THE TEXAS PROSECUTOR

The Official Journal of the
Texas District & County Attorneys Association

Volume 44, Number 5 • September–October 2014 • www.tdcaa.com

"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

The window-tint warrior

A "sovereign citizen" recently fought a fine-only Class C misdemeanor tooth and nail, and the chief prosecutor in Jeff Davis County lived to tell the tale.

By Teresa L. Todd
County Attorney in Jeff Davis County

"Afternoon, ma'am. Can I get you to roll down your back window? Oh … hello, sir."

So began a traffic stop for a window tint violation on December 13, 2013, that would monopolize six weeks of my time and introduce me to the mad, mad world of the sovereign citizen.

The traffic stop was made on a cold clear afternoon on a beautiful stretch of highway in Jeff Davis County, located in rugged, mountainous, Far West Texas. The county seat is Fort Davis, which is a picturesque, Mayberry kind of place filled with intelligent, independent-minded folks. As the elected (and the only) lawyer for Jeff Davis County, I handle everything including Class A, B, and C misdemeanors, all juvenile cases, and a hodgepodge of civil matters for commissioners court, other elected officials, and the county itself. I work with one constitutional county judge and one justice of the peace. Both are fine judges; neither are attorneys (common in rural counties). Because I am one of the few lawyers that many folks know, my courthouse office sometimes resembles a free legal clinic. My days are jam-packed, never the same, and never boring.

Cloudy with a chance of crazy

When I received a not-guilty plea with a request for a jury trial on a Class C window-tint ticket, it sure seemed odd. Shortly before the scheduled jury trial date, the defendant filed a document called "Ex Parte Re Notice and Motion to Dismiss Traffic Citation No. ***** on the Grounds that Representing Counsel Failed With the Above Court To Bring the Action to Trial Within a Timely Fashion Thus Violating This Petitioner's 6th & 14th Amendments of Due Process of Law of the State & National Constitution; Affidavit & Points & Authorities in Support and Order Attached" (which the defendant signed himself). What?

Unfortunately, despite looking high and low, the DPS trooper could not locally secure the in-camera video of the traffic stop. I was determined to have that video for the jury trial, so I filed a motion for continuance to secure a copy from DPS in Austin. The defendant protested but refused to come upstairs to the courtroom to argue against my motion. He yelled at me and the judge in the hall, then hurried out of the courthouse. When the judge granted the continuance, the defendant was incensed and argued that his rights had been violated.

At this point, I began to realize this was not just another weird Class C case. I decided the defendant was

Continued on page 21

Criminal Justice Section sponsors *Brady* webinar

I am pleased to announce that the Criminal Justice Section of the State Bar of Texas has agreed to be the major sponsor of the TDCAA *Brady* webinar that will be online soon. As you know, every lawyer prosecuting criminal cases must complete an hour of training on the duty to disclose exculpatory and mitigating evidence and information pursuant to Government Code §41.111. We want to make sure that training is accessible for everyone, and a generous grant from the State Bar's Criminal Justice Section will allow us to produce and offer the webinar free of charge through the TDCAA website.

By Rob Kepple
TDCAA Executive Director in Austin

The Criminal Justice Section is one of the largest sections of our Bar, and it is a meeting point of the three major actors in the criminal courtroom: judges, criminal defense attorneys, and prosecutors. The section's mission is to bring the three together to foster cooperation, collegiality, and education for the betterment of the all three professions.

I want to thank the Section Board and all of its members for their support. The *Brady* webinar is important not only for full-time prosecutors, but also for those criminal practitioners who pick up even a single prosecution as a special or *pro tem*. And under the Court of Criminal Appeals rules relating to Government Code §41.111, the training provided in 2014 will be "good" until the need for re-training in 2018. This *Brady* video will be around awhile, so it needs to be a quality product. With the Section's support, it will be.

Advanced Trial Advocacy Course

The core of the Foundation's mission is to support prosecutor excellence. Again this year the Foundation has been able to fund TDCAA's Advanced Trial Advocacy Course held in Waco at the Baylor College of Law in early August. A big "thank you" to the **Harris County District Attorney's Office**, which offered enduring support for this crucial training to benefit its prosecutors and others around the state. This is one of the best trial advocacy courses in the country, but it is a people- and resource-intensive exercise. We couldn't do it without that support.

Invitations are in the mail

Invitations to join the **Texas Prosecutors Society** have been extended, and the 2014 class will be announced at a reception in the Society's honor at the Elected Prosecutor Conference on December 3, 2014, in Austin. The society was created in 2011 as a way to gather those who have an enduring interest in the profession of prosecution and who want to support the improvement of the profession into the future. The members are asked to make a contribution of $2,500 over 10 years to the Foundation Endowment Fund, which, as they say, will turn into "real money" in no time flat with the support and interest we have had to date in the society. The Foundation Board works to identify nominees every spring, so if you have not received your invitation to join this year, sorry—but perhaps next year!

*Recent gifts to the TDCAF**

Richard B. Alpert
James M. Eidson
David L. Finney
Jack C. Frels
Eric J. Fuchs *in memory of Chip Rich*
Michael J. Guarino Jr. *in memory of G. Dwayne Pruitt*
Anton E. Hackebeil
Luke Inman
Ed C. Jones
Justynian Z. Jones
W.C. "Bud" Kirkendall *in memory of G. Dwayne Pruitt*
Doug Lowe
John A. Neal
Rene M. Pena
Curtis R. Tomme

* gifts received between June 6 and August 1, 2014 ❇

Couldn't say it better

Not long ago I received a letter from one of the original Foundation supporters, **Tom Hanna**. He was the long-time CDA in Beaumont and one of the original cast of prosecutors who re-drafted the State Bar's proposed 1974 Penal Code. It was great to be reminded of those who

Continued on page 4

Table of Contents

TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION
505 W. 12th St., Ste. 100, Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcaa.com

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, investigators, prosecutor office personnel, and other TDCAA members. Articles not otherwise copyrighted may be reprinted with attribution as follows: "Reprinted from *The Texas Prosecutor* with permission of the Texas District and County Attorneys Association." Views expressed are solely those of the authors. We retain the right to edit material.

TEXAS DISTRICT & COUNTY ATTORNEYS FOUNDATION
505 W. 12th St., Ste. 100 Austin, TX 78701 • 512/474-2436 • fax: 512/478-4112 • www.tdcaf.org

Continued from page 2

stepped up when it was time to advance criminal justice in Texas, folks like **Dain Whitworth, Carol Vance, Sam Robertson, Mike Hinton, Mike McCormick,** and **Bob Smith**, to name just a few. It is work by these leaders that advanced the reputation of Texas prosecutors as committed public servants.

I think Tom may have hit the nail on the head in his closing paragraphs: "Yes, there are challenges facing prosecutors and the Association. Some have been brought on by prosecutors behaving badly, some by changing attitudes of fundamental fairness, some by the complexities of life in the 21st Century. That is why the Foundation is sorely needed and why I have been proud to support it.

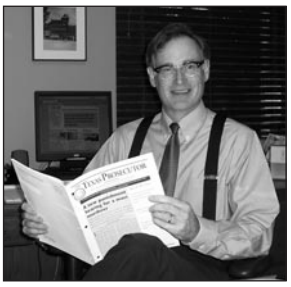
"When I was elected those many years ago, I was asked if I aspired to higher office. I responded then, and still believe it now, that the office of Criminal District Attorney (my office) was the highest office to which a lawyer could be elected because it was the chief law enforcement office in the county."

Thanks, Tom, for your work on behalf of your county and the state. And thanks for your continued support and good thoughts! ❇

EXECUTIVE DIRECTOR'S REPORT

Brady training update

We have completed our first round of free, three-hour ethics seminars that include the mandatory hour of *Brady* training. I say first round because they have been so popular and crowded that we will be offering some additional seminars this fall, so stay tuned to the TDCAA website for announcements.



By Rob Kepple
TDCAA Executive Director in Austin

In addition, you might notice some recent changes to the TDCAA website to help you quickly access *Brady*-related information and materials. We have inserted a *Brady* Resources tab on the homepage for quick access to a number of resources (find it on the orange bar at the top of the homepage). First, you can check the list of people who have completed the training mandated by Government Code §41.111. In addition, you can access a copy of **Chip Wilkinson**'s book on *Brady*, as well as a subsequent caselaw update. (Chip is our ethics guru and an assistant CDA in Tarrant County.) Finally, this spot on our site will be a repository for *Brady* and discovery-related resources, such as sample *Brady* policies and discovery forms. Have something you would like to share? Send it to me at Robert.Kepple@tdcaa.com.

DPS discovery policy

Speaking of discovery policies, the Department of Public Safety recently adopted a discovery policy to address its responsibilities under the Michael Morton Act. You can access the policy at www.tdcaa.com/brady-resources/2014-brady-materials. The policy is a succinct and straightforward document that requires DPS troopers and officers to get the prosecutor all relevant documents and evidence. It may serve as a good model for other police agencies sorting through various policies.

Discovery issues

By now most jurisdictions have begun to adjust to the discovery changes enacted by SB 1611, the Michael Morton Act, which went into effect in January. There have been resource issues and a little chafing between prosecution and criminal defense in some jurisdictions, but it sounds like people are figuring it out. Over the summer a panel of criminal justice practitioners talked about the new discovery statute at the State Bar Advanced Criminal Law Course. The panel was moderated by **Kenda Culpepper** (CDA in Rockwall County), and panelists included **David Escamilla** (CA in Travis County), **Bobby Mims** (defense attorney in Tyler), **Jarvis Parsons** (DA in Brazos County), and **Lynn Richardson** (public defender in Dallas). The panelists raised some issues, including the timing of discovery, *pro se* defendants, who does

redaction, how the continuing duty to disclose information will be handled, and in what format discovery must be delivered. Most agreed that the language of the statute was "clunky" and could use some clean-up, but it didn't sound like the wheels had come off.

Discovery will be a topic of discussion this fall for prosecutors, and let's hope discussions will continue with the defense bar on how to make sure discovery is accomplished in the most effective and efficient way. Stay tuned.

Getting Life, by Michael Morton

By this time we all know that the story of Michael Morton and his wrongful conviction for the murder of his wife in 1987. With people pointing to a lack of open discovery as a key contributor for the bad conviction, you can see why his name is on SB 1611, the discovery bill we are all talking about.

Mr. Morton has recently released a book chronicling his ordeal titled *Getting Life*. It is a great read. Indeed, one defense attorney, **Shane Phelps** of Bryan, thought that it was so good that he sent a box of books to both **Jarvis Parsons** and **Rod Anderson**, the DA and CA in Brazos County. And this is a gift that will keep on giving: Both Jarvis and Rod have donated the books to the Texas District and County Attorneys Foundation so that we can lend them out to anyone who wants to read it. We have loaned them to Jarvis and Rod's offices first but have asked that they finish them up by the Annual. There, we will have them at the registration desk, so come by and pick up your copy. Just read it and send it back when you are through. Thanks Shane, Jarvis, and Rod.

PIA requests for info about officers

In the last couple months most prosecutor offices have received a Public Information Request for any letters the office has sent to a law enforcement agency notifying the agency that they would not accept cases from a particular peace officer and any lists maintained by prosecutors of officers who may be subject to impeachment if the officer testified. This is a follow-up to an article published in the *Austin American Statesman* newspaper concerning "gypsy cops," which can be found at www.statesman.com/weblogs/investigations/2014/jun/24/new-cases-point-police-discipline-dilemma. My guess is many offices have sent such letters in the past because in the last few years we have received numerous calls around here from prosecutors who have lost faith in a particular officer and want to know what they should do about it.

As the Morton Act works to focus us on information we need *from* peace officers and *about* peace officers, this discussion was timely and inevitable. Y'all have been taking these concerns seriously and have been notifying the departments when you will be turning over *Brady* information about a peace officer to the defense or not filing a particular officer's cases because of credibility issues. This can put the sheriffs and the police chiefs in tough situations, but you are properly guarding the integrity of your cases and your offices.

We are aware of at least one or two lawsuits filed by officers who were let go after the department received such a letter. (Read about one at www.search.txcourts.gov/Case.aspx?cn=03-14-00231-CV.) The prosecutors are not named in the suits, of course, because they were not involved in the employment decision. I am not an employment law expert, but it seems reasonable for a department to let an officer go if the officer's testimony won't stand up in court or isn't even good enough to get a case filed. And a quick read of the officer's arguments on appeal in the case linked above seems like a tough sell—essentially that truthfulness is not a qualification to be a peace officer. Not sure how that argument will play out, but we will keep you informed.

Welcome, Lily Braden

The TDCAA would like to welcome another member into the fold: **Lily Braden**, born to **Kaylene and John Braden** (all pictured below) July 28 at 8 pounds, 15 ounces. Lily and Kaylene, our Membership Director and Assistant Database Manager, are doing great, and I am sure you will see them both at a TDCAA event soon!

Continued on page 6

Electronic versions of the CCP and PC available

Two of TDCAA's code books, the 2013–15 Code of Criminal Procedure and Penal Code, are now available for purchase from Apple, Amazon, and Barnes & Noble (for iPads, Kindles, and Nooks, respectively). Because of fewer space limitations in electronic publishing, these two codes include both ~~strikethrough~~ underline text to show the most recent legislative changes and annotations. Note, however, that these books contain single codes—just the Penal Code and Code of Criminal Procedure—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files. ❇

Prosecutor booklets available for members

We at the association recently updated our 12-page booklet that discusses prosecution as a career. We hope it will be helpful for law students and others considering jobs in our field. Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to email the editor at sarah.wolf@tdcaa.com to request free copies. Please put "prosecutor booklet" in the subject line, tell us how many copies you want, and allow a few days for delivery. ❇

Continued from page 5

One-up on mountain-climbing

In the last edition of the *Texas Prosecutor* we printed a photo of **Bernard Ammerman**, our Willacy County Attorney, on top of Guadalupe Peak flashing the Red Raider "guns up" sign. I still think that is a challenge and invite others to claim the peak for their school, but I recently learned that we all may be, well, pikers compared to another Texas prosecutor.

Take a look at the photo of the climber, below. That is **Jack Strickland**, an assistant in Tarrant County. Turns out he is and accomplished climber—and by that I mean a real climber who travels the frozen world above 20,000 feet. His accomplishments include topping out on many unpronounceable peaks on many continents, but he caught my attention with his descriptions of his expeditions to the formidable and dangerous Denali in Alaska. Caught my attention in that he was actually still around to tell the stories after climbing that peak! Jack, that is inspirational stuff for us all. I am beginning my training for Enchanted Rock today! ❇

Why does human trafficking matter?

It is a crime against humanity. It is a crime against everything that we as human beings find most sacred. We all have the right not to be abused mentally or physically; not to be tortured, killed, or sexually assaulted; and not to be forced into a life of despair, pain, and torment. We all have the right to be safe and secure in our homes and in public. For those of us in law enforcement and prosecution, the issue is that human trafficking exists on a large scale and is difficult to detect and ultimately to prosecute.

By Rene Peña
District Attorney in Atascosa, Frio, Karnes, La Salle, and Wilson Counties

It matters because we are losing a generation of human beings. It matters because human trafficking is a significant part of the criminal enterprise model we fight every day. It generates millions of dollars for the enterprise.

Anyone who has turned on a television in the last several months knows that the Texas border has seen an increase in immigrants crossing into the United States. Some of the immigrants are hard-working people looking for a better life, some are people fleeing from danger in their home country, some are criminal aliens trying to avoid detection by law enforcement, some are terrorists, and many are victims who need to be rescued. Most law enforcement in South Texas has encountered human smuggling or trafficking at some point in their career. However, how many of those people are actually being trafficked in Texas?

Before we go any further, let's distinguish between human smuggling and human trafficking. Human smuggling primarily involves transporting undocumented individuals into the United States for a fee.[1] Essentially, a human being becomes cargo that a smuggler is paid to transport. Unfortunately, many of these individuals are threatened, tortured, and physically abused along their journey into the United States. In some instances the alien-smuggling operations demand more money to release the individuals from stash houses, force the individuals into involuntary servitude, or even worse, force the individuals to engage in sex acts with strangers for money to pay off their travel debt. As the debt keeps increasing, the smuggling victim has become a victim of human trafficking.

Human trafficking involves forcing another individual to engage in labor or prohibited sexual conduct through threats and coercion.[2] Essentially, a human being becomes a product sold repeatedly by the trafficker. The business of human trafficking is real and exists here in Texas.

So you might be asking yourself, "Why do we have difficulty detecting the people involved in human trafficking?" First, there has been a lack of awareness that human trafficking exists. Texas has enacted more effective laws and has begun training law enforcement personnel on human trafficking and smuggling, but there are still many barriers to overcome. The general public may assume immigrants are coming to the United States to make more money and find a better life, but all too often the reality is that the victim's dream of a better life will soon turn into a nightmare filled with abuse, mistreatment, and often times sexual assault. Making detection even more difficult for law enforcement is that at first glance the victim appears to be going willingly with the smuggler or trafficker. Moreover, the victim rarely wants to engage in conversation with law enforcement because they fear deportation and retaliation from the traffickers. In some cases, a language barrier prevents the victim from communicating with law enforcement at all. All these factors combined make it difficult for law enforcement to combat this growing epidemic.

Although detection of human trafficking or smuggling can be difficult, law enforcement has found some successful strategies. Identifying the victim is the first step in this process. The second and critical part of this process is victim services. Examples of services are child advocacy centers, proper housing, medical services, and psychological services. As you may surmise, these victims are in many cases poor or displaced, making them ideal targets of a criminal enterprise. The most effective tool when combatting any organized criminal activity is the use of confidential informants and undercover officers. Once law enforcement recognizes a human trafficking operation, it is imperative that we gather intelligence on how

Continued on page 8

Continued from page 7

the scheme is working, who is involved, and on what resources it depends. With such information, the State can obtain and effectively execute search warrants on locations involved in human trafficking. More importantly, this intelligence helps the State identify victims from the perpetrators (because oftentimes a victim may "promote" into a recruiter and later into perpetrator role).

For an effective human trafficking and smuggling investigation, law enforcement must also remember our federal partners who can provide invaluable resources and assistance. The majority of the time, the victim will need immigration relief, and the State cannot proceed on a human trafficking case without a victim. Our federal partners can also provide assistance with search warrants, wiretaps, court orders, and the detection of fraudulent documents. In addition, many of these investigations will lead to criminal organizations operating in multiple jurisdictions.

In 2011, our office prosecuted a case that started out as human smuggling and turned into an aggravated kidnapping and aggravated assault. Juan, the victim in the case, made his way from Honduras to Nuevo Laredo, where he paid a man $3,000 in advance to bring him across the Rio Grande River. Juan, along with 10 other men and one woman, walked from the border until they were picked up and placed like cordwood in the bed of a pickup truck for transportation. Juan said the woman in his party was either sick or drugged and was kept isolated from the rest of the immigrants with the smugglers. They were all taken to a compound made up of three mobile homes in a rural area near Poteet, where they were all slowly transported on to further destinations. Because Juan had paid in advance, his smugglers decided they could get more money from his family and kept him in a locked room for almost three weeks. The smugglers periodically called Juan's family to demand more money, but there wasn't any more.

Eventually, Juan saw an opportunity to escape when the door to his room was left unlocked. He ran from the room and jumped out a front window of the mobile home. Unfortunately, a meeting of numerous men was occurring outside and Juan was immediately caught. He was kicked and beaten unconscious. Juan woke up to hear the men talking about disposing of his dead body, and when the men moved away from him, Juan picked up his broken, bleeding body and ran to a neighbor's house for help. The neighbor called law enforcement and officers came to the scene. Law enforcement called Immigration and Customs Enforcement (ICE), as the agency was known then, for assistance. Local law enforcement parked down the road from the compound and watched vehicle after vehicle leave the scene. Law enforcement believed it was too dangerous for them to approach. More importantly, they believed the case was now a federal matter, so they waited for ICE to arrive. ICE had to assemble its team and drive at least a half hour to get to the compound, so by the time they got there, only the women and children residents remained at the scene. Local law enforcement believed ICE was handling the entire case; ICE agents knew they were there only to handle a smuggling case. Consequently, no evidence was recovered from the three mobile homes and the area surrounding them—no photographs or videos were taken, no blood from the ground or glass was sampled, and no one was even certain which of the windows had burglar bars on them. Fortunately, Juan recovered from his injuries and made an excellent witness for the State. The jury returned guilty verdicts on aggravated kidnapping and aggravated assault charges. The defendant in the case was sentenced to 60 years and 20 years, respectively, for those charges. The prosecutor spoke with the jury after the trial and most jurors pointed out what was painfully obvious: that there had been no communication between the agencies, merely assumptions about what each agency would do.

What did we discover during this trial? That law enforcement needs to be better trained on how to handle these types of cases, that local law enforcement has to understand the roles of the different federal agencies, and that communication between agencies is key. Had Juan not been such a strong witness, this defendant would have walked. Incidentally, during the course of this investigation, we also discovered that the defendant, who had been voluntarily deported numerous times, had been sexually assaulting his wife's little sister for years. He pled to 50 years on that case.

You may be asking yourself, "Why would criminal organizations be involved in human trafficking?" Criminal organizations exist to make

money. Mexican cartels have historically been involved in human trafficking and smuggling, and as part of the trafficking and smuggling operations, the cartels have built a partnership with Texas prison gangs to further the cartels' smuggling activities. It is difficult to provide statistics on these criminal organizations' involvement with human trafficking since we have only recently begun to document human trafficking cases, but what we do know is that the individual members of the gangs have been attracted to the easy money associated with human trafficking. According to the 2014 Gang Threat Assessment by the Texas Department of Public Safety, members from Barrio Azteca, Black Gangster Disciples, Bloods, Crips, MS-13, Sureños, and Tango Blast have all been involved in human trafficking in Texas.

As long as there is a demand for forced sex, criminal organizations will work to supply the victims. Trafficking provides a high return on a perpetrator's investment. The victim can be sold multiple times a day, every day, for years on end. According to statistics reported to the Texas Department of Public Safety, the drug trade in Texas in 2012 profited over $1.24 billion. According to the 2014 Human Trafficking Assessment by the Texas Department of Public Safety, an individual human trafficker with only two victims could earn between $1,120 and $8,960 per week, which translates to $53,760 to $430,080 per year.[3] According to the Urban Institute's Justice Policy Center, an individual trafficker in Dallas could earn $12,025 a week, or $577,200 per year.[4] If an individual trafficker can make around half a million dollars annually, we can only imagine the revenue the human trafficking trade makes as a whole every year in Texas. With such high profits, low risk of detection, and renewable resources, the human trafficking trade will continue to grow.

So in the end, dealing with trafficking or smuggling requires a comprehensive approach where the vested institutions, whether they be law enforcement, prosecution, victim services, or federal partners, collaborate to effectively detect, investigate, and prosecute human trafficking.

Endnotes

1 See Texas Penal Code §20.05.

2 See Texas Penal Code §20A.02.

3 See Texas Department of Public Safety 2014 Human Trafficking Assessment.

4 The Urban Institute, "Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities," March 2014.

News Worthy

Three new books from TDCAA

There are three new books we will have ready to sell at the Annual Criminal & Civil Law Update in South Padre this September (as well as on our website at www.tdcaa.com/publications): 1) an updated *Warrants Manual*, now with information on getting warrants for the contents of cell phones; 2) a new edition of *Warrantless Search and Seizure*, updated with new U.S. Supreme Court cases on anonymous tips, drug dogs, cell phones, and all the exceptions to the warrant requirement; and 3) the brand-new *Punishment & Probation*, which sets out the law for sentencing and covers everything in Code of Criminal Procedure Chapter 42. Pick up your copy in South Padre, order from our website, or call us at 512/474-2436 to get yours. ❇

You told us what help you need

Earlier this summer, we at TDCAA conducted a survey to find out what victim assistance coordinators (VACs) across Texas might need to make their jobs easier. The online survey was open to all victim assistance coordinators statewide, and it was designed to identify emerging issues and trends, challenges, and gaps in available training and technical assistance, as well as to give VACs a voice in the future training and assistance initiatives TDCAA offers.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

The assessment was available online in May 2014 with a total of 127 victim assistance coordinators responding. The 127 VACs were located in county attorney (30 percent), district attorney (35 percent), and criminal district attorney (35 percent) offices across Texas. The respondents primarily serve rural (57 percent) and urban areas (26 percent), with some serving the suburbs (17 percent).

See the chart at right for the years of experience among the VACs who responded, the pie chart on the opposite page for their awareness of TDCAA and the resources we offer, and the box on the opposite page for respondents' assessment of which TDCAA programs are most helpful.

When asked to indicate the preferred method of training, VAC respondents preferred distance learning or Web-based trainings, on-site consultations, and phone consultations over other methods of training.

When asked to list their top-three critical unmet training needs that would improve future efforts in working with crime victims, 56 percent of VACs reported best practices and programs as their top critical unmet training need with funding, resources, and grant-writing running a close second (47 percent); 28 percent want training on partnership and collaboration within community.

TDCAA intends to use the results of this survey to identify training and technical assistance gaps and in planning for future support to address needs in those areas.

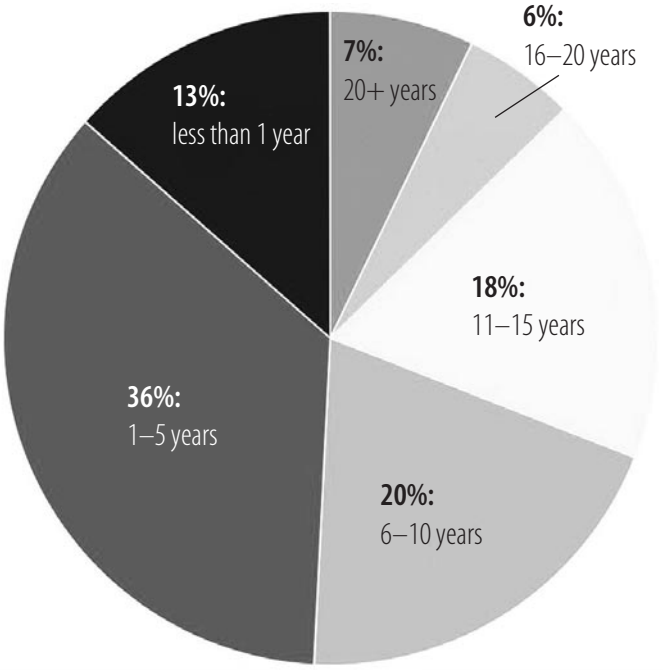
Did you know?

An individual serving as a witness in a criminal proceeding may be eligible for reimbursement of certain travel expenses through the Texas Comptroller of Public Accounts Witness Fee Claim Program. Mileage, rental car, meals, parking, taxi, and hotel expenses are reimbursable expenses. Travel may be by bus, train, air, or a personal automobile.

Art. 35.27 of the Code of Criminal Procedure governs this program (and Art. 24.28 governs out-of-state witness reimbursements). To be eligible for reimbursement from state funds, a witness must meet the following criteria:

- The witness must reside outside the county in which the trial is held.
- Confinement in jail must be a permissible punishment for the

Years of experience among VACs



offense for which the defendant is charged, so confinement in a juvenile detention center does *not* meet this requirement.

- The state will not reimburse expert witnesses for wages lost while appearing as a witness.
- The claim must be filed with the comptroller's office within 12 months from the date the witness is released from further court attendance.
- This program will also apply to any witness who has been requested, subpoenaed, or summoned for grand jury proceedings, habeas corpus proceedings, pre-trial hearings, and courts of inquiry; examining trials are eligible to be reimbursed if they reside outside the county of the request.
- Expenses of minor children who travel with a witness are eligible for reimbursement if the child is also subpoenaed as a witness, in which case a separate claim form, if possible, must be completed and filed with the comptroller's office.

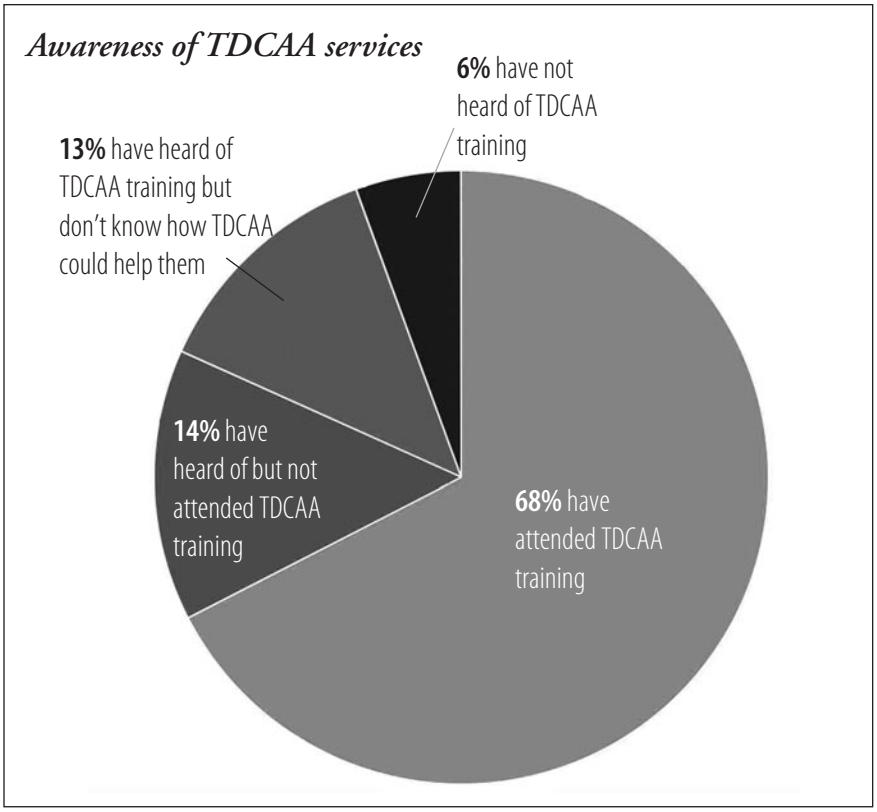
Parents or guardians of a minor under 18 years of age can be reimbursed when they are required to travel with a minor witness. The minor witness's name must be included on the claim form.

For witness fee claim reimbursement forms visit www.window.state.tx.us/taxinfo/taxforms/73-316.pdf. For witness fee claim guidelines visit www.window.state.tx.us/taxinfo/taxforms/96-762.pdf.

Upcoming training

The 2014 TDCAA Key Personnel & Victim Assistance Coordinator Seminar will be held November 5–7 in

Continued on page 12



Which form of assistance from TDCAA is most helpful? (from most helpful to least)

1. *Seminar or workshop-style assistance*
2. *Publications such as resource guides, factsheets, tool kits, and articles*
3. *Distance or Web-based learning*
4. *On-site consultation*
5. *Phone consultation*

Continued from page 11

San Antonio. Don't miss this opportunity to network with other victim service personnel and learn more on how to assist crime victims in your jurisdiction.

Visit www.tdcaa.com/training for registration and hotel information.

In-office VAC visits

In recent weeks, my TDCAA travels have taken me to Newton and Upshur Counties to assist new victimassistance coordinators. (We snapped a couple of photos [at right] to commemorate the visit.) Our goal at TDCAA is to offer training to VACs because many VACs are scrambling at times to navigate through the process of assisting crime victims. In-office consultations are proving to be a great way for VACs to learn one-on-one, in their own office setting, how to effectively serve victims of crime.

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

TOP PHOTO, from left to right: Britney Well, Secretary; Courtney J. Tracy, Criminal District Attorney; and Joy White, VAC, all in Newton County.
ABOVE PHOTO, from left: Jesica Wilson, VAC, and Becky Ojeman, Upshur County Assistant District Attorney.

SCOTUS has cell phones, and you need a warrant to search them after *Riley v. California*

When last we chatted, the Court of Criminal Appeals had held that people retain an expectation of privacy, albeit diminished, in their cell phones after those phones are collected with other personal belongings during the booking process.[1] The Court did not decide whether the search-incident-to-arrest exception to the warrant requirement would justify a search of the contents of the phone, but the Court did observe that the United States Supreme Court had already granted review of the issue in two cases.

By David C. Newell
Assistant District Attorney in Harris County

Well, police and practitioners did not have to wait long for the resolution to that issue. In *Riley v. California*, the United States Supreme Court held quite categorically that the warrantless search of a cell phone was not justified for officer safety or to prevent the destruction of evidence. And the only potential surprise in the opinion was not the result; rather, it was the vote count. In a virtually unanimous opinion, the United States Supreme Court answered the collective questions of law enforcement about searches of cell phones with, "Get a warrant."

A tale of two cell phones

To decide the issue, the United States Supreme Court combined two different cases, each with different levels of technology and intrusion. In the featured case, California police stopped David Riley for expired registration and arrested him for driving with a suspended license. Police searched Riley incident to arrest and found a smart phone in Riley's pants pocket.[2] Based upon Riley's possession of items associated with the Bloods street gang, the officer accessed information on the phone and saw the abbreviation for Crip Killers in either texts or the contact list. Two hours after the arrest, a detective specializing in gangs went through the phone at the police station looking for gang videos and pictures of gang members with guns. He found a picture of Riley standing in front of a car that had been involved in a shooting a few weeks earlier. Police ultimately charged Riley with that shooting, and Riley moved to suppress the evidence seized from the cell phone. The California Court of Appeals affirmed the conviction, holding that the Fourth Amendment permits a warrantless search of cell phone data incident to arrest so long as the cell phone was immediately associated with the arrestee's person.

The undercard case involved more dated technology and less police intrusion. There, police observed Brima Wurie make an apparent drug sale from a car. He was arrested and taken to the station. There, police seized two cell phones, one of which was a flip phone, from Wurie's person.[3] The flip phone kept receiving calls from a source identified as "my house" on the phone's external screen. The police flipped the phone open and saw a picture of a woman and a baby set as the phone's wallpaper. The police pressed one button on the phone to access its call log, and then another button to determine the phone number associated with the "my house" label.[4] They next used an online phone directory to trace that phone number to an apartment building. At the building, the officers observed Wurie's name on the mailbox and a woman in the window who resembled the woman on the phone's wallpaper.[5] The officers secured the apartment, got a search warrant, and found 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm, ammunition, and cash inside. Wurie moved to suppress, and a divided panel of the First Circuit Court of Appeals held that the search violated the Fourth Amendment. By granting review in both of these cases, the United States Supreme Court perfectly positioned itself to craft an elegant and nuanced opinion that could apply to the broadest range of issues attendant to cell phone searches incident to arrest without arbitrary line-drawing.

"Get a warrant."

In an ostensibly unanimous opinion, the United States Supreme Court held that the searches in each case were unreasonable without a search warrant.[6] To those who had been fol-

Continued on page 14

Continued from page 13

lowing the issues and the cases, this result was not as surprising as the broad agreement among the members of the Court. Only Justice Alito drafted a separate opinion, and that was a concurrence.[7] No one dissented.

Writing for the Court, Chief Justice Roberts first set out the rationale behind the search incident to arrest exception to the warrant requirement. A search incident to arrest is justified to protect officer safety and prevent the destruction of evidence. However, Justice Roberts acknowledged that the Court had held in *United States v. Robinson* that there was no need for a case-by-case adjudication of whether the officer actually had any basis to be concerned for his safety or that evidence would be destroyed.[8] Rather, the Court had held that a search incident to arrest required no additional justification because a custodial arrest of a suspect based upon probable cause rendered any subsequent search of items closely associated with the suspect as reasonable under the Fourth Amendment. And yet, in *Arizona v. Gant* the Court re-examined search-incident-to-arrest justification on a categorical basis (rather than a case-by-case adjudication) where its application to a car would have untethered the rule from the justifications underlying the exception. That is pretty much what the Court did in this case as well, categorically removing a particular "effect" from the search-incident-to-arrest exception to the warrant requirement.

First, Chief Justice Roberts explained that digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape.[9] Additionally, he rejected the argument that it might ensure safety in more indirect ways, such as providing police access to information about the defendant's friends who might be headed to the scene. According to Justice Roberts, as legitimate the interest in officer safety may be, this indirect danger was too speculative to warrant an across-the-board exception. Such concerns are better addressed on a case-by-case basis under the exigent circumstances exception to the warrant requirement.

Second, the possibilities of remote wiping and data encryption also did not justify an across-the-board exception to the warrant requirement. There was little reason to believe that either problem was prevalent as briefing revealed only a couple of anecdotal examples of remote wiping. Moreover, it could be prevented by either turning off the phone and removing the battery or by placing the phone in a sandwich bag made of aluminum foil (a "Faraday bag") to interrupt the signal. And again, if police are truly confronted with a now-or-never situation, they may be able to rely upon the exigent circumstances exception on a case-by-case basis.

And then, in a section of the opinion that tracked the reasoning of the Court of Criminal Appeals opinion in *Granville*, Chief Justice Roberts rejected the argument that an arrestee lost any legitimate expectation of privacy in his phone upon arrest. As Justice Roberts explained, "the fact that an arrestee has diminished privacy interests does not mean the Fourth Amendment falls out of the picture entirely."

But the Court went further than the Texas Court of Criminal Appeals by also distinguishing the modern cell phone from the package of cigarettes at issue in *United States v. Robinson*.[10] While he acknowledged that lower courts had upheld searches of address books and purses incident to arrest, he acknowledged that cell phones are both quantitatively and qualitatively different from other objects that might be kept on an arrestee's person. Describing cell phones as everything but Hermione's purse (with an undetectable extension charm), the Court then waxed rhapsodic about all the different functions cell phones are now capable of as well as emphasizing their immense storage capacity. This immense storage capacity allowed cell phones to store "the sum of an individual's private life," both in the individual items stored and the aggregate. As Chief Justice Roberts observed, searching a cell phone could expose to the government far *more* than the most exhaustive search of a house because it contains a broad array of private information never found in a home in any form—unless the phone is. And don't even get him started on the Cloud.[11]

What about "reasonable belief"?

If there is any potential weakness in the opinion, it lies in the Court's rejection of the argument that the search could have been justified under the "reasonable belief" standard set out in *Arizona v. Gant*. Chief Justice Roberts correctly noted that the majority opinion in *Gant* had noted this type of search for evidence of the arrest was endorsed based

upon "circumstances unique to the vehicle context." But the Court had never really explained in *Gant* what those circumstances were and why they would not apply to a search of a person.[12] Justice Scalia's concurring opinion in *Thornton v. United States*—the opinion that contained the justification for that type of search in the first place—first spoke of a "general interest" in gathering evidence and found support for this theory in cases where business places were searched. The only reason Justice Scalia limited this general search to vehicles was because a car was an "effect" that had a diminished expectation of privacy.[13] Given that the majority in *Riley* had also found there was a diminished, though not extinguished, expectation of privacy in a person's cell phone, Chief Justice Robert's attempt to foreclose a *Gant* "reasonable belief" search of a cell phone because *Gant* was only about cars seems to give short shrift to what was apparently a much more developed argument by the State.

Similarly, the Court's holding that there is no limiting principle when applying the "reasonable belief" search exception to a cell phone search seems to beg the question. The Court explains that in the vehicle context this type of search is necessarily limited to past crimes, but cell phone searches could reveal incriminating evidence regardless of when the crime occurred.[14] And while he observes that *Gant* necessarily restricts broad searches resulting from traffic violations, Chief Justice Roberts felt that only an inexperienced or unimaginative police officer could not come up with several reasons to suppose a cell phone would contain evidence of a traffic offense. But don't courts already litigate the reasonableness of officer imagination?[15] Perhaps the Court's efforts to distinguish cell phone searches with vehicle searches belies a skepticism of the relatively newly-minted "reasonable belief" search announced in *Gant* in addition to its strong desire to categorically remove cell phones from warrantless searches.

Finally, the Court rejected attempts to limit the scope of the search to call logs or analogues of physical records such as an address book. Acknowledging that the Court had allowed the use of pen registers to identify called numbers in *Smith v. Maryland*, Chief Justice Roberts nevertheless observed that the identifying information attached to the phone numbers in a contacts list is more than just phone numbers. And a proposed analogue test that allowed police to search for digital information on a phone that had a real-world analogue was even more problematic to the Court. As Chief Justice Roberts observed, this test would allow police to rummage through thousands of photos in a gallery simply because an individual might keep a photograph or two in his wallet. When addressing why the scope of the warrantless search could not be limited to specific areas of a cell phone, the Court simply said this approach would impose few meaningful constraints on officers.

Because *cell phones.*

Admittedly, these types of critical observations are merely arranging deck chairs on the Titanic. The United States Supreme Court was called upon to interpret the scope of the Fourth Amendment, and it drew the line at the lock screen rather than the call log. And it is difficult to argue with Chief Justice Roberts' central premise that cell phones, with all that they contain and reveal, hold "the privacies of life" for many Americans. That is really the driving force behind the opinion, the unique nature of the modern cell phone. As difficult as this may make cell phone searches for law enforcement, privacy comes at a cost. Of course, the Court stressed that fact-specific threats such as child abduction or bomb detonation may justify the warrantless search of cell phone data under the doctrine of exigent circumstances. But such circumstances merit consideration only on a case-by-case basis. As a general matter, if you want to search a cell phone, the Supreme Court requires you to get a warrant. ❇

Editor's note: This is the last As The Judges Saw It column that the esteemed David Newell will write, as he plans to leave prosecutor ranks at the end of December for a seat on the Texas Court of Criminal Appeals. He has been a longtime contributor to this journal (and a dear friend to me, its editor), and all of us within the family of Texas prosecutors have benefitted from his wisdom, insight, and humor. Pretty soon he will be writing the very CCA opinions that shape our practice of law, not just writing about *them, and I for one can't wait to read his footnotes.*

Endnotes

1 *State v. Granville*, 423 S.W.3d 399 (Tex. Crim. App. 2014).

Continued from page 15

2 In case you were wondering, Chief Justice Roberts clarifies that a "smart phone" is a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity.

3 Yes, Chief Justice Roberts also clarified that a "flip phone" is a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone.

4 The exact quote is, "They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the 'my house' label." Apparently more than one officer was required to work the otherwise primitive flip phone."

5 Chief Justice Roberts did not explain "wallpaper."

6 *Riley v. California*, 134 S.Ct. 2473 (June 25, 2014).

7 Justice Alito agreed with the majority that law enforcement officers should get a warrant before searching a phone. However, he did write extensively upon the history of the search-incident-to-arrest exception to advance his contention that search-incident-to-arrest should not be tied to the concepts of officer safety and preservation of evidence. He would also reconsider whether the federal or state legislatures could permissibly draw reasonable distinctions between categories of information contained on a cell phone to allow searches without a warrant in certain circumstances. As mentioned in the article, there were no takers on his invitation.

8 *United States v. Robinson*, 94 S.Ct. 467 (1973).

9 Not yet anyway. See Jacobsson, Sarah "Man Infects Himself with (Computer) Virus" www.pcworld.com/article/197294/Human_Virus.html. OK, maybe I watched too much *Fringe* on Netflix last night.

10 In *Robinson*, the Court upheld a search where a police officer found a package of cigarettes in a defendant's pocket during a search incident to arrest and looked inside it to find heroin. *United States v. Robinson*, 94 S.Ct. 467 (1973). But Chief Justice Roberts suggests that comparing a search of a cigarette container to a search of a cell phone is like "saying a ride on horseback is materially indistinguishable from a flight to the moon."

11 Indeed, Chief Justice Roberts also went on to explain how the analogy of a cell phone to a container crumbled in the face of a cell phone's ability to access data stored elsewhere. As he observed, "Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference." Even the Chief Justice of the United States Supreme Court doesn't understand the Cloud.

12 *Arizona v. Gant*, 129 S.Ct. 1710, 1719 (2009).

13 *Thornton v. United States*, 124 S.Ct. 2127, 2137 (Scalia, J. concurring).

14 Because police never search a car for a past crime—such as possession of marijuana—and find evidence of an ongoing crime, such as possession of cocaine. See e.g. *New York v. Belton*, 101 S.Ct. 2860 (1981)(upholding search incident to an arrest for possession of marijuana that uncovered possession of cocaine).

15 See e.g. *Ybarra v. Illinois*, 100 S.Ct. 338 (1979)(officer lacked specific articulable facts to justify pat-down of bar patron despite having search warrant for premises and patron's possible connection to drug trafficking).

A Q&A with a few TDCAA members

Editor's note: In this new standing column, we asked several TDCAA members to answer a few questions (some about prosecution, some not). We hope to run this column in every issue of the journal, so anyone who would like to submit his or her answers to these same questions can email them to the editor at sarah.wolf@tdcaa.com. All respondents will receive a free TDCAA T-shirt as a token of thanks.

~~*Inigo Montoya*~~ *Jon English*

Research Attorney / Ping Pong "D" Player, TDCAA


Jon English

Where are you from?

Born in Austin and raised in Marble Falls, where I lived until I graduated high school. At that point I moved BACK to Austin, recalling the excellent birth experience I had there, and lived there until my wife and I moved to the Austin suburb of Kyle 10 years ago.

How long have you worked in a prosecutor's office?

OK, well, I didn't want anyone to find out about this … but I've never really been a prosecutor before. I had a fantastic and infinitely valuable internship in Bexar County for two years during law school, and they were kind enough to occasionally let me go to court and to supervise me while I played lawyer in front of a real judge and jury. But apart from that, this is my first gig as a licensed attorney. It is my sincere hope that I will be a real prosecutor someday.

What do you enjoy about your job?

Two things: I have this sickness whereby finding answers to obscure and/or esoteric legal questions gives me a sense of euphoria. Sadly, that is not a punch line. It's the truth. Because I enjoy it so much, I do it a lot, and because I do it a lot, I've gotten to be pretty good at it. It's rare to get paid to do something you enjoy and to have the opportunity to use that ability to help people.

As a young prosecutor-in-training, with every research question I obtain first-hand, weekly insights into cases that range from fine-only offenses to capital murder, and I get to learn about them from some of the most interesting people across the state. I honestly feel like I should be paying someone to teach me these kinds of lessons; it doesn't seem fair that I get paid to learn them.

If you weren't in a prosecutor's office, what would your dream job be (and why)?

I don't know if "independently wealthy" is technically a job, but I'm honestly not concerned about whether I've answered this question correctly.

What's the best advice you've been given? (This can be about work or life or anything, really.)

My dad, a pastor, inscribed the word "hupomeno" on my class ring when I got my undergraduate degree from the University of Texas, eight years after I first enrolled. Loosely translated from the scriptural Greek, it means to persevere like you would in a battle when you are outnumbered and ostensibly doomed but when you also know reinforcements are coming to your defense if you can just hold on until they arrive. In those situations, you can go Butch and Sundance and go out in a blaze of glory; you can take a cyanide pill; or you can dig in and keep fighting until the tide turns in your favor and you get to be part of the victory instead of a victim.

What was your best day on the job?

Because I don't have any good prosecutor war stories—and because research attorneys don't *have* war stories—I'll use my previous job when I was chief of staff for State Representative Debbie Riddle. In 2007 she passed HB 8, "Jessica's Law," which created the charge of continuous sexual abuse. The day she passed that bill was significant for me for several reasons. First, it was a hard-fought victory for law enforcement, and the experience of working on the bill with the state's best prosecutors really instilled a love of criminal law in me that lead to my decision to become a prosecutor. Second, the day we passed that bill, my wife called me to say she was pregnant with our first child, Jackson. Third, just a few years later, a worker at Jackson's daycare was arrested and pled guilty to continuous sexual abuse before he could get around to victimizing my son. The idea that my own child would end up being protected by the law we passed the day I found out I was

Continued on page 18

Continued from page 17

going to be a father, and by that same the law that lead me to my own interest in law enforcement, makes that day a pretty hard one to beat.

What was your worst day on the job?

The dark side to that first glimpse into the criminal justice world I experienced during the Jessica's Law process was coming face-to-face with just how evil people can be. As part of my research for the bill, I read the reports relating to 9-year-old Jessica Lunsford's death. She was sexually abused for three days, stored in a closet between the abuse, then eventually buried alive in her abductor's backyard about 300 feet from her own home. Prosecutors hear that kind of information every day, but I had never been exposed to anything like that before. The night I read that report, and then every night for the rest of that session, I had terrible nightmares and insomnia.

What do you know now that you wish you knew when you started out?

It's not just OK to fail, it's necessary. Failure is the most efficient way to internalize best practices, and it's the only way to practice perseverance.

What do you like to do outside of work?

Spend time with my wife, three kids, and Basset hound. It doesn't matter if that's my honest answer or not, because with that many participants in my household I exercise very little personal discretion over my recreational choices. But that's *probably* my honest answer anyway.

Stacy Miles-Thorpe

Victim/Witness Counselor, Travis County District Attorney's Office

Where are you from?

I grew up in Houston and have been in Austin 20 years.

How long have you worked in a prosecutor's office?


Stacy Miles-Thorpe

I've been with the Travis County DA's Office for five wonderful years! And I have been a practicing social worker for 14 years.

What do you enjoy about your job?

I love that every single time I hang up the phone or walk a victim out of court, I've been able to help someone who really needed it. I love that, day in and day out, I have the opportunity to put my faith into practice by offering people compassion and complete presence as they deal with the worst thing that's ever happened to them.

If you weren't in a prosecutor's office, what would your dream job be (and why)?

Ooh, so many things! I would have really enjoyed being in the Peace Corps or being a librarian. Being among books is blissful.

What's the best advice you've been given?

To look at the world through soft eyes. That completely changed my attitude, mood, and entire approach to life. You can look at the world through many filters—judgment, fear, joy, or compassion. It's a choice and it changes everything when you choose a more positive, forgiving perspective.

What was your best day on the job?

We had a trial for a defendant who had committed numerous and brutal kidnappings and aggravated sexual assaults. The women he victimized were so vulnerable already—one had severe intellectual disabilities and was walking home from a low-wage job; others were struggling with substance abuse issues. We were able to engage all four victims to come testify. The prosecutors, investigator, and I had such great chemistry together and worked our tails off to put together a great trial. The jury found the defendant guilty and gave him life in prison. One of the victims wrote a powerful allocution that I read on her behalf, with her in the courtroom. It made me want to weep for them that they were able to finally stand up for themselves to testify against him, that 12 people validated their bravery and communicated loudly and clearly that no matter their station in life, they were valuable and worth protecting. BEST day on the job!

What was your worst day on the job?

I worked with a family on a capital murder case that we took to trial, where a young man had been shot and killed while trying to calm down an escalating fight between two

groups of people. We had some challenges with the case that we had discussed with the family, but nothing can adequately prepare them for hearing a "not guilty" on a case like that. After the judge read the not-guilty verdict, the victim's mother walked up to the defendant's parents and siblings, shook their hands and told each one of them, "God bless you." We then went into a conference room where she put her face in the corner and screamed for an hour and a half. There is nothing, absolutely nothing you can do to "help" at a time like that—no words, no actions—you can only be present. But the power of that just can't be understated. You can be present, not ask them to stop or "get control," but rather just bear witness to their suffering and extend your compassion. So I'd call that my most *painful* day on the job; my heart was just completely wrung out.

What do you know now that you wish you knew when you started out?

I wish I had known that I didn't have to have all the answers and can't possibly fix everything. I wrestled with that for a long time until I realized that the power of this healing profession is not in being omnipotent or omniscient, but in connection. What a relief to be able to let that go!

What do you like to do outside of work?

I have an exuberant 12-year-old daughter who goes on adventures with me. We go to concerts and musicals together and volunteer at the animal shelter. I read like mad and am a practicing Zen Buddhist.

Vivian Logan

Administrative Assistant, Appellate Division, Harris County DA's Office


Vivian Logan

Where are you from?

I was born and raised in New York City; in 1980 I relocated to Fairfax, Virginia, and in 1995 relocated to Houston.

How long have you worked in a prosecutor's office?

I've worked over 11 years with the current prosecutor's office. Prior to that I was an export buyer with a petroleum company.

What do you enjoy about your job?

I've actually gotten a better understanding of how the legal system works. In particular, I am fascinated how the introduction of DNA testing and other innovative electronic programs and devices have produced remarkable gains in the legal field.

If you weren't in a prosecutor's office, what would your dream job be (and why)?

I'd love to be the director of entertainment on the Royal Caribbean Cruise Line. I enjoy visiting different places, especially the Caribbean.

What's the best advice you've been given?

"When people show you who they are, believe it." —Maya Angelou

What was your best day on the job?

The day I was recognized for 10 years of service with the appellate division. For the district attorney to take time out of her day for this recognition really meant a lot to me.

What was your worst day on the job?

The day our former district attorney, Mike Anderson, passed away.

What do you know now that you wish you knew when you started out?

I wish I knew how quickly time would pass by. Had I known this when I started out, I probably would not have hesitated and eventually end my desire to take on a new career—even as a prosecutor!

Kelly Blackburn

Assistant District Attorney in Montgomery County

Where are you from?

Brownwood, Texas


Kelly Blackburn

How long have you worked in a prosecutor's office?

Fourteen years

What do you enjoy about your job?

Navigating victims of crime through the criminal justice system. Victims

Continued on page 20

Continued from page 19

don't get to hire their own lawyer in criminal court, so we are the only voice a victim has and the only thing standing between them and the person who victimized them. Everyone involved in the criminal justice system—police officers, victim advocates, first responders, medical personnel, child advocates, etc.—can do their jobs incredibly well, but if we don't do our job, then none of it matters. It's is a huge responsibility and one I love doing.

If you weren't in a prosecutor's office, what would your dream job be (and why)?

Besides being a professional golfer, I would like to own a hardware store/bait shop. It would be a place where people could come in and hang out; talk about tools and home improvement, hunting, and fishing; and a drink glass of free keg beer while they shop.

What's the best advice you've been given?

As long as you keep your head down, work hard, and take care of your business, everything usually works out in the end. To do this job for any period of time without going crazy, you can't sweat the small stuff or get distracted by all the drama that comes with it. As a prosecutor, you can never let people see you sweat. When things start going sideways, you are the one that has to be the calm in the eye of the storm and you have to keep moving forward. You must realize that all you can do is prepare to the best of your ability, go into the courtroom, put on the best case you can, and lay it all at the feet of the jury. If you do that, regardless of the outcome, you have done your job and sought justice, which is all we can do.

What was your best day on the job?

October 26, 2006. That was when a jury in Harris County convicted Virgilo Aguilar of sexually assaulting a little special-needs girl who would come over and play with his daughter. The case took only two days to try, including jury selection. There was no publicity, the courtroom was empty but for the victim's mom and dad, and probably 98 percent of the prosecutors in my office never knew I tried the case. The victim was 18 years old but had the mentality of an 8- or 9-year-old and spoke only Spanish. She was incredibly brave and did a great job on the witness stand. The jury convicted Aguilar in less than 20 minutes. That was a very good day.

I had been a prosecutor for about six years when I tried this case and it confirmed for me why I became a prosecutor. I have handled more serious, more high-profile, more complex cases, but this is the case that I have always carried with me. I still keep a picture of the victim in my office. She continually reminds me of why I do this job, and she keeps me moving forward when things get tough.

What was your worst day on the job?

In 2004 I was unsuccessful in prosecuting a defendant named Ivan Castaneda for breaking the leg of his 6-month-old daughter. On February 3, 2005, I received a call from CPS telling me that Castaneda had severely beaten another one of his children. This little girl was also six months old at the time. Her tongue had almost been cut off, multiple organs in her body had been severed, and her ribs and legs had been broken. The day I got that call was a very bad day. It made me question my ability as a prosecutor, my ability to make decisions, and my future in this profession. We eventually tried Castaneda and he received a life sentence. His wife was also convicted of injury to a child by omission. CPS was able to terminate the rights of both parents and the little girls were adopted by their foster parents. They are now both thriving in their new environment and are surrounded by people who love them very much.

What do you know now that you wish you knew when you started out?

The defense attorney that you are rude to today might end up being the judge you are in front of tomorrow. Treat everyone with respect until they give you a reason not to. We are all professionals and we all have a job to do. As prosecutors, we have a tremendous amount of power, and just because you can do something doesn't mean you always should.

What do you like to do outside of work?

Spend time and travel with my wife and kids, play a little golf, BBQ, sit on my back porch, and have a cold drink. ❇

Continued from the front cover

The window-tint warrior (cont'd)

bat-shit crazy. I have over 20 years of experience with incompetent defendants, both as neighboring Presidio County Attorney and as a court-appointed defense lawyer in Travis County. I made a note to research, in all my spare time, what to do with an unrepresented, incompetent defendant on a fine-only case.

Fortunately, I know people who are smarter than I am. I must pay a huge debt of gratitude at this point to our 394th District Judge, Roy B. Ferguson, who dropped by my office a few days later and nonchalantly said, "I hear you have a sovereign citizen." He had had a case against one before taking the bench and referred me to an article he had just seen in *Voice for the Defense* (of all places) that opened my eyes and was footnoted with many helpful references.[1]

Brave new world

Our federal government, I soon discovered, has classified the sovereign citizen movement as a domestic terror threat for its "extreme anti-government beliefs and violent attacks upon peace officers."[2] Sovereign citizens (SCs) aren't really a cohesive organization but rather a loose association of individuals and groups that share some common anti-government beliefs and behaviors, largely propagated on the Internet. Their overarching philosophy is that the U.S. government is illegitimate and has no authority over them. Sovereign citizens run the gamut from the majority who talk the talk, which is crazy, quasi-legal gibberish, to the minority who walk the walk and use deadly force to defend their belief system.[3]

Sovereign citizens believe that the government established by our Founding Fathers based upon common law was hijacked somewhere along the way and replaced by admiralty law.[4] For those of you keeping score at home, common law is good, and admiralty law is very, very bad. SCs can't agree on exactly when this sea change occurred.[5] They claim that when the U.S. was governed by common law, every person was sovereign. After the U.S. changed to admiralty law, the nation transitioned from government to corporation, and the formerly sovereign citizens gave up their individual rights as free men and women.

SCs believe they can take back their sovereign-citizen, common-law identity by declaring themselves sovereign from the United States government.[6] In so doing, they once again become free men and women subject only to common law, not the laws or regulations of the U.S. or any state or local government (which operate under admiralty law and therefore no longer have jurisdiction over them). They therefore believe that the only courts that have jurisdiction over them are "common law" courts set up by other sovereign citizens.[7]

They evidence their disassociation from the U.S. government by engaging in bizarre ritualistic behaviors, including but not limited to signing their names in small letters or all capital letters with strange punctuation; adding Sovereign titles to or after their names; citing the Uniform Commercial Code; creating their own license plates, vehicle tags, and driver's licenses; and filing fictitious documents and liens.[8]

If cited or arrested for a crime, the sovereign citizen will ceaselessly question the jurisdiction and authority of the court and the prosecutor and engage in paper terrorism by filing countless nonsensical, quasi-legal documents. Be not confused: No matter the title or its contents, all motions filed by sovereign citizens serve two purposes: 1) to make a mockery of the criminal justice system that they do not acknowledge or believe in; and 2) to frustrate you as the prosecutor and attempt to monopolize your time so that you will file a motion to dismiss simply to be rid of the case and the SC defendant.

Sovereign citizens will also attempt to represent himself because they distrust lawyers. In the SC world, lawyers cannot be citizens because we have the title of "esquire." SCs believe this is a title of nobility that precludes us from having citizenship.[9] It is a real pain to prosecute a sovereign citizen case, but my heart truly goes out to the unfortunate defense lawyers who get court-appointed to represent SC defendants.

Smells like mean spirit

My local sovereign citizen defendant signed all of his court documents with his name, followed by Sovereign Native American. He looks like Gene Simmons from KISS (long, dark hair) and co-owns an

Continued on page 22

Continued from page 21

herbal/shaman shop right smack-dab in the middle of downtown conservative little Fort Davis. As far as domestic terrorists go, he wasn't the full-frontal kind of fellow who would just come to court with an AR-15.

No, Shaman Gene Simmons was wily.

Instead of conventional weapons, he utilized a chemical and biological weapon in his assault on the Jeff Davis County criminal justice system. I called it his Stank Sauce, and it was his first line of defense. You could literally smell him coming way before he got to the courthouse, and his malodorous scent remained long after he left. So toxic was the Stank Sauce that multiple county officials and employees had headaches and nausea after his pretrial hearing, and all four courthouse doors had to be propped open all day for the cross breeze. Because of this, the justice court instituted a "no scent" policy for everyone's protection.

By the pretrial hearing filing deadline, the defendant had filed the following:

- Disqualification of All Masonic Lawyers & Judges due to Conflict of Oaths & Unconstitutional Religious Associations;
- Motion to Recuse Judge Granado for Cause;
- Judicial Notice of Lack of Jurisdiction, No Person of Proper Power or Authority to Prosecute the Case, Objections for Counsel Having No Standing to Sue on Behalf of State of Texas;
- a letter to the judge accusing him of violating Every Single Canon of the Judicial Code of Ethics, and
- (my favorite) Supplemental Exhibits: Objections and Support of Motion for Dismissal (stating in grandiose terms how he had exposed malfeasance and misconduct in several federal and state agencies and in various courts, as well as alleging criminal misconduct [RICO, treason, kidnapping, and unauthorized practice of law] against several area officials including me, the sheriff, and the JP).

After the pretrial deadline he filed:

- Motion for Choice of Counsel Points and Authorities in Support Contract & Order;
- Demand for Court Reporter;
- Objections for Failure of Court to Give Notice of Hearings;
- Ex Parte Motion to Dismiss;
- Recusal of Judge; and
- Objections to Untimely Preliminary Hearing & Failure to Give a Timely Probable Cause Hearing.

I researched and filed a response to the few claims that required or merited one and did my best to ignore the host of spurious and slanderous claims. At this point I must effusively thank TDCAA Research Attorney Jon English, who had researched a sovereign citizen case before and was my tripmaster from beginning to end. Without Jon, I would have never separated the wheat from the chaff and would have probably gone crazy myself. I must also thank Staff Attorney Thea Waylon at the Justice Court Training Center for her wise counsel on justice court matters.

Déjà vu? No, thank you.

How you as a prosecutor respond to a sovereign citizen case is up to you and of course depends on the particular circumstances. In hindsight, I could have saved myself a world of hurt by just trying the case and skipping that motion for continuance to secure the missing video. It also wouldn't have been shameful to have requested dismissal of the citation, especially considering the fact that I have no assistant county attorneys to share the workload.

I could not do so, however. Jeff Davis County was the site of the Republic of Texas standoff in 1997, when an armed anti-government separatist group took two hostages in the Davis Mountains Resort for a week before a peaceful resolution was reached. It did not become a Ruby Ridge or a Waco, but it easily could have. My damn good reason for taking this $200-plus-court-costs case seriously was that I could not let Jeff Davis County once again become known as friendly headquarters for anti-government zealots. I have to cut this sort of thing off at the knees—every time.

The defendant was truly mystified when all of his motions and jaw-flappin', which apparently work for other defendants in other places, only stiffened my resolve and made me more determined to get him before a Jeff Davis County jury for his day of reckoning. And get it he did, in a very surreal trial.

Voir dire straits

Usually in justice court voir dire, I just hope that six qualified jurors show up. This time, however, I actually needed time to talk to the 16-member venire about their views on the government, window tints, and circumstances in which someone might be excused or exempted from following the law. It was like philosophy class, but unfortunately, the fun was short-lived. Once my 15 minutes was up, all hell broke loose.

Continued on page 24

Top 10 tips for prosecuting a sovereign citizen

By Teresa L. Todd
County Attorney in Jeff Davis County

1 **You can't be lazy just because they're crazy.** You can't phone this in—prepare a sovereign citizen (SC) case as you would any other. In fact, be even more on your toes than usual because unrepresented SC defendants will not be bound by the rules of evidence or the boundaries of common decency. They will say anything, and prosecutors had better be ready to respond.

2 **Do your homework (just like Mama said).** Read up on the SC movement and know what you are up against. Also brush up on contempt of court and be ready to use it. Conduct voir dire on the SC movement, anti-government extremists, and jury nullification verdicts to flush out any SC sympathizers who are challengeable for cause (but remember that everyone has some issues with the government, so tread lightly). Prepare that killer cross you may never get to do.

3 **The best defense is a good offense.** If the defendant takes the stand, go on the offensive by quizzing him about SC beliefs, making sure to use SC buzzwords. The conversation may sound like another language to the judge and the jury, but the defendant will clearly understand that you have infiltrated his insane little world, and the effect will be immediate. Also, point out inconsistencies, as there is usually a strong financial component that accompanies the SC philosophy (tax evasion, unwillingness to pay government fees but willingness to accept the accompanying benefits [e.g. driving, business ownership, etc.]).

4 **When things go wrong, expect the worst.** Expect a crazy filing every day; expect to be personally slandered and defamed; and expect the defendant to disrespect you, the judge, and the jury. A toddler behaves like a toddler, after all, and we can't expect an SC to behave like anything other than an SC. Expect the defendant to bring his own jury charge (from the *Citizens Rule Book Jury Handbook*) or otherwise attempt to co-opt the proceedings into an SC "common law" court. Easily refute any claim that you do not have authority to prosecute by introducing your oath of office or similar documentation.

5 **Keep Calm and Prosecute On.** SCs love to get the prosecutor, the judge, and the jury all off track—confuse and distract is their motto! Breathe, stay calm, and stay focused on (and keep bringing the judge or jury back to) the defendant's unlawful, charged conduct. The judge and jury must see the prosecutor—in stark contrast to the defendant—as the voice of reason, respect, authority, and calm in the artificially induced storm. Exude confidence, no matter what happens.

6 **Call for backup.** Marshal extra law enforcement during court. It shouldn't be hard, as an SC trial is a circus worth watching. Call Jon English, research attorney at TDCAA, or Thea Waylon at the Justice Court Training Center (if the offense is a Class C) for advice, or visit with other prosecutors like me who have been down this long, strange road. You are not alone.

7 **Don't be intimidated.** At the end of the day, these SCs are a lot like schoolyard bullies. After six weeks of sound and fury, my case went down with a whimper. Why? Because the State was prepared, because the defendant was *guilty*, and because the system worked.

8 **Order in the court.** Do not underestimate how disruptive SCs want to be to our court proceedings. Things may get out of control or hang on the edge for what seems like forever. This is normal. Have your "just add insanity" objection(s) ready when the case starts going off the rails, and ask the court to impose reasonable time limits in advance to keep the trial moving.

9 **God bless America!** Be respectful of the SCs First Amendment right to have his own opinions, and just try the case itself. Demonizing the defendant could backfire and create sympathy for the jury, adding fuel to the fire of the SC's victim argument. Let the *defendant* alienate the jury, and don't object while he does so.

10 **This too shall pass.** I truly believe than an SC case will only be bizarrely, excruciatingly difficult the first time. The rest will just be variations on a theme, and the theme will not be played as often or as loudly if the prosecutor does the job right the first time. ❇

Continued from page 22

(Going in, I erroneously thought the craziness would build to a crescendo—I didn't expect the case to go from 0 to 60 on the insanity scale the minute the defendant opened his mouth.)

Shaman Gene Simmons got up and authoritatively announced to the jury that the United States Supreme Court had said that he was entitled to a jury of his peers, and that meant there had to be at least one Native American on the jury for it to be legal. I popped up to object, but then Juror No. 9 raised her hand and calmly announced that she was 25-percent Native American. I slowly sat back down and watched the drama unfold. The defendant's jaw dropped, and he demanded to know if she was registered with her tribe. She told him she had always meant to register but just hadn't done so. He said dismissively, "So you aren't a card-carrying member?" Juror No. 9 said she was not.

Out of the blue, Juror No. 24 piped up from the back: "I'm a card-carrying member." Shaman Gene Simmons couldn't believe it, and neither could I. Juror No. 24 turned out to be a registered, card-carrying member of the Oklahoma Chocktaw tribe. The defendant attempted to discredit Juror No. 24, but the juror grew tired of the interrogation and summarily ended it by yelling, "*I already told you I was Chocktaw!*"

Several jurors were excused for cause including Juror No. 2, who became so disgusted with the defendant's racial profiling questions (apparently he intended to claim that the trooper pulled him over because he is Native American) that she collected her things and attempted to excuse herself. We then endured the most tortured process of the defendant striking three jurors ever conducted in justice court.[10] The jury was finally seated almost an hour later, with both Juror No. 9 and Juror No. 24 in the box. The Sovereign Native American had a true jury of his peers, no doubt to the delight of the U.S. Supreme Court.

Showtime

I had wisely heeded the sage counsel of Jon English, who advised me during one of my more frustrated moments to prepare the case like I was trying it against a very good lawyer, rather than a very slippery character with no grasp of the criminal justice system. This advice paid off in my case-in-chief.

I had a new but very likable trooper, and this was his first trial ever. We tried this Class C window-tint case with all the seriousness of a first-degree felony. We found the roadside video, and the trooper even did a window-tint meter demonstration. He did an outstanding job for the jury and for the large group of law enforcement in the back of the courtroom. I even introduced my oath of office into evidence to refute the claim that I didn't have the authority to prosecute cases in the name of the State of Texas.

In his cross-examination, Shaman Gene Simmons tried to convince the jury that the traffic stop was bad because he was racially profiled. Fortunately, even though my trooper was new, he was very clear on the difference between probable cause and reasonable suspicion and knew the exceptions to the warrant requirement. We had also addressed the "Dude (Looks Like a Lady)"[11] video confusion in our case-in-chief (the trooper, when he approached the defendant's car, mistook him for a woman at first), pointing out to the jury that 1) the defendant's window tint was 5 percent, which made it impossible for the trooper to see him clearly; and 2) the trooper had never seen the defendant before and had no idea he was Native American.[12] Plus, when the nice trooper told the defendant on the video how to get his ticket dismissed, it really took the wind out of the shaman's racial profiling argument.

Yes, I realize that some of these are pretrial issues; however, an unrepresented SC will not understand or care about the difference between legal and factual issues, or trial and pretrial issues. The SC will just try to confuse the jury and disrupt the proceedings. A motion in limine will not help, because even if understood, it will be ignored. The best way to proceed is simply to try to anticipate the SC's best arguments and be prepared to fight that battle over and over again, first with the judge, and then in front of the jury.

Because we were prepared, the defendant did no real damage to the State's case. It was time for the defendant to get up and preach, and then he was going to be mine. I had put in the time to prepare a killer cross-examination, and it was going to be a thing of beauty. I never got the opportunity to ask him a single question, though, as he unexpectedly decided to exercise his Fifth Amendment right. Then, suddenly, the case was all over save for the charge and the closing, and far sooner than I had anticipated. By this time, the air in the courtroom was starting to smell eerily familiar. Could it be … Stank Sauce?

All over but the cryin'

The Sovereign Native American vehemently argued to send his own jury charge back alongside the court's charge, which was a tiny little book entitled *Citizens Rule Book Jury Handbook*.[13] It detailed the SC "common law jury" and explained (sort

of, in its own convoluted way) the power of a jury nullification verdict. He had discussed it in voir dire and told the jurors again at closing that they needed to follow their conscience and not enforce any law they thought unjust. I objected each time he made mention of this book, as it had not been admitted into evidence. The judge quickly sustained my objections and made it abundantly clear that there would be *one* jury charge, and that *he* would give it.

When the defendant demanded that the court send the entire file back to the jury room so they could see how he had been "oppressed by the State," I had no objection. I wanted the jury to see exactly what the defendant had been filing.

I had thought a lot about how to handle the closing and decided that I was going to take the high road. As Americans, we are fortunate to live in a country where reasonable minds can differ, where we have the freedom to disagree openly with our government. Shaman Gene Simmons isn't the enemy for hating the government, disrespecting the system, or making me work hard on a $200 ticket. He is entitled to his opinions, and I respect that; however, he doesn't have to respect me or the government I represent. He just needs to follow the law, like everybody else. If he violates the law, then his anti-government opinions can't magically turn an equipment violation into a case of constitutional proportion, no matter how much he rants and raves. It wasn't about the constitution, after all—it was a window tint—and I wouldn't let the jury forget it. And a window tint case that the State proved *way beyond a reasonable doubt*.

After a brief deliberation, the three-woman, three-man jury of his peers found the defendant guilty as charged and gave him the maximum punishment of $200 plus court costs. The defendant promptly paid the fine and court costs, thanked the jury, and attempted to give copies of the *Sovereign Citizen's Handbook* to the jurors on the way out. I was one of the few takers.

To a person, the jury members told me how his attitude had angered them during voir dire and that they were disgusted by his frivolous filings. Several jurors also told me that they appreciated how calm I had been and how I tried the case without disrespecting his views. To my surprise, the defendant did not appeal the case to county court, where I fully expected to try the case *de novo* to another jury.

Hit the lights on your way out

At the end of the day, was it worth it? Six weeks of my life for a $200 fine?

Yes.

Sometimes doing the right thing is a pain in the ass, but it has to be done. And we have to do it the right way—with respect for the accused, no matter how unhinged he may be. When we take the high road as prosecutors, then the "victim" card the defendant tries to play simply won't stick. Why? Because a jury will believe what is believable. When your green-as-summer-grass trooper refers to the defendant as "ma'am" rather than "sir," it's far more believable that the defendant's 5-percent-tinted windows are too dark (and that maybe he needs a haircut) than that he was racially profiled by the government he doesn't believe in, led by the elected prosecutor who doesn't have authority to bring a case in the name of the State of Texas. Right.

Maybe next time he should work with that "Dude (Looks Like a Lady)" defense. It's more believable. ❇

Endnotes

1 Melissa L. Shearer and Christina M. Koenig, Representing the Sovereign Citizen, *Voice for the Defense*, March 2014 at 26-31, and sources cited therein.

2 *Id.* at 26, citing a DOJ/FBI circular.

3 "A Quick Guide to Sovereign Citizens," *UNC School of Government*, September 2012 at 1.

4 *Id.* at 1-2.

5 *Id.* at 2, Shearer & Koenig at 27.

6 Shearer & Koenig at 27.

7 *Id.*

8 *Id.* at 28-29, Quick Guide at 2-5. "Buzzwords" on page 4 is particularly helpful.

9 Shearer & Koenig at 28.

10 The defendant unsuccessfully argued for permission to use the restroom in the hall rather than the jury room, presumably so he could talk with the potential jurors after voir dire was over; he made the court clerk go over the jury list with him and point out each individual juror and where they were seated because he "didn't write anything down"; finally he did a strange "roll call" where he called potential jurors' names out loud so he could match each name with the face to determine whom to strike. Other than insisting that he use the restroom in the jury room, I didn't object, as all of this upset the potential jurors and strengthened their negative feelings.

11 Aerosmith, "Dude (Looks Like a Lady)," *Permanent Vacation*, Geffen Records, 1987.

12 If in fact that was the case. The defendant had an Italian surname, and his tribal affiliation was never established during the trial.

13 *Citizens Rule Book Jury Handbook* is available online at http://famguardian.org/Publications/CitRulebook/rulebook.htm or in hardcopy format from Whitten Printers. Another popular SC booklet entitled, "Title 4 Flag Says You're Schwag! The Sovereign Citizen's Handbook: Version 3.2" (November 11, 2013), by H.I.R.M. J.M. Sovereign: Godsent™, is published by CreateSpace Independent Publishing Platform and is available on amazon.com.

A new perspective on domestic violence

Even a lawman with more than 42 years of experience had a few things to learn upon taking a job as an investigator in a county attorney's office. The area of family violence was the most eye-opening.

Editor's note: Pete Wilkerson, the chief investigator in the Hood County Attorney's Office, was a Department of Public Safety highway patrolman for 30 years and a highway patrol sergeant for another 10. About 18 months ago, Hood County Attorney Lori Kaspar hired him as an investigator in her office. Here, he shares what he has learned about domestic violence since he started seeing so many cases, as told to Sarah Wolf, TDCAA's communications director and the editor of this journal.

Birt "Pete" Wilkinson

How long have you been at the county attorney's office?

I started in January of 2013. Our county has about 70,000 residents, and I'm the only investigator in our office. I work 60 to 70 hours a week.

What kind of police work had you done before?

I used to do mostly traffic-related crimes—traffic stops, which led to narcotics investigations. Stuff like that. And we also did investigations on accident reconstruction. I knew there was family violence, but as a law enforcement officer I was never involved in those cases.

But when I came over to this office, Lori Kaspar, the county attorney, wanted me really involved in investigating family violence. When I walked in the door, Lori started handing me files. "Oh my gosh," I thought. "All of these are family violence! Man, this is bad." I just really didn't imagine, for the life of me, how much family violence there is in a small county like Hood. But everyday we get more cases. And we're handling just the misdemeanors! I know the DA's office gets felony cases at least every other day.

What did you used to think about family violence cases? You can be honest.

For all those years, I'd always downplayed family violence. I thought that maybe women must've liked getting whipped on because why else would they not leave an abuser? But that's not the case. Now I feel sorry for the victims. I've gone from being sort of hardened toward family violence to really getting to know the victims. They need extra attention to get them away from their abusers. It's hard for them to leave. And these abusers are professionals. They know exactly how to put a wedge between their victim and their families and friends—to isolate them. Because when an abuser isolates his victim, he has control; he uses that control over his victim.

I just talked to one gal—she's in our office right now filling out a PO (protective order). Her boyfriend told her he would jump off a bridge if she left him. This poor gal thinks he's going to kill himself! But nine times out of 10, it's just his way of keeping her there. We have a great gal from the local advocacy center, Deanna Derrick, who can explain that to a jury.

I was picking her brain one day when she came up from Cleburne for one of our cases. I had asked her why alcohol and drugs show up in every one of these family violence cases. She said that drugs or alcohol take the victims out of the real world and into another one where it doesn't hurt as much. I had never thought of it that way. Having been an officer on the road for so long, I got used to putting up a wall and dismissing everything a person says when they're high on drugs or drunk on alcohol. But with these domestic violence victims, there's no wall there. We might have to filter through what they're saying to get to the truth, but the truth is there. It was helpful for Deanna to explain it that way, and it makes me think we need to build in an extra step with our investigation, to talk to our victims more and find out a little bit more information to get them to understand this cycle of violence.

What are some of the challenges you face?

I've seen a lot of things in my career. The Luby's massacre in Killeen—I was there. Also at the Branch Davidian deal in Waco. I've seen a lot of terrible stuff in my life, and you harden yourself so it doesn't really affect you. But these domestic violence victims, you feel sorry for them. You really do because it's a way of life for them. That's why they don't leave. When I found that out, that victims stay with their abusers because violence just seems normal to them, I began really working on getting these cases to court because these crimes will escalate. If we dismiss these cases at the county court level, it'll just escalate to felonies later. But when that guy, that abuser, has to spend some time in jail, has to really think about what he's done and that somebody's watching him, he might get to thinking that he doesn't need to commit this crime again.

But even when we take cases to court, it can be hard. We had one case where there was no doubt in anyone's mind that he was guilty. Well, except the jury's. We brought the victim in from Oregon—that's how far away from the defendant she'd had to move—and she testified about how he'd slapped her around. We had photos of her bruises and everything, but the jury found him not guilty. I talked to one of the jurors, a retired state police officer, and he said to me, "Hey, we knew she was assaulted, but she just wasn't assaulted enough." I wouldn't expect that from a peace officer! But I think that's the way the public sees these cases. They want to see blood, an ambulance ride, stitches, a cast, something like that. This gal, her face was all puffy and red from where this fella had hit her, but "she wasn't assaulted enough." We couldn't believe that. After that case, the attorneys and I sat down and talked about it. From now on, they are explaining at voir dire and during opening statement what pain is and what serious bodily injury is.

Family violence is a very hard thing to get across to a jury. Sometimes abusers will hit their victims on the top or the back of the head where their hair will cover any bruises, or maybe they'll hit them on the chest where clothes will cover it up. And sometimes I look at that jury of men and women, and I wonder if some of those women have been whipped or abused and they think it's all right.

What resources have been helpful?

Deanna Derrick from the advocacy center in Cleburne, she does a great job explaining the dynamic of violence in these relationships to a jury. She will testify as an expert witness about how these abusers work—by isolating their victims from their families and moving them from one town to another to keep control of them—and then when the victim testifies, she will confirm a lot of the things Deanna said on the stand. This one time, Deanna had testified that on average, women return to their abusers seven times before they leave for good (though she has since told me that that number has increased to eight times). When the prosecutor questioned the victim on the stand, asking her how many times she had left her husband, the gal replied, "Seven." And here she was, testifying in court after she left him for good.

What might you want to tell folks in other offices?

I have learned not to talk down to the victims. They really are victims of crime, though some of them don't know it. I find that I often have to convince them that they are. The first thing I usually tell them is that there is nothing they did to deserve what they got. They'll often look at me like, "Really?" And I reply that a person couldn't do anything to deserve what they got. We get to know each other a little bit—I ask what they do and whether they have children. I get them to calm down and realize I'm not there to browbeat them but just to get some information.

That usually breaks the ice because they realize that I really am going to try to help them. They get comfortable around me. They get really comfortable around me! I had one gal drop her pants in front of me to show me some bruises! (I always keep my door open and have a female colleague keep an eye on us.) But these victims, believe me, they always want to talk. And the main thing is just to listen to them. To listen to all of what they say. There might be some little things in there that you can pick up and follow up on. And don't ever stand up over the top of them. If she's sitting down, find a place to sit across from her so you're not standing over her so that she's having to look up at you—that might be how her abuser used to treat her. If you sit across from her,

Continued on page 28

Continued from page 27

you're at her level and you can look her square in the eye and talk to her.

I'm a father and a grandfather and I've been in law enforcement a long time, about 42 years now. I'm an old, gray-haired man, and these victims are young women. They think of me as an old man, and they'll often talk to me. And I've sort of got the gift of gab. ❇

No body, no murder? Not necessarily.

Williamson County prosecutors recently tried the estranged husband of a woman who disappeared more than 20 years ago for murder—even though her body was never found. Here's how they did it.

In October 1991, Vicki Lynn (Johnson) Nisbett and her three sons, ages 7, 5, and 3, left her high school sweetheart and husband of about 12 years, Rex Nisbett. Vicki and the boys moved into their own apartment, she opened a separate bank account, and in November 1991 she filed for divorce to escape years of Rex's physical abuse and drug use. She began dating other men and by all accounts was moving on with her life. Then the holidays rolled around, and Rex needed a place to live, as he was not fond of working. Vicki offered to let him stay at the apartment through Christmas for the sake of the boys.

By Jana Duty
District Attorney in Williamson County, pictured with Captain Richard Elliott of the Williamson County Sheriff's Office

On Friday, December 13, Vicki got paid, deposited her $807 paycheck in her bank account, and paid her rent. On Saturday the 14th, she was getting ready to go to her company Christmas party when the arguing began. Rex did not want her to go to the party; he had already thrown away or hidden two different outfits that Vicki had planned to wear. Vicki's friend and co-worker, Julie Coen-Tower, called around 2:30 that afternoon to make sure that she and Vicki were still on for the party. Vicki said, "Yes," but she added that she and Rex were arguing about it.

Julie called again at around 5:00 p.m. to find out what time Vicki would be picking her up. Vicki was very upset, saying that she and Rex were still arguing and that Rex had "just choked her, and that she hoped he had left bruises so she could use it against him" (presumably in the divorce and custody case). Julie told Vicki to hang up and come to her house to finish getting ready. At around 6:00 p.m., a man named Wayne Castleberry, whom Vicki had just recently met and was dating, called to inquire as to their plans for that night after the party. Rex answered the phone downstairs and Vicki picked up the extension in the upstairs master bedroom. Rex began yelling and proceeded upstairs screaming at Vicki to "hang up the phone." She did.

Wayne was the last person to speak to Vicki.

Julie called back at around 6:15 to check on Vicki, and Rex answered the phone. He told Julie that Vicki had already left and was on her way to come get her. The party was scheduled to start at 7:00 p.m. at the Driskill Hotel in downtown Austin, about a 45-minute drive from where Vicki and Julie lived. Julie waited for her friend and called back between 6:30 and 6:45 to check on her whereabouts. Rex answered again, but this time he told Julie that Vicki was running late and had decided to go straight to the party without picking up Julie first. Remember that this was before cell phones, so the only way Rex would have known that Vicki had changed her plans was if Vicki stopped at a pay phone and called Rex to tell him. (And it makes much more sense that if Vicki had decided to drive straight to the party instead of picking Julie up, she would've called *Julie* to tell her, not Rex.)


Vicki Lynn Nisbett

Vicki never showed up to the Christmas party. She did not meet Wayne afterward. No one saw her that next day, Sunday, and she did not go to work on Monday. Late Monday, Vicki's supervisor called the police to report her missing, and he urged Rex to do the same (which he did).

The investigation

Officer David Proctor, who took the missing person's report, noted at trial that when he arrived at the apartment it was "immaculate." He recalled this only because he had been called to the apartment twice before in the two and a half short months that Vicki had lived there, and both times he had noted that Vicki wasn't the tidiest housekeeper. The first call, in early November 1991, came when Vicki had a man over at her apartment and Rex had been watching through the windows. When Rex saw the two on the couch, he broke the window, crawled through it, and proceeded to assault the new guy. The second call was when Vicki had asked for assistance in getting a protective order to keep Rex away from the apartment. The officer gave her the information and advised her not to be alone with Rex Nisbett—advice she did not take, as only a few weeks later, she let Rex move back in for Christmas. On both occasions, the officer noticed that the house was messy, but as he took down information for the missing person's report, he noted how clean the place was.

Rex's story was that Vicki had "run off" with some other man or that she had "run" to a friend's house to "take a break." He insisted that she did this all the time and that she would be back. Five weeks after her disappearance, there was still no word from Vicki. By that time, Rex had been evicted from the apartment because he was not on the lease, and immediately after he moved out, Captain Richard Elliott from the Williamson County Sheriff's Office called Department of Public Safety Crime Scene Investigators to the apartment. Vicki's disappearance, the lack of activity on any of her bank or credit card accounts, and the information he had gained earlier from Julie and Wayne convinced Elliott that if there had been an altercation between Vicki and Rex the night of the 14th, it probably occurred in the master bedroom where Vicki had been getting dressed for the party. That's where law enforcement started their investigation.

Devane Clarke, DPS's Crime Scene Investigator, sprayed Luminal across the bedroom to reveal a pretty horrific scene. Two large areas lit up with the presence of blood, showing where the struggle likely started and ended. One was on the carpet near the entrance to the bedroom, and the second was in one of the closets. Although Clarke could not see any blood with the naked eye, he cut the carpet in the closet and found that blood had soaked down into the padding underneath. There was also a bloodstain on the drywall near the entrance to the bedroom (above the other carpet stain), and near the light switch there was a faint bloody handprint. Both tested positive for human blood.

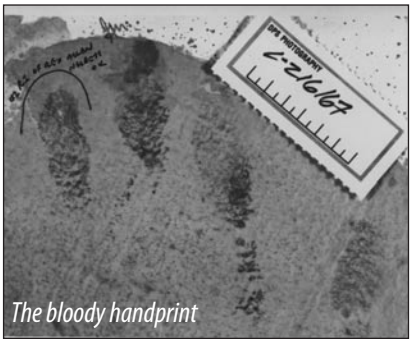
All three of the boys were in the apartment the afternoon Vicki disappeared. CPS interviewed the boys and they all repeated the same answer about their mother's whereabouts: They all said, "Mommy went to a party." When asked if they saw her leave the apartment, they replied that they did not see her leave but that "she went to a party." Rex never allowed investigators access to the boys so they were not interviewed by police.

Continued on page 30

Continued from page 29

Testing the evidence

When I first looked at this case, I was in awe of the handprint. How many times in the life of a prosecutor does she get a case with a handprint in human blood? In 1991, DPS did not do DNA testing because authorities there were not equipped for it, so the first DNA tests were done by what is now the University of North Texas (UNT) Health Science Center. The right index finger and right palm print came back as a match to Rex Nisbett's prints. The blood tested positive for being human blood, type A-positive. Both Vicki and Rex have that blood type, so it was unclear at first whose blood it was.


The bloody handprint

Pieces of the carpet and padding from inside the closet were submitted in early 1992 to UNT for DNA testing. Because there was no way to collect DNA from Vicki, investigators collected blood from Vicki's parents to do reverse parentage testing. The tests came back that the probability of Earl and Carol Johnson being the parents of the contributing "unknown female" was 99.999999 percent for the stain on the carpet and 99.82 percent for the stain on the padding. Earl and Carol had three children, two daughters and one son. The other two children besides Vicki were excluded (because the lab had their DNA samples to compare), leaving Vicki as the contributor of the blood. Due to the sheer volume of blood in the bedroom, it was clear to investigators that Vicki had been gravely injured in that room.

Although investigators were confident that there was sufficient evidence to move forward, the two previous district attorneys did not agree, so the case was never presented to a grand jury. When I took office in 2013, I was contacted by Julie Coen-Tower, Vicki's friend and co-worker, and asked to reopen the case. I met with Detective Robert Key and Chief Elliott and decided pretty quickly that the case was as good as it was ever going to get, so it was time to present it to a grand jury. Rex was indicted in March 2013.

Over the last 23 years, Captain Elliott, now Chief Elliott, never let this case fall by the wayside. He reopened it about every five or six years (in 1992, 1997, 2003, 2007, and 2013). In an attempt to get more definitive DNA results, each time the case was reopened, pieces of carpet and padding from both areas in the bedroom were submitted to DPS or UNT. Each time that new testing was requested, new samples of either blood or saliva from Carol and Earl Johnson were also resubmitted.

In 2013, when I decided to reopen the case, I contacted Jane Burgett, fondly known as "DNA Jane" at DPS (who is fabulous to work with) and asked her if there was any evidence left worth testing. She went digging and found that Devane Clarke had taken the piece of drywall from the bedroom (which could not be tested in 1992 because testing was not sophisticated enough) and had frozen the entire sample. Jane also found that another technician had taken scrapings from the drywall with the handprint and had frozen those samples in 1997, along with some pieces of the carpet from the closet. She found that the carpet padding had been completely depleted by previous testing, but other than that, she felt that she had plenty to work with.

The piece of drywall (which in March 1992 tested positive for human blood) came back in March 2014 with 99.9999999999 percent of the population excluded as a biological child of Carol and Earl, meaning that the "unknown female" contributor of that blood could not be excluded as their biological child. (It should be noted here that UNT and DPS use different terminology to explain their testing results, which complicates things a bit when you are presenting to a jury. Maybe someday we will get to a point where all agencies can simply say, "The blood belongs to Vicki.")

The scrapings from the drywall with the handprint (which also tested positive for human blood in 1992 and was a positive match to Rex's right index finger and right palm) were found, in March 2014, to be a mixture of DNA. Rex, according to DPS, could not be excluded as a contributor, and the same "unknown female" from the other piece of drywall (the same biological child of Carol and Earl) also could not be excluded. In other words, the drywall stain was a mixture of Vicki's and Rex's DNA. The carpet from the closet, which had been frozen in 1997, also contained Vicki's DNA.

So people might read all of this

and think, "What was the problem? Why wasn't Rex ever arrested and tried for his wife's murder?" Captain Elliott and his team did an amazing job investigating this case from the beginning, and it was never a question of "whodunit." The problem has always been that Vicki's body has never been found and Rex never confessed. And some prosecutors believe that with no body and no confession, there can be no conviction. After all, Vicki Nesbitt could have run off to California or Mexico, right? Well, that's what Rex has been telling people for 23 years. But Chief Elliott and his team have known differently all along.

Rex told the police that after Vicki "left for the party," he stayed home all night with the boys. But three weeks after Vicki's disappearance, a neighbor, Morris "Bubba" Smith, came forward and told police that Rex (whom he barely knew) had asked him to babysit his boys for an hour or two the night Vicki disappeared. Rex also asked to borrow Bubba's car. Bubba said he thought it was odd that someone he barely knew would ask that he babysit three little boys and want to borrow his car, but he agreed. Bubba's sister and roommate at the time, Lana Faye Reed, went to the video store to rent movies for Bubba and the boys to watch that night.

Police were able to retrieve the receipt from the video store to verify that Lana Faye rented the movies on the 14th, the night of Vicki's disappearance. Bubba said Rex was gone for about an hour to an hour and a half. He later added that when he saw his car the next morning he was upset, as some of the chrome pieces on the front end of his '69 Chevy Nova had been knocked off and were sitting in the backseat. Also, the lock on the trunk had been broken. Rex had no explanation as to why the car looked as though it had been "four-wheeling" or why he so desperately needed to get into that trunk.

One of the best moments in the preparation for trial was when I was searching through old photos of Vicki's car, which was found abandoned in an HEB parking lot two months after she "ran off to California" (supposedly in her car, at least according to Rex). I came across a grainy photo of a checkbook on the passenger seat; it had been taken out of the glove compartment when DPS was processing the car. I got a magnifying glass and looked really closely at the checkbook but could make out only two numbers. Rex had admitted that he had written a check (check No. 698) from Vicki's personal account five days after she "left," and Vicki's bank records revealed that she had been using the pad of checks that started at No. 651 and ended at 675. I contacted Chief Art Acevedo with the Austin Police Department and asked if his forensic photo lab techs could enhance the negative of this photo with only a few days' notice. He agreed to help without hesitation. I sent the negative over, they enhanced it, and amazingly, it was the pad of checks numbered 676 to 700. So how could Rex explain writing a check from a checkbook that was in Vicki's car that Vicki was supposedly driving on her way to California? That this book of checks was in Vicki's glove box put Rex in his wife's car *after* she "ran away" in it.

Admissions by omission

The one thing that seemed very revealing to me from the beginning was that Rex never professed his innocence. In a press conference when we first indicted Rex, I made the mistake of calling him "homeless" (as he was a drifter and difficult to locate). For the 14 months between his arrest and trial, I listened to Rex's phone calls and visits from jail, and for 14 months I listened to Rex whine and complain and call me every name in the book about the fact that I had humiliated him by "lying" and calling him "homeless." But never once did he call me a liar or complain to anyone that I also called him a "murderer." He spent many hours on the phone with one of his brothers who helped Rex with everything he needed: procuring his medications, contacting witnesses, getting clothes for court, talking to his lawyers—but he never once asked his brother for help finding Vicki.

If I were in the Williamson County Jail facing many, many years in prison for a crime I did not commit—and I knew that my spouse was out there somewhere—the only thing I would say to every person I encountered would be, *"Please find my spouse!"* And I would add something like, "I didn't kill my spouse; I don't deserve to be here!" The last thing I would say is what Rex said many times: "Well, if it's God's will that I go to prison …" Really? I don't know about you, but I would be cursing God if I were truly innocent and sitting in jail falsely accused of murder. I would eventually call Rex's brother to testify at the trial that in

Continued on page 32

Continued from page 31

the 14 months that Rex was in jail, Rex had asked his brother for help with many things, but he never asked his brother to find Vicki. I made sure to emphasize all of these issues to the jury.

The plea offer

From the beginning, this case was about getting Vicki's body back to her family. Her parents were not out for vengeance—they were not asking to see Rex go to prison for life; they just wanted their daughter's remains. We made an offer of 15 years for manslaughter in return for Vicki's remains, but Rex refused to give up Vicki's body. He even said in one phone call to his brother that he would take 30 years, but that he just couldn't give us what we wanted. I believe that he *wouldn't* give us what we wanted, not that he couldn't.

After *Stobaugh*

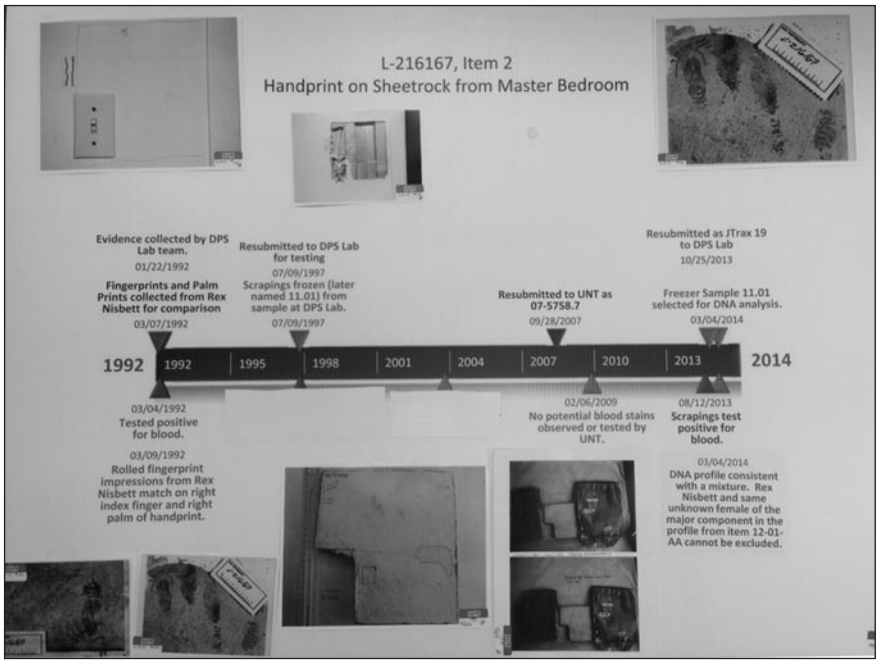
We went into this case shortly after the Second Court of Appeals overturned a Tarrant County murder conviction against defendant Charles Stobaugh that had gone to trial without recovering the victim's body, so we had some idea of what we were facing. (Read about the Stobaugh case here: www.tdcaa.com/journal/vanished-without-trace.) But we felt that our case was easily distinguished from *Stobaugh*. In the *Stobaugh* opinion the court noted, "There was no body, no murder weapon, no direct evidence, no witnesses, no blood, no DNA evidence, no incriminating statements by the defendant, and no evidence that a murder had occurred."[1] In our case, we had evidence that Rex and Vicki were arguing, that he had choked her during a fight the night of her disappearance, and that he lied and said he was home all night with the boys when he had actually left the boys with that neighbor for an hour or two. He also never explained why he returned with damage to the trunk lock and front end. More importantly, we had evidence of a struggle that caused Vicki to bleed all over the master bedroom; her blood and DNA were on the drywall, carpet, and carpet padding, and Rex's bloody handprint was nearby. The best evidence? Testing proved that the DNA from the handprint was a mixture of Rex's and Vicki's DNA.

The jury trial

Our biggest hurdle in trial was that each time new DNA testing was conducted, new samples of blood or saliva were collected from Vicki's parents. Twenty-two years of DNA testing made for quite a nightmare of chain-of-custody issues, and the defense team put us through our paces and did not miss a step. That was a rough day in court. But Paul Davis in my office created five wonderful charts, each about 4x6 feet, that outlined the 23 years of DNA tests and their results (see one of them below); they explained with color coding what evidence was submitted and when, along with the testing results.

The defense strategy was to convince the jury that there really was not "that much" blood in the bedroom and to mention the other things that react to Luminol (such as horseradish and animal blood). The defense also stressed that Vicki could have just run away, but our witness from the DPS Missing Persons Clearinghouse did an excellent job detailing all of the efforts to find Vicki over the last 23 years, to no avail. There was no evidence that Vicki was alive and well, living it up in California or anywhere else. After they got the case, the jury deliberated for 22 hours and sent several notes saying they were stuck, 7-to-5.

Once the judge read the *Allen*



charge, the jurors went back into the jury room and started from scratch. They laid out all of the evidence and went through the timeline of the night of the 14th piece by piece. They looked at the charts that we had created that spelled out the results of 23 years of DNA testing and examined the pictures of the crime scene. (We were fortunate to get a really great jury.) They finally made their unanimous decision: Rex was guilty.

I thought it was odd that the defense attorneys did not ask for a lesser included of manslaughter in the charge, as I had already decided that I would not fight them on it if they requested it. But they didn't ask. And the jury came back with a question after a full day of deliberation about whether they could convict Rex of a lesser charge than murder. Obviously, the jury was ready to compromise, but due to a judgment call on the part of his defense team, it was all or nothing.

In punishment, we offered only two prior assaults: the one in 1991 just before Vicki's murder and another in 2012 where Rex swung a bag with a brick or a large rock in it and smacked his neighbor across the face, causing a large laceration across the man's cheek. In closing, I didn't ask the jury for a specific number of years. How do you put a number on leaving three young boys motherless? I asked only that they consider what a mother is worth. The jury came back with 42 years. I did not ask them how they came up with that number, and I didn't care; the message from the jury was clear enough.

The jury

When we spoke to the jury (10 jurors stuck around to meet with us), we found out the split was seven for guilty, four "wafflers," and one staunch not guilty. (The "not guilty" juror had been on two previous criminal juries where the defendants were convicted and both cases had been overturned on appeal, so he had lost much of his faith in the justice system.) The "wafflers" got hung up on various things, such as one eyewitness testifying that he saw Vicki 15 days after her disappearance in the parking lot of the apartment complex. None of the jurors said that they had trouble with the fact that we did not have Vicki's body.

The boys

Rex never allowed Vicki's family to visit the boys alone (he said he "had to protect himself") so Vicki's family has had little to no contact with them in the last 23 years. Rex was and is an admitted crack cocaine addict who moved from place to place, and his boys were scattered to the wind most of their lives. He told these boys for 23 years that their mother abandoned them. The oldest son, now 29, has had a long history of mental illness and is currently in prison in the psychiatric unit. I sent a copy of a newspaper article about the conviction and a note detailing facts that I had learned about Vicki, Rex, and the boys to his psychiatrist in the hope that it might help his patient heal. The middle son, now 27, seems to be doing OK, considering his chaotic upbringing. The youngest son, now 25, moved to Colorado and works at a ski resort. None of the boys have contact with their dad, and as far as I can tell, none of them have ever spoken about that night.

Conclusion

Because of the dedication of Chief Richard Elliott, who never gave up on his promise to Vicki's parents that they would see justice for their daughter, and with the help of three very special men, First Assistant Mark Brunner, Investigator Randy Traylor (who, incidentally, was a young sergeant who worked on this case 23 years ago), and one of my staff members, Paul Davis, we pulled a 23-year-old case out of the mothballs and breathed new life into it. Mark helped me immensely when I struggled (after being out of the courtroom for so many years). Paul spent hours and hours unraveling the DNA testing web (with the help of Jane Burgett from DPS and Farah Plopper from UNT). Randy Traylor spent countless hours finding witnesses from 23 years ago and getting them here from all over the country.

After my first meeting with Chief Elliott, I knew that he and Vicki's family and friends would never be at peace until this case was resolved, one way or the other. We had all of this amazing evidence that a murder had occurred, yet Rex was still free and Vicki was still gone. Sadly, we did not accomplish our main goal, which was to bring Vicki's remains back to her family. Instead, we will just have to be satisfied with a "guilty" verdict and a 42-year sentence. ❇

Endnote

1 See *Stobaugh v. State*, 421 S.W.3d 787 (Tex.

Montgomery County's approach to veterans' court

This specialty court has been in existence for about a year, and MoCo prosecutors share how they built it from the ground up.

By Mike Holley
Assistant District Attorney in Montgomery County

It is not Justin Frost's best day. He's drinking again. The point where he should have stopped has come and gone. Now he's driving. Drifting from street to street in his ex-wife's white Saturn sedan, Justin wanders through a maze of residential streets in Montgomery, Texas. It is 1:00 a.m., late May. Justin is disoriented, upset, and highly intoxicated. He stops in front of a stranger's house not sure what to do next. Suddenly the lights of a private security guard appear in his mirror. The guard, thinking Justin might be lost, approaches. Justin pulls forward, rolling over the curb. They speak briefly. There is anger in Justin, drunken anger and confusion. The guard is alarmed. He un-holsters a can of OC spray, threatens to use it, and does. Justin's anger erupts into rage and now the security guard and two deputies who have just arrived are in a struggle. Justin, 6-foot-2 and 275 pounds, fractures the hand of one deputy as they roll around on the ground together. He kicks at another deputy, piling up two felonies in as many minutes. The day ends with Justin bruised, tired, sick to his stomach, and lying on the cold concrete floor of the Montgomery County Jail.

That was a bad day, but for Justin Frost (not his real name) it's been worse.

A few short years before his arrest, Justin was working as an Army medic in Afghanistan. Much to his surprise, Justin found himself not treating soldiers but stitching Afghani children back together after an errant bombing raid hit a wedding party. Justin dealt with multiple child victims on that day, some as young as 4 years old. One child had part of his skull missing, and more children were missing limbs. Justin attempted desperately to apply tourniquets to stop the flow of arterial blood among tears, chaos, and confusion. He saw some of these children die. It was not what he expected to do, it was not what he wanted to do, but he did it because he was sworn to do so. It was a bad day. There were many others like it in Afghanistan.

More bad days followed when he returned to the States. Justin struggled to deal with his own wounds, the deep emotional kind, sustained from his difficult service 8,000 miles from his home.

I met Justin in my capacity as an assistant district attorney in Montgomery County. I began work there in August 2012 after 13 years of military service and six years as a plaintiff's lawyer at a civil firm in Houston. Unknown to me at the time, Brett Ligon, the Montgomery County District Attorney, had been actively pursuing a veterans' court for this county. Brett and others were concerned about the alarming number of veterans entering the criminal justice system. The reasons for the increase in these cases remain a point of debate; regardless, the mental health and substance abuse issues that often result from combat service were contributing factors. (Some studies have indicated that around one in five veterans has symptoms of a mental health disorder or cognitive impairment[1] and that as many as one in six veterans of the campaigns in Iraq and Afghanistan suffer from a substance abuse issue.[2]) Significantly, Brett had taken the time to talk to veterans and their families, and he understood the problem in flesh-and-blood terms, not just dry statistics. Brett wanted to do what he could to help, and he wanted to do it the right way.

Flowing from his interest in setting up a veterans' court, Brett asked me and several others to assist him with this goal. Brett thought I might be helpful in this regard because of my past military service.[3] Our first assistant, Phil Grant, a graduate of the Virginia Military Institute, took the lead on the program, and he and

I received Brett's orders to move forward with the program.

Phil and I started our efforts with a series of committee meetings in the county. We also began speaking to a wide assortment of dedicated people who have made the program work in other parts of the state. Two of those individuals were Loretta Coonan and Henry Molden, both of the Veterans Administration (VA) and both deeply committed to the veterans' court program.[4] After several months of staffing and researching the issues, we initiated our program. Justin Frost was our first participant.

One of the more challenging aspects of initiating the program was answering the question of who would be allowed to participate. Many of our defendants had some military service in their past, but not all of these defendants were appropriate candidates for the program.

The veterans' court program is sometimes misunderstood as a "get out of jail free card" for veterans. That is not the case. We do not believe that military service, in and of itself, means that a defendant in the criminal justice system deserves a pass. It does not honor veterans to treat them this way. Instead, in this program, we are trying to identify those veterans whose military service has created conditions that led them into the criminal justice system when they would likely not otherwise have gone down that path. In particular, we are attempting to identify veterans who have experienced combat and as a consequence of their service need assistance that can be provided in the context of the criminal justice system. The assistance we provide is very costly in terms of resources and time, and frankly it requires some risk on our part and on the part of the community. If not every veteran is a suitable candidate (and not every veteran is a suitable candidate), then how to go about identifying who is? Our response was to consider veterans in terms of eligibility and suitability.

Eligibility and suitability

To be eligible, a candidate for our program would need to meet several requirements. With respect to the nature of the charge, the veteran must have a felony charge currently pending (and by rare exception a misdemeanor charge).[5] Generally, all but the most serious offenses make a veteran eligible. For example, defendants charged with murder, indecency with a child, and sexual assault would not be eligible for the program.[6] With regard to criminal history, the general rule is that the veteran not have a prior felony conviction of the type that, if the charge were currently pending, would make them ineligible. With regard to military status, we require that the veteran have either an "Honorable" or "General, Under Honorable Conditions" discharge.[7]

Assuming the veteran meets these requirements, we would then have the candidate evaluated by a trained psychiatrist. We are very fortunate to have a particularly gifted psychiatrist, Dr. Andrea Stolar, who screens our veterans.[8] Dr. Stolar usually meets with the veterans at her office; however, she has on occasion very graciously travelled to the Montgomery County Jail to conduct her interviews there when necessary. Among other issues, Dr. Stolar attempts to determine whether the veteran is suffering from a brain injury, mental illness, or mental disorder that resulted from service in a combat zone or other similar hazardous duty area. Dr. Stolar also attempts to determine whether the previously mentioned conditions materially affected any criminal conduct at issue in the case.[9] Following the interview, Dr. Stolar provides a recommendation as to eligibility.[10]

If the veteran is eligible, the next question is whether he is suitable for the program. Whether a veteran is suitable is a judgment call that our office makes as part of team staffing effort. This part of the process begins with a meeting with the veteran, his attorney, and myself as the program manager. We discuss the program in frank terms, and I try to answer questions and get a sense of the veteran's real interest in the program. Following this meeting, I will then discuss the case at length with our Veterans Justice Outreach Specialist (VJO), Wade Cooper. Wade, who is an employee of the VA and himself a skilled counselor, works with the veterans from the beginning of the process. Wade provides excellent insight into both the suitability and eligibility of the candidate. After Wade and I reach agreement on a candidate, I then discuss the case with the felony division chief and any victims. With this input, I then submit the veterans' packet to the first assistant for approval. When appropriate, the first assistant discusses the case with the district attorney and together they consider all the circumstances and the interests of the victim and the community.

Continued on page 36

Continued from page 35

The process is intended to be careful, deliberate, and informed.

Justin Frost met all the eligibility requirements, and he was certainly suitable for the program. Justin 's service in the Army began in 1996 and ended in 2004. At the time he was arrested he was 37, divorced, and a father of three. He was working as an x-ray technician at a Conroe Hospital. Justin had no criminal history. He was, however, suffering from PTSD and struggling with substance abuse. He needed help, but it's very likely he would not have sought that help without the shadow of felony charges looming over him. After a careful review of his case, he was determined to be both eligible and suitable. The next step in his application and in our process was to have the veteran sign a pretrial diversion contract with our office. The pretrial diversion contract is an agreement where the district attorney agrees to hold any prosecution while the veteran is in the program and to dismiss the pending case when the veteran successfully completes the program. In return, the veteran agrees to comply with the normal conditions of probation and to cooperate fully with the veterans' court program. We have found that this arrangement with veterans works extremely well, as it allows us to tailor a contract to a particular individual and his situation. Additionally, the prospect of a dismissal at the end of the program provides a great incentive for a struggling veteran.

Since Justin's enrollment in August 2013, another six candidates have been accepted into it. At the time of this writing, roughly twice that number of candidates have been considered and determined to be either not eligible or not suitable or both. Some candidates were rejected because they had significant criminal history that pre-dated their military service. One candidate was rejected when he seriously misrepresented his combat service and resulting injuries. Most candidates who are rejected do not meet the basic eligibility requirements or are not deemed suitable candidates given the nature of the offense.

How it works

For those veterans admitted into the program, these individuals have found that their challenges are just beginning. In our county, the participant has to report to community supervision personnel and do everything that a normal probationer would do. This includes random urinalysis, paying restitution, maintaining an ignition interlock device, reporting to an officer, etc. On top of those requirements, the candidate begins a series of phases with the veterans' court program. The phases are designated as Stabilization, Treatment, Transitional, Maintenance, and Aftercare. The first four phases are generally 90 days in length with the Aftercare phase lasting 180 days. The length of each phase is a guideline and can change depending on the needs of the veteran and his compliance with the program. If the participant is not fully compliant, the time in a particular phase can be extended.

The requirements in each phase depend upon each veteran's needs. Generally, though, the treatment "modalities" consist of substance abuse treatment (which may require psychosocial assessment), emotional behavioral assessment, a health screen, weekly case management, medications as required, and residential treatment or hospitalization in certain cases. With respect to mental health treatment, candidates may receive biopsychosocial assessment, "Seeking Safety,"[11] anger management, cognitive processing therapy, psychosocial rehabilitation, family therapy, psychodrama, OEF/OIF coping skills, Combat Nightmare Group, women's groups, and other treatments as required. In addition, the candidate must make two court appearances a month along with residential court case management visits. It is a very difficult, demanding program. As one respected Texas judge stated on the program *60 Minutes*, the veterans "do more programs on this probation than any other program in the state."[12]

In Montgomery County, our compliance hearings are overseen by Judge Marc Carter, the presiding judge of the 228th District Court in Harris County. Judge Carter is a veteran himself, and he oversees the Harris County Veterans' Court. We chose to team up with Judge Carter for several reasons including his leadership, resources, and "mass." ("Mass" is one of the nine "principles of war" and refers to collecting combat power at a time or place to obtain the desired results. In this context, we are referring to collecting enough veterans at a particular time and place to accomplish our objectives.)

As we began to study the problem of creating a veterans' court in our county, we spent time with the very successful veterans' court pro-

gram in neighboring Harris County. We were impressed by a number of talented and passionate people in that program, people like the previously mentioned Loretta Coonan, who was so instrumental in starting the program in Harris County and ours as well. There were many other talented people in the Harris County program, and Judge Carter was its clear leader. We noted how expertly he handled his veterans and how well he worked with all the team members. Judge Carter demonstrates the perfect balance of firmness and patience that these struggling veterans need. We witnessed multiple examples of encouragement from Judge Carter, encouragement that clearly made an impact on the men and women in his court. We also saw him sanction veterans when necessary, sanctions that could range from a verbal reprimand to short terms of confinement. In short, we saw that Judge Carter was both perfectly positioned and well equipped to provide leadership to men and women who desperately needed it.

In addition to Judge Carter's leadership, we saw that he had marshaled resources that, frankly, were beyond our ability to field in our county. Dr. Stolar, whom we previously mentioned, attended staffing meetings before each compliance hearing, and her input was invaluable. And she was not alone. Judge Carter enlisted the help of a number of people in various fields of expertise and with considerable experience in dealing with important issues such as mental health and substance abuse. In addition, a wide variety of volunteers and non-profit agencies from the greater Harris County area routinely attend these hearings. These individuals provided a number of extremely helpful services such as employment assistance as well as informing veterans of other benefits that were available to them.

We also noticed something else we thought very important with regard to "mass." We began to see that the participants had essentially created a *de facto* military unit, with Judge Carter as the commanding officer and various court personnel and VA staff as subordinate leaders. We saw that the veterans policed themselves, so to speak, with the more senior, experienced veterans mentoring the junior and new participants. We saw that a great motivator for the veterans was to not be embarrassed in front of this large group of their brothers- and sisters-in-arms. It occurred to us, however, that to create this kind of *de facto* unit would require a fairly large number of participants (the Harris County program runs at around 100 participants). Our county is much smaller than Harris County, with roughly 500,000 people, and we estimated that our veterans' court program would probably never exceed more than 20 veterans at a time, and 20 veterans was simply an insufficient number to create the "mass" needed for the group to become the functioning unit we witnessed in Harris County. We wanted our veterans to join this thriving unit in Harris County with Judge Carter as their commander, at least with respect to the compliance hearings. For these reasons and several others we opted to send our veterans to Harris County for the compliance hearings, and this has worked extremely well. Our hope is that for mid-size and small counties, this model of what amounts to a regional veterans' court might pave the way for more Texas veterans to gain access to this great program.[13]

Why we do this

Overall, this is hands-down one of the most rewarding aspects of my job as a prosecutor for the State of Texas. Although I am no longer a member of the Armed Forces, I continue to have great admiration, affection, and appreciation for those men and women who have served. This program allows me to serve them. Our district attorney and first assistant feel as strongly about these men and women as I do. Although we realize that we cannot help every veteran who crosses our path, we can help some of them.

As for Justin Frost, his bad days—or at least his really bad days—are, we hope, a thing of the past. Justin is nearing the final phase of the program. He's sober and his anger issues have greatly improved. He has committed no new offenses. He's working again and back with his family. He's helping other veterans in the program. The deputy whose hand he fractured is encouraged by Justin's progress and glad that Justin is doing so well. Justin Frost is serving his country again, but these days he's doing so as a good citizen.

That's a good day for all of us. ❇

Endnotes

1 Tanielian, Terri, et al. "Invisible Wounds of War: Summary and Recommendations.", A Joint Endeavor or Rand Health and the Rand National Security Research Division. Pages 30-31. Web.

Continued on page 39

Drawing blood on every suspected DWI

All law-enforcement agencies in Burnet County participate in the Blood Alcohol Taskforce (BAT); in just a year of existence, BAT has proved a great success in obtaining both blood and justice.

By Colleen Davis and Katherine McAnally
Assistant Criminal District Attorneys in Burnet County

It's a running joke in Burnet County that the prosecutors are vampires: When it comes to DWI, we want blood, we want it fast, and we want it *all the time*. To get all that blood, we formed the Burnet County Blood Alcohol Taskforce (BAT) in 2013. Now, with a year of seeking search warrants for blood on every suspected intoxicated driving case, we reflect on what worked, what didn't, and how prosecutors in other counties might adopt a similar program.

BAT is an organization comprised of law enforcement agencies collaborating with the prosecution and county government to oversee a county-wide blood draw program. Beginning in 2006, it became clear that blood evidence was the future of DWI prosecution. Through a long evolution, BAT is Burnet County's response to problems accessing this vital evidence in DWI cases.

The Marble Falls Police Department, through the leadership of Sergeant Barry Greer, was the first agency in Burnet County to do blood draws on DWIs 24 hours a day, seven days a week, 365 days a year. Unfortunately, the only place to have the sample taken was at a local hospital, and there were challenges with that procedure. The hospital required that a physician medically clear the defendant before a blood draw could occur. This clearance could take upwards of several hours, with the defendant sitting in the hospital (and sobering up) before the blood sample was ever taken. Additionally, hospitals charged agencies for both the blood draw and "treatment" of the defendant, which was prohibitively expensive for our meager budgets.

In response, officers began taking defendants to hospitals in neighboring counties where draws were free and treatment was not required. But this work-around was not without its problems. First, drawing blood in another jurisdiction raises issues for suppression. Second, it is at least a 30-minute drive, which results in an increased cost (in both fuel and overtime) for the agencies. And third, there was an increased risk to the safety of both the officers and the defendants travelling this distance on Hill Country roads.

Although the blood draws were problematic for the officers, having blood results was a game changer in the courtroom. You may have heard the mantra, "If it bleeds, it pleads," and that was our experience in Burnet County. With the success of the program in Marble Falls, we wanted to expand the blood draw program to all agencies in Burnet County. To accomplish this goal, it was necessary to make blood draws easier and more efficient for the officers. A number of alternatives were considered: employing a nurse in the jail at all times, managing a list of on-call phlebotomists, or training officers as phlebotomists. But each of these approaches had major drawbacks. A local Texas Parks and Wildlife Department captain, Kevin Davis, enlightened us regarding a private company[1] that provides phlebotomists on a contractual basis. A contract was negotiated with this company to provide an on-call phlebotomist to conduct blood draws at the Burnet County Jail when requested by law enforcement.

The key to the success of BAT is consistency: *Every agency* in the county participates through identical contracts with the same blood-draw provider. Each draw follows the same procedures, for the same cost, using the same forms, reviewed by the same judges. Consistency is key!

So, how did we do it?

In addition to consistency, centralized management of the contracts, program, and funding also plays an important part in the success of the program.

Burnet County has an individual contract with the company that sets the terms of the relationship including costs, service provision expectations, and eligible participating agencies. Secondary to that contract, each participating law-enforcement agency also has a contract with the phlebotomist provider that refers to and mirrors the terms of the parent contract held by the county. As

part of the contract, the provider is responsible for carrying insurance on all employees, tracking qualifications and continuing education credits, and maintaining an on-call list to have staff available to respond when needed. The phlebotomists agree to be available to testify as needed for an agreed hourly rate. The agency contract must be approved by the agency governing the participating law enforcement agency prior to participation in the program.

Centralized management is also evident in the governing structure of the program. A board of directors consisting of representatives from participating law enforcement agencies is responsible for making policy and procedure decisions for the program. These representatives are selected by the participating agencies pursuant to the bylaws of the organization. The board is responsible for determining the cost to agencies for participation in the program, negotiations and recommendations regarding contractual issues, and setting policy and procedures for the program including where the draw is conducted and the procedures followed.

Most importantly, the costs are managed through a centralized fund. The Burnet County Commissioner's Court provided $15,000 in seed money to jumpstart the blood draw fund. This, combined with a contribution from an anonymous donor, provided sufficient capital to fund one year of blood draws at no cost to the agencies, allowing them to try the new process without risk. Each participating agency has a

Continued on page 40

Continued from page 41

Montgomery County's approach to veterans court (cont'd)

http://justiceforvets.org/sites/default/files/files/RAND%20invisible%20wounds%20of%20war.pdf.

2 Seal, K. H., Bertenthal, D., Miner, C. R., Sen, S., & Marmar, C. (2007). Bringing the war back home: Mental health disorders among 103,788 US veterans returning from Iraq and Afghanistan seen at Department of Veterans Affairs facilities. *Archives of Internal Medicine*, 167, 476-482. Referenced in the National Survey on Drug Use and Heath Report, November 1, 2007 "Serious Psychological Distress and Substance Use Disorder Among Veterans. Found at www.samhsa.gov/data/2k7/veteransDual/veteransDual.htm.

3 My prior military service consisted of time as a Military Police Platoon Leader in the 1st Cavalry Division and as the MP Operations Officer at Fort Hood followed by assignments as a military prosecutor and defense attorney in Korea, Fort Bragg, Fort Hood, and Iraq.

4 Loretta Coonan, perhaps more so than anyone involved in this effort, deserves the credit for navigating the procedural hurdles in setting up a program. She provided a number of documents that were invaluable in starting our program, and I am happy to share those templates with those who are interested in beginning their own programs. I can be reached at mike.holley@mctx.org. Henry Molden of the VA's office was also extremely helpful in setting our program. Additionally, Shannon Davis, my brother veteran and the ADA veterans' court program manager in Harris County, was incredibly gracious in his help to us, for which I am forever grateful.

5 Some counties have a misdemeanor veterans' court program, but we rarely admit veterans charged with a misdemeanor. The reason is that the requirements of the program are so onerous and the program so lengthy that only the danger of an impending felony conviction is sufficient to incentivize participation, particularly when things get difficult. We have made some exceptions in the appropriate cases.

6 Charges that would *generally* make a veteran ineligible would include drug delivery; murder; indecency with a child; aggravated kidnapping; sexual assault; robbery; injury to a child, elderly, or disabled person; and offenses with a finding of a deadly weapon.

7 Military discharges fall within two categories: punitive and administrative. Punitive discharges result from courts-martial. Enlisted and non-commissioned officers may receive a dishonorable discharge or bad-conduct discharge. Warrant and commissioned officers may receive a dismissal as a result of a general court-martial. Administrative discharges are outside of the courts-martial process, and all ranks can receive them. The three characterizations of administrative discharge are Honorable; General, Under Honorable Conditions; and Other than Honorable. Every servicemember receives a DD-214 when they are separated from service. This form will explain both the nature and reason for the discharge as well as summarize the veterans service. Unless the veteran has a Honorable or General, Under Honorable Condition discharge, they generally won't be eligible for VA services and thus ineligible for the program.

8 Dr. Stolar is the Director of Residency Education, Menninger Department of Psychiatry and Behavioral Sciences, Baylor College of Medicine in Houston.

9 Chapter 124 of the Government Code governs veterans' court programs. Section 124.002 requires a finding of the described mental condition and a link of that condition to the charged offense. The most important result of this requirement is simply that not every veteran who commits an offense is eligible for the program.

10 Dr. Stolar will continue to work with the veteran even after entry into the program. She is an active member of the staffing sessions for each veteran and attends many of the compliance hearings.

11 "Seeking Safety" is a treatment program focused on individuals with PTDS and substance abuse issues. It was developed by Dr. Lisa M. Najavits of the Harvard Medical School. For more information see www.seekingsafety.org/3-03-06/aboutSS.html.

12 You can find the program at www.cbsnews.com/news/coming-home-justice-for-our-veterans/#comments. If you are at all considering beginning a veterans' court program in your county, watch this show. I promise you that it is worth 12 minutes of your day.

13 Section 124.004 of the Government Code authorizes regional programs.

Continued from page 39

Memorandum of Understanding with the county and with BAT that outlines expectations regarding payment for blood draws and the collection and disbursement of restitution. Both the agency contract and Memorandum of Understanding must be approved by the agency governing the participating law enforcement agency prior to participation in the program.

Pursuant to the Memorandum of Understanding, all costs for the blood draws are paid, according to the contracts, out of the central blood draw fund, and all restitution by defendants is paid back into the central blood draw fund. Having all restitution paid to one place and all invoices paid from the same place simplifies the process in the courtroom. Collecting restitution is easy because we *always* know what it costs and where the money should be sent. The county is billed for each draw, and the fund pays the invoice. The county auditor manages these invoices and the fund.

The company expects payment of invoices within approximately 30 days of the draw. As we all know, very few cases reach disposition within 30 days of arrest, so the capital provided by the seed money allows invoices to be paid in a timely manner and the fund to be replenished by restitution collected at disposition. To keep the working capital necessary in the fund, prosecutors attempt to collect restitution prior to allowing the defendant to enter any plea agreement (restitution for both the blood draw and testing at DPS is collected at the time of the plea). Restitution for the blood draw includes the cost of the contracted phlebotomist, the DPS test kit, and administrative costs for the management of the program. Some amount of replenishment is necessary from outside sources to compensate for cases that are dismissed, cases that are resolved without financial input from the defendant, or those where disposition is not possible. Restitution may not be collected when a defendant refuses to pay, is deported, is sent to prison, or dies prior to collection. The goal is a program wholly funded through restitution. In the meantime, we continue to accept private donations to the fund.

From the roadside stop

Regardless of which department makes the arrest for DWI, the procedure that follows is the same. The officer contacts dispatch and requests a phlebotomist be called to the jail at the same time he requests "the next in-rotation vehicle removal device" (also known as a tow truck). This timing allows officers and phlebotomists to often arrive at the jail at the same time, eliminating wait for either party. Dispatch then calls the company, which is responsible for notifying the on-call phlebotomist. By contract, the phlebotomist must arrive within 45 minutes of contact. Meanwhile, the officer uses either the computer provided in the jail or his own laptop to access the standardized search warrant forms. He completes the search warrant, calls a local judge, and makes arrangements to fax or email the warrant to the judge. After the judge has signed the warrant, it is returned to the officer.

The phlebotomist is responsible for cleaning the area, completing the inventory and blood draw logs, taking the sample using the next numerically ordered kit, and completing the Affidavit of Person Who Drew Blood. The officer is responsible for observing the procedure, checking the accuracy of all documentation, securing the sample and corresponding documentation, and forwarding the sample to the lab. After the draw is completed, the defendant is booked into the jail.

What parts of the process worked?

Standardized search warrants. All officers use a search warrant template maintained by the BAT Board and provided on the computer in the jail as well as in electronic format to all officers. One of the major benefits of a standardized form is that both judges and prosecutors are accustomed to the review of any arguments pertaining to this particular form. Additionally, any changes or updates necessary due to issues raised at suppression or trial are easily incorporated and disseminated to all departments. It also avoids arguing the same issues repeatedly—once an issue has been ruled upon, the form is updated and the issue is considered resolved by both judges and prosecutors (although not always by defense counsel).

Blood kit tracking. All blood kits ordered are matched to three different tracking systems and then matched to incoming invoices from the company. To track the blood kits, we use a quadruple sticker system. One numbered sticker goes on each blood kit when it is placed in the supply closet. The second numbered sticker is placed on the blood draw log with case identifying infor-

mation. The third numbered sticker goes on the blood vial itself. Finally, the fourth numbered sticker is placed on the phlebotomist's paperwork for the company. As the auditor receives invoices, she matches each invoice to a specific jailing record in the county database and to the blood kit inventory and the blood draw log before making payment. This process allows the auditor to confirm that a blood draw occurred before making payment. It also assists with proving chain of custody.

Blood kit ordering. There can be a lengthy delay in receipt of blood kits once we order them from DPS. For this reason, it is necessary to order a three-month supply, which we keep away from the jail each time the jail inventory is replenished. This allows the program administrator the ability to monitor the need to reorder and avoids running out of kits at an inopportune time (for example, New Year's Eve).

Blood results. We all know that the backlog at DPS results in long waits for blood results. One trick to speed this process is to put the prosecutor's email address on the lab submission form. Then, results will be sent directly to the prosecutor's office, eliminating the wait for law enforcement to forward them. Additionally, the lab prefers that drug results are requested only when drugs are suspected. However, if the request is made within 30 days after alcohol testing, they will retest for drugs. Finally, if a case is disposed of prior to testing, the lab appreciates being notified. Any tests that can be removed from the queue speeds up the process for everyone.

The toxicologist as an expert witness. Not only can the toxicologist testify regarding the blood results, but she can also testify as to the effects of that level of alcohol in the bloodstream on the human body. Toxicologists are very impressive witnesses due to their extensive experience and education.

What didn't work?

Fundraising. Fundraising efforts for the central blood-draw fund have not been nearly as successful as desired. Although the goal is a self-sufficient fund, currently supplemental funding remains necessary. Members of the BAT Board continue to monitor the financial position of the program.

Single vial kits. One defense attorney filed a Motion to Retest Blood evidence. With only one vial of blood, the same vial was retested, resulting in a slightly different BAC. As a result, the plea offer was reduced.[2] We now use double vial kits.

Inability to test for certain drugs. The DPS lab will not test for cannabis and cannot test for any of the synthetic cannabinoids. It also cannot test for a number of other common drugs. Without the defendant's admission that he used a drug, the lab's inability to test the blood for the drug's presence generally leads to significant issues proving the case.

Receipt of lab results on drug testing. The length of time needed to test for drugs delays the disposition of cases. The only state-funded lab that tests for drugs is the Central DPS Lab in Austin, and it is not prepared for the influx of blood testing that no-refusal programs generate. It has been suggested that private labs may be an alternative solution if funding is available.

Storage and disposal of blood evidence. Local law enforcement agencies seem challenged by the procedures for storage and disposal of what is, in effect, medically hazardous materials.

How has BAT worked so far?

See the chart below for some statistics over the last year.

DWI Statistics in Burnet County, 2013–14

Misdemeanor DWIs	168
Blood draws	120
Consensual	44
Nonconsensual	67[3]
Breath tests	33
Average BAC	.17
Highest BAC	.393
BAC below .08	4
Drugs suspected but not tested	2

The average time from the stop to the blood draw was 2 hours 14 minutes, and the average time between the roadside stop and the Breathalyzer test is 1 hour 20 minutes. The average time from an officer's request for a phlebotomist to the blood draw is 1 hour 9 minutes, which is very close to the contractual requirement that the phlebotomist arrive within one hour of the request. Knowing when to expect the phlebotomist helps officers time

Continued on page 43

At war with evil

McLennan County prosecutors tried a capital murder case against an extremely violent defendant—the worst they had seen in decades of prosecution. Here is their story.

Kim Petetan and her 9-year-old daughter, Allyson, began Sunday, September 23, 2012, with morning church services. Afterward, they returned to their Waco apartment where they ate lunch and began watching a movie. In the afternoon they heard a knock on the front door. They weren't expecting guests so they continued watching their movie. There was another knock a few seconds later, and this time, Kim went to the door to see if someone needed help. When she opened the door, she came face-to-face with her estranged husband, Carnell Petetan, Jr. She tried to close the door, but Petetan forced his way into the apartment and closed the door behind him. He pulled out a pistol, pointed it at Kim, and ordered her and Allyson into an upstairs bedroom.

By Greg Davis (center), former First Assistant Criminal District Attorney, pictured with Abel Reyna (left), Criminal District Attorney, and Michael Jarrett (right), Assistant Criminal District Attorney, in McLennan County

He demanded that Kim go to Port Arthur with him and retract a statement she had made to police about 10 days earlier. In that statement, she had told police how Petetan had thrown her into a wall in his Port Arthur apartment, pulled a knife on her, and threatened to kill her in front of Allyson. Kim pleaded with Petetan to leave her apartment, but he refused. Instead, he told her to get the keys to her truck and drive him to a nearby motel, warning her that he would shoot her and Allyson if they attempted to escape or get help. The three of them drove to the motel where they picked up two men. Then, the five of them drove back to Kim's apartment. The two men from the motel stayed downstairs while Petetan took Kim upstairs and again tried to convince her to return to Port Arthur.

Petetan later came downstairs with Kim and Allyson. Kim asked Petetan for permission to take Allyson back upstairs so that she could use the bathroom. He agreed. Kim took Allyson's hand and started toward the front of the apartment. But instead of turning toward the stairs, she quickly moved to the front door and attempted to open it. Petetan grabbed her, slammed her against a wall, and pulled out his pistol. Kim tried to retreat up the stairs, but, as Allyson looked on, Petetan shot Kim twice, once in the left leg and once in the right shoulder. The latter shot penetrated both of Kim's lungs and thoracic aorta. She staggered down the stairs and fell to the floor. She died before the first officers arrived at the scene. She was only 41 years old, and she left behind not only Allyson, but three other adult children, Kristin, Tyler, and Wesley.

The first responding officers discovered Kim's body lying face down in a pool of blood on the entry floor. No one else was in the apartment. Neighbors gathered outside and told police that she was separated from her husband and had a young daughter living with her. Officers attempted but were unable to locate Allyson in the apartment complex. A bystander told them that he saw Petetan force his way into Kim's apartment earlier that afternoon. As a result, Waco police issued an Amber Alert for Allyson and Petetan's white SUV.

Police in Bryan stopped Petetan's SUV about 90 minutes after the murder as it headed south toward Houston. They found four people inside: Allyson, Petetan, and the two men from the Waco motel, Adrian Miller and Kerrie Mouton. Miller and Mouton told officers they had traveled from Port Arthur to Waco with Petetan earlier that morning under the assumption that he was buying a large amount of crack cocaine in Waco.

All four occupants of the SUV

Continued from page 45

Drawing blood on every suspected DWI (cont'd)

were taken to the Bryan Police Department for further questioning. Allyson, Miller, and Mouton told Bryan detectives that they witnessed Petetan shoot Kim as she attempted to flee with Allyson. Detectives then spoke with Petetan. Displaying absolutely no grief or emotion, Petetan repeatedly blamed Adrian Miller for the murder. He terminated the interview when detectives requested a buccal swab for DNA testing. He was charged with murder and returned to Waco the next day.

Preliminary investigation

Criminal District Attorney Abel Reyna, ACDA Michael Jarrett, and I were trying another death penalty case in Waco when we first heard about Kim's murder and Petetan's arrest. None of us recognized the names, and a quick search of county records revealed no arrests for Petetan. Given the parties' relationship, our first assumption was that the murder was an act of domestic violence.

After the conclusion of our other death penalty trial, we began reviewing police reports and witness statements. Two very distinct images began to emerge.

Kim was uniformly described by family members and friends as a devoted mother. At the time of her death, she was taking college classes to become a counselor. She wanted to help young women overcome problems related to addiction and abuse—problems that Kim herself had experienced. Her relationship with Petetan began after a chance meeting with his brother in Waxahachie in which the brother

Continued on page 44

their requests so that no time is wasted waiting on the phlebotomist. Although blood draws take longer than breath tests, the delay seems to be the result of longer on-scene time. We are finding that the time from the request for the phlebotomist to actual blood draw is similar to the time from request to breath result. And blood-draw cases would otherwise be refusals, meaning that the suspects are less cooperative and the cases more complicated all around, leading to longer times on the roadside.

There were 19 felony DWI blood draws and 1 blood draw in a murder case. Of the 20 felony draws, three were consensual; nine were involuntary, mandatory, non-warrant blood draws; and eight were the result of search warrants. They have results back on 14 of the cases, and the average blood result is .18. There are no results for DWI below .08, and the highest is .27.

We have filed complaints on 111 (of 120) defendants, and 13 have entered a plea.[3] Those cases are just now reaching the arraignment setting, so we don't yet have good statistics about suppression hearings and jury trials. However, anecdotally, we have observed that many of these cases plead more quickly than their Breathalyzer or refusal counterparts. Additionally, many of them may go to suppression, but very few go to trial. And so far, we have been 100-percent successful at suppression hearings. So the lesson is that the success rate is higher, but it takes longer to get there.

The Burnet County Blood Draw Program is far from perfect. As you can see, there are a number of challenges yet to be conquered, but it has been a positive force for prosecution of DWI cases. The program allows for consistent procedures for law enforcement, which makes the prosecution straightforward and uniform from case to case. Having a centralized program, including invoicing, simplifies the restitution process and will lead to a self-sufficient blood draw program. The numbers speak for themselves—blood draw evidence demonstrates that officers are accurate in their suspicions that drivers are intoxicated. With expert witnesses available to testify not only to the blood results but also the effects that alcohol has on the defendant's system, more intoxicated drivers will be held accountable. Hopefully that results in fewer intoxicated drivers on our roadways!

And that makes us perfectly content to be called vampires. ❇

Endnotes

1 We're happy to share the company's name and more details to anyone who'd like to contact us.

2 Using the Head Gas Chromotography process, a portion of the head gas is removed in the first test, resulting in a lower percentage of alcohol in the head gas on the second test. That is the non-scientist understanding of this process. If you want to know more about this issue, the scientists at the DPS lab were extremely informative.

3 The remaining nine are still in the intake process. We may be waiting on blood results or other documentation.

Continued from page 43

explained that Petetan was an inmate in TDCJ and needed encouragement and support. He asked her to become Petetan's pen pal. Wanting to help someone else in need, Kim began writing Petetan. Later, she began visiting him at his TDCJ unit. Their relationship grew, and in September 2010, she married him despite her family's concerns.

Petetan's story was quite different. He grew up in Port Arthur. His criminal history included two 20-year prison sentences for attempted murder out of Jefferson County. He served more than 19 years of his sentence before being paroled in April 2012. Upon his release, he moved into the apartment that Kim shared with Allyson in Waco. Kim's neighbors described him as a street-wise hustler who enjoyed talking about rap music and boxing, and there were suspicions that he was dealing drugs out of Kim's apartment. After a brief honeymoon period, he and Kim began experiencing problems. There were numerous arguments. Police were called to their apartment on at least one occasion. Petetan moved out of Kim's place in July and returned to Port Arthur, but he and Kim continued communicating by phone in the hope of reconciling their marriage. In mid-September, Kim agreed to move to Port Arthur to be with him. She and Allyson moved into his apartment. However, the arguments quickly resumed and eventually led to the violent incident where Petetan threatened to kill Kim in front of Allyson. Kim and Allyson immediately returned to their Waco apartment after that, and she decided to end her marriage.

After making a preliminary report to Mr. Reyna, I began a more in-depth investigation to determine whether we should seek the death penalty against Petetan. I first ordered all of Petetan's TDCJ paperwork, including his pen packets, disciplinary reports, medical records, and parole records. I also ordered his Jefferson County (Port Arthur) records, including records from his juvenile probation, arrests, and schools.

Petetan's criminal history

Having tried numerous death penalty cases, I had long ago come to the realization that there are evil and depraved people in this world. How else can you explain the actions of a mother who stabs to death her two young sons or a serial killer who celebrates after murdering five innocent people in a single night? Still, Petetan's TDCJ records were among the worst I had ever seen.

He was confirmed as a member of the Crips street gang. Numerous homemade weapons were found in his cell during his confinement. He assaulted several inmates and correctional officers, both with and without weapons. Many of these attacks appeared to be planned and premeditated. He severely beat a sleeping inmate in the head with a metal combination lock stuffed in a sock, sending the inmate to a local emergency room. (The attack was so vicious that the first correctional officers on the scene later told us that he would never forget the smell of blood in the air.) On another occasion Petetan repeatedly stabbed an inmate with a 12-inch metal shank. The inmate survived the attack only because of the quick response of emergency medical personnel. Near the end of his prison sentence, Petetan solicited a fellow inmate to rape, torture, mutilate, and murder a female correctional officer in front of her family. Fortunately, the plot was discovered before it was carried out. And finally, the records contained detailed accounts of Petetan's sexual depravity. He repeatedly exposed himself in front of female correctional officers and on one occasion solicited a male officer for sexual favors. Moreover, he sexually assaulted at least three male inmates. In the last documented incident, Petetan struck the inmate in the head with his fist, dragged him into his cell, and sodomized him while he held a metal shank to the inmate's throat.

Petetan's Jefferson County records were no better. Beginning when he was 10, his offenses included burglary, theft, vandalism, assault, aggravated assault, and attempted murder. He assaulted a public school teacher in her classroom and also vandalized another teacher's truck when ordered to leave the school campus. Later, he broke a teenager's jaw by striking him in the face with a metal chair. Petetan also assaulted an elderly teacher while in juvenile detention. He was subsequently placed in the Brownwood State School before being returning to Port Arthur on juvenile parole.

His convictions for attempted murder stemmed from two separate shootings in Port Arthur. In the first case, he shot a friend while he and the victim were in his mother's backyard. In the second case, committed while he was on juvenile parole, Petetan randomly shot an elderly

Continued on page 45

man walking on a sidewalk. He was certified to stand trial as an adult in both cases and was sentenced to 20 years in each.

Petetan's history of violence left no absolutely doubt that he would be a future threat to society. However, there was still the issue of mitigation. Were there were any mitigating factors to justify a life sentence? To answer that, I turned to his school and juvenile probation records.

Those records showed that Petetan was expelled from school in the ninth grade after numerous disciplinary violations. His overall academic performance was poor. He was raised by his mother in a modest, single-family home. According to his mother, Petetan attended church regularly as a child. His medical records contained no evidence of mental illness, physical disabilities, childhood abuse, or drug or alcohol addiction—despite his admission to a counselor that he sold crack cocaine as a teenager.

His juvenile probation records did, however, contain evidence suggesting that he might be mentally retarded. Two sets of IQ tests had been administered to him prior to his incarceration in TDCJ. The first test, administered when he was 15, resulted in a combined score of 61. He was tested a year later and received a combined score of 64 on the Wechsler Intelligence Scale for Children (WISC). Because the psychologist suspected that he was malingering, Petetan was then administered the Wechsler Adult Intelligence Scale (WAIS). It produced a combined score of 74. We also later learned that Petetan had been administered another IQ test in 2012 as part of his application for SSI benefits. The combined score for that test was 55. We obtained the testing psychologist's records and were relieved to see that his notes contained numerous entries indicating that Petetan had failed to give full effort on the test and appeared to lack motivation.

The IQ test results obviously caused concern in light of the *Atkins* decision. We had three sub-70 test results. Still, Petetan's TDCJ and parole records, as well as his school records, contained no evidence of retardation. Furthermore, the test results appeared suspect due to Petetan's malingering.

I made my final report to Mr. Reyna and recommended that we seek the death penalty notwithstanding the IQ test results. He agreed that Petetan's crime and violent criminal history called for the ultimate punishment. He was also firm in his belief that Kim's family deserved a full measure of justice. Petetan was indicted for capital murder, and Mr. Reyna, Michael, and I began our trial preparations.

Preparation for trial

Following her mother's death, Allyson had gone to live with her older sister, Kristin, outside of Houston. I made arrangements to meet them at their home on my way to TDCAA's Annual Criminal & Civil Law Update last year in Galveston. After my arrival, Kristin and I sat in her living room where we spoke about the upcoming trial. She was concerned about possible delays, explaining that the pending trial was taking a heavy emotional toll on her and the rest of the family. I assured her that there would be no delays. When we finished talking, she brought Allyson into the room so that I could speak with her.

I began by having Allyson tell me about school and her favorite activities. I quickly realized that she was mature beyond her years. Her communication skills were excellent. She was focused and surprisingly poised given the circumstances. After a few minutes, I told her that I needed to speak with her about what happened to her mother. She hesitated for a moment before telling me about their last day together: the church services, the lunch she and her mother picked up at McDonald's after church, and the movies they rented on their way home. I let her go at her own pace. Her recall of the day's events seemed remarkable. She appeared to be reliving the moment as he told me how Petetan forced his way into the apartment. I could almost see the fear in her eyes as she told me how it felt to see Petetan point his gun at her mother. When she began describing the moments leading up to her mother's death, she looked down and began crying. She cried as she told me how Petetan slammed her mother against the wall and then shot her as she tried to run up the stairs. It was heartbreaking to hear her describe how her mother "flopped like a fish" after she fell to floor.

She finished her story by describing how they drove out of Waco after the shooting, stopping somewhere outside of Waco so that Petetan could throw his pistol into a field. After she concluded, I told Allyson that I needed her to be strong for her mother and testify at Petetan's trial. Without missing a beat, she said that she want-

Continued on page 46

Continued from page 45

ed to testify and was not afraid of seeing Petetan in a courtroom. I left Kristin's home that evening filled with outrage over the damage that Petetan had inflicted on these two innocent daughters.

After we returned from Galveston, we began trying to locate correctional officers and inmates who could testify to Petetan's violent acts in prison. That was no easy task given the passage of time. Many of the officers from the early- and mid-'90s had retired, and most of the inmates had been either released from prison or transferred to different units. Investigators Mark Leger and Jason Chambers began communicating with the last known TDCJ units and TDCJ's Office of Inspector General. With their help, they were eventually able to locate almost every key officer and inmate. Remarkably, almost every one of them still remembered Petetan and agreed to testify about their interactions with him.

That left Jefferson County. We needed to locate people who had known Petetan during his childhood to rebut his retardation claim. And to do that, we needed boots on the ground in Jefferson County. Michael Jarrett and Mark Leger spent several days there, and with the help of the Port Arthur Police Department and the Jefferson County Criminal District Attorney's Office, they located Petetan's crime victims. Michael persuaded all of them to testify.

Michael and Mark spoke with numerous police officers in Port Arthur. To a man, they still remembered Petetan as someone with no regard for the law or the rights of others. Not a single officer believed that he was retarded. Michael and Mark also spoke with Petetan's probation and parole officers who later testified at trial that he showed no signs of mental retardation while under their supervision. New witnesses were also identified. One was the retired justice of the peace who had arraigned Petetan after his first arrest for attempted murder. Her later trial testimony allowed us to introduce Petetan's written confession in which he admitted that he tried to shoot his friend in the head after shooting him in the arm. Other new witnesses included Petetan's first- and third-grade teachers who testified that Petetan was a troublemaker whose poor grades were due to lack of effort rather than mental retardation, and one of Petetan's former principals testified that Petetan was the worst student he had seen in his 40-year career with the Port Arthur ISD. The principal also said that Petetan was placed in the district's special education program not because he was mentally challenged but because of his repeated disciplinary violations. Finally, Michael convinced Adrian Miller to testify—despite Petetan's claim that Miller had killed Kim. The trip to Petetan's hometown gave us powerful anecdotal testimony to rebut the retardation claim.

To help further undermine the validity of Petetan's IQ tests, we employed the services of Dr. Randy Price, a Dallas-area forensic psychologist. I had seen him speak at numerous capital murder conferences and knew that he would be a valuable asset at trial.

The trial

Jury selection took more than six weeks to complete. During that time, Michael and I questioned approximately 150 prospective jurors. No one was accepted as juror unless they agreed that: 1) IQ tests could be manipulated, and 2) lay testimony from teachers, counselors, and others would assist them in determining a defendant's adaptive functioning.

Testimony began in the 19th District Court in Waco on April 15, 2014. The courtroom was packed as Mr. Reyna read the indictment to the jury. Due to the nature of the case and Petetan's violent history, all trial spectators had been searched for weapons, and Petetan wore an electric stun belt under his suit coat. Over the next two weeks we presented 49 witnesses and offered approximately 150 pieces of evidence. Like most trials, this one had several memorable and decisive moments. The first occurred when Allyson testified as our last witness on guilt-innocence.

By the time she testified, Petetan's guilt had been conclusively established through a combination of overwhelming eyewitness and circumstantial evidence. However, we still wanted the jury to see first-hand the damage he had inflicted on this 9-year-old girl. As I began questioning her, she displayed the same maturity and poise I had witnessed in Kristin's home months earlier. Her recall of events was still remarkable. She had the jury's undivided attention as she described the events of that fateful Sunday afternoon. She fought back tears as she told the jury how Petetan gunned down her mother in cold blood. Many of the jurors cried during this portion of

her testimony, and it was obvious that they too felt a sense of outrage over Petetan's actions. When I asked her to identify her mother's killer, Allyson quietly but confidently pointed directly at Petetan. She remained just as poised on cross-examination, answering each question politely and directly. As she stepped down from the witness stand I was certain that her testimony had moved us much closer to a death sentence. (The presiding judge, Ralph Strother, later said that he had never seen a better child witness than Allyson. Neither had I nor any other member of the trial team.)

The second pivotal moment came when Petetan elected to testify at the guilt phase. As a result, jurors had the chance to judge his intellectual functioning for themselves, rather than having to rely on second-hand accounts from Petetan's family or defense experts. They quickly saw that he had above-average communication skills. He had no difficulty understanding and answering questions—even those Michael asked on cross-examination. During his three hours of testimony, Petetan showed his true nature as a calculating and remorseless individual. He certainly did not come across as retarded.

The jury took approximately an hour to convict Petetan of capital murder.

Punishment

We began the punishment phase with testimony from Petetan's crime victims, including correctional officers and inmates he assaulted—including the three inmates he had raped. The defense then began its effort to prove mental retardation through the testimony of family members and two psychologists, one from San Marcos on the issue of adaptive functioning and another from Dallas on the issue of intellectual functioning. The latter had administered a pretrial IQ test to Petetan that purported to show a combined score of 51.

Rather than present our own expert testimony, we chose to rebut the defense's experts through cross-examination, the testimony of lay persons from Jefferson County, and Petetan's own words—lengthy letters he had written to Kim while he was still in TDCJ, letters that included discussions, among other things, of economics and world affairs, letters that clearly were not written by a mentally retarded individual.

The jury deliberated about three hours on punishment. The courtroom was packed again as Judge Strother received the jury's verdict. The jury rejected the defense's retardation claim and found that there were no sufficient mitigating circumstances to justify a life sentence. Petetan then stood with his lawyers. He was by this time fully shackled and surrounded by deputies. With Allyson, Kristin, Tyler, and Wesley silently watching from the gallery, Judge Strother imposed the death sentence.

Then, one by one, Kim's children delivered their impact statements. And, as she had been during our guilt phase, Allyson was the last to speak. She calmly walked to the witness stand, pulled out a piece of paper, and began reading the statement that she had written earlier that day: "My name is Allyson Williams. I am Kimberly's youngest daughter. You took the most important person in this world that loved me. My mom will never see me get married or graduate. You would not like it if your stepdad killed your mom right in front of you. And I know that you're not stupid. You could write songs and everything just fine. God knows the truth."

Final thoughts

This case was another battle in our ongoing war with evil. We are thankful that good prevailed this time.

As members of the trial team, we were privileged to be the voices for Kim, Allyson, Kristin, Tyler, and Wesley. We will never forget them. It is our sincere hope and prayer that what we did in this case will have a positive and lasting effect on their lives. ❇

Texas District & County Attorneys Association

505 W. 12th St., Ste. 100
Austin, TX 78701

RETURN SERVICE REQUESTED