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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

Two trials, an unforgettable victim, and finally, justice

The first trial ended in a hung jury, and the second resulted in a guilty verdict against a man for sexually assaulting a mentally retarded woman. How Tarrant County prosecutors secured justice for this vulnerable victim.

A few years ago, Ronald Coleman worked for a private company that contracted to provide rides for MITS, the Mobility Impaired Transportation Service, of Fort Worth. MITS is associated with "The T," Fort Worth's public bus system, and provides public transportation for those with physical and mental disabilities.

By Heather J. Davenport
Assistant Criminal District Attorney, pictured with Bill Vassar (left), Assistant Criminal District Attorney, and Don Pilcher (center), Investigator, all in Tarrant County

Diane Taylor (not her real name) was a 27-year-old mentally retarded woman new to Coleman's route. She had not ridden on MITS very often, and she took her second ride with Coleman on August 26, 2009. Coleman picked up Diane and two others from a Fort Worth day habilitation workshop, and along the route, dropped off and picked up various other disabled passengers. At one passenger's house, during a 12-minute delay, Coleman got in the backseat with Diane and sexually assaulted her. Coleman dropped her off two stops later, where Diane's mother, Audrey, was waiting for her daughter.

Audrey could immediately tell something was wrong with Diane, as she was hunched over and looked upset. When she got inside, she threw a water bottle and said she "hated" herself. A few hours later, Diane refused to take a bath and told her mother, "He hurt me." Audrey took Diane to the emergency room, where Diane reported that the driver of her transport had touched her vagina with his fingers. An external physical exam was done, no injuries were noted, and hospital staff called the Fort Worth Police Department (FWPD).

A little bit about Diane

At first glance, Diane's disability is not obvious. She is average height, thin, pretty, and cheerful. When you interact with her, however, she is difficult to understand, due to her mental retardation and also a very thick speech impediment. Estimates of Diane's "mental age" varied, anywhere from a 4-year old to a 13-year old. Diane can tell you her month and date of birth, but not the year.

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She can say how old she is, but not how old she'll be next year or how old she was last year. She knows those with whom she lives (people and animals) but not her address. She can write her name but not many other words or sentences; she cannot read, do math, make change, or work. She can bathe herself but needs to be encouraged, and she cannot drive, cook, or live independently. Diane's concept of time is particularly poor. She loves to write on paper, and during witness meetings appeared to be taking notes, writing various letters of the alphabet covering the entire page. (We used one of her notes as a trial exhibit to establish the disability element.)

Conducting interviews

The case was assigned to FWPD sex crimes Detective Kerry Adcock, a 29-year police officer who works homicides and cold cases. Det. Adcock, a soft-spoken, compassionate man, interviewed Diane two days after the offense. Diane told him that the driver touched her and it hurt. After some time, Det. Adcock brought Audrey into the room to translate one word he could not understand. It sounded like Diane was saying that the defendant touched her "bud," which Det. Adcock thought might mean butt. With Audrey's assistance Det. Adcock learned Diane was saying "blood." Audrey explained that Diane was menstruating at the time of the assault, and Diane told Det. Adcock that Coleman touched her blood and then licked his fingers. When Audrey heard this, she left the room, emotional over the additional detail she had just learned.

Audrey returned a few minutes later, and Det. Adcock showed Diane a six-pack photo lineup, and allowed Audrey to read the instructions so that Diane understood. The audio recording of Diane's interview and the lineup became our best piece of evidence. Diane looked at the lineup and immediately exclaimed, "That's him!" and "I'm scared!" and started wailing. Audrey began to cry as well, told Diane she was proud of her, and that he would not hurt her anymore. Diane was able to circle Coleman's photo, and Audrey initialed the photo for her. The audio recording of Diane's emotional reaction is heart-wrenching.

A few days later, the defendant gave a voluntary, non-custodial interview to Det. Adcock. The defendant denied sexually assaulting Diane but gave some detailed information about the driving route that Diane could not explain due to her disability. The defendant said he picked up Diane and two young men at their workplace; Diane got in the front seat and the men in the backseat. Coleman claimed that Diane asked him about his marital status, and he told her he was married. At a stop along the way, for some reason, Diane got in the back seat. Once in the back seat, Diane played with and dropped some change she had in a change purse. During the 12-minute delay during a drop-off at a passenger's house, Coleman went to the back seat to help Diane look for her change. They never found the dime that she dropped, but Coleman said he gave her a coin to replace it.

Det. Adcock told the defendant that a woman had made a sexual assault report, but according to established protocol, he had not identified the woman by her name or pseudonym. The defendant, however, immediately knew the complainant was Diane. This became a critical piece of evidence for guilt. The defendant gave rides to at least 11 disabled female passengers on the day of the offense. How would he have known which woman made the accusation if nothing had happened? (As an odd side note, during the interview, the defendant compared himself to Michael Jackson, as being similarly falsely accused.)

The defendant also spoke to police twice more, for polygraphs (of which the jury never learned). The first was inconclusive, and the second indicated deception. After Coleman failed the polygraph, Det. Adcock got an arrest warrant and gave it to the Fugitive Unit to serve. Coleman could not be located, however, as his cell phone was off and he had moved away from his apartment. He was subsequently featured in late 2009 on Tarrant County's Most Wanted List in the *Fort Worth Star-Telegram* newspaper and on the local news with no luck. Coleman was finally stopped on a minor traffic violation and arrested on the warrant in March 2011, over a year and a half after the offense.

Preparing for trial

I reviewed the reports and listened to all the audio recordings, and then met with Diane and Audrey. Diane radiates happiness. She is a cheerful young woman, polite, talkative, and happy, and she loves to dress up. She smiles a lot and is typically in a good mood. She and Audrey have a very

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close relationship, and it is obvious Audrey cares for Diane very well. My impression of mother and daughter was that they are kind, good people in a difficult situation. At our second witness meeting at their apartment, they had Diane's clothes for court already laid out and ready to go. Three years after the offense, and despite her disability, Diane remembered what happened and was emotionally ready to go to court.

By the time of trial, the defendant was facing a three-count indictment: 1) aggravated sexual assault of a disabled individual; 2) sexual assault; and 3) injury to a disabled individual (first-, second-, and third-degree felonies, respectively). We initially included Count Two in case the jury did not think Diane met the legal definition of disabled, but we ended up waiving that count as the evidence of disability was overwhelming. We included Count Three in case the jury did not believe penetration had occurred but believed she had felt pain, or in case jurors wanted to convict him of something lesser. Diane was consistent that the defendant touched her and that it caused pain, and we felt he was guilty of both.

My trial partner, Bill Vassar, and I tried this case twice, the first resulting in a hung jury, and the second resulting in a conviction on both counts. We met with Diane and Audrey three times before each trial, meeting them casually the first time to get to know them (and vice versa) and discussing facts with each witness, separately, at the second and third meetings. In preparation for Diane's testimony, we treated her similarly to a child witness. We made sure she understood the difference between a truth and a lie. She said telling the truth was good and promised she would do that. We went through the offense, and she was always consistent. I recognized that direct examination would be limited by her disability, as she is incapable of giving answers longer than a few words. I tried not to ask leading questions but rather those that gave her options to choose from, such as, "Were you in the front seat or the back seat?" During trial, I also showed her different body parts and had her name them (head, eyes, nose, mouth, hand, elbow, knee, foot), and asked which part of his body touched her. We used two different visuals (a finger penetrating both a closed fist and then the opening of a Kleenex box) to demonstrate penetration, which she consistently affirmed.

The first trial

The first trial occurred in November 2012. Throughout voir dire and opening statement, I prepared the jury to hear from our victim. In jury selection, I asked potential jurors about people they knew with mental disabilities and what it might be like for a person with a mental disability to have to testify. In opening, I became much more specific and told them all about Diane. I told them about her disability and her speech impediment, and I asked them to listen very closely to her testimony and to be patient.

We called Audrey first and Diane second. One defense position in both trials was that Diane was not competent to testify. The judge asked Diane several simple questions, which she answered appropriately, and asked her what it meant to tell the truth. Diane replied, "The truth will set you free," and the judge was convinced. I also remember a highlight of the trial being when the judge sneezed, and Diane told him, "Bless you." Diane did well on direct but failed to identify the defendant in the courtroom. She testified it was her driver, and she knew his name, so identity was not an issue, but I was surprised she did not see him in the courtroom. I have no explanation for why—he looked the same from what I could tell, but it had been three years since Diane had seen him. She may not have looked closely out of nervousness or fear, but she did look in his direction and said she didn't see him.

Diane did worse on cross. She got very quiet initially, having never met the defense attorney before, but then relaxed and was able to answer some questions. The defense attorney, David Richards, set up five chairs in front of the bench to represent the five seats in the car, sat himself in the driver's seat, pantomimed steering a steering wheel, and asked who he would be? Diane did not recognize that he would be the driver, and it seemed that she could not understand the symbolism of the chairs in the courtroom. Diane was able to answer some of his questions, but not all. At one point, Diane asked Mr. Richards a question herself: Why did he walk with a limp? That spontaneous moment showed her as she is, child-like and simple.

We had several other witnesses, including Diane's Tarrant County MHMR service coordinator, who testified to the disability element and

that she has never seen Diane in a bad mood; the ER doctor who examined her; the patrol officer who made the report; Det. Adcock; the fugitive officer who tried to find the defendant; our investigator Don Pilcher, who was instrumental in our trial preparation; and the patrol officer who ultimately arrested Coleman. We also called the MITS contractor liaison who testified as to the route Coleman drove that day, the 12-minute delay at the one house, and that per their GPS records, it did not look like he had strayed from the route.

I had prepared a short clip of Diane's audio interview with Det. Adcock—her emotional reaction to the six-pack photo lineup that I wanted the jury to hear—and offered it as an excited utterance. The defense requested that the entire interview be admitted. I felt confident that Diane's interview helped us, and I immediately agreed. I think the defense wanted it in to establish that Audrey got very upset at one point during the interview, to argue that that could have affected Diane.

The first trial in November 2012 ended in a hung jury, with eight jurors for guilt and four for not guilty. Among the not-guilty votes was a male Dallas police detective. In voir dire, that juror did not seem the strongest juror regarding a child witness, but I figured the defense would surely strike him, and, if not, he ultimately would be good for us, being a police officer. I was very wrong. Can you imagine being a non-law-enforcement juror in the room with a seasoned detective who is voting not guilty? I don't know why he voted the way he did, but I imagine he got a few jurors to go with him. I am proud of our other eight citizens who stood up and refused to change their vote. I learned my lesson never to pre-judge any juror based on occupation, even those in law enforcement.

Prior to the first trial we had offered the defendant an eight-year prison sentence on aggravated sexual assault. Coleman had previously completed a deferred adjudication probation for auto theft and had been arrested for driving while license suspended, but he otherwise had a clean record. Importantly, though, he had been investigated one year prior to meeting Diane (in August 2008) for fondling another young disabled woman who also rode with him. That woman, who has Down's Syndrome, made an outcry to her mother and then recanted. The case was investigated internally, but due to that victim's recantation and Coleman's denial, he was not fired, and no one called the police. That woman's mother allowed me to speak to her daughter, and it was my impression, as well as the mother's, that her daughter was in love with the defendant. That woman denied that the defendant had touched her, but she also readily admitted that she liked him and would cover for him to get him out of trouble. That woman's mother remained convinced that the defendant had touched her daughter.

After the mistrial, we offered Coleman a deferred adjudication to aggravated sexual assault. He declined, asking to plead guilty to a non-registerable, state jail felony deferred. Diane and Audrey steadfastly wanted to go forward with another trial and so did we, so we proceeded.

The second trial

In April 2013, we tried Coleman again. I felt that, in theory, a retrial could only help us because Diane was comfortable with us and the courtroom, and she was consistent—but I was very nervous. Diane did better on direct than in the first trial, and even identified the defendant in the courtroom. We actually had never discussed her failure to identify him in the last trial with Audrey or with Diane; in fact, I thought it was probably easier on Diane that she had not seen him. At the second trial, however, Diane walked into the courtroom and there was a 10-minute delay as the jury passed around and read an exhibit admitted with the previous witness, the MHMR service coordinator. Perhaps Diane felt more comfortable, or maybe it was those awkward 10 minutes of silence as she sat in the witness chair, but she identified the defendant enthusiastically, pointing at him, and exclaiming, "There he is!" and "He's the devil!" The rest of her direct exam went very well.

Cross examination, however, was worse than the first trial. The same defense attorney, David Richards, repeated his seats-of-the-car demonstration and had Diane step down and sit in different chairs to represent where she was at various points during the ride. I am not sure if she understood what she was doing at all. She also for the first time mentioned that another young man was in the car that day, which was clearly not true according to the driving record and all the other evi-

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dence. Ultimately, Diane became extremely agreeable, answering "yes" to every question that was asked. I realized she was just saying "yes" and did not fully understand the complex questions Mr. Richards was asking her.

Knowing the defense had previously wanted the whole interview into evidence, we offered the entirety of Diane's interview with Det. Adcock, including that upsetting reaction to the lineup, and it was admitted again. In the first trial, we had emphasized Coleman's apparent flight as evidence of guilt. However, the defense had countered that the FWPD Fugitive Unit did not avail itself of every possible resource. Defense had called Coleman's wife in the first trial, who claimed the defendant did not abscond and that his cell phone was cancelled for financial reasons. She worked for Fort Worth Independent School District and stated that the police department had never once contacted her looking for him. In the second trial, we made less of an issue of the flight and did not call the fugitive officer, although we did ask Det. Adcock about the Tarrant County Most Wanted List. The defendant's wife testified again and again denied that they absconded, but this time admitted that a church friend had alerted them that the defendant was on the Most Wanted List.

The MITS contractor liaison testified for us again and in a little more detail than the first time. She brought up several interesting points. For one, I specifically asked her about all the other women he drove that day (in the first trial, I had mentioned that only in closing). Secondly, the witness said that Diane's moving from the front seat to the back seat was a major safety violation, which the defendant had been trained on and reminded about previously. She said that Coleman should have stopped the trip and reported it at once, but he did not. Third, she pointed out with the driving record, that the defendant had altered the original schedule just slightly, a change that resulted in him having a few more minutes with Diane in the car. We had, frankly, failed to realize these second and third points before the first trial, but they came out on our second witness meeting with the MITS liaison.

Unlike the first trial, Coleman testified in the second trial, I think because he realized he had to explain how he knew which of the 11 female passengers made the allegation. He claimed that Det. Adcock had tangentially revealed Diane's identity in an un-recorded pre-interview, before turning the recorder on. During the audio of the defendant's statement, however, he immediately jumped to Diane as the complainant but says several times, "I don't know what's being said," which conflicted with his trial testimony that Det. Adcock told him details before the recorder was turned on.

The defense

The defense arguments were: 1) Audrey had somehow coached Diane to make the allegations up; 2) Audrey had become upset when she learned details at the hospital and at the detective's office, and Diane persisted in the allegations to avoid upsetting her mother further; and 3) Diane's word, confused as it was, was not enough to convict him without DNA evidence. I had voir dire'ed the jury on the "'CSI' effect," and that there may well not be DNA. The victim had gone to an ER that did not do sexual assault exams, and the defense argued that she should have been taken to a second hospital for a second exam. We were able to elicit through the doctor that digital penetration would not always cause injuries, and through Det. Adcock that it is not realistic to find the defendant's DNA in the victim's vagina where there's been digital penetration—in fact, in his 29 years of detective work, he had never had such a case. The defense took the argument further, arguing that they should have swabbed her clothes, the seat, and even the dime she dropped on the floor. I pointed out in closing that such testing would not be helpful, as you would expect the defendant's skin cells to be throughout his car, so it might be found on her clothes and the seat, and the dime simply wouldn't prove anything.

In closing arguments, as in the first trial, I re-played a short audio clip for the jury: Diane's hysterical reaction to the six-pack photo lineup. I was later told that the defendant's teenage daughter ran out of the courtroom when that audio was played (she had not been present for the first trial). I reminded the jury about how consistent Diane had been, that Audrey had done nothing but be supportive and loving, and that Diane did not have the capacity to make up and remember something like this unless it were true.

After a long deliberation, during which they listened to Coleman's and Diane's audio statements again,

the jury convicted the defendant of aggravated sexual assault of a disabled individual and injury to a disabled individual. In punishment, after hearing about his prior deferred, they sentenced him to 12 years in prison on the first count and five years on the second. I think hearing the story from the victim both in court and on audio and observing her demeanor and disability sealed it for the jury.

Conclusion

It was an honor to stand up for this family at trial. It was a challenging case, but it was an important one to prosecute for several reasons: the vulnerability of the victim, the defendant's violation of a position of trust, and the 2008 allegations as well. Although the jury never heard of the 2008 investigation, that woman's mother was in the courtroom for closing arguments and was happy when justice was finally served. Diane and Audrey were so pleased that several people—the detective, prosecution team, and jury—believed and stood up for Diane. This case will always serve as an important reminder of why we do this job. ❇

Editor's note: Please read "A very special victim," at right, for the story of this trial told from the point of view of the victim assistance coordinator, Laura L. Flores.

A very special victim

Diane went through two trials to get justice against the man who sexually assaulted her. She reminded herself often that "I have a voice"—a voice that those in the Tarrant County DA's Office won't soon forget.

Diane Taylor (not her real name) was 27 years old when she was sexually assaulted by Ronald Coleman. Coleman was a driver who shuttled her and several others home after spending the day at Dayhab, where Diane learns life skills and community integration. Coleman evaded arrest for more than a year but was finally picked up in March 2011.

By Laura L. Flores
Victim Assistance Coordinator in Tarrant County

It is an honor to share my involvement with Diane throughout the case. After the case was filed, we set up a victim meeting at our office with her and her mom. It was an opportunity to get to know the victim, meet her family, go over the grand jury process, discuss the Attorney General's Crime Victim Compensation Program, and address any questions or concerns they had. We also wanted them to see our victim assistance waiting area, which is a large room filled with comfortable sofas, a TV, a computer, lots of board games, coloring books, a refrigerator, and a microwave for victims and their families who must be here for trial.

Before going into the victim meeting, I was told that Diane is 27 years old and is considered mildly retarded with a 4-year-old's mentality. I was also told she lives with her mother, Audrey (also not her real name), who is her caregiver.

The first meeting

When I initially met Diane, my first thought was that she has great taste in clothes. She had on a long-sleeved white blouse, vest, and long, Western-style denim skirt with a pair of low-heeled cowboy boots—very Fort-Worth-cowboy chic! She is a true fashionista with a sense of humor and a bit of silliness—I immediately felt connected to her. She had brought a bag full of notepads and pens because Diane enjoys writing. She knows how to write her name and knows the letters of the alphabet.

Our initial meeting included assistant criminal district attorney Nikki Nickols. Nikki conducted the meeting, gathering information from Audrey about Diane's disability and her day-to-day routine. Then she gingerly interviewed Diane regarding the sexual assault in the car with Mr. Coleman, to which Diane responded consistently. She would say, "I have a voice. I have a voice." I

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could tell Audrey instills self-worth and value in her daughter and has shown her unconditional love, filling Diane's world with Scripture, spiritual songs, and spiritual direction.

Once the case got indicted, it was transferred to assistant district attorney Heather Davenport, whose professionalism and gentle techniques in dealing with victims who have special needs are commendable. We had several meetings with Diane and Audrey before trial began. During one of them, we took them to the courtroom and did some role-playing. We put Diane in the witness chair so she would know where to sit. We explained where the judge would sit, where the jury would be, and where prosecutors Heather Davenport and Bill Vassar would be sitting. Heather asked Diane some basic questions (not about the case), such as when is her birthday, what is her stuffed doggie's name, etc. What I appreciate most about our prosecutors is their sensitivity to our victims by involving victim assistants in this process. It gives victims reassurance and continuity to see a familiar face so they can feel comfortable, and it also establishes a good foundation of trust.

First day of trial

On the first day of trial, Audrey and Diane came to our victims' waiting area. Audrey brought some snacks for Diane—she has a major sweet tooth, it turns out. When it was time to go upstairs to court, Audrey had to stay behind because she was a witness and could not be in the courtroom. So before Diane testified, I told her I would be in the courtroom to support her. We hugged, and I told her she was brave and courageous and I was proud of her. I told her the most important thing to remember is to tell the truth. She said she was ready and repeated, "I have a voice," and gave me another hug.

She did great on the stand when Heather questioned her. She charmed the jury with her innocence and her communication style, which was similar to that of a young child. The defense attorney, David Richards, was a bit harsh trying to confuse Diane during cross-examination. For example, Mr. Richards asked the bailiffs to gather some chairs in the area below Judge George Gallagher's bench to re-create the seating arrangement of the car where the sexual assault took place. He asked her some tricky questions where all he got was a blank stare and several seconds of silence because she wasn't processing the question. On the questions that mattered the most, though, Diane did not waiver. She knew what the defendant did to her, whichever way the defense asked the questions.

When Diane was through with her testimony, she came down to my office. She stayed with me while her mother testified. This is when I found out Diane has a sweet tooth. She had brought a toy stuffed dog from home. This dog has a secret compartment that was filled with candy she took from the other victim assistance coordinators' offices! I had introduced her to the other ladies in our office and they were gracious in offering her sweets from their candy dishes. Diane would smile, take a handful, and then stuff the candy in her (already stuffed) dog. By the end

The whole trial team (top row, from left: Don Pilcher, investigator; Laura Flores, victim assistance coordinator; and Bill Vassar, assistant criminal district Attorney; and Heather Davenport [bottom row at left], assistant criminal district attorney), along with Diane (bottom row at center) and her mother, Audrey (bottom row at right). (Both "Diane" and "Audrey" gave permission to publish their photo.)

of the day, her dog was full of sweets! She told me, "Shhh, don't tell my mom!" Of course, I had to tell Audrey, for one because it was funny, but also because I did not want to get blamed if Diane shows up at her next dentist appointment with a cavity.

I kept Diane occupied by having her color and write on notepads. After all the witnesses testified and both sides rested and gave closing arguments, we came down to the victim assistance area and waited patiently for the verdict. Audrey is a woman of faith; she had been the pillar of faith by standing firm that justice would prevail. She was also glad that Diane finally was able to "have a voice" in all of this.

After many hours of deliberation from the jury, it could not reach a verdict, and the trial ended with a hung jury. Disappointing, yes, but

not a loss. Heather and Bill talked to Audrey about whether to retry the case, and Audrey was adamant that she wanted another trial, but we were concerned with how difficult it might be for Diane to take the stand again. Heather and Bill sent Diane and Audrey home with the hope that we would meet again soon to discuss the future of the case. After several weeks, Audrey called and said she talked to Diane and that she wanted to testify again. So we had a second trial.

The second trial

Several months later, the first day of the second trial rolled around, and in walked Ms. Fashionista. This time, instead of cowboy chic, Diane went simple and sophisticated. She had on a beautiful silk skirt suit in slate blue and low-heeled black sandals. She looked so amazing! I told her how well-dressed she looked and I couldn't wait to see what she was going to wear the next day. Of course her goodie bag filled with notepads and pens were in tow. Her mom allowed her to bring her karaoke machine to pass the time while she waited to testify. I checked with our director of victim assistance, Blanca Burciaga, to see if that was OK, and we came to an agreement that Diane could use her karaoke machine in my office as long as we kept the volume low. Diane sang me a beautiful worship song and asked me to sing along. I know she liked the karaoke machine because of all the buttons and lights on the front of it.

Diane did another exceptional job testifying. The defense (same defense attorney as at the first trial) got demonstrative again and had the bailiffs re-create that same car seating scenario with the chairs. Unlike in the first trial, he asked Diane to step down from the witness stand and sit down where she was in the car on the day of the sexual assault. It was not looking good for the State because the defense attorney got Diane confused. (Apparently, Diane had moved sitting positions during the course of that day while passengers were getting dropped off.) But again, on the most important part she did not falter: She was clear that Mr. Coleman touched her and even licked his finger afterward—and she held her finger up for the jury to see. It was a very compelling moment, raw and innocent to the core, especially given Diane's mental capacity, that she was able to describe in detail what he did to her and how it made her feel. Several jurors were brought to tears during her testimony.

After Diane testified, she came back to my office, where her playful personality kicked into high gear. She brought laughter and sweetness. We talked about our families and what kind of activities we enjoy: my love for tennis and her love for her dog and playing on her keyboard. I have a Rubik's cube on my desk that shows pictures of several hot spots in San Francisco (where I grew up), so I pointed out what I knew about the Golden Gate Bridge, Alcatraz, cable cars, and the famous Lombard Street, which is the most crooked street in the country. She listened with interest and plugged in a few comments of her own.

After both sides rested, we all went in for closing arguments, and after several hours, the jury came back with a guilty verdict. Although the judge asked the gallery to hold its composure during the reading of the verdict, I held Diane's hand and she squeezed it real hard. Her mother and I both knew that justice was served that day.

Afterward, we met behind the courtroom and Audrey broke down in tears filled with gratitude for all the hard work the prosecutors put into the case. After sentencing, the jury gave the defendant 12 years in prison. Diane and Audrey were happy that the defendant was going to prison. Diane gave a short allocution—just "He hurt me"—after sentencing, and I could tell in her demeanor that she felt good about herself. She told me before they left our victim assistance area that "the truth will set you free."

What an inspiration and an encouraging way to end the trial! Diane is a true testament that even a disabled crime victim can step forward, be courageous in a very scary situation, and come out of it as an overcomer.

What I learned

What I would like to pass on to other victim assistance coordinators dealing with disabled or special-needs victims is to find a common interest with the victim and run with it. I was told once by a very special person that "they're gonna tell you in their time and in their way." Not all disabled crime victims are forthcoming with what happened to them, so it takes time. It may require several meetings for them to open up, but it is worth it in the end to be patient. When we sincerely take the time to get to know special-needs victims as people and then help them in the

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criminal justice process, they have a better understanding of what to expect, and their anxiety will diminish over time.

Diane and I shared similar interests. We both like fashion and we both like to sing. We both "made a joyful noise" while waiting during the trial when she brought her karaoke machine into my office. Diane was also taking piano lessons, and I love to listen to solo piano music while working. Because we had several interests in common, we forged a bond during our time together, making her journey through the trial that much easier.

It's wise to keep the context simple. We all know that the trial process can be overwhelming not only to a victim (whether disabled or not) but also to her family. The prosecutors handle the details of the case, and victim assistants tend to the victim's needs. Depending on the disability or special needs, an age-appropriate discussion with the victim about courtroom etiquette and what to expect in trial will help make her a better witness for the State. The more time we invest in the victim, the more she will feel empowered and encouraged.

Also, take the time to go out into the community and meet the people in charge of these programs that assist our crime victims. They are the ones that work closely with our victims, whether for counseling, financial assistance, job skill training, or finding housing. Tarrant County has a wealth of resources. For example, I have met the founders of the Disabled Crime Victim Assistance here in Fort Worth. They go above and beyond to assist victims with CVC and other financial assistance needs. They also do court accompaniment and a host of other selfless acts to make sure the victims and their families are taken care of. I have also toured the Battered Women Foundation in North Richland Hills to see firsthand what victims and their children go through. Having been to these places, I can visualize them and in turn share this information with the victim so she knows what to expect.

I would also like to encourage victim assistance coordinators to talk with the parents or guardians of sexual assault victims, especially those with a disability or special needs, to watch their demeanor after trial. See if they withdraw, become depressed, or are just not themselves. It would benefit their loved one to meet with a counselor to decompress. Make a follow-up call to see how the victim is doing a week or so after the trial.

Although I have worked with disabled and special-needs victims before, Diane made a long-lasting impression on me. A quote from the movie *As Good As It Gets*, starring Jack Nicholson, comes to mind when I think about her. In the film, he tells Helen Hunt, who plays his love interest, "You make me want to be a better man." Diane has set the bar for me in working with disabled victims. I strive to give every such victim I work with my attention, care, and concern. That's the kind of attention I would want for my child if I had to go through this process. ❇

A victim assistance alphabet soup

Validate the victim's concerns.
Implement policies and procedures to assist victims.
Communicate with your victims and relay information to prosecutors so everyone is on the same page.
Thoughtfulness goes a long way. Be thoughtful in your actions.
Integrity. Walk with the integrity, sincerity, and a good moral compass that comes with the job.
Motivate yourself to take care of your health and well-being through exercise and rest. A well-balanced victim assistance coordinator is an effective one.

Assure the victim that coming forward and testifying is the right thing to do.
Support victims, especially during trial. If time allows, sit in the courtroom with him or her. Seeing a friendly face can calm the victim down.
Safety is one of our primary concerns. Make sure there is a secure and safe place where victims can go before and after testifying in trial.
Inspire victims to set goals.
Simplify the criminal justice process with the victim. Not everybody knows going in what to expect. Take the time to explain. They will appreciate it if you talk on their level.
Training. Always find time to seek training in your community or online that will help you learn new ways and techniques in helping victims.
Active. Play an active role in the victim's case. Attend meetings and be there for the victim when in trial. They will forever be grateful.
Navigate the victim through this adversarial and confusing system.
Compassion. Show compassion to victims. They did not ask to be victims.
Edify one another so you will be encouraged to do the same. ❇

— By Laura L. Flores

TDCAA is member-focused and member-driven

By David Escamilla
County Attorney in Travis County

Now that my term as president nears completion, it's time to look ahead and mention an observation or two about the organization.

Earlier this year I wrote that the true value of TDCAA lies in it membership. And with current membership exceeding 5,800, TDCAA is the largest statewide association of prosecutors in the nation. You don't need a Ph.D. in math to calculate that we've got a great deal of value available to us, much of it untapped.

Having been a member of TDCAA for over 25 years (they should award a pin of some kind after that long), I've been involved in many different aspects of the organization. For the most part, this primarily involved volunteering with other members on a TDCAA committee in support of a particular initiative or subject matter important to the organization and its membership. I've often found that our work was greatly enhanced by the diversity of our committees, including representation from prosecutors' offices large and small and reflecting viewpoints from various regions of the state.

As a result of these experiences, I've come to believe that it's critically important that we continue to emphasize the importance of keeping our membership engaged in the association and its ongoing operations. And with the broad scope of matters in which we are continuously involved, the need for more direct involvement from our members is growing.

You need look no farther than the recent regular session of the Legislature to see evidence of this need for our members to get engaged. Of the 5,873 bills filed this session, TDCAA and other volunteers, directly monitored 1,473 of them (approximately 25 percent) because of their potential impact on our offices and/or the criminal justice system. These volunteers, expertly led by our Government Relations guru Shannon Edmonds, frequently travelled to Austin to testify before legislative committees and otherwise educate legislators and their staffs on our concerns and input on pending legislation. The recent legislative session included consideration of several initiatives of critical concern to prosecutors, including discovery reform, changes in bar grievance procedures for prosecutors, and the proposed creation of an innocence commission. Our legislative rotation program, which is open to any TDCAA member, enabled prosecutors to come to Austin for two to four days to watch, learn about, and impact the legislative process. While this initiative goes into action on a biennial basis to coincide with the legislative sessions, we have a great need for more prosecutors to get involved in this important effort.

Perhaps the most important service that TDCAA provides involves producing comprehensive continuing education for prosecutors, civil lawyers, investigators, victim assistance coordinators, and key personnel. While overseen and administered by TDCAA staff, our volunteers carry out the bulk of the effort, from the planning of topics and recruitment of speakers, to preparation of papers and presentations. Several groups, including the Training Committee, Civil Committee, Key Personnel Section, Victim Services Section, and the Investigator Section, produce these seminars. The need for more volunteers and speakers to maintain these excellent programs is never-ending.

Complementing the education program, TDCAA produces an extensive catalog of legal publications to assist member offices in carrying out their work. More importantly, continuing sales of several of these publications provides a significant share of our annual revenue. Overseen by Diane Burch Beckham, the Publications Committee utilizes volunteers to plan and author publications. And I know from personal experience that we are always on the lookout for volunteers to author articles of interest to our profession.

A volunteer board governs the Investigator Section and, in addition to planning and providing training

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for our investigators, this board manages the affairs of the section, including conferring scholarships and other awards annually. Volunteer boards likewise govern the Key Personnel Section and Victim Assistance Section, primarily focusing on planning and presenting the annual Key Personnel and Victim Assistance Coordinator Seminar.

Plenty of opportunities also exist for elected prosecutors to assist TDCAA with our administrative operations. Most of you are of course aware that we now own our own building. Our decision to end leasing our facilities and instead pursue purchase of the building was arrived at only after much due diligence, financial analysis, and formal recommendation by our Building Committee. Primarily meeting on an as-needed basis, the committee remains available to assist the board of directors on actions related to the use and maintenance of this valuable asset. Additionally, the Finance Committee, composed of members from the board as well as non-board elected prosecutors, assists the board of directors in monitoring our annual budget and investments.

E. Pete Adams, Executive Director of the Louisiana District Attorneys Association, has been credited with this observation: "Because if you don't know where you are going, any turn is OK." Recognizing this truism, TDCAA establishes a Long-Range Planning Committee approximately every five years to conduct a comprehensive review of our mission, goals, and services. Volunteer members of this committee, likely to begin work again in the next couple of years, are usually selected from TDCAA's membership, including elected prosecutors, assistants, investigators, victim assistants, and key personnel.

In 2006, the TDCAA board created the Texas District and County Attorneys Foundation (TDCAF), a 501(c)(3) support organization. TDCAF's stated mission is "to provide enduring support for the mission of TDCAA to improve prosecution and government representation in Texas through education and technical assistance by seeking the resources and other assistance from all sources, including the community at large." A volunteer Board of Trustees, composed of TDCAA leadership and other public members elected by the TDCAA Board of Directors, is responsible for successfully accomplishing TDCAF's mission. The Foundation board is also assisted by a volunteer Advisory Committee. Since its inception six years ago, the Foundation has raised more than $2,058,000 in contributions to support the mission of TDCAA.

As you can conclude from the foregoing summary, TDCAA is supported by a large and diverse operation of boards and committees. The vast majority of our efforts are planned and implemented by our volunteer membership working together to assist Texas' elected prosecutors and their staffs. In order to succeed, TDCAA requires a large number of volunteers experienced in the operation and laws related to the functions of a prosecutor's office. There's a continuing need for volunteers possessing this experience to engage with us to successfully carry out TDCAA's mission today and for the decades to follow. Please email me at david.escamilla@co.travis.tx.us or search me out at our upcoming Annual Criminal and Civil Law Update in Galveston if you would like to know more or are otherwise interested in exploring how you might personally contribute to our efforts.

Finally, I wanted to take a moment to recognize our own Bell County District Attorney Henry Garza for his induction this summer as president of the National District Attorneys Association. NDAA was formed in 1950 to advance state and local prosecutors' issues at the national level. According to its website, "NDAA representatives regularly meet with the Department of Justice, members of Congress, and other national associations to represent the views of prosecutors and influence federal and national policies and programs that affect law enforcement and prosecution." Henry also serves on the TDCAA board of directors, and we are fortunate to have him representing our interests on a national level. Congratulations, Henry. ❇

Hot topics at our Legislative Updates

By the time you read this column, most of TDCAA's Legislative Updates will have been completed. I want to say thanks to all of the TDCAA staff who have worked so hard from the first day of the legislative session to the end of summer to get that training done. I still marvel at the turnaround time—the ability of **Shannon Edmonds**, TDCAA Staff Counsel and Governmental Relations Director, to take everything he has learned during the session and, within two months, provide you with an insightful Legislative Update in a three-hour MCLE program. What's more, the entire staff works together to get the show on the road to a location near you. Thanks to everyone for making this year's travelling road show a success.

By Rob Kepple
TDCAA Executive Director in Austin

No doubt about it, the new discovery law taking effect on January 1, 2014, is the most significant change in a long time because it impacts every case. In concept, of course, Senate Bill 1611 doesn't seem big: The law mandates pre-trial discovery of offense reports and witness statements, which almost all Texas prosecutors were already providing as part of discovery. So no big deal, right?

Well, the devil is always in the details, and a number of details will need to be worked out in each jurisdiction. The issues do not revolve around the principle of the new law to provide open discovery. The issues revolve around: 1) the practical aspects of properly documenting the discovery; 2) proper handling of the discovery by the defense team to ensure that victims and witnesses are not subjected to retaliation; and 3) possible sanctions for both the State and the defense for failure to comply with the law.

At this point in our Legislative Update Texas tour, we are getting a lot of feedback on these issues. We plan to take what we are learning from our members and discuss it in earnest at the Annual Criminal and Civil Law Update in Galveston this September. Our intention is to widely share offices' solutions later this fall, so stay tuned.

Today I cannot answer the question about what to do if a defense attorney violates the restrictions concerning the dissemination of the discovery provided. Indeed, there are no provisions in the new law specifically setting out penalties and procedures; you might also note that there are no penalties or procedures set out in the statute if a prosecutor violates its provisions.

The reason? It is founded in the concept of "the loyal opposition." Those negotiating the bill entered the legislative arena with a healthy respect for the job of their courtroom opponents and worked from a position of trusting the good intentions of those who are officers of the court. We know that the vast majority of defense attorneys and prosecutors are going to observe the strictures of the discovery law, so focusing on penalties for either the defense or the prosecution was not a priority.

Naive? No. We all know that there are some who don't play well with others regardless of the circumstances, so it was wise to focus from the beginning on how this new law will be used by those on both sides of the bar with good intentions.

As a matter of personal privilege

Every now and again during a session, a legislator rises to speak on "a matter of personal privilege." They are generally given the floor to answer an unfair attack, or on occasion, to scold someone for conduct regarding a measure before the legislature.

I want to take a moment as a matter of personal privilege to rise to the defense of one of the main actors in the passage of the discovery legislation, **Senator Joan Huffman** (R-Houston). I describe her as an actor in the *passage* of the legislation, because Senator Huffman, as a former prosecutor and district judge, supported the concept of open discovery and sought its passage. But before she would sign off on this change, she sought assurances that before the bill left the Senate it had protections against widespread disclosure of victim and witness information. The Senate leadership and the body itself allowed her to take the lead on this, because it is fair to say that no legislator wanted this dis-

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covery bill to put victims and witnesses at risk.

So I was chagrined to see that some media outlets chided Senator Huffman for her work on the bill, as if to imply that she opposed the measure. I am still mystified that anyone would do anything short of recognizing her commitment to justice for taking the time to protect innocent victims and witnesses who are brought into the criminal justice system against their will. Thanks, Senator, for jumping in when it was needed most!

Mandatory *Brady* training

As part of its focus on discovery and *Brady* reform, the Legislature passed HB 1847, which mandates that every attorney prosecuting Class B misdemeanors and greater receive one hour of instruction on their duty to disclose exculpatory evidence. This duty kicks in January 1, 2014. Those already in the trade will have a year to comply with this new law. Anyone coming into the profession after that time will have 180 days to complete the course.

The Court of Criminal Appeals is mandated to write the rules regarding this training and will be working with TDCAA to set up both the training and the mechanism for reporting and recording your participation in the class. So stay tuned as we develop this course for you.

Prosecutor safety

In the wake of the Kaufman County murders, the Legislature moved to help button up some personal information relating to prosecutors and police officers. We live in a pretty information-soaked world these days, but some of your info will be harder to obtain after the Legislature passed HB 1632, which makes confidential the information a prosecutor or prosecutor office personnel submit for the purposes of voter registration. If you'd like more information on this topic in general, please give me a call or contact me by email at Robert.Kepple@tdcaa.com.

Welcome to the newest Texas DA

On September 1, 2013, the newest district attorney's office sprung into existence: the fighting 452nd Judicial District Attorney's Office serving Edwards, Kimble, McCulloch, Mason, and Menard Counties. This is the result of a redistricting version of musical chairs necessitated by growth in the Hill Country. Our DAs for the 216th and 198th Judicial Districts, **Bruce Curry** and **Scott Monroe**, will continue to share Kerr County as their base of operations, but a third DA will be added to the region. By the time you read this, that appointment should have been made, so keep an eye on the TDCAA website or log into the TDCAA online Membership Directory to see who is at the helm of the new office.

An ethics pop quiz

Every now and then, we come across an interesting issue that serves as good water-cooler talk. Here is one that I want to share, and I would like to hear back from you on it. The hypothetical:

You are preparing a murder case for trial. You check the court's file and find that the defendant has subpoenaed two women to court. You interview them and find they are alibi witnesses; they are prepared to testify that the defendant was clear across town with them at the time of the murder. You have a pretty strong case, but you would sure like to poke a hole in this alibi, and you don't have much time to do it.

In your investigation, you find that the two witnesses are on Facebook. You quickly create a false Facebook profile and introduce yourself to the witnesses as the mother of the defendant's child. That seems to chill the witnesses' desire to participate in the proceeding quite a bit. Indeed, in a follow-up conversation (as the prosecutor, not the false Facebook persona) with one of the witnesses, she says something to the effect of, "I'm not going to lie for that guy." As you figured, the women turned out to be two sketchy alibi witnesses provided by the defendant.

So, discuss among yourselves. Let me know what you think of the prosecutor's conduct here. If you would, email me at Robert.Kepple@tdcaa.com. I will report the discussion in my next Executive Director's Report. ❇

Photos from July's Prosecutor Trial Skills Course

A tribute to Erik Nielsen, former TDCAA training director

Andrew Smith
TDCAA Sales Manager

Erik was the first at the office and the last to leave almost every day. He could make anyone and everyone feel included. He was always up for a game of "Where Is My Head?" (a game we made up) and could recite the entirety of *Les Miserables*, note for note. His laugh attacks could be heard from outside the building. The first thing he thought was the first thing he said, which meant that an honest and sincere comment was always coming. We will miss him indeed.

Shannon Edmonds
TDCAA Staff Attorney

Everyone who has worked with Erik can agree on at least one point: You rarely had to wonder where Erik was. Having worked several doors down from Erik's office for lo these many years, it was always entertaining to hear what new sound would come rolling down the hallway next. Uninhibited, spontaneous laughter was the most common, but sometimes I would catch certain "unprintables" floating my way (usually after a seminar speaker cancelled at the last minute). This unpredictable background noise could occasionally make it a challenge for Erik's coworkers to conduct serious phone calls with those outside the office (including people at the state capitol, ahem!). But more often, it was a welcome respite from whatever we were working on at the time, providing us an invitation to stretch our legs and wander over to see the latest and greatest Internet video of someone trying to dive into a frozen pool or a poor reporter trying her hand (feet?) at stomping grapes into wine, with disastrously funny results. Now that he's left, I realize that small moments like that help coworkers bond over things other than their work and that we will miss Erik's mastery at bringing people together for a common purpose—even if that purpose didn't always fall within the mission statement of the association.

Erik posing in front of the new signage in our conference room.

Richard Alpert
Assistant Criminal District Attorney in Tarrant County

I had the pleasure of working closely with Erik at least twice a year as course director for TDCAA's Prosecutor Trial Skills Course. Erik's boundless energy and enthusiasm gave each seminar a boost of adrenalin that carried me and the 20-plus faculty advisors through a week of education and bonding. His passion for teaching and his spontaneous energy made every training he was part of better for his presence. He is one-of-a-kind, and whichever office snags him will benefit greatly from his knowledge, talent, and passion for the profession.

Lauren Marfin
TDCAA Research Attorney

I started working at TDCAA in the middle of one of our trainings, so I didn't get to meet Erik until my second week here. I can distinctly remember the vast difference in the volume level within the office my first week versus the second, when Erik returned. The singing! The laughing! The endless supply of

movie and TV quotes for every occasion! It's safe to say Erik was TDCAA's resident entertainer.

When Erik asked how your day was going, it was apparent he really cared about the answer. He was always ready and willing to help when I had a tough question. And if he didn't know the answer, he could always point me to someone who would because Erik knows, and is friends with, just about everyone in our prosecutor network. He is very much missed around here, and the training hallway is a much quieter place without him.

Sarah Wolf
TDCAA Communications Director

I always marveled at Erik's energy, that he didn't seem to ever get tired or worn-down. That vigor applied to everything from stuffing name badges before a seminar to playing ping-pong during a break at the office, and it's something I've long admired about him. Also admirable is his sheer intellect: How he kept so much information (both law- and "Simpsons"-related) in his head is really beyond me, but I always felt blessed to be on the receiving end of his knowledge. He is so generous with all of his many gifts.

Rob Kepple
TDCAA Executive Director

"All in." That is how I would describe Erik Nielsen's dedication to our profession. In the last eight years, TDCAA training has had the benefit of Erik's experience, energy, and enthusiasm. I am most grateful for his work in developing our Train the Trainer programs and bringing to our seminars a strong and experienced faculty. He has done a terrific job for Texas prosecutors, and although he will remain a prosecutor at heart (thank goodness), I know you will miss his energy and expertise at all the TDCAA seminars. That, and his man-hugs.

Diane Beckham
TDCAA Senior Staff Counsel

In 2000, when TDCAA was looking for a new research attorney, I asked a friend who worked at the Court of Criminal Appeals for recommendations. She told me we need look no further than the first-year lawyer working with her in Judge Tom Price's office: Erik Nielsen. Not only was he smart, hilarious, detail-oriented, and diligent, he apparently danced for her every morning. We were sold.

Although Erik didn't dance every morning he worked at TDCAA, I can't think of a single morning we didn't hear him singing, laughing, shouting, or all three. He is a guy who will never fail to tell you what is on his mind—including how what he has just eaten is affecting his digestive system. The digestion update I will never forget came seconds before Erik and I began a three-hour legislative update presentation after Erik had wolfed down a multi-plate Mexican food lunch. After a different legislative update, Erik and I (amped up on the drive home after the crowd had laughed in all the right places and our presentation felt effortless) demonstrated how difficult it was to find the right key for singing "The Lord's Prayer" by singing it—start-to-finish—about 50 times. (Like "The Star Spangled Banner," it is critical not to begin on a pitch too high or too low.) The drive from Dallas to Austin in rush hour is a long one, and I'm still surprised that John Brown, our former CFO, didn't pull the TDCAA Suburban over and kill us.

Manda Herzing
TDCAA Meeting Planner

I don't think anyone really understands all the work Erik put in leading up to a training or conference. They saw the easy-going, affable Erik running the show on-site and very often would say to him: "I want your job!" But it takes more than being a people person (which Erik certainly is)—his position required him to be a people manager as well, which takes patience, endurance, follow-up, and finesse.

We will always remember the fun times we had with Erik, because he truly did bring the fun wherever he went. But he should also be recognized for his eight years of creating and sustaining an intricate, well-oiled machine that has given TDCAA such a stellar reputation for its high-quality training. And we will definitely miss the "fun" Erik, in the office and on the road. ❇

Remembering Erwin "Ernie" Ernst

If you were to poll the prosecutors in the Harris County District Attorney's office from the late '50s through the '70s, no doubt they would vote Erwin Ernst the most unforgettable character.

Erwin "Ernie" Goree Ernst was of "the greatest generation." He began his adulthood enlisting in the Army Air Force shortly after Pearl Harbor. He was 17 at the time. He claimed his only promotion was to PFC. He was part of the crew flying freight over the Pacific. Following the war the G.I. Bill put him through undergrad and law school.

By Carol Vance
Former District Attorney in Harris County

He begin his career as an assistant DA in West Texas and later was recruited to try felonies in the Harris County office where he moved up the ranks, including Chief Prosecutor, and was named the first Chief of the Trial Division with perhaps 100 lawyers under him.

During his years in Harris County, Ernst prosecuted some notorious crimes including the murder case that was the subject of Tommy Thompson's best-seller, *Blood and Money.* This book was the story of the death of Joan Hill followed up with the assassination of her husband, Dr. John Hill. Author Thompson nailed Ernst when he wrote:

> "Ernst was a romantic, stocky, loquacious, philosophical lawyer with a voice from the cracker barrel. He was on intimate terms with Roman poets and Greek philosophers. He had prosecuted hundreds of murderers sending some to the chair. He was a practical joker and favorite of the courthouse on whom anecdotes hung around his neck like ornaments from a Christmas tree."

I think Tommy could have added that Ernst was a cross between Jonathan Winters and Will Rogers.

Ernst was known also for hanging nicknames around the neck of nearly every assistant DA and most of our criminal court judges. Names come to mind like Pig Eyes, Dealing Dan the Docket Man, the Fat Fluff, Deadbeat Twilley, Utah Carl, Big Fat and Lazy, Fun and Games, Little Dickie, Sambo Robertson, Machine Gun Hinton, The Meadowlark, Steelhead, Terrible Tommy, Fuddy Duddy, the Senator, Lacy Pants, the Shadow, Cutty Sark, Spot, the Biggest Bigot, Oil Wells, and Sammy Davis Sr., to name a few. When Ernst named you, that was what you were called. (Out of respect for the living, I will not disclose the identities of those mentioned.)

Perhaps Ernst's best contribution was being an on-site master teacher to eager assistants looking to be amused. Ernst would admit assistants into his office over the lunch hour each day until the room ran over. There they would laugh themselves sick as Ernst picked out a few to take on in lively banter. Ernst would then pull out a brown sack and take out his barbecue, an onion, and a jalapeno, which he would cut with an old rusty switchblade knife straight from one of his old murder cases.

Ernst gathered a crowd every time word got out he was to make a final argument. In one, he told the jury, "If you acquit this man of murder, the dead of World War II will rise up from their graves." After the defendant appealed his death sentence, the Court of Criminal Appeals declared the argument highly improper but harmless error as no juror would possibly listen to such an outlandish appeal. Of course the court was not in that jury box on that day. I was. It was a powerful argument.

Ernst was arguably the most popular speaker on the TDCAA circuit. The audience particularly loved the Q-and-A time as Ernst would throw back questions in the face of the one who dared open his mouth.

After a couple of decades at Harris County, Ernie began another long and distinguished career in criminal justice. He became the first general counsel for the Texas Department of Corrections. George Beto and Jim Estelle gave him solid marks. From there Ernie ran for and was elected DA for Walker County and served until he was elected district judge for the same area. There he spent 20 years on the bench, including his many years as a visiting judge. Lawyers have told me how much fun he was to try a case before. In fact he sat on the bench until he was 85.

When he died last month a few days before his 89th birthday, some 50 or more ex-prosecutors traveled up to Huntsville to see him off. All of

us were grateful for our friendship with Ernie the "World's Greatest Living Trial Lawyer," a title he reserved for himself. And we appreciated his mentorship. I recall the day I was promoted to district court in late 1959, when Ernie was acting chief in that court. That first day Ernie handed me an old, dog-eared murder file and said, "Go try this case." With only a year's experience I was scared. But Ernst got me through that case and many more. Every office should have an Ernie Ernst.

Ernst could have worked for just about any law firm in town, made a fortune, and moved way up from his 10-acre Armadillo Ranch that housed a couple of neighbor's cows; but from fighting in World War II through his prosecutor years until he heard his last case on the bench, he gave it all to public service. Along the way he challenged us all. His favorite question was, "What are you going to do when you grow up?" And to the beat-down defendant waiting to plead, "When the court asks you what you are going to do with the rest of your life, what are you going to say?" ❇

Assistance available for mortgage-fraud prosecution

If you need expertise or money to try mortgage fraud, here's where to get both.

By F. C. "Chris" Schneider
Associate General Counsel at the Texas Department of Savings and Mortgage Lending in Austin

Since 1999, the Texas Department of Savings and Mortgage Lending has been responsible for licensing and regulating mortgage originators in Texas. In 2008 the mortgage industry experienced a meltdown, which resulted in a flurry of new legislation on the national and state levels and created a national registry for mortgage loan originators. In the years prior to that legislation, when the real estate market was booming and mortgage loans were being handed out to almost anyone who could breathe, mortgage fraud was commonplace in the industry and many of those cases are just coming to light or working their way through the system.

Today, mortgage fraud continues to occur as fraudsters seek new ways to separate unsuspecting consumers from their money. Over the past seven years, the department has had significant experience in investigating the various forms of mortgage fraud. We have pursued administrative actions against those individuals as well as assisted federal and state law enforcement authorities with criminal prosecutions.

Mortgage fraud can take many forms. Fraud to purchase a home includes such actions as falsified income verifications, employment verifications, and bank statements and involves the borrower as an active participant. Fraud to make money normally takes the form of a straw borrower transaction and usually includes falsified appraisals, falsified income verifications, falsified repair invoices, phony consulting fees, or other nonexistent expenses to drain money off of the transaction. These types of fraud were greatly reduced with the tightening of lending practices after the mortgage collapse in 2008. These changes eliminated some of the fraud on the origination end, causing the fraudsters to move on to different scams. The most common of these, post-2008, has concentrated in fraudulent loan modification and foreclosure prevention scams. These individuals frequently obtain up-front money for which no services are provided, telling the homeowner to stop making payments on their mortgage and not to contact their lender or servicer. With the growth of the Internet, these fraudsters can wreak their

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How to host a Tree of Angels in your community

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

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

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

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

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havoc from anywhere in the country on trusting homeowners. Internet solicitations for loan modification and foreclosure services are very common and often involve attorneys, many of whom have been prosecuted for fraud.

In February 2012, a coalition of state attorneys general and federal authorities settled a multi-state litigation case against a number of the nation's largest mortgage servicers for $25 billion. The State of Texas, through the Office of the Attorney General, was included in that settlement and as a result received a large sum of money, which was divided among a number of state agencies. The Department of Savings and Mortgage Lending received $500,000. We have placed that money into a fund to assist local law enforcement and prosecutors in the investigation and prosecution of mortgage fraud. This fund is now available upon approval to assist local prosecutors with the costs of investigating mortgage fraud, witness expenses, and other related expenses. In addition to financial assistance, the department has made its personnel available to assist local prosecutors in the investigation, preparation, and prosecution of mortgage fraud cases.

These cases are often intimidating to people unfamiliar with the vernacular and the intricacies of the mortgage business. Paper crimes can be challenging to investigators and prosecutors who are not used to dealing with them on a daily basis. We have resources available to assist law enforcement and prosecutors with investigating mortgage fraud and related crimes. We employ four investigators with over 35 years of experience investigating mortgage issues and mortgage fraud. All four have experience in the mortgage-lending business and are familiar with its forms, language, and procedures, which can often be confusing to someone unfamiliar with the industry. Our investigators are available to review documents and evidence at our offices or to travel to assist investigators and prosecutors in interpreting and evaluating such information.

The department also has resources available to assist prosecutors with trying mortgage fraud and related crimes. I am the associate general counsel for the department and have served as the chief enforcement attorney for the past six and a half years. Prior to that, I was the criminal district attorney for Caldwell County and was in private practice for 20 years before that, including criminal law and 20 years as an escrow officer and closer for a title insurance company. I have tried more than 100 criminal jury trials in my career, and I'm available to assist local prosecutors in evaluating, preparing, and trying cases involving mortgage fraud.

Interested prosecutors and investigators can apply for this assistance by contacting me at 512/475-0980 or cschneider@sml.texas.gov. The criteria and financial limits on this assistance are purposely being left open to encourage interested parties to seek assistance and take advantage of this service. Limits and criteria may be redefined at a later date depending on demand. ❇

Hunting for history

Investigators in the Lubbock County Criminal District Attorney's Office have a fascinating hobby: They are researching the site of an 1871 battle between American soldiers and Comanche Indians in Crosby County.

In October 1871, a small group of 4th Cavalry soldiers found themselves under attack by a large group of Comanche Indians in Crosby County, Texas. Leander Gregg of Belmont, Ohio, was killed and buried near the spot where he fell. His grave and the battle site were lost to history.

By K. Sunshine Stanek
Assistant Criminal District Attorney in Lubbock County

In 2012, investigators from the DA's Office in Lubbock set out to locate this site and have Gregg's grave and the battle site get the recognition it deserved. Applying the skills developed in their law enforcement career, these investigators have conducted countless hours of research and spent many weekends with "boots on the ground," tracking and identifying this location. I talked with several of these folks (my colleagues) about their investigation.

Who from the Lubbock County office is involved in the 4th Cavalry project?

Todd Smith: Primarily it has been Jimmy Isbell, Mike Mitchell, Robert Noah, and me, although several others have been out and hunted the site with us using metal detectors and helped in researching various pieces of this puzzle.

How did you get interested in this event and hobby?

Mike Mitchell: We like to refer to ourselves as the DA Forensic Metal Detecting Team (it sounds good and helps justify the amount of time we spend talking about it around the office). But actually for the last several months we have been historic metal-detecting. It takes hundreds of hours to hone your skills with these machines, and we are beginning to feel like we are at a level of competency to use them in actual police work.

Robert Noah: As a kid, my father used to take me along as he metal-detected at old homesteads and parks, and that got me interested in it. Age forced him to retire from the hobby, and he passed his metal detector on to me. Looking for historical artifacts and solving the battle-site mystery has been my motivation.


Button


Belt buckle


50-caliber Spencer cartridge


Fired bullet

Jimmy Isbell: As an almost lifelong resident of Crosby County, I got interested in this from a local history standpoint. There was a site already declared to be this battle location, but our initial research indicated several things had been overlooked by other historians. Being able to actually prove the location of the battle site and set the record straight became my main interest.

Todd Smith: I really had no idea that this kind of history was around here, and the thought of Gregg's grave being out there unrecognized appealed to the investigator in me.

What types of objects have you recovered?

Jimmy Isbell: Shell casings, bullets, arrowheads, infantry buttons, military buttons, Calvary spurs, square nails, saddle rings, Indian "jingles," and horseshoes. [See some photos of these items at left.] All these items have been found in a way that gives a clear picture of the battle that matches the descriptions of the participants.

What do you plan do with the items after you recover them?

Mike Mitchell: Right now, all artifacts are photographed and logged using their GPS coordinates. We are on private property, so each item belongs to the ranch, but most likely these artifacts will end up in a display

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A long-dormant Houston case is

The chilling story of a "black widow" in Houston

In the early morning hours of April 22, 1987, the sheriff's department was called to an upper-middle-class home in northwest Harris County. Neighbors called police after Norma Jean Clark woke them in the middle of the night claiming an intruder had shot her husband, Ed.

By Katherine McDaniel
Assistant District Attorney in Harris County, pictured with Sgt. Eric Clegg (left) and Sgt. Dean Holtke (right) with the Harris County Sheriff's Cold Case Unit

When police arrived at the two-story home in a wooded, small neighborhood, they found the front door open with no signs of forced entry. Just inside the master bedroom, Ed Clark lay dead. The only signs of distress in the bedroom were the gunshots and resulting blood spatter—Mr. Clark had clearly been killed in his sleep. He was face-down with the covers up to his neck, a gunshot wound to the back of his head and another through the sheets into his back. Ed's own handgun, a .38 revolver, had been used to kill him, and it lay on the dresser near his lifeless body.

A search of the exterior of the house showed no signs of entry at the back door or through any windows. There were no indications of a struggle, and nothing was taken from the home. The alarm either had not been set that night or had been turned off. Ed's friends and family reported that he was a stickler for the alarm, and they all found it out of the ordinary that the alarm would be off. Ed's son, Edmund, even said that as a teenager, he had been caught sneaking out because even the windows had a sensor that would sound an alert when opened. This meant it was highly unlikely that there had been an intruder: If there had been, Ed would have heard the door sensor at a minimum, and the sheets would have been disturbed from his waking up.

John and Judy Manack were neighbors and friends of the Clarks. John and Ed worked together in the construction business, and Judy and Norma frequently socialized. In fact, the Manacks called police when Norma Jean woke them early that morning. Norma told them she had been asleep upstairs when she heard "something" downstairs followed by a gunshot. She said she was sleeping alone in the upstairs bedroom with a bad cough because she had not wanted to wake Ed. She added that when she heard the gunshot, she went downstairs, past her marital bed, through the house, and out the garage, then ran through the woods to the Manacks' house. She had not checked on Ed to see if he was OK.

Judy Manack remembered several odd bits of behavior that night: For example, after running through the dense woods, Norma didn't have any dirt or debris on her nightgown or her feet. And Norma went back home to get a change of clothes and returned holding her nightgown, which she asked Judy to wash for her. Judy had placed the nightgown on top of the washing machine and called police. She didn't want to believe her friend had killed Ed, but she also didn't want to destroy evidence. Reflecting on that day and Norma's strange behavior, Judy noted, "Norma's first concern did not seem to be that Ed was dead."

It was soon discovered that the Clarks' marriage was in shambles at the time of Ed's death. His friends and coworkers said that Ed was planning to leave Norma. Ed's ex-wife, Linda, provided helpful insight into the background of Ed's life. She and Ed had two children, and Ed worked in the construction business. As a site superintendent, he met Norma on a work site, where she was the trash truck driver. Ed left his family for her, and they were married. As time went on, the marriage began to falter, and there were rumors of Ed having an affair with someone at work; he was also moving money into bank accounts bearing only his name. Norma told her friends she wasn't about to be on the losing end of another divorce. She had clearly come from humble beginnings. She told Judy and some of her other friends that she had been left penniless in the dissolution of her first marriage. She was bitter and resolute not to be poor again. On the night of his death, Ed's bags were packed for a business trip to Miami. He had gone

to a coworker's house that night for drinks and expressed his intention to go home to tell Norma the marriage was over and demand that she move out while he was out of town.

On the morning Ed's body was found, while Norma was at the Manacks', she called Dr. George Aubert, the chiropractor for whom she worked. She called with two specific requests: She asked for Dr. Aubert to help her get admitted to a hospital, and she asked for $10,000. Norma was trying to get the money for a defense lawyer, and she knew that after Ed's death, their bank accounts would be frozen. Dr. Aubert corroborated that Norma had been ill with a bad cough—so ill, in fact, that she had stayed home from work for a few days before the murder. That morning, Norma said she "needed" to be admitted to the hospital because the police wanted to test her hands for gunshot residue. Dr. Aubert encouraged her to cooperate, saying that of course she hadn't been shooting a gun—she had been bedridden for the last several days. But Norma said she had indeed been shooting in the backyard. At that, Dr. Aubert was puzzled. He was even more puzzled when she asked for money.

Always a suspect

From the beginning, Norma was a suspect. No signs of forced entry, no signs of burglary, a marriage on the rocks—all circumstances that led police to Norma. Without Dr. Aubert's help, she got herself admitted to the hospital with bronchitis. She refused to give a formal statement to police.

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Hunting for history (cont'd)

at the Crosby County Pioneer Museum.

Do you think you have or will locate the grave and battle site?

Todd Smith: At this point, I think our evidence and the research is overwhelming that we have the battle site located. A hundred and forty-two years of erosion has probably ended any chance at finding Gregg's exact burial spot, but I think we can get close enough to eventually recognize Gregg's sacrifice.

Have you ever used your skills in a work-related environment or to assist other law enforcement agencies in trying to recover items?

Robert Noah: We have assisted Lubbock police in an attempt to find some shells that a capital murder suspect threw from the window of his vehicle in Amarillo. Chief Smith and I were also called to assist the Lubbock County Sheriff's Department on a double homicide and successfully found shell casings at the scene.

What has been the most enjoyable and most difficult part of this project?

Robert Noah: I think that the most enjoyable part is to be able to help recreate a battle that most folks never knew happened. You find yourself quite often just staring off in the wind actually imagining the Indians and the U.S. Cavalry fighting at this spot. Sounds funny but I know all my partners shared the same experience. The hardest part is when you have hunted all day and find nothing. It's hot, cold, or raining but you keep on going—knowing at any minute you might get the big find.

Todd Smith: I think the best parts have been meeting and learning from a group of historians in this area and being able to recover things that were left so long ago in such a significant event. The hardest part has been researching and identifying ballistic evidence (make, model, and caliber) and other items found at the location.

Jimmy Isbell: The most enjoyable part has been being outside and getting away from it all. That and meeting new people and re-connecting with some folks I haven't seen in years. The hardest part is making the time to get out and go do it.

Mike Mitchell: One of the most enjoyable aspects of this hobby is getting to know the history of this area and about the artifacts we have found. I never imagined I would learn the calibers and make of post-Civil War rifles and pistols while tracking the 4th Cavalry across this part of Texas. It is also great to get back outdoors after spending most of the week behind a desk. It is usually a long and exhausting day, but the hard work is worth the reward. ❇

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Back in 1986, Detective Anthony Rossi of the homicide division had secured Norma's nightgown and had sent it to the Texas Department of Public Safety to test for gunshot residue and to determine if there were blood on it. He had also sent the sheets and bedspread for analysis. Detective Rossi presented his investigation to the district attorney's office, and Norma was brought to the grand jury, as were her two teenage children, but Norma refused to testify. The grand jury had not been presented with charges, merely the investigation of the murder. It is hard to know why Norma was not charged back in 1987—the evidence was circumstantial but strong. The prosecutors back then made the decision to wait and see if the evidence improved.

After that, Norma moved to Tennessee. Over time, there was a fight over Ed's estate. Norma wanted to receive half and for Ed's two children to each get a quarter, but Linda, Ed's ex-wife, fought for the children's fair share. The estate settled with one-third for Norma and one-third each for Ed's two children. Linda long suspected that Norma had killed Ed for the money.

With the passage of years, Detective Rossi retired, and the investigation went dormant.

In 2009, a captain in the sheriff's office, J.D. Satcher, remembered the case, and as he was planning to retire, he asked David Rossi (no relation to the homicide detective Rossi) of the Crime Scene Unit if he would examine the evidence. Over the years, Deputy David Rossi had developed an expertise in blood-stain pattern analysis. He pulled the nightgown Norma had been wearing the night of Ed's murder, only to find that the cuffs on the sleeves were missing. He used a high-resolution microscope to examine the garment and found more than 50 potential microscopic blood spots. Significantly, these spots were consistent with impact spatter, which occurs when a projectile hits an object, such as a human head, and the blood "blows back" in a fine mist in a distinct, identifiable pattern. While the blood-stain pattern is affected by many things such as distance and whether there are any intermediary targets, its presence on the nightgown, when Norma said she'd been in another part of the house during the shooting, contradicted her statements to police. Deputy Rossi contacted the Harris County Sheriff's Office Cold Case Unit, and the case was reopened.

An old case gets a new look

In 2010, I was assigned to our office's Major Offenders Division, with a focus on large narcotics cases, gang cases, and cold-case homicides. I met with the sheriff's Cold Case Unit detectives Dean Holtke and Eric Clegg to discuss Rossi's findings and develop a plan for the case. Sgt. Holtke and Sgt. Clegg re-interviewed many of the participants from 1987—the Clarks' coworkers, neighbors, the chiropractor, and Ed's family. In each of those interviews, people said basically the same thing: that everyone had known Norma had killed her husband.

Because of the age of the case and the age and fragility of the evidence, we had to proceed with extra care. We knew the nightgown had been tested in 1987. What we did not know is which chemicals had been put on the polyester nightgown back then or the potential degradation of what we thought was blood spatter due to those chemicals, time, and heat. We took the nightgown to the Harris County Institute of Forensic Sciences, where Katie Welch, the assistant director of the lab, performed some testing on the spots. In 1987, there was only a presumptive test for blood, and the science of bloodstain pattern analysis, much less the technology of high-resolution microscopes, was not well-developed. In the last 25 years, many changes in the ability to test for the presence of blood had evolved.

Katie took a look at the nightgown and did a cutting on one of the spots we believed could be blood. She used the Hematrace test, which is a confirmatory test for upper primate blood. The first spot tested from the nightgown turned up a positive result. Another spot yielded inconclusive results, and the case came to a standstill again. The Hematrace test consumed the entire spot each time the test was performed, so conducting additional tests was problematic. Similarly, any DNA testing would consume the individual spots. We made the decision *not* to have any DNA analysis done; if the spots yielded Ed's DNA, it would neither help nor hurt the case—of course a husband's DNA on his wife's nightgown would be expected. The blood findings seemed much more important to the case. With a singular positive result for the presence of blood, we were prepared to go forward.

Sgts. Holtke and Clegg traveled to Tennessee to attempt a non-custodial interview of Norma. Sgt. Holtke was equipped with a button record-

ing device. Norma spoke with the detectives and claimed that she had always wanted to help find her husband's killer. Apart from her attempt to find out what the detectives knew, the detectives learned nothing new. None of us expected she would admit to killing Ed in cold blood, but we wanted to afford her one more opportunity to give a statement.

Much of what she said during this recent interview contradicted what she'd said in the days after the murder. Norma said on the night of the shooting, she had been sleeping on the second floor and was coming downstairs even though she "didn't hear anything" until she was partway down. She said that the front door (at the base of the stairs) was wide open but that she had gone past it, through the house, and out the back door. She said she'd run through the woods to the Manacks' house, rather than to the next-door neighbors because of their vicious dog. (We found out later she had often fed and tended to that dog.) She disavowed knowing Judy Manack very well and stated that her marriage was good. We knew that Ed was planning on leaving her, and he had told Norma so the night he was killed. We knew, too, that Norma and Judy had been great friends—so great, in fact, that Judy was listed as Norma's "emergency contact" during her bogus hospital stay.

Norma told Sgt. Holtke that she "didn't feel like" she was a suspect and made contradictory statements about the gunshot residue test, first saying she didn't know there was one and then saying no one had asked her to take it. Judy Manack had told us about a conversation she had with Norma the morning Ed died, where Judy talked to Norma about gunshot residue and noted that it would be easy for the police to exclude her as a suspect if she underwent the test. Detective Rossi said he had asked her to take the test but she had refused back at the house. The reality was, of course, that with the disposable nature of gunshot residue particles, it is very possible nothing would have been recovered from her hands. What was important was her reaction and avoidance of the test. When they asked her about shooting the gun in the backyard (as she'd told Judy and Dr. Aubert way back when), Norma said she had not fired a gun. With discrepancies in her story identified, the detectives contacted me, and we prepared an arrest warrant.

After Norma was arrested and brought back to Houston, we began to prepare for trial. I had the privilege of handling this case with Assistant District Attorney Donna Logan, who was there that first day for arraignment and for every step after. While Deputy Rossi's opinions regarding the presence of the impact spatter were valuable, we wanted those findings to be peer-reviewed. We contacted Officer Chris Duncan of the Houston Police Department, an expert in crime-scene reconstruction, and asked if he would look at the nightgown. In addition to his blood spatter expertise, Officer Duncan holds a specialty in forensic photography, which, unbeknownst to us at the time, proved to be key to the investigation.

We met with the professionals at the Institute of Forensic Sciences again, this time with a request to perform Hematrace on the sheets where Ed was shot. The idea was that if those sheets, which clearly had a large amount of blood on them, did not show a positive Hematrace result, we would know that the inconclusive results on the nightgown were likely due to the passage of time in non-climate controlled storage. If the sheets yielded a positive result, we would have to do additional research to determine what chemicals had been put on the nightgown in 1986. The Hematrace test on the sheets was negative, which was consistent with our theory that the passage of time and storage had caused the hemoglobin to become undetectable. If the bloody sheets were not positive for blood, we could better understand how the nightgown had yielded only one positive result on the impact spatter: simple destruction of evidence.

We also asked that Dr. Bill Davis, an expert in the field of gunshot residue, examine the nightgown for any particles that might have remained on it. Dr. Davis explained to us that the particles of lead, barium, and antimony (all present in gunshot residue) were disposable, meaning the particles could fall off the gown in repeatedly transferring and packaging it. Dr. Davis was able to locate two particles, which, by his office's standards, meant it had to be classified as "inconclusive." However, Dr. Davis was confidant that the presence of this combination of elements would have come only from gunshot residue, and he testified accordingly. He also explained that the Atomic Absorption and Gryce tests used in 1987 would contribute

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to the loss of particles, as would any handling or agitation of the fabric.

The defense retained the services of Tom Bevel, a nationally recognized expert on blood stain analysis and crime scene reconstruction. We made accommodations for Bevel to examine the evidence in person and made the evidence available should the defense seek to perform any additional analyses. (They didn't).

We went to trial 26 years, almost to the day, after Norma shot Ed to death.

Blood findings

As the day of trial approached, we had all of the evidence pulled from the property room. We looked through the boxes and found the fitted sheet, top sheet, and nightgown. There had been a bedspread on top of the sheets that had been logged into evidence in 1987, and Detective Rossi had submitted it to DPS that same year. The bedspread had been missing since then. As I reviewed Bevel's report in preparation for cross-examination, I noticed something surprising: He documented having examined that missing bedspread, in fact using it as an important part of his analysis that there was no impact spatter on Norma's nightgown. In reality, however, he had viewed only a 1987 photograph of the bedspread to draw this overreaching conclusion.

We tried the case in front of Judge Marc Carter. The defense was multi-layered and quite challenging. Neal Davis, lead defense counsel, had been a police officer for quite some time and is an accomplished lawyer. He was extremely professional and knowledgeable in all the areas of forensic analysis and police investigation. Two lawyers, a jury consultant, and at least one intern assisted him. They challenged us at every juncture. Their defense was clearly that an intruder had killed Ed, but how that actually played out morphed during the days of trial.

At trial, many of the crime-scene officers came to watch Tom Bevel, who had literally written the book on blood-stain pattern analysis. He initially stood by his finding of examining the bedspread, and when confronted with its absence, eventually conceded that he had not seen the actual bedspread, but rather a photo. He asserted that viewing a 26-year-old, 3x5-inch photo was sufficient for his conclusion that there was no impact spatter. It was here that Officer Duncan's expertise in forensic photography, in addition to crime scene reconstruction, became so important. Officer Duncan explained to the jury that the quality of such an old photo would never be sufficient, in his opinion, to find definitively, as Bevel had, that there was no blood on the bedspread. This was a huge blow to the defense. It had premised a large part of its theory on Bevel's findings and the State's "less-qualified" experts being wrong. The defense theory was that there was not enough evidence to file charges in 1987, and if they proved there was no impact spatter on the nightgown, they asserted there was no new evidence, and hence, no case. Bevel was exposed for his erroneous conclusions and shoddy work, and the defense amped up its rabbit trails.

Whodunnit?

The defense contended that Ed had lots of enemies. For example, there had been a few instances of vandalism to the house and at least one where Ed had been hit on the head while resting on the couch some months prior to his death. But when these incidents happened, Norma's disgruntled son was suspected of committing these crimes; he was eventually kicked out of the house. Still, that didn't stop the defense from insinuating that maybe this angry stepson had killed Ed. The defense waited to make these allegations about the stepson during cross of the State's witnesses. The defense theory appeared to be that Norma was not the killer and that lots of other people might have done it.

We had learned through our investigation in 2010 that Ed had been constructing an apartment complex in Miami back in 1986 and that he had fired a plumber due to a drug problem. The defense deemed the plumber "the true assailant." We were able to track down Billy Salyers, the plumber, and called him as a witness. When he took the stand, the jury saw a somewhat goofy, kind old man who admitted he'd had a drug problem back then but that he had worked for Ed after they patched things up in 1986. Billy and his wife remembered finding out about Ed's death while they were in Miami around the time their baby was born—the timing and these details made it improbable that he could have been the murderer.

The next suspect devised by the defense was Billy's "assistant," Michael Todaro, a man described by a friend of Norma's as a "scary-look-

ing Asian." In 2010, homicide ran an ATF check on the gun used to kill Ed and found that the original purchaser in the 1970s was Mr. Todaro. Todaro had long ago moved to another country, but we were able to track down a DWI booking photo of him from the early 1990s. In the picture, he was naked. And laughing. The truth was that Todaro had no connection to the case other than that he was the original purchaser of Ed's gun. In Texas, there is no database of registered guns as there is with cars. The gun likely changed hands several times through legal sales before Ed bought it at a gun show or from a private seller. The defense created the image of the "scary-looking Asian" as a rabbit trail, but Todaro had no part in the lives of any of these parties—neither Billy Salyers, nor anyone in the Clark family or among Ed's co-workers had seen or heard of him before. One of Norma's life-long friends tried to say she had seen him at the house before, but her overdramatic testimony did not hold up on cross.

Next, the defense contemplated calling Norma's original lawyer from 1987. After much discussion regarding whether his testimony would then vitiate the attorney-client privilege, the defense decided not to call him. And after much discussion with her lawyers, Norma did not testify.

Closing

Finally, after two weeks of testimony, we argued. Donna and I walked the jury through all the circumstances surrounding Ed's death and why everything pointed to Norma. We talked about the impossibility of Norma's running through the woods without a scratch and about there being no evidence of an intruder. We pointed to the fact that nothing was taken from the house and that Ed had been killed in his sleep with his own gun. Norma knew Ed was going to leave her, and she was not about to stand for mistreatment. She had grown accustomed to their fancy lifestyle and was not going to let it go easily. The morning when she appeared at the Manacks', she was the picture of a victim: vomiting from fear, in a daze, and crying. But we pointed out that as the hours wore on, even her closest friends doubted her status as victim and suspected her as the shooter. Imagine the mistrust her good friend Judy Manack must have felt when, on the same day her husband was found shot to death, Norma asked Judy to wash her nightgown. Imagine the confusion Dr. Aubert felt when Norma told him she had shot a gun shortly before Ed's death. Each friend of Norma's and Ed's consistently walked away thinking something was not right with her behavior.

In the end, it was the forensic evidence that proved beyond a reasonable doubt that Norma had shot and killed Ed. Her web of lies could not withstand the blood spatter on her nightgown. No one—not Norma herself, nor her friends, nor her experts could explain why, if Norma had been upstairs in the other room when Ed was shot, how or why she would have blood on the front of her nightgown. Impact spatter, consistent with a close gunshot wound, was the only explanation, just as we argued Ed had suffered at Norma's hand.

Norma Jean Clark was found guilty after less than a day of deliberations. We had no other criminal acts to talk about in punishment. The defense talked about the defendant's health problems, her advanced age of 65, and how Ed was "sort of a jerk" who seemingly had it coming. Ed's family testified about growing up without their father and without a grandfather. This Texas "black widow" who went free for 26 years ultimately got snared in her own twisted web of lies: A jury sentenced her to 25 years in prison.

In the end, justice was served thanks to the persistence of a team committed to the truth. This case went forward because Sgts. Holtke and Clegg cared enough to revive it and because of dedicated professionals such as assistant DA Donna Logan; Colleen Jordan, the assistant director of the Victim and Witness Division; DA Investigator Dennis Field, and the rest of the people who cared enough to bring justice to Ed's family. ❇

Chilli's story will warm your heart

This adorable 8-year-old wrote a touching letter to the man who plowed into her car while drunk, paralyzing her and badly injuring her aunt. After news outlets picked up the letter, support poured in from around the country—and the local prosecutors' office.

As prosecutors, we deal with crime victims everyday—it's part of the job. We deal with some who are very sympathetic victims as well as those who are very difficult. We don't choose our victims.

By Allenna Bangs
Assistant Criminal District Attorney in Tarrant County

I knew all of those things from my five years in the Tarrant County District Attorney's Office, but I never expected to learn so much from a victim, especially an 8-year-old.

In July 2011, I was wrapping up a three-month term in Grand Jury, and I happened to be six months' pregnant with my first child. I was looking through my list of unindicted cases and found a newly filed intoxication assault. When you work in Tarrant County and you are trained by misdemeanor chief Richard Alpert, you are predisposed to an interest in intoxication cases. I opened the file and began to read. The facts of the case were not particularly different from those I have read in the past, but the injuries to and the age of the victim immediately struck me. In fact, as I read through the case, 8-year-old Xiticalli "Chilli" Vasquez was still lying in a hospital bed, fighting for her life. She was outfitted with a metal halo with screws directly into her head to stabilize her spine and prevent any further injury. (She's wearing the halo in the photo below.)

One day earlier that month, at 3:25 in the afternoon, 20-year-old Jeremy Adrian Solis was driving on the north side of Fort Worth and attempted to make a hard left turn into a liquor store parking lot. He plowed directly into Maria Gutierrez's car, crushing her vehicle (see a photo from the scene on the opposite page). The only thing Maria remembers is that she had taken her two young nieces, Chilli and Giselle, to the mall to get their nails and hair done as a special treat three days before Chilli's birthday. Maria's son, Warren, was in the front passenger seat and her nieces were in the back seat, and all were immediately transported to area hospitals. Maria fractured her neck and shattered her leg from her hip to her ankle. It took her four months to learn to walk again. Chilli did not leave the hospital for 105 days, and she left as a paraplegic. She had suffered a broken spine, shattered leg, and ruptured bowel. She had multiple surgeries, a tracheotomy, a feeding tube, a catheter, and a rod placed in her leg. But what Chilli had really lost was the ability to be a precocious little girl—or so I thought.

A sweet girl with attitude

I called Chilli's mother, Arabella, to introduce myself and ask her about Chilli's prognosis and injuries. Throughout the entire conversation I could hear the struggle in Arabella's voice as she tried to remain positive and strong while fighting back tears and obvious despair. Of all the victims I have spoken to, she was the most heart-wrenching. She was literally painful to listen to.

Before we hung up, Arabella said, "You know, I hope you get to meet Chilli one day. I think you would be really impressed. She is the

Chilli smiling in her hospital bed

one that keeps us positive. Without her attitude, we would lose hope." I asked if she had considered what kind of punishment she wanted for the defendant, Mr. Solis. She said she had spoken to Chilli about it and that Chilli just wanted him to go to prison until she learns to walk again. Arabella finally let the tears out and said, "I just don't have the heart to tell her that is forever." At that, I had to get off the phone before I lost all sense of professionalism. I put the phone down and hung my head. Maybe it was the fact that I knew I was having a daughter or maybe it would have happened to any prosecutor, but I had a hard time accepting what Arabella was going through. Just a few short months ago she had a little girl with so much spirit. She had dreams of Chilli playing sports, attending school, and one day getting married and having her own children. Now it all seemed lost.

The defendant, Solis, was charged with two counts of intoxication assault with a deadly weapon for the injuries that Chilli and Maria sustained. Both Warren and Giselle had suffered only minor injuries that did not rise to the level of serious bodily injury. Solis had failed the HGN and then consented to a blood draw. His BAC was .23, almost three times the legal limit. The owner of the house where the defendant had been drinking had let Solis borrow his truck to go get more alcohol, and he never returned. There was still a cold 24-ounce can of Bud Ice in the truck.

I emailed the defense attorney and offered 10 years on both counts and filed a motion to stack—the maximum. At the time, punishing the defendant seemed like all I could do to help make this family whole.

At the defendant's first court setting, I noticed the courtroom was really full. This was not unusual, but there was a large group of people that stood out because they clearly all knew each other. They were all surrounding a little girl in a wheelchair. Chilli was dressed in jeans and a hot-pink shirt with sequins. She had a bow in her hair that was as big as her head and her signature purse draped around her tiny body. She was speaking to her MADD (Mothers Against Drunk Driving) representative and was smiling ear to ear. I approached her and shook her hand. She was a little shyer than I had expected, but of course she would be. This was the first time Chilli was well enough to make it up to the courthouse to meet in person.

I met with her and about 15 members of her family in our victim's assistance area. Actually, I met with her parents because Chilli could not sit still. She wheeled up and down the hall talking to members of her family and court staff. Arabella told me that the girl had just had her halo removed and was really enjoying her newfound freedom. I also had the opportunity to meet with Maria, who had been driving that fateful afternoon. She had just started walking with a walker and was so proud of her recent accomplishment. It was so exciting to hear of both victims' recent improvement and so sad at the same time. I felt terrible that Chilli and Maria now got excited over regaining control over parts of their bodies that used to be completely normal.

The court settings continued for over a year. The defense continued to ask for probation given Solis's age and lack of criminal history. I knew that was never going to be an option. Eventually, the defense decided they would take the 10-year offer. It was a plea to the maximum but somehow felt like it would never be the justice this family deserved.

Chilli's letter

The day that the defendant pled was not unlike his first court setting. The docket was full. Chilli and about 15

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The scene of the wreck

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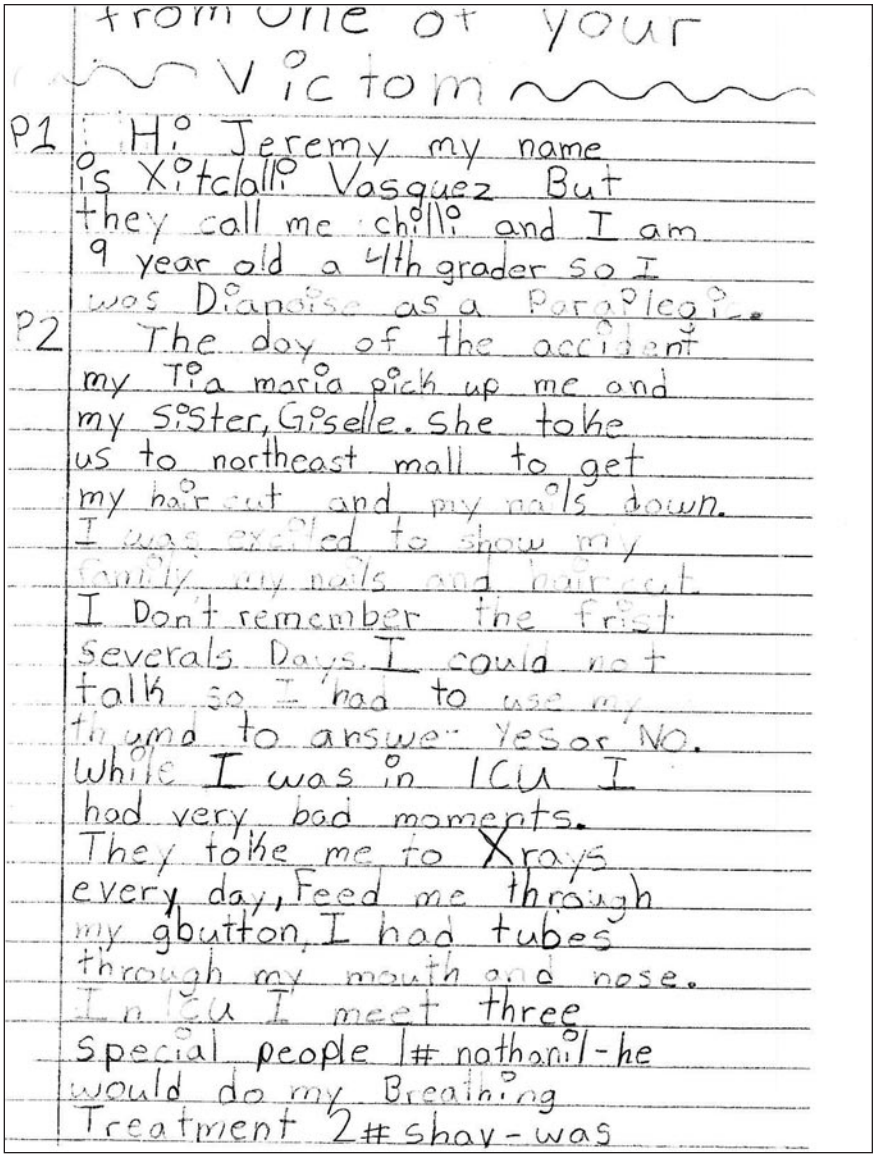
family members arrived to watch Arabella and Chilli read their allocutions. Chilli came in with a handwritten letter. I looked at the first page and could not read any further. It was written on loose leaf paper, the "i's" dotted with big polka-dot circles, and the paragraphs were numbered as she had learned in grade school. (See a scan of it, below.) A letter written by a child that spoke of the ICU, her feeding tube (known as a "g-button,") and other medical terms she should never have to know. At the very top she had titled her letter "From one of Your Victom."

Arabella went first and sat on the witness stand. She told Solis what his actions had done to her family. She wheeled Chilli up in front of the witness stand so he could see the result of his actions. Chilli looked a little stunned but brave nonetheless. The defendant hung his head, the judge teared up, a bailiff had to walk out of the room, the other defendants who were present for docket cried, and Chilli's family sobbed.

When it was Chilli's turn to talk, she looked at me and shook her head. She couldn't do it. She just wanted out of that room, and that was so understandable. Her mom read Chilli's letter to the defendant, and it felt like it took 100 years. Arabella choked back tears as she read, "There are days that I cry cause I can't do what I used to do." The letter ended with, "Look at what I said and the words I said and tell me how I look and feel. How do you feel today?" When it was finally over and the family left, it was like the air was sucked out of the room. Everyone told Chilli they were very proud of her for facing the defendant, and you could see relief on her face. I am not sure if it was because she faced him or if she was just glad it was over.


from one of your
Victom
P1 Hi Jeremy my name
is Xitclalli Vasquez But
they call me chilli and I am
9 year old a 4th grader so I
P2 was Diagnise as a Paraplegia.
The day of the accident
my Tia maria pick up me and
my Sister, Giselle. She take
us to northeast mall to get
my hair cut and my nails down.
I was excited to show my
family my nails and haircut
I Don't remember the frist
Severals Days. I could not
talk so I had to use my
thumb to answer Yes or NO.
While I was in ICU I
had very bad moments.
They take me to Xrays
every day, Feed me through
my gbutton, I had tubes
through my mouth and nose.
In ICU I meet three
Special people 1# nathanil-he
would do my Breathing
Treatment 2# shay-was

The story takes off

Little did she know that an even bigger story was just beginning. I snapped a quick picture of Chilli and her family thinking I might submit their names for our annual Christmas Family Adoption, where our office "adopts" a family in need and buys them Christmas presents and food for the holidays. I answered a few questions and showed them to the elevators thinking this is where our brief relationship ended.

By about lunchtime that day, our Public Information Officer, Melody McDonald, was sitting in my office telling me she had received numerous phone calls and media requests about the Solis case. I was a bit confused. After all, this was a plea, not a weeks-long, televised trial. The Victim's Assistance Unit had

asked the family for permission to post Chilli's letter on our website, and the local news had picked it up. By the end of that day, I had done a phone interview and an on-camera interview for the news. Surely, that was the last of this case. I was wrong.

Once the story aired on the evening news, the calls started pouring in, not only from media but also from the community. People wanted to know how they could help Chilli and where they could send checks. By the next night, her letter to the defendant was on every single station in both English and Spanish. I quickly contacted Richard Alpert, our misdemeanor chief, and asked him if we could adopt the family for Christmas and explained that I didn't think donations were going to be an issue! Richard also suggested that we make Chilli the face of the holiday "no refusals" campaign, but I was reluctant to ask the family to do any more press. Since the day Chilli had been in court, news crews had been to her house, but I called Arabella and asked if Chilli would be willing to come up to our office and do one last interview. She happily agreed. Both Arabella and Chilli said that if this was to help curb drunk-driving over the holidays, they were in.

Chilli came to my office, and we talked about what she might say. I gave her a pencil and paper, and she wrote one sentence: "Please don't drink and drive over the Holidays because you might hurt or kill someone that you don't even know." Another prosecutor, Ashlea Deener, came by to ask Chilli and Arabella what their family might want for Christmas and explained to them we had adopted them for the holidays. I was surprised when Chilli listed off things that her brothers and sisters wanted for Christmas, and Arabella politely said they didn't really need anything. Then I walked Chilli down the hall to the media room and expected to find two or three camera crews. When we turned the corner, I thought the President might be speaking—there were probably 10 news agencies there to film this little girl and a few radio stations that wanted audio. I gave a brief synopsis of Chilli's case and then she read her message. When the press conference was over, each reporter stood in line to ask Arabella and Chilli questions. I thought this would overwhelm the child, but she handled it with poise—and a little attitude.

Later that day I called Arabella to check on Chilli, and she told me that they were packing their bags. "The Today Show" had called! Arabella and Chilli flew to New York for the weekend. I woke up early on Saturday morning and Chilli was being interviewed by Lester Holt. The calls and emails to our office skyrocketed. Ashlea and I made sure to inform the media that we had adopted the family and hoped to make their Christmas special. I could have never imagined the response we received. Everyday I came to work and there were stacks of letters from across the country and even Canada. Some letters included encouraging messages and some just included checks. I received packages with wrapped gifts to give to the family. A local car dealership called and asked if they could have a fundraiser, and we agreed. When we attended the fundraiser, they presented us with a $10,000 check to be spent for the family. There were articles posted on websites for ABCNews, CNN, TruTV, and Huffington Post. The comments after each article were very emotional as people shared how their lives had been touched by drunk driving and

Chilli (in her wheelchair) at the press conference introducing her as the face of the holiday "no refusal" campaign. Richard Alpert, misdemeanor chief of the Tarrant County Criminal District Attorney's Office, is at the podium.

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how Chilli inspired them. The Texas Department of Transportation (TXDOT) called and asked if Chilli would like to be the face of its statewide holiday campaign to curb drinking and driving. Again, the Vasquez family agreed, saying they would do anything to stop this from happening to another family.

Wading through unfamiliar waters

To be honest, I was happy that the family was getting attention, but I worried too. First, we were taking in a lot of money and gifts. I wanted to assure each donor that all of the money donated was going to be spent directly on the family. We opened up a bank account for charitable giving and deposited all of the money there. The attention also made me nervous because I didn't want people directly contacting the Vasquez family at home. We received a few letters that were unnerving and a few requests from people who wanted to meet Chilli that made our "prosecutor radar" go off. We set up a system so that all such requests had to be filtered through Melody (our PIO), Ashlea, and myself to determine legitimacy. In total, we received over $17,000 in donations.

The misdemeanor section worked very hard to determine the family's needs, including through a field trip to their home. There was a small makeshift ramp at the front of the house so that Chilli and her wheelchair could get inside. She had had to abandon her bubble-gum pink bedroom upstairs for a room on the ground floor, and she could no longer get upstairs where her siblings were. Her new room had a hospital bed so that she could move it up and down to get in and out. Where you might expect to find dolls and toys, there were medical supplies for her still-evolving needs. I realized there was a lot we *could* do for Chilli, but what Jeremy Solis took away, no one could give back.

After identifying the needs of the Vasquez family, attorneys from our office contacted local businesses about in-kind donations. The response was overwhelming, as most had seen Chilli's story on the news already. One morning in mid-December, a crew of volunteers from our office went over to the Vasquez home. The family was soon to head off to church. We set up a lunch at the same restaurant that hosted a fundraiser, gave them spending cash, and asked them to just go out and have a great day. Once they were gone, we went to work. We put up a Christmas tree; contractors came over and measured to fix the roof; and representatives from Lowe's came over to build a new concrete ramp in the back of the house. Sam's Furniture donated bunk beds for Chilli's sisters so they could all share a room and outfitted the new space with a flat-screen TV. We had many wrapped gifts for each child, mom, and dad. Local restaurants donated snacks and sweets to leave for them. We were able to coordinate with Project Walk, a local non-profit for people with spinal injuries, for a month's worth of tuition. Project Walk is a specialized rehabilitation facility that designs unique classes to teach people with spinal cord injuries how to cope and live with their injuries. Arabella had heard of the program and really wanted Chilli to attend to keep focused on her goal of walking again, but they could never have afforded it on their own, and insurance would not cover it. Finally, we left an $11,000 check in a neatly wrapped box on top of a new motorized wheel chair in the living room. We cleaned the house and snuck out.

That day, the media contacted me and asked if they could be present for the big reveal. They wanted to capture Chilli's face as all of their surprises first greeted her and her family. For the first time, the answer was "no." Arabella and Chilli had been on a whirlwind media tour, and we felt like it was finally time to just have some peace. I wanted them to feel like a family and not like a sideshow. Arabella texted me when they arrived home and said simply, "Thank you for everything." As we all say, we don't get into this job for the thank-you's, because they are few and far between, but they are nice when they come. All I could respond was, "Thank *you* for everything."

I had learned so much. I really got to look at a case for so much more than what was in a report. I got a glimpse into the life of a victim, long after a crime was committed. I saw how caring the people in this country, my community, and my office are, and I was impressed. I am not an overly emotional person—I don't cry at work, and I have learned to separate the emotional aspects of this job from my personal life. But this situation was just different. In this job, we deal with victims every-day—but some of them we will never forget. ❇

Reflecting on their journey through the criminal justice system

What victims have to say about the judicial process years after they've gone through a criminal trial

By Mark Odom
Deputy Director of the Victim Services Division at the Texas Department of Criminal Justice (TDCJ)

In the summer of 1997, I remember sitting on the porch of our family's ranch visiting with my father, Wendell Odom, about my new position working for the Victim Services Division of the Texas Department of Criminal Justice (TDCJ). I had spent the previous 10 years working for the Texas Board of Pardons and Paroles as a parole officer and later as a parole revocation hearing officer. It was always easy visiting with my father about criminal justice. He was a retired judge who had served for over 25 years in the Harris County and District Courts and then later with the Texas Court of Criminal Appeals in Austin. As I was explaining the programs that were then available to crime victims, as well as new programs that were developing to assist victims, he commented to me, "Well, it's about time."

He reflected back to his days in the Harris County district courts in the 1960s and remembered how difficult and profoundly moving it was to observe victims of violent crime having to endure the legal process. Before the Texas Legislature adopted the first Crime Victim Bill of Rights in 1985, victims had little or no opportunity to participate in the criminal justice process. But since then, the victim rights movement has advanced exponentially in Texas and nationally. The conversation we had that night was an eye-opener for both of us.

Advances in victim services

When I first started in this field, the victims were often very critical of the judicial process. They would say that they were treated like evidence and with little consideration. For example, they often had to sit near the offender's family or friends in the halls of the district courts while waiting to testify. They felt left out of the process, having no one to ask when they were confused about sentencing or excluded from court hearings or plea agreements.

Now, more often than not, I hear stories of victim advocacy and an improved sense of inclusion and participation. District attorney's offices and the victim assistance coordinators (VACs), as well as advocates throughout the state, should be commended for the work they have done to assist victims through a very difficult time in their lives. Victims will always remember the assistance they received as well as the difficulties and anxieties surrounding their involvement in the process. Also, victims of violent crime teach us about human spirit, tenacity, and resilience. Victims' stories on their experiences are deeply moving for all of us. Victims not only talk about the crime and devastating aftermath, they often relate back to their journey through the judicial process.

What victims say about the system

For the purposes of this article I reached out to three amazing women; I had the honor of meeting and working with them through our various programs at TDCJ Victim Services. When victims are working with our office after the trial has concluded they are often very reflective, amazingly strong, poignant, and at times even humorous. Their thoughts about the judicial process can give us significant insight. I want to thank them for their willingness to share their reflections. (Please note that they all gave me permission to share their stories here.)

Monika was shot by her ex-husband in 2004. When I asked her to reflect back on the trial, she had these thoughts:

"With regards to having a victim's advocate, I don't think I could have made it through the pre-trial,

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trial, or post-trial without her. She was someone who made me feel safe in a very scary situation. Having to be anywhere in the vicinity of the person who assaulted me, much less in the same building or room, was terrifying but, with her by my side, I knew nothing was going to happen to me. She was willing to do anything to make sure I felt safe. She helped me feel confident and reassured me through every step of the process. I can't say enough about how valuable having her by my side was to me.

"As far as the actual trial, there are a few things that I think about often. While I was completely confident about telling the details of what happened to me, I don't think enough time was spent in preparing me for certain aspects of testifying. This was completely new to me. I had never testified in court before. I had no idea that I, the victim, would be personally attacked by the defense attorney. That may sound naïve, but I wasn't prepared for it at all. I think victims need to be reminded that, no matter the circumstances, it's the defense attorney's job to do whatever it takes to make sure his client isn't found guilty, even if that means vilifying the victim. It was a very painful lesson to learn from the witness stand.

"The other part about the trial that has really weighed heavy on me is the fact that I didn't look at the jury when I was testifying. I was advised to look at the jurors when I answered questions but, for whatever reason, I was very uncomfortable doing so and I really don't think I looked at them even once. I often wonder if that made them doubt me in any way. That bothers me tremendously. If I had looked at them as I should have, maybe they would have returned with a longer sentence. I don't know if my lack of eye contact with the jurors had any influence on their decisions or not but it is certainly something that keeps me awake at night, wondering if they had any doubt regarding the truthfulness of my words."

Some victims struggle with life after the trial. They are often faced with the notion that they need to move on or find meaning. Elizabeth, who was sexually assaulted in 1992, wrote about her thoughts and feelings five years after the trial:

"I struggle very much with the problem of getting on with my life. I have not stagnated: I've gotten engaged to a wonderful man, I quit my clerical job and moved to England for seven months, and I am completing my degree. But I still find that one of the hardest things for me to do is begin allowing and looking for meaning in my life again. Sometimes what I grant meaning to seems artificial, arbitrary. Other times I'm too afraid of the meaning being stripped away again. Giving things meaning requires trust in a 'normal' course of events, some feeling of security in my life. It's admitting that I'm leaving behind the rape—and if I do that, aren't I saying it's not so bad after all, if I can recover from it? Doesn't that lessen its awfulness? It almost seems like a betrayal of my pain and of all other women who have been raped.

"I asked in my victim impact statement that the members of the parole board remember, when determining whether to vote for his release, that his crime was not *committed* on February 22, 1992—it *began* on that day. As the months go by and the date of the rape gets further away, I realize with greater depth how true those words are."

In 1998 Debra's husband, Nino, was shot and killed; she was raped, kidnapped, and held captive for five days. She had similar experiences and feelings as Monika and Elizabeth about the judicial process. In her book *Shattered, Reclaiming a Life Torn Apart by Violence*, she had these thoughts immediately after the trial:

"Relief is what I think I should feel. Maybe later it'll hit me—the feeling of completion, a sense of justice won. But now I am vaguely dissatisfied. Yes, we did what we came here to do. The result was not as good as I had hoped, but if I try hard enough, I know I can make it be enough."

Later she writes:

"Even now, long after the crime, with the trial over and [the defendant] in jail forever, few people ask me what went on during those five days. I know they're curious, so I have to conclude that they avoid the subject out of respect for me. What they don't realize is that even years after the crime, many victims find it therapeutic to talk about the experience. As for me, if someone is willing to listen, I'll never shut up."

As victim advocates we have learned that often by being present or just listening to victims talk about the crime and the aftermath, we provide important advocacy and support. Often, if we can provide this support without judgment and without offering reasons or solutions, listening itself can be the answer.

Two areas of confusion

Many victims choose to stay involved with the criminal justice process long after the trial. Most stay connected through our Victim Notification System. Often, as in the case of plea bargains, they are burdened with lingering questions about the crime or the offender. Victims may ask: "Does he admit guilt?" "What really happened?" or "Is he sorry for what he did?" They may seek out the answers by requesting to meet with the offender through the mediation program. For victims who choose to receive information about their offender after the trial, it is essential that district attorney's offices and advocates provide information about post-conviction victim services. Many victims, for example, are shocked when they receive the first notification that the offender responsible for their victimization is being considered for release by the parole board. Our staff works closely with victims explaining sentencing and parole eligibility, as well as their right to protest. After sentencing, it is important for VACs and prosecutors to explain to them how long the offender will be in prison before he/she becomes eligible for parole.

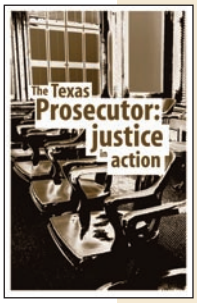
Another significant area of confusion evolves around the Victim Impact Statement (VIS). The VIS is a form provided by the VAC in a prosecutor's office a crime victim fills out to detail and record the emotional and psychological impact, physical injury, and economic loss a crime has had on her and her family members. This form is important, as it is considered by law enforcement agencies, court personnel, probation departments, the TDCJ Victim Services Division, and the Texas Board of Pardons and Paroles in many stages of the criminal justice system, including the court system and the parole review process. When we ask victims if they completed a VIS, they often confuse the written document with the verbal impact statement or allocution given after the sentencing phase of trial.

Conclusion

If my father were still with us today, he would be amazed and proud of the advances in the victim services field in the past 15 years. Crime victims and advocates should be commended for a social movement that was born out of a need to seek changes. Those of us who are in system-based programs must continually strive to build on the past successes while working to improve services by listening to the needs of the victims and improving access to programs and services. ❇

Newsworthy

Prosecutor booklets available for members



We at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

Freshman of the Year Award winner

State Rep. Gene Wu (D-Houston, center) was recognized with TDCAA's Freshman Legislator of the Year Award during TDCAA's Legislative Update in Houston. The award was presented by Harris County Assistant District Attorney Justin Wood (left) and TDCAA's Shannon Edmonds (right). Rep. Wu, a former prosecutor in the Harris County District Attorney's Office, was instrumental in passing several bills supported by prosecutors during the 83rd Regular Session. Congratulations on this honor!

Out-of-court testimony by a child

How to protect a child, as well as his parents' constitutional rights, in civil trials

By Versel Rush
Special Litigation Attorney for CPS in Wichita Falls

Jared (not his real name), age 14, had been in Child Protective Services (CPS) care over half his life. A jury terminated both his parents' rights, but the court of appeals reversed as to his father, Victor (also not his real name), a drug addict who admitted he wasn't in a position to raise his son and didn't know if he ever would be. The court said that the best interest evidence was insufficient because Jared was in a residential treatment center (RTC) due to anger issues and meltdowns that would cause him to spiral out of control; Victor had a steady job, paid child support, and had regular visits with Jared before the RTC—and Jared loved his father very much.

By the second trial, Jared had been released from the RTC, was living in an adoptive home with a coach, was making As and Bs in school, and was no longer having meltdowns. He hadn't seen Victor in over a year, but Jared would regress at any mention of his father. Like many children in CPS care, no matter the abuse or neglect, Jared still loved his dad and wanted to see him. Victor's attorney wanted to call Jared, a teenager now, to testify at the second trial in an attempt to defeat the State's argument that termination was in Jared's best interest. The caseworker, court-appointed special advocate (CASA), and Jared's attorney were all concerned that the teen could not emotionally handle testifying in front of his father; they were afraid that, if put in public before a jury of strangers, Jared would simply shut down and physically hide under a desk or chair (something he had done in schools before his current placement). We had to protect Jared while affording Victor the right to have his son testify.

What to do in such a circumstance?

Unusual for kids to testify

Unlike in criminal cases where a child victim usually testifies, it is unusual in CPS cases for children to testify against their parents. Because parents have no right to a blanket invocation of the Fifth Amendment in civil cases, parents are themselves usually the first witnesses called in a trial. In most cases, termination grounds can be proven with that testimony—trial admissions of failure to comply with court orders, drug use, or domestic violence are very common.

The parents' attorneys may not call the child for a variety of reasons: They don't issue the proper subpoenas, the child's testimony will not help their case, or the attorneys know that backlash from the jury (who may see the lawyers as "beating up on the kid") is not worth whatever nugget they may find. The caseworker will almost always admit that the child loves the parent, the parent loves the child, and, in fact, the child has said that she wants to return home to the parent.

However, there are times (as in Jared's case) when the parent's attorney will roll the dice and call the child. How do prosecutors protect the child from the trauma of testifying in court as well as protect the parent's constitutional rights?

A few options

There are a few options when it comes to admitting a child's out-of-court testimony and statements in civil court, but not all protect a child from having to later testify in front of his parents.

For example, while everyone is aware of the availability of depositions under §199 of the Texas Rules of Civil Procedure, taking a deposition does not preclude the appearance of the witness at trial. Instead, and especially in cases dealing with abused and neglected children, a deposition allows the respondent's attorney two bites of the apple, picking at every word or misstatement the child may have made. (I had a case in which the child told her father's attorney, under oath, that she had never been assaulted and then later, once again under oath, she went into details about what her father had done—a point that the father's attorney attacked as impeachment material. It was only when she answered in the negative my question, "Do you know what 'assault' means?" that we were able to explain the discrepancies.)

In addition to depositions, Texas Family Code Chapter 104 outlines other means of introducing a child's statement or testimony in court. (See

the chart on page 38 for an outline of what each section provides.)

Texas Family Code §104.002 ("Prerecorded Statement of Child") makes reference to recordings made prior to trial without attorneys present. These are usually the CAC (Child Advocacy Center) videos taken by a trained forensic interviewer. This taped statement is not to be used in lieu of testimony[1] (such videos are "statements," not "testimony") and, even if found by the judge to be admissible under §104.006(2) (which is, by no means, a settled matter of law), there is nothing that prohibits an attorney from subpoenaing the child to testify at trial too.

Texas Family Code §104.004 ("Remote Televised Broadcast of Testimony of Child") bears a resemblance to Texas Code of Criminal Procedure Art. 38.071, §3. As is obvious from the title, §104.004 is not a way to avoid the child testifying at trial because the testimony is taken at trial, just via closed-circuit TV. As with the Code of Criminal Procedure provision, the age for §104.004(a) is 12 or under, but there is no requirement that the court make a finding that the child is "unavailable to testify." Also, while Texas Code of Criminal Procedure Art. 38.071, §3 has been widely litigated, there is a paucity of state court opinions directly dealing with the Family Code provision for closed-circuit presentation of live testimony of a child. Therefore, there is no caselaw indicating whether, after testifying in such a manner, the child may be recalled and required to testify (presumably in the same manner) later in the trial.

The best option

Texas Family Code §104.003 ("Prerecorded Videotaped Testimony of Child") is the best provision for allowing a child to testify without the parent being present, with the important guarantee of §104.005(a) that the child will not be compelled to testify again in open court. As clear by its title, §104.003 immediately distinguishes itself from the CAC interviews so often seen in §104.002 ("Prerecorded Statement of Child"). First, there is no statutory requirement that the child be the victim of abuse or neglect in the suit before the court. This allows a court to order the videotaped testimony of other children in the home or neighborhood children who may be witnesses. Also, there is no age limit in §104.003; the statute simply refers to the witness as "a child."

The child is sworn in and, if necessary, his capacity to testify is proven up before the questioning begins. The courtroom process is the same. Questioning by direct or cross-examination, including a second or even third round if necessary, occurs. Objections are made. Exhibits are shown to the child witness and identified. The video continues until all parties have passed the witness.

While this testimony can be taken in front of a judge, there is no requirement in the statute that a judge actually be present at the time of the video. With modern technology and the ability to edit video recordings, the judge is not necessary. Parties make the same objections as in a courtroom ("Objection, hearsay"; "Objection, asked and answered"; "Objection, assuming facts not in evidence"; etc.) and then the question is answered. At some point prior to playing the video, the court will hold a hearing and rule on the objections made. If needed, the objections and answers may be edited out of the testimony actually shown to the jury (and the original, unedited version can be made a part of the record solely for appellate purposes). At this same hearing, the judge will make rulings on the evidence identified and offered in the video (often photographs or letters) so that the recording can continue without interruption when played before the jury.

There is no requirement that a court reporter be present to take this testimony. Practically, though, the presence of a court reporter (in addition to the videographer) will make the process easier for the attorneys as well as the judge. The court reporter can swear in the witness, and later, the judge can use the reporter's record to rule before showing the video; the record can also assist whoever is doing the editing. And of course, putting sticky notes on a typed page (as opposed to trying to hand-write exact quotes from a moving video) will always help the attorneys in preparing closing argument.

§104.003 allows for an "other person" to be present if that presence would contribute to the child's welfare and well-being during the video testimony. While there is no rule prohibiting a therapist from sitting in, it is often the guardian *ad litem* or CASA who has developed a relationship of trust and reassurance with the child.

And because courtrooms can be

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Types of Child Testimony in Civil Cases

Who can testify?	What kind of testimony and how?	When and where?	Who else is present?	Does the child appear at trial?	What else should we know?
Child 12 or under, alleged in a suit to have been abused	Video statement; video [Family Code §104.002 (Prerecorded Statement of Child)]	Prior to trial; outside the courtroom, usually at a CAC	No lawyers and no parents	Yes; the videotaped statement may not be used in lieu of testimony, but see Tex. Fam. Code §104.006 regarding hearsay statements about abuse or neglect.	These are usually forensic interviews, and they require non-leading questions.
Any child	Video testimony; video [Family Code §104.003 (Prerecorded Videotaped Testimony of Child)]	Prior to trial; outside the courtroom	Videographer, attorneys, child, and "other person whose presence would contribute to the welfare and well-being of the child" (usually CASA or guardian *ad litem*); no parents	Child may *not* be compelled to testify at trial [Fam. Code §104.005(a)]	Objections just like in court; if possible, have a court reporter there as well; motion and order are required.
Child 12 or under, alleged in a suit to have been abused	Closed-circuit testimony; video/ closed-circuit TV [Family Code §104.004 (Remote Televised Broadcast of Testimony of Child)]	During trial; outside the courtroom but close by in the courthouse	In the room with the child: videographer, court reporter (usually), judge (maybe), and attorneys (same as §104.003); in the courtroom: parents, jury, audience, and judge (maybe)	This testimony *is* the appearance by the child at trial.	Can be very hard to set up in small counties, requiring additional notice; the court may require a hearing (as in a criminal procedure) with a showing that the child cannot testify in court.
Any child	Any manner provided by Family Code Ch. 104; video/closed-circuit TV [Family Code §104.005(b) (Substitution for In-Court Testimony of Child)]	Prior to or during trial; outside the courtroom	Any of the above	Child may *not* be compelled to testify at trial [Fam. Code §104.005(a)].	No existing caselaw here, and child must have a "medical condition" that makes him incapable of testifying in open court.
Anybody	Deposition; court reporter, video recording, and/or audio recording [T.R.Civ.Proc. 199 (Depositions Upon Oral Examination)]	Prior to trial; outside the courtroom, usually in the attorney's office	Attorneys, reporter, videographer, parents, and CASA	Yes, it can be used instead of live testimony, but there's nothing prohibiting calling the child in court too.	Notice of deposition; specific objections (not standard courtroom)

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large and imposing—and §104.003 mentions taking the testimony "outside the courtroom"—I like to take that literally. A comfortable room allowing the attorneys and child to sit around a conference table is a non-threatening atmosphere. Microphones make all the questions and answers audible so the entire testimony takes on a more conversational tone.

Questioning the child

If a child's testimony is being recorded to be played before a judge or jury during a trial, put the child at ease while letting the jury know this witness is more than a name on a piece of paper in a jury charge. I've asked about favorite school subjects, pets, and sports teams to get the child talking. It is the 21st Century and just about every child who can talk has been videotaped multiple times and will rarely be nervous about talking on camera. Ask the foster parent or placement if the child has made something that can be introduced into evidence (and explain that they probably won't get it back). Homework and artwork are excellent ways to connect with the child, have the child talk about something that isn't scary, and give the jury members something to "hold onto" when in the jury room. A drawing of a rose done by an abused child while in foster care can show the amazing resiliency of the human spirit.

Be prepared for answers you don't like, and understand that this is not the time to be aggressive. If the 8-year-old says he loves his dad and wants to live with him, don't try to change his mind. Instead, get him to talk about how different his life is now than it was when he lived "at home": Does he get to go to the movies? Is he afraid anymore? Does he see anyone hit anyone else in his new home? Does someone make him do his homework and see that he gets to school on time? Ask about all those moments of childhood the jury members probably take for granted.

The attorney needs to make the big decision about whether you actually ask the child if the parental rights should be terminated. I personally do not recommend asking that question. "Termination" is a difficult concept to explain to a child, even a teenager. If the child is in an adoptive home, ask the general questions about whether he would like to continue to live there and, if he has voiced a desire to be adopted (even if he also has the contradictory wish to see his parents), ask him about that.

Finally, a provision in §104.005(b) permits taking the testimony of any child in any manner prescribed in Chapter 104 as long as the court finds that the child has a medical condition which does not allow the child to testify in court. There is no caselaw on this provision, but it seems to require a hearing, much like the one required for CCP Art. 38.071 with testimony and evidence that some medical condition exists of such a debilitating nature that the child cannot testify in a courtroom.

Conclusion

Though it is uncommon for parents' attorneys to call a child to testify in a termination case, it does occasionally happen, and testifying against one's parents can be very traumatic for a child. Prosecutors have a solid option in Family Code §104.003 to take a child's out-of-court testimony that not only prevents the child from confronting his parents but also protects his parents' constitutional rights to call and question the child witness.

As an addendum to Jared's case, just before I finished writing this article, the court of appeals affirmed the termination of Victor's rights during Jared's second trial. Though the opinion mislabeled Jared's §104.003 testimony as a "video deposition," it was obvious from the court's comments that the court not only reviewed the reporter's record of Jared's testimony but also watched the video, observed the teenager's demeanor, and was able to contrast it with the stories of his behavior before he was placed in the coach's home. Providing the court with videotaped evidence of the changes in Jared since his placement in a healthy home environment is a by-product of §104.003 I had not thought about before. ❇

Endnote

1 *In re S.P.*, 168 S.W.3d 197, 209-10 (Tex.App.—Dallas 2005, no pet.).

'I object to his objec-

The rules of evidence do not apply at suppression hearings, so most objections from defense counsel are pointless—which is something that many prosecutors (and judges too!) don't realize. This article aims to change all that.

By Brian Foley
Assistant Criminal District Attorney in Polk County

If there is one thing I have learned since becoming a lawyer, it is that old habits die hard. My aim in writing this article is to help end one such old habit and to arm prosecutors with the ability to end it in every jurisdiction. How many times have you heard objections on hearsay or relevance grounds (those based on the rules of evidence) at a suppression hearing? If you are like me, the answer is, "Countless times." Well, I object to those objections! The rules of evidence do not apply at suppression hearings.[1] There is one exception to that rule with respect to privileges (marital, attorney-client, etc.); any objection as to privilege is a valid one. But other than that—save it for the jury.

I tried to make this point in court once and my judge said, "Well, surely some of the rules apply." Old habits, my friends. Let's stop the insanity! All we should need are Rules 101 and 104.[2]

Rule 101

Rule 101 covers the title and scope of the Rules of Evidence, and subsection (d) covers special rules of applicability in criminal proceedings where it announces that the "*[r]ules [are] not applicable in certain proceedings.*"[3] These rules, except with respect to privileges, do not apply in the "determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104."[4] Hearings under Rule 104 are suppression hearings. The list also includes proceedings before grand juries, the initial bail hearing, and hearings on the issuance of a search or arrest warrant, among others. The only exception is that the "rules with respect to privileges apply at all stages of all actions, cases, and proceedings."[5]

Rule 104

Rule 104 covers preliminary questions, and subsection (a) covers questions of admissibility generally. It removes all doubt from our minds as to whether the rules of evidence apply at a suppression hearing when it announces, for the second time in the first four rules, "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [(conditional admissibility doctrine during trial in front of the jury).] *In making its determination the court is not bound by the rules of evidence except those with respect to privileges*"[6] (emphasis added). "Well, that was easy," one might say. Why don't we prosecutors just show defense counsel and the judge those two rules before? Well, I have. Old habits, my friends.

History of the Rules

So why would the text of Rules 101 and 104 not be enough to end the string of hearsay or other objections? Because that hasn't always been the rule. And when a lawyer has a funny feeling that says, "Hmm, that sounds pretty drastic and I am fairly certain that I have heard that is not correct," it's going to require a little more evidence to change one's mind.

The current Texas Rules of Evidence became effective March 1, 1998. Prior to the 1980s, the common law governed the law of evidence in Texas. But in 1983 the Texas Rules of Civil Evidence were created, followed by the Texas Rules of Criminal Evidence in 1986.[7] The old rule governing the applicability of the rules was Tex. R. Crim. Evid. 1101(d)(4), which provided: "In the following proceedings these rules apply: … (4) motions to suppress confessions or to suppress illegally obtained evidence under Texas Code of Criminal Procedure art. 38.23."[8]

Under the old rules, the Court of Criminal Appeals held that objections based on hearsay or other rules

were valid at suppression hearings through *McVickers v. State*.[9] But former Rule 1101(d)(4) was not incorporated into the current rules of evidence.

In *Granados v. State*, the Court of Criminal Appeals held that the *McVickers* analysis no longer applied and that courts should not give effect to the old rule or any common-law principle that applied the rules of evidence to suppression hearings "because suppression hearings involve the determination of preliminary questions concerning the admissibility of evidence, [so] the language of the current rule indicates that the rules of evidence (except privileges) no longer apply to suppression hearings."[10] The dissent in *Granados* helps explain why the applicability of the Rules has a lingering effect in today's courts: "The dissent contended that the parties relied upon the old rule and will now be surprised by our holding. Presumably, however, the parties were aware—or ought to have been aware—that [the old rule] had been deleted."

"Old habits" was almost argued as a legal point outright by the dissent. "Rule 1101(d)(4) has been absent from the rules since 1997. By my watch, it is now 2002. In those five or so years, no party, including the parties before the court today, has argued that the Rules of Evidence do not apply to suppression hearings." If you encounter an attorney who wants to re-argue the dissent's point, let the court know that he differs from "the conclusion drawn by both [the Court of Criminal Appeals] and the United States Supreme Court."[11] His objection should be overruled.

What appellate courts say

The federal rules of evidence have been explicitly inapplicable to federal suppression hearings since *United States v. Matlock* in 1974.[12] But even prior to the federal rules' creation, the Supreme Court of the United States ruled in 1949 that "the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine admissibility of evidence."[13] The principle is so fundamental that the U.S. Supreme Court noted the broad agreement within the legal community by citing treatises and law journal articles dating back to 1927.[14] That is why the Supreme Court held in *Matlock* that "where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel."[15]

The Texas Supreme Court followed this rationale in *State v. Petropoulos*,[16] several years after the Court of Criminal Appeals reaffirmed its ruling in *Granados* in *Hernandez v. State*.[17] The Advisory Committee's Note to Federal Rule 104(a) quotes Dean McCormick, as did the Supreme Court in *Matlock*: "Dean Wigmore relied upon the common-law distinction between preliminary proceedings and jury trials in stating that in all interlocutory proceedings, even when responsory and not *ex parte*, the usual system of rules is ignored, again partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of evidence are, as rules, traditionally associated with a trial by jury."[18]

Indeed, the principle goes so far that lots of things are different at a suppression hearing. For example:

- Even an unsworn police report may be admitted and serve as the basis for a judge to rule evidence admissible.[19]
- A judge may decide questions on the admissibility of expert testimony independent of the rules of evidence.[20]
- Defense counsel cannot be found ineffective for failure to object to hearsay and leading questions at suppression hearings.[21]
- Lack of independent knowledge by a police officer about the event surrounding an investigative stop does not make him incompetent as a witness at a suppression hearing.[22]
- Sufficiency of a witness's oath may be made without regard to the rules of evidence.[23]
- A trial court may admit a witness's lay opinion testimony without predicate requiring it to be "rationally based."[24]
- And National Crime Information Center (NCIC) reports may be admitted without business record predicate to determine whether a defendant's prior conviction was admissible under Tex. R. Evid 609.[25]

The only instance of a rule of evidence applying at a suppression hearing in any court comes from the Ninth Circuit when it held that Federal Rule 615 ("The Rule" excluding witnesses from the courtroom while

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other witnesses are testifying) properly applied at a suppression hearing.[26] This is procedural in nature and presumably would have been within the judge's discretion under common law anyway without the necessity of the rules applying.

Another indication that pre-trial suppression hearings are different is that the Supreme Court of the United States ruled in *McCray v. Illinois* that the right of confrontation does not apply at suppression hearings.[27] In McCray's suppression hearing, police proved probable cause for the arrest by testifying to the out-of-court statements of an unidentified informer. The Supreme Court specifically rejected the claim that the defendant's right to confrontation under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment had in any way been violated. This opinion has not been disturbed post-*Crawford*. However, there is a split in the Texas courts of appeals: *Curry v. State* determined that the suppression hearing is a "critical phase" in which the right should apply,[28] whereas *Vanmeter v. State* held that the constitutional right of confrontation is a trial right, not a pretrial one.[29] The court in *Curry* admitted that "there is authority for [the] proposition [of the *Vanmeter* court]."[30] *Curry* then cites to a 1996 (pre-*Crawford*) Fifth Circuit opinion that held the aims and interests involved in a suppression hearing are just as pressing as those in the actual trial. Since *Crawford*, the Ninth Circuit has held confrontation to be inapplicable at suppression hearings.[31] And of course *Vanmeter* cited the U.S. Supreme Court.

A judge's discretion

Suppression hearing determinations are subject to the discretion of the trial court, and a trial court's ruling on the admission or exclusion of evidence will not be disturbed unless the record clearly demonstrates an abuse of discretion.[32] An abuse of discretion occurs when the trial court acts arbitrarily and without reference to guiding principles.[33]

So is all of this caselaw for nothing? If the judge has the exclusive right to admit or exclude anything within an abuse of discretion standard, then where are we left? I submit we are left with common sense and logic. Even if a judge has discretion to exclude evidence from the hearing, why on earth would he? Let's say a hearing is based on whether the officer had reasonable suspicion to pull over a driver because after running his plates through dispatch, he discovered the car had been stolen. Defense counsel objects based on hearsay, that anything the dispatcher told the officer was hearsay, that the reading on her screen was hearsay, and that she had no personal knowledge that the car was stolen. Mountains of hearsay can be found. Put aside the fact that the State is using it, not for the truth of the matter asserted, but to show the mindset of the officer and whether his actions were reasonable in pulling the defendant's car over. The trial judge may exclude this evidence—but why would he? The judge has the power to believe or disbelieve any of the evidence that he hears; he may judge the credibility of the officer, and defense counsel may ask questions of that officer. Even the judge may question the officer. If the judge doesn't believe in the officer's credibility, then he may find that the stop was unreasonable. That is a different story from not admitting or reviewing the evidence at all.

What if the judge applies the rules of evidence at a suppression hearing within his discretion? Then the defense lawyer objects that a statement is hearsay. Won't the judge have to listen to the statement and entertain more hearsay statements as to whether an exception is met? Will the judge apply the rules of evidence to the preliminary examination within a preliminary examination he has created? If he doesn't apply them, isn't he acting "arbitrarily and without reference to guiding principles?"[34] Put in this light, the entire notion is silly and appears more like a judicial version of "talk to the hand." It ought to be eradicated from the courts of our state.

Conclusion

When we know we are correct on the law and rulings don't go our way, it can be very frustrating, but it's even worse if we aren't aware that the law goes in our favor. If this issue plagues your courts as much as I have seen it in my short time as a prosecutor, then I hope this article will give you what you need to convince any doubters. ❇

Endnotes

1 Tex. R. Evid. 101(d)(1); Tex. R. Evid. 104(a); *Granados v. State*, 85 S.W.3d 217, 227 (Tex. Crim App. 2002); *Hernandez v. State*, 116 S.W.3d 26 (Tex. Crim App. 2003); *State v. Petropoulos*, 346 S.W. 3d 525 (Tex. 2011); *United States v. Matlock*, 415 U.S. 164, 175 (1974).

2 Yes, admittedly there is a logical problem with relying on the Rules to say that they do not apply,

but the purpose of Rules 101 and 104 are to set out the applicability of the Rules. You don't have to ignore their existence to understand their applicability.

3 Tex. R. Evid. 101(d)(1).

4 Tex. R. Evid. 101(d)(1)(A).

5 Tex. R. Evid. 101(d)(2).

6 Tex. R. Evid 104(a) & 104(b).

7 Mark K. Sales, *New Evidence Rules, Part I*, Dallas Bar Association Resources for Dallas Attorneys and the Public (March 1998).

8 Tex. R. Crim. Evid. 1101(d)(4) (now replaced by Tex. R. Evid. 101 and 104).

9 *McVickers v. State*, 874 S.W.2d 662 (Tex. Crim. App. 1993).

10 *Granados v. State*, 85 S.W.3d 217 (Tex. Crim. App. 2002).

11 *Id.*

12 *United States v. Matlock*, 415 U.S. 164, 173 (1974).

13 *Brinegar v. United States*, 338 U.S. 160, 172-174 (1949).

14 5 J. Wigmore, *Evidence* §1385 (3d ed. 1940); C. McCormick, *Evidence* §53, p. 122 n. 91 (2d ed. 1972). See also Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 Yale L. J. 1101 (1927)."

15 *United States v. Matlock*, 415 U.S. 164, 173 (1974).

16 *State v. Petropoulos*, 346 S.W. 3d 525 (Tex. 2011).

17 *Hernandez v. State,* 116 S.W.3d 26 (Tex. Crim App. 2003).

18 *Ford v. State*, 305 S.W.3d 530 (Tex. Crim. App. 2009); 1 John Henry Wigmore, *Evidence*, §5 at 14 (1904).

19 *Ford v. State*, 305 S.W.3d 530 (Tex. Crim. App. 2009); *Caballero v. State*, 2005 Tex. App. LEXIS 1865 (Tex. App.—El Paso Mar. 10, 2005 no pet.).

20 *Hernandez v. State*, 116 S.W.3d 26, 31 n.11 (Tex. Crim. App. 2003).

21 *Piper v. State*, 2004 Tex. App. LEXIS 7601 (Tex. App.—Texarkana Aug. 25 2004 no pet.).

22 *Belcher v. State*, 244 S.W.3d 531 (Tex. App.—Fort Worth 2007 no pet.).

23 *Scott v. State*, 80 S.W.3d 184 (Tex. App.—Waco 2002 pet ref'd.).

24 *Denton v. State*, 2007 Tex. App. LEXIS 1706 (Tex. App.—Tyler Mar. 7 2007 pets ref'd.); Tex. R. Evid. 701.

25 *Gay v. State*, 2004 Tex. App. Lexis 5448 (Tex. App.—Dallas June 18 2004 no pet.).

26 *United States v. Brewer*, 947 F.2d 404 (9th Cir. Cal. 1991).

27 *McCray v. Illinois*, 386 U.S. 300 (1967).

28 *Curry v. State*, 228 S.W.3d 292, 297-98 (Tex. App.—Waco 2007 pet. ref'd).

29 *Vanmeter v. State*, 165 S.W.3d 68, 74-75 (Tex. App.—Dallas 2005 pet. ref'd).

30 *Curry v. State*, 228 S.W.3d 292 (Tex. App.—Waco 2007 pet. ref'd).

31 *Peterson v. California*, 604 F.3d 1166 (9th Cir. 2010) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (holding that "the right to confrontation is a trial right" and "[n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses"); *California v. Green*, 399 U.S. 149, 157 (1970) ("[I]t is th[e] literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause[.]")).

32 *Pina v. State*, 38 S.W.3d 730 (Tex. App.—Texarkana 2001 pet. ref'd).

33 *Id.*

34 *Id.*

News Worthy

Electronic versions of the CCP and PC available

Two of TDCAA's code books, the 2013–2015 Code of Criminal Procedure and Penal Code, will soon be available for purchase from Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both strikethrough-underline text to show the most recent legislative changes and annotations. Note, however, that these books contain single codes—just the Penal Code ($10) and Code of Criminal Procedure ($25)—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files.

The new editions of these electronic books will be available in mid-September. ❇

From the prosecutor's tool shed, the writ of mandamus

The purpose of this seldom-employed tool—and when you might need to use it

"The judge did *what*?' I asked the agitated prosecutor who burst into my office at 3 o'clock on what had been a quiet Friday afternoon.

"He did not have any authority to make that decision and I told him so,"[1] the trial prosecutor replied. "He can't do that, can he?"

"He should not have done that," I agreed.

"Well," my exasperated coworker replied, "what are you going to do about it?"

Thus was my introduction to the rarely used tools in the prosecutor's tool shed, the writ of mandamus and writ of prohibition. I have worked as the appellate attorney for felonies at the Midland County District Attorney's Office for only a couple of years. The prosecutors in the office didn't have much familiarity with the extraordinary writs, and our form bank was bare of writs filed by the State. So I dove in to do my own research on these two writs, and I've been asked to share what I learned with other prosecutors. In this article, I will not cover all of the details of the writ of mandamus, but rather I'll offer some suggestions for your consideration before you employ this tool.

By Carolyn D. Thurmond
Assistant District Attorney in Midland County (pictured with Chips)

Where to begin?

I needed an instruction manual for this mandamus, so I reached out to colleagues for advice and forms. The State Prosecuting Attorney's Office (SPA)[2] represents the State in all proceedings before the Court of Criminal Appeals, and I thought maybe they had dealt with extraordinary writs. I learned the SPA does not customarily become involved in mandamus proceedings because they need to be filed quickly, are fact-intensive, and are required to be sworn—but the attorneys at the SPA are willing to assist by consulting on the legal issues, research, or editing.

I next contacted TDCAA's research attorney, Lauren Marfin, and I explained the situation to her. She provided a copy of the section about mandamus from the *State's Appellate Manual*.[3] It is a useful manual about the nuts and bolts of the mandamus petition and a great starting point for research. Lauren also put me in touch with David Newell, an assistant district attorney in the appellate division of the Harris County District Attorney's Office. David provided invaluable advice as a consultant about procedure and ideas.

Writs of mandamus and of prohibition

The writ of mandamus and writ of prohibition are seldom-used tools; but, unlike a chainsaw or garden tiller, which sits in the corner of the shed collecting dust and rust until the change of season necessitates their use, the mandamus is comparable to the fire extinguisher: "a drastic remedy, to be invoked only in extraordinary situations."[4] The formal definition of a writ of mandamus is "a judicial writ issued by the proper court to the individual, official, or board to whom it is addressed, to perform some specific legal duty to which the party applying for the writ is entitled under legal right to have performed."[5] Generally, if you want to undo something the trial court or the lower court should not have done, or to compel such a court to do something it should have done—and the duty is compelled by law—the remedy is mandamus.[6]

In contrast, a writ of prohibition issues to prevent the commission of a future act by the court.[7] It does not undo, nullify, or review an act already performed.[8] A writ of prohibition directs a lower court to *refrain* from doing some act, while a writ of mandamus commands a lower court to *do* some act.[9] A writ of mandamus is more common than a writ of prohibition. (In the case presented to me on that Friday afternoon, the trial judge pronounced an order but had

not yet prepared the paperwork to enter the order. I considered filing a writ of prohibition prior to entry of the order, but the trial court completed the paperwork before I finished my research. Thus, the writ of mandamus became my tool of choice.)

One should keep in mind in the course of preparing the writ and research on a particular issue that the issuance of a writ is never a matter of right but rests with the sound discretion of the court.[10] The Court of Criminal Appeals discourages the writ of mandamus except in the extraordinary situation.[11]

Requirements for a writ of mandamus

Mandamus relief may be granted if the relator can demonstrate that 1) the act sought to be compelled is purely ministerial, and 2) the relator has no other adequate legal remedy.[12] The Court of Criminal Appeals further defined the ministerial act requirement to be one in which the relator "has a 'clear and indisputable right to the relief sought,' and the merits of its legal position are 'beyond dispute.'"[13]

No adequate remedy at law. While the existence of a "ministerial act" is the first prong of the mandamus test, I recommend starting any analysis by first determining whether another tool is available—that might typically be the appeal route. As appellate courts abhor the use of the extraordinary writ, they are inclined to say the remedy is via appeal, so the mandamus applicant must convince the appellate court that there is no other legal remedy available based on the facts of the case.

The State's right of appeal is authorized only in limited situations. Article 44.01 of the Code of Criminal Procedure allows the State to appeal a court order in a criminal case if the order:

- dismisses an indictment or any portion of an indictment,
- arrests or modifies a judgment,
- grants a new trial,
- sustains a claim of former jeopardy,
- grants a motion to suppress evidence in certain cases,
- is issued for forensic DNA testing, or
- pronounces an illegal sentence.[14]

Under appropriate circumstances, the statute may not authorize the appeal, and a prosecutor may proceed with the writ of mandamus.

Another approach to consider, even if you have a remedy at law, is whether the remedy at law is *adequate* in the circumstances of your case. A remedy at law, though it technically exists, "may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective to be deemed inadequate."[15] For example, in *Bowen v. Carnes*,[16] the Court of Criminal Appeals held that the respondent judge abused his discretion to deprive the defendants of their Sixth Amendment right to counsel of choice and that the ordeal of trial and appeal were a waste of public resources. The mandamus article in the *State's Appellate Manual* contains several cases in which the Court of Criminal Appeals granted mandamus relief as the remedy at law was inadequate in the circumstances.

You may even consider filing a writ of mandamus and a notice of appeal to pursue both routes concurrently. Simply acknowledge in the writ that you also filed a notice of appeal so as not to waive appellate rights if the appellate court denies the writ. Filing the notice of appeal may undercut your argument of no adequate remedy at law, but if the writ is denied, you are still in the game.[17]

Ministerial act requirement. On first look, the ministerial act requirement seems like a straightforward proposition. The Court of Criminal Appeals has stated that an act is "ministerial" if it does not involve the exercise of any discretion:

> [A] "ministerial" act is one which is accomplished without the exercise of discretion or judgment. If there is any discretion or judicial determination attendant to the act, it is not ministerial in nature. Nor is a ministerial act implicated if the trial court must weigh conflicting claims or collateral matters which require legal resolution.[18]

However, when one begins research through the Westlaw or Lexis databases, it quickly becomes apparent that the ministerial act is an elusive concept. The additional definition of a "clear right" is also somewhat unsettled. "A clear right to relief is shown when the facts and circumstances dictate but one rational decision under unequivocal, well-settled (i.e., from extant statutory, constitutional, or caselaw sources), and clearly controlling legal principals."[19] The Court of Criminal Appeals has engendered some controversy in recent years when it added "a clear right to the relief sought" in its articulation of the ministerial act.[20] There are some who

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believe this has liberalized the exercise of mandamus authority.[21] The point is that prosecutors must do thorough research to support the argument that we have a ministerial act or clear right to relief in a given situation. Anticipate the counterpoints and give the responses in the petition.

Although the Court of Criminal Appeals has on occasion suggested a legal issue's status as one of first impression means the law is not well-settled, it has since clarified that an issue of first impression can sometimes qualify for mandamus relief.[22] So do not give up if you are plowing new ground.

In which court should I file the petition?

If there is a clear right to relief and no adequate remedy at law, the next question is in which court to file the petition for writ of mandamus. Both the Court of Criminal Appeals and courts of appeals have jurisdiction to preside over writs of mandamus and other extraordinary writs. The state constitution is the source of the Court of Criminal Appeals' jurisdiction:

> Subject to such regulations as may be prescribed by law, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and, in criminal law matters, the writs of mandamus, procedendo, prohibition, and certiorari. The Court and the Judges thereof shall have the power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments. The court shall have the power upon affidavit or otherwise to ascertain such matters as fact as may be necessary to the exercise of its jurisdiction.[23]

The jurisdiction for the courts of appeals to issue writs of mandamus emanates from Tex. Const. art. V, §6, which provides, "Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law." Additionally, Government Code §22.221(b)(1) authorizes writs: "Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principals of law regulating those writs, against a judge of a district or county court in the court of appeals district."

There is an inclination to go through all of this effort to prepare the petition for writ of mandamus one time and just get an answer "straight from the top." However, the Court of Criminal Appeals discourages this practice, so when a court of appeals and the Court of Criminal Appeals have concurrent, original jurisdiction over a petition for a writ of mandamus against the judge of a district or county court, the petition should be presented first to the court of appeals, unless there is a compelling reason not to do so.[24] For example, in *State ex rel. Lykos v. Fine*,[25] the respondent district court judge commenced a pretrial evidentiary hearing to declare the death penalty unconstitutional in a capital murder case. As the Texas Constitution provides the appeal of all cases in which the death penalty is assessed shall be in the Court of Criminal Appeals,[26] the most judicious choice was to file that petition for writ of mandamus in the Court of Criminal Appeals.[27]

If one does not get a satisfactory response from the court of appeals, then a prosecutor may file a petition for writ of mandamus against the court of appeals in the Court of Criminal Appeals. There is no remedy for a petition for discretionary review from an adverse ruling in an original mandamus proceeding.[28] A court of appeals abuses its discretion when it grants a writ of mandamus absent a proper basis.[29]

Does anybody have a form?

For those who have made it this far, the next step is to put it all together in proper form to present the case in the best possible light—or at least avoid the petition getting tossed on a technicality. One quickly discovers there is a lack of specificity as to form, content, and procedures for a petition for writ of mandamus for a criminal matter in the Texas Rules of Appellate Procedure (TRAP). TRAP 52 provides rules for original proceedings of civil matters in the court of appeals and Texas Supreme Court, which include writs of prohibition and mandamus. Use TRAP 52 for guidance to the essential components of a petition for writ of mandamus. You may also look to a form book such as the *Texas Criminal Practice Guide*[30] or call on a colleague who has plowed this ground before and ask for a form.

TRAP 72 governs extraordinary matters in the Court of Criminal Appeals. If the writ of mandamus is filed in the Court of Criminal Appeals, one must also include a "motion for leave to file" a writ of mandamus as instructed in TRAP 72. This rule does not contain any

guidance as to the content, form, or procedure for the motion for leave to file, but TRAP 10 contains the requisites of a motion filed in an appellate court.[31] As to the form of the petition for writ of mandamus to file in the Court of Criminal Appeals, use the guidance in TRAP 52.

You will also need to gather supporting documents to attach to the petition. This will include certified copies of any order, motion, exhibit, etc., as necessary for the facts of the case.[32] An affidavit is required to verify the facts alleged in the petition and the pleadings of the documents attached as exhibits.[33]

In addition, attach a reporter's record of the hearing if pertinent to the claim for relief. Contact the court reporter to discuss how quickly the record can be transcribed, format options, and costs. You may need the transcript only of the hearing proceedings if you pursue just the petition for writ of mandamus. However, if you intend to pursue a writ of mandamus and the appeal tracks concurrently, then you may want the appeals court format, which includes a master index and exhibits attached to the reporter's record. This second method may cost more for the initial copy, but it may be cheaper for both if the appeal route must be pursued as well.

Filing the petition

As a practical matter, check the appeals court or Court of Criminal Appeals website for basic information about filing the petition for writ of mandamus, such as number of copies, docketing statement, etc. You may also wish to contact the clerk's office as a courtesy to let them know the petition is on its way and to clarify any of your questions. Serve copies of the petition and appendix on all the parties, including the real party in interest, i.e., the defendant.[34] Remember to include a certificate of compliance as it is required for all documents filed with an appellate court.[35]

The appeal: a well-used tool

Much to my surprise, in the course of my research for the mandamus petition, I discovered a few recent cases that showed the Court of Criminal Appeals's preference for the subject matter of my case to be handled via the appeals process. In other words, there appears to be an adequate remedy at law without resorting to a mandamus, so I did not get to make use of it. However, I am better prepared for the next time a judge steps outside his or her authority.

If you decide to pursue a petition for writ of mandamus, do so judiciously. Remember that it is to be used only in extraordinary circumstances and not just with every disagreement you have with a judge. Prosecutors are charged with seeking justice, and a judge takes an oath to uphold the laws and constitution of this state[36] in every case. A judge does not get holiday from that responsibility. ❇

Endnotes

1 I hate to give away the ending in the first paragraph, but this case is pending on appeal so my vagueness is necessary until the outcome is final.

2 The State Prosecuting Attorney's Office website address is www.spa.state.tx.us.

3 Although the *State's Appellate Manual* was a grant-funded publication and is no longer available for purchase, in early 2014, TDCAA will publish *Writs* by Andréa Jacobs, which will cover all non-capital writs.

4 *Landford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 (Tex. Crim. App. 1993).

5 *State's Appellate Manual,* 2007-2009, "Mandamus" (2007), page 257; citing 38 Tex. Jur. 3d Extraordinary Writs, §167 (1998).

6 *State's Appellate Manual,* 2007-2009, "Mandamus" (2007), page 257.

7 *Id.* at 258.

8 *Id.*, citing *Garcia v. State*, 596 S.W.2d 524, 529 (Tex. Crim. App. 1980).

9 See *Tilton v. Marshall*, 925 S.W.2d 672, 676 n. 4 (Tex. 1996).

10 *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 926 (Tex. Crim. App. 1994).

11 Id.

12 *Neveu v. Culver*, 105 S.W.3d 641, 642 (Tex. Crim. App. 2003) (citing *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 198 (Tex. Crim. App. 2003)).

13 *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 907 (Tex. Crim. App. 2011) (citation omitted); *State ex rel. Hill v. Fifth Court of Appeals*, 34 S.W.3d 924, 927-28 (Tex. Crim. App. 2001).

14 Tex. Code Crim. Proc. Ann. art. 44.01.

15 *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013) (citations omitted).

16 *Bowen v. Carnes*, 343 S.W.3d 805, 813 (Tex. Crim. App. 2011).

17 See *In re State ex rel. De Leon*, 89 S.W.3d 195, 197 (Tex. App.—Corpus Christi 2002, no pet.) (writ denied because State had an adequate remedy at law, "which it failed to exercise in a timely manner").

18 *State ex rel. Hill v. Fifth Court of Appeals*, 34 S.W.3d at 927 (quoting *State ex rel. Curry v. Gray,* 726 S.W.2d 125, 128 (Tex. Crim. App. 1987)).

19 *In re State ex rel. Tharp*, 393 S.W.3d 751 (Tex. Crim. App. 2012) (citations omitted).

20 See *State ex rel. Young v. Sixth Judicial District*

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Court of Appeals at Texarkana, 236 S.W.3d 207, 211 (Tex. Crim. App. 2007) (citations omitted).

21 *Id.*

22 *In re State ex rel. Weeks*, 391 S.W.3d 117, 122, n. 18 (Tex. Crim. App. 2013) (citing *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194-199-203 (Tex. Crim. App. 2003); *State v. Patrick*, 86 S.W.3d 592, 594-96 (Tex. Crim. App. 2002)).

23 Tex. Const. art. V, §5.

24 *Padilla v. McDaniel*, 122 S.W.3d 805, 808 (Tex. Crim. App. 2003).

25 330 S.W.3d 904 (Tex. Crim. App. 2011).

26 Tex. Const. art. V, §5(b).

27 See *Padilla v. McDaniel*, 122 S.W.3d 805, 807 (Tex. Crim. App. 2003).

28 *Landford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 586 (Tex. Crim. App. 1993).

29 *Id.* (citations omitted).

30 See Texas Criminal Practice Guide, §4:90B.100 (Matthew Bender).

31 Tex. R. App. P. 10.

32 See Tex. R. App. P. 52.3 & 52.7(a)(1).

33 *State's Appellate Manual,* 2007-2009, "Mandamus" (2007), page 269; see Tex. R. App. P. 52.3 & 52.7(a)(1).

34 *State's Appellate Manual,* 2007-2009, "Mandamus" (2007), page 269.

35 Tex. R. App. P. 9.4.

36 Tex. Const. Art. XVI, §1.

Securing the out-of-state witness

How to bring a reluctant witness from another state to Texas for a criminal trial

When the case against Jane Smith[1] hit my desk, it looked like another cut-and-dry murder case with a self-defense claim. The deceased was the defendant's husband, and he died from three gunshot wounds to the chest. From the crime scene, we determined that Ms. Smith had shot her husband twice while he was backing down the hallway away from her. The final of the three shots had occurred while he was lying on his back on the floor. All three shots were in close range, with the pistol 2 to 4 inches from the victim when it was fired. Oh, and he was naked.

By Kevin Petroff
Assistant Criminal District Attorney in Galveston County

The defendant called 911 in hysterics but didn't mention self-defense—only that she shot her husband. Our concern about self-defense was based on the fact that lying next to her husband's right hand was a buck knife. The sheath of the knife was found on the kitchen counter. We believed that because the knife was lying on top of blood—but there wasn't any blood on it—and because she was 2 inches away when she shot him three times but she herself had no injuries, that the knife had been planted next to him after he died.

While the forensic evidence was key in the investigation and prosecution of this case, there was a witness who proved to be very important. Susan Jacobs was the deceased's girlfriend. (Suddenly a motive became clear.) Susan had worked for Jane and her (now deceased) husband and had spoken to both earlier in the day of the murder. Once she found out her boyfriend was dead, Susan skipped town and headed back to her home state of Arizona. Before taking that trip out of Texas, she had made a statement to investigators that our deceased had mentioned, the day of the murder, that he was planning on telling his wife—our defendant—that he was leaving her for good and wanted a divorce.

Although not required by law, motive is a pretty nice thing to be able to present in a murder case, especially where there is a self-defense claim. So we needed to find Susan and make sure she would be available to testify. I asked my crack investigator, Carol Adkins, to start a search for her while I did some research into the law to find just how I was going to bring an uncooperative witness back to Texas.

The law

Chapter 24 of the Texas Code of Criminal Procedure sets forth the process by which we prosecutors have sent thousands of subpoenas to witnesses and how we ensure that the witnesses comply with those subpoenas. Let's all be thankful it's a simple process. We fill out a subpoena application to the clerk stating the names of the witnesses and their locations. Out-of-county subpoenas are addressed under Art. 24.16 of the CCP and are not much more difficult.

Bringing an Arizona resident into Texas, however, is a little trickier. Out-of-state subpoenas are issued under the Uniform Act to Secure Attendance of Witnesses from Without State. This act, which has been adopted in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands, has been codified under Art. 24.28 of the CCP, which sets forth all of the necessary steps in bringing out-of-state witnesses to Texas.

The witness

Carol, my investigator, has an uncanny ability to find people. People who fall off the grid, people who get lost or become homeless, and even people who don't want to be found. Her work seems to involve one part training, one part people skills, and some art. In any case, Carol was able to find Susan in Arizona. Susan made it clear over the telephone that she didn't want to be found. And she certainly didn't seem to like the idea of discussing her affair with our victim or the murder that resulted from it. After some time she became a bit more cooperative, but she was adamant that she would not willingly come back to Galveston.

A critical part of this process, while not specifically mentioned in Art. 24.28, is communicating with the prosecutor's office where the witness is located. So our next call was to the prosecutor's office in Pima County, Arizona. We explained our problem to an investigator there, who was sympathetic. He, in turn, connected us to a prosecutor in that office who has dealt with out-of-state subpoenas, and she agreed to help us draft orders and to have a judge sign them.

It's important to remember that your deadlines are important only to you. Without human contact in that other state, no one cares when your trial starts or by what date you need a witness. But if you have a local prosecutor on board, she can help meet those deadlines. In addition, every jurisdiction has its own preferred way of doing things, and this can extend to the form of motions and court documents. Normally I send prepared documents to the out-of-state prosecutor to make things easier, but in this case the prosecutor had some form motions she routinely used.

Texas' court documents

The first thing I had to prepare on our end was an application for the out-of-state subpoenas. In our office, we simply call it an "application for process on out-of-state witness," though sometimes it is called a "motion to secure the attendance of out-of-state witness." That application requires several things. First, it is a sworn document. It should state who is making the request and that the witness is material and necessary. Additionally, the application should specify how long the witness is anticipated to be needed in Texas. My application started as follows:

> I, Kevin Petroff, being duly sworn, depose and say, I am an Assistant Criminal District Attorney of Galveston County in the above styled cause; that the above criminal prosecution is being prosecuted in the 56th Judicial District court, which is a court of record in this State; that Susan Jacobs is a material and necessary witness and has material evidence for the prosecution and who has testimony concerning the alleged offense of murder, the prosecution of which before said Court is necessary for the proper administration of justice; that the witness is presently to be found at 1002 Main Street, City of Tucson, County of Pima in the State of Arizona, that her presence as a witness will be required for approximately eight days. …

Short, simple, and to the point. Our application went further to show the absence of any undue hardship on Susan, by including the following in the application:

> The office of the Criminal District Attorney of Galveston County, Texas, stands ready and willing to provide transportation and lodging to Susan Jacobs upon receipt of the appropriate orders from a court of record in Pima County, Arizona, in order that Susan Jacobs come to Texas to testify as a witness in the above mentioned prosecution at the expense of the County of Galveston, Texas.

An additional requirement in the application is to state that the witness is free from arrest and service of process. This requirement is set forth in §5 of Article 24.28, which

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protects the person who is being forced to come into Texas as a witness by making that witness exempt from arrest or service. This is also true if they are simply passing through Texas to testify in another state. Remember, all 50 states have codified these protections. My application had the following wording:

> … that in order to arrive at this Court it will be necessary for the witness to pass through those States between Arizona and the State of Texas and such States, as well as the State of Texas, will under their laws give the witness protection from arrest and service of civil and criminal process in connection with matters which arose before her entrance into said State.

This protection naturally doesn't extend to crimes that the witness commits while in Texas for her testimony, only those that occurred pre-subpoena.

The judge's certificate

Along with the State's application, the prosecutor should prepare the judge's certificate for signature. This is the most important document in the process and is the basis for all decisions made in the witness' home state. The judge's certificate is a relatively short document (only about three paragraphs long) that is presented to the court in which the case is pending. The certificate must contain four things:

1) a statement that the criminal prosecution is pending in the court or that a grand jury investigation has commenced or is about to commence;

2) a statement that the requested witness is a material witness for the State in a criminal proceeding;

3) the specific number of days that the witness will be required; and

4) the seal of the court.

The judge's certificate is important because it is the whole of the evidence that will be used in the witness' home state. A judge there must make these same findings and does so solely on the signed certificate from the Texas court. It's important to explain exactly why the witness is material. For example, the certificate can include a brief summation of events, such as:

> Said witness is material and necessary for the People of the State of Texas for said prosecution in that it is alleged that she will testify as to the fact that in Galveston County, Texas, on December 11, 1993, she was present during a shooting which took place in Room #205, Seahorse Motel, Galveston, Texas. She will describe the people in said room during the shooting.

It's hard for a court in another state to argue the materiality of a witness with the above finding. But it is also important to keep in mind that an uncooperative witness may try to argue that she is not in fact material to the case. Because you won't be there to rebut those claims, you want to judge's certificate to be as detailed and convincing as possible.

Both our application and judge's certificate described that Susan Jacobs had given a statement to police that she had an affair with the deceased and that he told her on the day of his murder that he was going to ask the defendant for a divorce. We described the circumstances of the murder and attached a copy of Susan's statement to both documents. We worked to avoid making conclusory statements without support, but we made as convincing a case as we could to show the materiality of Susan's testimony. Had we not had a witness statement to attach, I would have included an affidavit from my investigator regarding her statement.

Once we had our judge sign the certificate and affix the court's seal, I was able to send our application and the judge's certificate to our contact in Pima County, Arizona. We spoke with the prosecutor and investigator there over the phone and gave them the latest information on Susan's whereabouts. I knew from prior conversations with the Arizona prosecutor that their judge required us to include language as to why we needed her for the specified number of days, and that the judge wanted the witness statement or affidavit that I mentioned above. The Arizona prosecutor reviewed our paperwork and agreed to set it for a show-cause hearing. She knew our deadlines and was able to work with us in terms of scheduling.

The Arizona hearing

It's difficult for me to give up this level of control over my case, but I couldn't be a part of the Arizona hearing to determine if I was going to have my key "motive" witness for trial. Fortunately, due to my having made early and repeated contact with the Arizona prosecution, I knew I was in good hands. That prosecutor, Theresa, presented my application and judge's certificate to the Arizona judge along with her motion and order setting a show-cause hearing. Just as the application

existed to give the Texas judge sufficient information to sign the certificate, that certificate exists to give the out-of-state judge sufficient information to sign the order. Once the Arizona judge signed the show-cause order, it was time to serve our witness, Susan. The Pima County investigator served her with the order, and we were up and running. Susan would have to attend the show-cause hearing in Pima County.

It should be noted that if a witness is more cooperative, she can sign a waiver of the hearing. That waiver would also act as an agreement to appear and testify in the requesting state. The Uniform Act doesn't discuss this option, but it's been an acceptable practice in most jurisdictions. If this is something you are considering, it's important to check with the out-of-state prosecutors to see if the judge would allow such a waiver. The waiver normally states something similar to the following:

> I, Susan Jacobs, of 1002 Main Street, City of Tucson, County of Pima in the State of Arizona, enter my appearance in the above-entitled matter in the District Court of the State of Arizona in and for Pima County, Arizona for the purpose of being ordered to appear. …
>
> I, Susan Jacobs, further waive my right to a hearing on an Order to Show Cause and agree and consent that my testimony is essential to the trial of the above referenced action of the State of Texas, and that said testimony will cause me no undue hardship, and hereby agrees to appear before the 56th Judicial District Court. …

This wasn't a feasible option for us, as I was not convinced that Susan was going to be cooperative enough to follow through. I felt that having an Arizona judge personally explain to Susan that she had to appear in Texas would help reinforce the importance of this matter.

Soon we got word from the Arizona prosecutor that the judge held the hearing and signed a finding that: 1) Susan Jacobs is a material and necessary witness; 2) there is no undue hardship to her being compelled to attend and testify; and 3) she will be exempt from arrest and service of process. Again, the Arizona judge made these determinations solely from our judge's certificate. With those three findings, the law requires the judge to issue the subpoena. Susan was now required to obey the subpoena, and we could ask for an attachment if she didn't show.

The truly uncooperative witness

In the end, the Arizona hearing was all Susan needed to convince her that she should cooperate with us. A truly hostile witness, however, can present more problems. The Uniform Act does have a provision that allows the witness to be brought immediately before the judge in her county and for that judge to take the witness into custody and be delivered to a Texas peace officer. This is a pretty extreme measure to take, but it can be very helpful with a witness who is actively avoiding service. In this situation, the judge's certificate must include a recommendation of immediate custody. Obviously, proving up the materiality of the witness and why custody is necessary is extremely important to convince a judge to take this measure. Also, timing is everything. Working with prosecutors in the witness' state as to when to serve the witness and bring her before the court with paperwork in hand is essential for this process to work.

Conclusion

I'm very indebted to the great work of both my own investigator and the investigators and prosecutors in Arizona. The importance of maintaining these kinds of contacts cannot be overstated. I find that it's always inspiring to see prosecutors working together across state lines to ensure that justice is done. ❇

Endnote

1 Names, locations, and facts of the real case have been altered for illustrative purposes.

A little healthy competition

Members of the Tarrant County DA's Office gathered at a local shooting range for the Second Annual Prosecutor Shootout, which is aimed at building camaraderie and familiarizing everyone with firearms.

By Anna R. Summersett
Assistant Criminal District Attorney in Tarrant County

The room is dark, shielded from the harsh Texas summer, and smells of sweat. The new guy hunkers down on a plastic milk crate to steady the nerves of inexperience gripping his chest while he prays they do not paralyze him with panic. He glances over his right shoulder and catches sight of a figure amidst the shadows; clad in camouflage, a wounded soldier awaits a daring rescue. He whispers a silent prayer that the solider is not waiting on him, because 100 yards due west from his milk-crate perch, someone else's life depends on his immediate action. A hostage, bound around the neck, needs the aim of his AR-15 carbine rifle to be true. A few inches in error, and she is gone.

He pulls up to the sniper stand and adjusts the sandbag support to sight-in his target. The crosshairs hover just between the suspect's eyebrows as his head begins to tingle for want of oxygen. He releases a breath slowly, places his finger beside the cold trigger well, and flips off the safety with such vigor that he has to correct his aim. He contemplates a pep talk: "You can do this. You thrive on moments like this, where preparation meets expectation and good abounds victorious." He pulls the trigger.

The rest of us do not hear the shot ring out, but the soft clinking of the discharged shell provides celebratory music—he nailed his target. A small round of applause pulls us out of the action-packed scenario we have imagined and lands us in the middle of something much more realistic: The 2nd Annual Prosecutor Shootout is underway—and the new guy can really shoot!

Getting comfortable around guns

The idea for our office shootout started two years ago when I was headed to a pre-trial witness meeting with several local officers on a felon in possession case. I felt prepared, having organized my trial notebook, brushed-up on germane cases, and created exhibits for court. But I lacked the skill to handle what was in the sealed evidence box the officers placed before me: a Kel Tec 9-mm pistol with an extended magazine. Then a second-year misdemeanor prosecutor, my experience with firearms was limited to the fifth grade when my brother enlisted a .22 caliber air rifle to scatter campground vermin. (Animal activists, be not afraid: His aim was terrible.)

As the arresting officer opened the evidence box, I stepped back, feeling as if I'd walked onto a movie set, and I waited for the officer to show me the weapon. Chuckling at my naiveté, he explained the weapon's parts and illustrated its disarmed status, then walked me through forensic lessons regarding different weapons' ejection procedures. My hearing concluded successfully, but I felt timid asking for this felon's punishment while pinching the firearm between my fingers as if it had cooties. Something had to change.

Taking the first step toward gaining confidence with firearms, several young prosecutors in our office got together and organized a Concealed Handgun Licensing (CHL) class for law enforcement personnel only. Investigators Wayne Fitch and Lester Couch taught gun safety while another investigator (and seasoned firearms expert), John Hubbard, instructed us on the finesse of trigger-control. We went through a boot camp of sorts, as a team, and learned how to safely handle these deadly weapons. The class was successful in teaching the basics, but now our appetites were whetted, and we wanted more.

Few things encourage self-education and camaraderie with colleagues like a little friendly competition. Even fewer things spur a Texas prosecutor's excitement like a quiet morning at the gun range. So when Bill Carlton and his team at 2A Freedom Shooting in Tarrant County approached our office with an idea

that incorporated both, we decided to give it a shot (heh).

2A Freedom Shooting was established to provide law enforcement a space with versatile, challenging training engagements free from the safety concerns of a public range. The facility includes ranges from 15 to 100 yards and provides for reactive training, multiple target placement, and twilight engagements. The AR-500 steel used throughout the premises allows fire exchange from a pellet gun to fully automatic, military-grade weapons.

The shootout

The First Prosecutor Shootout in 2012 was sparsely attended, with only eight competitors locked and loaded. Still, it provided a variety of weapons with an even greater variety of targets. A .22 rifle, 9-mm pistol, 12-gauge shotgun, and AR 15 carbine rifle were all used to hit spinning targets, tin cans bobbing in the wind, stationary steel targets, and skeet flying across the blue sky. An afternoon of laughter, fajitas, and shuffling around the thousands of shell casings left us exhausted but with a sense of accomplishment; we now felt comfortable, some proficient even, with numerous types of firearms.

The next year, buzz spread quickly through the office about the impending rematch in the Second Annual Prosecutor Shootout. Had competitors been practicing? Did anyone have the advantage of already knowing the maze of targets Bill Carlton was preparing for us? Would a new sharpshooter come out of the woodwork and surprise us all? Gossipy whispers wore on my confidence until the day finally arrived.

TOP PHOTO: Assistant Criminal District Attorneys Tim Rodgers (left) and Lloyd Whelchel (center) pose with Criminal District Attorney Joe Shannon (right). ABOVE PHOTO: Range owner Bill Carlton (far left) poses with (second from left to right) Vincent Giardino (third place), Anna Summersett (second place overall and first place women's), and Nathan Martin (first place), all assistant criminal district attorneys.

The competition pool had increased to 26, including our elected district attorney, Joe Shannon, but as the office had just welcomed several new hires to our ranks, unfamiliar faces had the veterans on edge. The range had been turned into somewhat of an obstacle course as we all strived for accuracy while besting each other's time. During the second competition, certain targets would

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appear only if the shooter had successfully acquired the preceding target. Each successful shot increased the opportunity for a higher score, but with a limited number of rounds available for each target, the course was notably more difficult than the year before. Competing with the goal of accuracy was the need for speed as time was ultimately the tie-breaker. Also added this year were portions of the course that had to be navigated on foot, preferably at a run, to prepare shooters for real-world situations.

The scores were neck-and-neck as the new guy, Nathan Martin, took his position at the sniper stand. He raced through the events with his shots singing for points as the projectiles hit their metal targets. Up and out went the clay pigeons, just to moments later be decimated with buckshot (Nathan's hunting skills proving beneficial). With all the twists and turns of the course, we lost sight of him as he made it to the final event until "ping, ping, ping"—and there went our shot at the championship. Blast!

First place bested second by only one shot. It may sound like a close competition, but in the real world, where each shot could mean the difference between life and death, Nathan is more than just the champion, he is the survivor. At the end of day, all participants walked away with a smile and a bit more confidence in handling firearms—and that is success all around. I'm holstering my weapon until the competition next year. Hope to see y'all there! ❇

Casting a wide net for fugitives

Dallas County has had great success using digital billboards to catch family violence felons. Here's how.

Covay Davis has a criminal history of 50 offenses in Dallas County, with 10 arrests. The vast majority of his offenses are family violence and drug crimes. He is wanted for one count of aggravated assault with a deadly weapon and one count of aggravated assault family violence with a deadly weapon, and he has been on the run for about seven months.

By Gene "Buddy" Evans Jr.
Senior Sgt. Investigator in the Criminal District Attorney's Office in Dallas County (Family Violence Division)

The Dallas County Criminal District Attorney's Office, with the support of District Attorney Craig Watkins, is taking a new approach in addressing the many cases where defendants wanted for felony family violence offenses have not been apprehended and brought to trial. The reasons why these felons have not been captured are varied: Some have gone to Mexico, some have changed their names, some are given safe harbor by family members, some are incarcerated elsewhere, and some are so far off the radar that they are never contacted by law enforcement. With today's social and mass media, the old ways of just knocking on doors and using the telephone to track down felons has been expanded to a whole new sphere: specifically, digital billboards. These signs in high-traffic areas allow the public to get involved in their community's safety and well-being. Posting a wanted notice with a criminal's name, face, and crime on a roadside Jumbotron gets noticed.

New way to solve an old problem

I came to work at the DA's office in August 2012. I brought with me 28 years of prior experience from the University of Texas at Arlington Police Department and the Arlington Police Department. My first assignment with the DA's office was as an investigator in the family violence unit, more specifically, to find the wanted felony defendants so they could be tried. Well, it's hard trying to find people who don't want to be found, especially those who have been off the radar for upwards of 10 years. Covay Davis, for example, had been on the run for seven months. The task seemed insurmountable.

While driving home on Interstate 30 one day, I noticed a billboard—but not just any billboard: This one was lit up and digital, and its screen changed about every eight

seconds. I noticed that on the billboard, the FBI had posted a "wanted" notice with a reward for a fugitive they were looking for. My immediate thought was, "If the FBI can do that, we can do it too!"

I thought that using the digital billboard might be the answer I was looking for, a way to cast a broader net. In a way, looking for fugitives is like fishing: You bait a hook and cast your line in various spots, hoping you will catch a big fish. It is long and tedious work in most cases, the bites few and far between. But a digital billboard is like having many hooks spread all over the city or county, and a reward from Crime Stoppers is the bait.

Obviously before moving too far forward, I met with my supervisors, both on the law enforcement side and the prosecutor side. Such an idea will never go anywhere if they are not in the loop. There I was, brand new to the office and pitching an idea like this to people who had either just met me or didn't even know my name. I figured they'd think it was a crazy idea—but that's not how they responded at all. Instead I heard, "Smart, great—let's move forward on that." It was a compelling concept—but how to pull it off? I did not really have a clue, so I had to do my research.

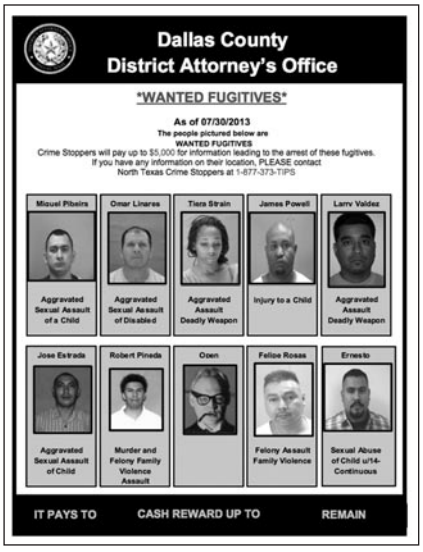
The process

The digital billboard I'd seen on IH-30 is owned by Clear Channel Communications. As part of its charter, Clear Channel sets aside airtime on its digital billboards for messages and announcements for the public's welfare or safety—with no fees attached. What an awesome service (that many law enforcement entities are probably not aware of)! I also learned that Clear Channel Outdoors (the billboard branch of the company) has as many as 80 billboards across Dallas County. That's a lot of hooks! Teresa Moore is the representative I spoke with; she handles the public service concerns in our area from her office in Arlington. We talked at length, and she answered all of my questions. She even came to our office and gave a presentation to Mr. Watkins and his executive staff so they could ask questions and find out how the program might meet our needs.

The billboard initiative was approved, and we could come up with our own design of what the billboards would look like and say. Different design suggestions were given to Mr. Watkins and his staff, and after a short time a design template was agreed upon. We also got Crime Stoppers involved so that when the billboards went online, people would have a place to contact if they had any information on the fugitive's location. This turned out to be relatively simple; we just called our local Crime Stoppers and explained what we were doing. We all agreed that Crime Stoppers would be the clearinghouse for the tips that were generated, which would be forwarded by email to me and another investigator, Ric Bruner. He is tasked with tracking down our absconded felons with assistance from the U.S. Marshals' task force.

We also had to choose which fugitives would be posted on the billboards. Because the idea was born out of my need to apprehend family violence defendants, we agreed to concentrate on FV cases involving felonies. The cases were reviewed as to their seriousness, complainant/witness support, the strength of evidence, the defendant's criminal history, and his likelihood of still being in the area, and the final decision was left to the chief prosecutors in the division. (Since we started this program, the list has expanded to include child abuse defendants too.)

The first 10 defendants were selected, including Covay Davis, the fugitive I mentioned at the beginning of this article. We designed a template of 10 fugitives to use in-house so our website coordinator, James Tate, can update our website (www.DallasDA.com), Facebook, and Twitter (see one version of the template, below). A copy of the template is also made available to Crime



Stoppers and Clear Channel. The list displays each person's name, photo, and the crime charged.

Clear Channel, using our template, enters the information for each fugitive on his own billboard template and submits a visual draft to me for approval. Once I give the

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go-ahead, it is placed in the general rotation to be displayed at random times on various billboards throughout the county. The template is designed so that when a fugitive is caught, it can be noted on the billboard and social media (see both the regular and the "captured" versions of the sign, above) and the listing removed so another fugitive can be posted. The program kicked off on March 15.

Which brings me back to Covay Davis. Within two weeks, a tipster called Crime Stoppers and stated that she had spotted Davis at a local liquor store. Not wanting the fugitive to get away, Crime Stoppers immediately contacted the Dallas Police Department, and Covay was arrested by patrol. We don't know where he had been for the previous seven months, but we caught up with him thanks to the billboard. It is great when a plan comes together!

We have tweaked a few things here and there, but the program is still going strong. As of this writing, pictures of 20 fugitives have been displayed and 11 have been captured. If I were a fisherman with that kind of average, I would be a professional!

I certainly don't know if this type of program would work for every county and every situation, but it has here in Dallas. Even with its success, it is still a work in progress. There are things that could be changed and most likely will change as time goes on, technology improves, and our needs evolve. It's still old-school police work of casting a lot of lines—only now with a technological twist that has vastly