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

Prosecuting human traffickers

A primer on how Dallas County prosecutors go after the criminals in these cases, where the victims are oftentimes unsympathetic and uncooperative

By Brooke Grona-Robb
Assistant Criminal District Attorney in Dallas County

Recently, I was discussing a human trafficking case with defense counsel, who leaned in and said, "You know, your alleged victim is a prostitute." I looked at him and said, "You know, she's only 15." It was clear that he will never see her as just a kid, just as I will never dismiss her victimization by categorizing her as "just a prostitute." She is both, making her case a very difficult one to resolve with a happy ending.

In Dallas County, we are extremely lucky to have police officers who look for these kids on the streets (and elsewhere) and a district attorney's office devoted to prosecuting their exploiters. Domestic trafficking of children is seldom the kidnapping at gunpoint imagined in the media and is instead often the planned commercial exploitation by pimps of at-risk youth.

Human trafficking refers to recruiting, transporting, or harboring victims for the purpose of forcing them into labor through force, fraud, or coercion.[1] In Dallas County, we consider human trafficking to be broader than the Texas statute and include compelling and promotion of prostitution as well as other prostitution-related charges in our human trafficking caseload. This article will discuss why we focus on these cases, how to investigate these offenses, charging options, and prosecuting these cases to a successful result.

Why these cases are important

The average age of initiation into prostitution is between 12 and 14.[2] Victimization of children through human trafficking is a brutal form of child sexual abuse, yet it is often overlooked and unrecognized. Child prostitutes have the unique status of being both victims and offenders. These are typically children who have run away or have been thrown away by their parents, and they have a host of psychosocial problems. They are sought out by their exploiters—pimps—and are lured into prostitution through a complex array of psychological and emotional controls between the ages of 11 and 16. These youth have frequent contact with police, juvenile justice, and Child Protective Services (CPS)—all of whom are ill-equipped to deal with them.

The traditional criminal and juvenile justice system practice of arresting these youth as prostitutes and treating them as offenders utilizing brief, ineffective, and costly periods of incarceration does not work. Simply filing a case against their exploiters, without further services to the victim, also does not work. Without individual attention and special services, these children will be victimized again and again until they become adult offenders in the same system that failed to help them as children. Because of their dual status as victim and offender,

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TDCAF celebrates 4th anniversary

It's hard to believe that four years have passed since the leadership of the Texas District and County Attorneys Association (TDCAA) announced the formation of the Texas District and County Attorneys Foundation, (a 501(c)(3) supporting organization). We would like to thank our TDCAA members, the TDCAA Board of Directors, the TDCAF Board of Trustees, and the TDCAF Advisory Committee for four successful years; we look forward to the foundation's continued success in the upcoming year. Please help us celebrate this year by making a contribution to the Annual Campaign! See the details that follow.

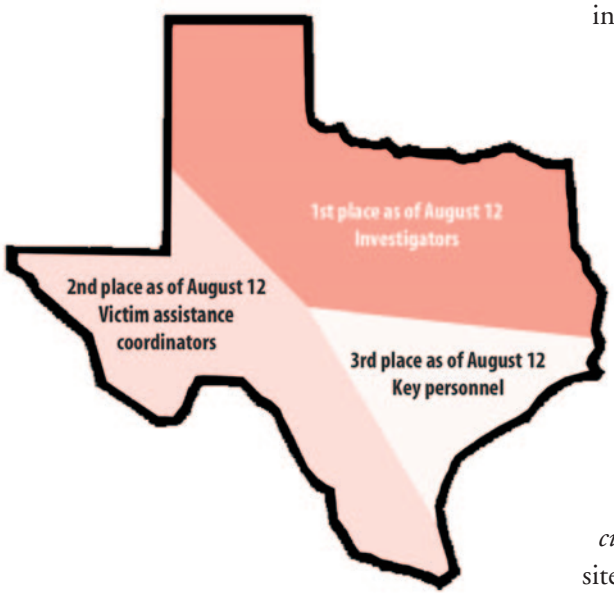
By Jennifer Vitera
TDCAF Development Director in Austin

2010 Annual Campaign needs your support!

As you know, we have two fundraising goals for our membership groups: one for elected prosecutors, and one for investigators, key personnel, and victim assistants. This year we are asking all elected prosecutors to coordinate with prosecutors in their office to raise $500 in unrestricted funds for the annual campaign. If all 332 prosecutors donate at this level, the foundation will receive $166,000 in unrestricted funds!

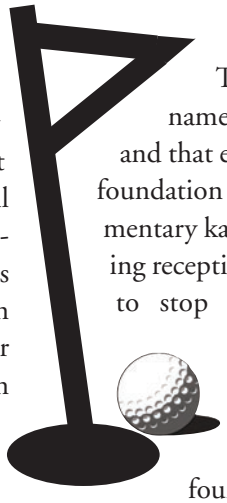
The second fundraising goal involves three of our membership groups (investigators, key personnel, and victim assistance coordinators) who have challenged each other in their fundraising. So far, the investigators are leading the way in the challenge! (See the map at left.) The foundation will host a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

You may designate your gift for training or books, make a gift in honor or in memory of a loved one, or contribute an unrestricted amount for general operations. Funding from individuals, foundations, corporations, and the community at large greatly increases the quality of service we are able to offer to our members. You can go online www.tdcaf.org to make a quick and secure donation. We appreciate your support and consideration!



Annual conference events

As you know, the TDCAA Annual Criminal & Civil Law Update will take place September 22–24 on South Padre Island. We wanted to let you know about the exciting foundation events planned during the three-day seminar. On Wednesday the 22nd, we will host the 2nd Annual TDCAF Golf Tournament starting at 8 a.m., and that evening at 6 p.m., the foundation is hosting complimentary karaoke after the opening reception. Also, don't forget to stop by the foundation booth (Wednesday afternoon through Friday) to learn more about the foundation and how we are supporting the association and you, our members.



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Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, investigators, prosecutor office personnel, and other TDCAA members.

A West Texas prosecutor and the rule of law

On October 13, 2010, the United States Supreme Court will hear oral arguments in a case captioned *Skinner v. Switzer*. This is a civil rights lawsuit brought by death row inmate Hank Skinner against **Lynn Switzer**, the district attorney in Gray, Hemphill, Lipscomb, Roberts, and Wheeler Counties. The facts are simple: Skinner was convicted of slaughtering a family—with lots of DNA evidence to back it up. The defense team, as a matter of strategy, declined to seek testing of additional items at the crime scene.

By Rob Kepple
TDCAA Executive Director in Austin

And now? Yeah, you guessed it. The defense wants the additional items tested, because the tests would show that "another guy" did it. Oh, and this should surprise you, that other guy is dead. The defense pursued its request for additional DNA testing through post-conviction writs of habeas corpus. After hearings at the trial and appellate level, testing was denied.

Not to be deterred, the defense then filed a federal civil rights action against the DA, claiming that her failure to agree to additional testing amounted to a denial of Skinner's civil rights. Unique and creative, to be sure. And interesting enough to get the attention of the United States Supreme Court.

At this point, even many prosecutors reading this may be saying, "Hey, just test the stuff and let's get this case moving along." Certainly that's the easy thing to do and would move the case to execution more quickly. But is that the most satisfactory path here? Lynn, as the attorney for the State of Texas, has chosen to stand up for the rule of law. The defendant made his choice on testing with his eyes wide open many years ago, and if you look at the record it was a wise choice. He has had every opportunity to litigate further testing through the habeas process and has failed to convince any court at any level that his position has merit. Now some creative lawyering brings a novel end-around attack on the conviction, which really is a challenge to the existing structure of capital appellate review.

Y'all know how lonely it can feel sometimes as you fight these battles that draw national attention. I am proud to serve prosecutors who appreciate their responsibility to the State to stand up for the rule of law, even if it means slogging through the anti-death penalty hate mail all the way to the Supreme Court. Any way this thing comes out, we are all better off when prosecutors stand on principle.

If you would like to keep up on the case, take a look at the American Bar Association's website at www.abanet.org/publiced/preview/briefs/oct2010.shtml#09571.

Watch out for low-flying liability

The day before *Skinner* is argued at the Supreme Court, on October 12, the High Nine will take up a case on prosecutor liability and immunity styled *Connick v. Thompson*. A case in New Orleans Parrish was reversed for a *Brady* violation. Though there is no history of such misconduct on the prosecutors' part, the DA was successfully sued in federal court in a §1983 action for failure to properly train his prosecutors. This attack on prosecutorial immunity, if it stands, has serious ramifications for our profession. We must ask, just as in the *Skinner* case discussed above, whether all existing procedures and laws relating to our work are tossed out the window if the case is packaged as a §1983 federal civil rights lawsuit.

Once again, you can follow the action at www.abanet.org/publiced/preview/briefs/oct2010.shtml#09571.

Strangulation law one year later

It seems not everyone got the memo on the implementation of new laws. During the 81st Legislative Session in 2009, the legislature passed a fairly uncommon statute relating to suffocation or strangulation in domestic violence cases. Section 22.01 of the Penal Code was amended to carve out a manner and means of committing a simple assault—that manner and means being the impeding of normal breathing or circulation of blood by applying pressure around the throat or neck—and jacking up the penalty from a Class A misdemeanor to a third-degree felony.

In July, 10 months after the new law took effect, an article appeared in a major newspaper citing domestic violence advocates critical of prose-

cutors for not prosecuting enough strangulation/suffocation cases, "despite a new law designed to automatically put the attackers in prison."

This is something we've seen before. In all different areas of the law, folks have high expectations of new Penal Code provisions. And the new laws can certainly make a huge difference—look at how the Internet solicitation provisions created a whole new avenue for prosecution of child sex offenders. But for some laws to have an impact, a few things need to happen once the legislature writes a bill and the governor signs it. For one, cops have to buy the books and find out about the change in the law. And crimes need to start occurring (unfortunately). Cases need to be filed. The trial courts must consider any issues the new law raises. Appeals of those cases must run their course.

With regard to the new suffocation/strangulation statute, it wouldn't be surprising that, 10 months in, police and prosecutors are being cautious. As **Shannon Edmonds**, TDCAA Staff Counsel and Governmental Relations Director, warned in our summer 2009 legislative update trainings, some significant issues must be worked out in the courts. Because we are carving out an existing manner and means of committing an assault for special punishment treatment, how do we allege it? As a manner and means or as a separate enhancement paragraph? This is new territory for a model penal code state that in the past has not pigeon-holed specific manner and means for special treatment. And because the conduct could conceivably range from simple assault to a second-degree felony, how do we charge the crime? How do we handle a request for a lesser-included offense? And if we have a case severe enough to merit a charge of second-degree aggravated assault, how do we convince the jury not to go for the lesser-included of the new third-degree felony (which predictably has now happened)?

There is no doubt that Texas prosecutors and law enforcement will figure all of this out and this new law will become a staple in the prosecution of domestic violence cases. But please, give us at least a year.

Oh, and we are still waiting for that new law that will automatically put bad guys in prison.

Judicial dynamite charge

In an effort to keep you up to date on the latest goings-on, TDCAA offers a wide range of resources. From an interactive website to telephone assistance and great legal manuals, we offer it all to keep you on the cutting edge of prosecution.

So in that vein, I offer you a new weapon for your prosecutor arsenal: the Judicial Dynamite Charge. It was created by assistant prosecutors **Ray Thomas** and **Brian Price** in the Brazos County District Attorney's Office. A judge was having a very difficult time deciding on punishment in a child pornography case and had imposed a deadline on himself for his sentence. Thinking he might miss his own deadline, they prepared the following *Allen* charge just in case:

> "I have advised myself in writing that I am apparently unable to reach a unanimous verdict.
>
> "Should I after a reasonable length of time find myself unable to arrive at a unanimous verdict it will be necessary for me to declare a mistrial and discharge myself. The indictment in the case will still be pending, and it is reasonable to assume that this case will be tried again before me at some future time. I will be impaneled in the same way I was impaneled and will likely hear the same evidence which has been presented to me. The questions to be determined by me will be the same questions confronting me, and there is no reason to hope that I will find those questions any easier to decide than I have found them.
>
> "Judges have a duty to consult with themselves to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment. A judge must decide the case for himself, but only after an impartial consideration of the evidence with himself. In the course of deliberations, a judge should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous. No judge should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of himself or for the mere purpose of returning a verdict.
>
> "With this additional instruction, I am requesting myself to continue deliberation in an effort to arrive at a verdict that is acceptable to me, if I can do so without doing violence to my conscience. I will not do violence to my conscience but continue deliberating."

The judge made the deadline just in time, so the *Allen* charge wasn't ever necessary. But aren't you glad to have a copy of the charge for your next bench trial?

So where does crime

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Reassurance from the unassured

By C. Scott Brumley
County Attorney
in Potter County

You don't need the news media to tell you (though they gleefully do anyway) that the economy is rough. With that in mind, we prosecutors as a lot are fortunate 1) to have jobs that 2) allow us to do work of significant public importance. Sadly, neither job satisfaction nor perceived importance of our work can stave off the due dates of our indebtedness. While I choose to do what I do because I enjoy the job more than I need to be part of the country club set, honesty would force me to admit that the country club probably wouldn't accept me because of my relatively modest income, poor table manners, and abysmal golf game. I'm told that yelling "fore" is supposed to be the exception, not the rule. Thank goodness for bowling leagues.

Back to the point. I have worried about the budgets in our office and those of my colleagues in the prosecution business for a while. Some are in better shape than others. I hear that there are those of you who actually can afford new file folders and sticky-note pads. Life is good for the bourgeoisie, I suppose. For even the most fortunate of us, however, the economy is about as secure as, oh, I don't know, maybe … the economy. That prompted me to think about what a prosecutor who suddenly finds himself laid off might do as a career alternative. Defense work and joining a firm are always possibilities, but sometimes job upheaval is a time to seriously consider the bigger picture. In that spirit, I offer five different careers that might be well suited to those leaving the ranks of prosecution (with hopes that none of you do).

Legal analyst

Admittedly, the scope of qualified candidates for this gig may be a bit more limited than some of its counterparts. First and foremost, you must have an exceptional—not a good, not a great, but a truly exceptional—head of hair. As I'm lamentably finding out, the Dwight Eisenhower look may land you a top military post, and in the past even may have been a ticket to the White House, but it's a deal breaker in the land of pop culture. I have had tremendous difficulty parlaying my self-purported similarity to Patrick Stewart into anything more than the customary "Good morning, Mr. Clean … er, Mr. Brumley" that I customarily get when I walk into the office. Looks matter. Fifteen years prosecuting murderers, armed robbers, and drug dealers simply doesn't stack up to three years of knowing where the courthouse may be plus a Hollywood face and an Armani wardrobe. Viewed another way, the subtleties of the exclusionary rule are so much more palatable coming from George Clooney than from Willie Nelson (insert your own credibility joke here).

Additionally, you must be glib with a punch. Most of us can string together two or more coherent sentences. That doesn't get you airtime. You've got to be outrageous in your coherence. "I expect the judge to apply established jurisprudential principles of due process and effectively strike the balance between the accused's right to a fair and impartial trial and the public's need to be apprised of its government's criminal justice operations" invariably will find the cutting room floor in favor of "talk, talk, talk, gab, gab, gab; let's do this. Bring that guilty sucker [or poor, innocent victim of thug prosecutors] in here and let's give him a fair trial!" In this biz, sound bites fare better than sound advice.

Critic

OK. Two media-related occupations may be causing this missive to list to port a bit, but hear me out. Haven't we been exposed to enough esoteric prattling from folks whose milieu is access to a computer, a stock repertoire of insults cultivated from a thesaurus, and an aura of condescension? And to what end? They get free food and entertainment for the express purpose of pillorying it in print, on the airwaves, and over the Internet. Sounds good to me!

In all fairness, you'll have to churn out some kind of critical commentary. But here, too, wouldn't it be refreshing to hear the kind of critique that only a seasoned prosecutor could provide? "It's really quite simple, ladies and gentlemen. I'm not asking you to convict the director of being a bad person. He's probably done some nice things in the past …

though heaven only knows what they might be. No, I'm asking you to consider the evidence. This movie is bad. It's worse than bad. It reeks like the passenger compartment of a car leaving a Phish concert. It's so bad that the director must have made it after throwing back the proverbial two beers that seem to cause every DWI arrest. Well, it stops here. You, ladies and gentlemen, are the voice of this community. And I'm asking you to raise that voice and send this felonious flop to the deepest recesses of administrative segregation usually reserved for films based on video games. Good taste rests, your honor." Or, maybe, in a restaurant review: "My waitress was a woman I put on probation two years ago, but the burger was pretty good." Either way, the utility of the analysis should be apparent.

Product warning writer

If I'm not mistaken, one of the obscure definitions of "convolution" is a lawyer recommending that fellow lawyers take over a job the very existence of which is necessitated by lawyers. So be it. The time has come to reclaim the utility of the English language and the aesthetics of products that currently look like entrants in a NASCAR event. Are some reasonable warnings about latent dangers of products necessary? Absolutely. But we long ago left behind the age of reason on this subject. My favorite example was found in a routine, lengthy, and relatively incoherent list of product warnings within assembly directions I was reading to (incompetently) create a bookshelf from a haphazard pile of fiberboard

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Executive Director's Report (cont'd)

stand?

In January 2011, the 82nd Legislative Session will begin. We get lots of questions about what the hot topics will be. If the surveys are correct, those topics by and large will not be related to crime.

In a recent University of Texas/*Texas Tribune* poll, Texans responded that the most pressing problems the country faces are the economy (22 percent), jobs (14 percent), and the national debt (18 percent). Crime and drugs was the top concern of … 1 percent of Texans. That would be right in front of housing, Iraq, federal nominees, foreign trade and the voting system, which all garnered a solid 0 percent.

That's not to say that we won't see plenty of criminal justice bills. And it's not to say that y'all aren't seeing significant up-ticks in certain offenses, especially property crimes, in your jurisdictions. There will certainly be opportunities for folks to get things done at the capitol; it just may be that it gets done without a lot of attention.

Former DA intern named to the bench

As a matter of personal privilege, I would like to congratulate **Marc Brown**, an assistant DA in Harris County, on his appointment to the 180th District Court bench. Marc started in Houston as an intern in the 262nd District Court in which I was an assistant back in the 1980s. Marc surprised the heck out of then-District Judge Doug Shaver in the first case he tried when a booming oratory came from his then-skinny frame. Yeah, Marc was a touch slighter than he is now, but he could really bring it in that big cavern of a courtroom. We knew he'd make a fine prosecutor, and he has.

Hands-on help

Most of us believe that what we do makes a real difference in peoples' lives—and it does. But **Jeff Matovich**, an assistant criminal district attorney in Dallas County, was even more hands-on when he recently performed CPR on a man in the courthouse parking garage. The fellow had had a heart attack, and Jeff's actions are credited with saving his life. Nicely done! ❇

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slats. It read: DO NOT USE FOR THE OTHER USE. Hmm, useful.

What I'm getting at is that the work of prosecution tends to demand getting to the point in a commonly understood way. That plainspoken communication might help bring the message home with greater retention. To illustrate, let's take the warnings on gasoline containers. As it is, we see something on the order of, "Danger! Contents are extremely flammable. Harmful or fatal if swallowed. Do not dispense into unapproved containers." It conveys the message but lacks gut punch efficacy. Now, let's try what some of our folks might write: "You know when they say something 'burns like gasoline?' There's a reason it's the measuring stick, sport. Also, if you can swallow this stuff and survive, we are unable to afford having you join us at happy hour." Another example might be the mosaic of yellow and white warning labels on a lawnmower. Put someone with a prosecutorial background in charge and you probably would get one label that says something like, "Put your hand under here when this thing is running and … well, you'll draw back a bloody stump."

Chef

Some of you may already dabble in the world of the gourmet. But I'm not concerned here with whether you have a $2,400 cooktop in your home and know the difference between spoom and Spam. I'm looking at the bigger vocational picture for my colleagues. In all candor I would have to concede that, left to my own devices in a professional kitchen, I could probably make any of the TV foodies catatonic quicker than a dope case motion to suppress. Even so, I don't think a transition from the persuasive arts to the culinary arts is too far-fetched. If a professional wrestler can be the governor of Minnesota and a porn star can run for senator, surely any of us is just a catchphrase and a fresh take on deviled eggs away from a career in haute cuisine.

For those who don't know their béchamel from their beer batter, don't be intimidated. Yes, there are words and phrases used in a gourmet kitchen that may not appear on a macaroni and cheese box. That elitism, however, isn't really different from law. We hear confusing words and phrases all the time like "evolving standards of decency," "exculpatory evidence" and "do that again and I'll hold you in contempt," but we persevere. If you think about it, cooking is pretty analogous to prosecuting. You round up disparate elements of the recipe and mix them together. Sometimes the process is smooth, other times it's smelly. The result may be a masterpiece or, depending on the circumstances, it may be half-baked. Yet two outcomes are as predictable as indigestion. Critics will claim that dog food would be an improvement. And someone will still have to do the dishes when it's over. At least if you're a chef, you may be able to foist that job on someone else. While we don't usually have that luxury, they do at law firms. They're called "associates."

Plumber

Of course, the analogy is almost too easy, isn't it? People accuse you of being gluttonously overpaid to spend your day up to your elbows in stuff those same folks don't even want to think about. There is the exhilarating moment when you arrive as the white knight (albeit with a few stains on your armor), riding in to slay the dragon of the belching toilet. Things change after the dirty work is done and the situation is put as right as possible, though. Gone are the kudos. In their place comes the Lysol.

On the upside, plumbers get to charge extra when they work beyond normal business hours. Try selling that proposition to a commissioners court. Moreover, there's a bit of a pass on the orderly workspace rule. As a plumber, a cluttered desk (which usually takes the form of a truck or van) indicates hard work and dedication. As a prosecutor, it makes you the butt of jokes about Jimmy Hoffa's final resting place and may get you a scowling visit from a supervisor. Even the nomenclature is a bit more ego-friendly. Plumbers who do complex and cosmetically-sensitive work are called "master plumbers." Prosecutors who do that either get called "divas" or someone "from the [expletive deleted] appellate division." Finally, plumbers get to eschew the scales of justice in their yellow pages ads in favor of a cartoon guy in overalls running with a plunger. We don't have to have yellow pages ads, but if we did, well, they might not be significantly different. ❇

TDCAF celebrates 4th anniversary (cont'd)

Still seeking sponsors for both events

We are asking members to please help the foundation identify corporations and individuals who might be interested in supporting our 2nd Annual Golf Tournament and this November's DWI Summit. Please contact me at vitera@tdcaa.com if there is someone in your area to whom we can send more information. ❇

Thank you to our DWI Summit sponsors (as of August 18, 2010)!

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Thank you to our golf tournament sponsors (as of August 18, 2010)!

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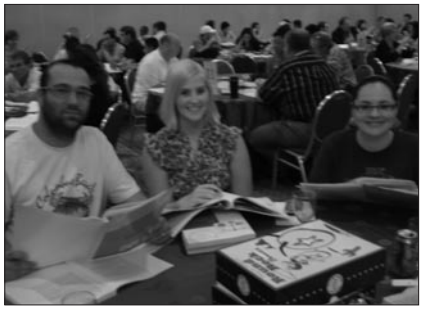
Photos from July's Prosecutor Trial Skills Course in Austin



VAWA survey update

Thanks to those of you who responded to our survey on behalf of the Governor's Criminal Justice Division regarding federal Violence Against Women Act STOP grant funding. As 25 percent of this grant funding is earmarked for prosecution efforts, your input is valued.

By Suzanne McDaniel
TDCAA Victim Services Director

STOP grant funding encourages development of programs that:

- prioritize support for programs that address sexual assault and stalking, including developing and implementing protocols; training for judges, other court personnel, prosecutors, and law enforcement; and developing coordinated community responses to violence against women;
- enhance or strengthen statewide collaboration efforts among law enforcement; prosecution; nonprofit, nongovernmental victim advocacy and service providers; and the courts in addressing violence against women; and
- implement community-driven initiatives, utilizing faith-based and community organizations, to address the needs of underserved populations as defined by VAWA, including people with disabilities and elder victims of domestic violence, sexual assault, and stalking.

Overwhelmingly you shared that with long delays for court dates, you were losing victims without additional resources. You also responded that more training and personnel were needed, especially given last session's strangulation legislation.

Wichita County assistant criminal district attorney Shelly Wilbanks and Dr. Michael Vandehey, professor of psychology at Midwestern State University, contribute an article in this issue on this very topic (see page 30). Prosecution is only one tool in the justice box. Victim services staff members provide a consistent contact throughout the process and may also be the first to realize a victim is considering not cooperating with prosecution. Victim service staff members establish invaluable connections from the moment a case is filed throughout the court process. Victim service staff can also assist victims by referring them to resources for emergency shelter, housing, counseling, safety plans, transportation, compensation, civil remedies, child custody etc.—all factors to consider when someone wants to drop charges.

I remember a young mother whose husband had stabbed her multiple times. She came to see me in the Harris County DA's Office to request that the DA drop charges; she always brought her children with her, but that day she was alone. I asked where her children were that day, and she told me that they were with her husband who was driving around the block with a gun to their heads. Thanks to the quick reaction of one of our investigators, all was taken care of safely. I will always wonder what would have happened if I hadn't asked.

Register now for 2011 NCVRW resources

National Crime Victim Rights Week (NCVRW) will be observed April 10–16, 2011. This year, those interested must register to receive announcements regarding 2011 materials and events, including a complimentary copy of the Resource Guide and poster, as well as notifications on the electronic availability of the Resource Guide, and details about the annual prelude events.

Bexar County Victim Services Coordinator Cyndi Jahn will be leading a workshop on activities for the week during this year's Key Personnel and Victim Service Coordinators Seminar in El Paso, which is November 3–5. Cyndi will share the history and "how to" behind San Antonio's week-long observance and facilitate discussion on adapting these activities and others for your community.

Crime Victim Rights Week offers a chance to promote victims' rights and honor crime victims and those who advocate on their behalf. It is a great way to bring together the community partners who provide much needed resources with prosecution and law enforcement.

Victim Services Board election FAQs

We are getting a few questions about the upcoming election and thought

Thanks to Pampa Crime Victim Coordinator Gail Sams for submitting this photo of 31st Judicial District Attorney Lynn Switzer and ADA Jeromie Oney surrounded by blue balloons prior to their Blue Sunday Observance at a local park. The activity culminated with the release of 131 blue balloons representing the current 131 area child abuse and neglect victims.

compiling the answers might help clarify things. The transition from Victim Assistance Committee to the elected Victim Services Board is a part of TDCAA's long range plan. The new VS Board will be structured similarly to the current Investigator Board and the Key Personnel Board.

Who is eligible for the board? Anyone working in the office of a district attorney, criminal district attorney, or county attorney who is designated to provide crime victim services, has paid her TDCAA membership dues, is present at the TDCAA Annual Update on September 23 in South Padre Island, and has permission from their elected prosecutor. Elected prosecutors can email or call with their authorization to me at mcdaniel@tdcaa.com or 512/474-2436 before September 6.

What will the election process be like? It will be fast! The election is scheduled for Thursday morning, September 23 between 8 a.m. and 8:30 a.m. We will divide into regional caucuses, and candidates may make a brief statement if they wish.

That's why we are asking you to let us know if you are running, have permission, and have paid membership dues by September 6. It will also help facilitate the process to get in touch with others in your region before the election.

Who can vote? One vote from each prosecutor office, regardless of the number of victim services personnel employed at that office.

What are the responsibilities of the board? The new Victim Services Board will assist in preparing and developing operational procedures, standards, training, and educational programs and serve as a point of contact for the members' regions. Board members will be required to attend either the Annual Update or Key Personnel and Victim Services Coordinator Seminar, along with a board meeting in Austin to plan both. They will also be called upon to facilitate trainings and mentor in their region.

Still have questions? Please call me at 512-474-2436.

PO extension forms

Many of you have commented on the recent article by Travis County Assistant District Attorney Erin Martinson about the extension of protective orders upon an offender's release from incarceration and how the Victim Services Division of the Texas Department of Criminal Justice (TDCJ) is notifying victims of the inmate's status and option to extend the order at the critical time of release. One county coordinator explained that the article was most timely as her office had a situation involving the release of a member of the Aryan Brotherhood and wouldn't otherwise have known of this process to protect the victim's safety.

Our communications director, Sarah Wolf, tells me that we have gotten over 160 "hits" on the protective order extension article; however, some of you are having difficulty finding the accompanying form that can easily be adapted for other counties. Here it is: www.tdcaa.com/node/6608; it is an attachment at the bottom of the article

Please let me know if you have any questions or examples of how the process has worked in your county. Again, kudos to Erin, D'Ann Anders of the Texas Advocacy Project, and Angie McCown and Brook Ellison of TDCJ for working together on a solution that has statewide applications.

Texas Association Against Sexual Assault (TAASA) honors prosecutors

Armando Villalobos, the County and District Attorney in Cameron County, received TAASA's Justice Award for outstanding support of

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victims' rights and sexual assault awareness. The staff at the Harlingen Family Crisis Center nominated Villalobos for his dedication to supporting victims of crime, particularly sexual assault survivors. Armando proves his commitment to the cause by hosting annual fundraising events to benefit crime victims and sexual assault agencies in Cameron County. In 2006, he founded the Cameron County District Attorney's Sword & Shield, a nonprofit organization that has donated over $22,000 to various organizations in the county.

Christina Coultas of the Family Place in Dallas nominated the Sexual Assault Team in the Dallas County Criminal District Attorney's Office for TAASA's Innovative Program of the Year. The Dallas program provides specialized prosecution and victim advocacy services to sexual assault victims. By sharing the Dallas team's experiences and successes, TAASA hopes to encourage and support others to develop similar programs. An article about the Dallas program is on page 44 of this issue.

Fall and winter victim service training

In this season of budget cuts, travel and training expenses are often the first to go. Therefore, TDCAA is excited to announce that the Victim Services Divisions of the Attorney General's Office and Texas Department of Criminal Justice are joining us this fall and winter to provide regional updates on victim rights, victims' compensation, and post-adjudication services. This one-stop shop for only prosecutors and victim assistants will offer basic implementation information along with an opportunity to network with others in your region on emerging issues and solutions.

Please let me know your ideas and suggestions for the training by emailing me at mcdaniel@tdcaa.com.

Key Personnel and Victim Service Coordinator Seminar coming up

Just a reminder that the annual Key Personnel and Victim Service Coordinator Seminar will be this November 3–5 in El Paso. For more information and to register, please visit our website at www.tdcaa.com/node/6795.

As always, please let me know your ideas, thoughts, and comments for future issues. ❇

News Worthy

Correction

In the last issue of this journal, the title of an article on the civil commitment of sexually violent predators (SVPs) was misleading. "Keeping sexually violent predators locked up" implies that these offenders are in prison, but in fact, they are not. Through civil commitment, SVPs are received into a highly intensive and supervised treatment program at a halfway house. *The Texas Prosecutor* regrets the error. ❇

Mike Burns and John Bradley honored

Mike Burns earns DPS praise and award

Since he took office as district attorney for the 29th Judicial District in 2007, Mike Burns has prosecuted numerous defendants involved in the manufacturing and distribution of methamphetamine in Palo Pinto and surrounding counties. In late June, Jack Webster, commander of Texas Department of Public Safety Region 1, recognized Burns' work with a Regional Commanders' Award.

Burns received the award because he was instrumental in the indictment and prosecution of 63 defendants in five separate drug trafficking organizations involved in making and distributing methamphetamine. Lt. Doug Wood of the local DPS Criminal Investigations Division (CID), which investigates narcotics cases in a six-county area, nominated Burns for the award.

"It is extremely flattering and gratifying," Burns said of the honor. "The rewarding point of it is the ability to work in conjunction with such professional people. We're able to achieve these successes because of the dedication and perseverance of the narcotics officers.

"As a prosecutor, I have worked with some of the finest law enforcement in the area," he added. "You are only as good as the officers who bring cases."

Burns said one of his goals has been to target organized crime related to the manufacture and distribution of methamphetamine and cocaine in and coming to Palo Pinto County. He said part of his plan targeting these crimes is "to cut the head off the snake" and slow down the incidences of organized crime.

"I think it is well deserved," said DPS Sgt. John Waight of the DPS honor. "Mike serves a capacity that is invaluable to us as investigators. We put in the work and effort and he's the one who makes it all come together. He puts the glue to it and holds it together."

Commander Webster, Mike Burns, and DPS Narcotics Lt. Doug Wood with the award.

Bradley presented with Moxie Award

On Monday, July 19, at the Behavioral Health Institute Conference held at the Austin Conference Center, Calvina Fay, Executive Director of Drug Free America Foundation, presented the prestigious Moxie Award to state Senator Florence Shapiro, District Attorney John Bradley in Williamson County, and anti-drug activist Jon Cole for their steadfast efforts in drug prevention.

Senator Florence Shapiro, John Bradley, and Jon Cole are committed to supporting anti-drug issues, as well as combating efforts that seek to destroy drug prevention, treatment and law enforcement. The three recipients are all well known for being key stakeholders for the health and wellbeing of Texas residents, especially the children.

"All three of these individuals demonstrate an extraordinary amount of dedication to combating substance abuse and furthering drug prevention throughout the great state of Texas," said Calvina Fay. "It was with great pleasure that I was able to honor their hard work and multiple achievements with our Moxie Award."

Drug Free America Foundation's Moxie Award was established in 2006 to honor those who demonstrated outstanding courage and leadership in preventing substance abuse and keeping children safe from the harms of drugs.

Drug Free America Foundation is a national nonprofit organization dedicated to fighting drug use, drug addiction and drug trafficking and to promoting effective sound drug policies, education and prevention.

Congratulations to all on these honors! ❇

Continued from the front cover

Prosecuting human traffickers (cont'd)

these children often lose in the competition for services against other victims and offenders, and their complex needs remain unmet.

Children who are at risk for commercial exploitation often have a history of truancy and running away that was precipitated by sexual and other abuse at home. Studies show that nearly a third of the children who run away trade sex for food, drugs, money, or a place to stay.[3] If they are left without services, their path frequently follows the one shown in Figure 1 on the opposite page. Running away from home generally leaves the child in a situation where she is residing on the street and thus vulnerable to adults who seek to commercially exploit her. The exploitive adult recruits her and starts a grooming process to develop control over her and to indoctrinate her into his lifestyle. Soon he convinces her it is "natural" for her to engage in prostitution, child pornography, sexual performances, or other commercialized sexual activities as a way to support her new family, of which he is clearly the head. Once she becomes successful in this role, the exploitive adult will generally persuade her to help recruit other children for their commercial sexual endeavors. If this process is not interrupted, she will become, to this pimp or to another one, a "bottom girl"—the head girl in the prostitution ring. This life of prostitution leads to a life of crime, drug addiction, and early death.

It is essential to intervene before the child becomes a perpetrator herself by recruiting other children into commercial sexual exploitation. Generally, children caught in this life are uncooperative victims—they do not consider themselves victims of their adult exploiter and do not cooperate with service providers who attempt to remove them from their unhealthy lifestyle. In fact, most do not even recognize themselves as victims and have been trained by their exploiter to view law enforcement and adult service providers as their enemy. Through the grooming process, the adult exploiter convinces the child that she must protect him and their commercial sexual enterprise. Thus, intervention services must be equipped to deal with both cooperative and uncooperative victims.

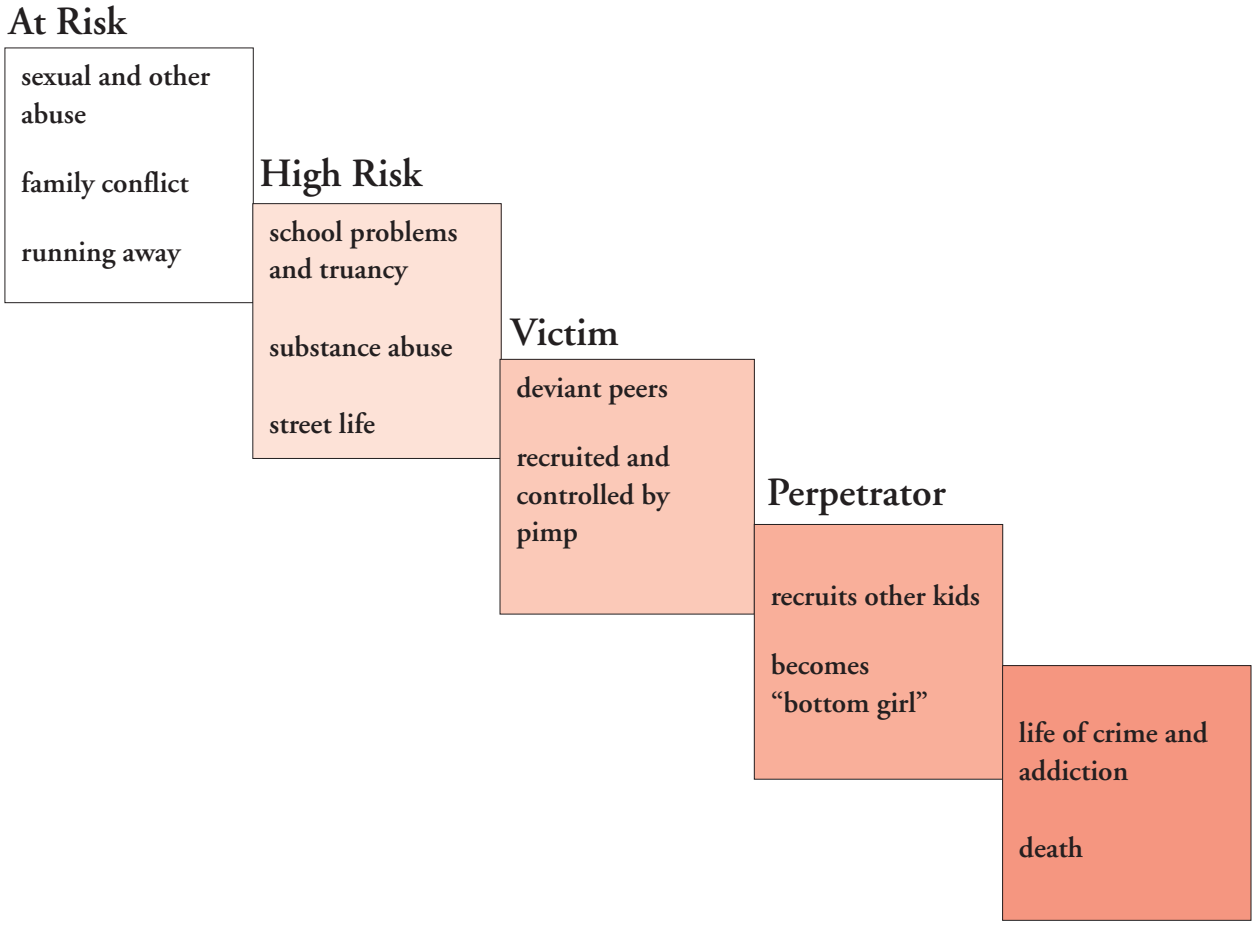
Investigating these cases

The Dallas County Criminal District Attorney's Office receives human trafficking cases from two groups of investigators: vice detectives from several different police departments and Dallas Police Department's High Risk Victim's Unit. The Dallas Police Department (DPD) has received a human trafficking grant, and as a result, many vice detectives in our area have been trained on the dynamics of human trafficking. Thus, when they arrest prostitutes, they often start gathering information about the pimp and can develop a case against him.

Sergeant Byron Fassett of the DPD has developed a high-risk victims model which is used to identify and locate children at risk for commercial exploitation. DPD's High Risk Victims and Trafficking Investigative Team (HRVT) identifies high-risk youth by examining runaway reports to find chronic runaways, targeting juveniles who are involved in prostitution, and recognizing children with repeated reports of sexual abuse and exploitation. Once these high-risk victims are identified, the HRVT flags them within the department's Missing Person System and in NCIC so that any law enforcement officer anywhere in the country who contacts the child will know that she has been identified as a high-risk victim and will contact DPD's HRVT. Once the HRVT is notified that a high-risk victim has been contacted by law enforcement, the team conducts the initial investigation into any sexual abuse and exploitation of the child. If past or current exploitation is identified, the HRVT will conduct any follow-up investigation. Additionally, it will conduct an initial risk assessment for the child and will assist in determining her appropriate initial placement. After the child is safe, the HRVT will seek to identify the exploiters and file appropriate charges.

For cases based on both adult and juvenile witnesses, the key to a successful prosecution is corroboration, which helps insulate the prostitute witness from claims of fabrication. Though Penal Code §43.06 specifically excludes the corroboration requirement for prostitution, promotion of prostitution, aggravat-

Fig. 1: Tracking the life of a human-trafficking victim without intervention



ed promotion of prostitution, and compelling prostitution, if human trafficking is charged, corroboration is required. (Plus, many jurors do not find victims who are also prostitutes credible witnesses.) Generally one of the first questions I ask of a detective when discussing a case is, "What is the corroboration of the offense?" Sgt. Fassett has described his investigation technique as akin to a murder investigation—take the victim out of the picture and figure out how to prove the case.

Some examples of corroboration include:

Motel records. These records show that the hotel room was rented by the pimp or associates. Motel staff can sometimes identify the victims and the pimp by sight and recognize them as renting a room at the time in question.

Phone records. Much of the business of pimping, whether the girls are walking the street, stationed in a brothel, or working from advertisements, is done on the telephone. Phone records link the pimp to the victim, showing the timing of events (some girls are required to call their pimp each time they have a date), measuring the response to an advertisement, or identifying other of the defendant's associates.

One-party consent calls. With a cooperative victim, the police can set up a phone call to the pimp and have her elicit criminal admissions from him. As with other sexual assault cases, most one-party consent calls give the prosecutor something to work with because it is very seldom that the defendant denies all criminal activity to the girl on the phone. Calls are also an important way to corroborate acts of violence or the element of coercion, and they show the jury the relationship of the pimp to the victim.

Jail records. Book-in information such as names, addresses, tattoos, and emergency contacts can help corroborate a victim's information about where the defendant lives and who works with him. Just like drug

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dealers, pimps generally are able to keep their business running even when they are incarcerated for short periods of time, so visitor lists, calls, and incidents at the jail can help to show the pimp's associates and who is running his operation.

Medical records. Doctor's notes can be invaluable, but generally prostitutes do not give their true name when they go to the hospital. Get from your victim the name she used at the hospital so that you can get the records corroborating the pimp's acts of violence.

Prior encounters with law enforcement. Many police officers encounter a pimp with his victims without realizing that they are witnessing an offense. Traffic stops, manifestation of prostitution tickets, prostitution arrests, public lewdness charges, and accident reports can reflect who was together where and at what time.

Computer records. With Craigslist and other Internet advertisements, it is hard to be a profitable pimp without a computer. Executing a search warrant to seize the computer will provide the investigating detective with photos, the correspondence to pay for the ads, and any email correspondence planning or discussing criminal activity.

Photos. Pictures of the crime scene, hotel room, and most importantly, the victim can make a huge difference. The child will look all grown up at the time of trial, but a picture taken in the middle of the night when the investigation is beginning can show her vulnerability. Photos from previous police encounters may portray the victim as a child or show signs of abuse.

DNA. Because it is common for pimps to have sex with their trafficking victims, DNA can be a useful clue in an investigation. DNA testing can prove that the victim was at the location where she states the perpetrator kept her. DNA evidence on implements or tools can help prove physical or sexual abuse.

Charging options

In 2007, the legislature changed the trafficking of persons statute to make it more onerous for prosecutors to prove. Prior to 2007, the State simply had to prove trafficking (transporting, recruiting, harboring, enticing, providing, or otherwise obtaining for transport by deception, coercion, or force) and a Chapter 43 (public indecency) offense (we generally used prostitution) or forced labor. Currently, the State must prove trafficking (transporting, recruiting, harboring, enticing, providing, or otherwise obtaining by any means) with the intent that the victim engage in forced labor or services. Forced labor or services is a long definition but essentially includes labor or services obtained through:

(a) injury or threats or injury,
(b) restraint,
(c) withholding identifying records,
(d) threats of abuse of legal process,
(e) threats of deportation,
(f) financial debt that either cannot be paid down or is indefinite or unreasonable, or
(g) using a scheme of intimidation.

Since it was changed in 2007, we have filed only a few cases under the human trafficking charge. The stories of trafficking victims are complex, and they seldom fit neatly into the categories of forced labor that the statute provides, so we generally charge offenses with less complex language, such as compelling prostitution or aggravated promotion of prostitution.

When children are the victims and the forced labor is prostitution, compelling prostitution is the obvious charge, especially with the 2009 statutory changes to the Penal Code. A person now commits the offense of compelling prostitution if he "causes by any means a child under 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense."[4] "By any means" gives the State an extremely broad range of conduct that can be alleged as causing a child to prostitute. Examples of conduct that caused the child to prostitute by any means include offering to buy a child,[5] promising her that she could earn money by working for the suspect,[6] buying her revealing clothes,[7] driving her to the location to prostitute,[8] providing the child food, clothing, and lodging in exchange for money,[9] telling the child where and how to prostitute,[10] and telling the child what to charge and collecting the money she earned from prostituting.[11] Compelling prostitution is a second-degree felony, and it requires lifetime registration as a sex offender when the victim is a child.[12]

When adults are the sex trafficking victims, the easiest charge is generally aggravated promotion of prostitution.[13] For this offense, the State must prove that the defendant "knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes." Generally, corroborating evidence

shows that the pimp was controlling, supervising, and managing the operation. Note that the bottom girl can often also be charged with aggravated promotion of prostitution, which might give her incentive to give information on her pimp. Aggravated promotion of prostitution is a third-degree felony offense, but unlike compelling prostitution, it does not carry with it a duty to register as a sex offender.

Another choice is compelling prostitution by force, threat, or fraud.[14] We find that it is generally easier to prove compelled prostitution through force, fraud, or coercion—which is a simple idea for juries to understand—than to prove the defendant transported, recruited, harbored, enticed, provided, or otherwise obtained the victim and *then* forced or coerced her by one of the means enumerated in the human trafficking statute. Holding a woman at knifepoint and threatening to kill her, hitting her so she fell and hit her head and became unconscious, and burning her were all held sufficient to show compelling prostitution by force and threat.[15] As with trafficking of persons, compelling prostitution of an adult is a second-degree felony; however, it carries with it the added benefit of requiring the defendant to register as a sex offender for the duration of the sentence plus 10 years.[16]

When we are prosecuting a large-scale criminal network, such as a brothel or an extensive pimping operation, we can also increase the penalty range by alleging aggravated promotion of prostitution or compelling prostitution as engaging in organized criminal activity (EOCA).[17] With this offense, we can charge the main pimp, recruiters, managers, and the bottom girl. The defendant can even be convicted of EOCA as a mere party to the offense of compelling prostitution.[18] (For comparison's sake, trafficking of persons either under age 18 or for the purposes of compelling prostitution or sexual performance by a child is a first-degree felony and and is not a registerable offense. Trafficking of persons over 18 is a second-degree felony.)

Trial preparation

Perhaps the most difficult thing about prosecuting a human trafficking case is the unpredictability of the victims. We are lucky to have Art Garcia, an investigator assigned to our unit at the Dallas County Criminal District Attorney's Office who is very skilled at finding runaway witnesses. The majority of our witnesses are not very cooperative and reluctant to come to court. Trying such cases is the first situation I have encountered as an ADA where the arrest and incarceration of a victim witness is generally a benefit to the case, not a detriment. Her arrest or incarceration—sadly, it's usually for prostitution—allows us to locate her and assist her in stabilizing her life and for her to get away from life on the streets and the negative consequences of that lifestyle.

When we evaluate the strength of our cases, we must consider the degree of corroboration. In a compelling prostitution of a child case, essentially we want to corroborate that the child was prostituting or trying to prostitute and that the pimp caused this by any means. Generally, we show that the pimp himself or through his bottom girl taught the victim how to prostitute and was profiting from her exploitation. For compelling prostitution of an adult, we must show this plus the defendant's use of force, threat, or fraud. For aggravated promotion of prostitution, we must show that the defendant is a pimp operating with more than one prostitute. For all these charges, the corroboration of as many aspects of the case as possible is crucial.

As we initially evaluate a case, we must determine our target. Other prostitutes, the bottom girl, and clients all might be facing criminal charges. Determining who at the outset we want to target allows us to begin discussing deals for the lesser players in return for their testimony. In Dallas, it is crucial to begin this immediately because juvenile and misdemeanor cases can be disposed of prior to an indictment being issued against our target. Beware that pimps often use their bottom girls to hide their involvement—so at first glance, it might seem like the bottom girl did all the training and organizing of the prostitutes and collected all the money. Yet, it is almost always done at the direction of her pimp, who gets the money, controls the girls, and directs the decisions. The pimp is generally the worst actor—he is the one employing violence, threats of violence, and emotional manipulation to get the girls to work for his sole benefit. Proper allocation of law enforcement resources directs us to attack the greatest threat of violence.

Trial

Jury selection is difficult in these cas-

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es. We generally start with a questionnaire, to get basic information about panelists' opinion on prostitution, prior criminal history, and victimization crimes including sexual abuse. During voir dire in cases involving child victims, we focus on qualifying the jury panel on two major issues: (1) that the child's apparent consent into a life of prostitution is not a defense, and (2) that the defendant did not have to know that she was a minor. We spend as much time as possible discussing these issues, so that once a jury is picked we can argue that they must follow the law, even when the child "consented" and even when the defendant claims he did not know she was a child. I find this crucial to obtaining a conviction because these victims often do not come off as sympathetic on the witness stand. Of course, as a child, the victim can never really consent, but the testifying victim often makes that a hard sell to an uneducated jury; she can appear very mature in her looks and very experienced for her years.

These cases vary in their complexity: One might have voluminous evidence from computers and phone records and the next might be almost entirely based on witness testimony. Each case must be evaluated for a proper workup to ensure that the correct documents are received and filed as business records when appropriate, witnesses are prepped and thoroughly interviewed for any additional information that can be corroborated, and jury visuals are created to explain the relationship between the parties, the timeline, or any other confusing material. One thing we have found to be essential is to use a police detective as an expert. The detective will explain, much as the expert in a drug delivery case, how this underground world of crime operates, and generally the jury is fascinated to learn the "business" of prostitution. The expert will also discuss the dynamics of the relationship, grooming the victim, and the pimp's control mechanisms, similar to how experts might explain why a victim stayed with her abuser in a domestic violence case or why a child recanted in a child abuse case.

In these cases more than any other, be prepared for the unexpected. Have extra clothes for your witnesses for when they show up for court—their "best" might not be what you want the jury to see. Discuss their testimony with them and prepare them so that they will not appear defensive when defense counsel challenges them. File and argue motions *in limine*, so that you know in advance what prior convictions will be discussed and what (if any) prior bad acts of your witnesses and defendants are admissible. Be prepared for your jury to not like your victims. No matter how cleaned-up, straight-forward, and pulled-together they appear for trial, most juries will not see them as merely victims because of their willing involvement in the offense.

Be ready for the defense to attack your victim through witnesses, cross-examination, and argument. If your corroboration is strong, the defense attorney's major goal will likely be jury nullification. Remember that §43.06 specifically excludes the corroboration requirement for prostitution, promotion of prostitution, aggravated promotion of prostitution, and compelling prostitution, so the general requirement for accomplice corroboration imposed by Code of Criminal Procedure art. 38.14 should not appear in the charge or be argued by defense counsel. Get your victim to tell her story so the jury knows about the home life she is running from and, if appropriate, ask her to own her mistakes. This is a delicate balance, because she is definitely a victim of commercial exploitation at the defendant's hand, yet her mistakes made her more vulnerable to that exploitation. Most kids I have worked with realize they made bad choices, and in my experience, the jury wants to know that the kids recognize that and have learned from it.

Legal issues that should be addressed in the jury charge include the law of parties, "on or about" language, and mistake of fact. Another to consider for compelling prostitution of a child is that of concurrent causation. To qualify for such a charge, the defendant "must show that the concurrent causation was sufficient to produce the result and the defendant's conduct was clearly insufficient to do so."[19] We try to meet this argument from the start. We ask investigators to discuss with victims this particular pimp's rules of conduct, his methods of prostitution, and the consequences of not following his rules and methods. We inform juries from the start that providing opportunity, persuasion, or influence is enough to show that he caused her to prostitute by any means and repeat it from jury selection through closing argument.[20]

Post-trial

A successful prosecution is only a

small step toward restoration for the victim, however. With court oversight and services for the child and her family, stabilization of the child is the ultimate goal. Once stabilized, the child can receive the long-term treatment, counseling, and therapy she needs. Yet this stabilization is difficult to obtain, both because the child usually continues to face the same family issues that precipitated her running away and because long-term placement options are very limited for this group of youth. Adult victims face similar challenges and need assistance and resources to help them stabilize their life. In Dallas, as across the nation, we are struggling to find resources and help for these girls and young women so that they can become healthy, successful citizens.

Improving our chances

Several institutional changes are needed to improve our ability to prosecute human trafficking cases in Texas. The statute should be improved, law enforcement should be better trained to detect and respond appropriately, and systems should be developed that help these girls permanently escape this life.

The human trafficking statute would be more useful if it included other Chapter 43 offenses, including Production of Child Pornography and Sexual Performance of a Child. In addition, Trafficking of a Minor should not require the State to prove that the defendant used force, fraud, or coercion. Conversely, that general idea of force, fraud, or coercion would be better as a replacement for the enumerated list of methods of forced labor now required to be proved by the statute so that the victim's situation does not have to be strained to fit a certain category of forced labor. As an example, it would be simpler to allege forced trafficking by coercion and allow the victim to explain that she was coerced by the exploiter requiring her to meet a quota, his retaining her birth certificate, and his threats of violence toward her family. That is preferable to the current law under which the prosecution would have to prove at least eight complicated elements of this crime based on an indictment which would probably read like this (possible elements are numbered):

> On or about June 1, 2010, the **1**defendant did **2**intentionally and knowingly **3**traffic the victim by transporting, enticing, recruiting, and harboring **4**the victim **5**with the intent and knowledge that the victim engage in forced labor or services, **6**to wit: prostitution, that was **7**performed by the victim and obtained through the defendant's **8(a)**threatening to cause bodily injury to the victim's family, and **8(b)**by knowingly confiscating the victim's actual or purported government records and identifying information and **8(c)(1)**by exerting financial control over the victim **8(c)(2)**by placing the victim under the defendant's control as security for a debt **8(c)(3)**to the extent that the duration of the services provided by the victim is not limited and **8(c)(4)**the nature of the services provided by the victim are not defined.

This indictment would leave more room for legal arguments about whether the State had met its burden on every element than one that simply alleged that the victim was trafficked by force, fraud, or coercion.

In addition, law enforcement and those who deal with youth must be trained to identify these kids and young adults as victims, and there must be services to help the victims escape from this life. Decriminalization of all juvenile prostitution—as proposed by some victims' advocate groups—is not a viable solution because it could increase minors' victimization by those seeking to take advantage of "legal" prostitution. The Texas Supreme Court recently started down the path to decriminalization with its opinion *In the Matter of B.W.*[21] (See page 33 for more in-depth analysis of the case.) The court held that juveniles under the age of 14 may not be charged with prostitution because they lack the capacity to consent to sex as a matter of law.[22] The dissent points out the hurdle that this creates when dealing with juveniles, such as B.W., who continually run away from their guardians and need treatment and rehabilitation to find their way out of this life.[23] Although the majority discusses CPS as an alternative to the juvenile system for rehabilitating these children, CPS has not historically been able to meet their complex needs.

Some youth and young adults need the threat of juvenile or criminal penalties to reform their life, and sadly, many of them can receive rehabilitation services only within the juvenile and criminal justice systems. There are not currently enough long-term services or placement options available for victims of domestic trafficking. These victims have special needs, separate from other runaway youth or women's shelters. Their safety concerns, thera-

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peutic needs, and unique issues mean that other shelters are not always an appropriate placement for these victims.[24] There are reportedly fewer than 50 beds across the country for human trafficking victims in only four shelters, none of which are in Texas.[25] Hopefully, these changes and/or similar recommendations by the Human Trafficking Prevention Task Force created in 2009[26] will become law next session so that we can better protect these victims and make our communities safer.

If no one is looking for them, the victims of human trafficking can easily by missed. Their exploiters count on the fact that their victims will not be found, they will not talk, and no one will believe them. As prosecutors, we must advocate for a better solution for these victims. With improved criminal prosecutions, trained law enforcement, and victim services, we can better combat the problem of human trafficking. ❇

Endnotes

1 Texas defines human trafficking in Chapter 20A (Trafficking of Persons) of the Texas Penal Code. The federal definition is found at 18 U.S.C.S. §1589 (2009) (Peonage, Slavery, and Trafficking in Persons).

2 Richard J. Estes and Neil Alan Weiner, *Commercial Sexual Exploitation of Children in the U.S, Canada and Mexico*, University of Pennsylvania, Executive Summary at 11-12 (2001).

3 Ian Urbina, "For Runaways, Sex Buys Survival," *New York Times*, 10/26/2009.

4 Tex. Penal Code §43.05(a)(2) (2009).

5 *Davis v. State*, No. 05-99-00378-CR (Tex. Ct. App.—Dallas 2000) (unpublished opinion).

6 *Id.*

7 *Id., Baker v. State*, No. 05-96-00705-CR (Tex. App—Dallas 1998) (unpublished opinion).

8 *Davis v. State*, No. 05-99-00378-CR (Tex. App.—Dallas 2000) (unpublished opinion), *Baker v. State*, No. 05-96-00705-CR (Tex. Ct. App—Dallas 1998) (unpublished opinion).

9 *Cotton v. State*, No. 05-95-01070-CR (Tex. App—Dallas 1997) (unpublished opinion).

10 *Id.*

11 *Davis v. State*, No. 05-99-00378-CR (Tex. App.—Dallas 2000) (unpublished opinion).

12 Tex. Code Crim. Proc. art. 62.101(a)(2).

13 Texas Penal Code §43.04.

14 Texas Penal Code §43.05(a)(1).

15 *Davis v. State*, 735 S.W.2d 737, 738 (Tex. Crim. App. 1982).

16 Tex. Code Crim. Proc. art. 62.101(c).

17 Tex. Penal Code §71.02(a)(3) (2009).

18 *McIntosh v. State*, 52 S.W.3d 196, 207 (Tex. Crim. App. 2001).

19 Tex. Penal Code §6.04(a); *Baker*.

20 "One who provides opportunity for a willing minor to engage in prostitution and influences, persuades or prevails upon her to do so has … caused the prostitution …" *Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App—Austin 1995, no pet.) (citing *State v. Wood*, 34 Or. App. 569 (1978)).

21 *In the Matter of B.W.*, ___ S.W.3d ___ (Tex. 2010).

22 *Id.*

23 *Id.*

24 Office of the Attorney General, *The Texas Response to Human Trafficking Office of the Attorney General Report to the 81st Legislature*, p. 47 (citing U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, September 2007 Issue Brief: *Finding a Path to Recovery: Residential Facilities for Minor Victims of Domestic Sex Trafficking*, Heather J. Clawson and Lisa Goldblatt Grace, p. 1).

25 *Id.*, p. 10.

26 Tex. Government Code §402.035, created effective September 1, 2009, expires September 1, 2013.

Let the buyer beware

Montgomery County prosecutors helped recover more than $11,000 in an eBay scam involving farm equipment and the Russian Mafia. Just another day at the office!

I must admit, I didn't know exactly what to do after my conversation with Detective Scott Davis of the Montgomery County Sheriff's Department. Our phone call started as many of my conversations with police officers normally do: "I need to talk to you about seizing some money," he said. I head up the division of the DA's office that handles asset and bond forfeiture cases, and I assumed the money in question was associated with narcotics. Detective Davis' story was quite to the contrary.

By Claudia Laird
Chief Prosecutor in the Civil/White Collar Crime Division in the District Attorney's Office in Montgomery County

He explained how the victim, Kelly Noack, a resident of the city of Willis in our county, had transferred over $11,000 to a Bank of America account in California to purchase some farming equipment listed for sale on eBay, but she never received the equipment. Kelly found through her inquiries with eBay that the seller and posting were fraudulent, and Detective Davis was calling me to recover her money.

While I had on prior occasions successfully helped officers seize money from bank accounts, I had always done so to commence forfeiture proceedings. This situation was different; I had never helped an officer seize money from a bank account to return it to its rightful owner. I asked Detective Davis to email me his probable cause statement and all of the pertinent information.

The CCP to the rescue

In the meantime, I figured that someone in my office must be assigned to handle this type of a situation. Hoping to find such a person, I took a stroll around our office to inquire. No luck. Certain that the buck stopped with me, I looked for my answer in the Code of Criminal Procedure. Article 18.02(12) is my normal stomping ground; it allows for issuance of a search warrant to seize contraband as defined by Chapter 59 to commence forfeiture to the state. Scanning the article from the beginning yielded the answer for the dilemma at hand: Article 18.02(1) allows for issuance of a search warrant to seize "property acquired by theft or in any other manner which makes its acquisition a penal offense." It was relatively easy to revise the warrant form I typically use for forfeiture seizures to fit the requisites of Article 18.02(1).

More about the crime

True to his word, Detective Davis quickly emailed a probable cause statement and Kelly Noack's written statement. Kelly and her husband, Ralph, had been searching for a Bobcat front-end loader on eBay and found one in California. Kelly contacted the seller, "Teresa Huler," via email and told her they wanted to buy the equipment but needed a day or two to come up with all of the money. The next day, on February 24, 2010, the Noacks had the funds and emailed Ms. Huler to say so. Kelly then received an email from "eBay" with a description of the item and instructions to bank-wire transfer $11,200 to a Verified Safety Agent. She sent the money on the 25th and then emailed Teresa Huler to let her know the wire transfer was done. The two women exchanged several emails before Teresa said she would "come next Friday" to deliver the equipment. The next Friday came and went without a delivery.

Kelly emailed Teresa to ask where the equipment was, only to be met with excuses and further delay, which eventually led her to file a complaint with eBay. She then found out that the transaction was fraudulent. Kelly Noack had not actually purchased the equipment through the eBay site; she had initiated a wire transfer outside the eBay platform (in response to emails from Teresa Huler)—these emails were designed

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to look as if they were from eBay, but they were not. Being a first-time eBay user, Kelly did not know that she had not actually purchased the equipment through the eBay site, thus nullifying any buyer protection the site might've afforded her. A representative at eBay directed her to file a complaint with law enforcement, and she reported the incident to the Montgomery County Sheriff's Department on March 10.

Mrs. Noack's statement was disturbing, but the probable cause statement was even more so. Detective Davis had done some additional investigation after his initial conversation with me, contacting Bank of America to ask about the account to which Mrs. Noack had transferred her money. Bank of America's fraud team told him that they were aware that the funds in the account were obtained fraudulently, that the account had been frozen, and that a court order was required to refund any money. According to the bank, the account had an undisclosed amount of money from various victims across America; both the bank and the FBI believed it was linked to the Russian Mafia, and any names associated with the account were from stolen passports. Clearly (and sadly), the fraud extended far past the boundaries of Montgomery County.

Seizing the funds

My initial fear that the theft's perpetrator would remove the funds before we could execute our warrant was quelled, but I immediately considered that there were likely other people drafting warrants to seize the funds for other victims or for federal or state seizure. My next procedural question was answered by Joni Vollman, Chief of the Special Prosecutions Bureau at the Harris County District Attorney's Office, who verified that it was appropriate to deposit any recovered funds into our pending asset forfeiture account once they were seized from the bank to await the court order directing their disbursement. On March 18, Judge Fred Edwards of the 9th Judicial District Court of Montgomery County signed the warrant allowing seizure of the stolen money. Luckily we were able to regain Kelly Noack's funds before other interested parties drained all the money from the account.

Article 47.01(a) of the Code of Criminal Procedure provides the procedure for filing a petition to determine the right to possession of stolen property when no criminal prosecution is pending. Although no notice requirement was set forth, I still felt obligated to send notice to the individual named as the Bank of America accountholder. I subpoenaed this person's address from the bank and sent copies of the pleadings and hearing notice to the address in San Jose, California. The notice was returned as undeliverable, which was not a surprise as Detective Davis' report had concluded that the criminals were likely outside the United States.

The victims are restored

On May 21, I met Kelly Noack in court for the hearing on our petition. It was apparent after talking to her that she did not have $11,200 to throw away on an Internet scam. She told me details that were not in her written statement: She and her husband own a fence-building business. They were on a project for a client who wanted them to do additional work. That client fronted most of the $11,200 to purchase the equipment for the job, and in partial exchange for the additional work, the Noacks would own the equipment, which they could then use to expand their business. Not being able to secure the equipment meant that they couldn't complete the job as promised, resulting in lots of worry for the Noacks.

With appropriate testimony, the judge could remand the funds to the State, Mrs. Noack, or any other party appearing before the court and claiming them. Once he heard the testimony, Judge Edwards briskly exclaimed, "Well, give this woman her money back!" Those in the courtroom applauded. It is not often that I get to leave court with everyone smiling. The Noacks were thankful to recover the funds, and I was so happy have helped in the process. A check was quickly cut from the asset forfeiture account, where the seized funds had been deposited, and presented to the Noacks.

The Noacks' advice for anyone making a large purchase is to make sure you are geographically close enough to the seller to view the item and to talk with the seller in person. Mr. Noack's practice from now on, he assured me, would be to look people in the eye and shake their hand before conducting any business. With the advent of Internet sales, this practice is quickly fading.

My advice for prosecutors who have not seized stolen funds before is

not to be intimidated by the process and not to waste time. The longer the stolen money is in an account, the more likely it is to be removed, and the time required for an investigation already puts a prosecutor behind. I now realize that had I understood the law and procedure to accomplish this type of seizure, we could have obtained the money much more quickly—and though it didn't make a difference in this case, it might in future situations. Prosecutors would benefit from doing some things, such as reading the relevant article in the CCP and drafting a warrant form, in advance. The wording in our warrant states that the bank may comply by tendering a check payable to our office; it also commands the officer to bring before the judge any person failing to cooperate in the warrant's execution. In this case, as most, the latter clause was not useful, but in two asset forfeiture warrant executions it was invaluable. In one it gave us a hold on the account while the bank's legal department looked at the warrant over the next day, and in the other, the bank had informed officers it would take 30 to 60 days to determine if the bank would allow access to a safe deposit box. Once the officers politely directed the bank manager's attention to this clause, access was immediately granted, thus giving us access to the more than $200,000 in cash in the defendant's safe deposit box. The defendant would've surely removed it after he made bond.

If it looks as if someone other than the victim will show up at the hearing to state a claim to the funds, follow up the seizure warrant with a subpoena for the bank's records. Always remember to ask for all signature cards as well as the statements and underlying check and deposit copies. Gather all the documentation to show the judge the proof that the victim is the funds' rightful owner, and make sure the victim and officer attend the hearing.

Seizing such funds is easier than you might think, and the satisfaction from returning property to a victim is unusual and gratifying to say the least. ❇

Editor's note: The author wishes to thank Karen Morris from the Harris County District Attorney's Office for her assistance with the warrant form when she first started prosecuting asset forfeiture cases.

TDCAF News

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How's the weather in there?

How Waco prosecutors called on an old friend—the local weather anchor, a former assistant DA himself—to counter defense claims in a child sexual assault case.

By Beth Toben
First Assistant Criminal District Attorney in McLennan County, and
Lon Curtis
Meteorologist with KWTX in Waco

When I was a Girl Scout, I learned a song that said "Make new friends, but keep the old. One is silver and the other one gold." The wisdom of this children's song came to light recently when I needed the help of a meteorologist while prosecuting a child sexual abuse case.

We were prosecuting a step-father for sexually abusing his 11 year old step-daughter, whom we'll call Annie. When Annie's mother heard of the abuse, she was not sure she believed her daughter. She questioned Annie and her husband repeatedly to determine who was telling the truth. The girl explained that one of the incidents happened while her mother was in Dallas on business. Annie's mother asked her husband why the child was in the bedroom with him that night, and he claimed that the girl came in his room to sleep because she was afraid of the thunderstorms and lightning that were going on outside. At trial, both the mother and the defendant testified that Annie was afraid of storms, and that was why she was sleeping in the defendant's room.

To impeach the defendant, we decided to check the weather. We called Lon Curtis, formerly an experienced prosecutor from Bell County, who has moved on from doing "the Lord's Work" to his current career (reporting on "the Lord's Creation") as a weather anchor for News 10, the CBS affiliate in Central Texas. To my delight, Lon remembered me—he even remembered dancing at the Quarterdeck at the Annual in South Padre years ago. (This is clearly evidence that those receptions truly are beneficial.) To my even greater delight, Lon was willing to help, and the News 10 management agreed to let him testify.

How Lon prepared (in his own words)

My interest in weather stretches all the way back to the fourth grade at Tyler Elementary School in Belton. In high school, I thought I would study meteorology in college and perhaps become a weathercaster. I even had a stint as a radio weathercaster for a local station during my last year in high school. Alas, I ended up a lawyer and spent 24 years as a prosecutor in Bell County.

The idea of a career in meteorology faded, but my interest in the science did not. I began chasing severe storms in the early 1990s, and on May 27, 1997, I saw and photographed eight or nine tornadoes, including the F-5 tornado that killed 27 people at Jarrell. All of sudden, several television stations were interested in having me chase storms for them. My life changed in September 1997 when (driving home from TDCAA's annual meeting in Arlington) I received a phone call from KWTX asking if I would be interested in working part-time doing weekend weathercasts. The regular weekend weathercaster was leaving suddenly, and they wanted me to cover the weekend shows until they could hire someone permanent. For more than three years, I worked as a prosecutor Monday through Friday and as a weathercaster on the weekends. In May 2001, I retired from county employment and began my new, full-time career as the morning and noon weathercaster at KWTX.

Although I had done some forensic weather research for out-of-state attorneys, I had not been called to testify in court until this trial. Beth gave me several dates in September 2008 on which the offenses might have occurred and wanted to know if I could find out whether there were thunderstorms in McLennan County on those nights.

I bypassed one obvious source of information intentionally. At least two companies in the country operate lightning detection networks, which record the lightning strikes with great precision. That data is stored and can, for a fee, be made available for forensic investigations.

The reason I bypassed that type of data is that the lightning detection systems record only lightning strikes that hit the ground, and because some thunderstorms produce mainly cloud-to-cloud (within the cloud) lightning, the data from the lightning detection networks would not have been conclusive.

Instead, I looked at the daily climatological data available from the website of the National Weather Service (NWS) office in Fort Worth, which includes data from the Waco airport. The records from the NWS website indicated that there were no thunderstorms reported at the Waco airport on the nights in question. Unfortunately, the record also displayed a bold caption cautioning that the records displayed there were "unofficial" and that the official record could be obtained from the National Climate Data Center (NCDC) for a fee. I knew from years of using NCDC data and comparing it with the data stored locally at NWS offices that the data was always the same. The direction to obtain it from NCDC was primarily a way to generate money for the agency.

Anticipating that a defense attorney might question whether the Waco airport records were conclusive as to whether thunderstorms might have occurred elsewhere in McLennan County, I went to a section of the NCDC records where digital radar data generated by the network of nexrad radars is stored. ("Nexrad" is the popular name for the next generation of weather radars developed in the 1980s and deployed across the country in the '90s.) Access to these stored records for each radar site is free unless you want the data "certified," which requires a fee. I vaguely recalled a rule of evidence, Rule 703, that allows for expert testimony about what is contained in records commonly used by experts in forming opinions, provided that the records themselves need not be admissible in evidence. This rule opened the door, at least preliminarily, for me to utilize the radar records without having them certified, which costs money and takes time—an important consideration because I wasn't sure whether the records could be certified and available by trial.

Two of the nexrad radar sites provide excellent coverage of McLennan County. Those radars are located on the far south side of Fort Worth and south of Temple near Granger. It took me about 10 minutes to look at the summary records from those sites and conclude that there weren't any radar echoes that supported the existence of any convective cells (known to lay-people as thunderstorms). I was able to make this quick decision simply by noting that both radar sites operated in a clear air volume coverage pattern (VCP) (in lay terms, "mode") at all times on the nights in question. If a nexrad had detected any convective cells, it would have automatically switched to one of several precipitation modes instead.

To back up my preliminary opinion, I also downloaded some of the individual radar files and inspected them in software suitable for the purpose to be sure that there weren't cells that the radars had ignored. There weren't. Based on that, within a few days I was able to tell Beth that in my opinion, there weren't any thunderstorms (convective cells) capable of producing lightning anywhere in or near McLennan County on those nights. By then, it was too late to get the radar records from NCDC certified and delivered to us, and Beth elected not to have me testify as an expert because the deadline for designating experts had also passed. But she thought she could get my testimony in for rebuttal.

Back to Beth (in her own words)

The defendant opened the door to Lon's testimony by claiming that his step-daughter was "sleeping" in his bedroom on the nights in question because she was scared of lightning and thunderstorms outside. He had even convinced his wife (the girl's mother) that this was true, and she believed him because the child apparently is actually afraid of storms. When we called Lon in rebuttal, he explained to the jury that he had checked the records kept by the Waco Municipal Airport to make this determination. The defense attorney, who is a pilot, questioned Lon's conclusions, pointing out potential inaccuracies in the airport weather reporting system. In a very thorough way, Lon explained that he had also checked the automated radar records generated by the National Weather Service radar system, which conclusively indicated that there were no thunderstorms or other cells capable of generating lightning, and thus, thunder, anywhere in or close to McLennan County, on those nights in question.

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Having been shut down, the defense had no other questions.

The jury found the defendant guilty of three counts of aggravated sexual assault and one count of indecency with a child by exposure. The Honorable Judge Matt Johnson out of the 54th District Court stacked the sentences, and the defendant was ordered to serve 145 years in prison.

After the trial, one of the jurors told us that when the defendant testified about the weather, the juror wondered if there was any way to verify that testimony. He said when he walked into the courthouse the next morning and saw Lon sitting outside the courtroom, he smiled to himself and thought, "Busted!"

When we left the courthouse, there was a double rainbow in the sky. Most unusual! I couldn't help but hope that the pots of gold at the end of those rainbows were at the Channel 10 weather desk rewarding my "old" friend, and fellow prosecutor, Lon Curtis for jumping in again to do "the Lord's Work!"

The moral of the story? We make some pretty great friends in this line of work. We need to remember to make new friends, but keep the old—one is silver and the other one gold! ❇

Hiring a weather expert

By Lon Curtis
Meteorologist with KWTX in Waco

As to what types of forensic weather research can be done—or put another way, what types of weather reconstruction a forensic meteorologist can do—the answer may surprise you: a lot.

But first, a caveat: A lot of weather reconstruction takes more time than in this case. Basically, the sooner you decide you need an expert and tell your expert what you need to know, the better.

The sheer size of our state notwithstanding, we now have decent coverage of automated weather stations, making frequent observations and sending them electronically to the National Weather Service (NWS) switching center, from which they are distributed to interested parties and permanently stored. These weather observations normally include air temperature, dewpoint (from which relatively humidity can be derived), wind direction and speed, cloud cover (height above the ground and extent of coverage), horizontal visibility, and present weather (i.e., rain, snow, fog, mist, thunderstorm, etc.). These observations are made at least hourly.

Even if the location in which you are interested isn't close to one of the stations, it is often possible to interpolate between several stations with reasonable accuracy. And most of the state is within range of the network of nexrad radar sites, from which we can assess whether precipitation was occurring, and in many cases, provide an estimate of how much was falling. The only portion of Texas that has very limited nexrad radar coverage is the Big Bend area.

To select a weather reconstruction expert witness, I should mention that you need not waste time asking one of the local NWS forecasters to testify. Federal regulations prohibit NWS employees from testifying in any case wherein the federal government is not a party. Nor can I make a blanket endorsement of other meteorologists in the media. There are some obvious advantages to using the local TV meteorologist who is "in" hundreds to thousands of homes every day or night; potential jurors develop a sense that they know these people personally, and they also develop strong opinions about who they like and who they don't like. But not all media meteorologists are equipped to do the kind of reconstruction I have mentioned in this article, and you might be better served by someone from a private company that specializes in weather reconstruction.

If you choose to use a local media meteorologist, look for certain minimal qualifications. It isn't required that a media meteorologist have a degree in meteorology. Years

of study, training, and research can certainly make a person qualified to be a meteorologist, and some media meteorologists have taken 40 hours of course work from Mississippi State University (MSU) in a distance learning program. Two national associations of meteorologists, the National Weather Association (NWA) and the American Meteorological Society (AMS), offer some type of certification for broadcasters. At a minimum, a weather expert ought to have completed course work leading to either a B.S. degree in meteorology or atmospheric science or completed the 40-hour MSU program and hold a Certificate in Broadcast Meteorology. The expert also should be a member of one or both of these organizations and hold a certification, such as the AMS Certified Broadcast Meteorologist designation.

Both organizations publish scholarly journals composed of articles written by members or nonmembers, which appear in print only after passing a peer-review process in which the article is examined by other meteorologists with expertise in the field covered by the article. It is icing on the cake if a weather expert has published a peer-reviewed article in a professional journal such as those published by NWA and AMS. You will find that it is very rare that an active broadcast meteorologist has published in a peer-reviewed journal. (As an aside, the last time I checked, I was the only active media meteorologist in the country who has published in a peer-reviewed journal recently.)

Also consider the fees for professional services. If you hire a private company to perform weather reconstruction, plan on fees consistent with what other forensic experts charge. I did not charge a fee for researching and testifying in Beth's trial, but I was able to obtain the data she needed quickly, and I considered my work to be worthy of handling on a *pro bono* basis. Likewise, when I can find information quickly and easily, I don't charge local police agencies, which is not to say that I would not have to charge fees for weather reconstruction for a Texas prosecutor who required more work than in this case. For the forensic work I have done for attorneys handling personal injury cases in other states, I have a fee schedule that must be agreed to in advance.

Finally, keep in mind that local media meteorologists are under all sorts of pressure from management regarding how they spend their time. In all television markets, there are ratings periods (called "sweeps") that each last four weeks, during which it may not be possible to depend on local meteorologists to be at a prosecutor's beck and call. To media companies, the outcome of sweeps is crucial to profitability because the ratings govern how much the station can charge for advertising going forward. Most media companies prohibit on-air talent from being absent during sweeps.

As a closing note, you might think that having tried hundreds of felony trials to juries and having spent over 12 years on-air as a meteorologist, testifying in court in Beth's trial would have been a piece of cake, but not so! I found myself strangely nervous sitting outside the courtroom waiting to testify, not to mention being a little jittery while on the stand. I was reminded of the respect I had for all of those witnesses who testified in my trials years ago and did so without appearing nervous. When I heard from Beth about the outcome of her trial, I was elated to have had a small part in seeing that justice is done. ❇

If she doesn't want to prosecute, why should we?

Why prosecutors should pursue cases of family violence even when the victim refuses to cooperate or testify

It's happened to all of us: A new assault family violence case packet or file crosses our desk—a violent assault, possibly even with a deadly weapon or strangulation attempt. The pictures show bruising and other injuries. We call the victim to make contact, get a statement, and start building our case. Her response? She asks how she can get the emergency protective order vacated so the defendant can come home. Or he's already there and she tells us she wants nothing to do with the prosecution; she won't testify and wants to know how to dismiss the charges. We look at the pictures and review the case, considering the challenges of trying it without her.

By Dr. Michael Vandehey
Professor of Psychology at Midwestern State University and
Shelly Wilbanks
Assistant Criminal District Attorney in Wichita County

And we ask: If she doesn't want to prosecute, why should I? Why shouldn't I just save myself the time and effort—and the probable acquittal—and dismiss it? Translation: Why does she stay with the guy who hurts her? It's the same question those fighting against domestic violence have been trying to answer for decades. Why is it important that we proceed with prosecution despite the victim's lack of cooperation? Consider that 70 percent of batterers also abuse children, and children who grow up in homes where they witness domestic violence are at a higher risk for teen pregnancy, drug and alcohol abuse, truancy, and running away;[1] approximately 324,000 female victims of intimate partner violence are pregnant at the time of the abuse;[2] and intimate male partners perpetrate 40–50 percent of murders against women.[3]

This country struggles with intimate partner violence that impacts both men and women. The Center for Disease Control and Prevention[4] showed that approximately 4.8 million women and 2.9 million men experience intimate partner violence every year, with more than 500,000 women requiring medical treatment.[5] However, when we look at all intimate partner violence (as opposed to reported incidents), women make up about 85 percent of the victims.[6] Finally, the CDC reported that intimate partner violence led to 1,510 deaths in 2005, with women making up 78 percent and men 22 percent of the victims. It is for this reason that our look at prosecuting an abuser will focus on male perpetrators and female victims.

Many factors

For individuals fortunate enough not to have experienced domestic violence, remaining in such a relationship and failing to prosecute is both frustrating and mind-boggling. However, there are psychological reasons, both internal and external, such as the "threshold effect," learned helplessness, and financial issues that render a victim in such a relationship incapable of cooperating and impact her choice to remain in an abusive relationship.

Internal factors

A "threshold effect" occurs when a person experiences a little discomfort that slowly escalates. People are able to tolerate increasing amounts of discomfort if the discomfort is not too intense at the beginning. Most abusers do not begin at the physically assaultive level. There is a slow build-up where the partner is at first lov-

ing, then slightly jealous or controlling. Name calling, damaging objects, and pushing come later. Isolation from friends and family occurs slowly over time. Finally, threats, physical assaults, and even sexual assault (marital rape) are used to dominate and totally control the partner.[7]

This slow change in the relationship disrupts a victim's ability to effectively evaluate the relationship and see realistic options.[8] For example, she may minimize the abuse by "forgetting" the bad times and focusing on the good, or she may view her abusive relationship as less intense as the one(s) her mother was in. Finally, the abuser may be seen as the key to social, educational, or professional goals, and the victim does not perceive there to be other eligible, nonviolent potential partners. She becomes dependent upon her abuser for social and financial advancement.[9]

Another internal struggle for victims of abuse is "learned helplessness." This process occurs when a victim experiences punishment or failure over and over. Eventually, the victim gives up trying and becomes passive and submissive. Prolonged abuse robs a victim of her ability to be effective in her life. Problem-solving skills become limited and real options are missed. The more a woman fears her partner, the less likely she is to leave.[10] Other internal barriers include: (a) feeling responsible for the abuse, (b) past unsuccessful attempts to leave, (c) belief in being able to access help, and (d) confidence in being able to determine one's own fate.[11]

These internal protective factors found to increase a victim's ability to leave an abusive relationship quickly: (a) high self-esteem or self-worth, (b) positive social support, (c) healthy coping skills, and (d) high sense of perceived control; all of which are diminished or lacking in a prolonged abusive situation.[12]

External factors

It is vital for all of us to understand the fear that comes with leaving an abusive partner. Battered women routinely deal with being "stalked, harassed, beaten, and killed after they have ceased living with their abuser."[13] "Leaving is not always a rational response to abuse" because separation tends to increase the abusers' violence.[14] Berlinger reported that 70 percent of women murdered by their intimate partners are killed during the separation period. "The average victim leaves her abuser seven times before she leaves for good. Only she can determine when it's safe to leave."[15] If we can create safety around leaving an abusive intimate partner (this includes police and DA office responses), women may leave those relationships much earlier.[16]

Other external factors that pressure a woman to stay include:
(a) finding safe and affordable housing,
(b) providing financially for children,
(c) cultural or religious beliefs,
(d) living in a rural community where leaving also leads to separation from family and friends, and
(e) a lack of social services.[17]
Unlike other crimes, the victim has an emotional relationship, a history, and connections such as family and/or children with the defendant. A domestic violence victim's situation is complicated by those ties. When they do have children, because of the laws governing divorce and child custody in Texas (the presumption that it is in the best interest of the children to have contact with both parents), it is unlikely the victim will ever be completely free of the defendant. In addition, abusers often threaten the victim with taking custody of the children if she leaves. To further complicate the situation, the victim may be financially dependent on the defendant, need his medical benefits, or simply have nowhere else to go. In fact, it is very clear that financial worries are the number one reason why women stay, and this has been documented since the 1980s.[18] When women cannot afford to house or feed their children, they stay with abusive men.

Finally, and this may be surprising to many, care for pets is a consideration of women in abusive relationships.[19] Some victims have witnessed cruelty against or the death of a pet at the abuser's hands. Threats to harm a beloved pet are not uncommon. Many women experience grief at being separated from their pets, and that it is worse for childless victims.[20] If children are present, they are often worried for the pet's safety putting additional stress on the adult victim. Victims may lie to their children or even take the children back to the home to verify the safety of the pet even though this could prove to be dangerous. Sixty percent of pet-owning victims reported that the concern over leaving a pet impacted their decision to leave, and 88 percent said leaving a pet delayed the decision to leave.

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Seeing that justice is done

Texas Code of Criminal Procedure art. 2.01 makes it our job and duty to pursue justice. Further, under art. 5.06 it forbids us from requiring proof that a "complaining witness, victim, or defendant is a party to a suit for the dissolution of a marriage or a suit affecting the parent-child relationship before presenting a criminal allegation to a grand jury, filing an information, or otherwise proceeding with the prosecution of a criminal case."

Therefore, we cannot require a victim to leave her abuser as a condition of or prerequisite for pursuing criminal charges. That does not mean we should disregard the victim's preference, especially when she informs us that she has no interest in prosecuting and will not cooperate, significantly increasing the difficulty of proving our case. However, while it is necessary to evaluate each case with a critical and discerning eye—and certainly not every assault family violence case is a righteous case worth pursuing. Dismissing a family violence case solely because the victim is too afraid of retaliation, too weak due to psychological conditioning, or too trapped financially to cooperate is not doing justice and not doing our jobs.

If there is evidence—pictures, 911 calls, medical records, and/or other witnesses—that would enable us to proceed without the victim's testimony, or treating her as an adverse witness, we should. *The defendant is counting on us to dismiss the case when the victim files an affidavit of non-prosecution.* In fact, he is likely pressuring her to do so and promising her anything he thinks will convince her to "drop the charges" against him. If we proceed anyway, the defendant may take a plea—if not before trial, then when the victim responds to the subpoena and shows up at trial. When we proceed in spite of the victim's initial refusal to cooperate, she has the opportunity to change her mind before the case goes to trial. This often happens when the defendant returns to his old ways and assaults her again or fails to make good on the promises he made in exchange for filing that affidavit.

Finally, the reaction of the legal system is important, and there could be consequences to our inaction. Especially in strangulation cases, the victim may not survive the next assault as strangulation is an indicator of lethality. One of the children could be injured or, in more extreme situations, if we do not make an effort to hold the defendant accountable, the victim may see death (his or hers) as her only escape. If women do not believe they will be believed or protected by the legal system, they may very well be taking their lives into their own hands by leaving.[21] In addition, though no prosecutor likes to lose, when we make the effort, we send a message to the victim. We tell her that the defendant's actions are not only unacceptable but criminal, and we are willing to stand up for her. Knowing this could alleviate some of her fear and motivate her to seek out assistance through other avenues or to cooperate the next time it happens. And we all know it will. ❇

Endnotes

1 Berlinger, J. (1998). "Why don't you just leave him?" *Nursing*, 28(4), 35-39.

2 Berlinger, J. (2004). Taking an intimate look at domestic violence. *Nursing*, 34(10), 42-46.

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4 Center for Disease Control and Prevention (CDC; 2009). Understanding intimate partner violence. Fact Sheet. Retrieved on 6/28/2010 from www.cdc.gov/violenceprevention/pdf/IPV_factsheet-a.pdf

5 Berlinger, 2004.

6 Ibid.

7 See Berlinger 1998 and 2004; see also Stork, E. (2008). Understanding high-stakes decision making: Constructing a model of the decision to seek shelter from intimate partner violence. *Journal of Feminist Family Therapy*, 20(4), 299-327, and Few, A. L., & Rosen, K. (2005). Victims of chronic dating violence: How women's vulnerabilities link to their decisions to stay. Family Relations, 54(2), 265-279.

8 See Few & Rosen; see also Shaffer, M. (1997). The battered woman syndrome revisited: Some complicating thoughts five years after *R. v. Lavallee*. *University of Toronto Law Journal,* 47(1), 1-33.

9 See Few and Rosen.

10 Kim, J., and Gray, K. A., (2008). Leave or stay?: Battered women's decision after intimate partner violence. *Journal of Interpersonal Violence*, 23(10), 1465-1482.

11 Stork, E. (2008). Understanding high-stakes decision making: Constructing a model of the decision to seek shelter from intimate partner violence. *Journal of Feminist Family Therapy,* 20(4), 299-327.

12 See Few and Rosen.

13 Shaffer, 1997, p. 12.

14 Ibid.

15 Berlinger, J. (2004), page 38.

16 See Kim and Gray.

17 Shaffer, 1997.

18 Kim and Gray, 2008.

19 Strand, E. B., & Faver, C. A. (2005). Battered women's concern for their pets: A closer look. *Journal of Family Social Work*, 9(4), 39-58.

20 Id.

21 See Berlinger, 1998 and Shaffer, 1997.

Tricks are for kids! How *In the Matter of B.W.* exempted 13-year-olds from the prostitution statute

A wise man[1] summed up for me the recent Texas Supreme Court decision reversing a prostitution case against a 13-year-old juvenile thusly, "I never in a million years thought a court would hold that a 13-year-old kid can fellate someone for 20 bucks." Obviously this is a bit of an over-simplification, but it does highlight the difficult decision the Texas Supreme Court faced when deciding *In the Matter of B.W.* How can a child commit the offense of prostitution if the child cannot legally consent to sex with an adult? Any answer to that riddle would necessarily be problematic, but arguably the decision the Texas Supreme Court arrived at leaves more questions than answers.

By David C. Newell
Assistant District Attorney in Harris County

The case began when B.W. waved over an undercover police officer driving by in an unmarked car. She offered to engage in oral sex with him for $20. The officer agreed and arrested the girl when she got in his car. She was originally charged with prostitution in criminal court because everyone thought she was 19. However, a background check revealed she was only 13, and the case was refiled in juvenile court. The girl pleaded true that she had engaged in delinquent conduct and the court placed her on probation for 18 months. In a motion for new trial, she argued that she could not engage in delinquent conduct by committing the offense of prostitution because a child cannot legally consent to sex with an adult. The court of appeals affirmed the adjudication.[2]

The Texas Supreme Court disagreed and reversed.[3] Writing for a six-judge majority, Justice O'Neill initially noted that the Penal Code containing the prohibition against prostitution does not generally apply to juveniles under age 17. Instead, the Family Code establishes that juvenile justice courts have jurisdiction in all cases involving "delinquent conduct," which includes violating a penal law of the state punishable by confinement in jail. Because prostitution is punishable by confinement in jail, it amounts to delinquent conduct.

B.W. argued that she could not "knowingly agree" to commit prostitution because children under 14 cannot legally consent to sex. She based this argument on §22.021 of the Penal Code, the aggravated sexual assault statute that makes it a crime to cause a child under 14 to engage in sexual intercourse. The majority found this argument very persuasive and noted that the principle that a child cannot legally con-

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sent to sex "is of longstanding origin and derives from common law." According to the court, Texas took this rationale and incorporated it into the Penal Code, giving defendants an affirmative defense if certain facts are shown and the child is between 14 and 17 but taking that defense away if the child is under 14.[4]

From there the court goes on to glean the legislature's intent based upon the number of different statutes providing protection against the sexual exploitation of children. For example, the legislature has made it a more serious crime to pimp out a child than an adult.[5] Additionally, the court notes other statutes that levy harsher criminal penalties for crimes against children, such as aggravated sexual assault and human trafficking. This serves a dual purpose in the opinion: First, it demonstrates the court's view that the overall goal of the legislature is to prevent the exploitation of children given the legislature's recognition of their special vulnerability. Second, it feeds into the court's later argument that the State still has available avenues to prosecute the exploiters of children even if it cannot "prosecute" the child prostitute.[6]

More problematically, the court also went on to note children's lack of experience and mental capacity as justification for its position that children cannot knowingly consent to sex. The court relied upon a number of out-of-state decisions to support this conclusion, as well as its own decisions holding that children cannot enter into contracts and statutes noting the prohibition on child marriages. The court also relied upon the United States Supreme Court decision in *Roper v. Simmons* which held that a juvenile younger than 18 cannot be given the death penalty, in part because his lack of maturity and responsibility makes his conduct less morally reprehensible.[7] Indeed, the court repeatedly referred to *Roper* for the proposition that minors have a reduced mental capacity as compared to adults.[8] What makes this argument problematic is that the court's rationale could be stretched to invalidate a juvenile's violation of *any* provision of the Penal Code, not just prostitution. Unlike *Roper*, which used the juvenile respondent's age to diminish the degree of punishment, the court in this case used the juvenile respondent's age to diminish the child's ability to formulate a culpable mental state, thereby absolving the child of *any* culpability. By interpreting *Roper* in this manner and combining it with generalizations about child victimization to divine the legislature's intent, the court may have crafted an opinion with some interesting and unintended consequences.

For example, did the legislature really draw the line at 14? Under the court's reasoning, the legislature's statutory limitation of consent demonstrates its position that a child of that age cannot consent to sex. Well, the legislature also crafted an affirmative defense to sexual assault that prohibits children between the age of 14 and 17 from consenting to sex with someone who is more than three years older than they are. Does the legislature's limitation of the child's ability to consent in that circumstance also suggest that the child lacks the mental capacity to knowingly consent to sex with someone more than three years older than the child? Remember, the juvenile respondent in *Roper* was a 17-year-old, so presumably the court that relies upon this case repeatedly would have to acknowledge that kids over 14 can also have maturity and responsibility issues. Thus, the court's linking of a limitation on the ability to consent to sexual assault with the requisite culpable mental state of prostitution creates the potential to exempt various categories of individuals from criminal culpability.[9]

And does this rationale apply equally to prostitution through solicitation? After all, B.W. was charged with "agreeing" to engage in sexual conduct for a fee. The court held that she was legally incapable of knowingly agreeing because she could not legally consent to sex. But what if the State had alleged B.W. engaged in delinquent conduct through solicitation of her services as a prostitute presumably without ever proving that there was a meeting of the minds?[10] In fact, the majority even notes this distinction between prostitution by agreement and solicitation of prostitution when it attempts to rebut the dissent's argument that the inability of the juvenile to agree to engage in prostitution makes it impossible for the State to prosecute the adult male for prostitution (because the intercourse would not have been consensual). According to the majority, "section 43.02 expressly allows for the prosecution of a person who 'solicits another in a public place to engage with him in sexual conduct for hire,' regardless of the solicitee's consent."

So if there's no need for "knowing consent" under a solicitation theory, why does the juvenile's legal inability to consent to sex matter at all? Doubtless the court would hold that child prostitution under any theory would be legally barred when the juvenile respondent is under 14, but it would be hard pressed to do so while remaining consistent with the rationale set out in this opinion.

This opinion may also have ramifications beyond the offense of prostitution. If juveniles' legal inability to consent to sex prevents them from forming the requisite culpable mental state for prostitution, it may also prevent them from forming the requisite culpable mental state for aggravated sexual assault. There also may be some precedent for that position from the Texas Court of Criminal Appeals. In *Lawhorn v. State*, the CCA explained the difference between legal and factual impossibility. One of the examples the court gives to illustrate an example of legal impossibility is "attempt of a minor to commit rape."[11] Admittedly, the Court of Criminal Appeals got this example out of a treatise and only uses it as an example *in dicta*, but the case might make it a little harder to argue that extending the holding of *In the Matter of B.W.* to aggravated sexual assault leads to absurd results, particularly if the juvenile respondent comes from the same type of abusive background that B.W. did.

But perhaps the court can draw a distinction between the requisite mental state for aggravated sexual assault and prostitution. After all, according to the court's view, prostitution contemplates some form of agreement between both participants, but the aggravated sexual assault statute does not require a "knowing agreement," only that the actor knowingly cause the intercourse.[12] Not surprisingly, the statute does not consider the defendant's ability to consent to his own conduct. Moreover, the juvenile respondent who commits aggravated sexual assault is less a victim of his own exploitation than a juvenile respondent who engages in prostitution. This may be a fragile distinction to be sure, but perhaps in a particularly egregious case it may garner some consideration.

To spare B.W. the stigma of a juvenile adjudication, the court crafted an opinion that seems to place the sole job of rehabilitation for these types of juvenile respondents upon CPS, which already demonstrated its inability to keep her from becoming a child prostitute.

Both the majority and the dissent noted B.W.'s history of physical and sexual abuse along with her troubled childhood in and out of CPS placements. These references to B.W.'s history point to something larger in the opinion that deserves mentioning. The policy considerations at work in cases involving the exploitation of children are significant. In 2001 it was estimated that 293,000 American youth are currently at risk of becoming victims of commercial sexual exploitation.[13] These children tend to be runaways or thrown-away youth who live on the street who generally come from homes where they have been abused or from families who abandoned them.[14] Once these children become involved in prostitution, they are often forced to travel far from their homes, further isolating them from their friends and family and making it difficult to develop new relationships with peers or adults other than the person victimizing them.[15] Their lives often revolve around violence, forced drug use, and constant threats.[16] The average age on entry into prostitution is from 12 to 14.[17] It is not for nothing that the majority writes that "children are the victims, not the perpetrators, of child prostitution."[18] The desire to protect and not punish the children caught up in such a nightmare existence is certainly sincere and deserving of respect. (See the cover story in this issue for a related article on human trafficking.)

But while the Texas Supreme Court certainly approached this very serious subject with the best of intentions, the court's concern that the juvenile avoid the "stigma" of a juvenile adjudication may have made it the perfect enemy of the good. A juvenile adjudication is not a conviction of a crime; it imposes no civil disability nor does it prevent a child from any civil service application or appointment.[19] Additionally, an adjudication of delinquent con-

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duct based upon the misdemeanor offense of prostitution can be sealed by the trial court two years after discharge of the probation.[20] Surely this blemish on the juvenile's record is not significantly worse than the lifelong scars the child undoubtedly receives actually living some portion of his or her life as a prostitute. Yet, to spare B.W. the stigma of a juvenile adjudication, the court has crafted an opinion that seems to place the sole job of rehabilitation for these types of juvenile respondents upon CPS. Tragically, it did so in a case where CPS had already demonstrated an inability to prevent the child from becoming a child prostitute. And, as my wise friend pointed out, the court also somehow turned the inability of a child to legally consent to sex into a pass (for the child at least) to engage in sexual conduct with an adult for money.

And that is no small trick. ❇

Endnotes

1 OK, it was Dan McCory, the dude who handled the appeal.

2 *In the Matter of B.W.*, 274 S.W.3d 179 (Tex. App.—Houston [1st Dist.] 2008, writ granted)

3 *In the Matter of B.W.*, ___ S.W.3d ___; 2010 WL 2431630 (Tex. 2010).

4 Compare Tex. Penal Code §22.011(e)(2) with Tex. Penal Code §22.021(2)(B).

5 Compare Tex. Penal Code 43.03(b) (promotion of prostitution is a class A misdemeanor) with Tex. Penal Code §43.05(b) (compelling a child to commit prostitution is a second degree felony).

6 The court repeatedly refers to the "prosecution" of juveniles implying that the court regards the juvenile adjudication as more of a "criminal" proceeding than a "quasi-criminal" one. And while the court does note that the purpose of placing jurisdiction with civil courts is to "provide for the care, the protection, and the wholesome moral, mental and physical development of children," it appears to have more confidence in the rehabilitative aspects of CPS custody than those found in the juvenile justice system. Compare Tex. Fam. Code. §51.01(3) with Tex. Fam. Code §51.01(2)(C). This is ironic, of course, given that B.W. had run away from her third CPS placement when she became a prostitute.

7 *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005).

8 Surprisingly, they did not cite to Bill Cosby's experiences with his own "brain-damaged children." *Bill Cosby: Himself*, 20th Century Fox, 1983.

9 Indeed, the legislature has also said that sexual assault of elderly or disabled individuals deserves more severe punishment. Tex. Penal Code §22.021(2)(C) (Vernon 2003). Does this mean Betty White or Abe Vigoda can have a second career in the world's oldest profession?

10 Compare Tex. Penal Code §43.02(a)(1) with Tex. Penal Code §43.02(a)(2).

11 *Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995).

12 Tex. Penal Code §43.02(a)(1); Tex. Penal Code §22.021(a)(1)(B).

13 Richard J. Estes and Neil Alan Weiner, *Commercial Sexual Exploitation of Children in the U.S, Canada and Mexico*, University of Pennsylvania, Executive Summary at 11-12 (2001).

14 *Id.*

15 Francis T. Miko & Grace Park, *Trafficking in Women and Children: The U.S. and International Response*, at 7 (2003)

16 *Id.*

17 Estes and Neil Alan Weiner, *Commercial Sexual Exploitation of Children in the U.S, Canada and Mexico*, University of Pennsylvania, Executive Summary at 11-13 (2001)

18 *In the Matter of B.W.*, slip op. at 7.

19 Tex. Fam. Code §51.13(a).

20 Tex. Fam. Code §58.003(a).

What lies beneath

The defendant may look like a model citizen when sitting at defense counsel's table, but he just may have a rap sheet longer than his arm. Here's how to properly use a defendant's criminal history at punishment to cast him in the right light for the jury.

A defendant's criminal history is a vital tool in prosecutors' arsenal. By giving proper notice of our intent to offer a criminal history and using it at punishment, we can help the jury see past a defendant's clean-shaven, crisp-shirt exterior in the courtroom for what he really is. On the other hand, improper use of such histories, especially with nondisclosures and expunctions, can land prosecutors in hot water with the justice system. Here's how to use—and when *not* to use—these valuable tools.

By Ben Hoover
Assistant Criminal District Attorney in Wichita County

Criminal history at punishment

The authority to use a defendant's criminal history against him during a trial's punishment phase is found in art. 37.07, §3 of the Texas Code of Criminal Procedure. The law authorizes either the State or the defense to offer any evidence the court deems relevant to sentencing, including the defendant's criminal record, his general reputation, his character, the circumstances of the offense, and any other evidence of extraneous crimes or bad acts.[1] A prosecutor must give notice of her intent to introduce such evidence only if the defendant makes a timely request for the notice;[2] the notice requirement applies only to evidence presented in the State's case in chief. (Texas courts have suggested that at least 10 days' notice is reasonable in most cases.[3]) When extraneous offense evidence is introduced during cross-examination or rebuttal, a defendant is not entitled to notice of the extraneous offenses,[4] nor is the State required to give notice of its intent to introduce character or reputation evidence of the accused.[5]

The notice requirement raises an interesting question: If the defense attorney fails to request notice, should we give it anyway just to be safe? Some may choose to give it out of an abundance of caution to avoid an ineffective assistance claim down the road. Whether a defendant received ineffective assistance of counsel must be assessed with a two-pronged analysis.[6] Texas courts have been reluctant to uphold ineffective assistance claims based on the failure to request notice; one held that defense counsel's failure to request notice was unreasonable because there was no strategic basis for not requesting notice. Even though it was unreasonable, the appellant failed to show that he was so prejudiced that he was deprived of a fair trial.[7] Another court held that failure to request notice was not per se ineffective assistance of counsel.[8] The court rejected a per se rule because such a rule would allow the defendant to claim ineffective assistance as a matter of right and would give the defense attorney a veto over the prosecution's use of extraneous offense testimony.[9] The one court that did find ineffective assistance, the Waco Court of Appeals, was subsequently reversed.[10] It is permissible under art. 37.07 to withhold giving notice until a request is received. However, be aware that the circumstances of a particular case will dictate whether the defendant was prejudiced.

Improper disclosure of criminal records

Despite the fact that a defendant's history can haunt him when he re-offends, the law prohibits the improper use and dissemination of certain information. The Texas Government Code dictates that a person cannot knowingly or intentionally obtain criminal history record information in an unauthorized manner, use the information for an unauthorized purpose, or disclose the information to someone not entitled to it.

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A violation is a Class B misdemeanor or a second-degree felony if the disclosure was done for remuneration or the promise thereof.[11]

So, practically speaking, how does this law affect prosecutors? It means we must be cautious to whom and how we disseminate a defendant's criminal history. For example, a prosecutor is required to list in detail the prior convictions and extraneous offenses that she intends to prove in a written notice to the defense upon request. This notice is typically filed with the district clerk, which makes it a public record. Even though this practice is legally mandated, it is inadvisable to attach or include a copy of the defendant's NCIC record along with the notice. If so, a defense attorney could allege that the State committed an offense by giving the public access to not only his client's criminal record but also to personal identifying information. It would also be inadvisable to disclose this information to any other person without a specific criminal justice purpose. To improperly disseminate this information would not only violate state law but federal law as well. The FBI regulates NCIC information and permits disclosure only to authorized users, such as criminal justice agencies.

Orders of nondisclosure

Another aspect of a person's criminal history that can be used at punishment is what has been sealed by an order of nondisclosure. Nondisclosure means that a person's criminal record has been sealed under specifically prescribed circumstances (when a person is placed on deferred adjudication and later receives a discharge and dismissal of the offense) that prohibit a criminal justice agency from disseminating "criminal history record information."[12] A person whose criminal history has been sealed is not required to state in any application for employment, information, or licensing that he was the subject of a criminal proceeding;[13] indeed, the general public would have no way of discovering that the person had been placed on deferred adjudication.

While an order of nondisclosure may afford some protection from discovery by members of the public, it does not prevent the use of the information in a subsequent criminal proceeding. For those defendants who fail to learn a lesson the first time around, a prior deferred adjudication can be used against them when they re-offend. This raises another important question: How do we give notice of intent to offer the deferred adjudication without violating the nondisclosure order?

First, the Government Code provides a general exception as long as the criminal record is used for a "criminal justice purpose."[14] This provision should protect prosecutors who file notice with the clerk and serve it upon the defense. However, if you are still concerned about violating the nondisclosure order, you can file the notice with the clerk's office and have the notice or the entire file sealed. If you would rather avoid a claim that you violated the nondisclosure order altogether, you could put the notice on the record in open court during a pre-trial hearing. Doing so would accomplish the same thing without putting it in writing or on file with the clerk's office. The code says that orders of nondisclosure do not apply to court records of public judicial proceedings.[15]

Expunctions

Expunctions are another tool used to prevent the dissemination of criminal record information. A person can have his arrest record expunged in various circumstances, including when he is acquitted or pardoned, when an indictment is not presented, or if an indictment is later dismissed.[16] Its ultimate purpose is to allow a person a clean slate in the event of an unlawful arrest. When an expunction is granted, it places a duty upon law enforcement agencies to comply with the order by destroying all files, records, and indices arising from the arrest. Destruction may be accomplished by obliterating the file, returning the records to the court, or redacting any identifying information.[17]

Texas law makes it a Class B misdemeanor to violate an expunction order by knowingly releasing, disseminating, or otherwise using expunged records or files.[18] It is also an offense to knowingly fail to return or obliterate identifying portions of an expunged record or file.[19] The law places an affirmative duty upon the state agent who receives this information to either send it back or destroy it.

Conclusion

We prosecutors cherish those opportunities to confront the defendant with a criminal record so voluminous it requires its own file folder. In doing so, though, it is important to ensure that our verdicts are secure by

avoiding simple procedural errors. We must also be aware of the criminal and civil penalties for misusing criminal record information. It is crucial that we not become targets for accusations from defense attorneys and stay above reproach—all while exposing the defendant's criminal background for the jury to plainly see. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 37.07, §3(a)(1).

2 Tex. Code Crim. Proc. art. 37.07, §3(g).

3 See *Fairrow v. State*, 112 S.W.3d 288, 295 (Tex. App.—Dallas 2003, no pet.).

4 See *Jaubert v. State*, 74 S.W.3d 1 (Tex. Crim. App. 2002).

5 See *Hardaway v. State*, 939 S.W.2d 224 (Tex. App.—Amarillo 1997, no pet.).

6 See *Loredo v. State*, 157 S.W.3d 26, 29 (Tex. App.—Waco 2004, no pet.).

7 See *Loredo* at 30.

8 See *Rodriguez v. State*, 981 S.W.2d 357, 359 (Tex. App.—San Antonio 1998, no pet.).

9 *Id.*

10 See *Jaubert* at 4.

11 Tex. Govt. Code §411.085.

12 Tex. Gov't Code §411.081.

13 Tex. Gov't Code §411.081(g-2).

14 Tex. Gov't Code §411.081(d).

15 Tex. Gov't Code §411.081(a)(4).

16 Tex. Code Crim. Proc. art. 55.01.

17 Tex. Code Crim. Proc. art. 55.02 §5(a)(1).

18 Tex. Code Crim. Proc. art. 55.04 §1.

19 Tex. Code Crim. Proc. art. 55.04 §2.

To recuse or not to recuse?

A guide for prosecutors (in both fighting a defendant's motion and in filing our own motion) on this possibly touchy topic

One foundation of the American legal system is the idea that a person should be tried by a neutral court instead of a judge or jurors who have a personal interest in the outcome. For a jury, the entire voir dire process is intended to discover who might be biased in the case. But for a judge, there is no formal procedure. Judges simply have an ethical obligation to recuse themselves if they know of any reason to do so, and the parties may file a motion to recuse if they believe a judge should not hear the case.

By Andrea L. Westerfeld
Assistant Criminal District Attorney in Collin County

Prosecutors therefore have two potential roles when judicial recusal becomes an issue. We may have to argue against a recusal when a defendant is trying to force a judge to be removed, or we may need to file the recusal motion ourselves. This article is intended to give a general guide to prosecutors for handling motions to recuse from either side, including both the grounds when a recusal is necessary and the procedural aspects of a motion to recuse.

Disqualification v. recusal

There are actually two distinct ways of removing a judge from a case, disqualification and recusal. The terms are often used interchangeably, but they are very different. Grounds for disqualification are found in the Texas Constitution and the Rules of Civil Procedure.[1] (All recusals, including in criminal cases, are governed by Rule of Civil Procedure 18a.)[2] These grounds include where the judge has previously served as a lawyer on the case,[3] has a personal or financial interest in its outcome, or is related to any of the parties.[4] Disqualification is concerned with situations where the judge has a direct, personal connection to the case.

Most importantly, disqualification is absolute. A recusal may be waived by failing to file a timely motion,[5] but disqualification may be raised at any time because actions taken by a judge who is disqualified are *void*.[6] Disqualification may even be raised for the first time on a collateral attack or by the appellate court on its own motion.[7] Therefore, if you know of any reason why your judge is disqualified on a case, it is vital to raise the issue immediately so that a new judge may take over. Otherwise, all of your hard work may be useless.

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When is recusal necessary?

Recusal is an important matter and not something that should be taken lightly. Judges should not recuse themselves for no reason. Judges have a duty to sit and decide matters brought before them unless a valid basis exists for recusal.[8] There is as much obligation for a judge *not* to recuse himself where there is no valid reason as there is for him to do so where there *is* such a reason. And the parties have an incentive for not filing recusal motions on a whim as well: If the judge presiding at the recusal hearing determines that the recusal was brought "solely for delay and without sufficient cause," then the judge may assign sanctions.[9]

The reasons for recusal are governed by Rule of Civil Procedure 18b. Some of the reasons are very specific. A judge may not sit on a case where he has a financial interest in the case, whether in one of the parties to the case or in the "subject matter in controversy."[10] Judges have an obligation to stay informed of their various financial interests and that of their spouses and children so they know when they may run afoul of this rule.[11] The only exception is if the financial interest is in a mutual fund that owns securities—the judge's interest is only in the mutual fund itself, not each individual security owned.[12] If, however, the judge takes an active role in the management of the mutual fund, then the rule applies.[13] Similarly, if the judge holds an office in a charitable or civic organization, the judge does not have a financial interest in the securities held by the organization.[14]

A judge must also recuse himself if the judge, his former law partner, or his close relative has been or will likely be a material witness in the case.[15] In part, this is because the Rules of Evidence prohibit the judge of a proceeding from testifying as a witness, and thus not requiring the judge to recuse himself could deprive a party of a necessary witness.[16] But this requirement applies only when the judge is a *material* witness. Otherwise a party could force the recusal of a judge merely by threatening to call that judge as a witness.[17] Although "material witness" is not defined, the Court of Criminal Appeals has held that a witness was not material when he was not a witness to the offense, had no personal knowledge of the offense, and could not provide relevant evidence regarding the defendant's mental state or motive.[18] As a party may not disqualify opposing counsel by unnecessarily calling counsel as a witness, so too a party may not recuse a judge merely by claiming the judge *might* be a witness.[19]

A judge's actually having served as a lawyer on the case is a grounds for disqualification, not simply recusal.[20] But if the judge's spouse or close relative is a lawyer on the case, then the judge must recuse himself.[21] Also, if the judge "participated" in the case—even as an adviser or merely giving an opinion on the merits—as a government attorney, then he is also subject to recusal.[22]

Most contested recusals, however, fall under the two more general "catch-all" provisions. A judge must recuse himself in any proceeding in which his impartiality might reasonably be questioned, where he has a personal bias or prejudice against the subject matter or the parties, or where he has personal knowledge of any disputed facts.[23] But "bias or prejudice" does not simply mean any unfavorable disposition toward a party.[24] It refers to a disposition that is wrongful or inappropriate, either because it is based upon an improper source or is excessive. A recusal based on bias or prejudice must show "a deep-seated favoritism or antagonism that would make fair judgment impossible."[25] Bias may be a ground for disqualification "only when it is shown to be of such nature, and to such extent, as to deny the defendant due process of law."[26]

The test for deciding whether bias or prejudice has been proven is whether the movant showed facts to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge.[27] Keep in mind that this is a person knowing *all* the circumstances involved. As Justice Scalia recently reminded us, determining whether a judge's impartiality might be questioned should be based "in light of the facts as they existed, not as they were surmised or reported."[28] Media reports alone do not subject a judge to recusal. The reports must be supported with evidence. Facts, not speculations, establish grounds for recusal.

Generally, bias or prejudice must be from an extra-judicial source to warrant recusal.[29] If a judge hears evidence in a case and becomes convinced the defendant is a terrible person, that is not grounds for a recusal. Rather, it is a necessary part of trial to make judgments based on

the evidence. "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."[30] But if the judge's beliefs—although based on events occurring at trial—are so extreme that they make fair judgment impossible, the judge may still be subject to recusal.

For this reason, judicial rulings alone almost never constitute a valid basis for a bias or partiality claim because they will rarely show the kind of favoritism or antagonism required.[31] Expressions of "impatience, dissatisfaction, annoyance, and even anger" do not show the kind of bias that would subject a judge to recusal.[32] A judge's pretrial actions, including issuing a search warrant or ruling on a motion to suppress, also do not inherently show bias.[33] And the mere fact that a judge has previously tried a particular defendant does not establish bias or partiality.[34]

In short, a judge may be recused if only he has some actual interest—personal, familial, or financial—in the outcome of a case, or where he has shown himself to be so prejudiced against one of the parties or the case's subject matter that he cannot be trusted to rule fairly. The threshold is a high one, and it is meant to be. Judges are presumed to be impartial and are trusted to apply the law fairly to all sides. It is only when there is a genuine reason to question a judge's impartiality that he should be removed from a case.

Procedural guidelines

After deciding whether the judge in a particular case is subject to recusal, there are still important procedural requirements to consider. As mentioned before, all recusals, including in criminal cases, are governed by Rule of Civil Procedure 18a.[35] A party's failure to comply with the requirements of Rule 18a waives any right to complain about the judge's failure to recuse himself.[36] A motion to recuse must be verified, based on personal knowledge, and set out with particularity the grounds of disqualification.[37] It must be filed at least 10 days before the trial setting or "any hearing,"[38] meaning a substantive hearing of some kind rather than a merely ministerial act by the court.[39] If grounds for recusal arise less than 10 days before trial, then the motion must be filed at the "earliest practicable time" after the grounds for recusal become apparent.[40] If a motion is filed less than 10 days before the proceeding, then the party must explain in the motion how the grounds for recusal only just developed or risk its dismissal as untimely filed.

Once a timely motion has been filed, the judge is left with only two options: either recuse himself or refer the matter to another judge to decide.[41] There previously was a separate standard for criminal judges, allowing them to first decide whether the motion stated sufficient grounds for recusal.[42] However, the Court of Criminal Appeals determined that there was no reason for criminal judges to have a different standard than civil judges.[43] The only determination that the judge may make is whether the motion was timely filed because an untimely motion for recusal does not trigger the requirements of Rule 18a.[44]

If the judge declines to recuse himself, he must forward a copy of the motion to the district administrative judge.[45] The administrative judge must then hold a hearing personally or designate another judge to conduct it.[46] Generally the administrative judge will assign another judge in the same county to hear the recusal hearing, if one is available, but the decision is completely discretionary. The hearing is mandatory; the defendant's failure to object does not waive the right.[47]

If the order is granted, then the presiding judge appoints another judge to hear the case.[48] An order granting a motion to recuse may not be appealed.[49] An order denying the motion may be appealed but only after the final judgment.[50] There is no right to an interlocutory appeal.

Conclusion

Recusal is not a method of first resort. There are many requirements that must be met before a judge can be removed from a case, both from a procedural standpoint and on the merits. Prosecutors should zealously oppose any attempt to remove a judge that does not meet the standards of recusal. But they should be equally zealous in pursuing a recusal where there is a genuine question of the judge's impartiality, on either side. The justice system can only succeed where both sides can be confident of receiving a fair trial from an unbiased judge.

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Endnotes

1 Tex. Const. art. V, §11; Tex. R. Civ. P. 18b(1).

2 *Arnold v. State*, 853 S.W.2d 543, 544-45 (Tex. Crim. App. 1993).

3 This rule also applies if the judge's former law partner served as a lawyer on the case, but only if it was during the term that they practiced law together. If the former partner became involved only after he and the judge stopped practicing together, then the judge is not disqualified. He may, however, be subject to recusal if a reasonable person would question the judge's impartiality.

4 The relationship must be within the third degree of affinity or consanguinity. In other words, the judge must be related by blood or marriage. The Government Code provides an explanation for calculating degrees of relationship and sets out explicitly which relatives are related within the third degree. See Tex. Govt. Code §573.023.

5 *Barron v. State Atty. Gen.*, 108 S.W.3d 379, 382-83 (Tex. App.—Tyler 2003, no pet.).

6 *Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982).

7 *Lee v. State*, 555 S.W.2d 121, 124 (Tex. Crim. App. 1977).

8 *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., concurring), citing *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 823-24 (Tex. 1972).

9 Tex. R. Civ. P. 18a(h).

10 Tex. R. Civ. P. 18b(2)(e). This rule also applies where the judge's spouse or minor child still residing in the household has a financial interest rather than the judge personally.

11 Tex. R. Civ. P. 18b(3).

12 Tex. R. Civ. P. 18b(4)(d)(i).

13 *Id.*

14 Tex. R. Civ. P. 18b(4)(d)(ii).

15 Tex. R. Civ. P. 18b(c) & (f)(iii).

16 Tex. R. Evid. 605.

17 *Sommers v. Concepcion*, 20 S.W.3d 27, 42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

18 *Green v. State*, 676 S.W.2d 359, 363 (Tex. Crim. App. 1984).

19 See *Gonzalez v. State*, 117 S.W.3d 831, 838 (Tex. Crim. App. 2003) (holding party seeking disqualification may not invite prejudice by unnecessarily calling counsel as witness).

20 Tex. R. Civ. P. 18b(1)(a).

21 Tex. R. Civ. P. 18b(2)(g). Note that a "close relative" here is only one related to the judge or his spouse within the first degree, such as parent or child (or that person's spouse), rather than the third degree used in the rest of the rule.

22 Tex. R. Civ. P. 18b(2)(d).

23 Tex. R. Civ. P. 18b(2)(a) & (b).

24 *Liteky v. United States,* 510 U.S. 540, 550 (1994).

25 *Id.*

26 *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992).

27 *Id.*

28 *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 914 (2004) (memorandum of Scalia, J.).

29 *Liteky*, 510 U.S. at 551.

30 *Id.*

31 *Id.* at 555.

32 *Id.* at 555-56.

33 *Kemp*, 846 S.W.2d at 306.

34 *Id.*

35 *Arnold v. State*, 853 S.W.2d 543, 544-45 (Tex. Crim. App. 1993).

36 *Barron*, 108 S.W.3d at 382.

37 Tex. R. Civ. P. 18a(a).

38 *Id.*

39 *Sanchez v. State*, 926 S.W.2d 391, 395 (Tex. App.—El Paso 1996, pet. ref'd) (holding trial court signing order granting substitution of counsel was not a substantive hearing that triggered 10-day requirement).

40 Tex. R. Civ. P. 18a(e).

41 Tex. R. Civ. P. 18a(c).

42 *McClenan v. State*, 661 S.W.2d 108, 110 (Tex. Crim. App. 1983).

43 *DeLeon v. Aguilar,* 127 S.W.3d 1, 5 (Tex. Crim. App. 2004).

44 *Id.*; see also *Arnold*, 853 S.W.2d at 544-45.

45 Tex. R. Civ. P. 18a(d).

46 *Id.*

47 *Sanchez*, 926 S.W.2d at 394.

48 *Id.*

49 Tex. R. Civ. P. 18a(f).

50 *Id.*

Not just assistance for victims

Your friendly office victim services coordinator can also help prosecutors. Here's how it works in one office.

We victim assistance coordinators (VACs) often talk about how we help crime victims, but do we ever talk about how we help the prosecutors in our offices? VACs are a valuable resource for prosecutors; some prosecutors say they cannot imagine working victim cases without a VAC.

By Kathy Dixon
Victim Assistance Coordinator in the 33rd and 424th Judicial District Attorney's Office in Llano County

Our office's Victim Services division consists of just two of us, me and Susie Miller. We work with victims prior to indictment, so we know how the victims have reacted to the crime, the extent of their trauma (whether emotional or physical), and whatever financial loss they have experienced. This information is not on the offense report, but it is valuable to a prosecutor as he screens a case for grand jury.

Locating victims is also a valuable resource to prosecutors. Victims often move many times without notifying our office, and it would be time-consuming if a prosecutor had to track down victims from the address in the offense report. We use many resources, such as Regional Organized Crime Information Center, to locate victims. In the event a victim cannot be found, we can document it if court proceedings cannot be delayed, thus complying with a victim's right to be notified concerning proceedings.

In our office, victim services makes all the travel arrangements for victims as well as other witnesses who live out of the county and must travel to court for a jury trial. Our four-county jurisdiction is 60-plus miles from the nearest airport in Austin, so coordinating travel is no small feat. We obtain the witnesses' airline tickets, rental cars, and motel reservations and gather the receipts to submit the paperwork to the comptroller's office so witnesses and the county can get reimbursed. Prosecutors never have to worry that we cannot get a witness here for a jury trial. What a valuable resource when that witness could be the one that will make the case!

By the time a case is ready for jury trial, we have been working with the victims for a year or more. They have confidence in us and trust we will guide them through the judicial process. When we set up an appointment for the prosecutor to meet with the victim, it is a smooth transition. Even though our office has a division dedicated to victims, the DA's policy is that no one—no attorney, investigator, or other personnel—may refuse to talk to a victim; it is truly a team effort.

The prosecutor knows the office has established contact with the victim and that the victim knows what to expect from the system and is willing to cooperate in the judicial process. By this time, the victim, we hope, has undergone voluntary counseling and has received crime victims' compensation through the Attorney General's Office to pay for lost wages and mileage when they miss work to meet with the prosecutor. Our division initiates both the counseling and compensation processes.

If the State decides to offer a plea instead of going to trial, we explain the plea offer to the victim or, if the plea is too complicated, we are at least present when the ADA gives an explanation. Victims usually accept the plea because they trust that the DA's office knows how to handle their case; they understand from the beginning that the decision is ultimately up to the DA's office but that their input will be taken into consideration. They know that victim services will notify them if there is a violation of the terms and conditions of probation, and they understand that a guilty plea versus a jury trial could be a good thing for their case.

During the jury trial, we take care of the victim and their family, whether in the waiting room or courtroom, so that prosecutors can concentrate on the trial and know that the victim will be there to testify when the time comes. If the victim is upset after testifying, we are there to calm them down. When it is time for the verdict, we get everyone to the

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courtroom, prepare them for the verdict, and make them aware that it could go either way. If there is a guilty verdict, the prosecutor can meet with the family and receive the well-deserved praise and thanks. If there is an acquittal, the prosecutor and victim services can console. It is a team effort between victim services and the prosecutor to coordinate a jury trial and take care of everyone involved.

After the disposition of a case, the victim feels that justice has been served. Our mission statement is, "Treat all victims with dignity, compassion, and respect while providing services related to their needs and rights as an individual who is a victim of crime." We work with victims and prosecutors to see that this is done.

Our elected district attorney, Sam Oatman, believes his victim services division is one of the most valuable assets in his office. "Victims can be a good voice or a bad voice affecting your office, especially if you are elected and in a small jurisdiction," Oatman says, "but most importantly, victims deserve that special attention." ❇

Best practices in collaborative sexual assault prosecution

The Dallas DA's Office formed a sexual assault prosecution team three years ago, modeling it after similarly specialized family violence teams. Here's how it works.

By Bobbie Villareal
Chief of the Family Violence Division,
Erin Hendricks
Sexual Assault Prosecutor, and
Tania Loenneker
Family Violence Advocacy Program Manager, all in the Criminal District Attorney's Office in Dallas County

Successful prosecution of sexual assault crimes can be challenging. Due to lack of time and resources, the State's best efforts can still sometimes leave victims out of touch with the justice process, resulting in their embarrassment, stigma, and further victimization. In 2007, led by the efforts of Dallas County Criminal District Attorney Craig Watkins, a new Sexual Assault Prosecution Team was formed to meet these challenges head-on.

One particular case

On May 12, 2004, Valerie Brown was sexually assaulted by Michael Murphy (not their real names), her boyfriend and the father of her child. Valerie called the police, went to Parkland Hospital for a sexual assault examination, was interviewed by a Dallas Police Detective, and went to a local domestic violence agency for counseling. The criminal case was filed with the Dallas County District Attorney's Office and heard by a grand jury that summer, where it was no-billed.

Right after the assault, Valerie and the baby moved in with her mother. Not too long after that, Valerie's mother, her greatest source of emotional support, suddenly died. Broken and alone, Valerie returned to Murphy that same year, and his emotional abuse began again. In 2005, they had another child.

In 2007, Murphy's felony drug probation was revoked, and he was ordered to prison. Too soon thereafter, in the spring of 2008, Murphy was released on parole. In spite of her efforts years earlier to leave the relationship, Valerie returned to her abuser, and they conceived their

third child. She was five months pregnant by summer's end.

In the early morning hours of August 5, 2008, an angry and intoxicated Murphy came home to his sleeping family and woke up Valerie to argue with her over his months-long suspicions of infidelity while he was incarcerated. Valerie, ever desperate to appease her boyfriend, tried to convince him that he had no reason to suspect her of being unfaithful.

Murphy's rage turned physical. He beat and raped Valerie and threatened to kill her with a kitchen knife. When she called 911, Murphy immediately started manipulating her, suggesting that she would be sending him to prison for *her* infidelity. He tried to convince her to lie to the police, to say that there had been an intruder who was responsible for the blood all over her face. Within minutes, Dallas police responded, arrested Murphy, and arranged to take Valerie to the hospital for a rape exam. His parents came to collect the children who had been in the next room, behind closed doors, probably terrified by what they heard.

The story of how Valerie found safety, healing, and justice has almost everything to do with how the Dallas County Criminal District Attorney's Office handles sexual assault cases. Since 2007, the office has received state and federal grant funding to form the Sexual Assault Prosecution Team, the first of its kind in Texas. Its purpose, like that of the office's Family Violence Division, is to meet crime victims' unique needs while holding their abusers accountable.

The team is made up of one felony prosecutor, one felony level investigator, and a specialized victim advocate, all of whom handle sexual assault cases where the victim was 17 or older at the time of the offense, regardless of the victim's relationship with the defendant. This team is part of the Family Violence Division and can draw upon the support and resources of the larger specialized department. Due to the impact of trauma on victims of sexual assault and the complex issues that arise in the prosecution process, the team handles a smaller caseload that allows intensive contact between them and the victim, filing agencies, and outside support services. In 2009, the team was assigned more than 100 new sexual assault cases.

Erin Hendricks, a seasoned felony prosecutor in the Family Violence Division, slipped easily into the specialized position of sexual assault prosecutor with her knowledge and expertise in working with sexual assault victims and her relationships with key partners in the community. In her role as the sexual assault prosecutor, she meets with victims in person immediately after indictment, before trial, or for case resolution and debriefing. Few other areas of prosecution have this close contact with a victim, but this ongoing communication through every step of the process is crucial for responsible prosecution. In some cases, the prosecutor can reach out to victims before case filing or indictment to better acquaint them with the criminal justice process and better dialogue about realistic expectations for the criminal justice system. Because the team is a part of the Family Violence Division, it facilitates the effective use of safety tools, such as the close monitoring of protective order applications and hearings and bond issues both before indictment and while the criminal case is pending. A specialized prosecutor also inherits a greater responsibility of educating the jury pool on the dynamics of intimate partner violence, typical responses by victims of trauma, and demystifying stereotypes common in our society.

Juliana Martinez, the team's bilingual victim advocate, came with prior experience with both adult and child victims of family violence and sexual assault. Her role is to build a relationship of trust with the victim while assessing her needs. Not only is the victim advocate making sure that the voice of the victim is heard in the process, but she also eases the prosecutor's burden by addressing the victim's emotional and basic survival needs so that the prosecutor can focus on the legal aspects of the case.

Senior Sergeant Thad LaBarre is the seasoned felony investigator. Thad brought to the team years of experience in investigating crimes at a municipal police department in Dallas County. Thad, like any investigator assigned to a specialized sexual assault prosecution team, must have not only competence and exude authority but also possesses maturity, understanding, and compassion for victims of trauma.

Back to Valerie

Days after the rape and beating, Valerie was at the DA's office applying for a protective order. The PO staff brought in Erin and Juliana to ensure that the legal facts were presented as effectively as possible early

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in the process so they could keep Valerie and her children safe. At the PO hearing, a timid and still bruised Valerie testified that she needed the court's protection and feared that Murphy's violence would continue. The protective order was granted.

In September 2008, a Dallas County grand jury indicted Murphy for aggravated sexual assault with a deadly weapon. Already familiar with the facts of the case, Erin filed a motion to increase Murphy's bond, and he remained in jail under a $150,000 bond with a hold for Texas Department of Criminal Justice. Right away, he began writing letters to Valerie and the children.

Valerie started seeing a new counselor at the university where she was enrolled as a full-time nursing student, and she delivered their third child in December. Throughout the fall and into the new year, she came in to the DA's office for several interviews with Erin and Juliana to give the full history of her relationship with Murphy and to prepare for trial.

Once the case was set, Murphy's letters to Valerie took a new form. His mother (the same grandmother who'd come to collect the children the night of the assault) showed up at Valerie's door with a teddy bear dressed in a striped jailhouse T-shirt that said "Convicted of Love." Valerie then got letters from Murphy's aunt who begged her to "stop" the trial and asked how she wasn't already satisfied with the fact that Murphy had been locked up for so many months. Everyone in his family was holding Valerie responsible for that awful night of the assault and Murphy's time in jail.

Then the case took a turn that caused Valerie more pain and inconvenience: Murphy's attorney asked for a continuance to establish the paternity of the third baby. (Murphy was still convinced Valerie had been unfaithful while he was in prison.) Erin had Juliana join her in court when the defense attorney asked for the continuance. After hearing both prosecutor and defense counsel's arguments, the judge asked Juliana for her opinion. She told the judge that Valerie was ready for her voice to be heard and asked the judge to expedite the court process. The judge set the trial date 60 days out.

The DA's office immediately looked for outside civil legal assistance for Valerie in the paternity action. Valerie found herself conflicted out for representation at the local legal aid office because Murphy and his mother had sought assistance from them in the past. The DA's office was able to connect Valerie with a legal services provider that reviewed legal documents and prepared pleadings on her behalf for the remainder of the family court case but was unable to provide representation on short notice at the paternity hearing. In the meantime, Juliana accompanied Valerie to this upcoming appearance in family court. Valerie found great comfort and support in having an experienced advocate by her side in the courtroom, especially because Murphy's family was represented by counsel.

Just in time for the second trial setting in June 2009, tests confirmed that the youngest baby was Murphy's, which not only emphasized the depth of his obsession with whether Valerie had strayed while he was in prison, but it also validated that Valerie had been telling the truth about her fidelity.

Because Valerie relived the trauma and fear every time she had to talk about her sexual assault, Juliana provided ongoing information and support so she could be emotionally strong enough to testify. They discussed at length what to expect in court. As the trial approached, Juliana recommended that Valerie make a special appointment with her counselor to prepare her for the emotional aspect of trial. During that time, Juliana also coordinated with the DA's crime victim liaison in completing the relocation paperwork, ultimately helping her receive compensation for medical expenses and counseling.

The case went to trial in June 2009. Erin called on experienced family violence prosecutor Leah Ballard Thomson to pick the jury. Leah educated the venire about family violence dynamics and addressed issues of prior consensual sex and juror expectations for rape victim testimony.

In trial, Valerie was amazing: strong, resolute, and this time unafraid to face her abuser in court. She was surrounded by friends and Juliana, and the presence of investigator Thad gave her an added sense of support and protection. Thad's cooperation, communication, and relationship-building brought together witnesses and agencies and made the case preparation and presentation flow smoothly.

In addition to Valerie's testimony, the State presented the responding officers, a doctor from Parkland, a forensic biologist, and the investigating detective. The State admitted

into evidence the 911 tape, photos, the knife, medical and lab reports, and eventually written statements to rebut the defense's theory, which was to discredit Valerie. The defense focused on Murphy's claims of her infidelity and tried to expose inconsistencies in the case. The defense tried to minimize his criminal culpability by denying non-consensual sex and blaming Valerie for violence. Murphy was convicted of aggravated sexual assault with a deadly weapon.

At punishment, the State presented the history of abuse through testimony from Valerie's prior and current counselors, the doctor from Parkland from 2004, and a former probation officer who addressed Murphy's utter lack of respect for authority. Murphy's mother (who had testified for her son at the grand jury in 2004) testified on his behalf, and Murphy testified. He admitted at the punishment phase that he called Valerie a "dirty whore." He went on to testify that he "never said [he] didn't slap her [and] punch her." He admitted he was wrong, and he apologized for his "sins," but he maintained that it wasn't sexual assault.

Murphy was sentenced to 30 years in prison and the jury assessed a $10,000 fine. The jurors said they were proud of Valerie's courage to testify and pleased to see she had moved on with her life. Valerie graduated with her degree in nursing and works as a school nurse. She lives with her three children in Dallas.

Conclusion

The Sexual Assault Prosecution Team works closely with other agencies toward a coordinated community response to sexual assault. The sexual assault prosecutor, investigator, and advocate have close relationships with local law enforcement agencies that allow for better case investigations and filings, as well as more thoughtful, uninterrupted victim services. These relationships also allow for opportunities to educate law enforcement and provide guidance on the documentation and evidence collection during investigation.

In addition, the team collaborates with the community to achieve a more comprehensive response to victims' needs. The team has been actively involved in the Dallas County Sexual Assault Coalition (DCSAC) from its inception. DCSAC is a coalition of area service providers, medical professionals, law enforcement, and other allied groups that recognize the ongoing and critical need to examine the community's response to sexual assault survivors. Looking into the future, the team aims for effective prosecution in each of its hundred cases, and the hundreds to come, while providing quality services to every victim. Achieving best practices in the collaborative prosecution of sexual assault offenses, the Sexual Assault Prosecution Team hopes to be integrated into the county budget. In the process, the team strives for continued opportunities to develop innovative strategies that improve the response to the sexual assault victims of Dallas County. ❇

A murder too close to home

The path of one Texas prosecutor crossed with a career criminal twice—and the second time, she put him in prison for life.

As prosecutors we've all had cases that touch our lives, that hit too close to home. *The State of Texas v. Charles Eden* was mine. Eden's trail of mayhem and destruction that would eventually lead to my Dallas courtroom began across the road from my childhood home in Oklahoma when I was 7 years old. That's where he shot our neighbor, Terry Ingmire, in the small town of Enid. Little did I know then that my path would cross with Charles Eden's almost 30 years later.

By Rachael Jones
Assistant Criminal District Attorney in Dallas County, pictured with
Robert McClure
Assistant Criminal District Attorney in Dallas County

Small town, small world

One typically sultry Dallas July afternoon in 2008, I was called upstairs by our Homicide Intake Prosecutor, Andrea Handley, to review a new murder case coming to my court. As I skimmed the file to familiarize myself, I noticed the defendant, Charles Eden, had been convicted of shooting with intent to kill in 1983 out of Garfield County, Oklahoma. What a coincidence! The Garfield County seat is my hometown of Enid.

Enid is small town America. It has a population of about 40,000 and is truly a community where most folks know—or know of—each other. It is timeless; a place where several of my high school friends have returned from the big city to raise their children in a small town with the values and lifestyle we grew up with. It is a town where people hand out flags on street corners on the Fourth of July. It is farm country where one can see for miles, through "amber waves of grain," to sunsets over family farms passed down for generations. It is a place I loved growing up; my mom was an avid volunteer and homemaker and my dad was a lawyer. In Enid, men take off their hats when introduced to a lady or when sitting down at the local lunch counter. It's a town where cars still pull over to the side of a highway when a funeral procession moves toward the cemetery. In Enid, any shooting is big news.

As I sat there, I thought how strange it was that this man, now a defendant in my court, had been convicted in my hometown, where I graduated from high school, where my dad has practiced criminal law for 40 years. Before going any further, I needed to make sure my dad hadn't represented Eden, which could pose a potential conflict of interest for me. The judgment did not reflect my dad's name, but to be sure, I made a phone call home. I should have sensed this case would get even more interesting when he answered my question with, "No, I didn't represent him, but that name sure sounds familiar. I just can't place it."

With that inquiry out of the way, I started building my case. I sent an e-mail to the elected district attorney of Garfield County, Cathy Stocker, requesting her case file. The e-mail subject line read, "Your former defendant is now my defendant." How's this for a small world? It turns out that Cathy's first job as a lawyer was working for my dad in 1975, the year I was born. She later became an assistant district attorney and then the elected DA for Garfield County in 1983, a position she still holds today. When I was growing up, she was jokingly known as "the enemy" because my dad was often opposite her, and I enjoyed watching them spar in the courtroom over the years. She used to needle my dad and teach me to say the word "pro-se-cutor" when other children were learning the names of dinosaurs. Cathy was the first prosecutor I ever knew and often the one I think of as I do my job.

Cathy is very organized, and she did not disappoint in this case. In response to my inquiry about Eden, Cathy sent me the DA file for his 1982 offense, and it arrived the following week. In it, the victim's name was handwritten on a series of intra-office notes regarding my request

identifying the file as "the Terry Ingmire case." Of course this raised my curiosity, so I did what any red-blooded American would do: I Googled Terry Ingmire. Turns out, he had gone on to become a member of the Oklahoma House of Representatives.

This information warranted another phone call to Dad. I told him who Eden's victim was, and my father started recounting the details of the offense. I interrupted him midway through the story: "Are you telling me this is the shooting that occurred across the street from our house? The reason you and Mom always warned us never to open the door to strangers?" He replied that it was. This defendant, Charles Eden, had been convicted of shooting Terry Ingmire across the highway from my childhood home. He was sent to the penitentiary in Oklahoma and eventually paroled, and later came to Dallas and murdered a man named Willis Green. Out of 230 prosecutors in Dallas County, his case was randomly assigned to me.

The Enid shooting

In 1982, Terry Ingmire was a recent college graduate, a former college baseball player, and the manager of an Enid sporting goods store. He lived in the bunk house on the grounds of the Martin Garber farm north of town. Mr. Garber, former Oklahoma Highway Commissioner, was a prominent man in the community—his father had been a congressman—and he owned half the local newspaper. Terry's brother, a Ponca City, Oklahoma, police officer, had given Terry a .357 pistol as a college graduation present. Terry enjoyed target shooting on the spacious grounds of the Garber farm. His brother insisted Terry had to practice turning and shooting from the hip because all too often, when one has to use a gun in self-defense, there isn't time to get into position to point, aim, and shoot. Terry did as his big brother instructed, practicing several times a week. Little did Terry know, his brother's advice would one day save his life.

On August 16, 1982, Terry was awakened by a knock at his front door just before dawn. He wondered who it was, since Mr. Garber had recently died, leaving the big home on the farm uninhabited. The family had left after the funeral the previous day. Terry picked up his pistol and walked to the door, holding the gun at the small of his back, just in case of trouble. (In small towns like this it would not be unreasonable to answer your door with a weapon in hand or close by, especially if your home is outside of town and not visible from the highway, like Terry's was.)

At the door were Charles Eden and Coyalita Humphrey, claiming to have car trouble. They asked to use the telephone. He allowed them in, all the while keeping the pistol hidden behind his back. Eden talked to Terry while Humphrey used the phone. In retrospect, he was sizing Terry up. After a few minutes, she hung up saying she was unsuccessful reaching anyone. They said they would just wait on their friends, who were hopefully not far behind. As they left, Terry, being the nice guy, said, "Well if your friends don't come soon, let me know and we can handle it when the sun rises." Little did Terry know that the pair was planning on breaking into Mr. Garber's home and stealing whatever they could put in a U-Haul trailer they had parked out of sight.

Terry shut the door behind them and returned the 10 steps to his bedroom to go back to sleep. Just as he laid the gun next to his bed, Terry heard another knock at the door. This time, he didn't look out the door as he did before, and he didn't pick up his gun from the bedside table. After all, only a few seconds had passed, and he was sure it was the two people who had just left. As he opened the door, he was greeted by a shotgun blast to his stomach. Humphrey fired the shotgun while Eden stood off to the side holding the screen door for her—pretty smart plan, because if one were to look out the peephole, one would be more likely to open the door to a woman.

Terry managed to slam the door shut and ran for his bedroom. As he was running, he felt another shotgun blast to his left arm, almost separating his hand from his body at the wrist. He knew they were close behind him. He reached for his gun and, in one motion, swung around and fired from his hip, hitting Humphrey, just as his brother taught him. Humphrey, having been shot in the lower abdomen, fell to the floor and crawled out the door. Terry lay on his bed, critically wounded, waiting with gun in hand until he was sure they were gone. After a few minutes, he heard the sound of a car leaving the driveway. Holding his large intestines with one hand, with his other hand barely hanging on by a couple of tendons, he crawled to

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the phone and called for help. Terry was taken to St. Mary's Hospital, and in the emergency room he described what happened to him, including that he'd managed to shoot one of the robbers. Incredibly, a nurse who overheard realized that Humphrey was being treated in the very next room—Eden had thrown her out of the truck at the hospital door and left.

Terry survived with the pellets from the first shot only perforating his liver (the one damaged organ that would grow back), and skilled physicians managed to save his hand. He believes he owes his life to his brother's shooting advice.

The assailants were prosecuted by Cathy Stocker's office. Humphrey was sentenced to 35 years in prison, and Eden pled to a 13-year sentence.

When Terry was shot, I lay in my bed across that old Oklahoma highway, a 7-year-old little girl. While I have no memory of the event, I do remember Mom and Dad's cardinal rule: "Never open the door to strangers, even if you've seen them out front and they seemed nice and return to the house later. Remember what happened to that guy across the road."

Charles Eden went on to become a career criminal. He made parole in about four years and was soon convicted of, among other things, assault with a dangerous substance with intent to kill and forgery. He spent the majority of the next 25 years in and out of prison until one day, in May 2008, he used a hammer to beat 67-year-old Willis Green, cracking his skull, praying blood on the walls of a dismal, weekly-rental motel room in the Dallas suburb of Grand Prairie—all so he could steal Mr. Green's Social Security check to buy more crack. Charles Eden's path would once again cross mine.

The trial team of DA Investigator Edith Santos, DA Investigator Eddie Salazar, assistant criminal DA Rachael Jones, assistant criminal DA Robert "Mac" McClure, and Dallas Police Lead Homicide Detective John Davison

The Dallas police quickly arrested Eden and filed the case with our office. It became what I refer to as "my calling." After all, how often does a prosecutor get to travel back to her hometown, out of state, to build a punishment case? I jumped right in with both feet and soon received the Garfield County offense reports. They were extensive, with no detail left untold. As police departments used to do, every officer who did something on the case had written a report. As I prepared for trial, it was very helpful to know the exact role each witness played in the 26-year-old case. DA Investigator Edith Santos and I traveled to Oklahoma to interview witnesses. We met with Rick West, one of the responding officers who is now chief of police and married to DA Cathy Stocker; he remembered the case well. Rick had just recently run into another witness when he was on the way to his deer lease—and who was more than happy to talk with us. Only in a small town!

We continued digging for punishment evidence, always finding something more. DA Investigator Eddie Salazar and I had heard that Eden had an ex-wife, Jane (not her real name), whom he conned out of a bunch of money and left for dead. One cold winter morning, we again made a trip to Oklahoma to talk with her. We learned that Eden targeted Jane after discovering that she was coming into approximately $300,000 (her share of her husband's retirement from a divorce settlement).

One thing Eden perfected in prison was how to con people. In the span of 90 days, Eden had introduced Jane to crack, had gotten her addicted, convinced her to marry him, and persuaded her to put that money into a joint bank account. As the bank officer and the woman's sons watched helplessly, Eden spent the last of the money on his new truck, a mobile home, and crack,

and left his new wife psychologically damaged and physically wasted on the side of a road in Dallas. Her money was gone and so was Eden, the man who had professed to love her.

Set for trial

By the time Judge Don Adams called the case to trial, we were ready. Eden thought about trying to disqualify me from the case given my personal connection, but I was prepared for his motion, having considered it myself early on and discussed it with our First Assistant Terri Moore. There was really no reason for my recusal because I didn't know the victim personally, was not a witness, and had no memory of the case; furthermore, in small towns prosecutors often know a lot about an offense or even know people involved because of the size of the community. At the last minute Eden decided not to pursue the issue.

With other prosecutors in my court on medical leave, my dear husband, Assistant Criminal District Attorney Robert "Mac" McClure, stepped in as my trial partner. I have to admit, it was rewarding to have Mac by my side while trying a man who started his criminal career across the highway from my childhood home. We put on the case in chief, and the jury quickly found him guilty. It was time for the Oklahomans to enter the courtroom.

On the first day of punishment evidence, we called Jane to testify first, then her sons, and finally the bank officer who oversaw the cash withdrawals but was unable to stop it. She described how Eden belittled Jane and that he was impatient while she processed the transactions—she could never give him the cash fast enough. She described how she had a feeling that Eden intended all along to leave the marriage as soon as all the money was gone. When she testified about Eden going through almost $300,000 in less than 30 days, several members of the jury let out audible gasps and dropped their heads in despair.

On day two, we called Garfield County DA Cathy Stocker to testify about Eden's prior convictions. She also explained some quirks and differences in the Oklahoma penitentiary packets. Our second witness was Rick West, the original responding officer. He described in complete detail what he found that day, setting the stage for the motive of the shooting with his discovery of the U-Haul tire tracks. Our final witness was Representative Terry Ingmire, the shooting victim from so long ago. He talked about his injuries and showed the jury some of his scars. He also described the preliminary hearing in Oklahoma in 1982. (In Oklahoma all defendants are entitled to a probable case hearing which requires the victim to testify.) Terry recounted how Eden sat and laughed at him as he testified about the events of that August morning. Terry's scars and description took the jurors back in time to that August morning in my hometown. So many people whose involvement with Eden spanned decades had been located, and though some were not willing to relive the trauma again by testifying, all were glad to close the Eden chapter of their lives.

The jury took less than an hour to deliver a life sentence. Eden had finally been stopped in Dallas, 27 years after shooting his first victim that August morning across from my childhood home. I often think about how much we all worked on that case: the travelling, driving, digging, interviewing, it seemed as though it would never end. Many nights I knew we would get only a few hours sleep only to start all over again the next day. Several people questioned whether we really needed all that "extra" evidence. To which my answer was always, "we have to try because you never know what one fact will make a difference for each individual juror. At the end of the day we have to say we did our best." In that moment when Judge Adams read the verdict "Life," you know all your efforts were worth it, and you know you will do it again.

Rick West recently retired as chief of police. The last time he testified was in our Dallas County courtroom—ironically, beginning and ending his distinguished career discussing this same case. Cathy Stocker is retiring in December after serving as district attorney for 28 years. Terry Ingmire retired from the Oklahoma Legislature, serving a full, term-limited 12 years. He is now a successful lobbyist and was recently able to return the life-saving favor to his brother by giving him a kidney. As for me, once a little girl across that Oklahoma highway, I continue to go on not opening doors to strangers and prosecuting criminals like Charles Eden. ❇

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