THE TEXAS PROSECUTOR

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

International extradition

Returning criminals who have fled the United States isn't easy, but it's a fight worth fighting.

On the night of February 4, 2010, Juan Castillo and his common-law wife, Monica Leija, had an argument in their home. Hours later, Castillo shot Monica in the head while she was sleeping—their children were lying in bed with her and witnessed the horrific crime. Within days of the murder, Castillo abandoned his children and fled to his home country of El Salvador. In January 2011, federal authorities reported Castillo's whereabouts in El Salvador, and I was asked to assist in the arrest and extradition process.

By Kim Bryant
Extradition Administrator in the Harris County District Attorney's Office

The U.S. has had an extradition treaty with the government of El Salvador since 1911. Our diplomatic relationship with this country, however, has always been strained. I knew that Harris County had never succesfully extradited anyone from El Salvador, and I learned from the Department of Justice (DOJ) that extradition from this country was so rare that DOJ officials could not tell me the last time it had happened. Regardless, I submitted my extradition package to the DOJ, and I "rattled their cage" every six to eight months to see if relations were changing between the two countries. For two and a half years I received the same discouraging response every time I inquired: El Salvador was denying all extradition requests. At some point, the DOJ stopped submitting extradition packages to El Salvador altogether, so Castillo's extradition package was just sitting on the back burner in Washington D.C.

Then, in the summer of 2013, I received a phone call from the DOJ's Office of International Affairs. Officials there explained that diplomatic tensions between the U.S. and El Salvador were starting to ease, and they wanted to submit the Castillo extradition package as a test case. The request for provisional arrest to El Salvador was submitted immediately, and in April of 2014, we received official notification that the Salvadorian Supreme Court had granted the request and issued a warrant for Castillo's arrest. Within seven months, he was arrested, extradited, and returned to us by December 2014. He is currently in custody pending prosecution in our jurisdiction. This was the first successful extradition from El Salvador in Harris County's history.

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The 2015 Legislative Update road show

By the time you read this column, we will have wrapped up the 2015 Legislative Update Tour of Texas. It is always fun for us to see what emerges from our audiences as the hot topics of particular interest. This year's winner? The efforts to crack down on synthetic drugs such as "K2" and "spice." It was nice to get some new tools to address what has been a real problem in many communities, and as ugly as the legislative process can get, this was some good work by the folks in the big pink building.

By Rob Kepple
TDCAA Executive Director in Austin

The award for the most groans? New Code of Criminal Procedure Chapter 42A, which is a "non-substantive" revision of the mess that is the current Chapter 42.12. It doesn't go into effect until January 1, 2017, and it was something that needed to happen *someday*, but there is always a danger that something substantive *did* get changed inadvertently. And now we all have to read it and figure out where all of our favorite parts of 42.12 went. A reminder: As we went to press, no one had yet claimed the reward for finding the first substantive mistake in the new chapter. If you think you found one, just give me a call for a chance to win a copy of the new *Quick Penal Code Reference 2015* (it makes a great Christmas gift!). Of course, we are hoping to never have to make good on the offer—we'd much rather that the new Chapter 42A came through its revision unscathed.

One note: A chart showing where pieces of the old Art. 42.12 have been moved in the new Chapter 42A is included in TDCAA's 2015 editions of *Criminal Laws of Texas* and *Code of Criminal Procedure* books.

NDAA summit on prosecution integrity

In July the National District Attorneys Association (NDAA) hosted a summit on prosecution integrity in conjunction with its annual meeting. The summit's purpose was to gather prosecutor delegates from all over the country to talk about the "state of the union" of the profession and to share the proactive steps many prosecutor offices are taking to improve the quality of justice in America. Over two days, delegates identified some significant efforts on behalf of the profession being made around the country, as well as some areas that are going to require time and resources. In the coming weeks the NDAA will produce a summary of the summit's discussion points and distribute it to all of NDAA's state directors so they can in turn pass it along to their respective state prosecutor associations. (FYI, Travis County Attorney **David Escamilla** is Texas's NDAA State Director, and Bell County District Attorney **Henry Garza** serves on the NDAA Board as a Past President.)

The challenges we face in Texas are by no means unique. In broad terms, the prosecutors in attendance acknowledged that as good public servants, we would just as soon spend our time prosecuting criminals and helping restore victims than responding to the 24-hour news cycle, which can take one ugly case and make it seem like it is the norm across America. But the delegates recognized that public perception can be very important when it comes to public trust, so we not only have to strive to get it right every time, but we also have to build trust in our communities.

Because prosecutors are busy doing their jobs, the profession as a whole is not as good as it could be at pushing back on false and misleading information that at some point is recited as fact in this echo chamber of 24-hour news, advocacy pieces, and bloggers. An example raised at the summit was the current refrain of America's "broken criminal justice system!" I tend to agree with the prosecutors at the Summit: There are things that require immediate attention, but the system is far from broken. Indeed, from my 31-plus years in the courthouse and the Legislature, the thing is working pretty much as our policymakers intended when they rewrote the Penal Code in 1993. If the consensus of our state leadership and legislative body is that we now need to change things, fair enough. But totally broken? Not so much.

There were many great projects discussed at the Summit. From conviction integrity units to community prosecution to training, there is a lot going on around the nation that

improves the quality of our work. One intriguing development is the the establishment of the Prosecutors' Center for Excellence (http://pceinc.org), a research entity associated with the NDAA that promises to bring additional research and scholarship, as well as a prosecutor perspective, to the national debate on criminal justice issues. This is something we sorely need if NDAA is going to truly serve as the "Voice of America's Prosecutors."

Police use-of-force prosecutions

As we know, one of the issues swirling in the national discussion of police use-of-force cases is the role of the elected prosecutor. Some have suggested that the local elected prosecutor can't effectively handle these cases, and many states have seen legislation filed—but not passed—on the matter. Indeed, the Texas Legislature discussed the issue in the context of HB 1369, a bill that had a public hearing in a committee but did not go any farther. The arguments in favor of HB 1369 and such a disqualification relate largely to perception: It just "looks bad" that the prosecutor, who works with the police, also prosecutes the police.

As a counter to that view, many prosecutors, including **Jeri Yenne** (CDA in Brazos County) and **Phil Grant** (First Assistant DA in Montgomery County), discussed the cases they have prosecuted involving police officers as defendants and invited the committee to focus on the law, the cases, and what prosecutors actually do in these situations. Bottom line: Prosecutors feel that we have a job we were elected to do, we take it seriously, and we feel accountable for how that job is done. And it seems this view is widely accepted around the country.

So many folks were taken by surprise when New York Governor **Andrew Cuomo** issued Executive Order 147, which by executive fiat disqualifies all New York district attorneys from the investigation and prosecution of the deaths of unarmed civilians at the hands of a police officer, and it assigns such investigations and prosecutions to the New York Attorney General. (A copy of this executive order is on our website; look for it as an attachment with this column in this issue.) Understandably, the District Attorneys Association of the State of New York did not take this very well and pointed out a number of structural and practical problems associated with the order (the DAs' response is also on our website). It should be interesting to watch how this plays out in New York. The perception may change, but what will the actual result be? Better investigations or worse? More prosecutions or fewer? More convictions or fewer?

Use of force in Texas

Given the attention police use-of-force cases have generated, the TDCAA leadership thought it was time that our profession took a close look at how we are handling these cases in Texas: what is working, what is not working, and what we can do better. If we are going to do the job, let's make sure we are doing it right. So TDCAA applied for and received a grant from the Court of Criminal Appeals to host a summit for a limited number of Texas prosecutors (by invitation only) in November. TDCAA's Investigation and Prosecution of Police Misconduct Summit will allow some of our most experienced prosecutors who specialize in police misconduct cases to discuss the challenges of the work. Our goal will be to examine the "state of the state" when it comes to these cases. We hope to identify good strategies and practices, as well as problems that we frequently encounter.

I apologize in advance if you specialize in these cases and didn't get an invite; we have a limited grant so we had to keep the program small. But our expectation is that this summit will lay the groundwork for future training, so there will be lots of opportunities to plug in. If you want more information, give me a call at 512/474-2436.

"I'm drunk, officer, but my car is driving itself!"

In an exercise in forward-thinking, the Texas A&M Traffic Institute recently held a workshop for law enforcement on what will certainly be a gnarly issue: traffic accidents involving AVs (automated vehicles—cars without drivers).

This could get complicated. No firm recommendations are available yet, but the questions were good: If an AV causes the wreck, who gets the ticket? What if the person sitting in the driver's seat is drunk but claims that the car was in complete charge of the "driving task?" What if the AV fails to stop at an accident scene? What data will be available to law enforcement in the event of an AV-related traffic accident?

A new must-read for prosecutors

We have a lot of talented folks among

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News Worthy

Prosecutor booklets available for members

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

*Recent gifts to the Foundation**

Richard Alpert
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Rene Pena
William Porter *in memory of Bill Jennings*
B.J. Shepherd
Bill Wirskye

* gifts received between June 5 and August 7, 2015 ❇

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the ranks of prosecutors, and it is fun to read their works. Many of you have a copy of *The Best Story Wins—And Other Advice for New Prosecutors*, written by John Bobo, a former Tennessee state assistant prosecutor and now NASCAR Managing Director of Racing Operations. *The Best Story Wins* is a terrific guide on how to handle yourself as a new prosecutor, and you can still get a copy on Amazon.

And now, John has broken into the ranks of a top-selling author for his latest work of fiction, *Three Degrees from Justice*. This book, a No. 1 seller for Amazon Kindle's Noir Crime Fiction, tells the story of a state prosecutor, Jack Henley, and his efforts to fix a criminal justice system in the wake of his fiancé's murder at the hands of a parolee. You are promised a read that is "as fierce as it is funny! Justice served pot-boiling hot." Agreed; a great read for prosecutors and crime novel lovers.

Former prosecutor on the Lottery Commission

Congratulations to **Doug Lowe**, former Anderson County CDA, on his appointment to the Texas Lottery Commission. Many of you know Doug as an expert in the investigation and prosecution of illegal gambling in Texas, so it only makes sense that Governor Greg Abbott would appoint Doug to the Lottery Commission. Congratulations!

Texas cases garner worldwide attention

We all know that Texas has been in the national, and even international, spotlight over cases that have happened here. The high-profile cases can put a lot of pressure on state prosecutors to make the right call. And yes, I am talking about the alligator revenge killing. You have probably watched the coverage on national news: An alligator killed a man who threw caution to the wind and jumped into the Sabine River for a midnight swim. Days later, the alligator was illegally baited and killed by a man who goes by the name Bear. (You can watch the story about this vigilante justice at http://cw39.com/2015/07/07/tale-of-texas-revenge-killer-gator-killed-by-bear.)

Many of you have spent decades trying child abusers, robbers, and worse, but you don't get a huge number of calls about those cases. Just ask **John Kimbrough**, the Orange County and District Attorney who fielded calls demanding prosecution of the alligator-killer. Or ask **Travis Koehn**, the Criminal District Attorney in Austin County, who recently had to deal with allegations of animal cruelty when a local veterinarian killed a cat—with a crossbow. (Here is that story: http://heavy.com/news/2015/06/kristen-lindsey-no-charges-texas-veterinarian-vet-killed-cat-tiger-bow-and-arrow-animal-cruelty-fired-facebook-photo.) Perhaps the alligator is a bit less likable than the cat, but these are challenging cases that test a prosecutor's skill at fairly investigating a case and making the right call based on the evidence. By all accounts John and Travis did a masterful job of handling the cases and the news media and public attention that came with them. ❇

Body worn cameras—coming soon to a jurisdiction near you

Body worn cameras have been a hot topic over the last year due to several high profile officer-involved shootings. Politicians, the media, and law enforcement reform groups have been clamoring for widespread implementation of body worn cameras (sometimes abbreviated as BWCs) across the country. Advocates for reform believe that BWCs will have a deterrent effect on officer use of force and will provide the best evidence in cases where force is used. Polling data shows that the vast majority of Americans are in favor of police wearing body cameras.

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

Additionally, technology has made body worn cameras much more user-friendly. The size and quality of body worn cameras has improved by leaps and bounds in recent years and they can very easily be worn on the chest, shoulder, or even on eyeglasses that weigh little more than regular sunglasses. The clarity of the video is incredible, much better than typical dashcam footage, and the cost has also decreased significantly, making body worn cameras very affordable.

The combination of strong public opinion, support from reform groups, improved technology, and decreasing costs has resulted in many jurisdictions across the country implementing full-scale BWC programs. Many other jurisdictions have implemented pilot programs or are considering how to use body worn cameras in the future. While the speed of implementation varies across the country, it is apparent that the body worn camera tidal wave will eventually sweep the land. In fact, the Texas legislature recently loosened the purse strings and set aside $2 million in grant funding for law enforcement agencies that want to implement BWC programs.

What does all of this mean? Body worn cameras will be coming soon to a jurisdiction near you!

Reducing use of force

Body worn cameras have a number of potential benefits. The cameras can capture critical incidents and encounters between police and the public, strengthen police accountability and transparency, and provide valuable new evidence for the prosecution of criminal cases. Recent studies on the use of body worn cameras have been very positive about their efficacy in reducing the use of force.

A recent study in Rialto, California, shows the profound effect that body worn cameras can have on officer use of force and on citizen complaints. From 2012 to 2013, the University of Cambridge's Institute of Criminology partnered with the Rialto Police Department on a large-scale study of body cameras. Rialto, a city of 100,000, has 115 sworn peace officers who deal with approximately 3,000 property crimes and 500 violent crimes per year. The homicide rate in Rialto is roughly 50-percent higher than the national average.

Over the course of one year, the Rialto PD randomly assigned all police shifts to either the experimental or control conditions. Experimental shifts had all of the officers wear high-definition BWCs. On the control shifts, no cameras were issued. The shifts were randomized on a weekly basis and at the end of the study, 489 shifts had used the body worn cameras, and 499 shifts had not. For purposes of the study, the "use of force" encompassed force more than a basic control or compliance hold, including the use of pepper spray, baton, Taser, canine bite, or firearm.

The results of the study are compelling. The study, which was published in the *Journal of Quantitative Criminology*, found that shifts without body worn cameras experienced twice as many use of force incidents as did the shifts with cameras. Additionally in the year prior to the implementation of the camera program, 28 citizen grievances had been filed against Rialto PD officers. In the year the cameras were used, the number of citizen grievances

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decreased to only three, an almost 90-percent drop. The study also noted an overall decrease of 60 percent from the previous year in the use of force by the Rialto PD following the implementation of camera deployment. Studies in other jurisdictions have shown similarly positive results.

Do BWCs decrease use of force and cut down on citizen complaints? The answer appears to be a resounding yes.

Valuable evidence

My own personal experience with body worn cameras has been overwhelmingly positive. In my jurisdiction, the Vernon Police Department has been using body worn cameras for over three years. The program was initiated by the police chief, and later my office used forfeiture funds to help purchase additional cameras to ensure that all on-duty officers could wear a BWC. While we have not conducted any studies related to the use of the cameras, I believe that they have had a strong, positive impact on prosecution.

Before I begin extolling the virtues of the camera footage, let me pause to say that BWCs do have side effects. The biggest side effect for prosecutors is the increase in the amount of time it takes to review a case at intake. A typical case may take an additional 30 to 45 minutes to review. A violent crime that involves several officers may include hours of camera footage, much of it being of no evidentiary value. Prosecutors are generally pressed for time as it is, and adding BWC footage to the mix can slow down the case review process. At the end of the day, however, the footage should increase efficiency as it provides us with powerful evidence that can potentially help us resolve more cases by plea. The footage is particularly powerful in family violence cases.

By way of example, in 2013, a Vernon police officer was approached by a man and a woman at a local truck stop. The woman quickly broke away from the man and ran to the police officer stating that the man had recently assaulted her. The woman's eye was obviously swollen. Officer Jerry Ranjel arrived at the scene as backup and interviewed the suspect who claimed that he had actually been assaulted by the victim. According to the suspect, the woman had assaulted him by scratching his face and body. Ranjel, wearing his body worn camera, asked the man to show him where the scratches were located. The man rubbed his face as if to suggest that some scratches should be there, but the camera footage clearly showed no injuries. Then the man suggested that he was scratched on his chest and torso. Ranjel asked the man to take off his shirt and show the injuries. The man handed his cigarette to Ranjel who politely held it as the man lifted his shirt. The camera footage shows Ranjel walking around the man and examining his body for injuries. There were none. The man was arrested and taken to the Wilbarger County Jail for booking. After 30 minutes in a holding cell, the man asked to speak to an officer to complain that the woman should be in jail for assaulting him. At that time, 30 minutes after arrest, the man had a bleeding scratch on his right cheek and fresh blood on his hand. Imagine that! The video footage from the scene came in quite handy at trial when the defendant tried to claim that he was actually the victim.

That is just one of many examples that I could give about the effectiveness of body worn cameras in family violence cases. The camera captures victims right after they have called 911. They are shaking, crying, distraught, and disheveled. Anyone watching the footage can see the fear in their body language and hear it in their voices. As a prosecutor, looking at that footage has a powerful impact on the charging decision. It is one thing to read a dry piece of black and white paper where a victim's behavior is described and quite another to actually see her for yourself. The footage also has an incredible impact on defense attorneys and their clients. Once the defense attorney sees the actual footage of the victim on the night of the crime, he is much less likely to believe his client's story that the victim was "crazy" and that she actually just fell down and injured herself. This puts the State in a much stronger position during plea negotiations.

Do body worn cameras provide excellent evidence that can help prosecutors achieve better results? Again, in my experience, the answer is a strong yes.

Texas legislation

If you are wondering how law enforcement agencies in your jurisdiction can get funding for body worn cameras, look no further than the governor's office. The legislature recently passed Senate Bill 158, which provides $2 million in grant funding for BWC programs. Any

law enforcement agency in the state can apply for funding that will be used to purchase the cameras. This legislation takes effect on September 1, 2015, and the applying agency is required to match 25 percent of the grant money. As a condition of the grant, the law enforcement agency must report to TCOLE the costs of implementing the program, including the costs of data storage, which can be significant.

While SB 158 created this wonderful pot of money, it also put into place several statutory requirements for the operation of a body worn camera program. These statutory requirements apply to all law enforcement agencies that operate BWC programs, regardless of whether they receive grant funding. So if you already have a law enforcement agency operating a BWC program in your jurisdiction, make sure that they are aware of SB 158 and its requirements.

SB 158 requires any agency operating a body worn camera program to adopt a policy related to the use of the cameras. The policy must ensure that the cameras are activated only for law enforcement purposes and must include guidelines for when a peace officer should activate the camera or discontinue a recording currently in progress. The policy must also contain provisions related to data retention (with a minimum of 90 days), storage, guidelines for public access, procedures for internal review, and the documentation of equipment handling and malfunction. A BWC policy may not require that an officer keep her body worn camera activated for her entire shift. In addition, SB 158 provides an officer with the statutory right to review her body camera footage prior to making any statement about a recorded incident, including, presumably, any use of force by the officer.

The legislation also has a mandatory training component. All officers who will wear body worn cameras and all other personnel who will come into contact with the video footage must be trained by September 1, 2016. TCOLE is charged with developing or approving a model training curriculum by January 1, 2016.

While the training and policy provisions do not go into effect until September of 2016, there are some provisions that go into effect on September 1, 2015. One of the more interesting provisions is that an officer may choose not to activate his camera or may choose to discontinue a recording that is currently in progress during any "non-confrontational" encounter. The statute does not define non-confrontational—I guess officers are supposed to know it when they see it. Of course, this provision does not seem to take into account the numerous interactions that go from friendly to confrontational in a matter of seconds. Its intent seems to be to allow officers to interview cooperative witnesses or other members of the public who have information related to criminal activity without recording those people. However, this poorly worded provision may put officers in a tough spot when deciding whether to deactivate their body worn cameras as doing so could potentially increase their liability.

SB 158 also requires a peace officer who fails to activate her BWC when responding to an incident to note the reason that she failed to activate the camera in her offense report. This is something that we have asked our officers to do with limited success. Typically, we see officers fail to activate the camera when they have to respond quickly to a situation and simply do not think about turning it on. For example, defendants who flee a traffic stop on foot can be seen running away on the dash cam but sometimes the officer, while running after the suspect, forgets to activate his body camera. These lapses should be expected occasionally and should not be a problem if they are noted in the offense report.

One thing that all officers need to know is that it is a Class A misdemeanor for an officer or other law enforcement employee to release a body worn camera recording without the permission of the law enforcement agency. Finally, the body worn camera footage is subject to the Public Information Act. To obtain a copy, a person must deliver a written request that includes the date and approximate time of the recording, the specific location where the recording occurred, and the name of one or more of the persons known to be a subject of the recording. There are too many details regarding the release of the BWC footage to cover in this article, so if you are interested in this aspect, definitely read SB 158.

Conclusion

Body worn cameras will play an important role in the future of policing. Their use is supported by an

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overwhelming majority of the public, and studies show that they have a positive impact on interactions between citizens and police. As this technology continues to advance and become more affordable, we can expect to see body worn camera programs in jurisdictions from coast to coast.

National Crime Victims' Rights Week 2015

In April of each year, the Office for Victims of Crime offer assistance to communities throughout the United States in observing National Crime Victims' Rights Week (NCVRW). This year's theme—*Engaging Communities, Empowering Victims*—emphasized the role of the entire community, individually and collectively, in supporting victims of crime and empowering crime victims to direct their own recovery.

By Jalayne Robinson, LMSW
Victims Services Director at TDCAA

The Office for Victims of Crime offers a resource guide each year that includes everything needed to host an event in your community. The resource guide may be obtained at http://ovc.ncjrs.gov/ncvrw/index.html, or to request materials by mail, sign up for the NCVRW mailing list at https://puborder.ncjrs.gov/Listservs/Subscribe_NCVRW.asp.

Numerous communities across Texas observed NCVRW, and TDCAA would like to share photos and stories submitted from our members.

Mary Duncan Former VAC in the Lubbock County Criminal District Attorney's Office

We had another hugely successful event this year. We had approximately 200 people in attendance, including Texas State Senator Charles Perry as our guest keynote speaker. This year we did something a little different: We recognized that peace

TOP PHOTO: Senator Charles Perry delivering a compassionate speech at the Lubbock County NCVRW event. ABOVE: Lubbock County ACDA Trey Hill, ACDA Tom Brummett, former VAC Mary Duncan, Senator Charles Perry, ACDA Eddie Wharff, and ACDA Aaron Moncibaiz.

officers and first responders can be victims too. In addition to Senator Perry acknowledging and recognizing our seriously injured peace officers (17 of them), the founder of the Peace Officers' Angels Foundation, Maria Barreda-Alvarado from the Metroplex, attended and brought all the peace officers a token of appreciation and, most importantly, encouraging words for these officers who were seriously injured.

Both a citizen and law enforcement victim spoke. Officer Michael Matsik fell victim to a crime; his case has been adjudicated and the defendant received a 50-year sentence. We also recognized more than 30 individuals for going "above and beyond" the call of duty to assist victims of crime. We recognized Jaret Greaser, Assistant Criminal District Attorney and Chief of the 137th District Court; ACDA Morgan Vaughan; Texas Ranger Todd Snyder; and Investigator Larry Burlesmith for their dedicated work on a Continuous Sexual Abuse of a Child case that involved not one or two, but eight victims! This defendant received a life sentence.

Becky Ojeman
Assistant District Attorney in Upshur County

National Crime Victims' Rights Week was recognized outside the Upshur County Courthouse on April 23. Despite inclement weather, citizens, county employees, and crime victims gained awareness of the services and outreach programs available to victims in the county. Everyone was invited to sign a banner in support of victims' rights and light a candle honoring crime victims in our area.

At left, Domestic violence survivor Angela Haney and at right, Upshur County ADA Becky Ojeman at Upshur County's event for NCVRW.

Participating organizations included MADD, Lone Star Legal Aid, the Women's Center of East Texas, and the District Attorney's Family Violence Intervention Program. Information for the Northeast Texas Child Advocacy Center was also available. Three victims who came to the courthouse for assistance with protective orders and other matters that day were able to immediately receive information and services from the agencies present.

Angela Haney, a survivor of domestic abuse, and Assistant District Attorney Becky Ojeman, the county's family violence prosecutor, received certificates of appreciation for their work in advancing victims' rights. Ms. Haney first shared her experience as a domestic violence victim at a "Next to the Jury Box" event in January of this year. As a result, she realized how important her story could be to other survivors and will be speaking to support groups at the Women's Center of East Texas. Ms. Haney and Mrs. Ojeman are teaming up with Brooke King of the Women's Center to launch a Cut It Out campaign in local salons in Upshur County. *(Editor's note: For more information on Cut It Out, visit http://www.tdcaa.com/journal/"cutting-out"-domestic-violence-one-hair-stylist-time.)*

Wanda Ivicic
VAC in the Williamson County Attorney's Office

At Williamson County's NCVRW ceremony, we presented 12 awards to individuals who went "above and beyond" this past year in their service to victims. Our emcee was local meteorologist Chikage Windler. She brought a fresh face to our ceremony

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Awards presented by Williamson County

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and was even a good sport when our last speaker, Dee Hobbs, the Williamson County Attorney, gave a presentation and called for two volunteers (our emcee and keynote speaker Mindi Sherman) to play the role of a victim. Then he challenged the rest of the audience (more than 200 people) to get up and form a circle around the two of them, really bringing home, visually, what it looks like when we engage our community in helping to protect others. We even had a prosecutor play the role of the bad guy! We had lots of fun making "the bad guy" step farther and farther away as more people circled around those two "victims."

It was a great ceremony and motivated us for the next year!

Tracy Viladevall
VAC in the McLennan County Criminal District Attorney's Office

On Tuesday, April 22, the McLennan County Crime Victims Coalition hosted an Evening in the Park. Our District Attorney, Abel Reyna, was the guest speaker, and we served hot dogs and all the fixin's to our guests. The weather was perfect, we had a good turnout, and our guests loved the door prizes and great music. It was a fun way to honor our victims and law enforcement community.

Also, we put 50 pinwheels in the courthouse lawn to recognize Crime Victims' Rights Week. They spun like crazy with the wind, but somehow they stayed up all week (perhaps emblematic of the victims they represented).

Bea Salazar
VAC in the Cameron County Criminal District Attorney's Office

We had an amazing 10th annual National Crime Victim's Expo with 43 agencies participating and over 400 people in attendance. We released biodegradable paper doves to a Holy Spirit song by Franshesca Batasteli.

Above (from left) Williamson County Attorney Dee Hobbs, emcee Chikage Windler, and keynote speaker Mindi Sherman, a survivor of domestic violence. Below, Hobbs gets the crowd involved.

Releasing paper doves in Cameron County.

Chad Bridges
Assistant District Attorney in Fort Bend County

The Fort Bend County Crime Victims Response Team held its Sixth Annual National Crime Victims' Rights Week Reception Thursday, April 23, in the Fort Bend County Justice Center.

This year's speaker was Betty Ann Rutherford, a former staff member of the Fort Bend County

Women's Center. While she worked with the Women's Center, Rutherford participated in a case of family violence in which the suspect, the husband of the victim, was sentenced to life in prison. This was a Missouri City Police Department case and Rutherford recalled the hellish life the victim endured. She said the husband violated a protective order, returned to the family home, and tortured his wife. "She was totally under his control," Rutherford remembers.

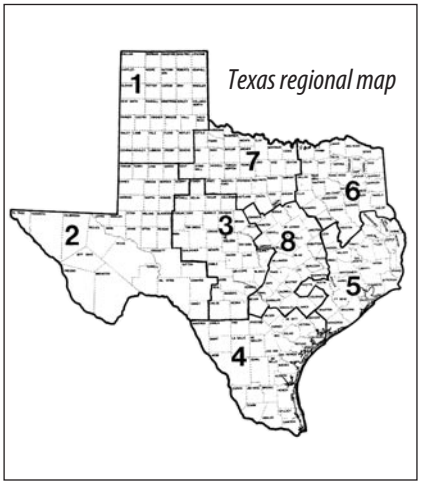
But the story is one of strength and courage. Rutherford said the victim overcame her previous life and recovered. "She went from protecting him to protecting herself and her children from him," she says. "It took time to build up the strength to overcome the situation she was in."

TDCAA Victim Services Board Elections

Elections for the 2016 TDCAA Victim Services Board (Regions 2, 4, 6, and 8) will be held on September 24, at 1:15 p.m. at the TDCAA Annual Criminal and Civil Law Update in Corpus Christi. The Victim Services Board assists in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their regions. To be eligible, each candidate must have the permission of the elected prosecutor, attend the elections at the Annual seminar, and have paid membership dues prior to the meeting. The bylaws for the board are posted at www.tdcaa.com/victim-services, and a map of the regions is at right. To register for the Annual conference in Corpus Christi, go to www.tdcaa.com/training/annual-criminal-civil-law-update.

Upcoming training

The 2015 TDCAA Key Personnel & Victim Assistance Coordinator Seminar will be held November 4–6 at the Hotel Galvez in Galveston. Don't miss this opportunity to network with other key personnel and victim service coordinators from prosecutor offices across the state. Visit www .tdcaa.com/training for registration and hotel information.



Victim Impact Statement (VIS) revision

In accordance with the Texas Code of Criminal Procedure Art. 56.03(h) and following the 84th Legislative Session, the Texas Crime Victims Clearinghouse and the 2015 VIS

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Some of Fort Bend County's Crime Victims Response Team (CVRT) members preparing for the annual Crime Victims' Rights Week reception are, from left, Le'Shae Haynes, District Attorney's Office; Marcela Ramirez, Catholic Charities; Terri Leach, District Attorney's Office; Dua Qurashi, Missouri City Police Department; Sandra Cardenas, District Attorney's Office; Raquel Porras, Stafford Police Department; Jordan Schlafer, District Attorney's Office; Irene Rios, Rosenberg Police Department; Gloria Reyes, District Attorney's Office; Leslie Rebeiro, Fort Bend Women's Center; Toni Slusser, Missouri City Police Department (retired); Barbara Reinhardt, Austin County Sheriff's Office; Ana Pineda, District Attorney's Office; Chad Bridges, District Attorney's Office; Tonika Davis, District Attorney's Office; and Ray Roberson, Bellville Police Department.

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Revision Committee have met this summer to review the Victim Impact Statement and reporting procedures for revision. The committee's goal has been to make the documents user-friendly for victims as well as criminal justice professionals. In the near future, we will be posting the revised VIS and accompanying report form on our website at www.tdcaa.com/victim-services.

The revised VIS forms may also be found in the near future on the Texas Department of Criminal Justice website at www.tdcj.state.tx.us/publications/pubs_victim_impact_statement.html.

In-office visits

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

My TDCAA travels have recently taken me to Mason, Potter, and Moore Counties to assist VACs with in-office consultations for their prosecutor-based victim services projects. Thanks to each of your offices for allowing me to offer support to your victim services programs! I thoroughly enjoy helping VACs because I have been in their shoes and realize how nice it is to have someone to whom you can turn when there are questions.

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

From (left to right) Scott Brumley, Potter County Attorney; Angel Morland, Region 1 Representative, Potter County Attorney's Office; Tina Chester, Victim Assistance Coordinator, Potter County Attorney's Office; Brenda Loveday, Director of Victim Assistance, 47th District Attorney's Office; and Jan Kile, Victim Assistance Coordinator, 47th District Attorney's Office.

ABOVE: From the 452nd District Attorney's Office in Mason County are (left to right) Tamra Frey, Victim Assistance Coordinator; and Darla Pope and Jana Ritter, Legal Assistants.

ABOVE: From Moore County are (left to right) Ruth Torres, Administrative Assistant; Audrey Contreras, Victim Assistance Coordinator for the District Attorney's Office; Terri Smith, Victim Assistance Coordinator for the County Attorney's Office; and Grace Dovalina, Executive Director at Safe Place, Inc.

Photos from our July Prosecutor Trial Skills Course in Austin

How the Foundation promotes excellence

Promoting excellence in the profession of prosecution is the mission of the Texas District and County Attorneys Foundation. One of the anchor grants to the Foundation came when then-Harris County District Attorney **Ken Magidson** offered enduring support for TDCAA's Advanced Trial Advocacy School and our Advanced Appellate Advocacy School through his office's discretionary funds. As many of you know, these courses are designed to give experienced prosecutors the opportunity to sharpen their skills and receive critiques from their peers and an accomplished faculty. It is the type of intense training designed to take good skills to the next level. And it is harder and harder to find this type of quality experience at the national level.

By Rob Kepple
TDCAA Executive Director in Austin

Because of the sustained funding from Harris County, during the week of August 3–7, the Baylor University School of Law once again welcomed TDCAA into its top-notch facility for the Advanced Trial Advocacy Course. Every year, the faculty and attendees utilize a real-life case scenario to craft various mock-trial skills, and this year's scenario was a continuous sexual abuse of a child case that was originally prosecuted by Course Director **Melinda Westmoreland**, Assistant Criminal District Attorney in Tarrant County. The scenario afforded the attendees an opportunity to delve into some complicated trial issues, as well as discuss some of the current trends arising in child sexual abuse cases.

Jack Choate, TDCAA's Training Director, reports that both attendees and faculty members told him that this course was the best training that they had ever attended. The "all-star" faculty of child abuse prosecutors from all over the state seemed to take their presentations to a level beyond their usual excellence. Though primarily a trial advocacy course, the clearinghouse of great ideas among the various faculty and participants will surely benefit the prosecution of those who harm children.

Thanks to all of you who have offered continuing support for this critical training … so the State is

The Faculty Advisors for this year's Advanced Course

A roundup of notable quotables

"Well, the problem with necrophilia cases is that the victims very rarely come forward."

An unnamed TDCAA staff attorney during a watercooler discussion about, yes, necrophilia.

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes a quote to this column will

"Next you're gonna tell me that Texas isn't a planet."

Stephen Colbert, during an interview with Neil deGrasse Tyson, who insists that Pluto isn't a planet. Colbert pointed out that Pluto has a moon ("and planets have moons!") and that the moon is as big as Texas. (http://www.ew.com/article/2015/07/15/stephen-colbert-neil-degrasse-tyson-pluto)

"I just like pigs."

Larry William Henry, 64, of Millersville, Pennsylvania, to police after he was found drunk and naked in a hog barn from which he'd previously been banned, when officers asked him why he was there. (http://abc13.com/news/police-arrest-drunk-naked-man-in-hog-barn/839792)

"None of the three looked like they were in danger. None of the three were where I would have liked them to be, but not many dogs in East Texas would fit that bill."

Humane Society of Marion County President Caroline Wedding, of the three pit bulls that were found chained on property in Gray, Texas, with little access to food and water. (http://www.news-journal.com/news/2015/aug/09/recent-case-shows-what-constitutes-as-animal-abuse)

"If the government has an idea they can come in and take over and take guns away, the stupidest place they could come is West Texas. There's more guns and ammo here and more people willing to use them than any combat area they've fought in."

Bill Ford, a commissioner in Tom Green County, as quoted in *The New York Times* regarding Operation Jade Helm 15, an eight-week military exercise conducted in seven states. (http://www.nytimes.com/2015/07/16/us/in-texas-a-military-exercise-is-met-by-some-with-suspicion.html)

"For purposes of [Art. 18.24 of the Code of Criminal Procedure], 'body cavity search' applies only to cavities below the waist and does not include a pat-down (but if that last caveat makes a difference in how you conduct a pat-down, you are doing it wrong)."

TDCAA Director of Governmental Relations Shannon Edmonds, in the *2015–17 Legislative Update* book, on House Bill 324, which prohibits a peace officer from conducting a warrantless body cavity search during a traffic stop.

"I'm not sure how they do that in Colorado. You can only kill someone one time."

Polk County Criminal District Attorney Lee Hon to a friend on Facebook, who had asked how Colorado prosecutors charged James Holmes, the gunman who killed 12 people inside an Aurora, Colorado, movie theater, with two counts of first-degree murder each. Holmes was found guilty of all 24 counts of murder.

"YOU'RE ONE OF THOSE RARE PEOPLE WHO LOOKS LIKE A CHILD AND A CHILD MOLESTER AT THE SAME TIME."

Comedian Jeff Ross to a prisoner named Michael in the Brazos County Jail. Ross filmed a comedy special, "Jeff Ross Roasts Prisoners: Live at Brazos County Jail," earlier this year. (It's available for streaming on Comedy Central's website, www.cc.com.)

New training tools for local prosecutors

I love driving all across Texas teaching prosecutors and police all I can about investigating and prosecuting DWI—no joke, I really do. But despite my best efforts, I am not sure it is enough.

Many prosecutors supplement my work by training their local peace officers between my visits, which is a great idea. There are counties I miss and officers or prosecutors who can't attend, and I get requests all the time to help local prosecutors talk about the issues I present weekly all over the state. Years ago, TDCAA created a DWI Resources page at **www.tdcaa.com/dwi** to address this need (if you haven't checked it out, go do it right now—it's chock-full of helpful info), but there are some common issues for which prosecutors wanted even more resources.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Well, I am very glad to announce they are here! After months of work, four new training videos are now online for you to watch, provide to officers, and add to your local presentations. They cover three topics—breath testing, officers' courtroom testimony, and roadside investigations—that prosecutors have long requested, and now, at long last, they are ready. Here's a little background on each topic.

Breath-Testing in Texas

Did you know that for the first time in a very long while Texas is getting a new breath-testing instrument in 2015? The Intoxilizer 5000 is being replaced by the Intoxilizer 9000. But don't panic! Our first video addresses the new instrument and breath testing in general. The science in both the 5000 and the 9000 is the same, but the interface and appearance on the new version is vastly improved. It also provides data in a much more usable form, and it looks much cooler! (Think of the 9000 as the slickest new smartphone and the 5000 like a serviceable flip-phone.)

I have talked extensively about blood testing over the last 11 years (scary, I know, but I have had this job that long). I have championed blood search warrants, promoted no-refusal initiatives, and responded to greater awareness of drugged driving, so talking about blood testing often was necessary and inevitable. But last year there were still 40,000–50,000 *breath* tests in Texas. Breath testing is a big part of DWI investigation and prosecution; it is essential to getting the job done and essential for prosecutors to understand. Being an old guy, I cut my teeth on breath-test cases, but many of today's prosecutors have far less experience with breath. Plus, we add new prosecutors to our ranks faster than we can hold schools to teach them all they need to know.

This video employs the State's leading scientific experts to explain the new instrument and breath testing in general. Mack Cowan and his team of scientists at the Texas Breath Testing Lab at the Texas Department

A behind-the-scenes photo from our shoot at DPS in Austin. Associate producer Bill Conerly, far left, discusses what Mack Cowan, far right, Scientific Director of the Texas Breath Alcohol Testing Program, will say during his on-camera interview on the science of breath-testing. Director of Photography Jack Twesten is behind the camera (center)—he's hard to see but trust us that he's there setting up the shot.

of Public Safety discuss not only the history and science behind the testing but also the incredible quality control that goes into every breath test result. Accreditation, audits, certification, and verification exist for every person in the system, as well as for the instrument and the calibration verification solutions (reference samples). While the instrument has become simpler to operate, the quality control has become much more exacting and standardized. Like our blood labs, breath-test results have the same quality in every test, in every jurisdiction, across the state.

This video also includes well-done footage of an actual test run on the Intoxilizer 9000 with excellent voiceover explanation by Meda Nix, the technical supervisor in the Travis County region. Would you like to see an actual breath test on the new instrument before you have to present it in court? Now you can—while sitting at your desk.

My hope is that prosecutors who have a breath-test case coming up can watch this video and improve their trial performance. I also hope they can use it to prepare themselves and their local technical supervisors for courtroom presentations. And prosecutors should be able to use this video for public-speaking opportunities to start discussions with their constituents at local luncheons and community outreach. And like all of the videos (more about the others below), this is a high-grade production created by the same very talented people who helped bring three DWI Summits to Texas. It is not a fly-by-night, handi-cam production. Go to our website at www.tdcaa.com/dwi and take a look.

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Another set-up shot also at DPS Laboratories, Director-Producer Kirk Hawkins (far left) and Gaffer-Grip Pat Blackard (second from left) set up lights and a boom microphone for "the talent" (W. Clay Abbott, second from right) to film an introduction and conclusion to the day's topic (the new Intoxilyzer 9000), as Associate Producer Bill Conerly (far right) listens in.

The Basic and Intermediate Courtroom Testimony videos were filmed in a spare courtroom at the Williamson County Courthouse. Prosecutors from the Williamson County Attorney's Office, including Stephanie Greger (far left) and Brian Klas (far right), went on camera to help Detective Richard Mabe of the Austin Police Department's DWI Team (center, in an outfit meant to demonstrate a "don't" when it comes to officers' appearance in court) show both the right and wrong ways to testify in a DWI case.

TOP PHOTO: W. Clay Abbott, left, and Associate Producer Bill Conerly, right, have a meeting of the minds in a spare Williamson County courtroom. MIDDLE PHOTO: Director-Producer Kirk Hawkins (in the plaid shirt) scrutinizes the jury box where Rudy Gonzalez, Deputy Chief Investigator in the Williamson County Attorney's Office, is sitting. Meda Nix, a DPS Technical Supervisor in Travis County, is on the stand and will testify as an expert witness, while Warren Waterman, normally a criminal court prosecutor, steps in as judge. ABOVE: Investigator Rudy Gonzalez and Stephanie Lloyd, Office Administrator, both in the Williamson County Attorney's Office, pose next to some of the loads of equipment that were hauled into the courtroom for the shoot.

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Basic and Intermediate Courtroom Testimony for Officers

Have you ever wished you could sit down with an officer and get a 30-minute tutorial from me on how to testify in court? Do you ever wish you could show officers how silly they will look if they don't implement your simple instructions on how to dress, how to testify, and how to keep their cool on cross? Well, your wishes (even if you first had them only when you read this paragraph) are granted.

We created two videos with the help of Detective Richard Mabe of the Austin Police Department (he's one of the best DWI officers in Texas and my longtime teaching partner) and the folks at the Williamson County Attorney's Office. The videos include actual courtroom footage of an officer messing up (on his dress, on his demeanor, and on cross), then an example of him doing

everything right, all narrated by my explanations. These videos don't just *tell* officers what to do in court: They *show them*. You'll laugh and wince when you see the "bad" portions—and then you'll cheer when you see the officer get it right.

In addition there is much for prosecutors to learn here, including how to present testimony and roadside video in court. More importantly, the videos demonstrate a number of things we must make sure officers know before we put them on the stand. You can't have prosecuted long before you see an officer make a bad mistake in the courtroom. Yet surprisingly, we seldom think it is our job to ensure the officer does not make the same mistake the next time he testifies. (If the same dog bites you twice, it is not just the dog's fault.) These videos can ease prosecutors into these very necessary (and very difficult) post-trial discussions.

My hope is that prosecutors will use these videos in lots of different ways: by hosting their own local trainings, during pre-trial preparation—you could even talk your agencies into routinely adding them to role-call instruction or academies. Lab and breath-test results tell us with no doubt that officers are arresting the right folks for DWI, but breakdowns in the courtroom are often to blame for juries not returning guilty verdicts. I really believe these training videos will be a great tool in addressing this very common challenge.

Effective Roadside Investigation through Conversation

I think in every DWI class I've ever taught, I have begged officers to slow down during the roadside stop and do more investigation before they ask the driver to leave the car to perform Standardized Field Sobriety Tests. Many of you have heard my discussion of "Mom's sobriety test" or learned about "the five best questions you can ask at the window." But after years of begging, I decided I needed to *show* officers—not just tell them—why it is important to slow down at the stop and have a longer, friendlier conversation with a possibly impaired driver.

Thanks to the following people at the Texas Breath Testing Lab at the Department of Public Safety in Austin: ***Randall Beaty,*** *Deputy Scientific Director •* ***Mack Cowan,*** *Scientific Director •* ***Heather Greco,*** *Quality Manager •* ***Zachary Kilborn,*** *Technical Supervisor •* ***Meda Nix,*** *Technical Supervisor •* ***Trooper Michael Nix,*** *Lieutenant, Texas Highway Patrol •* ***Ronald Oliver,*** *Certified Reference Material Analyst.*

Thanks to the following people from the Williamson County Attorney's Office for all of their assistance: ***Bobbie Byerly****, Criminal Court Legal Assistant •* ***Rudy Gonzalez****, Deputy Chief Investigator •* ***Stephanie Greger****, Criminal Court Prosecutor •* ***Dee Hobbs****, Williamson County Attorney •* ***Brian Klas****, Criminal Courts Chief •* ***Deb Lewis****, Court Coordinator for 26th District Court •* ***Stephanie Lloyd****, Office Administrator •* ***Heather Parmer****, Chief Intake Prosecutor •* ***Alison Tierney****, Criminal Court Legal Assistant •* ***Warren Waterman****, Criminal Court Prosecutor.*

Thanks also to ***Detectives Michael Jennings*** *and* ***Richard Mabe*** *of the Austin Police Department DWI Team and* ***Maghan Ellington****, Texas SFSTs Program Services Specialist.*

Much like in the courtroom videos I discussed earlier, this video lets officers *see* how badly this part of the investigation is often done. In it, the officer (Detective Mike Jennings of the Austin Police Department—my longtime friend and someone who trains with me on the road) pulls over a possibly impaired driver (and does it poorly), and then we cut to the studio where I break down what he could do to improve the "person contact" phase of the DWI investigation. Then we show Officer Jennings performing this part of the investigation better. (The best training always involves showing *and* telling.) All of the bad examples we show are things that I—and most prosecutors—have actually seen when we've sat down to watch the video of the roadside stop.

I have the highest hope for this video: that everyone who trains officers on DWI will use it. The National Highway Traffic Safety Administration and the traffic community have done a great job in the last couple of decades in pushing the SFSTs—a great tool that has produced great results—but one unintended consequence is that officers have abandoned a tool that has worked ever since the first cop shouted "Halt—who goes there?" And it *still* works for every officer who has ever effectively questioned a suspect: That magical tool is simple, friendly conversation—instead of an abrupt confrontation—with a citizen driver. Conversation (rather than confrontation) results in a much slower walk to the back of the squad car, but it nets a whole lot more evidence than a quick and curt interaction with an impaired driver. In this

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new training video, this art of conversation is not only discussed, but more importantly it is demonstrated.

Final thoughts

The last 11 years have clearly taught me that peace officers desperately want to hear from prosecutors. They want to be taught and shown what they can do to improve their cases. In creating these video tools, I hope that prosecutors will use them to create far better dialogue with their local officers and constant training on how those officers can improve at the roadside as well as on the stand. I hope the videos make those tasks easier.

I also hope to create a place where brand-new prosecutors can go for ideas and information that they would otherwise learn the hard way (by losing cases and letting impaired drivers go free). Please take a look at these new tools and make whatever use you can of them. Each video can be viewed from our website at www.tdcaa.com/dwi; each video can also be downloaded so you can keep them on your laptop or on your office's server. Take them, use them, and make the roads safer for the people of the State of Texas.

All of this would not have been possible without Bill Connerly, our longtime video producer and his top-notch media team; the TDCAA staff; our numerous, very talented volunteers; and funding through our TxDOT traffic safety grant and the Texas District and County Attorneys Foundation. I hope these new resources help! ❇

Testimonial or not? The Supreme Court delves again into the Confrontation Clause

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

Ever since *Crawford v. Washington* reinvigorated the Confrontation Clause, practitioners have struggled with how to decide whether a statement is "testimonial" for purposes of invoking the Confrontation Clause. Out-of-court statements are often vital in domestic violence and child abuse cases, and often such statements are given to social workers, teachers, or counselors in settings far removed from the police station interrogation of *Crawford*. To what extent does the Confrontation Clause apply to these types of statements? The Supreme Court again waded into the discussion in *Ohio v. Clark* and delivered an opinion with many useful arguments for prosecutors.

Crawford and the Confrontation Clause

In 2004, *Crawford v. Washington* changed the landscape of criminal trials as it moved the focus of the admission of hearsay away from the reliability of the statement and instead considered whether the defendant had the opportunity to confront the declarant.[1] Because the Confrontation Clause applies only to "witnesses against [the defendant]," *Crawford* held that any "testimonial" statements could not be introduced without giving the opportunity for the defense to cross-examine the declarant. But *Crawford* left one crucial point unclear: What exactly is a testimonial statement? The Court concluded that "at a minimum," it is testimony at a preliminary hearing, before a grand jury, or at a prior trial and a declarant's statements during police interrogation.[2] But the decision left it to future courts to determine what else did or did not count as testimonial.

Further cases helped define testimonial for confrontation purposes. In *Davis v. Washington*, the Court laid out the "primary purposes" test.[3] Statements are testimonial when made in the course of police interrogation whose primary purpose is to establish or prove past events relevant to future prosecution. But statements made for the primary purpose of responding to an ongoing emergency, even in the course of police interrogation, are not testimonial. In other words, an assault victim's 911 call or initial statements to police at the scene are generally admissible, whereas further questioning after the victim is separated from the abuser is not.

Michigan v. Bryant also elaborated on the primary purposes test,

confirming that it was not limited solely to ongoing emergencies.[4] The Court recognized that there may be other circumstances in which a statement is not made with the primary purpose of creating a substitute for trial testimony. Instead, a court should consider "all of the relevant circumstances." Thus, a dying declaration made by a shooting victim at the scene was not testimonial because it was aimed at helping the police find a shooter who was still at large.

Preschool teachers uncover child abuse

Under this backdrop, the Ohio courts considered the case of *Ohio v. Clark*.[5] Three-year-old L.P. lived with his mother and her pimp, Darius Clark. When his mother went out of town to work as a prostitute, L.P. and his little sister A.T. stayed with Clark. One morning when L.P. went to preschool, his teachers noticed his left eye was bloodshot. One of them asked what happened, and L.P. said "nothing" and that he fell. When they reached the brighter lights of the classroom, the teacher noticed red, whip-like marks on L.P.'s face. She asked him, "Who did this? What happened to you?" L.P. replied that "Dee"—Clark—did it. The teacher called a child abuse hotline to report the conversation. Ultimately the children were removed from the home with more signs of abuse—including black eyes, belt marks, bruises, a burn, and 18-month-old A.T.'s pigtails ripped out at the root.

Clark was indicted for various charges of child abuse. L.P. was found incompetent to testify due to his age, but Ohio law permits the admission of "reliable hearsay" by child abuse victims, and L.P.'s statement to his teacher that "Dee" was responsible was admitted. Clark argued, at trial and on appeal, that L.P.'s statement to his teacher violated the Confrontation Clause because the teachers, as mandatory reporters of child abuse, were acting as agents of the State and acted for the purpose of gathering evidence. The Supreme Court of Ohio agreed and reversed Clark's conviction.

The primary purpose test and beyond

The key issue when the Supreme Court granted cert of *Clark* was whether L.P.'s statements counted as "testimonial." If not, the Confrontation Clause did not apply and state hearsay laws governed. The first issue was one that the Court had avoided in all previous Confrontation Clause cases: Must a statement be made to the police to be testimonial? Previous Confrontation Clause cases involved statements made to the police, so the Court had refused to address whether this was a necessary requirement. Here, L.P.'s statement was made to his preschool teachers, which, the State had argued, categorically removed it from the ambit of the Confrontation Clause, while Clark argued that because teachers were mandatory reporters of child abuse, they became state agents. The Supreme Court refused to adopt a categorical rule, noting that there may be some statements made to non-law enforcement that "could conceivably raise confrontation concerns."[6] But the Court did note that non-law enforcement statements are much less *likely* to be testimonial.

The main focus of the opinion was on the primary purposes test, and the Court ultimately concluded that L.P.'s statement to his teachers was not testimonial. First, as in *Davis*, the statement here was made during an ongoing emergency.[7] The Court noted that the teachers' concern was to "protect a vulnerable child who needed help." They did not know who had hurt him, whether it was safe to release him to his guardian at the end of the day, and whether any other children were in danger. Their questions were aimed toward "identifying and ending the threat."

The Court also pointed out that there was no indication either L.P. or his teachers intended to gather evidence for prosecution.[8] The teachers did not tell L.P. that they were going to arrest or punish his abuser. The conversation was "informal and spontaneous." Most importantly, the Court considered L.P.'s age. It noted that young children "have little understanding of prosecution," and a young child in L.P.'s circumstances would be interested in ending the abuse or "have no discernible purpose at all."[9] In other words, a child might simply be answering his teacher's questions without any intent to punish or prosecute anyone. The Court did not *quite* introduce a categorical rule that young children's statements can never be testimonial, but it found that their statements "rarely, if ever, implicate the Confrontation Clause."

In all, the Court found that L.P.'s statement to his teachers was not given for the primary purpose of prosecution. The child's age, the informality of the questioning, the fact that questioners were not police officers,

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and the ongoing emergency were all factors.

On a final note, however, the Court observed that the primary purpose test is "a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause."[10] Even if the primary purpose of the statement was for future prosecution, the Confrontation Clause nonetheless did not bar the introduction of statements "that would have been admissible in a criminal case at the time of the founding."[11] The Court examined a variety of common law cases from the 17th and 18th Centuries to conclude that L.P.'s statements would have been admissible at the time the Constitution was written.[12] In these cases, courts tolerated "flagrant hearsay" from child victims considered too young to testify because they could not appreciate the significance of their oath. Because the framers of the Constitution would have considered this type of hearsay admissible, the Confrontation Clause should not bar L.P.'s statement in this case.

Going forward

Ohio v. Clark is an excellent ruling for the State and contains some very exciting language for future possibilities. It is important not to overstate the importance of this case: It does *not* give carte blanche to introduce hearsay statements despite the Confrontation Clause. But it *does* give prosecutors some very important arguments to make in many cases, and let's hope that it allows the introduction of many *more* statements. A few key points to consider are:

- **There is a great deal more leeway now in introducing child hearsay.** The Court backed off of a blanket rule, but its broad language that statements of "very young children will rarely, if ever, implicate the Confrontation Clause" certainly gives a lot of breathing room.[13] The main limitation is that it applies to "very young" children, not all children. Certainly teenagers and preteens in most cases can be found to understand that their statements could be used to arrest and prosecute an offender. Be prepared to argue the child's specific age and level of understanding in a particular case.
- **The Court also seemed to draw the definition of "ongoing emergency" fairly broadly.**[14] L.P. was in a classroom environment where he was not around his potential abuser, so the situation would seem to be more akin to *Hammond v. Indiana*, where a domestic violence victim had been separated from her abuser before giving a statement, and that separation was used to conclude the situation was no longer an ongoing emergency. Pay close attention to the factors the Court used here, including that the teachers needed to know if it was safe to release L.P. at the end of the day. The Court also pointed out that the circumstances were "not entirely clear," so the perspective of the questioners at the time of questioning can make a difference—whether they already know anything about the situation or if there are many possibilities that might require immediate reaction.
- **Circumstances matter.** The Court repeatedly noted that lower courts must consider all "relevant circumstances" in considering the primary purpose of the statement.[15] This is a good totality of the circumstances argument that will allow prosecutors to raise any other issues that might be relevant to the state of mind of either the declarant or the witness. Factors such as the declarant's age or ability to understand, whether the questioner ever said that he was interested in arresting or prosecuting the offender, the informality of the situation, the spontaneity of the questioning, and the declarant's stated purpose were all factors the Court considered here.
- **Whether the testifying witness was a member of law enforcement is a relevant circumstance.**[16] Although the Court backed off the categorical rule, it did repeat several times that the fact that the teachers in Clark were not law enforcement officers contributed to the conclusion that L.P.'s statement was not testimonial. Statements made to non-law enforcement personnel are "significantly less likely" to be testimonial.[17]
- **It does not matter that the questions did ultimately end up resulting in Clark's prosecution, or even if the teachers could have foreseen that it would.**[18] Merely because the teachers knew they would be reporting any allegations of abuse to the state did not mean that was their primary purpose in asking the questions.
- **The Court's consideration of the admissibility of the statements at the time of the founding is interesting but should not be taken too far.** Justice Scalia wrote a heated dissent,[19] and courts are unlikely to consider admissibility at the time of founding as a stand-alone argument for avoiding the Confrontation Clause. But it can, as in this case, be

useful as an additional argument.

In all, *Ohio v. Clark* is not a trump card, but it does add arrows to our quiver and should be very useful in cases involving children and statements to non-police witnesses. ❇

Endnotes

1 *Crawford v. Washington*, 541 U.S. 36, 51-54 (2004).

2 *Id.* at 68.

3 *Davis v. Washington*, 547 U.S. 813, 822 (2006).

4 *Michigan v. Bryant*, 526 U.S. 344, 369.

5 *Ohio v. Clark*, 135 S.Ct. 2173 (2015).

6 *Id.* at 2181.

7 *Id.*

8 *Id.*

9 *Id.* at 2182.

10 *Id.* at 2180-81.

11 *Id.* at 2180.

12 *Id.* at 2182.

13 *Id.*

14 *Id.* at 2181.

15 *Id.* at 2180, 2182.

16 *Id.* at 2182.

17 *Id.* at 2181.

18 *Id.* at 2183.

19 *Id.* at 2183-85 (Scalia, J., concurring).

Law & Order Award winners

ABOVE: State Representative Travis Clardy (R-Nacogdoches) came to TDCAA's Legislative Update in Lufkin to receive his Law & Order Award recognizing him for passing legislation to help stem the spread of synthetic drugs and for his work on the House Judiciary and Civil Jurisprudence Committee. Presenting the award to Rep. Clardy (center) were Shannon Edmonds (left), TDCAA's Director of Governmental Relations, and 159th Judicial DA Art Bauereiss (right) of Angelina County, who serves as the director for TDCAA Region 5 in southeast Texas.

BELOW: State Senator John Whitmire (D-Houston) received his Law & Order Award at the Houston stop of our Legislative Update tour in recognition of his work as chairman of the Senate Criminal Justice Committee. Presenting the award to Chairman Whitmire (holding the plaque) were (from left to right) Harris County First Assistant District Attorney Belinda Hill, Harris County Attorney Vince Ryan (who holds the County Attorney At-Large seat on the board of directors), and TDCAA Director of Governmental Relations Shannon Edmonds.

Continued from the front cover

International extradition (cont'd)

Extradition in Harris County

The Harris County District Attorney's Office created the formal position of extradition administrator in 2008, and I moved into that role. I had worked on U.S. state extradition cases, Interstate Agreement on Detainers, and federal writs since 1999, and I became adept at returning fugitives wanted in Harris County regardless of where they were within the U.S. In my new role, some of my focus shifted to international extradition. I soon realized a pattern among many of our murder cases: The fugitives fleeing to other countries were rarely extradited back. In some instances, I discovered case files with extradition paperwork—but no extradition was ever granted. I consulted the homicide divisions of our police department and sheriff's office and found that detectives were operating on the assumption that if a fugitive fled the U.S., there was nothing that could be done to bring him back.

Over the last 15 years, I have worked to change that mindset, and Harris County has extradited about 60 fugitives from other countries. On average, our jurisdiction works on 10 to 20 international extradition cases annually. These cases can be challenging, but the rewards are great.

But what steps a prosecutor should take when she finds out that a defendant has fled to another country is not always clear. The pointers below can help when pursuing a defendant and seeing an international extradition case through to the end.

The Department of Justice is your BFF (best friend forever) with international extraditions.

The Department of Justice's Office of International Affairs (DOJ OIA) is the county prosecutor's tour guide and BFF. We need these folks to navigate international extradition waters, so do not alienate them. To stay on their good side, prosecutors and extradition officials need to keep track of their deadlines and responsibilities concerning finalizing an extradition package—in other words, don't wait until the last minute. An international extradition package goes through many agencies before it is in the asylum country; we need to give DOJ enough time to get its part of the package together to meet the treaty deadline.

In the area of international extradition, the DOJ can make or break us in terms of success on these cases. The lawyers at the DOJ are specialized in international law, and they have very close working relationships with extradition teams on the other side of the world. The DOJ lawyers and their support staff are employed to help us draft an extradition package that gives us the best chance to get an affirmative ruling from the asylum country.

No matter how frustrated you get with their numerous questions about your case—and you *are* going to get frustrated when they send back a package for the third time with revisions and questions that you feel are insignificant—do not throw in the towel. Their job is to make sure that the evidence and facts that you are presenting to the asylum country are concise and leave no room for confusion.

The main number to the DOJ OIA is 202/514-0000. Ask the receptionist to transfer you to the lawyer who handles the country to which the fugitive has fled.

Extradition from another country is a judicial process.

It is important to understand that an international extradition is a judicial process that takes place in the asylum country. The demanding jurisdiction (that's us) is asking a sovereign country to take a look at the facts and evidence of a case and make a judicial determination that it will allow the extradition of a person from their country. Sometimes this is a hard pill to swallow on our end because it's *our* case and this person committed a crime in *our* jurisdiction. That fugitive, however, is now in another country/jurisdiction, and we have to play by their rules.

The demanding jurisdiction has to meet certain elements, just like any other judicial process within the U.S. The proving elements for an international extradition are not the same as a U.S. state extradition. In a state extradition, the demanding jurisdiction has to prove just that the person in custody is a fugitive; that valid charging documents exist to formally charge the fugitive; that the fugitive has violated the law in your

state; and that the person in custody is the person sought for the prosecution. In an international extradition, we have to prove those same elements in addition to presenting facts and evidence proving that probable cause exists to move forward with a trial in our jurisdiction.

Additionally, that probable cause standard has to meet the standard of the asylum country, not just the U.S. standard of probable cause. For example, Australia has a higher standard of probable cause for a theft charge than the Texas' standard of probable cause. In this scenario, a Texas prosecutor may find it challenging to have enough evidence to move forward with an international extradition simply because the burden of proof cannot be met in the asylum country. This is something important to consider when assessing a case for international extradition because no one wants to do all that work just to find out the facts don't meet the asylum country's standard of probable cause. Consult with your BFF at DOJ for more about this.

Consider other options.

Before embarking on the challenges of an international extradition, consider the other options. Extradition is not always the best choice, and it is certainly not the only choice we have to return the fugitive back to the U.S. If the fugitive is a U.S.-born citizen with family ties to the U.S., deportation could be a viable option. A U.S. Marshal or FBI contact should be able to assist with a deportation because they work closely with the immigration services in other countries. I always attempt a deportation first and then proceed with an international extradition if the deportation attempt fails.

It is also important not to do both at the same time. If you submit an extradition package to the DOJ while a deportation is being attempted and that deportation happens to be successful, there could be diplomatic ramifications with that asylum country. When we submit an extradition package, we enter into a "good faith" relationship with that country committing to its officials that we intend to go forward with the judicial process of extradition and giving them a chance to review the facts and evidence to make a judicial finding. In other words, submission of an extradition package to another country is a formal request to arrest and consider that fugitive for extradition. We risk alienating that country by going back on our commitment to extradite.

In a capital murder case in which the death penalty is being considered, international extradition most likely will not be an option. Depending on the asylum country, you'll have to assure that country that you will not seek the death penalty, and that assurance is binding under the extradition treaty. If you're not willing to take death off the table, don't bother sending an extradition package to the DOJ.

INTERPOL can be a good option when dealing with a country where we don't have good extradition relations. Diplomatic relations between the U.S. and countries such as Venezuela, China, and Russia are often strained and challenging, and filing a Red Notice in countries such as these can be beneficial for many scenarios. A Red Notice alerts member countries of INTERPOL that we are interested in seeking the location and arrest of a wanted person with a commitment that we'll seek extradition or similar lawful action if we receive a notification. Some member countries will even temporarily detain a fugitive on a Red Notice until we get a provisional arrest warrant in place. If I do not have a specific location on a fugitive but I have good information that he is in a city or state of a particular country, I will file a Red Notice. Or if I receive information that a fugitive has fled to a country where the U.S. has no extradition treaty, I will file a Red Notice. Just remember that a Red Notice is a formal commitment that you will seek extradition if the fugitive is located.

Dual citizenship could be a hurdle we have to jump over.

Dual citizenship means that a person is a citizen of two countries at the same time. Each country has its own citizenship laws based on its own policies. For example, the U.S. government recognizes the existence of dual citizenship and its citizens may possess dual citizenships. Other countries do not allow dual citizenship.

This difference can present a problem in international extradition because some countries will not allow extradition of their citizens even if they have an extradition treaty with the U.S. (for example, Venezuela). So a naturalized U.S. citizen who was born in Venezuela, committed a murder in Texas, and fled to his home country of Venezuela would likely *not* be extra-

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dited to the U.S. Venezuela would consider that fugitive a Venezuelan national.

You could also be dealing with dual-citizenship issues with a U.S.-born citizen who flees to a country where her parents were citizens. Mexico, for example, would likely consider that U.S. citizen a dual-citizen if she had family ties in Mexico. In this instance, a Texas prosecutor could not deport this individual even though the fugitive is a U.S. citizen. We would have to go through the judicial process of an extradition to get the fugitive back on U.S. soil.

The Rule of Specialty really is *special.*

The Rule of Specialty is a principle of international law that is included in most extradition treaties. It states that a person who is extradited to a country to stand trial for criminal offenses may be tried only for those offenses, not for any other offenses.

If a prosecutor's office desires to seek further charges on a defendant who has already been extradited internationally, prosecutors can submit a new extradition package to the DOJ detailing the evidence and facts in the new violation. However, this always becomes a logistical nightmare once the defendant is already returned to your jurisdiction simply because his cases are already going through the court system, and an extradition package can take six months to even three years to receive the judicial answer from the asylum country to move forward. Inevitably, the case will get to trial in Texas before we receive an answer from the asylum country as to whether we have permission to move forward with the new prosecution. It's much better to indict the defendant with anything for which we possibly intend to prosecute him on the front end of an international extradition package. Do not risk violating an extradition treaty. It is not worth the diplomatic trouble that would follow.

Dual Criminality is a consideration.

As with the Rule of Specialty clause, the Dual Criminality clause is a principle of international law that is included in most extradition treaties. According to the dual-criminality principle, a person may be extradited only when his actions constitute an offense in both the asylum and demanding countries. This means that the absence of a potential defense does not establish the absence of dual criminality. So if you are evaluating a question of dual criminality, you must look at the accused person's conduct and determine if that conduct falls within the parameters of the asylum country's own statutes. Consult with the DOJ about this because it may require some "out of the box" thinking.

It's important to note that the charge of bail jumping, for example, is not an extraditable offense in many countries, including Mexico. However, sometimes we can get around this challenge depending on the charge. Interference with child custody is not recognized as a criminal violation of Mexico's criminal statutes either; however, we may be able to present a case of kidnapping in the extradition package, depending on the facts of the case, and potentially get an affirmative ruling from the Mexican courts.

The statutes of limitations vary from country to country—and that matters.

Under Texas statutes, as long as we indict a case before the time limit runs under statute, we are not barred from prosecution. This helps prevent a fugitive from escaping prosecution by merely evading law enforcement for a period of time. But dual criminality does come into play when dealing with international extradition. In some countries the statute of limitations is based solely on how old a case is. If the statute of limitations for that particular charge has run in the asylum country, we may be barred from extraditing the fugitive.

For example, did you know that Mexico has different degrees of murder with a different range of statutory limitations for each? If the facts in your case include both the defendant and victim having a weapon, it's considered a dual fight homicide in Mexico with a five-year statute of limitation. A general fight homicide has an eight-year statute of limitation. A general homicide has an 18-year statute of limitation. Homicide of a relative carries a 25-year statute of limitation. A general homicide with aggravating factors defined under Mexico's Constitution carries the highest statute of limitation for murder in Mexico: 45 years.

This means Mexico's court system will likely deny an extradition request where the crime was a typical nightclub murder involving one weapon and the case is older than eight years. We are dealing with a sovereign nation that has its own rules, and we are forced to play by those rules under the extradition treaty agreed to by both countries.

The U.S. Marshals Service and FBI are invaluable resources.

Offense reports often include information about where a defendant may have fled, and murderers and sex offenders almost *always* go home to family. That is when U.S. Marshals or FBI agents and their resources and contacts in other countries can help confirm information for a local prosecutor. Crime victims calling to ask if we can pursue the defendant can also be valuable resources for information as to the defendant's whereabouts that we can pass along to federal authorities. In fact, the DOJ will require that a federal law enforcement agency (U.S. Marshals or FBI) be assigned to the case because those agencies coordinate with authorities on the ground in the asylum country to return that fugitive back to the U.S.

Many jurisdictions have fugitive task forces in their area. For example, the Houston area has two: one sponsored by the U.S. Marshals Service and another by the FBI. They generally are made up of federal, state, and county agencies that all work together to catch bad guys. Utilize any fugitive task force that is available because they are a great resource on both the front and back ends of an extradition and throughout the process.

An international extradition can be complex and is oftentimes consuming, but do not be dissuaded.

Tenacity and patience are important qualities to possess when working an international extradition case. This isn't a situation where you'll always do A, B, and C and get X result.

One defendant in a brutal 1993 capital murder case, for example, immediately fled to Mexico and evaded law enforcement until 2013. A formal extradition package was submitted a couple of months after his arrest and over two years later Mexico has still not reached a judicial decision. Needless to say, I'm frustrated, but I keep "rattling the cage" at the DOJ, asking my contacts there to follow up with Mexico for an update on this case.

I've waited up to six years to get a fugitive back from another country. Keep being the squeaky wheel, and it will eventually happen.

If a fugitive is arrested on a provisional arrest warrant, don't miss the treaty deadline.

Caseloads must be prioritized, and extradition matters tend to be placed on the back burner, but it is important not to let this happen. Once a defendant is arrested in another country, the clock is ticking, and we are bound by the treaty to fulfill all of its obligations, including the deadlines. Depending on the asylum country, we may have only a few weeks to finish the formal extradition package. At best, we will have 30 days to finalize everything.

At the point of arrest, we will have already submitted an application for provisional arrest and completed a first draft of the affidavits. It's time to get those affidavits into final form, have them executed, and put your exhibits together. Don't miss the treaty deadline. Think of it this way: You have formally asked a country to locate and arrest a fugitive for you. That country has housed and fed that fugitive only to release him months later because you didn't fulfill the treaty obligations and missed the deadline. Violating the treaty never makes for a great day. It makes the U.S. look foolish and discredits our character as a nation and as a jurisdiction. Put these cases on the front burner once a fugitive is arrested. If you follow the DOJ's timeline, you'll be in good shape.

If an international extradition is denied by the asylum country, is it over?

I adhere to the hard and fast rule that it is never really over. But if your extradition request is denied, what do you do?

1) Consider requesting a foreign prosecution. In many countries, we can surrender a case to the asylum country and ask authorities there to prosecute and sentence the fugitive in their jurisdiction. I have had a handful of extradition requests denied out of Mexico and each time, Mexico has automatically prosecuted that fugitive under its laws and sentencing guidelines. Those fugitives received significant time and to my knowledge are still serving their sentences. Foreign prosecution can be a beautiful thing, but we must understand the limitations. We are surrendering our case to that country, which means we will have no control over the outcome.

2) File a Red Notice with INTERPOL. As mentioned previously, a Red Notice is an international request for cooperation allowing police in member countries to share critical, crime-related information. It is basically a collateral sent to all member countries of INTERPOL

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asking them to attempt to locate a fugitive on our behalf. If an extradition request is denied, filing a Red Notice can help. For example, if a fugitive takes a vacation to a neighboring country, he can be arrested in that country on the Red Notice and put into extradition proceedings.

Why it's worth it

The absolute best part of my job is being able to call crime victims and tell them we arrested the person who murdered their loved one. The day that Juan Castillo was extradited back to the U.S., the victim's family was so elated that the joy was palpable. There is nothing like that feeling. Don't give up on arresting the criminals that flee the United States just because it is hard. I can assure you that the time, patience, and perseverance that it took to apprehend and extradite Juan Castillo was paid back to me tenfold when I saw the relief on the faces of Monica's family. Your elected official is depending on you. Federal authorities are depending on you. Most of all, the crime victim is depending on you. You are their main advocate in an international extradition case, and it is a fight worth fighting. ❇

NEWSWORTHY

Law & Order Award winner

State Representative Four Price (R–Amarillo) came to TDCAA's Legislative Update in Amarillo to receive a Law & Order Award recognizing him for passing legislation cracking down on synthetic drugs and for his work on behalf of prosecutors and crime victims while serving on the House Appropriations and Calendars Committees. Presenting the award to Rep. Price (left) was 47th Judicial DA Randall Sims (right) of Amarillo, who serves as the Secretary/Treasurer for TDCAA's board of directors.

Lights, camera—captured!

Austin police are employing game cameras to catch stalkers and those who violate protective orders in the act—and gather fantastic video evidence in the process.

By Senior Sergeant Eric De Los Santos
Austin Police Department's Violent Crimes II–Domestic Violence/CRASH unit

Scout cameras, also known as game cameras, have been used for years by ranchers and hunters to photograph livestock, game, and trespassers. Applying this same technology in protective order, bond condition violation, and stalking cases has proven to be an effective yet inexpensive means to obtain evidence of these violations and behavior.

In the summer of 2014, the Austin Police Department, in an effort to seek more aggressive approaches to domestic violence prevention, and with an eye on budget considerations, ran a three-month pilot program. We considered and implemented numerous approaches for the pilot program—all of them were simple, and the department did not spend any additional funds on them. One such idea was to install sensor-activated scout cameras (also called game cameras) at the homes of several victims of domestic violence and stalking. We hoped to catch violators in the act and snap photographic evidence of their crimes. (More about the specifics is below.)

A review of the pilot results was promising. Three months of operations resulted in a 5-percent decrease in domestic violence aggravated assaults during the same time period of 2014 and in previous years. There was also a decrease of more than 100 bond condition violations per month (down from an average of 267 violations to 149 violations) during the pilot period. (It's also interesting to note that bond condition violations returned to pre-pilot averages a month after the much-publicized conclusion of the pilot.)

Austin Police Chief Art Acevedo and Assistant Police Chief Troy Gay reviewed the results and on January 1, 2015, made the pilot program a permanent unit consisting of four patrol officers, including me. The unit is called Coordinated Responses to Abuse for Safe Homes, or CRASH.

The information gleaned from the pilot program indicated that CRASH needed these sensor-activated cameras at a protectee's residence. The process of obtaining these cameras for testing included contacting several manufacturers of scout cameras and explaining our objectives; each graciously provided us with a model that met our requirements to test. Those requirements were:

- day and night photographic capability,
- multiple shot and video capability,
- date and time stamp embedding,
- sensor activated,
- able to withstand various weather conditions,
- battery life, and
- no detectable flash at night

The camera that performed the best for us was the Bushnell Aggressor, priced at $165.49, at the government rate. In addition to the actual camera, we tested an assortment of rechargeable and non-rechargeable batteries (each scout cam takes eight AA batteries to operate). We found that regular batteries sufficed, but they did not perform with the consistency of lithium or nickel-cadmium (NiCad) batteries. This was a painful lesson to learn when one of our scout cameras with regular batteries shut down minutes before a drive-by shooting of a protectee's residence. Had the batteries not failed, the camera would likely have captured the incident. We finally opted to use the NiCad rechargeable batteries and quality chargers to ensure the batteries remained properly conditioned for longer life. We now average as many as 4,000 day and night photographs in a three-day period with acceptable battery levels remaining.

We established a protocol for the use of the scout cameras, as we have a limited number. Conditions for the use of the scout cams include:

- a high-threat case,
- cooperative victim and household,
- a signed consent form that warns the victim and adult household members that any criminal activity

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captured by the camera can be used against them,

- apartment complex managers must give permission for open area installations,
- location allows cam(s) to be hidden, and
- no consent required for public area installations

Typical length of deployment at a residence has been a week to two weeks, and we set that time-frame according to the level of threat to the protectee and/or if the suspect had been arrested. The very first time we deployed a scout camera, it captured images of a suspect violating a protective order after just two days, and we obtained a warrant for the violation.

Since that first deployment, the scout cameras have been capturing images of suspects violating or exhibiting stalking behavior on a somewhat regular basis. Sometimes we've even captured footage of violations the same night the camera was deployed! One memorable capture involved a serial sexual assault suspect. Our Sex Crimes Unit requested a scout camera be set up at the home of a woman who had been sexually assaulted. The scout camera captured the suspect returning the very next night. The DNA match and clear photos with date and time stamps captured by the scout camera make for a great case to present, though it has yet to go to trial.

Another memorable case involved a stalking victim with a high-risk assessment. Three cameras were deployed at her residence, including one in the backyard. A few nights later, two cameras captured images of a suspect prowling around the front of her home at 3 a.m. The third camera was stolen the same night the images were captured, but two cameras were left in place and checked every other night for new images. After three weeks of nothing unusual, the cameras captured 60-plus images of the suspect prowling the house at 2:30 a.m. Based on the timestamps, we were able to determine the suspect stayed in the backyard for two hours. CRASH officers searched the yard and found where the suspect had defecated during his stay back there, and he had left ear and fingerprint impressions on the rear sliding glass door. The suspect was interviewed and confessed; he also admitted that he knew his stalking behavior was escalating and he feared that he would eventually be violent. A warrant for stalking was obtained.

While nothing is more effective than officers on surveillance for spotting a violation and reacting immediately, most departments lack the financial and personnel resources to deploy multiple officers at multiple locations on a 24-7 schedule. Scout cameras allow for surveillance of multiple locations around the clock. Officers go to camera locations to switch out batteries and SD cards on a daily to every-other-day basis. Our protocol for the initial installment takes approximately 30 minutes, and swapping out batteries and SD cards takes 10 to 15 minutes, and that includes a check of the area for a suspect first. Officers have the capability to review the images in the field or in the office, and upon seeing violations, they arrange for arrest warrants, usually on the same day. In terms of preventing violent crime, scout cameras are a low-cost option (compared to more officers in the field). Of all the tools and resources that CRASH has and is constantly developing, the scout camera is the simplest, cheapest, and most effective tool in our post-response arsenal. It is ideal for both small and large departments, and it yields results for all kinds of crimes, such as sex assaults, thefts, narcotics, and gangs.

Another benefit of the scout cameras is the interaction that takes place between the CRASH officer and domestic violence victim. Victims are reporting and writing that they feel safer and more empowered because they are working with these officers to increase their safety and develop evidence against their abusers. They feel like they are retaking control of their lives—and they are telling their friends about the program and how it's helping. Perhaps this encourages others who are in abusive relationships to seek assistance. ❇

Editor's note: Senior Sergeant Eric De Los Santos has been with the Austin Police Department for 27 years. His work experience includes seven years on patrol, five years in homicide, and a total of 13 years with the Organized Crime Division. He is currently assigned to Violent Crimes II–Domestic Violence/CRASH unit and may be reached at edls1737@yahoo.com

Legislative changes to the occupational driver's license statutes

Big changes are afoot when it comes to impaired drivers who want to be out on the roads again.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

The Texas Legislature finally figured out what every misdemeanor prosecutor gets in his first few days on the job: Suspending someone's driver's license does not keep him from driving.

Being able to move across the big distances this state is so famous for has always been an issue. (Heck, there was a time that stealing a horse in Texas carried the death penalty.) And the "one size fits all" driver's license suspension tool met some real challenges here—but it was the only tool we prosecutors had for a long time.

But not anymore. In the 84th Regular Session, the Legislature passed House Bill 2246, which makes sweeping changes to how impaired drivers can stay on the road. While HB 2246 does not end automatic license revocation (ALR), essential need licenses, or Driving with License Invalid offenses, it does add a lot more sanity to the complicated system of license suspensions in impaired driving cases.

What changed

The act begins in Code of Criminal Procedure Art. 42.12, §13, which deals with impaired driving offense probation. That section was amended with a subsection (c) that grants probationers whose driver's licenses have been suspended the right to drive if: 1) they install ignition interlock, and then 2) obtain an "occupational driver's license with an ignition interlock designation" under the Transportation Code. They can't get that occupational license until they can prove they have already installed ignition interlock on all vehicles they own and operate. Smart and capable defense counsel will want to get this handled before or with the plea or sentencing.

The act goes on to fix potential conflicts between CCP Art. 42.12 §13 and Penal Code §49.09(h), which deals with mandatory ignition interlock for repeat offenders, by clearing up that §49.09(h) controls over all of Art. 42.12, §13.

Perhaps most importantly, the act fixes lots of head-scratching issues in the occupational license laws. Transportation Code §§521.242(a) and 521.243(a) were amended to make it clear that the occupational driver's license provisions in those sections apply to all Chapter 49 DWI offenses (including DWI with a Child and flying, boating, and setting up carnival rides while intoxicated), and not just the jumble that appeared in the statute before.

No longer must the defendant show a need for the occupational license, nor must the judge find such a need, nor must the court limit the driving to certain events or times or require driving diaries and all the other crap we have cobbled together over the years. All that incessant arguing about the defendant's unique work hours and unfathomable work responsibilities are gone. To get the occupational license a defendant needs two things, and only two things: First, he must have evidence of financial responsibility; second, he must prove he has already had an ignition interlock device installed on "each motor vehicle owned or operated" by the petitioner. Yes, he must show that he already did it, not that he swears, promises, and affirms that he *will*. Judges and prosecutors no longer have to trust that "the check is in the mail" on installing the interlock.

The act goes on to radically amend §521.246 of the Transportation Code concerning requiring ignition interlock as part of the occupational license. Gone is the language that the court "may" require ignition interlock. Now the court simply "shall" order ignition interlock—the order must state that the driver can't operate a vehicle without interlock. Gone is the court's ability to require it during only half of the suspension period—now the order is for the whole duration of the suspension period. The act also amends

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§521.248 of the Transportation Code to make it clear that the only restriction on driving is having that ignition interlock on the vehicle—all time, reason, and location limitations are prohibited. (The limitations still exist for suspensions not connected to impaired driving convictions.)

Did you ever think that requiring the driver to carry around and show the occupational license order to an officer who had to somehow make sense of it was kinda stupid and fraught with danger? Well, me too—and now that requirement is gone. The act amends §521.2465 of the Transportation Code to have the driver's license conspicuously show that the person's right to drive is limited to vehicles with ignition interlock. The driver gets his old, unrestricted license back when he reapplies for it and shows the suspension is over. This is a great tool for officers making stops.

Finally, the act amends §521.248 of the Transportation Code to require the court to revoke the occupational license of any person who "fails to maintain an installed ignition interlock device on each motor vehicle operated by the person." Now how the court finds out that someone failed to maintain an interlock is still a little vague. But obviously pursuant to that, the amendment goes on to prohibit a non-court of record from order the driver to be supervised by community supervision. But for those defendants being supervised in the criminal case, there is a chance to police compliance.

What did *not* change

Two helpful provisions remain unchanged. Section 521.2461 of the Transportation Code still allows the court to order the driver to have alcohol or drug testing done. Even more importantly, if the holder of an occupational license violates the terms of that license—yes, that means driving a car without an interlock—§521.253 of the Transportation Code makes that violation a Class B misdemeanor. To actually enforce this life-saving restriction, prosecutors will need to actively coordinate the efforts of local police, probation departments, and courts.

It will probably distress victims in intoxication manslaughter and intox assault cases to hear that their defendant still gets to drive, but let's be honest: The defendant was *already* driving. Now at least he can do it legally. We will also need to be able to tell victims and their families that we are keeping track of that defendant and his interlock device, but first we need to make sure we *are* keeping track.

Final thoughts

My final advice is to read the law and talk to the other players. These new measures simplify the work of prosecutors, defense counsel, defendants, probation officers, courts, and police. Talk with local ignition interlock providers and make sure you can be notified somehow if the defendant quits complying. Heck, make sure you can be notified if the defendant keeps trying to start the car with too high a blood-alcohol concentration.

While future tweaking is certainly inevitable, this new law is a good start in the proper direction—but like any new legislative tool, it will work only if we make it work. ❇

The interplay between polygraphs and adjudication of sex offender community supervision

Two Court of Criminal Appeals cases, *Leonard* and *Dansby*, have changed the way prosecutors should handle sex offender community supervision. Here's how.

By Robert DuBoise
Assistant District Attorney in Parker County

At any given time in our county, and I suspect in yours too, there are multiple defendants on community supervision for sex offenses. Whether the imposition of community supervision resulted from the facts of a particular offense or unique characteristics of either the victim or offender, or it was imposed by the court over the State's objection, prosecutors must remain aware of recent changes in Texas law when attempting to adjudicate a sex offender's community supervision. Headlining these changes is a pair of decisions from the Texas Court of Criminal Appeals, *Leonard v. State*[1] and more recently, *Dansby vs. State*.[2] To understand the scope of the rulings, a brief review of each case is required.

The *Leonard* decision

In *Leonard*, the defendant was indicted for aggravated sexual assault of a child. He pled guilty to injury to a child and was placed on a five years' deferred adjudication community supervision, which included sex offender conditions requiring him, among other things, to:

> Submit to sex offender treatment and evaluation as directed by the supervision officer. Attend and participate fully in and successfully complete psychological counseling, treatment, and aftercare sessions for sex offenders with an individual or organization as specified by or approved by the Court or the supervision officer. Pay all costs of evaluation, counseling, treatment, and aftercare. Treatment must be completed within three years of its initiation, with a least one-third of treatment completed each year.
>
> And also:
>
> Must submit to, pay all costs for, and show no deception on any polygraph examination and other diagnostic test or evaluation as directed by the court or supervision officer.[3]

In Leonard's fourth year of community supervision, the State petitioned the trial court to proceed to adjudication. In its petition, the State alleged three counts:

1) the defendant had been unsuccessfully discharged from sex offender treatment, or alternatively, failed to complete one-third of the sex offender treatment within the first year;

2) the defendant's polygraphs revealed significant criteria indicative of deception; and

3) the defendant failed to pay his fine and supervision fees.[4]

At the adjudication hearing the State waived the second count (dealing specifically with the polygraph examinations) and the third count (dealing with the failures to pay) and called the defendant's sex offender treatment provider to testify. Over defense objection, the treatment provider testified that he discharged the defendant from sex offender counseling after he failed five polygraph examinations.[5] The treatment provider explained that the defendant had failed three earlier polygraphs but then made several admissions and passed. The defendant then failed the next five polygraphs, three of which asked about sexual contact with children, if the defendant had isolated children, if he had sexual contact with children, and if he had committed a sex crime.[6] Ultimately, the treatment provider testified that the sole basis of the defendant's dismissal from the program was that the defendant could not pass a polygraph exam, leading the treatment provider to conclude that the defendant was not being truthful and was engaging in "secret-keeping."[7] The trial court found the first portion of the count (failure to complete sex offender counseling) true, adjudicated the defendant guilty, and sentenced him to seven years in prison.[8]

Abuse-of-discretion finding

When the Court of Criminal Appeals began its analysis in *Leonard*, it initially pointed out that both the court of appeals and the parties framed the issue as one of the admis-

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sibility of polygraph exams and whether an expert could base his opinion solely on the results of polygraph exams.[9] Correctly framed, according to the Court, the issue was solely whether the trial court abused its discretion in proceeding to adjudication.[10]

What made this abuse of discretion review different, according to the Court, was that the trial court made a condition of the defendant's community supervision (the completion of sex offender counseling) subject to the discretion of a third party (the treatment provider). In such a case, the determination of whether the trial court abused its discretion necessitated a review of the treatment provider's use of its discretion to ensure that it was used on a basis that was rational and connected to the purposes of community supervision.[11] Viewed in this context, the Court opined that if the polygraph results were inadmissible, either on their own or as the underlying basis of an expert's opinion, then the trial court record would not contain any legitimate reason supporting the treatment provider's decision to discharge the defendant, and the trial court abused its discretion in adjudicating the defendant guilty.

The Court first examined the admissibility of polygraph exams as an independent piece of evidence. After a multi-page discussion on the historical inadmissibility of such exams, the Court stood behind its previous decisions that polygraph exams are inadmissible, even in situations where a stipulation of admissibility has been signed by the parties.[12]

The Court then turned to the issue of whether the polygraph results were admissible as the basis of a testifying expert's (the treatment provider's) opinion. It initially acknowledged that the plain language of Texas Rule of Evidence 703 allows an expert to rely upon inadmissible evidence if it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[13] In interpreting the language of Rule 703, the Court decided that the use of the word "reasonably," rather than another word such as "customarily" or "regularly," was an indicator that judicial oversight of the reliability of the underlying facts and data forming the experts opinion was required.[14] In short, if the methodology or data underlying the expert's opinion would not survive a Rule 705 hearing, then Rule 703 does not provide a basis to render the opinion admissible.[15] Having eliminated the sole basis for the treatment provider's testimony, the Court found that the trial court abused its discretion in adjudicating the defendant guilty.[16]

The *Leonard* opinion squarely lays down two rules:

1) polygraph exams are not admissible now, nor will they be in the foreseeable future; and

2) a defendant's failure of a polygraph exam may not serve as the sole basis of a treatment provider's discharge of a defendant from sex offender counseling.

Dansby, the Court's next step

After *Leonard*, I remember distinctly thinking, "I know Texas law requires that persons on sex offender community supervision are required to have polygraph exams[17]—even if I'm prohibited from introducing the results at an adjudication hearing, I can at least use the information gained during the polygraph process in the hearing." And then along came the *Dansby* decision.

In *Dansby*, the defendant pled guilty to indecency with a child and was placed on five years' deferred adjudication community supervision. At the time of his plea, Dansby was ordered by the trial court to comply with "sex offender terms and conditions." Only that general term was used in open court, and there was no discussion as to what the defendant's obligations would be under those conditions.[18] Later that day outside the courtroom, the defendant's general probation conditions were modified through a written document that the defendant signed. The modification document, for the first time, included conditions requiring the defendant to pass a polygraph examination and to successfully complete a sex offender treatment program.[19]

The defendant complied with the vast majority of his sex offender counseling requirements, including the completion of written screening questionnaires, participation in therapy sessions, and passing polygraphs inquiring about his compliance with his community supervision conditions.[20] Issues developed, however, when Dansby was given a sexual history polygraph exam. The defendant refused to talk about any victims other than the one for whom he was on probation, even when told that he could use "generic, non-identify-

ing information."[21] As a result of the defendant's failure to complete a sexual history polygraph, his treatment provider discharged him from sex offender counseling.

The State petitioned the trial court to proceed to adjudication alleging that the defendant refused to obtain a sexual history polygraph and failed to attend and successfully complete his sex offender treatment program.[22] The defendant entered a plea of "not true" and filed a motion to quash the State's petition, alleging in part that his community supervision conditions violated his right to remain silent and be protected from self-incrimination under both the Texas Constitution and the United States Constitution.[23] An adjudication hearing was held, during which the polygraph examiner and defendant's community supervision officer testified. The defendant also testified, stating that he was aware his modified conditions required him to take a sexual history polygraph but that he never agreed to forfeit his Fifth Amendment rights. The trial court adjudicated the defendant guilty and sentenced him to 18 years in prison.[24]

Dansby's appellate history

Unfortunately, understanding *Dansby* entails a quick review of its lengthy appellate journey. The Dallas Court of Appeals initially affirmed the trial court's adjudication, declining to reach the merits of the defendant's Fifth Amendment argument.[25] In its first bite at the apple, the Court of Criminal Appeals ruled that the court of appeals erred in determining that the defendant's discharge from sex offender treatment was not a product of his invocation of his Fifth Amendment privilege.[26] Upon remand, the court of appeals once again affirmed the trial court, finding that the defendant forfeited his Fifth Amendment argument by failing to object to the specific conditions of community supervision at the time they were imposed.[27]

The CCA's second dance with *Dansby*

The narrow issue before the Court was whether the defendant was placed on notice that his conditions of community supervision required him to waive his Fifth Amendment constitutional right by having to discuss other victims in a sexual history polygraph exam.[28] As an initial matter, the Court quickly disposed of one of the State's primary arguments, that the ability of the defendant to describe his other victims in general, non-identifying terms removes such disclosures from Fifth Amendment protection.[29] Having determined that the defendant's Fifth Amendment rights were implicated, the Court then determined:

1) the requirement that a defendant preserve his complaint at the time the community supervision condition is imposed; and

2) the reasons the defendant did not forfeit his complaint in this case.[30]

The Court then turned its attention to the State's contention that Dansby had waived his right to complain. In doing so, the Court reiterated that the placement of a defendant on community supervision occurs in the form of a contract between the trial court and the defendant.[31] If the defendant does not object to a condition of community supervision (except those involving a systemic right or prohibition) at the time of imposition, that condition will be deemed to be affirmatively accepted by the defendant.[32]

The Court then reviewed each of the ways the court of appeals stated that the defendant was placed on notice that he would have to disclose his sexual history with other victims, namely:

1) his offense report mentioned other victims;

2) during formal court proceedings, the trial court told the defendant he would have to comply with sex offender conditions;

3) outside of formal court proceedings, the trial court modified his conditions to add the polygraph exam requirement and the defendant signed numerous consents during his sex offender treatment agreeing to take polygraphs and disclose his sexual history; and

4) the defendant was constructively aware of statutes regarding sex offender conditions and treatment.[33]

In reviewing these points, the Court began by stating that the appearance of certain facts in an offense report is immaterial and does not equate to a defendant's waiver of his Fifth Amendment privilege with respect to those facts.[34] It then reviewed the formal trial court proceedings at the time of the plea, during which the defendant agreed to comply with sex offender conditions in general, and found that those proceedings did not amount to a waiver of the defendant's Fifth Amendment

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right with respect to statements about his sexual history with victims other than the complainant.[35]

In discussing the third basis of notice, the modification of the defendant's community supervision outside of formal court proceedings and his subsequent execution of consents during treatment, the Court determined those insufficient to place the defendant on notice because:

1) the clear language of the modifications did not inform the defendant he would be required to waive his Fifth Amendment rights;[36]

2) the modification was made outside of formal court proceedings, thereby denying the defendant a right to object and obtain a ruling on any such challenge;[37] and

3) the waivers the defendant signed either failed to reflect whether the defendant's attorney was present (with respect to the modification document executed after the plea) or failed to indicate that the defendant understood the consequences of the waivers (with respect to both the modification document and the treatment waivers).[38]

Finally, with respect to the State's argument that the defendant had constructive notice of his Fifth Amendment waiver due to the statutes describing the requirements for sex offender treatment, the Court held that no law particularly requires a sex offender, such as the defendant, to disclose all of his sexual victims; thereby, the defendant was not on notice that he would be required to waive his Fifth Amendment rights.

In light of the above, the Court remanded the case to the court of appeals for consideration of the defendant's Fifth Amendment violation argument.[39] On remand, the court of appeals reversed the trial court and remanded the case for further proceedings and presumably the continuation of the defendant on his community supervision.[40]

How to proceed

In my review of the holdings, and almost as importantly, the factors considered by the respective courts in reaching those holdings, I've found that making several small changes on the front end greatly enhances a prosecutor's position at an adjudication hearing for defendants on deferred community supervision. These changes are:

1 Avoid revocations solely based on polygraphs. In both *Leonard* and *Dansby*, the defendants were adjudicated solely based on polygraphs. Quite simply, make sure you allege another violation. In 16 years of prosecution, I cannot recall a case where I filed a motion to revoke or petition to proceed to adjudication consisting of a single violation—though I recall *several* times where the probation department sent over a violation listing a single infraction. When that happens, I comb the defendant's progress notes from the probation department to find and allege other legitimate violations. Under the Texas Administrative Code, sex offender counselors are required to file monthly treatment progress reports with the probation department.[41] Review those reports to look for and list other violations.

2 Have all your paperwork ready at the plea. One of the first things that struck me in *Dansby*, which I believe played a role in the ultimate reversal of the adjudication, was that the sex offender conditions that contained the obligations to attend, participate in, and successfully complete sex offender counseling and to take a sexual history polygraph were not imposed in open court. Instead, they were done in a modification document after the plea. A defendant has a much harder time avoiding a waiver argument if he was present and had the right to object to the imposition of the conditions in open court but failed to do so. In fact, since *Dansby*, the Court of Criminal Appeals has already issued one opinion finding a defendant waived his right to challenge his community supervision conditions by not objecting to them at the time of imposition.[42]

3 Increase the specificity of conditions so that they provide notice. As I write this, Parker County's current condition imposing sex offender counseling reads:

> The defendant shall attend, participate in, and successfully complete a sex offender counseling program with a therapist who is registered with the Interagency Council on Sex Offender Treatment and approved by the Community Supervision Officer. This will include any testing, group sessions, and aftercare prescribed by the counselor, and the defendant will be responsible for the costs for this program.

To guard against the type of notice issues encountered in *Dansby*, I anticipate that the condition will change in the near future to something along the lines of:

> The defendant shall attend, participate in, and successfully complete a sex offender counseling program with a therapist who is registered

> with the Interagency Council on Sex Offender Treatment and approved by the Community Supervision Officer. Included in this counseling program shall be a comprehensive assessment as required by 22 Texas Administrative Code §810.64(a)–(c), a treatment plan in accordance with 22 Texas Administrative Code Rule §810.64(d)–(e), and any other testing, polygraph examinations, group sessions, and aftercare prescribed by the counselor. The defendant will be responsible for the costs of this program and all testing.

In short, we don't want to leave the slightest doubt in the mind of the trial court or the appellate court that a defendant had any misunderstanding as to the nature and extent of his obligations under the terms of his community supervision.

4 Consider granting use immunity for information obtained during polygraphs or sex offender counseling. In *Dansby*, Justice Cochran writes a concurring opinion dedicated to the idea that the simple solution to this quandary is for the prosecution to grant full use immunity (both direct use and derivative use) to a defendant for information obtained during sex offender counseling, including polygraph exams.[43] She discusses the status of the law for use immunity in situations where a defendant is compelled to provide incriminating statements as a condition of community supervision, noting that in the Fifth Circuit a defendant does not need any notice of use immunity because the immunity attaches to coerced statements whether the defendant knows it or not.[44] Keep in mind, however, that this increased ability to revoke a defendant for less than full compliance with his terms of community supervision, including polygraph exams, must be weighed against the cost of possibly granting a "free pass" for other criminal acts disclosed by a defendant.

Conclusion

Our obligation as prosecutors is to get it right—to seek justice above all else. Sometimes that means placing a sex offender on community supervision and giving him a chance at rehabilitation outside the penal system. When a defendant does not (or will not) take advantage of the resources provided, he may present a continuing danger to the community. In that circumstance, let's make sure that the adjudication hearing is done once and done correctly. Keeping focused on the factors outlined by the Texas Court of Criminal Appeals in *Leonard* and *Dansby* will help us achieve that goal. ❇

Endnotes

1 *Leonard v. State*, 385 S.W.3d 57 (Tex.Crim. App. 2012).

2 *Dansby v. State*, 448 S.W.3d 441 (Tex. Crim. App. 2014).

3 *Leonard*, 385 S.W.3d at 572.

4 *Id.*, at 572-573.

5 *Id.*, at 573.

6 *Ibid.*

7 *Ibid.*

8 *Id.*, at 574

9 *Id.*, at 576

10 *Ibid.*

11 *Id.*, at 577 (citing Tex. Code Crim. Proc. art. 42.12 §11(a)("The judge may impose any reasonable condition that is designed to protect or restore the victim, or punish, rehabilitate, or reform the defendant").

12 *Id.*, at 581 (citing *Romero v. State*, 493 S.W.2d 206, 213 (Tex. Crim. App. 1973).

13 *Id.*, at 581-582 (citing Tex. R. Evid. 703).

14 *Id.* at 582.

15 *Ibid.*

16 *Id.* at 583.

17 See 22 Tex. Admin. Code §810.68(3)("Autobiographies, sexual history polygraphs, offense reports, interviews, and cognitive-behavioral chains shall be used to identify antecedents to offending"); see also 22 Tex. Admin. Code §810.64(d)(17)("Licensees should refer the client for a polygraph exam as soon as possible if the client is suspected of engaging in suppression behaviors on the [penile plethysmograph]").

18 *Dansby v. State*, 448 S.W.3d 441, 444 (Tex. Crim. App. 2014).

19 *Ibid.*

20 *Ibid.*

21 *Id.* at 445.

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Id.* at 446 (citing *Dansby v. State*, No. 05-10-00866-CR, 2012 WL 1150530, at *5 (Tex.App.—Dallas, April 9, 2012)).

26 *Ibid* (citing *Dansby v. State*, 398 S.W.3d 233, 234 (Tex. Crim. App. 2013)).

27 *Ibid* (citing *Dansby v. State*, No. 05-10-00866-CR, 2014 WL 259014 at *4 (Tex.App.—Dallas January 22, 2014)).

28 *Ibid.*

29 *Ibid.* (citing *Chapman v. State*, 115 S.W.3d 1, 5-6 (Tex. Crim. App. 2003).

30 *Id.* at 447.

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31 *Ibid.* (citing *Speth vs. State*, 6 S.W.3d 530, 534-35 (Tex. Crim. App. 1999)).

32 *Ibid.* (citing *Speth*, 6 S.W.3d at 534).

33 *Id.* at 448.

34 *Ibid.*

35 *Id.* at 449.

36 *Id.* at 450.

37 *Ibid.*

38 *Id.* at 451.

39 *Id.* at 452

40 *Dansby v. State*, No. 05-10-00866-CR, 2015 WL 3657749 at *7 (Tex.App.—Dallas June 15, 2015, 2014)).

41 See 22 Tex. Admin. Code §810.64(d)(7)("Monthly treatment progress reports shall be distributed to the supervision officer, referring agency, and/or court").

42 *Donovan v. State*, No. PD-0474-14, 2015 WL 4040599 at *3 (Tex. Crim. App. July 1, 2015)(not designated for publication).

43 *Dansby*, 448 S.W.3d at 452.

44 *Id.* at 454 (citing *Guiden v. McCorkle*, 680 F.2d 1070, 1071 (5th Cir. 1982)).

Another writs checklist

A handy guide to Texas Code of Criminal Procedure art. 11.072 writs of habeas corpus

Whether you respond to applications for writ of habeas corpus every day or once every six months, a checklist can be invaluable in planning and organizing your response. Here is a checklist specifically for article 11.072 applications for writ of habeas corpus (non-revoked community supervision in misdemeanor or felony cases, ruled on by the trial court and appealable).

By Andréa Jacobs
Assistant Criminal District Attorney in Tarrant County

Editor's note: TDCAA will publish Andréa's book, Writs, *in early 2016. Look for more information on our website, www.tdcaa.com, in January.*

First of all, some calendar deadlines[1]

30 days from receipt of application. (One 30-day extension could be granted for good cause.)	State's response due
60 days after day the State's response is filed	The trial court shall grant or deny relief. No dismissal or extension is available.

Can it be denied on procedural or frivolous grounds? (Is dismissal not available?)

- Is 11.072 the right vehicle? Is/was the applicant on non-revoked community supervision?[2]
- Is this a subsequent application? (It does not overcome the §9 subsequent writ bar.)
- Is this a challenge to the legal validity of:
  1) the conviction or order placing on community supervision *or*
  2) the conditions of community supervision?
- Can the applicant obtain the requested relief by an appeal?[3]
- If attacking the conditions of community supervision, has the applicant filed and presented a motion to amend the conditions to the trial court?[4]
- If attacking the conditions of community supervision, is the attack on constitutional grounds?[5]
- Are these claims cognizable?
- Are the applicant's claims moot? (Note: Revocation alone *does not* render claims moot.)
- From the face of the application and documents attached, is it clear that the applicant is manifestly entitled to no relief?[6]
- Has the applicant died?

Investigation

- What are the claims?
- Order records to familiarize yourself with the case—trial files, probation records, etc.
- Do you need evidence to properly respond to claims? (Is it a purely legal claim?)
  1) Do you have the evidence (e.g., appellate record, witness statements, etc.)?
  2) Do you need affidavits (e.g., ineffective assistance of counsel [IAC], involuntary plea, unconstitutional conditions, etc.)?
- Is a hearing needed? (e.g., actual innocence, IAC, etc.)

Do you need an affidavit or hearing?

- Contact the affiant to find out how much time is needed to comply.
- Request an order for affidavit by:
  1) Filing a motion for extension (30 days maximum) and a motion for an affidavit/hearing (recommended) *or*
  2) Filing the State's response requesting an affidavit/hearing ordered (but doing this is not recommended because it cuts down the amount of time the trial court has to ultimately rule on the application after receipt of evidence).

State's response

- Request one 30-day extension for good cause.[7]
- Respond on the merits.
- Request an order for affidavit (though this is not recommended because it cuts down the amount of time the trial court has to ultimately rule on the application after receipt of evidence).
- Request a hearing (also not recommended because it cuts down the amount of time the trial court has to ultimately rule on the application after receipt of evidence).
- Request a scheduling order for deadlines.
- Note: If the State does not respond, matters "not admitted by the State are considered to have been denied" by the State.[8]

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Findings of fact

- If it cannot be determined from the application and attached documents alone that the applicant is manifestly entitled to no relief, the trial court *must* enter findings of fact.[9]
- Should be separate from conclusions of law (discussed below).
- Address every claim.
- Consider organizing findings by ground for clarity if there are multiple grounds.
- Every finding should have a citation to the record or a clear explanation as to its origin (e.g., trial court's personal recollection).
- Each finding should contain only one fact.
- List in a logical order; it should read like a road map for the trial court.

Conclusions of law

- If it cannot be determined from the application and attached documents alone that the applicant is manifestly entitled to no relief, the trial court *must* enter conclusions of law.[10]
- Should be separate from findings of fact (discussed above).
- Address every claim.
- Consider organizing findings by ground for clarity if there are multiple grounds.
- Every finding should have a citation to the record or a clear explanation as to its origin (e.g., trial court's personal recollection).
- Each conclusion of law should contain only one conclusion.
- List in a logical order; it should read like a road map for the trial court.

Order

- If trial court determines from the face of the application and attached documents alone that the applicant is manifestly entitled to no relief, the trial court *shall* enter a written order denying the application as frivolous.[11]
- If filing findings of fact and conclusions of law (because the application is not frivolous), always prepare:

  1) a proposed order for the trial court to sign adopting your proposed findings/conclusions or

  2) a proposed order that includes the desired findings/conclusion unless local rules dictate otherwise.
- The trial court hears the evidence and resolves credibility issues.
- The trial court rules on the application.[12]

Objections

If the State is concerned the trial court will adopt the applicant's proposed findings, file objections to the proposed findings as soon as reasonably possible.

Appeal[13]

- If denied, in whole or in part, the applicant may appeal.
- If granted, in whole or in part, the State may appeal.

Endnotes

1 Tex. Code Crim. Proc. art. 11.072, §5(c);6(a).

2 *Id.* at §2(b).

3 *Id.* at §3(a).

4 *Id.* at §3(b).

5 *Id.* at §3(c).

6 *Id.* at §7(a).

7 *Id.* at §5(c).

8 *Id.* at §5(e).

9 *Id.* at §7(a).

10 *Id.*

11 *Id.*

12 *Id.* at §6.

13 *Id.* at §8.

How different offices do discovery

We asked people in several offices about how they conduct discovery in light of the Michael Morton Act; here are answers from six jurisdictions both big and small, urban and rural.

Are documents in your office initiated on paper or does your county have an electronic filing system?

Dick Bax, General Counsel, Harris County DA's Office
Most of our documents are initiated on paper. However, the county and our office are moving toward an electronic filing system.

Laurie English, 112th Judicial District Attorney in Pecos County
All agencies file paper copies of their reports, etc., with my office. We are experimenting with one sheriff's office and allowing them to file via email in an attempt to develop a system that we can expand to other agencies in the future.

Kevin Petroff, First Assistant Criminal District Attorney in Galveston County
We do not yet have electronic filing through the district clerk's office, though we do send out most of our discovery electronically.

Paul Davis, Assistant District Attorney in Williamson County
Electronic filing system—we have a paperless office. We store only the media (DVD, CD, flash drives) and papers that cannot be scanned (certified copies, medical records, etc.) in a file.

Steven Reis, District Attorney in Matagorda County
Most cases are filed on paper, although we ask that the agencies provide digital copies of the paperwork and of all digital evidence (photos, videos, audio).

Robert DuBoise, Assistant District Attorney in Parker County
Documents in our county are still initiated on paper. We do not have electronic filing for criminal cases yet but will as of November 1, 2015.

What case management software does your office use? Does the software take care of all requirements of CCP art. 39.14?

Dick Bax: I am told the case management software we use is a custom system developed within the county. At this time, for the most part, compliance with 39.14 is still done manually.

Laurie English: Pecos County implemented the Odyssey System a few years ago and we use that for our case management software, although we are still learning how to use it effectively and efficiently. Since my other four counties do not use Odyssey, nor have those counties implemented a county-wide system, we enter the cases from all five counties in my jurisdiction into Odyssey to condense our case management into one general system for my office. We continue to do a lot of work manually to satisfy the requirements of Article 39.14. We scan the paper copies and continue to date and number the pages via a "Bates" program so we can document what the defense was given and when we provided it.

Kevin Petroff: Our county uses Odyssey Case Management software from Tyler Technologies. It does not assist in discovery or any requirements of 39.14. Apparently they're working to develop software that would assist in these requirements, but for now it's just talk.

Paul Davis: Odyssey from the Software Group/Tyler Technologies. Most of the work is manual. The software is really just a system for keeping various offices on the same page with the status of the case, and inside the office, it provides a central location for notes, settings, and case documents.

Steven Reis: We use Odyssey Case Management by Tyler Systems; it

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does not automatically manage 39.14 requirements—that is done manually.

Robert DuBoise: We are on TSG Odyssey 2013 for case management software. The software does not address the CCP art. 39.14 requirements. We still have our legal assistants manually generate a discovery compliance log that lists all of the documents and other tangible items provided as well as a general description of each item withheld.

How many additional people have been hired to help with discovery since 2013? What are the assigned tasks of the people in your office who handle discovery?

Dick Bax: None. Discovery requests are handled by assistant district attorneys, investigators, paralegals, and administrative assistants. These individuals are responsible for copying responsive documents and electronic files.

Laurie English: I have not hired any additional staff since 2013 to help with discovery. We have upgraded our scanners and copiers, and we have all become more proficient and efficient with the processes to streamline preparing discovery for delivery to the defense.

Kevin Petroff: We have not hired any additional people for the sole purpose of discovery. Discovery is handled almost exclusively by the assistant district attorneys, although administrative staff will sometimes be asked to handle large copy projects. Attorneys usually do the copying as they must create a log or index of the items being turned over.

Paul Davis: Three. Kathleen Brunner enters all intake—that is, she creates the discovery log of all incoming DVDs, CDs. Colleen Taylor processes requests and makes the actual copies of media. And I collect and enter the requests, which are sent in electronically and in person, and keep them in order for a timely response. I also update the discovery log to reflect when work was done, and I email paper discovery. We equally avail ourselves to defense attorneys who come in to view materials and respond to special projects as requested by the ADAs.

Steven Reis: We have no additional employees since 2013 in our budget. Utilizing state funds, we have employed a part-time employee who provides assistance in 39.14 compliance requirements. Otherwise, all digital copying is done by our investigator, receipts are obtained by office staff, and the part-time person helps in collating paperwork for compliance.

Robert DuBoise: No additional persons have been hired to address the discovery compliance issues. We have a legal assistant assigned to each of our two district courts. These two are responsible for scanning the paper offense reports, generating the discovery compliance logs, making copies of the digital media, and transmitting the information via email (with a request for the attorney to come to our office to pick up the physical media). As additional information is received in a case, each attorney will update the discovery compliance log as necessary so that it is current when the time for a plea or trial comes.

How do defense attorneys access the State's files?

Dick Bax: We have approximately 400 attorneys signed up to a website dedicated to providing access to the State's file. Access is limited to attorneys of record. Attorneys of record may access offense reports and other documents as well as audio and video files in many cases through the portal. In all other scenarios we provide paper and electronic copies upon request.

Laurie English: Most of the attorneys who practice in our courts do not live in the counties we serve. If the defense attorneys want to look at a file, they can do so while we are in court, or they can travel to the office where that file is housed. Since I took office in 2005, we have provided paper copies of all the reports, witness statements, and copies of CDs, DVDs, etc., to the defense attorneys upon their appointment or when we are notified they have been retained. These copies are hand-delivered or mailed as soon as the discovery packet is ready.

Kevin Petroff: We have an open-file policy if attorneys want to come look at a file. We try to encourage appointments, but many just show up wanting to see the file. We don't require written requests for discovery

before we send it out. We send most paper discovery and some audio/video through Hightail, a system that allows us to upload documents and videos into a cloud-based file that stores the information, creates a log, and allows us to control access to the files. Defense attorneys can then create their own username and password to download the documents free of charge, which is then logged to our system. (The Hightail system we use is good but not great—it takes forever to upload videos, for example. Our county just happened to have an existing contract with Hightail, so our Information Technology people worked to make it useful for discovery.) Larger videos are usually just copied with DVDs and manually turned over to the defense.

Paul Davis: Material that can be copied is copied and left at our front desk to be retrieved by the defense. Paper discovery is sent via email. Material that cannot be copied can be viewed in our office. Defense counsel must come in person to pick up copied materials; most send a staff member. They don't need an appointment to pick up materials, but some choose to make an appointment when they're coming to view child advocacy center interview discs or material that is classified as child pornography. Our staff makes all the copies but does not do so until a timely request is made by the defense, per Code of Criminal Procedure art. 39.14.

Steven Reis: Our office prepares an initial defense packet, which includes copies of all paperwork submitted initially (offense reports, statements, warrants, affidavits, etc.). An attorney is provided this packet immediately upon being appointed or retained; they typically come to our office to pick it up, although we will mail or email it upon request. We generally do not make copies of digital evidence until requested by defense counsel. At that time, copies are made and provided, again, either in person or by mail if requested. We make all necessary copies and do not require defense counsel to make their own copies, although that would be permitted upon request. No appointment is necessary to obtain copies nor to review the case materials, although one is recommended to ensure the materials are readily available.

Robert DuBoise: Defense attorneys are sent electronic copies of the scanned offense report by email. Pictures and short audio files are also sent by email. For videos, multiple pictures, and long audio files, we make copies of the CDs or DVDs for the defense attorneys, who are informed what type of discs and how many of each type their case involves, and they are required to bring blank discs to our office when they pick up their copies. Discovery is sent whether or not the defense attorney requests it.

Does your office charge defense counsel for the costs of copying files?

Dick Bax: Normally, our office does not charge for such costs.

Laurie English: I do not charge for the copying/duplicating costs. It doesn't make sense for me to charge an attorney (especially the court-appointed ones) and then have the county billed for those copies. The administrative burden is not cost-effective in my mind.

Kevin Petroff: We do not charge defense counsel for the duplication costs.

Paul Davis: Appointed counsel makes no compensation, but we ask retained counsel to give us blank DVDs, CDs, and flash drives in reimbursement to those used to make copies for them.

Steven Reis: No, even if represented by retained counsel. We do request that retained counsel provide replacement media (CD, DVD, USB drive) if used; however, the discovery is not withheld if replacement media is not provided.

Robert DuBoise: We do not charge. We do require they bring blank media to replace that used to make their copies.

Does your office redact identifying information in the files, or do you require defense attorneys to redact?

Dick Bax: Generally speaking, unless 39.14(c) is implicated, we do not redact identifying information that is contained in our files.

Laurie English: When redacting must be done, it is done manually in my office.

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Kevin Petroff: We do not redact information (except CPS information) but rely on defense to do so.

Paul Davis: We follow the Michael Morton Act, requiring defense counsel to redact.

Steven Reis: We redact nothing. Our documentation (receipt and compliance documents) clearly identify the responsibility of defense counsel.

Robert DuBoise: If the redaction is not required to be done by our office by law, we produce the material without redactions and require the defense attorney to do it in compliance with CCP art. 39.14.

How does your office notify defense counsel of *Brady* material before trial? What about during or after trial?

Dick Bax: Currently, we notify defense counsel of potential *Brady* material by written correspondence, by email correspondence, or through filings with the court.

When our prosecutors discover potential *Brady* material during trial, disclosure is made to defense counsel as soon as possible. Normally, this is done by simply talking with defense counsel. In most cases, the oral disclosure is subsequently noted on the record. In situations involving the discovery of potential *Brady* information after trial, we attempt to notify the defendant in writing while sending a copy of that correspondence to the defendant's trial or appellate attorney.

Laurie English: *Brady* material is handled the same way that we provide discovery. If there is no paper to hand over to the defense attorney, a letter or memo is created that documents whatever information needs to be conveyed so we have a paper trail for future reference.

Brady notifications are handled the same whether it is before, during, or after trial. If documents exist, we provide copies the same way that do with all discovery in the case. If there is no paper to hand over to the defense attorney, a letter or memo is created that documents whatever information needs to be conveyed so we have a paper trail for future reference.

Kevin Petroff: We notify the defense counsel in writing and then file that notice with the district clerk's office. That's true of pre-trial and post-trial *Brady* notices. We do this in addition to keeping it in the Hightail folder.

Paul Davis: This work is handled by the ADA on the case. If they locate any *Brady* material that has not already been turned over, it is called to the attention of our discovery division so that copies can be made and sent out immediately.

This is pretty much the same as material discovered before trial. As quickly as it can be, we make a copy and alert the defense trial counsel. For work done in response to writs, this material is sent to the appellate attorney.

Steven Reis: We utilize email more than printed mail to notify defense counsel of all aspects of discovery, including any *Brady* material. If applicable, we make copies (paper or digital) of the material and provide this information to defense counsel at their convenience.

We provide general notice as well as specific notice, both before trial and during or after trial. For example, I recently sent a digital copy of the DPS memo regarding DNA via email to all defense counsel with whom we have recently done business. It provided no additional information other than that provided by DPS and explains that additional specific information will follow. That email is maintained as proof of initial compliance and, once a comprehensive list is made of the DNA reports since 1999, we will send written notice to defendants, defense counsel last representing the defendant, and file copies of the correspondence with the district clerk in each applicable file.

Robert DuBoise: *Brady* material is required to be produced as soon as practicable. I personally try to get that material out the same day we receive it. Our policy (although not written) has always been to produce that material in writing. That applies whether the discovery is prior to trial, during trial, or after trial. ❇

A fraud examiner's role in a prosecutor office

A few large prosecutor offices have fraud examiners on staff; here's a rundown of what expertise and assistance these professionals can bring to organized credit card fraud, embezzlement, and contraband forfeiture cases—among others.

One of the largest embezzlement cases in Galveston County came to me after only three months on the job as the fraud examiner for the Galveston County Criminal District Attorney's Office. After grand jury subpoenas were served for more than 20 different bank, credit card, and home utility accounts, it was determined to be a typical embezzlement case. The difference with this one was the magnitude of theft.

By Jeremy McAfee
Fraud Examiner for the Criminal District Attorney's Office in Galveston County

Bookkeeper Janice Doe stole over $900,000 from her workplace, where she was employed for over 21 years. (Because it's an actual ongoing case, we've used a pseudonym for the defendant.) Doe was in charge of paying the company's bills and had full access to the checking accounts. Her scheme was to write checks to herself for random amounts, in addition to the normal paychecks she wrote as part of her job duties. Additionally, she would send checks from the company's account to pay for her personal expenditures, sometimes signing with her own name and sometimes forging her manager's signature. The banks and credit card companies stored data dating back only seven years, so we aren't sure the full magnitude of how much she actually embezzled—it could have been more.

Cases with magnitude similar to Janice Doe's take a lot of investigative work by a fraud examiner. It is a time-consuming, painstaking process of making spreadsheets filled with all the bank and credit card information and deciphering these documents to show the fraud. Many prosecutors do not like accounting or working with numbers, which is why some offices in the state, including my own in Galveston, have full-time fraud examiners on staff. My hope for this article is to explain what a fraud examiner does, how one can help in certain types of criminal cases, and how Texas prosecutors can utilize their services in seeking justice for victims of fraud and theft.

Fraud examiners' role in general

Fraud examiners are investigators who specialize in the financial arena of personal and business records. We must know how to trace funds from start to finish throughout the process of payments, deposits, and check writing. Through our studies and experience, we know how to find anything fraud-related in someone's bank records, and for that reason, we can help in almost any case that involves money or bank accounts. For example, in a murder trial a fraud examiner may locate any investments the victim might have in her name.

Fraud examiners usually have backgrounds in accounting. I earned my Bachelor's degree in Business Administration from Eastern Illinois University, and while there, I learned about forensic accounting and fraud examination. These career paths interested me because they include an investigative type of accounting instead of everyday business accounting, and I ended up earning a Master's degree in business administration with a specialization in forensic accounting and fraud examination from Southern New Hampshire University. I worked for a local financial institution in various positions (bank teller, internal auditor, and branch security administrator), each one preparing me for my current job as a fraud examiner.

A certification is not required to work as a fraud examiner, but there is the option to become a certified fraud examiner (CFE) through the Association of Certified Fraud Examiners (ACFE). This certification covers four areas: investigation, law, fraud prevention and deterrence, and financial transactions and fraud schemes. The CFE is a 500-question

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exam taken online, and you must meet certain educational requirements and work experience to take the test. Once you pass it, a CFE must complete 20 hours of Continuing Professional Education (CPE) courses per year, much like lawyers must receive ongoing CLE to keep their licenses. This certification and the requirement of the CPE courses will show a jury, when a fraud examiner testifies as an expert witness, that the examiner has the requisite expertise and education and is up to date on the latest ways to uncover fraud.

My role in Galveston

Within the last four years, our office added the fraud examiner position due to the increase in fraud cases. I work primarily with the Major Fraud prosecutor, Robert Buss, on cases involving misapplication of fiduciary property, contract fraud, game room investigations, organized credit card fraud, and counterfeiting check schemes. My caseload in Galveston County right now is about 15 to 20 open investigations with another 15 to 20 indicted cases.

A fraud case goes through an extensive investigation before it is taken to indictment because of all the paper and tracing involved. Once it has been indicted, the majority of the work is complete and all discovery documents are turned over to the defense attorney, though I do some minor work after indictment to make sure the case is ready for trial. I also work on cases for the Public Integrity Division, though this caseload is generally smaller due to the nature of crimes that fall into this category.

Most of the cases I have seen so far are embezzlement and organized credit card fraud. For example, we are seeing a lot of criminals who know the algorithm of how credit card numbers are generated. These people make lists of card numbers, which they then check by calling the merchant's 800-number, entering the stolen credit card number, and verifying that the credit card number is authorized and active. Once they have determined which card numbers actually work, they make up laminates with the verified numbers already printed on them, and those are in turn are laminated onto reloadable gift cards whose numbers have been scraped off. The magnetic strip is deactivated, and these criminals then use the cards at stores that will manually enter the card numbers to buy products.

These type of cases are usually investigated after one person is caught on a traffic stop or arrest warrant in possession of supplies to make these fraudulent credit cards and a list of card numbers. With these types of cases, my main job is preparing the grand jury subpoenas to get information from credit card companies to determine the cards' real owners. Once the statements have been received, I review them for transactions that had some connection to Galveston County. Most of the time, these card numbers belong to people all over the country who may not be aware that their credit cards are being used fraudulently. Once we identify the victims, we can then look at the case as a potential fraudulent possession of identifying information case. These types of cases are more about finding out to whom card numbers belong so we can send subpoenas to them.

Another area I am involved in is contraband forfeiture cases. When there is a theft involving money, I determine how much of that money can be seized from the defendant's bank accounts. If someone has a large sum of money in his accounts and he embezzled from an employer, one way to seize the funds is if the defendant was depositing the money into his bank account. Most of the time, when working on contraband forfeiture cases, I make changes to the documentation for the criminal case to help the contraband forfeiture prosecutor on his civil hearing. (Because I am not a lawyer, I cannot speak on how cases are handled civilly; I just assist in showing that the stolen money was deposited into certain accounts so it can be seized.) In the Janice Doe case, Ms. Doe was writing herself checks. I was able to determine, through reviewing her bank records, that she deposited these checks into her bank accounts. (When we completed a search warrant of her house, we also executed a search warrant on her bank accounts.) I traced each check and made a spreadsheet on how much money from each fraudulent check went into each account and could thus determine how much money to seize.

With the Janice Doe investigation and others similar to this case, we begin by getting credit reports, sending subpoenas, and performing data entry of the bank statements. With the majority of my cases, I start by running a credit report on the victim (or target) to get a listing of all credit accounts they have, both open

and closed. The credit report might also help me find her bank accounts.

Once I receive the credit report, I send out grand jury subpoenas to all credit accounts that were open or opened during the timeframe of the embezzlement. The most important thing we request are the statements, copies of checks and deposits into bank accounts, and copies of all payments on credit accounts. Once all these items are received, we input all the transactions on the statements into a spreadsheet, including notations of to whom the checks were written, what was included in deposits, and where payments on credit accounts came from. This evidence showed the amount of checks Ms. Doe was writing to her creditors and, with the help of the victims, we were able to determine how many fraudulent checks she wrote.

Do you need a fraud examiner?

Determining when an office needs a full-time fraud examiner compared to contracting with someone on a temporary basis requires asking a few questions. How many fraud cases does your office handle in a year? How busy are your prosecutors? Does a local police department have a specialized financial crime section? (They're uncommon except in bigger cities.) Answering these questions will help you decide if hiring a fraud examiner is worth your while.

Fraud cases are tedious and involve a large amount of paperwork. If the prosecutors' caseload is lighter, hiring a fraud examiner on a contract basis, rather than hiring one full-time, may be a better choice as the examiner can fill in when the number of cases overwhelms the office. If the office has a large caseload per prosecutor, the fraud cases may not get all the attention needed to get to the full extent of the crimes.

I spoke to one of the prosecutors in our office about the average caseload. He said his court has one of the lighter dockets in the county, and he currently has 80–90 cases total (not just fraud cases). Fraud examiners spend most of their time inputting data into spreadsheets, which could take days or even weeks depending on the size of the case. When an examiner is inputting this information, it is usually the only task they work on at that time. Prosecutors usually don't have this kind of time available to handle the investigation of fraud cases. In my Janice Doe case, I spent a good four months working only on this case, to investigate it and take it to grand jury. Also note that the prosecutor who tries the case would not be able to enter any data into a spreadsheet because prosecutors are not allowed to be witnesses to confirm evidence. This is where police departments could help prosecutors on the financial information, though it is rare to find a detective who will make spreadsheets for a financial crimes case. The fraud examiner typically would enter the information into the spreadsheet and then be the witness during the trial to explain the information to the jury.

You might also review the fraud cases your office has prosecuted to see if there could have possibly been a stronger charge had there been a dedicated fraud examiner assigned to the case. If so, it might be worthwhile to hire one for future cases.

I asked one of the chief prosecutors in our office why she didn't like financial cases, and the answer I got from her was, "I don't like math." Many people don't care for math and numbers, and I am going to guess that many prosecutors are among them. Accounting is not an area that everyone understands, and in financial crimes, accounting is a big part of the investigation. Some cases could involve getting into businesses financial statements and tracing where funds were moved. If a prosecutor doesn't enjoy math or accounting, it will be a very difficult case to handle or understand—he or she might not even see that a crime was committed. In this instance, it is important to have a fraud examiner assist in the investigation.

Finding your own fraud examiner

If you have determined that a fraud examiner would be helpful on a contract basis (rather than full-time) or if you want to try someone on a contract basis first to see how he or she might help, there is a website to assist. The Association of Certified Fraud Examiners doesn't directly connect clients with fraud examiners, but there is a webpage that lists all CFEs: www.acfe.com/findacfe. You can search for one in your area and then contact that person.

I am available for any questions regarding my position as a fraud examiner; just call me at 409/766-2414 or by email at Jeremy .McAfee@co.galveston.tx.us. ❇

Getting serious about domestic violence

Cameron County uses an office vehicle to spread the word that the DA's office is serious about holding offenders accountable. Melissa Landin, the office's public information officer, tells us all about it.

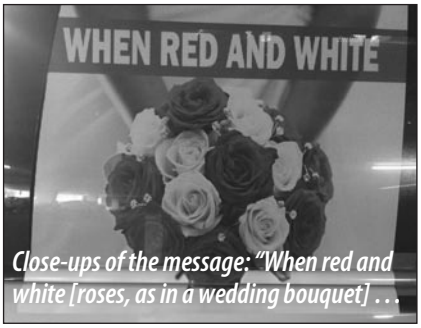
"District Attorney Luis Saenz feels very strongly about domestic violence awareness and in breaking the cycle of domestic violence. In 2013, he established a Domestic Violence Unit. In 2014, as part of our domestic violence awareness campaign, we had the vehicle wrapped in the design we created for our posters, billboards, and bumper stickers for a more cohesive outreach campaign. (The vehicle was purchased years ago with grant funds for office use. *[Editor's note: Indeed, the car came to TDCAA's attention in the parking garage of the hotel where we hosted July's Prosecutor Trial Skills Course in Austin.])* Last year for domestic violence awareness, we also had an art and poetry competition for high school students, a 'survivors speak' exhibit, and an event that recognized survivors of domestic violence. We have already started planning these events for October 2015.

"Our community education specialist drives the vehicle to visit schools, law enforcement agencies, community events, etc., to distribute information on the services the DA's Office provides for victims. We also strongly believe in preventative initiatives where we educate the public not only on domestic violence, but also on sexting, bullying, elderly abuse, and the like.

"We've had a very positive response on our domestic violence campaign, and we've had tremendous media exposure. Most recently, we utilized the vehicle for a parade. We had many spectators reading the message on the vehicle and giving us the thumbs-up. It was very exciting to

The driver's side

The passenger's side



Close-ups of the message: "When red and white [roses, as in a wedding bouquet] . . .


. . . turns to black and blue [as in bruises] . . .


". . . you get orange"—an orange jail uniform.

Law & Order Award winner

TDCAA's Freshman Legislator of the Year Award was presented to State Senator Jose Menendez (D–San Antonio) at our recent Legislative Update in San Antonio. Presenting the award to Sen. Menendez (center) were Shannon Edmonds (left), TDCAA Director of Governmental Relations, and Nico LaHood (right), Bexar County Criminal District Attorney. Sen. Menendez was recognized for his work on the Senate Criminal Justice Committee and his successful passage of a bill to re-write the state's prohibition against Invasive Video Recording.

Texas District & County Attorneys Association

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