunately, that offer fell through and a couple of weeks later we received an offer to serve in Ecuador. As soon as the offer popped up, we started seeing Ecuador all over the place. For example, the day we received the offer we went for a walk in a park in Northern Virginia and stumbled upon an Ecuadorian festival in the park. What a coincidence! A couple of weeks later we signed up for a continuing education Spanish class at Georgetown University. And our teacher—yep, she was from Ecuador.

In February of 2003, we set off for Ecuador. After three months of training in the coastal region, we moved up to the mountains of southern Ecuador for our two-year stint. We lived in a beautiful little village in the mountains at 8,800 feet. The weather was cool, the scenery was amazing, and the people were awesome. Of course there were some slight drawbacks. We had a couple of holes in the ceiling, and you could see the sky if you stood in the right spot. There were occasional mice. And our water went on the fritz every few days and would stay off for up to a day or two, depending on the rain. We had to boil the water from the tap. It had an oily sheen on top and red flakes in the bottom. Strain it through a coffee sock and voila, the reddish, cloudy water tasted just like you think it would. And of course there were the bucket baths. Nothing like taking a "shower" by using a Nalgene bottle to scoop water out of a big bucket to pour over your head. Refreshing!

But I digress. I am sure you are wondering what this has to do with becoming a rural prosecutor—and where Chuck Norris fits in. Trust me, we'll get there soon.

An Achuar and a bat

At the end of our two-year stint in Ecuador, Meg and I decided to extend our Peace Corps service for another year in the Galapagos Islands. Before we started that third year, we traveled around Ecuador. In April of 2005, my brother and his wife came to visit us. We took a special vacation to the Amazon and stayed at an eco-lodge that is only reachable by jungle airstrip and boat. It was run by the local Achuar Indians. On our second day we went for a visit to a nearby village and then for a hike in the jungle. As we were walking through the jungle with our guide, Cristobal, he suddenly stopped the group and told us that he had encountered a very powerful sign. A bat had eaten some fruit and left the seeds on the trail. Crisobal told us that this important "sign" meant that someone in our group was pregnant. The same thing happened the next day, and according to Cristobal, encountering seeds on the trail twice in two days was irrefutable proof that someone was pregnant.

Turns out, Meg was indeed pregnant—which we confirmed with a non-fruit-bat test upon our return from the jungle. The pregnancy forced us to separate from our Peace Corps service prior to our move to the Galapagos. We had not been looking for jobs and decided to just return stateside while we did some searching. The most convenient location was my hometown, Vernon, where I could work at my father's law firm doing general practice and criminal defense while I looked for jobs elsewhere. I never thought I would return to Vernon for good—it was supposed to be temporary. And my poor wife, she wasn't even *from* Vernon. But after living in rural Ecuador for two years, she was really impressed with Vernon's paved roads, readily available tap water, hot showers, and grocery store.

And I enjoyed working with my father. He had been district attorney in Vernon during the '70s and '80s, and being a prosecutor was always something I had considered. Late that summer, the then-district attorney resigned to run for judge. After discussing it with my wife, I decided to take the plunge, and I announced my candidacy for office.

What's up, Chuck?

Because of the timing of the prior DA's resignation, a special election was called in 2006 to fill what remained of the unexpired term. A few weeks after I announced my candidacy, another attorney filed his paperwork and announced. Shortly thereafter, the governor appointed him to the position. I went from

running for an open seat to running against an incumbent in a matter of weeks.

That wasn't the worst of it. During the heat of the campaign, my opponent was endorsed by the one, the only, *The* Chuck Norris. Mr. Norris did a radio spot where he referenced his past as a television Texas Ranger and said that he supported my opponent. Devastating. My opponent was endorsed by the man who can give poison ivy a rash. Undeterred, I continued with my campaign, and when all of the votes were counted, I came out on top. I defeated Chuck Norris.

A couple of weeks after assuming the office, my staff bought me a gift to commemorate the victory. It is a toy gerbil dressed in a karate outfit with nunchuks. When you push the button on the gerbil's hand, it twirls the nunchuks and sings "Kung-Fu Fighting" in a chipmunk voice. Priceless. It still sits on the shelf behind my desk today (there it is in the photo below).

The last nine years as a rural prosecutor have been incredible. As the only attorney in the office, I handle every case from intake to trial to appeal. I have no one else to push the cases onto. Unfortunately, that means that I get stuck trying the occasional state jail felony possession case, but on the bright side, I am responsible for each and every case, and if I obtain an indictment, I am the one trying it. As my own appellate lawyer, I have to read my transcripts and prepare my arguments for the court of appeals. I've argued several cases at the court of appeals, and it really causes me to focus on getting things right at trial because I know I'll have three sharp appellate judges putting my actions under the microscope.

So there you have it. Now you know how Mardi Gras, the Old Ebbitt Grill, the Peace Corps, an Achuar Indian, a fruit bat, and Chuck Norris all led me to a life as a rural prosecutor. I wouldn't trade it—or the story—for anything. ❇

News Worthy

Upcoming TDCAA seminars

Elected Prosecutor Conference (open to elected prosecutors and their first assistants), December 2–4, 2015, at the La Cantera Hill County Resort, 16641 La Cantera Pkwy., in San Antonio.
Prosecutor Trial Skills Course (open to prosecutors with less than six months of experience), January 10–15, 2016, at the Radisson Town Lake, 111 E. Cesar Chavez, in Austin.
Investigator School, February 8–12, 2016, at the Omni Colonnade, 9821 Colonnade Blvd., in San Antonio.
Investigating and Prosecuting Sexual Assaults of Children, April 12–15, 2016, at the Wyndham San Antonio Riverwalk, 111 E. Pecan St., in San Antonio.
Civil Law Seminar, May 11–13, 2016, at the Omni Southpark, 4140 Governor's Row, in Austin.
Evidence Seminar, June 15–17, 2016, at the Intercontinental Dallas, 15201 Dallas Pkwy., in Addison.

Registration for seminars is online only and is available at www.tdcaa.com/training about three months before the seminar. Hotel information is also on our website. ❇

Prosecutors' sensitivity toward crime victims

Recently, at our TDCAA Annual Criminal & Civil Law Update in Corpus Christi, I had the privilege of visiting with former TDCAA Research Attorney (our former coworker) Jon English.

Last spring, Jon took a job as a prosecutor in the Criminal District Attorney's Office in Galveston County. While we hated to see Jon leave TDCAA, we were all thrilled for him to have the opportunity to prosecute cases.

By Jalayne Robinson, LMSW
Victims Services Director at TDCAA

At the Annual seminar, Jon was eager to tell us about prosecuting his first jury trial involving a crime victim. As I listened to him recount his steps in trying the case, it was so very refreshing to hear a young prosecutor express how difficult a trial must be for crime victims and his true concern for this one in particular. The victim testifying in Jon's case was an adult, but many years before (when she was a child), she had been the victim of abuse and had had to testify against her offender in court. The defense attorney (in this most recent case) had carelessly asked a question about the victim's prior involvement in the criminal justice system—which would've required her to tell a bunch of strangers (people in the courtroom) about the earlier trial and her painful abuse.

But Jon (such a quick thinker!) would not have it. He quickly piped up with an objection, preventing this witness from having to go through the ordeal of telling the story of her abuse yet again. As the prosecuting attorney, Jon alone had the ability to stand up for that victim in that moment—a VAC couldn't have done what Jon did in open court. And I was so glad he was there to protect this woman who was already pretty fragile.

Jon knew that there are certain ethical limitations between the association of prosecutors and crime victims, but it was also clear that he shared in the victim's emotions with genuine human understanding. "Shared emotions" are a very important element when it comes to crime victims. If a victim has an opportunity to share her emotions with the prosecutor, then the two can become jointly committed to their respective roles in a case.

In my past working experience, I actually had a prosecutor say to me once, "Victims, schmictims—I can't be bothered. I have a job to do." But when talking to Jon, I saw a different attitude. Our interaction inspired me to hope that the old attitude of "victims schmictims" might be changing to one of compassion—prosecutors devoting more time to understanding where the victim is right now in her life and allowing an in-person meeting with the prosecutor (especially in death cases) when possible.

In researching background information on prosecutor-victim sensitivity, I located a journal article outlining a research study conducted and supported by a federal grant from the National Institute of Justice. Below, I've shared with you highlights of the study I found interesting in regards to prosecutor-victim sensitivity.

The study included 32 grieving victims whose loved ones were murdered between 1994 and 1999 in Union County (a pseudonym) and published in the spring of 2013 in the *Law & Social Inquiry*, a journal of the American Bar Association.[1] Twenty of the 32 bereaved victims had met in-person with a county prosecutor, and these 20 participants were the primary source of victim data in the study.

Researcher Sarah Goodrum explained that some of the data came from bereaved victims' responses to questions about the criminal justice system in general and the local district attorney's office in particular. These questions included:

1) What was the most difficult part of the district attorney's office's involvement in this case for you?

2) What was the most positive part of the district attorney's office's involvement in the case for you?

3) If you could change anything about the way the district attorney's office worked with you, what would you change?

The study showed that participants "shared emotions" when they met in-person with the prosecutors, and that sharing built a connection between the crime victims and prosecutors and improved victims' experiences with the criminal justice system.

The grieving victims in the study wanted a prosecutor who understood—and even shared—their devastating grief over a loved one's murder. When asked what the

prosecutor did to make their experiences with the criminal justice system easier for them, 17 of the 20 bereaved victims (85 percent) who met with a prosecutor mentioned the prosecutor's heartfelt compassion for them and their deceased loved one.

Although Article 56.02 of the Texas Code of Criminal Procedure affords crime victims their legal rights, it is not always a given that the crime victim will have the opportunity for "shared emotions" with a prosecutor. However, the study found that prosecutors often honored victims' desire for interaction with the prosecutor and considered their input on case decisions.

I have found in my past work experience, victim assistance coordinators (VACs) can act as a liaison between prosecutors and crime victims to create necessary boundaries during the judicial process. During early interaction with victims, the VAC must explain:

- what role the prosecutor plays in the case;
- that the prosecutor represents the State and is not the victim's private attorney;
- that the information the victim shares with the VAC must be relayed to the prosecutor; and
- that the crime victim's wishes for the outcome of the case will be relayed to the prosecutor but ultimately it is the State's case, the prosecutor represents the State, and there are never any guarantees of the outcome.

My wish is for prosecutors, victim assistance coordinators, and court staff to not be so quick to judge crime victims, to take a step backward and put themselves in the victim's shoes, and to try to understand her feelings and respect her unfortunate situation. After all, we at any given time could be faced with some of their same circumstances through no doing of our own. Try to look at it this way: Each case is an opportunity to invest in a person's life. Yes, we want to put the bad guy (or gal) away, but win or lose the case, we want to make sure the victim knows she was supported and her emotions were shared during her interaction with the criminal justice system.

After Jon had told me about his first trial, I thanked him for his compassion and understanding for the crime victim and told him it was my hope for the next generation of young prosecutors to be as empathetic as he was while carrying out their duties as prosecutors. As it says in the Scriptures, "But we proved to be gentle among you, as a nursing mother tenderly cares for her own children. Having so fond an affection for you, we were well-pleased to impart to you not only the gospel of God but also our own lives, because you had become very dear to us." (1 Thessalonians 2:7–8 [NASB])

Free training on protective orders

All year, we have been training people on protective orders for free. Our last such training in 2015 will be in conjunction with our Elected Prosecutor Conference on Wednesday, December 2, from 10 a.m. until noon at the La Cantera Resort in San Antonio. The training covers the differences between statutorily available types of protective orders (including final protective orders, emergency orders and temporary *ex parte* orders); jurisdiction for each of these types of orders; additional measures of protections for victims, such as safety planning, community resources, and conditions of bond; working with other stakeholders—including local law enforcement, state agencies, and nonprofits—for victim safety and restoration; and prosecuting violation of protective order and bond cases.

All attendees will receive a free copy of a protective order manual, including sample forms and docu-

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Left to right: Donald W. Allee, Kendall County Attorney; Michelle Jurica, Victim Services Advocate; Fran Craig, Victim Services Coordinator; Darrell L. Lux, Kendall County Judge; and Nicole S. Bishop, Assistant County Attorney.

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ments on a CD. To register for this seminar, check the appropriate box on the online registration page of the Elected Prosecutor Conference, www .tdcaa.com/training.

In-office VAC visits

I recently visited the Kendall County Attorney's Office in Boerne to assist with victim services (see the photo below). Assistant County Attorney Nicole Bishop contacted me by email, we arranged a convenient date for their office, and I traveled to Boerne. New VAC Michelle Jurica was only weeks into her position, and it was truly inspiring to spend the day in that office visiting with staff and introducing Michelle to our mandated duties as VACs as set out in the Code of Criminal Procedure.

TDCAA's Victim Services Project offers in-office support to the victim services programs in prosecutor's offices. We at TDCAA realize the majority of VACs in prosecutor's offices across Texas are the only people in their offices responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We realize VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support.

Please email me at Jalayne .Robinson@tdcaa.com for inquiries or support or to schedule an in-office consultation. ❇

Endnote

1 Goodrum, S. (2013). Bridging the gap between prosecutors' cases and victims' biographies in the criminal justice system through shared emotions. *Law & Social Inquiry*, 38(2), 257-287. doi:10.1111/lsi.12020.

Management training for prosecutors is coming

We all know a prosecutor's job description as provided in Article 2.01 of the Texas Code of Criminal Procedure: "It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done." But *implementing* this duty is a whole other ballgame. Implementation of this special duty is what we call management.

By Rob Kepple
TDCAA Executive Director in Austin

Elected prosecutors must not only define justice, but also implement the methods to see that justice is done. This special duty means that elected prosecutors and their management teams must effectively lead their staffs and other law enforcement down this narrow path. Policies must be drafted to serve as road maps, and excellent communication must exist to ensure that the management team's concept of justice is heard and understood at the lowest levels of an office's operation. This new area of training is a focus of the Foundation, which is actively seeking support for a comprehensive management training program for Texas prosecutors.

Management is a difficult task. Quite often, the individuals who are promoted into management positions do so because of their courtroom success, as opposed to their ability to manage other people. That's understandable. Our job is to make sure that skilled trial prosecutors learn the skills to manage others in the office. That is a different set of abilities that's not really addressed in current law-office management programs, which focus on civil law-office management.

Thus, in March 2016, TDCAA will host its first three-day Prosecutor Management Training in Fredericksburg. We have woven various management topics into our other courses over the last several years, but this training will be dedicated to this subject alone. Enrollment will be limited in this first year to approximately 36 attendees due to space limitations. The course will begin on Sunday, March 6 and go through the morning of Tuesday, March 8, 2016. Be sure to keep an eye out for a brochure and website announcement in December to apply.

Training our trainers

When the State first invested in professional prosecution back in 1979, I doubt our leaders knew how far we could come in 36 years. The Professional Prosecutors Act of 1979, which represented a commitment by Texas to devote resources to criminal prosecution, focused attention on the continuing need to train young lawyers and office personnel. Those of us who are in the trade today "caught the wave" of training that began in the 1980s, and we have seen the benefits.

The Foundation is proud to support a keystone to that training: production of our yearly Train The Trainer course. This course, first developed in the 1990s by the National Highway Traffic Safety Administration, sought to replace the "get up and give a talk" approach to adult education with a method of training lawyers in the art of passing their skills on to others. From designing course objectives to deciding on useful PowerPoint graphics, a lot goes into an effective learning event.

This year, TDCAA—with critical support from the Foundation—will host its Train the Trainer program March 8–11 in Fredericksburg. This is our chance to take those rising stars in the courtroom, in the office, and in the field and help them become stars at TDCAA seminars. This is a limited-enrollment, invitation-only course, but if you have knowledge and skills that you want to pass on to others (or if you supervise such a person in your office), please let us know! This is just one way the Foundation supports professional prosecution in Texas. ❇

Must a suspect actually *commit* a traffic violation to give an officer reasonable suspicion?

A warrantless temporary detention, such as a traffic stop, is lawful when a peace officer has reasonable suspicion to believe that an individual is violating the law. Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably suspect that a person has engaged, is engaging, or will soon be engaging in criminal activity.[1] Officers make this determination by considering the totality of the circumstances at the time of the detention.[2]

By Jessica Akins
Assistant District Attorney in Harris County

The Court of Criminal Appeals' recent decision in *Jaganathan v. State* examines the reasonableness of a traffic stop where, in addition to the officer's testimony, there was video evidence of the traffic stop. The defendant in this case was driving her vehicle eastbound on Interstate 10 in Chambers County. A DPS State Trooper initiated a traffic stop because Ms. Jaganathan was driving in the left lane without passing. During the stop, the officer smelled marijuana, and a search of the truck revealed more than 5 pounds of marijuana. After her arrest and indictment for possession of marijuana, the defendant challenged the traffic stop, and both a court of appeals and the Court of Criminal Appeals have weighed in on the issue—with differing results.

Left lane for passing only

The Transportation Code states that the operator of a vehicle shall comply with applicable official traffic-control devices and that a "left lane for passing only" sign is such a device.[3] If there is a sign present that says the left lane is for passing only, it is a traffic offense to drive in the left lane when not passing another vehicle.[4]

The officer in this case was traveling on a section of Interstate 10 that has three lanes. While he was in the right lane, he observed traffic in the middle and left lanes. The defendant, who was traveling in the left lane, passed a "left lane for passing only" sign. The video from the cruiser's dashboard camera shows that the defendant was at the front of a short line of vehicles traveling in the left lane. After passing the sign, she continued in the left lane.

The officer began shifting his vehicle from the right lane to the left

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lane and eventually got behind the defendant. As he followed her, the middle lane was clear of traffic, and the defendant did not pass any other vehicles. The defendant flipped on her left turn signal, then turned it off and activated her right turn signal before moving into the middle lane. The officer then initiated a traffic stop for remaining in the left lane of the highway without passing, and then he found all that marijuana.

Motion to suppress

The defendant filed a motion to suppress evidence of the marijuana, challenging the validity of the traffic stop. The trial court denied her motion, but the Fourteenth Court of Appeals disagreed with that ruling because the officer did not have reasonable suspicion that Jaganathan committed the traffic violation of driving in the left lane without passing.[5]

In coming to this decision, the Fourteenth Court reviewed prior authority from the Court of Criminals Appeals analyzing the offense of driving in the left lane without passing, *Abney v. State*. In that case, the high court determined that the officer did not have reasonable suspicion to stop the defendant for this offense based on the following facts:

- the officer followed the defendant for one mile,
- the only sign that indicated "left lane for passing only" was approximately 15 miles earlier, and
- he had no idea when the defendant entered the highway. There was simply no evidence to support that the defendant had driven past the sign and continued to drive in the left lane.[6]

In *Jaganathan*, the Fourteenth Court relied heavily on evidence from the officer's dashboard video camera to make a determination regarding reasonable suspicion. The court presented very detailed factual findings in its opinion regarding the defendant's actions and her proximity to other vehicles. The court observed that the defendant did pass one vehicle while in the left lane after she drove past the "left lane for passing only" sign. The court reasoned that due to the placement of other vehicles on video, the defendant may have thought it unsafe to move back into the middle lane after passing.

The court also took note that the officer's actions may have influenced the defendant's driving behavior, suggesting because he approached her vehicle at a high rate of speed, she may have slowed down, thus hindering her ability to pass the car in the middle lane.

And finally, the court had a real problem with the officer's timetable and had no confidence that the officer allowed enough time to develop reasonable suspicion—this, based on the court's calculations that only 45 seconds had elapsed from the time the defendant passed the "left turn for passing only sign" to when she was stopped.

The CCA weighs in

The Court of Criminal Appeals disagreed with the lower court's analysis, finding that the Fourteenth Court improperly provided justifications for why Jaganathan could not move her vehicle to comply with the law. To correct course, the Court boldly stated that the question in this case is not whether the defendant was guilty of the traffic offense but whether the officer had reasonable suspicion that she was.[7]

The video evidence in this case put the two appellate courts at odds. Obviously there is going to be a difference between what an officer sees during an ongoing event and the video surveillance depicting the event. In coming to its conclusion that the officer did not possess reasonable suspicion for the traffic stop, the lower court was presumably able to review and enlarge the video several times and make notations about the positions of each vehicle on the highway, their speeds, distances between cars, etc.—as did the Court of Criminal Appeals. But the high court's review of events did not necessarily coincide with that of the Fourteenth Court.

In bringing the focus (appropriately) back to the officer's observations of the traffic violation, the Court of Criminal Appeals keenly noted: "We would be much closer to knowing what the officer observed if we were to view the video only one time, from start to finish, without stopping. But even then, we might not focus on what the officer focused on at the time of the stop."[8]

The Court criticized the lower court for failing to review the evidence as a whole (the officer's testimony *and* the video) in the light most favorable to the trial court's ruling, which is the proper standard of review. The Court disagreed with the lower court's assertion that the video plainly showed the defendant could not safely change lanes and noted while that was certainly a possibility, it was not obvious from the video. This theory is more properly

advanced as a defense of necessity to the traffic offense—an officer's suspicion is not unreasonable just because facts surrounding the suspected offense might ultimately show a defense to the conduct. That is important to remember.

Also key: A determination that reasonable suspicion exists *does not equate to a determination of guilt, which would require ruling out defenses or the possibility of innocent conduct.*[9] The reasonable suspicion standard accepts the risk that officers may stop innocent people,[10] and the mere possibility that an act is justified will not negate reasonable suspicion.[11] Because the record in this case established that the defendant passed the "left lane for passing only" sign and stayed in the left lane without passing, the officer had reasonable suspicion to stop her.[12]

Jaganathan is a great guideline case for evaluating reasonable suspicion when prosecutors have evidence from sources other than an officer's testimony. In our society there is an increased preference for video evidence ("Was the receiver in bounds or out? Let's run it back and see it in slow motion"), and the Court of Criminal Appeals reminds us that reasonable suspicion is established through an officer—even if a reviewing court disagrees after review of the play. ❇

Endnotes

1 *Abney v. State*, 394 S.W.3d 542, 548 (Tex. Crim. App. 2013).

2 *Id.* at 547.

3 Tex. Trans. Code §541.304(1).

4 Tex. Trans. Code §542.301; *Abney*, 394 S.W.3d at 548.

5 *Jaganathan v. State*, 438 S.W.3d 823 (Tex. App.—Houston [14th Dist.] 2014, pet. granted).

6 *Abney*, 394 S.W.3d at 549-550.

7 *Jaganathan v. State*, No. PD-1189-14, 2015 WL 5449576 (Tex. Crim. App. Sept. 16, 2015).

8 *Jaganathan*, 2015 WL 5449576 at *2.

9 *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

10 *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

11 *Jaganathan*, 2015 WL 5449576 at *3.

12 *Id.*

NEWS WORTHY

Free money!

Who doesn't want free money, especially when it helps towards a college education? Well, TDCAA's Investigators Section awards two scholarships every year to children of current TDCAA members. And the Investigator Board recently increased them from $750 to $1,000 each.

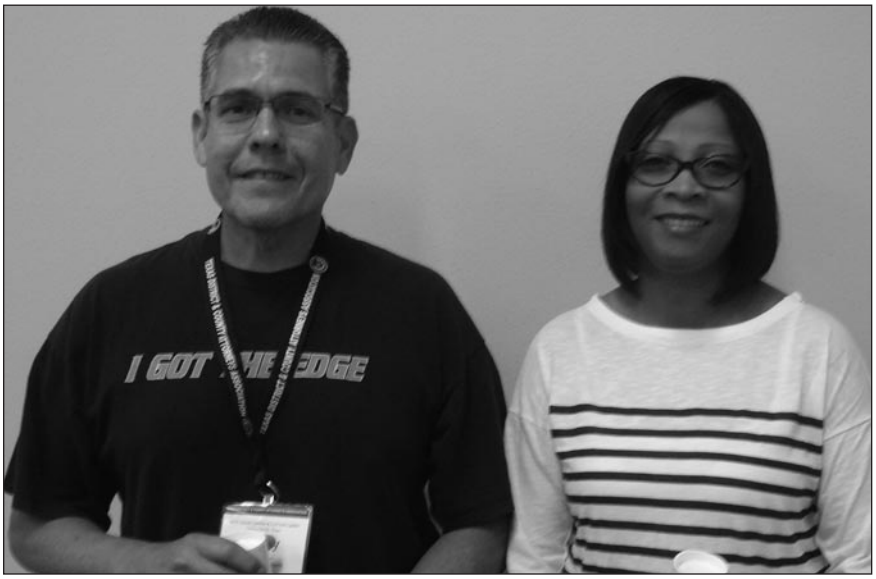
Our scholarship program was initiated in 2002 by the Investigator Section Board of Directors with the objective of encouraging our future through the support of our present. The first scholarship is awarded at the TDCAA Investigator School every February and is open *only* to the children of members of the Investigator Section. The second scholarship is awarded at the TDCAA Annual Criminal & Civil Law Update in September and is open to the children of *all* TDCAA members. These scholarships are funded by you, TDCAA members, through sales of TDCAA merchandise at both conferences and by a silent auction during Investigator School.

Scholarships are awarded based on scholastic achievement; school, civic, and community activities; and a written essay on topics that frequently change. All awards are final and are contingent on the availability of funds. Awards are paid to the recipient or registrar (or equivalent) of the recipient's school. Past recipients are not eligible.

The winner of the February 2015 scholarship was Brittni Franklin, who attends Texas A&M University. Her mother is Investigator Kim Franklin with the Montgomery County DA's Office. The winner of the September 2015 scholarship was Delaney Neal, who attends Sam Houston State University. Her father is Investigator Rodney Neal with the Collin County Criminal DA's Office.

Completed applications must be postmarked by December 1 for the award given in February and by July 1 for the award given in September. More information on eligibility and the application process can be found on the TDCAA website; just search for "scholarship." ❇

Award winners from the Annual Update



TOP PHOTO: Ryan Calvert, Assistant District Attorney in Brazos County (pictured at right) was honored with the C. Chris Marshall Award at our Annual Criminal & Civil Law Update in Corpus Christi. This award recognizes distinguished faculty, and it was presented to Calvert by Kathy Braddock (at left in photo), Assistant District Attorney in Harris County and Chair of TDCAA's Training Committee. MIDDLE PHOTO: PCI Awards were also awarded at the Annual conference; Juan San Miguel and Vanessa I. Miller (left to right in photo) are pictured. Not pictured are PCI award winners Stephen F. Allen, Deborah S. Beavers, Martin A. Cuellar, Casey S. Finke, Jerry W. Hirsch, Roy A. Kuester, Michael R. Mitchell, Tuan Duy-Nguyen Pham, Eliud Plata, and Jacinda K. Vela. BOTTOM PHOTO: The Oscar Sherrell Award (Investigator Section) was given to Todd Smith, Chief Investigator in the Criminal District Attorney's Office in Lubbock County, who was honored for his service to TDCAA. Pictured below (left to right) are: Ray Scifres, Jim Boyd, Terry Vogel, Rob Kepple, Todd Smith, Bob Bianchi, Dale Williford, Frank Allenger, and Kim Elliott. Congratulations to all award winners!

A roundup of notable quotables

"Folks, that's not a plea of guilty; that's a cry of 'uncle.'"

Ryan Calvert, Assistant District Attorney in Brazos County, during closing arguments of an aggravated sexual assault of a child trial against a defendant who testified on his own behalf, as reported in the *Bryan College Station Eagle* newspaper. The defendant said on the stand that he himself had been sexually abused as a child and also admitted molesting three young victims and two now-grown victims, saying he wanted closure for them and himself. (www.theeagle.com/news/local/bryan-man-gets-life-for-sexually-abusing-stepchildren/article_d59d154a-0f76-5c0f-91d3-f4212b492dc7.html)

"I'm out a sport coat, unfortunately."

Leelanau County (Michigan) Prosecutor Joe Hubbell, after an intoxicated man wearing only boxer shorts and a ball cap was spotted by a janitor wandering around the courthouse after hours. The unnamed man walked into Hubbell's office, put on a suit jacket from inside the office, and left the building. (www.record-eagle.com/news/local_news/update-pantless-man-enters-courthouse-steals-prosecutor-s-suit-jacket/article_ e55af6bd-a923-5342-8219-bc0d65241b60.html)

"Dear law students: My opposing counsel destroyed the credibility of his own witness before I got to ask a single question. You'll be fine."

Twitter user @lawyerthoughts whose profile says, "Undefeated trial lawyer. Yoga instructor. Legal consultant to the stars. Retired underwear and sleep model. I occasionally lie in my bio." His profile photo includes the quote, "You don't have to be a lawyer to interrupt a stranger's conversation with 'allegedly.'"

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes a quote to this column will receive a free TDCAA T-shirt!

"I should have done this a lot sooner. I don't have to take it. You're out."

Judge Jack Skeen in Smith County, to James Calvert, a capital murder defendant accused of shooting his estranged wife, Jelena Sriraman, and abducting their 4-year-old son before fleeing to Louisiana. Calvert had been acting as his own legal defense throughout pre-trial proceedings and his criminal trial, drawing increasingly strong admonishments from the judge, until—midway through the presentation of the State's case—Calvert refused to stand when talking to the court, at which point Judge Skeen terminated his self-representation. Calvert was later found guilty of capital murder and sentenced to death. (www.kltv.com/story/30036181/judge-administers-calverts-shock-belt-terminates-self-representation)

"I understand they're just fish, but there's no reason to do that. That just tells me you're mean, [and] we have a place for people that are mean that are willing to hurt people to get what they want."

Judge John McClendon in Lubbock County, to defendant Paul Rodriguez while sentencing him to 50 years in prison for the brutal beating of a Dairy Queen employee during a robbery. Judge McClendon's remarks referred to punishment-phase testimony from Jay Kemper, whose home was burglarized by the defendant. Kemper said that Rodriguez ransacked every room, scattered their possessions everywhere, and even dumped an entire bottle of fish food into the fish tank in his son's bedroom. Evidently that detail made an impression on the judge. (http://lubbockonline.com/filed-online/2015-10-14/rodriguez-sentenced-50-years-violent-robbery-south-lubbock-dairy-queen#.Vh_FtaQupXY)

"You're lucky: You're going to die soon."

Kevin Daigle, a Louisiana man whose truck was stuck in a ditch, to Senior Trooper Steven Vincent after he shot Vincent in the head. Trooper Vincent had stopped to help the man after determining that Daigle's truck had been reported as a "reckless vehicle," and as he talked with him at the roadside, Daigle opened the driver's side door, pulled out a sawed-off shotgun, and shot the officer in the head. Vincent died the next day at the hospital. The whole incident was recorded by Vincent's cruiser camera. (www.khou.com/story/news/nation/2015/08/24/police-gunman-shot-taunted-louisiana-trooper/ 32254917/)

Continued from the front cover

'A good and faithful brother' (cont'd)

his home in Wichita Falls was searched as part of that investigation. Besides organizing the ABT, Byrd was trying to monopolize the methamphetamine market in Tarrant County and Wichita Falls and had made contact with other drug-dealing members of the ABT on the outside. One such local drug dealer, whom we'll call Hank, ended up the victim of Byrd's violent tendencies. (We will use pseudonyms for all involved witnesses due to ongoing threats.)

Hank had been in and out of prison since 2004 when he got hooked on methamphetamine after a divorce, dealing up to $8,000 of meth per day. During one of his stints in prison, Hank joined the ABT and was a documented member with the Fort Worth Police, but he was not active outside of prison. Byrd had become aware of Hank's meth business and sent word for him to "check in." Hank met Byrd one time at a motel as directed, and nothing became of that encounter.

On January 29, 2014, Byrd called Hank, directing him to report again. Hank was busy with family obligations at the time, yelled at Byrd, and hung up on him. Byrd found this to be a violation of a direct order and a sign of disrespect. Within hours, six or seven ABT members showed up at Hank's house wanting to know where he was. He wasn't home at the time but was alerted that they were looking for him. Hank called a member whom he knew and told them to come get him, so three ABT members picked up Hank and drove him to another house. He was told he would be held until Byrd could come over. The ABT members then stripped him naked, hog-tied him, and left him on the floor of a freezing cold laundry room for three hours.

Eventually Byrd showed up. He confronted Hank and accused him of disrespecting the ABT and its chain of command. Byrd punched and kicked him while Hank lay helpless on the floor. Byrd put a gun in Hank's mouth and asked the other members if he should kill him. (Hank said later he believed he would die.) One of the members told Byrd not to kill him, and Byrd told Hank he would let him live but that he owed a tax of $1,000 a month. Before Hank was allowed to leave, Byrd took a knife off his belt and stabbed Hank twice. Byrd then took a slice of white bread, soaked up Hank's blood, ripped the bread in half, ate one half himself, and shoved the other in Hank's mouth. Hank was then allowed to leave. He returned home, never seeking medical treatment or calling police.

It just so happened that the next day, Department of Homeland Security Agent Steve VanGeem was listening to jail conversations between a confirmed ABT member and his wife. VanGeem overheard that "Byrdman" had "disciplined" Hank. VanGeem knew that James Byrd was "Byrdman" and that "discipline" in the ABT most likely meant an act of violence. VanGeem wanted to investigate the incident in the hopes of making a case against Byrd, who was of particular interest to law enforcement for a few reasons. He was high-ranking, and in the past, removing the higher ranks often disrupted ABT activities. Byrd's reputation in the federal system was very violent and in the simplest terms "full-throttle." The longer Byrd was out of prison, the higher the potential for mobilization of the local ABT—and at an amped-up level of violence.

By March, VanGeem and his partner, Mike McCurdy, tracked Hank down: He was sitting in federal custody on a dope charge. By happenstance, Hank had been sharing a cell with Byrd, who had been picked up on a federal parole violation. VanGeem approached Hank on two separate occasions and interviewed him about the "discipline" he received from Byrd. Hank wrote a statement and showed VanGeem the scars from the stab wounds.

'What's hard for some is just right for me'

When the case came to our office, these two tidbits were the extent of the file: a statement from an incarcerated, habitual felon and a photo of a healed wound. That's it. Clearly, we had a lot of work to do to hold James Byrd accountable for this violent crime. Fortunately, all of the agencies involved in the previous dismantling of the ABT in 2011 were ready to build this case piece by piece

until we could try it.

There was a sense of urgency in sending Byrd back to the penitentiary for many reasons. First, Byrd needed to go to TDCJ (Texas Department of Criminal Justice). While in the federal Bureau of Prisons, Byrd was allowed to roam the yard and communicate freely with other gang members. Prosecuting him at the state level would put him in TDCJ where he would immediately be categorized and designated for solitary confinement with minimal privileges. Cutting off communication to ranking officials of the ABT is crucial to limiting their criminal activity. Second, intelligence from many different agencies showed that Byrd had committed many violent acts in the time he was out, and at that time, no other victims were cooperative. For example, Byrd stabbed a man 37 times in a drug deal gone bad and left him for dead. That victim and an eyewitness, when approached, refused to report anything further on James Byrd. A statement Byrd likes to use is, "What's hard for some is just right for me." That's how he lived his life, and it made him very dangerous on the streets of Tarrant County.

The warrant for James Byrd's arrest did not issue until August 2014, when we also obtained warrants for co-defendants Charles Garrett Jr. (aka CJ), Nicholas Acree (aka Bulldog), and Michael Young (aka Coyote), the ABT affiliates who were present during Hank's stabbing. Byrd had already been revoked from his supervised release and sentenced to 24 additional months in federal prison; CJ and Bulldog were also arrested on the gang-related murder of an Aryan Circle affiliate in April 2014. Because Byrd was already in federal prison, bringing him to Tarrant County for trial required extradition, a request that either the State or the defendant can make. In this case, Byrd signed his own Interstate Detainer request and was transported back to Tarrant County. From the day he landed in local custody, the State had 120 days, per federal statute, to try him. For a case file that was already thin, such a short timeline for preparation was certainly daunting.

Getting the rest of the story

By March 2015 we had a June trial date. We informed our Fort Worth Intelligence agent, Mike Valdez, that we needed a sit-down. When Valdez came to our first meeting, he did not come alone. There to present the case on James Byrd was Texas Ranger Joshua Burson, who assisted, and the two Homeland Security Investigations special agents from the National Gang Unit, Steve VanGeem and Mike McCurdy. It was made patently clear that, while this case seemed thin, expectations were high. James Byrd was no average gang member; he was high-ranking, "dyed in the wool" ABT, and extremely dangerous. The agents informed us that while our case file consisted of about four pages of information, each of their agencies had thousands of pages on James Byrd that included ABT communication, directives, and information on other unreported violent crimes.

The first step for building the case was simply getting briefed. We needed to be up to speed on who the actors were, what we knew about them, their whereabouts, and whom we would call as witnesses. We also needed to become experts on the inner workings of the ABT: its hierarchy, constitution, and criminal enterprises. We discovered that our victim, Hank, was in federal prison in Memphis; he was sent there for his own protection as the information he provided law enforcement, including his statement against Byrd, put his life in imminent danger. The agents weren't sure that Hank would cooperate further, nor did they know whether there were any other witnesses to the crime or any other corroboration. The agents, having worked many ABT cases themselves, knew that one major hurdle is always cooperation from the involved parties.

This meeting was also the first occasion for us to see Byrd's tattoos, photographs of which were included in nearly 600 pages of federal prison records the agents provided. (See them yourself on the next page.) He has three ABT "patches," one on each side of his abdomen and one on his calf, multiple swastikas, and additional Nazi symbols. Some of the more prominent links to white supremacy were David Lane's "14 words"[1] written out on his side, a poem about the Brotherhood on the other side, the Roman numerals I and II (standing for A [Aryan] and B [Brotherhood], the first and second letters of the alphabet) on his eyelids, and a roughly 20-inch depiction of Adolf Hitler on his back. Proving his gang affiliation was not going to be a problem.

However, we wanted to go fur-

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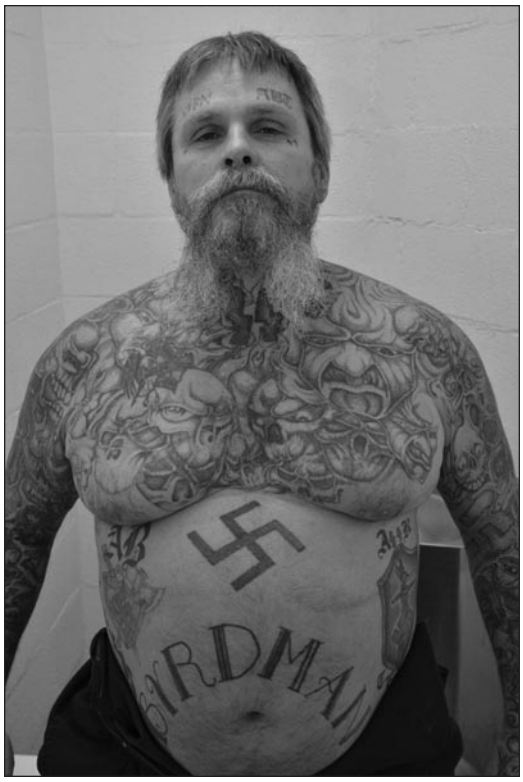
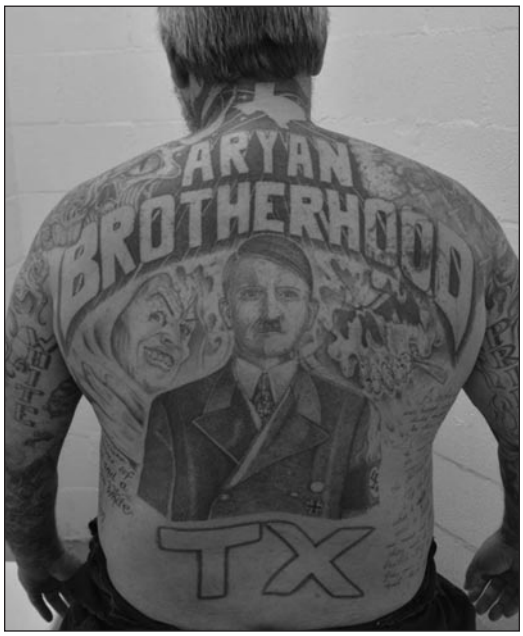
ther. Agents put us in touch with Agent Steve Lair, a Carrollton Police Officer and deputized Homeland Security agent, who is an ABT expert. We needed his testimony to explain all of the findings to the jury. Lair made it very clear that James Byrd was a major in the gang—or, to put it in the terms of the Penal Code, "part of the identifiable leadership"—and we could re-indict this case under §71.023. That portion of the code is often called "the kingpin statute," under which we could allege that Byrd used his position of rank to direct the commission of criminal offenses by other ABT affiliates. The punishment under §71.023 is 25 years to life. No one in our office had previously used this statute. We were aware that Kaufman County had recently used an older version of the statute, and we were able to speak with prosecutors there about their case, but because of language changes in the law, we had to choose how to indict the case with no prior cases or caselaw as direction. Using this statute is similar to using the engaging statute, but it adds an extra element of proving that an individual is directing the activities of the criminal street gang, as opposed to merely participating in them.





To prove Byrd's position as director of gang activities, we needed all of the evidence the various law enforcement agencies had collected over the years: Reports, interviews, jail call recordings, statements, Facebook posts, phone records, call logs, and text messages had all been collected in various agencies' surveillance of Byrd. HSI and Intelligence sent us emails almost daily with more information they were digging up—it was almost too much to digest in the short time we had. We got into the local ABT weeds, needing to remind ourselves at times to stick our heads up to see where we were. Having a large team of law enforcement at hand was invaluable for this portion of case preparation—their databases kept such clear logs of where information had been gained and from whom. We also kept organized by keeping case file boxes with notes and discovery obtained from potential witnesses. We divided up our social media research, captured it as we saw it, and maintained it in one file. We talked almost daily about new information to hand over to the defense and notices to put in the court's file. We listened to hours and hours of phone calls, reviewed thousands of text messages, had investigators take us to where the offense took place (where we discovered we were being watched), learned nicknames, and spoke to any and every inmate who reached out.

The minute Byrd hit the Tarrant County Jail, we began receiving "kites" from snitches who wanted to tell us what they knew about Byrd in exchange for consideration in their own cases. What many of them knew boiled down to this: "He is very scary, he is very dangerous, he runs the ABT, I will tell you what I know, and I will *never* testify." We followed every lead and visited each person who pointed us in the direction of another person. We spoke to more than 20 witnesses both in custody and out. We traveled to Bonham, Tennessee Colony, Parker County, and the Federal Correctional Institution in Fort Worth, and we made numerous trips to the Tarrant County Jail. We

became aware of another extraneous victim, "Colin," who had also been kidnapped at gunpoint by Byrd and Bulldog. He had reported the offense and was willing to testify at the time he was originally placed in custody. He was serving a 20-year federal sentence for selling methamphetamine and was in custody in Wisconsin—he, like Hank, had also been placed in that location for his own protection. We extradited him here with our fingers crossed that he would testify. (He told us later that he had planned to tell us he wouldn't do it, but because one of the agents at our meeting had testified on his behalf at sentencing, he agreed to cooperate. We learned then that there is very little prosecutors can offer someone who has already been convicted and sentenced for a long amount of time. But taking the time to see if you can touch base with their mom, girlfriend, or attorney goes a long way with these prisoners.)

Unfortunately, while all of this information made great punishment evidence or evidence for the elements of directing activities, we still needed to prove the underlying offenses of aggravated kidnapping and assault with a deadly weapon. And to do that, we needed witnesses to the crimes. Hank, our victim, was totally unsympathetic—that's usually the case with gang violence. He was a federal inmate who would have to be extradited from prison to testify in court, and he would appear in a jumpsuit and shackles in front of the jury. We first made contact with Hank via conference call to see if he was even willing to cooperate with us, then eventually get on a plane and testify in court. He was. Part of his cooperation was due to a downward departure he received at his federal sentencing—the information he had provided on Byrd had shaved 10 years off of his federal sentence, which could certainly be used by the defense to look like motive to make up his story. It was also another piece of information we would have to turn over to the defense and something else that made Hank unsympathetic.

Hank proved very helpful in pointing to witnesses. He told us who lived in the house at the time the ABT came by looking for him. We located the homeowner, "Shannon," who herself was a known methamphetamine dealer. Shannon was cooperative but scared. She told us that she did in fact receive a phone call from a woman named "Kimberly" that the ABT was at her house looking for Hank. We were able to find Kimberly. She was a known thief and drug user who happened to be sitting in the Tarrant County Jail with two new pending cases. She was also on parole for a life sentence for a drug case. We met with her and she remembered in remarkable detail the events of the day that Hank was kidnapped. She even recalled him coming back to the house later in the night and seeing the stab wounds. Because of the time she had spent in the drug world, she knew some members of the ABT and could identify at least a few of the people who had come over looking for Hank. Kimberly wrote a three-page, handwritten letter from jail—she was cooperative. But of course, she was also in custody, and again, could have something to gain from helping our case.

Finally, we tracked down "Margo." Margo made the original phone call to her husband, an ABT member in prison, about Byrd's disciplining Hank that Steve VanGeem had overheard. She was the catalyst to the entire case, and we needed her. Margo was a local girl who was a drug user, a felon, and an affiliate of the ABT. She had been visiting Byrd in jail, so we had very little optimism that she would cooperate with us. We worked on developing a trusting relationship with her during the several months the case was pending. We kept up with her and spoke to her constantly. Margo would agree to testify one day, and the next day we would lose track of her. By the time we were ready to try the case, there was credible information that Margo had been "green-lit." In ABT terminology, that means there was a threat on her life for her participation in the Byrd case—though she did end up testifying.

We were ready to try the case with witness testimony and evidence of Byrd's affiliation with the ABT from law enforcement, but after being presented an extraneous notice listing 31 separate bad acts, Byrd requested (and received) a continuance. With a little over a month of additional time, we requested that the agents write search warrants for the tower records from the cell-phone providers of Byrd, Bulldog, CJ, and Hank's phones. With the limited time we had before, this was not something we had been able to focus on. Cell phone companies can take weeks or months to respond to subpoenas and warrants, and the information they give on short

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notice can be very limited. We thought it was worth a shot to see what we could get and how we could use it to corroborate our victims' testimony. The house where the offense occurred belonged to a woman named Tonya Blackwood, a known Featherwood. (Featherwoods are women who associate with the ABT. Oftentimes ABT members will refer to themselves as Peckerwoods or Woods, and Featherwood is a derivative of that moniker.) Blackwood had been arrested on federal conspiracy charges, and her phone was seized as well. The results of the cell tower data warrants became the final piece of the puzzle, as the phones corroborated Hank's account of events on January 29 and 30, 2014. FBI Agent Mark Sedwick was able to create a map using the cell towers' data that told the exact story that Hank, Kimberly, Shannon, and Margo would tell on the stand. The evidence would be devastating to the defense's case, which relied on the idea that the State's case was a masterminded conspiracy to take Byrd out and save everyone involved penitentiary time. It was truly a team effort by the District Attorney's Office, FWPD, Wichita Falls PD, Texas DPS, Homeland Security, the United States Bureau of Prisons, and the FBI. We were now ready for trial.

Going to trial

The trial lasted a week. Voir dire, as it usually is, was the most important part. We had to be very up-front about our case's difficulties and admit that every witness was unlikeable in his own way. We had to explain that we had no weapon and zero crime scene evidence of Hank's kidnapping and stabbing. We focused on our witnesses' credibility and the jury's ability to look past their lack of knowledge of the ABT or gang lifestyle that would be presented in testimony. We used the idea of having "one courthouse for everyone." Most of the jury panel understood and said they could find a criminal guilty even if they didn't like the victim. As always, though, there were plenty of jurors who admitted that it would be difficult to punish someone for committing a crime against someone who "had it coming." Those jurors exposed themselves readily because that opinion is deemed acceptable. (You won't get glaring looks from other jurors for admitting you don't care for drug dealers and gang members.) It was important to strike a balance between those people who would hate James Byrd and those who would hate both him *and* Hank.

During guilt-innocence, we called Hank, Kimberly, Shannon, and Margo to the stand. Each of them had an appointed attorney. In fact, we did not present any civilian witnesses who did not need to seek legal advice before implicating themselves in this offense. We approached each one in the same upfront manner, asking them to tell the jury about their lengthy criminal histories, what they had been given or not given to testify, and for what crimes they were currently incarcerated. In comparison to Byrd, each witness had likeable or relatable qualities. We also thought that offering no minimization whatsoever for the witnesses' crimes made the jury more comfortable that they were being honest. At one point, the jury had to file by Hank to look at his wound. Many of them put their faces within inches of his shoulder, which led us to believe that they did not view him as threatening.

It also appeared that having the witnesses explain their lives before they were felons helped the jury understand how they ended up down this path. This would be important information to compare and contrast to Byrd himself later at trial.

After the civilians told their stories, we called Valdez, the Wichita Falls detective, Texas Ranger Burson, and Steve VanGeem. Each law enforcement agent could add another piece to the puzzle, certainly, but we were also hoping to convey to the jury—by calling officers from so many agencies—how many law enforcement groups had an interest in imprisoning James Byrd. We used photographs on PowerPoint, actual items seized from Byrd's home and property, and recordings they had collected. Mark Sedwick was called to corroborate all of the civilian testimony with the cell tower data. He presented the evidence in an interactive PowerPoint that traced all the involved parties.

Finally, Steve Lair presented all of the expert testimony that Byrd was in the identifiable leadership of the ABT. It was damning evidence, and listening to him was like watching a reality show on TruTV. We had a letter that Byrd had hand-written (found in his home in Wichita Falls) and copied several times. It directed his fellow gang members to pay dues, get in line, and find other "good and loyal brothers" to check in. It corroborated Hank's testimony

that he was being required to "check-in" with Byrd, and it proved Byrd was no average rank-and-file soldier in the ABT. We blew up the letter 6 feet tall, put it front of the jury, and walked them through it line by line with Lair. Every juror was engaged and interested. Lair worked with our trial art coordinator, Rhona Wedderien, to create a demonstrative presentation that depicted the history of the ABT, its inside leaders, its symbols, and its presence throughout Texas and the United States. While this is typically punishment evidence, it was all relevant to the elements in §71.023. When Lair went through his PowerPoint of Byrd's tattoos, he finished with the large depiction of Adolf Hitler on Byrd's back. It elicited an audible gasp from the jury.

After the State rested, and despite efforts by his counsel to dissuade him, Byrd decided to take the witness stand in his own defense. He wanted to explain to the jury that he was being blamed for the crimes because, "Look at me—I'm an easy scapegoat." He also needed to explain away the cell tower testimony, so he told the jury that he had given his phone to Coyote. His counsel tried his best to mitigate the defendant's offensive lifestyle choices, almost creating the impression that Byrd was just an old grandpa-type who happened to bounce around the federal prison system. But then came cross-examination, where we made it perfectly clear to the jury that Byrd bounced around the system because he was a consistent security threat to other inmates. He was questioned on each of his ABT-related transgressions in federal prison, including putting hits on other inmates. Everyone in the courtroom could see that he was proud of his résumé, coldly staring back at the State with a grin.

The jury was out just under an hour and half before convicting James Byrd. The jury did not ask to speak afterwards, but one woman stopped to pose two questions to the bailiff: Was Byrd in custody, and would he ever be getting out? We felt that her asking showed that the jury knew just how dangerous James Byrd was.

Byrd elected to go to the judge for punishment, and we resumed trial after a weekend. Over the two-day break, Byrd had shaved his head to reveal a scalp covered in tattoos: a scorpion going up the back of his neck with its claws pointing to "1488" (the "14 spoken words" by David Lane and "88" for "Heil Hitler"—H being the eighth letter of the alphabet) and the stinger going around his neck and up his chin. He had grown his hair to cover them during the jury trial, but they were on full display for punishment. He clearly wanted to make the point that he was not ashamed of what he was and what he represented.

After the testimony of our extraneous victim, Colin, the judge promptly sentenced Byrd to 50 years in prison. All of the agents who had worked on the case were in the courtroom to show the court their support in this matter. For 45-year-old Byrd, this 50-year sentence in solitary confinement in TDCJ is a life sentence.

As previously mentioned, our goal was to have Byrd in TDCJ, where he will remain segregated, as opposed to the federal Bureau of Prisons facility where he would be allowed to remain on a yard and stay affiliated with the ABT. Byrd had to be transported back to a federal BOP in South Carolina for the few months remaining of his federal sentence, but agents believed he would likely do anything to stay in federal custody, including trying to kill someone in prison so as to not be transported to TDCJ. The BOP agreed and decided to segregate Byrd as a security threat for the remainder of his sentence, after which he'll be transferred to TDCJ.

Closing thoughts

We spend so much time as prosecutors telling our juries that what they will see in a courtroom is nothing like what they see on TV. This trial and investigation seemed to be an exception. The facts themselves—from blood-soaked bread to the "hit" put out on a witness—were an introduction to an organized crime world that coexists right in our community that is totally unbelievable to the average person going about his daily life. Our goal was to make the jury understand that James Byrd was an exception even in that world, and we believe they did. ❇

Endnote

1 "We must secure the existence of our people and a future for white children." David Lane was an American white supremacist leader, convicted felon, and a founding member of The Order (a white supremacist terrorist organization active in the United States in the 1980s).

Now what? A guide to the new nondisclosure law

An attempt to summarize the changes made to Government Code §411.081(d) and help prosecutors through potential new pitfalls.

It was confusing, but it was ours. The nondisclosure statute of Government Code §411.081(d) was certainly not a model of clarity, but after more than a decade of using it, we had generally figured out what was required and how to respond to petitions for nondisclosure. Then in the 84th Regular Session, the Texas Legislature proposed a number of new bills to drastically change both expunctions and nondisclosures. Many of those bills were (thankfully) vetoed, but what passed was sufficient to change the nondisclosure landscape significantly. This article will attempt to summarize the changes made to the law and alert prosecutors to potential new pitfalls.

By Andrea L. Westerfeld
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When does (did) the law come into effect?

The most important thing to know about any new law is when it becomes effective. The nondisclosure changes have an effective date of September 1, 2015, but don't panic yet. The new statute applies only to *offenses occurring* on or after September 1, 2015, not *petitions filed* after that date.[1] For any offenses occurring before September 2015, regardless of when the petition is filed, the old law will continue to apply. This gives us all a little breathing room to figure out the new statute before it is applicable.

The new nondisclosure statute has been spun out of §411.081(d) and now has spread over several sections of the Government Code, §411.071–077. Note that §411.081(d) was not repealed and continues to exist for the purposes of offenses occurring before September 1, 2015.

Base requirements for all nondisclosures

Although there are a number of new categories of nondisclosures, there are two base requirements that apply to *every* nondisclosure under the new law. If the petitioner cannot meet these requirements, then she is not eligible for a nondisclosure.

First, the petitioner cannot have been convicted or placed on deferred adjudication for any offense (other than a fine-only traffic violation) at any time after the sentence was pronounced through any applicable waiting period.[2] Thus, if Nancy gets deferred adjudication on a case, but two months later she is convicted on another offense, she will not be able to get an order of nondisclosure on the deferred. The relevant consideration is when the person was actually convicted or placed on deferred, not the offense date. So if Nancy is charged with one offense in January, gets deferred on a second offense in May, and is not sentenced for the first offense until August, that offense will block her from receiving a nondisclosure on the deferred. If she pleaded to the January offense in April, however, that would not block a nondisclosure on the deferred because the plea occurred before she was placed on deferred.

The second base requirement is that the petitioner has never been convicted or placed on deferred for any offense out of a certain list.[3] This list includes any offense requiring registration as a sex offender, any case involving family violence, and any offenses under Penal Code §§19.02 (murder), 19.03 (capital murder), 20.04 (aggravated kidnapping), 20A.02 (trafficking of persons), 20A.03 (continuous trafficking of persons), 22.04 (injury to a child, elderly, or disabled), 22.041 (abandoning or endangering a child), 25.07 (violations of bond in family violence cases), 25.072 (repeated violations of bond in family violence cases), and 42.072 (stalking). This applies both to the offense which the person is seeking to have nondisclosed *and* any other offense in his criminal history. So if Joe received deferred adjudication on a family violence case, he is not eligible to have that case nondisclosed. But he would also be ineligible to have any *future* case nondisclosed because of the family violence case in his criminal history. Note that the statute applies to any case "involving family violence," not merely to cases

where there was an affirmative finding of family violence. Thus, if Joe received deferred adjudication on an assault without an affirmative finding of family violence, a future court could still look at the case to determine if it *involved* family violence and thus renders him ineligible for nondisclosure.

Five (yes, five) categories of nondisclosure

Once the petitioner has met the two base requirements, he then must fit into one of the five new categories of nondisclosure. If the petitioner does not meet the requirements of any of the five categories, then he is not entitled to an order of nondisclosure. And yes, this means we have to do five times the amount of work as before, checking in each category to see if the petitioner is entitled.

1. Deferred for Certain Misdemeanors ("Automatic Nondisclosures"): §411.072

The biggest point of discussion from the nondisclosure changes is definitely the so-called automatic nondisclosures. These changes were intended as a way to streamline the process for first-time, low-level offenders. By "low level," the statute excludes a number of misdemeanors from consideration,[4] including all misdemeanors under Penal Code Chapters 20 (kidnapping and unlawful restraint), 21 (indecent exposure and unlawful photography), 22 (assault, deadly conduct, terroristic threat), 25 (bigamy, enticing a child, criminal nonsupport, violation of protective order), 42 (disorderly conduct, harassment, animal cruelty), 43 (prostitution, sexting), 46 (unlawful carrying of a weapon, prohibited weapons), and 71 (engaging in organized criminal activity). If the petitioner was put on deferred for any misdemeanor under those chapters, he is *not* eligible for an automatic nondisclosure.

The next significant factor in automatic nondisclosures is that they are only for first offenders. Ordinary nondisclosures restrict only people previously convicted of certain offenses from obtaining an order, but automatic nondisclosures require that the person has *never* been convicted of or placed on deferred for any offense other than a fine-only traffic violation.[5] So if the petitioner has any prior convictions or deferreds, he is not eligible for an automatic nondisclosure.

Once the petitioner meets those two requirements, then the process is simple. He must successfully complete deferred and obtain an order of discharge and dismissal.[6] It also must be at least 180 days since he was placed on deferred. That means that a person whose probation lasted longer than six months can get a nondisclosure immediately upon completing probation. But if the probation lasted less than six months, he has to wait until six months have expired until he can get a nondisclosure.

One requirement for regular nondisclosures that does not have to be met in automatic nondisclosures is that the petitioner shows it is in the best interests of justice to issue the order. There is a similar provision, but it requires action earlier. Under the new Article 42.12, §5(k), when a trial court places a person on deferred, it must make an affirmative finding if it concludes that it would not be in the best interests of justice for the person to receive an automatic nondisclosure.[7] Thus, the State can make an argument on best interests of justice only at the time the person is placed on deferred. If that affirmative finding is made, then the person is ineligible to receive an automatic nondisclosure.[8]

Of course, there has to be one additional wrinkle to spice things up. In the same legislative session it passed §5(k), the Legislature wholly repealed Article 42.12 and replaced it with the new Chapter 42A of the Code of Criminal Procedure as of January 1, 2017.[9] The §5(k) language did not make it into Chapter 42A. Exactly what this means is unclear. The bill creating Chapter 42A specified that it was meant as a recodification only and no substantive changes were intended.[10] Thus, §5(k) may be one of several newly amended provisions of Article 42.12 that survive the repeal of that article and will likely be rolled into new Chapter 42A in the next legislative session.

Finally, a big question on "automatic" nondisclosure orders is how they will be issued. Unfortunately, the law is not clear. The statute simply says that the court "shall issue" the order after determining whether the person meets the requirements of the statute.[11] It also provides that a defendant is not required to file a petition. But the defendant *is* required to pay a fee and "present" to the court any evidence necessary to establish that she is eligible.[12] Evidence of eligibility would include the order placing her on deferred and the order of discharge and dis-

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missal, as well as a criminal history search to verify she does not have any disqualifying prior convictions or deferreds. Exactly how or when this information is meant to be presented is left unclear, but the best analogy would be acquittal expunctions under the Code of Criminal Procedure.[13] Like automatic nondisclosures, the defendant is not required to pay ordinary criminal filing fees and must only "request" relief rather than file a petition for it, but the "request for acquittal expunction" is generally identical to an expunction petition so the court has all the information necessary to grant it. Thus, the best practice would be to file a "Request for §411.072 Nondisclosure" with the court; it should contain the information about the offense listed above so that the court can enter an order. Different counties may come up with their own preferred approaches to these cases.

2. Standard Deferred Nondisclosures: §411.0725

If a person received deferred adjudication but does not qualify for an automatic nondisclosure, then he would be considered for nondisclosure under §411.0725.[14] This would include anyone who received deferred for a felony or a misdemeanor in the prohibited list of §411.072, a person who received a §5(k) affirmative finding, or someone with a prior conviction or deferred. These operate exactly like a traditional nondisclosure. The person must show that he was placed on deferred, that he received a discharge and dismissal, that a waiting period has passed, and that issuance of the order is in the best interests of justice.[15]

Waiting periods for §411.0725 nondisclosures are unchanged from earlier versions.[16] All felonies must wait five years. Misdemeanors under Chapters 20, 21, 22, 25, 42, 43, and 46—in other words, the misdemeanors barred from receiving an automatic nondisclosure—have a two-year waiting period. All other misdemeanors can be granted immediately. The waiting period begins to run only when the order of discharge and dismissal is signed, not when the supervision expires, so prosecutors must pay attention to when that order was actually signed.

These nondisclosures—and all nondisclosures other than automatic ones—require the petitioner to show that issuance of the order is in the best interests of justice.[17] This is the time to introduce any issues that do not technically disqualify someone from receiving a nondisclosure but that are still issues a judge might believe should not be sealed from public record. Examples might include several prior similar offenses—like if Ted has gotten deferred on numerous prior theft cases and now wants the latest one sealed, the court might believe his potential employers deserve to know he has a history of stealing. Or if the facts of a case were particularly heinous—perhaps a child sexual assault where the case was pleaded down to injury to a child solely to prevent the young victim from testifying—the judge may conclude it is not in the best interests of justice to seal that record. These are considerations that will vary widely from case to case and judge to judge, so it is something we have to consider on an individual basis.

3. Straight Probation for Certain Misdemeanors: §411.073

Another huge change made to nondisclosure laws is allowing people who were convicted to still have their cases sealed, as opposed to limiting this option solely to deferred adjudication. There are two separate sections that allow this—§411.073 for community supervision cases and §411.0735 for jail time cases.

Under §411.073, a person may be eligible for a nondisclosure if she receives community supervision for certain misdemeanors.[18] Mostly intoxication-related offenses are precluded, including any misdemeanors under Alcoholic Beverage Code §106.041 (possession and/or consumption of or selling alcohol to minors) or Penal Code §§49.04 (driving while intoxicated), 49.05 (flying while intoxicated), 49.06 (boating while intoxicated), or 49.065 (operating an amusement park ride while intoxicated). Additionally, any conviction under Penal Code Chapter 71 (engaging in organized criminal activity) may not be nondisclosed.

For any offenses not on the prohibited list, the petitioner must successfully complete community supervision and receive a discharge and dismissal.[19] This section applies to anyone who served community supervision, even if he also served jail time such as through shock probation or as a term and condition of probation.[20] The waiting period for these cases is, again, two years for offenses under Penal Code Chapters 20, 21, 22, 25, 42, 43, or 46, or immediately for all other misdemeanors. The petitioner must still

prove that issuance of the order is in the best interests of justice. But the petitioner must also show—as in automatic nondisclosures—that she was *never* convicted of or received deferred adjudication for any offense other than a fine-only traffic offense.[21] These nondisclosures are intended for first-time offenders only.

4. Misdemeanor Jail Time: §411.0735

Misdemeanor convictions that resulted in jail time are covered in their own section, but they operate much the same as straight probation cases. The person must have been convicted of a misdemeanor, but not for any of the prohibited offenses—generally intoxication offenses and engaging in organized criminal activity.[22] The waiting period for these cases is two years after the person is released from confinement.[23] Like straight probation cases, the petitioner must be a first-time offender. Any prior convictions or deferred, other than for a fine-only traffic offense, will disqualify him from receiving a nondisclosure.[24] Finally, the petitioner must show that issuance of the order is in the best interests of justice.

5. Human Trafficking Victims: §411.0728

This section will not likely be used very often because the requirements are very stringent, but for the situations where it occurs, here is your guide. This section applies only to people convicted of prostitution[25] and sentenced to straight probation.[26] They must then successfully complete probation *and* have the conviction set aside under the so-called "judicial clemency" act, Article 42.12, §20(a)[27] of the Code of Criminal Procedure.[28] If so, they may file a petition of nondisclosure and must convince the judge that they committed the offense solely as victims of human trafficking *and* that issuance of the order is in the best interests of justice.[29]

Other considerations

Most of the other nondisclosure rules have stayed essentially the same in the recodification. Other than in automatic nondisclosures, a person must file a civil petition to be considered for a nondisclosure.[30] The trial court must then provide notice to the State. But unlike the old statute, a hearing is not required. The petitioner must only receive the *opportunity* for a hearing.[31] The State must request a hearing before the 45th day after it received notice of the petition.[32] Otherwise, the court may grant the order without a hearing if it can determine from the petition alone that the person meets all the requirements.[33]

The new statute still does not give a right of appeal in nondisclosure cases. Generally, such cases cannot be appealed because they do not reach the required amount of controversy to vest jurisdiction in civil cases. But if a judge grants a nondisclosure to a person who is statutorily not entitled to it, the State may be able to seek a writ of mandamus to overturn the order. This would not apply to the discretionary sections, such as whether issuance was in the best interests of justice, but if a petitioner has a disqualifying prior conviction or the waiting period has not run, mandamus may be an option to obtain relief.

As ever, information about an offense subject to an order of nondisclosure may not be disclosed to anyone except 1) for criminal justice purposes, 2) to certain regulatory agencies, or 3) to the petitioner himself. The petitioner (or his attorney) is the only person who can obtain the records under that exception. He cannot generally waive a previously granted order of nondisclosure so that the agencies can disclose records to a third party.[34] The list of regulatory agencies remains generally unchanged, but banks and similar financial institutions are now included, so long as it is regarding an application for employment.[35] Similarly, employers of "critical infrastructure" are exempted regarding information about an employee or applicant who would be responsible for handling, manufacturing, or transporting certain hazardous materials.[36] Finally, while disclosure for criminal justice purposes has always been allowed, the new statute makes clear that any information subject to a nondisclosure order *may* still be admitted into evidence in a subsequent criminal case.[37]

Conclusion

The nondisclosure statute has drastically changed. Many more people will shortly become eligible for nondisclosure than have ever been in the past, which means our workloads will increase. The statute is also more complicated than before, requiring more review to determine whether the petitioner meets the new require-

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ments for nondisclosure. This article is only a summary of the changes to the law. For more information, TDCAA's book *Expunction and Nondisclosure* is being revised to reflect the new law and will be available in the spring.

In the meantime, the most important questions to ask when reviewing any petition for nondisclosure under the new law are:

- Does the petitioner have any prior convictions or deferred adjudications requiring registration as a sex offender for any of the prohibited list of offenses (Penal Code §§19.02, 19.03, 20.04, 20A.02, 20A.03, 22.04, 22.041, 25.07, 25.072, & 42.072), or for family violence? If so, he is not eligible for *any* nondisclosure.
- Was the petitioner convicted of or placed on deferred for any non-traffic offenses while on probation or during the waiting period? If so, he is not eligible for *any* nondisclosure.
- Does the petitioner have any prior convictions or deferred adjudications? If so, he is not eligible for automatic nondisclosures or nondisclosures following jail time or straight probation.
- Did the person receive an order of discharge and dismissal from deferred or straight probation? (Or was he released from jail?) If not, the clock has not yet started ticking on his waiting period.
- Has any applicable waiting period passed? Except for automatic nondisclosures, a person can get a nondisclosure only after the waiting period has run—five years for felonies, two years for certain misdemeanors, and immediately for all other misdemeanors, or two years from release from confinement. ❇

Endnotes

1 Acts 2015, 84th Leg., ch. 1279 (S.B. 1902), §32, eff. Sept. 1, 2015.

2 Tex. Gov't Code §411.074(a).

3 *Id.* at §411.074(b).

4 *Id.* at §411.072(a)(1)(A).

5 *Id.* at §411.072(a)(2).

6 *Id.* at §411.072(b). Some courts automatically issue an order of discharge and dismissal upon successful completion of community supervision. Others issue one only upon the defendant's request.

7 Tex. Code Crim. Proc. art. 42.12, §5(k).

8 Tex. Gov't Code §411.072(a)(1)(B).

9 The new Chapter 42A will become effective January 1, 2017. Acts 2015, 84th Leg., ch. 770 (HB 2299), §1.01, eff. Jan. 1, 2017.

10 Acts 2015, 84th Leg., ch. 770 (H.B. 2299), §4.01, eff. Jan. 1, 2017.

11 Tex. Gov't Code §411.072(b).

12 *Id.* at §411.072(c).

13 Tex. Code Crim. Proc. art. 55.02, §1.

14 *Id.* at §411.0725(a).

15 *Id.* at §411.0725.

16 *Id.* at §411.0725(e).

17 *Id.* at §411.0725(d).

18 *Id.* at §411.073(a).

19 *Id.* at §411.073(b).

20 *Id.* at §411.073(a)(2)(B).

21 *Id.* at §411.073(b)(2).

22 *Id.* at §411.0735(a).

23 *Id.* at §411.0735(d). A discharge and dismissal is not necessary for these cases, unlike deferred and straight probation cases.

24 Tex. Gov't Code §411.0735(b)(2).

25 Tex. Penal Code §43.02.

26 Tex. Gov't Code §411.0728(a).

27 Or Chapter 42A.702, when the recodification takes place.

28 Tex. Gov't Code §411.0728(a).

29 *Id.* at §411.0728(b) & (c).

30 *Id.* at §411.0745(a) & (b). The petitioner must pay a $28 fee in addition to any other civil filing fees.

31 *Id.*

32 *Id.* at §411.0745(e)(1).

33 *Id.* at §411.0745(e)(2).

34 Op. Tex. Att'y Gen. GA-0255, 2004 WL 2191050, at *2 (2004).

35 Tex. Gov't Code §411.0765(30).

36 *Id.* at §411.0765(31).

37 *Id.* at §411.0775. The evidence must still meet any other admissibility requirements.

Fighting the abuse of prescription medications

Diverting legal drugs into illegal uses is becoming more and more common. Here's how prosecutors recently shut down a "pill mill" in Montgomery County.

Prescription drug abuse is a serious epidemic in our state. It not only causes fatalities from overdoses, but intoxication from prescription drugs also leads to numerous intoxication assaults and manslaughters each year. Texas's method for tracking the abuse of prescription drugs is seriously flawed, as many counties do not accurately track statistics.

By Bradlee Thornton
Assistant District Attorney in Montgomery County

Drug diversion is the process of diverting legal prescription drugs to illegal use. One of the most common cycles of diversion goes something like this: A crew leader recruits several people called "doctor shoppers." The leader takes the shoppers to clinics, "pill mills," where shady doctors or physician assistants write prescriptions without proper treatment or diagnosis. Once they obtain the prescriptions, the shoppers fill them at equally dishonest pharmacies and give the pills to the crew leader, who diverts them to the street. The shoppers are paid in cash or pills.

Drug diversion creates issues in the community and problems for law enforcement. Many officers aren't trained in properly detecting signs of intoxication from prescription drugs when they investigate DWIs, and many prosecutors aren't trained to accurately check the prescriptions defense attorneys might offer (as an explanation for their clients' intoxication while driving) and are dismissing the cases when the script might have been for a completely different substance. As drug abuse evolves, so must our strategies for fighting it. We must not treat drug DWIs as less important than those involving alcohol or solely charge controlled substance abuse on the street level against the abuser or dealer. We must take the opportunity to hold doctors and pharmacies accountable as well. The only effective strategy to solving a problem is a far-reaching one.

In Montgomery County, I was asked to take on the responsibility of managing our drug diversion initiatives. At the time, we had several pending cases against pill-mill doctors that were all working their way to pleas—there had always been hesitation to try these cases because of their complexity and our not knowing how juries would react to them. But two years ago, the Conroe Police Department's Narcotics Division brought our office a case that sounded like it had potential to go to trial as a perfect test case, and I worked with the police department from beginning to end. Multiple agencies worked hard to put together a great case over the course of the last two years.

The Woodlands Diagnostic Clinic

Conroe PD, with help from the Drug Enforcement Agency's (DEA) Houston Tactical Diversion Squad, had identified The Woodlands Diagnostic Clinic as a potential source of drug diversion based on complaints from the community, information from a confidential informant, and information gathered from organized traffic stops of "patients" leaving the clinic. Undercover recordings showed that patients at the clinic were seen by Dr. Joseph Vadas and that the clinic was operated by the doctor's brother-in-law, Luis Espinola; sister-in-law, Laura Espinola; and wife, Martha Vadas.

Research into the drugs prescribed by the clinic gave us probable cause to believe that the majority of its patients were prescribed opioids, benzodiazepines, barbiturates, or carisoprodol. These drugs are considered pain medication according to §168.101 of the Texas Occupations Code, and a clinic that prescribes those medications to a majority of its patients must obtain a certificate from the Texas Medical Board. This

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clinic had not obtained such a certificate. Section 165.152 of the Texas Occupations Code makes it a third-degree felony to practice medicine in violation of subtitle B, which includes the pain management registration requirements.

Using this and additional information, we obtained a warrant to search the clinic and the residences of both families. Thousands of patient files were taken along with business records, computers, patient logs, bank records, receipts, and other information. Investigators scanned every page of the patients' files to create a database showing which patients received what drugs each month the clinic was in business, which had been less than a year at that point. Only one patient among thousands was found to have been treated by any means other than prescription pain medication.

Suspect interviews and the clinic's accounting records showed that Dr. Vadas and his wife split the profits equally with their business partners, Luis and Laura Espinola. Undercover video revealed that Luis Espinola was acting as a nurse and office manager. After asking what drugs they were looking for, he would routinely tell patients what pharmacies they needed to go to. He would even tell them which particular pharmacist to talk to in order to avoid suspicion. Laura Espinola worked the front desk, took payments, and managed the records. Martha Vadas, the doctor's wife, sat next him and told him what drugs the patient was asking for and what prescriptions to write. (We learned later that Dr. Vadas was in the early stages of dementia at the time.) The doctor made no diagnosis, nor did he conduct any physical exam (outside of an occasional blood pressure check by Luis). In light of all of this evidence, we decided to charge all four individuals with engaging in organized criminal activity, enhancing the charge to a second-degree felony.

While the charges were pending and we were heading to trial, Dr. Vadas passed away, leaving the remaining defendants with the perfect defense: "The doctor did everything and we had no idea what was going on!" Of course, the thought crossed our minds to let the case go because of the difficulties we would face in proving that the remaining defendants knew about the technical requirements of registering as a pain clinic, but we decided to look a little further before abandoning it altogether.

We eventually learned of the doctor's medical conditions and that people close to him believed his wife and in-laws were manipulating him, that he was not the mastermind behind the operation after all. We spoke to one of his daughters in Canada and learned that her husband had witnessed Martha and Luis sitting down with dozens of patient files and forging the doctor's signature on all sorts of documents, including prescriptions. But a call to his niece in Hungary proved the most fruitful for our current situation. After the three defendants were arrested, she had spoken to her uncle Luis by phone and recorded the conversation. On the recording, Luis admitted that they knew all along that the clinic needed to be registered as a pain management clinic but that they had neglected to do it. With that information, we went to trial.

Taking it to court

The subject matter in this case was daunting. The law is complicated and our facts were a spider web of information. Not only did we have to make the jury care about diverting prescription drugs to the street, but we also had to simplify the law to make it understandable. In all honesty, when I first sat down with the statute, I found the law to be about as complicated as I have ever seen or could ever dread to see again. But I quickly realized that it was only as complicated as I wanted to make it. It really came down to explaining it to the jury like this: The prosecution had to prove that the defendants engaged in organized criminal activity by aiding Dr. Vadas in the practice of medicine by operating a pain management clinic without a pain management certificate.

In addition to proving this more simplified charge, I still had to make jurors care. We began by presenting the lead investigator, Randy Sanders with Conroe PD, who explained why he initiated the investigation. Officer Sanders explained the damage the clinic was doing to surrounding businesses, whose parking lots were overrun by people seeking prescription drugs illegally. He testified to how the diversion cycle operates and the damage it does to the community. The jury heard about how most of the "patients" weren't even from our area, with many coming from Oklahoma and Louisiana.

Next we brought in three undercover officers from the Texas Depart-

ment of Public Safety who acted as our undercover "patients," in addition to a formerly confidential informant. The informant and the undercover officers had been able to record their entire visits to the clinic, and the jury watched the videos of Martha telling Dr. Vadas what to do and what prescriptions to write. They saw Dr. Vadas ask the "patients" what they were there for and then write prescriptions after maybe pressing once or twice on their backs. Any layperson watching the videos could clearly tell this place was shady. The best witness in this group was the confidential informant, who began assisting the narcotics division after successfully beating his addiction. He spoke about his original prescription abuse problem and his former involvement as a runner in a crew. He knew the drugs' street values and the runners' practices that laypeople couldn't see; he also pointed out to the jury that criminals on the streets identified this clinic as a pill mill.

After the videos, we jumped into the case's technical aspects by proving ownership of the clinic through the leasing agent and its lack of license through the medical director of the Texas Medical Board. The leasing agent testified how Luis was the one who originally leased the building and that his name was on all of the documents. The medical director explained the pain management laws and why the requirement is there in the first place: to make sure that pain clinics are properly prescribing pain medicine to reduce the risk of abuse.

We were fortunate enough to receive many offers from experts

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Preparing for the fight

Shutting down pain management clinics is just one step in the right direction. Dirty pain doctors, pharmacists, crew leaders, runners, and doctor-shoppers must all be held accountable and either punished or otherwise corrected. The law can be confusing, so I will briefly outline the most effective legal tools for each type of case.

Shady pain management clinics

Sections 165.151–.152 of the Texas Occupations Code make it a criminal offense to practice medicine in violation of the rules of the board or in violation of various statutes within Title 3, Subtitle B of the code. The rules of the board are numerous, but one of the most common is Rule 170.3, which requires that pain management agreements between physician and patients be followed, as well as the requirement that only one physician prescribe scheduled drugs and only one pharmacy fill those prescriptions.

Failing to register as a pain clinic is the easiest attack for prosecutors, assuming that is true of your clinic. It is a third-degree felony under §165.152 of the Texas Occupations Code, which can be enhanced to a second degree under the engaging statute (Penal Code §71.02). Even if pain clinics are registered, there are still numerous violations under Title 3, Subtitle B of the Occupations Code that might apply, so look in that section of the code for possible criminal offenses.

Pharmacies

Pharmacies break the law and subject themselves to prosecution in numerous ways. Because of the volume of patients they serve, prosecuting pharmacies can be as daunting as prosecuting a pill mill. Section 481.128 of the Texas Health and Safety Code places strict requirements on "registrants" and "dispensers," which is defined to include doctors and pharmacists. This section creates an offense if the pharmacist doesn't comply with §481.074, which describes the process for filling prescriptions and the verifications a pharmacist must make.

Other diversions

The Texas Health and Safety Code describes a violation that it also calls "diversion" in §481.1285. In this section, someone commits an offense if he knowingly converts to his own use or benefit a controlled substance to which the person has access by virtue of his profession or employment, or if he diverts to the unlawful use or benefit of *another* person a controlled substance to which the person has access by virtue of his profession or employment.

Once the drug is diverted to the street, the fraud section of the Health and Safety Code (§481.128) provides an offense that covers most of the possible crimes that can be charged in this situation (i.e., using someone else's prescription, obtaining a prescription through various forms of fraud, and possession of unauthorized prescription forms). Once the drugs have reached the street, those in possession can always be charged under simple possession of a controlled substance. ❇

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who were willing to volunteer their services in this type of case. We chose one doctor who was an expert in pain management. She was absolutely appalled after watching the undercover videos and reviewing the clinic's records, and her disgust came through on the stand. Her testimony was essential to show the illegitimacy of the clinic's operations, and she helped to convince the jury that this clinic was so underhanded that there was no way that the defendants could claim ignorance.

Next we brought in a diversion investigator from the DEA. Her role in the investigation was to go through all of the patient files, create a spreadsheet, and determine the percentage of patients who received pain medication. In addition to presenting the numbers, her testimony explained how corrupt pain management clinics evade detection and the tricks that this particular clinic attempted to use. For example, many clinics believe that by writing a prescription for a non-controlled substance along with a hydrocodone prescription, they somehow avoid suspicion. This clinic would include a prescription for ibuprofen along with hydrocodone and alprazolam. She explained that when DEA agents would visit pharmacies involved in these schemes, agents would find giant rooms stacked with ibuprofen that the pharmacies would order to help avoid suspicion too. When she was finished, the jury had an amazing picture of the problem and was pumped up to be part of the process of shutting it down.

Finally, we concluded with the family. Dr. Vadas's son-in-law's testimony was very compelling to link the family to the shady operation. The description he gave of Luis and Martha working together to sign files and prescriptions went a long way toward sealing the deal. But Dr. Vadas's niece and the recording she made of her phone conversation with Luis was so powerful that we let it be our last piece of evidence. We flew her all the way from Uruguay (where she had recently relocated from Hungary) to play it for the jury. In closing, I played several times the recording of Luis describing how he knew the clinic wasn't registered.

The jury quickly returned a guilty verdict against all three defendants. To their credit, the defense did an amazing job marching in witness after witness in the punishment phase of trial. From church members attesting to their religious devotion, to relatives who relied on the defendants for their cancer care, to kids who cried and told the jury how they couldn't go to college if their parents went to prison, the jury was left with a hard decision. Ultimately, jurors decided to put the defendants on probation.

But such a sentence doesn't change the need to try these types of cases. We are ready to combat such a defense next time. In this case, we had felt like the sheer number of pills that hit the street because of this clinic would be enough to secure a prison sentence. Detective Gerrit Wolfhagen testified about the street values of the drugs that this clinic prescribed and that their effects were comparable to heroin. In the future, a more effective strategy may be to also bring in families of those who have overdosed or have become addicted to drugs because of this doctor.

This trial had more issues than probably all of my other trials combined. We had concerns about international wiretapping laws, confrontation (when trying three defendants at the same time), wording an indictment when piecing together several statutes to create an offense that isn't specifically enumerated, dealing with Spanish and Hungarian translators, giving three defense attorneys an opportunity to gang up on one team of prosecutors—the list could go on and on. All of these things piled on to an already complex case, but in spite of it all, I would do it again in a heartbeat. I hope other Texas prosecutor's offices consider looking into the problem of prescription drug diversion as well. I've composed a sidebar ("Preparing for the fight") on page 31 to offer direction and a starting point for tackling such a case in your own jurisdiction.

Conclusion

Fighting diversion can be a complicated battle, but it is certainly one worth waging. The Texas Penal Code, Occupations Code, and Health and Safety Code contain numerous tools prosecutors may have never realized. To successfully prosecute these offenses, it takes the full commitment of local law enforcement and prosecution and usually assistance from the DEA or other administrative agencies. No matter how complicated these prosecutions may seem, we are faced with two options: We can sit back and watch the turmoil within our society that prescription drug abuse is causing, or we can do something about it. Because we are prosecutors, I am confident in what we will choose. ❇

To seize or not to seize … 207 horses

How does a prosecutor's office seize more than 200 horses that have been neglected and starving for months? Very quickly, it turns out.

Earlier this year, Montgomery County faced a highly unusual case of animal cruelty involving the seizure of more than 200 horses that was hotly contested by the owners. By and large, animal cruelty cases pursuant to the Health and Safety Code tend to be straightforward and often uncontested. But with 200-plus horses at stake, this case was the exception, not the rule.

By Ronald Chin and Stuart Hughes
Assistant County Attorneys in Montgomery County

Herman and Kathleen Hoffman owned 207 horses and, for over a year, had been keeping them confined on just 40 acres. (The rule of thumb is at least one acre per horse if grazing is the primary food source, though supplementing with regular hay and feed can reduce the acreage per horse considerably.)

The horses were confined in pastures resembling a desert with little to no grass to graze on and little to no shelter from the elements. Some of the horses stood in stalls surrounded by their own waste, pine shavings, and dirt pushed up in mounds around them, causing a "fish bowl" effect, which puts pressure on the horses' ankles by standing on uneven surfaces for long periods of time. They were often standing in their own feces. Every one of the horses had overgrown hooves to some degree, and a few horses' hooves were so severely overgrown that they were literally standing and walking on their ankles. Horses were going lame and starving to death, ribs and hip bones were protruding from their bodies, open sores were visible, and rain rot[1] was prevalent amongst the herd. (See some photos of the horses below.)

The Hoffmans

The Hoffmans owned a horse ranch called Premium Star, which used the slogan, "Where quality speaks for itself." The business involved breeding and selling American quarterhorses, "descendants of the legendary stallions Poco Tivio and King Fritz."[2] By all accounts, if you preferred a quarterhorse from a champion bloodline, you looked no further than Premium Star.

Sometime in 2010, the Hoffmans formed another business called Calico Dairy, a "raw milk to retail" business. In time, the Hoffmans' priority turned to the milk cows, and every last dollar went toward their

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feed. This dairy, we believe, led to the decline of the horse business.

The investigation

In the fall of 2014, former employees of the Hoffman ranch began to speak out. Claims of neglect, malnourishment, and dying horses surfaced. Local law enforcement was notified and began an investigation. Upon initial encounters at the ranch, law enforcement noticed some underweight horses, but most of the herd appeared healthy. After further encounters, law enforcement noticed a deterioration of body condition amongst the herd. As a result, the Hoffmans received a written notice to comply with the Texas Penal Code, which states, "A person commits an offense if the person intentionally or knowingly fails unreasonably to provide necessary food, water, or care for a livestock animal in the person's custody."[3] The notice directed the Hoffmans to seek medical assistance from a veterinarian and to improve the horses' condition. The hope was that the Hoffmans would get their act together, nurse the emaciated horses back to health, and get documentation from a veterinarian about their improved condition. Law enforcement and former employees at the ranch even presented a plan to the horses' owners to sell some of the animals so that they could provide for the rest of the herd. But all attempts at helping the Hoffmans fell on deaf ears.

In June 2015, law enforcement received another call concerning the welfare of the Hoffman horses. Over the months, the horses' conditions had declined significantly, with several needing immediate attention. The next day, our office received a call requesting our attendance at a meeting with the district attorney (among others) regarding allegations of neglect and cruel treatment of these 200 horses.

The issues we faced were numerous. If we went forward with a seizure, would the district attorney seize the horses pursuant to criminal charges, or would the county attorney initiate a civil seizure? If we implemented a civil seizure, would we seize the entire herd or just a handful of the horses in the worse condition? Where would the county put 200 horses if we seized them all? Financially, how would the county care for 200 horses? And how would we prove that every horse was cruelly treated?

The seizure

After a lengthy discussion and the combined efforts of Houston SPCA (Society for the Prevention of Cruelty to Animals), local law enforcement, the district attorney's office, and the county attorney's office, a plan was implemented. The DA obtained a search warrant to enter the Hoffmans' property and look for evidence of cruelty. A representative of the Houston SPCA and a veterinarian, as agents of the state, accompanied law enforcement on the premises and inspected the condition of all the horses. We too went to the Hoffman ranch to see the condition of the horses first-hand. We spent many hours at the ranch over a two-day period speaking with investigators, advising on legal issues, and making mental notes in preparation for the seizure hearing. As prosecuting attorneys, or any advocates for that matter, personal observations of the scene helps us understand the issues and better present our cases.

After consulting with the veterinarian and Houston SPCA, it was determined every horse was being cruelly treated, as defined by §821.021 of the Texas Health and Safety Code, which states the horses have been cruelly treated if they were "unreasonably deprived of necessary food, care, or shelter." Consequently, the decision was made to conduct a civil seizure of all the horses, and Houston SPCA would house and care for them pending final disposition of whether the Hoffmans would be divested of ownership. It was clear that only an outside agency like the Houston SPCA had the resources and expertise to house and care for 200 horses.

Chapter 821 of the Health and Safety Code provides that a peace officer or an officer charged with responsibility for animal control in a county may apply for a warrant to seize a cruelly treated animal in justice court or municipal court.[4] Upon a showing of probable cause, the court shall issue a warrant and set the matter for hearing within 10 days.[5] The sole issue is whether the horses have been cruelly treated, and if so, the owners shall be divested of ownership.[6]

We anticipated the need to keep the horses on-site while we attended to their needs so we asked for (and received) a court order to seize the animals in place. The SPCA vets and workers were at the Hoffman farm for several weeks examining, treating, and ultimately moving each horse in turn. It took an entire two weeks to do this for all 207 horses. From what we were told, SPCA had to seek out volunteers from across the state to do the hard work of managing the horses for the inspections and move them, as well as provide the dozens of trailers and vehicles to physically transport them. It was tru-

ly a statewide effort by the SPCA to save these horses.

In addition, all those involved anticipated the costs of caring for theses horses would be expensive. In an effort to help Houston SPCA with costs, the district attorney's office contributed $15,000 toward their care, and the Montgomery County Commissioners Court match-ed that with a $15,000 contribution of its own.

One issue that complicated matters for us was the concurrent criminal investigation. Typically, when there are also criminal charges for abuse, we would seize the animals after the person was convicted of the abuse. However, in this case, we felt that the horses' conditions were so precarious that we needed to act immediately to put them in the SPCA's care to prevent more death and suffering. A few of the horses had to be euthanized; however, most of the horses were treatable and have steadily been nursed back to health. This reality prompted the unusual situation of the animal seizure hearing taking place while the DA's office was still developing criminal charges. Representatives of the DA's office watched our seizure hearings with interest, eager to hear what defenses the Hoffmans would raise for their actions.

The JP trial

At the initial hearing before a justice court, Herman and Kathleen Hoffman represented themselves. They raised several legal challenges to the seizure, primarily concerning the search and seizure warrants. However, a few of their defenses were novel and might have been more effective had the pictures of the horses not undermined their arguments. The Hoffmans tried to argue that they were "mavericks" and "pioneers" in a "new" (old) way of raising and breeding horses that emulated the wild horses that live in the Rockies and western United States. They claimed to be raising wild herds in a natural, "organic" state and argued that it was not fair to judge their horses by standard "beauty" measures set by Hollywood movies, such as *Black Beauty* and *The Black Stallion*. They claimed that they were being punished by a society that was judging books by their covers instead of looking past some unkempt manes and unmanicured hooves to see wild, untamed horses. This argument may actually have resonated with some of today's emphasis on organic, free-range, all-natural production on farms and ranches, but the pictures of the pathetic, starved horses in cramped pens with no grass and little to no water undermined the stirring image of wild and healthy horses the Hoffmans intended to evoke. Also, because the Hoffmans argued that their horses were a "wild herd," one would expect a large amount of acreage per horse. The fact that the Hoffmans had each horse on less than one-fifth the recommended acreage severely undermined their argument.

Additional defenses raised by the *pro se* Hoffmans ranged from highly suspect to downright bizarre. Because the respondents were *pro se,* we found it necessary to handle such arguments with care, because the court was likely to give non-lawyers a great deal of lenience. (Defendants going *pro se* is often the case in civil seizures because of the quick statutory time frame to conduct the seizure hearing. However, if they appeal the initial decision, most owners at that point retain an attorney.) This required us to prepare to address each argument, no matter how flawed or meritless each seemed to our legal minds. For example, several of the Hoffmans' arguments relied on statutes and caselaw discussing civil forfeitures related to criminal cases. We found that it was not enough to simply point out that the respondents were citing the wrong law; the court often wanted at least some discussion about why the same principles did not apply to animal seizures. We found it helpful to continually remind the court that this proceeding was entirely civil in nature, with the burden of proof being preponderance of the evidence. The primary distinction is the purpose of the seizure: We were not seizing the animals to punish an offender for criminal acts or to preserve evidence for a criminal prosecution; rather, the statute we operated under authorized us to seize the animals for their own welfare and to protect them from cruel treatment.

The final big issue the Hoffmans raised was whether the language of the statute allowed for the seizure of a "herd" of animals and whether the seizure warrant was sufficient when it described "approximately 200 horses" at the Hoffmans' farm. The Hoffmans argued that the description was not specific enough and that it should have described the horses by breed, sex, color, etc. We found authority in prior caselaw that the description was sufficient, the standard being that the warrant must be sufficient to allow an officer to seize the correct property and not present a danger of being overbroad.[7] We believe the court found it compelling that the warrant and the officer's testimony established that it was the county's intent to seize all horses found at the farm; therefore, there was no danger of being overbroad.

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After an eight-hour hearing, the court found that the Hoffmans cruelly treated all 207 horses, divested them of ownership, and ordered costs incurred by Houston SPCA taxed against the Hoffmans in the amount of $122,254.87.

The appeal

To perfect appeal, the Hoffmans had 10 days to file a notice of appeal and post a bond.[8] Then the statute provides that the county court shall consider the matter *de novo* within 10 days of receiving the record from the JP court.[9] The case was moving fast.

For the second hearing, the Hoffmans retained an attorney. Interestingly, the attorney presented only a few narrow procedural arguments focusing on the validity of the seizure warrant and did not raise the "wild horses" defense that was so strangely compelling in the first hearing. Perhaps the Hoffmans' arguments would have been different if the second hearing was a jury trial instead of one before the district court judge.[10]

One of the difficult aspects of this case was the statute's swift deadlines. The intent is so that animals are not left in limbo, the owners have the opportunity to get their animals back quickly, and for adequate recovery of impound and care costs incurred during litigation. An issue we were confronted with was whether the county court would lose jurisdiction 10 days after it received the record from the JP court. Is the statute jurisdictional when it says the court shall consider the matter de novo within 10 days? What if the attorney requests discovery or a continuance past the 10 days?

We found two court of appeals cases discussing the issue, and of course, they were contradictory. The *Strachan* case determined that the county court lost jurisdiction 10 days after it received the clerk's record.[11] However, the court in *Brehmer* held that the hearing deadlines in the animal cruelty statute were not jurisdictional.[12] Out of an abundance of caution and to bring quick resolution to the case, we pushed for a trial within 10 days. The court granted our request, and the jurisdictional issue was avoided.

At the time this article was written, criminal charges were still pending against the Hoffmans. They each face 21 counts of cruelty to animals, and Hermann Hoffman has been charged with a felony tampering case.

And other than the handful of deaths, most of which occurred shortly after the initial seizure, we are happy to report that the rest of the horses have recovered and some have already been adopted by new forever homes. It is our understanding that it is the SPCA's goal to adopt out all of the horses that they deem suitable for adoption (that will be the majority of them). The remainder, which may be too old, ill, or wild to be adopted, will remain at SPCA facilities under their care.

In conclusion

After a criminal search warrant; a civil seizure warrant; the logistics of housing, caring for, and transporting 207 horses; and two bench trials—all occurring within 37 days—the Hoffmans were divested of ownership of all 207 horses, Houston SPCA was awarded ownership, and judgment of costs was entered against the owners in the amount of $485,331,68. And now, the Hoffmans have filed a Petition for Writ of Certiorari to the United States Supreme Court. Yes, the United States Supreme Court! So stay tuned: If the care of 200 horses in Montgomery County goes to the highest court in the land, we will tell you all about it. ❇

Endnotes

1 Rain rot, also known as rainscald, is a common skin disease in horses caused by bacteria. Insect bites often spread the disease, which is worsened by moist, warm conditions. Rain rot is easily treated and prevented with good grooming.

2 According to the Premium Star website.

3 Tex Penal Code §42.09(a)(2).

4 Tex. Health & Safety Code §821.022.

5 *Id.*

6 Tex. Health & Safety Code §821.023.

7 See, generally, *Pine v. State*, 921 S.W.2d 866 (Houston-14th Dist. 1996) (description of "approximately 15 horses and two head of cattle" sufficient for warrant); *Paselk v. State*, 2013 WL 6187005 (E. Dist. Tex. 2013) (description of "55 count of Arabian Breed Studs and Mares" was sufficient for warrant).

8 Tex. Health & Safety Code §821.025(b).

9 Tex. Health & Safety Code §821.025(d).

10 Sitting as the County Court at Law.

11 *In re Strachan*, 2012 WL 1833895 (Tex. App.—Dallas 2012)(mem. op.)

12 *In re Brehmer*, 428 S.W.3d 920 (Tex. App.—Fort Worth 2014).

Committed for consumption

Recently, a Tarrant County resident with tuberculosis was running around exposing people to the disease. How Fort Worth prosecutors secured a civil commitment against a man who refused treatment for this highly contagious illness.

There has long been a strange romanticism associated with those who suffer from tuberculosis (often abbreviated as TB). Think Doc Holliday in *Tombstone* or Nicole Kidman's heroine in *Moulin Rouge.* Even Lord Byron once wrote that he hoped to someday die from "consumption." The "good death" for which many 19th-Century figures longed is not nearly as glamorous when placed in the light of 21st-Century reality. The life of a tuberculosis victim is not pleasant and, generally speaking, most people who suffer from the disease desire treatment and cure.

By Chris Ponder
Assistant Criminal District Attorney in Tarrant County

Recently, however, at least one Tarrant County resident[1] seemed to share the desire of Lord Byron to die of tuberculosis—although, to be fair, our patient's motivation was likely less akin to the famed English poet's romantic ideals and more about his desire to live life on the street as he has become accustomed. We never learned precisely what compelled him to stay on the street instead of seeking treatment, but I suspect it had something to do with the stolen BMW and methamphetamine found in his possession.

When first contacted by Tarrant County Public Health to discuss this patient, I scheduled a meeting in the TB clinic with the TB Division Manager. As I walked through the hallways, I thought, "Isn't this disease airborne? Isn't this the place where infected people receive treatment? Shouldn't I have a biohazard suit on?" The division manager quickly calmed my fears about his facility. A healthy person is actually much safer from TB within the TB clinic than in the general public. That's because the TB clinic is outfitted with reverse airflow rooms, where the rooms are configured to create negative air pressure in the room, allowing fresh air to enter but keep infected air from escaping. The rooms and hallways also had ultraviolet light fixtures in all areas—UV light is effectively a disinfectant, killing the TB germs.

Here's what I learned about tuberculosis: It is a disease caused by the bacterium *Mycobacterium tuberculosis*. Generally, the bacteria attack the lungs, but it can also attack other areas of the body, including the kidneys, spine, and brain. Once the leading cause of death in the United States, TB spreads through the air when a person with TB disease of the lungs or throat coughs, sneezes, or speaks, sending tiny particles through the air to expose anyone who may be nearby. The germs can stay in the air for several hours, and those who breathe the air that contains the germs can be infected. This person-to-person transmission through the air is what makes the confinement and treatment of TB patients so important. If the patient is uncooperative and unwilling to seek treatment, public health interests prevail and the patient must be ordered to receive treatment and cease potentially infecting others in the community.

TB has two distinct stages: latent TB infection and TB disease. Latent TB infection is where the infection is in the body but effectively controlled by the immune system. Patients with latent TB are not symptomatic and not contagious. It is when the immune system is compromised that latent TB becomes active and the patient is symptomatic and contagious with TB disease. According to the Center for Disease Control and Prevention, there were 536 deaths from TB in the United States in 2011, the last year for which data is available. And TB deaths have been on a steady decline: 69 percent since 1992.

Our patient first came to the attention of Tarrant County Public Health after he was struck by a car and taken to the hospital. When hos-

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pital personnel reviewed his chest X-ray, they noticed an abnormality and the hospital performed a test for TB, which came back positive. An investigator from Public Health met with the patient in the hospital and explained the risks to him and the public if he did not submit to treatment and see it through to completion. Our patient agreed to comply and, pursuant to Texas Health and Safety Code §81.083, the investigator served him with an administrative order to submit to treatment. The administrative order gave instructions about where to go for medication, how important it is to keep all appointments, and that it is essential for the patient to advise the investigator if there is a change in residence. The patient was also warned that his failure to comply could result in the initiation of court proceedings.

The treatment for TB is through the regular administration of antibiotics over the course of six or more months. Patients under the care of the Health Department are subjected to directly observed therapy (DOT), which requires ingestion of the medication in personal view of the healthcare worker. This is necessary because of the proliferation of drug-resistant TB. Drug-resistance occurs from the improper or incomplete administration of the antibiotics that treat TB.

Hours after being served this administrative order and agreeing to comply, our patient fled the hospital against medical advice. Health Department investigators located him two weeks later in the Parker County Jail. Once released, the patient finally came to the TB clinic and again pledged to comply with the treatment. He took one dose of each of the medications while in the clinic and swore that he would meet officials there the next day. He did not. After this second violation of the administrative order, the Health Department contacted our office to prepare for civil commitment of the patient to the Texas Center for Infectious Disease. The severity of the symptoms varies depending on the patient's age and underlying general health. Though our patient had active TB infection and was contagious, his symptoms were relatively minor. We had no idea how many people he had already exposed to this disease, but the longer he stayed out in the public, the greater the possibility of infection.

Civil commitment

Chapter 81 of the Texas Health and Safety Code establishes the procedures and remedies for dealing with communicable diseases, including TB. (It is the same statutory basis used in the recent Ebola scares.) Section 81.083 provides that if a county health authority "has reasonable cause to believe that an individual is ill with … a communicable disease, the … health authority may order the individual … to implement control measures that are reasonable and necessary to prevent the introduction, transmission, and spread of this disease." The conventional control measures are directly observed therapy and self-quarantining. The administrative order from the health department does not, however, have any enforcement provision. Court intervention is the next step in securing compliance.

Although we had the information necessary to file for the commitment, we still did not know the patient's location. Health Department investigators took to the streets to locate him, with us on standby to immediately file upon learning of his location. Two months passed before I received a call on a Monday morning from a nurse in the TB clinic about our patient; he was in the Tarrant County Jail, having been arrested over the weekend for car theft and drug possession. We had to move quickly on filing for commitment because his bond was only $5,000, and if he was able to post it, he might be lost again.

Section 81.151 of the Texas Health and Safety Code provides that a county health authority may request a county or district attorney to file an application for court-ordered management of a TB patient. The application is filed in the district court. With the application, there must also be filed an affidavit of medical evaluation of the patient and a copy of the administrative orders previously delivered to him. The suit must be styled using the patient's initials and not his full name to afford a thin layer of privacy (by preventing quick searches of case names in a public database) from disclosing the condition. There are not, however, any provisions for sealing the case or any requirement that the patient's name not be used in the body of the application or in the required attachments. The patient is also entitled to the appointment of an attorney during the proceeding.

In addition to the application, we prepared a motion for order of protective custody, as authorized by

Texas Health and Safety Code §81.161, because he was an immediate threat to public health and had previously refused compliance with the administrative orders. Our patient had shown himself to be elusive and inclined to avoid treatment, so placing him in protective custody was a necessity. That meant a reverse airflow-equipped room in John Peter Smith Hospital in Fort Worth. He would stay in a room at JPS for the next couple of weeks until the completion of the commitment proceeding. (The hearing on the application has to occur within 14 days after the date that the application is served on the patient. The trial court may, however, grant one 30-day extension.)

The relief we sought in the application was to commit the patient to the Texas Center for Infectious Disease (TCID) for a period not longer than 12 months. The expectation was that treatment would not take all 12 months but would be at least six. The TCID is an impressive facility—far different from the State Tuberculosis Hospital that opened in 1953. The TCID is a state-of-the-art hospital situated on 56 acres in southeast San Antonio; it has only 75 beds to treat patients admitted by court order or referral by other medical facilities unable to treat a contagious disease.

By any standard, a stay in the TCID is far more pleasant than time in jail or on the streets, which were our patient's primary residences. But if we were going to commit him to this facility, what would we do with the criminal charges (of car theft and drug possession)? After consultation with our elected Criminal District Attorney, Sharen Wilson, our office dismissed the criminal case against the patient, which allowed him to be placed into protective custody at the hospital and moved forward to commitment. I filed the application and motion for protective custody with the Tarrant County District Clerk and was randomly assigned to Judge R.H. Wallace's 96th District Court. I went to his chambers to present the motion for protective custody, and after explaining the mechanics of the proceeding, I obtained his signature on the order for protective custody and appointment of attorney.

The attorney appointed by the district court to represent the patient had represented the last TB patient in a commitment proceeding (several years before). His experience with the process worked in our favor as the patient finally consented to an agreed judgment and consented to treatment at the Texas Center for Infectious Disease. It took the appointed lawyer a couple of days to secure the agreement and, in the meantime, we scrambled trying to make arrangements to conduct a court proceeding in a small hospital room. But fortunately, it was not necessary. With our patient's agreement, Judge Wallace signed the order, and Tarrant County Sheriff's deputies took custody of the patient and delivered him to the door of the hospital in San Antonio.

Now that he is in a structured setting with the best treatment available, our patient should recover from this disease that could have killed him and those with whom he has had contact. Never had I imagined that it would take so much work and effort to force someone to treat a potentially fatal but curable illness. ❇

Endnote

1 Although the media disclosed the patient's identity and the statute does not mandate confidentiality other than using initials, I would prefer to merely refer to him as "the patient" or "our patient."

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RETURN SERVICE REQUESTED