The official journal of the Texas District and County Attorneys Association

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

The devastation of driving while drugged

Even with a doctor's prescription and legitimate medical need, often people should not be driving with drugs in their systems. How to investigate and prosecute a case of driving while intoxicated (on prescription drugs).

By Andrew James and Tyler Dunman
Assistant District Attorneys in Montgomery County

On Sunday, September 20, 2015, at about 12:45 p.m., Roland Sedlmeier, his wife Mendy, and their two kids, Harley, age 6, and Sofie, 4, were driving home from church on State Highway 105 in Conroe.

A few minutes later, a 911 call came in to Montgomery County dispatch. The caller described a gray sedan that was almost hitting other vehicles and driving off the road. The sedan's driver was Ronald Cooper, who was also heading home from church on Highway 105. A Conroe Police Department (CPD) officer, hearing the call, raced down Highway 105 in an attempt to stop Cooper, but the officer could not get there in time. Cooper's sedan careened into the Sedlmeiers' small car—a crash witnessed by several other drivers, including the 911 caller—and Roland, Mendy, Harley, and Sofie were killed instantly.

Tyler had just gotten home from church himself when the phone rang. The Conroe Police sergeant in charge of investigating fatal crashes told him about a bad crash on Highway 105 where several were dead. In Montgomery County, we have a Vehicular Crimes Callout Team where prosecutors are on-call on a rotating basis to respond to scenes of crashes when there is potential for criminal charges to be filed. We believe this team is very important because we are able to actively assist law enforcement in real time with evidence collection; prosecutors can also see the crime scene with their own eyes. Overall, it gives us better connection to the case and a perspective that you can't get from photos or videos of the scene. Because it was a Sunday afternoon, Tyler, then the supervisor of the team, decided to give the on-call prosecutors a rest and handle this one himself.

He arrived about 35 minutes after the crash to a fairly chaotic scene. He was briefed by CPD officers and began to think about all that needed to be done. He learned that the entire Sedlmeier family had been killed and that the "at fault" driver was being treated by Emergency Medical Services (EMS) for what appeared to be impairment from prescription medication. He knew immediately this was not going to be an ordinary crash investigation. He called Andrew James, an experienced vehicular crimes prosecutor, to the scene to help out. Andrew and Tyler had been on many crash scenes, but nothing could prepare them for this

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Welcome to the Texas Prosecutors Society

I am very pleased to announce the 2017 inductees into the Texas Prosecutors Society. As you are aware, the Society was formed to bring together those who have demonstrated commitment and support for the profession of prosecution.

A select group is nominated by the Foundation Board each year. The Society gathers annually in conjunction with the Elected Prosecutor Conference in December, and new members are awarded the sterling silver Texas Prosecutors Society pin (at right).

Welcome to these new members!

Jay Aldis
Nelson Barnes
Ryan Calvert
John Fleming
Jana McCown
Katherine McDaniel
Greg Miller
Sunni Mitchell
Larry Moore
Ray Rike
Ed Shettle
Jane Starnes
Jaime Tijerina
Sharen Wilson
Victor Wisner
Bob Wortham

Congratulations to a great class! It is an honor to have you as members and an honor to serve you!

Advanced trial advocacy course

In August, TDCAA, with the generous support of the Foundation, completed another Advanced Trail Advocacy Course at the Baylor School of Law in Waco. This year the course used child homicide as the training case. Years ago, the Foundation received an anchor gift from the Harris County District Attorney's Office and then-District Attorney **Ken Magidson**, who was

By Rob Kepple
TDCAA and TDCAF Executive Director in Austin

impressed with the need to train trial prosecutors with the best, hands-on training possible. The goal was to make sure Texas prosecutors are well-equipped to go into court and fight for the victims of crime. This by-application-only course has been a great success, and congratulations to this year's attendees (see photos of everyone on page 21).

I want to take a moment to thank **Dean Brad Toben** of Baylor School of Law for his great support of our program. He gives us access to Baylor's state-of-the-art facility every year,

Texas District and County Attorneys Association

505 W. 12th St., Ste. 100
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About *The Texas Prosecutor*

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TDCAA Board service

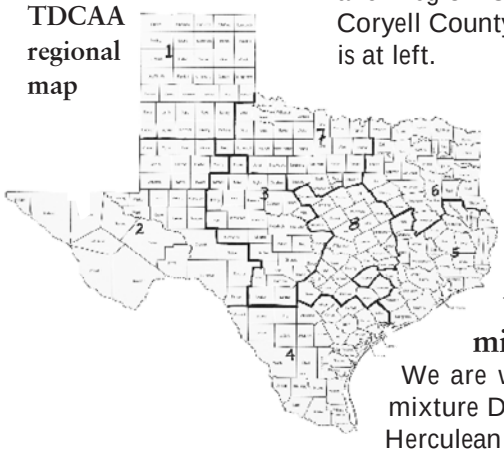
The key to TDCAA's success is that we are a member-driven organization. Our training and services are developed by committees of our members, all guided by a series of five-year, long-range plans.

By Rob Kepple
TDCAA Executive Director in Austin

And it all comes together under the guidance of TDCAA's board of directors. TDCAA has a strong board made up of the executive committee, at-large positions, and regional directors who represent a good cross-section of our profession; both rural and urban; felony, misdemeanor, and civil practice, and from across the state.

Elections for the board are held at the Elected Prosecutor Conference in December, with two-year terms that begin January 1. The executive committee and at-large positions will be nominated in the fall by the Nominations Committee. Here are the positions up for election this fall, with the current officer-holder in parentheses: Secretary-Treasurer (**Jarvis Parsons**, DA in Brazos County); District Attorney At Large (**Julie Renken**, DA in Burleson and Washington Counties); Assistant Prosecutor At Large (**Woody Halstead**, ACDA in Bexar County); Region 3 Director (**Rebekah Whitworth**, CA in Mason County); Region 5 Director (**Steve Reis**, DA in Matagorda County); Region 6 Director (**Kenda Culpepper**, CDA in Rockwall County); and Region 8 Director (**Dusty Boyd**, DA in Coryell County). A map of the TDCAA regions is at left.

TDCAA regional map



If you have an interest in running for election, call one of your board representatives or me for more information. We need your energy in TDCAA leadership for the good of the profession!

Update on the statewide mixture DNA review

We are well into the second year of the mixture DNA review process. It has been a Herculean effort for many of you to go back and identify all of the convictions based at least in part on the now-questioned mixture DNA tests using the combined probably of inclusion (CPI) analysis without the stochastic threshold. (Find a refresher on this issue here: www.tdcaa.com/journal/changing-state-dna-analysis).

I want to take a moment to thank **Bob Wicoff**, the Appellate Chief of the Harris County Public Defender's Office, who took on the task of operating the "triage unit" for communications with prosecutors whose convictions may have been tainted by a now-suspect CPI calculation. Bob has filled a gap in the process by re-evaluating these old cases when a convicted person has requested it. I have heard time and time again from y'all that Bob has done a great job of working with you, and he has earned high marks for his even-handed approach.

Remember that we started with a list of about 25,000 cases from DPS. By now prosecutors have sent out letters to almost everybody who may have a conviction based at least in part on an old CPI calculation. Of those, Bob's unit has reviewed around 2,800 cases and closed about two-thirds of them. Not surprisingly, it would appear that many of the cases have lots of additional evidence that supports the conviction with no further DNA re-testing warranted. We are far from concluding the process, but so far we have not had a cascade of cases in which the conviction is seriously undermined by a DNA re-calculation. It will be interesting to see how the numbers stack up at the conclusion of the project. But before you chafe about how this might end up being a big waste of time, remember that we have that continuing duty to the public to show we are always going to get it right. Even if we don't find a single wrongfully

convicted person in this mix, I would still argue that this is an important operation in the name of good government.

Conviction integrity update

Now that you just read the previous paragraph and remembered all the work you did to pull cases and send letters in DNA mixture cases—which will likely amount to nothing—note that it appears our nation is paying attention to your efforts to deliver justice, even if it means laboriously reviewing old cases to be sure justice was served. *The Atlantic* magazine just published a lengthy article on the status of prosecutor conviction integrity units around the country; read it at www.theatlantic.com/politics/archive/2017/07/district-attorney-convictions/ 535185. The article goes out of its way to recognize Texas offices as pioneers and leaders here.

Of course, we have many prosecutor offices in Texas, and most aren't large enough to dedicate multiple employees to such an effort. But I believe that the mindset of Texas prosecutors is correct: You are dedicated to the truth wherever it leads. (Which is why you sent out all those mixture DNA letters.)

Eyewitness evidence is better than you think

We've been conditioned over the last decade to question eyewitness identification and turn to hard science, such as DNA, to prove who committed a crime. After all, we know than incorrect eyewitness identification contributed to many wrongful convictions.

But wait! It appears that eyewitness evidence may not be as inherently suspect as we have been told. In a recent article in *The Scientific American* magazine, researchers argue that if eyewitness evidence is properly obtained and evaluated, it can be plenty reliable. (Read it at www.scientificamerican .com/article/eyewitness-memory-is-a-lot-more-reliable-than-you-think.)

Researchers discovered that there is a difference between malleability—the ability to contaminate a memory of an event—and reliability. Once that difference is appreciated, the researchers argue, procedures can be put in place to minimize "contamination." After all, we have learned through our DNA mixture exercise that evidence comes in different strengths. If the proper protocol is followed, the evidence is plenty reliable. What is true for DNA is true for eyewitness evidence, too.

Researchers identified three key components to a good eyewitness protocol. First, the initial eyewitness identification is the most important—after all, any subsequent ID (like in court months later) can be viewed as contaminated by earlier events. Second, that initial lineup must be fair. Third, the witness's confidence in the identification must be recorded. The bottom line is that a proper lineup with a "high confidence" report from the eyewitness turns out to be highly accurate.

At this point you might be thinking to yourself, "Wait, didn't I just hear at TDCAA's Legislative Update earlier this summer that there were significant changes to how lineups are to be done in Texas?" Yes, indeed. Article 38.22 of the Code of Criminal Procedure has been amended, effective September 1, 2017, to seemingly reflect the very research reported in the *Scientific American* article. First, lineups must follow evidence-based practices for selecting participants to be sure that the alleged perpetrator does not stand out. Second, a witness who makes an identification in a photo or live lineup shall immediately state in the witness's own words how confident he is in the selection. Finally, if there was an earlier out-of-court identification, an in-court identification is admissible only if all of the details of prior identifications are offered (remember the word "contamination" from the article?). It is nice to see that the legislature was in synch with developing research on this important issue.

Congratulations, Tuck McClain

Congratulations to **Tuck McClain** (DA in Grimes County) on his appointment to the newly created Grimes County Court-at-Law. Tuck had served as the DA for over 20 years and is going to make an excellent judge. Thanks, Tuck, for your service to TDCAA and the profession!

Straight into the frying pan

I would like to take a moment to recognize one of our county attorneys, **Kira Talip** (CA in Kleberg County), for her calm and resolve under fire. When Kira first took office, it wasn't long before she was bumping up against her county court-at-law judge, **Alfred Isassi**. You might

vaguely recall that name, as Isassi was a county attorney who back in 2008 was convicted of improper influence for trying to cut off the investigation and prosecution of a family member. Lo and behold, years later he reappeared as a judge, and things didn't get better.

Imagine as a new elected prosecutor, just getting up to speed at the job, looking at a case dismissal form with your signature on it—that you never signed. As uncomfortable a position as she was in, Kira forged ahead with an investigation that led to a special prosecutor, testimony in court, a conviction, and ultimately Isassi's recent disbarment. It is tough to go against a judge with serious accusations early in your career, and it was probably not what Kira thought she had signed up for—but then again, many of you face challenges that you never thought would come with the job of criminal prosecution. Well done, Kira.

Rejuvenated journal

You may have noticed upon receiving this issue of the journal that it looks different—that's because the editor, **Sarah Wolf**, TDCAA's communications director, has spent the last couple of months redesigning it. (In her words, "It was screaming for a makeover.") Some new fonts, an airier layout, and lots of trial and error later, the redesigned journal is now in your hands.

Please also look for the first appearance of some new columns in this issue. We plan to publish book reviews; columns on management and leadership, as well as TDCAA training; and a regular treatise from **Bill Wirskye**, First Assistant Criminal District Attorney in Collin County, regularly from now on. We hope you like the changes—see what y'all think!

A sobering situation

Being a lawyer is a stressful job. Heck, working in a prosecutor office can be a stressful job for anyone—as one of my prosecutor friends says, "you have your hands in the wounds." So when I recently came across this article about a lawyer who got into trouble (www.nytimes.com/2017/07/15/business/lawyers-addiction-mental-health.html), I thought it was worth sharing. It is about a "high-powered Silicon Valley attorney," yes, but

Recent gifts to the Foundation*

Richard Alpert
Bobby Bland
Kathy Braddock *in memory of Don Davis and in honor of Devon Anderson*
Don Clemmer
Michael Criswell
John Dodson
J. Kevin Dutton
David Finney *in memory of Dolena Westergard*
Tad Fowler
Larry Gist
Elizabeth Godwin
Lynn Hardaway
Luke Inman
Micheal Jimerson
Ed Jones
Rob Kepple *in memory of Alberto Byington*
Doug Lowe
Lyn McClellan *in honor of Judge Denise Bradley, Bill Hawkins, and Ken Magidson*
Amanda Navarette
Jack Roady
B.J. Shepherd
Stephen Smith
Jane Starnes
Jaime Tijerina
Bob Wortham

Navigating DPS's crime labs

Well, I never thought I would say this, but here goes: "Saved by the governor, a special session of the Legislature, and a change of heart!"

By Randall Coleman Sims
TDCAA President and District Attorney in Potter and Armstrong Counties

Without all three, I would've written this column about the Department of Public Safety's recent plans to start charging for lab tests along with the labs' rules and regulations.

Thank you, Director Steve McCraw, for deciding to retract charging fees for lab services. Absent that decision, law enforcement across Texas, particularly the non-metro areas, would be scrambling to find the funds from their bare-bones budgets to pay for the lab tests.

One bright spot that has come from this event is that a great light has been cast on the labs and their struggle to catch up with our ever-growing need for their services. Being long in the tooth as a prosecutor, I believe that the DPS labs have been overlooked for more than a decade. My premise for that statement is the long time we have had to wait in the past for almost all types of our testing, particularly on drugs.

There is a consistent and growing need for more testing from DPS labs, which has put DPS's back up against a wall. There are plenty of good people working very hard to get us test results, but they have been unable to keep up with our demands for their services. Only recently has there been a visible effort to increase staffing.

To get results out more quickly, DPS has imposed limits on what will be tested, how much will be tested and when, and how much of the sample will be retained. These restrictions have reduced the time to get results, but it's also meant jumping through hoops when we prosecutors request that additional items be tested in our quest for justice.

With the assistance of some friends and the DPS website, I have put together this article on DPS's rules and regulations concerning lab submissions. The statements in italics are extremely important to the labs.

And at the end of this article (as an incentive to read through the whole thing), I will share our jurisdiction's fix for getting all of our drugs tested on the first submission.

DNA

DPS's Crime Laboratory will limit the type of cases analyzed for DNA evidence and the number of items or samples that can be submitted based on the type of offense. For all cases accepted, the number of items that will be tested will be limited to the minimum number necessary to answer the relevant questions in the case.

It is imperative that agencies submit DNA evidence as soon as possible after it has been collected so that the laboratory can provide timely service. Please note these restrictions:

- The laboratory does not accept paternity cases.
- The laboratory does not perform DNA testing on drugs or drug paraphernalia.
- The laboratory does not perform DNA testing for "touch" DNA, including swabs of steering wheels, shift knobs, door handles, switches, counters, keys and locks, ammunition and cartridge cases, fingerprints and smudges, etc.

The known standards from suspects, victims, or elimination standards (including consensual sex partners) will not count against the number of items that may be submitted.

Burglary or property crimes

Submission is limited to two items. These must be swabs of blood from the crime scene or swabs of items left at the scene, such as cigarette butts, clothing, gloves, or drink containers. More than two items may be accepted if the circumstances (such as multiple perpetrators) dictate the need for additional analysis.

Sexual assaults

The initial submission will be limited to the sexual assault evidence collection kit, one pair of underwear, and one condom (if applicable). If the kit is positive, no additional submissions will be allowed unless circumstances (such as multiple perpetrators) dictate the need for additional analysis. If the sexual assault kit is negative, a second submission of up to five items, such as clothing or bedding, will be accepted.

Homicides

The initial submission of biological evidence is limited to 10 items, which the investigator and/or district attorney believe will be informative. It is recommended that the investigating agency have a conference, either in person or electronically, with the laboratory prior to evidence submission to determine which items will be most probative to the case.

Serology screening and/or testing will be performed on the 10 items in the first submission, and the five samples that indicate the highest chance for success will be forwarded for DNA testing. If informative results are obtained, additional items will not be examined unless circumstances (such as multiple perpetrators) dictate the need for additional analysis. If informative results are not obtained from DNA analysis of the first five samples, then the second five will be tested.

If no informative results are obtained from the items in the first submission, then a second submission of 10 additional items will be allowed. Those items will be processed as above.

A written request from the prosecutor, including sufficient justification, must be received by the laboratory before any decisions on performing additional testing will be considered once informative results have been obtained. (The lab has never turned down my request for more DNA testing when I have requested it. You need to justify why you want it, but they have always been extremely helpful.) Additional samples will not be tested to merely disprove all possible scenarios.

Other crimes against persons

Submission is limited to two items. Submission and analysis of additional items will be determined on a case-by-case basis with the respective laboratory.

DNA analysis for court

The laboratory understands the evolving nature of criminal investigations and court schedules. However, fulfilling requests for extremely short turnaround times is not possible from a laboratory standpoint without severe negative impacts to the timeliness of other case reports. Notice must be given to the laboratory *at least 60 days prior* to the date the results are needed for court purposes.

Drugs

Recently, some changes regarding drug testing have been implemented. These include:

- increasing controlled substance personnel,
- streamlining procedures, and
- defining the case acceptance policy (outlined below). These criteria will allow the laboratory to provide the timely and quality service.

The policy now states that for all cases accepted, the number of items that will be tested in each case will typically be limited to the minimum number necessary to reach the weight requirement of the highest penalty group in the Health and Safety Code. *This means that typically the only items analyzed will be the highest felony submitted.*

The DPS Crime Laboratory will limit the number of items or samples that can be accepted for a case based on their assignment in the Health and Safety Code and their weight. It is imperative that agencies submit felony substances as soon as possible after they have been collected so that the lab can provide timely service.

The laboratory does not typically accept or analyze evidence categorized as a misdemeanor offense, such as possession of marijuana under 4 ounces, synthetic cannabinoid materials under 4 ounces, identifiable dangerous drugs, etc. However, misdemeanor offenses may be analyzed when a prosecutor needs a laboratory report for adjudication purposes. To request such analysis, *a prosecutor must submit a written request to the laboratory before any testing will occur. Form letters and blanket requests for analysis will not be accepted.*

DPS non-bulk evidence

The Crime Laboratory will receive controlled substance evidence from DPS's law enforcement officers. Evidence will be analyzed to the same extent as our external partners. Only the items

needed to reach the highest penalty group will be analyzed. If a case contains both felony and misdemeanor items, they should be packaged in separate containers to expedite analysis.

DPS bulk evidence and excess evidence

The Crime Laboratory will accept these cases and process them in accordance with the Health and Safety Code and governing Administrative Codes.

Sample submission limits

The type and number of items or samples that will be accepted will be based on the substance's penalty group. Once results have been released, a written request from the prosecutor, including sufficient justification, must be received by the laboratory before any decisions on performing additional testing will be considered. Additional samples will not be tested to merely have a heavier weight on the report.

Controlled substance analysis for court

The Crime Laboratory cannot provide accurate and complete information without sufficient time to perform the testing and review the results. *Notice must be given to the Crime Laboratory at least five business days prior to the date the results are needed for court purposes for marijuana cases and at least 30 business days for all other substances.* This will enable the Crime Laboratory to perform the analyses in the most effective manner while maintaining a high level of quality.

Transportation of evidence to and from court

Laboratory personnel are not commissioned officers and are required at times to use their personal vehicles to travel to and from court. For these reasons, laboratory personnel are not permitted to transport evidence to and from court. Deviation from this policy must be approved by laboratory management.

Biohazardous evidence collection

Syringes will not normally be examined by DPS Crime Laboratories. Only the prosecuting attorney may request the examination of syringes or its presumed content. For analysts' safety:

- leave any liquid contents in the syringe. Do not attempt to transfer the contents of the syringe to another container.
- liquids from a syringe will be treated the same as a syringe. It will not be examined unless requested by the prosecuting attorney.
- If a prosecutor believes he has retrieved the contents of a syringe already in another container, consider it to be a biohazard and treat it with the same precautions.
- *Drug evidence confiscated from a body cavity, mouth, toilet, or other infectious environments is considered a biohazard and should be labeled and treated as such.*

In summary

These are the highlights of what prosecutors need to know concerning the DPS labs. There are other additional requirements for the collection of DNA and other evidence that I have not discussed here, but anyone who's interested can look on DPS's website, www.dps.texas.gov/CrimeLaboratory/Pubs.htm, to find out more.

Our local solution

Here is an exciting thing we have done locally. I recently helped our local police department negotiate a memorandum of understanding (MOU) with DPS. The Amarillo Police Department agreed to pay DPS for the salary and benefits of one chemist, and DPS provides that chemist to the lab. The MOU also requires that chemist to test all drugs sent to the lab by that local police department on the first submission.

This arrangement has been in place for several months and is working out extremely well for DPS, the police department, and the prosecutor's offices. The lab results are very timely, and this arrangement has made the drug cases that go to trial proceed more quickly and with less effort.

If you are interested in doing something similar in your area, please feel free to contact me, and I will fill you in on the details and send you a copy of our MOU.

Finally, a big cowboy "thank you" to all the DPS lab personnel for all that they do to assist us with evidence. Their dedication to what they do does not go unnoticed! Without them, there would be a lot more jury trials rather than guilty pleas and far more cases that could not be filed. I tip my white hat to each of you for what you do.

Until next time, be sure to keep that white hat clean! ❇

Staying strong for crime victims

There are about 380 victim assistance coordinators (VACs) working in prosecutor offices across Texas. Across the state, offices are structured differently, depending on the size of the county and workload of the office.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

Small county offices may have only one VAC (or may have designated the elected prosecutor as the VAC) while larger offices may have up to 35 VACs.

No matter the size of the office or an individual's workload, VACs all have some things in common. We strive to remain strong and resilient so we can help the next crime victim who walks through our doors. However, sometimes we get so emotionally wrapped up in the cases that we become mentally and emotionally exhausted.

VACs all know from the minute we arrive at our office to begin a workday, we are exposed to horrendous and disturbing details about criminal cases. We hear stories from our prosecutors and crime victims, read about crimes in offense reports, and see photos of crime scenes. Most of us have never experienced anything like it in our personal lives, so naturally it can emotionally wear on us. VACs should continually look for ways to personally stay strong so we can be strong for others.

As a VAC for 23 years in the Wood County Criminal DA's Office, sometimes other criminal justice professionals would ask me, "How in the world do you sit in that windowless office day in and day out listening to victims' problems?" Truly, not until the first time someone asked me that question had I ever really given it much thought. The clear answer was I *loved* my very difficult job. I felt like it was my calling to help crime victims and their families. I guess I could have worked under most any condition because of my passion to help those in my community and because of my devotion to the many prosecutors I worked for through the years. I completely understand those of you who may work in a small office or who may have to share an office with another person: I have been right in your shoes. The office set-up may not be ideal, but we continue to be there every day mentally and physically for our victims for "the good of the cause."

One thing that helped me face another workday in a very emotionally involved job was the roadside park between Quitman and Winnsboro near Cartwright. It became a dividing line between work and home for me. Passing the park each evening, I left my work worries behind and began to focus on my precious little girl and my loving husband who needed me to be strong and bubbly for them back at home. I stayed very active in our church and with my daughter's activities, our friends and extended families, and my husband and his many fun endeavors during those years. I left work at work.

Another thing that helped me continue to do the job I loved was that I rarely mentioned anything about my work when I was at home—I was careful not to expose my family to *my* job hazards, not theirs. Lastly, life management was the real key for me. I kept track of my schedule for a week for at work and at home to see where I spent my time; that way I could determine and my priorities and focus on them. Cut out things that drain your energy and are not priorities. We can't be everything to everybody if we don't take care of ourselves first.

Following are how a few other VACs across the state draw strength and remain motivated to help others on a daily basis. We hope these tips and advice will help you stay strong for the crime victims you serve.

Cynthia L. Jahn, CLA, PVAC
Director of Victim Services
Bexar County District AttorneyŐs Of-
Ţce

Generally, I don't enjoy doing things, even things I really like, for more than three or four hours at a time. So how is it that I've been able to work 40-plus hours a week for nearly 27 years for the Bexar County District Attorney's Office? Good question. I don't think the answer is simple or easy. Part of the reason is that in comparison to my past jobs, this one is much more exciting and interesting than anything else I've ever done. The fact is, even though it may move more slowly and be a bit more tedious, the reality of the criminal justice system and going to trial is almost as exciting as watching your favorite criminal law show on TV. I'm kind of hooked on it.

With this said, the sobering reality is that serving victims day in and day out can sometimes be troubling and stressful—but it can also be one of the most rewarding things I've ever been a part of. It always seems that on a day where I really just want to either scream or roll myself into a little ball under my desk, someone will say those two simple words that can make such a difference: "Thank you." When someone tells you that you are the only person who has taken the time to help and explain things to them, it really can erase most of the stress. It's for these folks that we get out of bed every day and make our way into our messy, cluttered offices, dealing with sometimes-persnickety prosecutors and often unsympathetic judges. It is for these folks who so desperately need our assistance and empathy that we do our jobs each day!

I don't think I have any special words of wisdom that have gotten me through all these years. I will say that, as much as I dearly love my job and I wouldn't want to have any other career, I truly believe in the motto, "Work to live; don't live to work." If you can, I would suggest finding some way to leave work behind when you walk out of the courthouse doors each evening. Find a hobby you enjoy. Do whatever it takes to spend time with and enjoy your family and friends. They should be your center, your focus in life, and your inner spring of refreshment. For all the rest, I've found I really enjoy a little moscato wine from time to time!

Jennifer B. Varela, LCSW
Director of Social Services, Sex Crimes Unit, Harris County District Attorney's Office

I've been with the Harris County District Attorney's Office working with violent crime victims for 22 years. My core belief is that while I can't change what happened to my social work clients, I can help change how it impacts them, whether that be through providing direct service, linking them with services, advocating for them in some way, making changes in the system, or simply being present with them. My goal is to help them get better, but sometimes I can help them only to get through this part. Either way, I love my job and consider it a great responsibility, honor, and privilege to do this work.

Adina Morris
Victim Assistance Coordinator
Palo Pinto County DA's Office

Two words: patience and compassion. When I am helping a victim or a victim's family, I always try to remember that the court system is overwhelming for someone who is not familiar with it. I have to remember that I am meeting this person after the worst day of his or her life. This is when we as VACs have the opportunity to make an impact by holding their hand (figuratively and many times literally) and guiding them. They have no idea what an indictment is or the difference between arraignment and pre-trial. All those victims know is they want justice, and they do not understand what is taking so long. We are the beacon that guides them through the rocky shores of the court system so that they may reach the other side intact and, let's hope, a little stronger. Through our patience and compassion, we can help make the difference between someone healing through the process or getting re-victimized over and over.

"When someone tells you that you are the only person who has taken the time to help and explain things to them, it really can erase most of the stress."

–Cynthia Jahn, CLA, PVAC, Victim Services Director, Bexar County Criminal District Attorney's Office

Colleen Jordan
Assistant Director, Victim/Witness Division, Harris County District Attorney's Office

One thing I do to stay strong is to tell myself to *slow down*, mentally and physically. When I am busy doing several different tasks at once (which seems to be every minute of every day) and I take a phone call from a victim, I remind myself to slow down my speech so that I don't sound rushed or hurried, because that can easily come across as insensitive to a victim's needs without my even realizing it. The same applies when I meet with a victim in person. I try to slow down my actions and movements. I find this has a calming effect on me and makes me realize that all my other tasks can wait. What really counts

"My advice for other VACs would be to find what works for you and make it a priority. It's not selfish, it's not a waste of time, and it's not a luxury."

–Wanda Ivicic, Chief Victim Assistance Coordinator, Williamson County Attorney's Office

is making the victim feel like the most important person in the world.

Oh, and I also work out during my lunch break.

Claudia Arnick
Victim Assistance Coordinator
Dallas County Criminal District AttorneyŐs OfŢce

I stay strong for self and victims by first being a good listener to my victims. Sometimes it makes a world of difference to hear their story from their point of view. This helps transition them into writing or filing out that Victim Impact Statement. Other things I do:

- exercising helps with stress—walking, mostly.
- taking time off for myself. Sometimes a full eight-hour workday (with supervisory approval) or just a half-day of leave. If time off is not a plan, I take a break to just go outside the building.
- doing something fun, like bowling or seeing a movie.
- lastly, I pray. I pray randomly as needed throughout my day. I am a Christian, and when I begin to count blessings, it gives me hope. I pray for guidance and insight. I pray for others on how best to help them. I pray for myself that God will help me help others, and sometimes when things do not turn out the way I expect them to or something I said is misinterpreted, then I pray for forgiveness.

Wanda Ivicic
Chief Victim Assistance Coordinator
Williamson County AttorneyŐs OfŢce

I like to spend time at the gym. I learned a long time ago that self-care is paramount when working in victim services. It took some time, but I finally found a way to de-stress in a healthy manner (emphasis on healthy). My fix is the gym. I love to put my headphones on, shut the world out, and lift heavy things. My advice for other VACs would be to find what works for you and make it a priority. It's not selfish, it's not a waste of time, and it's not a luxury. It's as necessary as the signature on the last page of the CVC application (a little VAC humor).

Tracy Viladevall
Victim Assistance Coordinator
McLennan County Criminal District AttorneyŐs OfŢce

I have been a VAC for 17 years, and trust me: It's been a wild ride. Every day is different, and some days are really great while others are really bad. But we do this job because we are compassionate and we want to help people. What I have learned over the years is that people need more than a Crime Victims Compensation application or a referral to VINE. What they really want is for someone to listen to *their* story. While is it important to make sure they receive all the information victims are entitled to, what's most important is that we offer our victims a sympathetic ear and an open mind. I know that doesn't always seem possible with the abundance of phone calls, new cases, and people just showing up in your office, but I have learned that making myself available and returning my never-ending phone calls can make all the difference in the world. Giving victims the opportunity to vent provides them with some sense of stability, trust, and confidence in my office. It makes working with them in the future much easier too. So that's my secret weapon, simply *listening*, and it has served me well through the years. And putting someone on speaker phone while you work on other things is technically listening—isn't it?

Yecenia Vargas
Crime Victim Coordinator
Upshur County District AttorneyŐs OfŢce

It is really hard for me to explain on paper what keeps me strong for victims. It is just something that I do. I personally believe that it truly has to do with the personality of the victim assistance coordinator; we are not in this career to make a fortune. We are here because we care, we want to help those in need, and we want to make a difference in our communities. If you need help from other VACs in your area, do not be afraid to give them a call and talk with them about questions or concerns you might have. At the end of each day, we have to understand that we did the best we could do for the people that walked through the door. Leave work at work. You have a family to attend to. You do not want to miss out on them.

Some other things I do:

- Network with other people. We learn from each other how to improve our interaction with crime victims. Have mutual respect toward these others who play a part in assisting victims; each one has a responsibility and meaningful role.

- Your office space should be comforting and inspiring not only to victims but to you as well.
- Treat victims as you would want you family and friends to be treated. Tell them that you are here from point A to Z.
- Understand you might not be able to help everyone, but you can refer them to another agency or organization that might.

Upcoming training

TDCAA's Key Personnel and Victim Assistance Coordinator Seminar will be held November 8–

10 at the Westin Oaks-Galleria Hotel in Houston. Don't miss this opportunity to network with other key personnel and VACs from prosecutor offices across the state and learn from the awesome workshops offered. Visit www.tdcaa.com/training for registration and hotel information.

Board merge and elections

On Wednesday November 8 at 1:00 p.m. (at the Key Personnel and Victim Assistance Coordinator Seminar), a meeting will be held to approve new KP-VAC board bylaws. Upon approval, elections for the East Area (Regions 5 and 6) and South Central Area (Regions 4 and 8) for the newly merged Key Personnel & Victim Services Board will be held the next day. (See the regional map, below, to find out what region you're in.)

The Key Personnel-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 region. To be eligible, each candidate must have the permission of the elected prosecutor, attend the elections at the KP-VAC seminar, and have paid membership dues prior to the meeting. If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. If you have any questions, please email me at Jalayne.Robinson@ tdcaa.com.

In-office VAC 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 Ellis, Burleson, and Pecos Counties to assist VACs with in-office consultations. In Pecos County, County Attorney Frank Lacy hosted a multi-agency training at the Fort Stockton Adult Community Supervision building. As guest speaker, I offered victim services-related training to more than 25 representatives from the Fort Stockton Police Department, Pecos County Sheriff's Department, Texas Department of Public Safety, local district and county attorney's offices, community supervision departments, judges, and other victim advocates. During the training, I gave an overview of Chapter 56 of the Code of Criminal Procedure, which covers victim rights during each stage of the criminal jus-

TOP LEFT (from left to right): Ernesto Velasquez, Investigator; Wendy Porter, VAC; Karen Suarez, VAC and Legal Assistant, all from the 112th Judicial District Attorney's Office. TOP RIGHT: Burleson County Attorney VAC Stephanie Lawrence. ABOVE: Pecos

At long last, management training for the masses

Any of you who have ever attended a TDCAA training event know that at some point we ask you to evaluate the course.

By Brian Klas
TDCAA Training Director in Austin

There are always two forms, and I typically make a very funny joke related to the color of those forms. I might say they are seafoam green and salmon, or teal and coral. Hilarious! Really though, they are green and pink. Always green and pink. I think maybe purple snuck in there once. Regardless, one of the forms is an evaluation for the course you just attended, and one is a questionnaire asking what areas you are struggling with and what topics you'd like to see more training on. I'd say we get about an 80-percent return on those forms, and aside from the occasional "Brian needs to talk less," the thoughtful responses we receive drive the development of our future training.

Without question, the No. 1 trouble area reported in the questionnaire is management, both in terms of managing your individual work and managing others. Oh sure, we get a lot of requests for more time in the day, wiser colleagues, and smaller dockets, but unless you are able to willfully disassociate yourself from reality, those things aren't changing any time soon. What we *can* change is how we approach those issues. That takes training and practice.

When I comb through the archives at TDCAA Central, I can see that all the past training directors have attempted to scratch the management-training itch. It has been tried by way of training tracks at various conferences, more focused forums, and even professional speakers. Still, we haven't quite hit our target, and management training has ended up being a poor fit for our training model. TDCAA's seminars are built to enhance specific skills our membership already possesses. Prosecutors typically become managers with no previous training, education, or experience in supervision. We become supervisors because we are good at our job, and our job is not management. This is a training issue whose solution is bigger than the current seminar calendar.

Enter the Prosecutor Management Institute. Or PMI for short. PMI is our new(ish) foray into training prosecutors and staff on how to be good supervisors and leaders.

The first step in getting this new training off the ground was to define the scope of our members' needs. Back in March 2016, TDCAA hosted a prosecutor management summit in Fredericksburg with our Houston-based consultant, Bob Newhouse. Our goal was to design a management course just for prosecutor offices. Bob had previously developed such a course for oil-field workers who, like prosecutors, don't necessarily promote to management positions based on management skills. (If you see him, ask Bob which group has been easier to work with.) At the summit, elected prosecutors, first assistants, and various chief-types from all over the state were invited to share their own issues with management as well as what characteristics they believe a good managing prosecutor will possess. From inception, it was crucial to us that this course be *by* prosecutors *for* prosecutors. The turnout was fantastic and the feedback was extraordinarily insightful.

Armed with the data collected during the summit, we began interviewing offices on an individual basis. (More data means more development.) From there, further meetings were held with existing supervisors to gather even more of

the information necessary to finally put together the Fundamentals of Management module. (That's the name of the first course, Fundamentals of Management.)

We've put on the module three times, and the response from our test subjects has been glowing. To date, I've had the great fortune to both attend and help facilitate the course. I can tell you that it is nothing like anything TDCAA has done before. The training is two and a half days, the number of attendees is small, and the pace is fast. Every attendee is asked to take a couple of assessments prior to the course, the results of which are woven throughout the training. Now, I'll tell you that I am pretty skeptical of any sort of behavioral or personality assessment. How could any simple test, with any sort of accuracy, divine the habits or proclivities of someone as complex as myself? Well, as painful as it is to say, it turns out I'm not that complex. It also turns out that by having a better understanding of my behavior, I can diagnose the cause of my inability to successfully communicate in the past (although I still say some of those people I was trying to communicate with were just crazy). And if you want to succeed as a manager, no matter how you reasonably define success, you are going to have to effectively communicate with your team. This course will teach you how to best convey your message in a meaningful way—and that's just on the first day! By the end of the training you will be outfitted with an arsenal of tools designed to make you a better manager. When you are a better manager, your team will shrink their dockets, they will be wiser, and you will start to find a little more time in the day. You may even get better-looking.

The Fundamentals of Management module is designed for no more than 20 attendees and may be delivered to a single audience in a larger office or in one central location for a group of offices. It won't appear on TDCAA's online training calendar, and you won't get a brochure in the mail with a list of dates for this training. (Offices that are interested in this training should contact me at Brian .Klas @tdcaa.com.) Attendance to the entire module is required, and attendees will be awarded 10.5 hours of CLE. While TDCAA makes every effort to fund the program, there is a material cost associated with the module, and that cost is determined by the particularities of each individual training. And though the course is designed for prosecuting attorneys, other DA and CA staff in supervisory roles are welcome to attend and would benefit from it too.

Look, this course is a long time in coming. I wish I could take credit for it, but it represents years of work by TDCAA staff, volunteer trainers, and the feedback of our members. I am proud that Texas prosecutors are the first to see the need for and develop such a course. Unsurprisingly, we are well ahead of the curve on a national level. Our mission is to see that justice is done. If that mission is to be more than a mere slogan subject to the smirks and cynical eye-rolls of ineffectual critics, we must seek out and exploit every opportunity we can find to get better. Fundamentals of Management is just the first step in the process. Testing for our next phase is already underway, and with your support, the Prosecutor Management Institute can become another hallmark of professional Texas prosecution. ❇

We've put on the module three times, and the response from our test subjects has been glowing: Jarvis Parsons, District Attorney in Brazos County, raves, "This management course is exactly what has been needed in our profession for a long time! The Prosecutor Management Institute should be mandatory training for any elected prosecutor, as well as any supervisor who manages other prosecutors."

A prosecutor's one-stop shop for crash reconstruction info

Every two years, attorneys at TDCAA hit the road to tell you all about the changes to the laws of Texas, and they change a bunch.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

The laws of physics, though—not so much. When I tried my first impaired driving crash case, I remember thinking that I really should have paid more attention in physics class. I had thought I'd never need it in life as a lawyer, but I was wrong. Turns out that crash reconstruction in a car crash involves lots of physics.

Luckily, my good friend John Kwasnowski, professor emeritus of forensic physics and a world-renowned expert in crash reconstruction, has put a vast portion of his work online. His digital library of videos, documents, and links to studies and resources is available by subscription at www .legalsciences.com. It includes over 18 hours of instruction in more than 30 videos (at 10 to 15 minutes each), which you can watch at your desk as your busy day allows. It is also cool because you can skip to the stuff you need today. The cost is $45 a year, which is really not bad for 18 hours of training with no travel costs. Perhaps Jim Camp, the former Traffic Resource Prosecutor from Tennessee, describes having a subscription best: "It's almost like having John sitting on the other side of your desk whenever you need him." I agree. Watching these videos (and having your crash reconstruction expert do the same pre-trial) is the next best thing to having John testify for you. It's a way to make sure both you and your expert are ready.

Go to www .legalsciences .com for crash reconstruction help.

I am often reluctant to recommend other folks' training—but this is an exception. The content and methodology of Kwasnowski's service fills a hole we have in Texas, and his expertise is second to none. He spent 31 years on the faculty at Western New England University in Springfield, Massachusetts, is a certified police trainer in more than 20 states, and has instructed prosecutors and police on more than 330 occasions across the U.S., including at almost every TDCAA Intoxication Manslaughter course. He has reconstructed more than 1,300 crashes and has given sworn testimony on more than 200 occasions. If you have attended my Worst Case Scenario regional program, you have seen him on video—he knows his stuff and can teach it as well. It is a rare thing when any one person has both of those skill sets. And fortunately, the laws of physics are the same across state lines.

John covers questions that I get regularly in an in-depth manner: "Is the accelerometer better than a drag sled?" "What is 'crush,' and how can I get it in to evidence?" "What can I expect from defense experts?" He also covers topics that I haven't been able to teach lately—my presentations focus on blood testing and drugged driving these days, partly because there is nowhere else I can send Texas prosecutors to learn about them. But for crash reconstruction—another complex topic I'm always fielding questions on—I can send prosecutors to Kwasnowski's site. Please go take a look.

More valuable videos

While my job takes me around the state to teach on a variety of DWI topics, I can't be everywhere as often as I am needed. Producing videos on high-demand training topics is a great way to disseminate training while decreasing how many miles I travel. If you have never seen TDCAA's videos on a variety of DWI topics, please go to the DWI Resources page on www.tdcaa .com. There are hours and hours of good stuff in bite-size pieces. The first four videos focus on courtroom testimony, roadside investigations, and breath testing. This fall, we will add instruc-

Go to www.tdcaa .com/dwi for videos galore.

What is criminal negligence? The CCA gives prosecutors a clear rule

The Penal Code's definition of "criminal negligence" uses a lot of words that need definitions themselves.

By Clinton Morgan
Journal Columnist and Assistant District Attorney in Harris County

Someone is criminally negligent as to the result of his conduct if he *ought* to be aware of a *substantial* and *unjustifiable* risk that the result would occur.[1] This risk must be of such a nature that the failure to perceive it constitutes a *gross* deviation from the standard of care than an *ordinary* person would have exercised. By my count, that's five undefined words that are subject to highly subjective interpretations.

Faced with negligence-based convictions, appellate courts want to interpret these subjective words as objectively as possible. The result of this impulse is that courts will typically try to show that the result of a given case is consistent with prior results, even if those prior results are, necessarily, somewhat subjective. Thus, more than any other area of the criminal law, appeals from negligence-based offenses involve looking closely at the facts of prior cases and figuring out how, exactly, the facts of a current case match up.

The Court of Criminal Appeals's latest foray into this field, *Queeman v. State*,[2] continues the pattern, but more so than most negligence cases it makes a concerted effort to provide rule-based guidance for the future. Based on its facts, *Queeman* gives us the rule: An unexplained fatal wreck where the evidence fails to prove that the wreck was caused by something worse than routine traffic violations is not sufficient to support a conviction for criminally negligent homicide. By discussing the facts in this case in relation to prior cases, *Queeman* tells what would be sufficient: To prove criminal negligence, there must be evidence either that 1) the defendant's deviation from the ordinary standard of care was well beyond the norm, or 2) the defendant was blameworthy in creating the risk or failing to perceive it.

The facts at trial

Robert Queeman's van struck the right rear corner of Maria del Rosario Luna's SUV. [3] At the time of the wreck, Luna was either stopped or driving very slowly as she tried to make a left turn. The wreck caused Luna's SUV to flip over an oncoming pickup truck and come to rest upside down. Luna's passenger died as a result. Luna was cited for failure to signal (which she admitted to an investigating officer), and Queeman was cited for failure to control speed, but importantly, not for speeding. Queeman was later indicted for manslaughter and criminally negligent homicide. The specific acts of negligence alleged in the indictment were that Queeman "fail[ed] to maintain a safe operating speed and keep a proper distance."

As reported by the Court of Criminal Appeals' opinion, the State's evidence had some holes. Based on tire marks, the investigating officer testified that Luna's SUV had a post-collision speed of 37 miles per hour. Based on the lack of tire marks from Queeman's van, the officer testified that Queeman had braked very little or not at all. The officer said that Queeman was going "significantly more" than 37 miles per hour, and the officer agreed it was "safe to say" Queeman was exceeding the posted limit of 40 miles per hour. However, based on an admitted lack of training, the officer was unable to specify how fast Queeman was going.

According to the Court of Criminal Appeals, there was no evidence regarding what Queeman was doing prior to the accident, or whether there was any particular reason he did not avoid a collision. Queeman seems not to

have testified, but the defensive theory was that Luna stopped suddenly and Queeman swerved but did not have enough time to avoid a collision, which is why he hit the corner of her SUV instead of striking it squarely from behind. The jury acquitted on manslaughter but found Queeman guilty of criminally negligent homicide.

Reversal in the Fourth Court

On direct appeal, Queeman challenged the sufficiency of the evidence to support his conviction.[4] In figuring out where this case placed on the negligence spectrum, the Fourth Court looked closely at the fact patterns of three other cases involving convictions for criminally negligent homicide: *Montgomery v. State*,[5] *Tello v. State*,[6] and a New York case discussed in *Tello*, *People v. Boutin*.[7]

In *Montgomery*, the defendant had been talking on her cell phone while driving on an access road. When she hung up, she realized she had missed her on-ramp, so she abruptly changed lanes without signaling or altering her speed, despite the fact that she had already passed the on-ramp entrance. Because she was going slower than traffic in the lane, this caused a fatal three-car pileup. The Court of Criminal Appeals held that the evidence was sufficient to show criminal negligence because the defendant's self-induced inattention had created the risk, and because making a sudden lane change without keeping a proper look-out posed a "great risk" to other drivers.

In *Tello*, the defendant was towing some dirt in a homemade trailer when it came unhitched and killed a pedestrian. The State put on significant evidence showing why the trailer came unhitched: 1) the hitch did not lock because it had been beaten with a hammer in an apparent effort to make it stay on; 2) the ball to which it was hitched was loose and wobbly; and 3) the defendant did not use chains to connect the trailer as required by law. Importantly, the *Tello* court reasoned that the hammer marks showed that the defendant was "on notice" of the condition of his trailer; thus, his failure to appreciate the risk of towing the trailer in that condition "involved some serious blameworthiness" and was sufficient to support a finding of criminal negligence.

Boutin was an example of where the evidence was insufficient. In that case, a big truck became disabled on the shoulder of a highway and a state trooper stopped in the right lane, activated his emergency lights, and attempted to help the trucker. The defendant struck the trooper's car, killing both the trooper and the trucker. The defendant said he did not see the flashing lights and did not see the police car until it was too late to avoid a collision. In reviewing the sufficiency of the evidence, the New York Court of Appeals reviewed its prior caselaw on the matter and concluded that criminally negligent homicide requires proof not only of a failure to perceive a risk of death, but also of "some serious blameworthiness in the conduct that caused it." The *Boutin* Court characterized the case then before it as nothing more than an "unexplained failure" to avoid a collision, and held that, "without more," it was insufficient to show criminal negligence.

After reviewing these cases, the Fourth Court looked at the evidence regarding *Queeman*. It noted that, even though there was some evidence that he was driving faster than the posted limit, it did not show that he traveling at an "excessive" rate of speed. The Fourth Court believed the case was like *Boutin* because there was no evidence that Queeman was engaged in "any criminally culpable risk-creating conduct."[8] The Fourth Court further noted that, unlike *Montgomery*, there was no evidence Queeman engaged in any "blameworthy conduct like distracted driving due to cell phone use and an abrupt, aggressive lane change." Characterizing the evidence as showing only that Queeman "inexplicably failed" to avoid a collision, the court found the evidence insufficient.

Discretionary review

The Court of Criminal Appeals granted the State's PDR on two grounds. The first ground pointed out that the wreck was caused by the appellant's failure to drive a safe speed and failure to maintain a safe distance, and then asked whether it was appropriate to characterize the failure to avoid as collision as "unexplained." The second ground questioned whether the Fourth Court had really viewed the evidence in the light most favorable to the verdict, as required on sufficiency review.

The Court of Criminal Appeals began by noting that the evidence showed three things that tended to support a finding of negligence: 1) Queeman failed to maintain a safe speed and distance; 2) he was speeding; and 3) he was inattentive. The court noted, though, that there was no evidence Queeman was "grossly negligent"

either by "speeding excessively over the limit"[9] or "in terms of the length or reason for his inattention." The meat of the opinion analyzes whether those facts showed the sort of gross deviation from the standard of care required to a finding of *criminal* negligence. It did so by comparing the case to *Montgomery*, *Tello*, and *Boutin*.

In comparing this case to *Montgomery*, the court noted that there was no evidence that Queeman was "engaged in any activity while driving that a reasonable person would know might distract him." Also unlike *Montgomery*, there was no evidence that Queeman "made any particular driving maneuver … that a reasonable driver would recognize as being inherently unsafe."

In comparing this case to *Tello*, the court noted that there was no evidence here showing that Queeman was "on notice" of a particular risk. Though the evidence plainly showed that Queeman's negligence (i.e., deviation from the standard of care) caused the wreck, additional evidence of blameworthiness would be needed to show the sort of "gross deviation" from the standard of care required to find criminal negligence. In Tello, that evidence was that the defendant was "on notice" of the faulty nature of his trailer, yet he continued to tow it. Here, there was no such evidence.

Instead, the court noted that the case was similar to *Boutin*: "As in *Boutin* … the evidence here is sufficient to show carelessness, but it does not establish that [Queeman] engaged in any criminally culpable risk-creating conduct or that his conduct was such that it posed a substantial and unjustifiable risk of death, or that the failure to perceive that risk was a gross deviation from reasonable care under the circumstances." Accordingly, the court held that the evidence was insufficient to support the conviction.

What more could have been proved?

The court ended its opinion by discussing how criminal negligence relates to driving. Usually, wrecks are caused by ordinary negligence. The driving errors the State proved Queeman committed—failing to control his speed and following Luna at an unsafe distance—are the sort of ordinary driving errors that "are often made by many drivers who also accept these same risks from other drivers because of the great social utility afforded by automotive transportation."

What elevates ordinary negligence to criminal negligence is that the risk is "substantial and unjustifiable," and the failure to perceive the risk is a "gross deviation" from the standard of care. The final part of the court's opinion points strongly at the sort of evidence that would have proven criminal negligence in this case. First, the court noted that there was no evidence that Queeman "grossly deviated from the standard of care, for example, by excessively speeding." Second, the court noted that while the State does not *necessarily* have to prove why a driver committed certain negligent acts to prove criminal negligence, there was nothing in the record showing that Queeman "engaged in acts that might be characterized as grossly negligent in the context of his failure to control speed and failure to maintain a safe distance, such as talking on a cell phone, texting, or intoxication."

Prosecutors looking at whether to bring charges or go to trial on a fatal wreck should keep these examples in mind. *Queeman* makes clear that the focus of such a charge is not just that the defendant was at fault, but also that the defendant's negligence was out of the ordinary, either in the danger of his driving or in his blameworthiness for creating or ignoring the risk. ❇

Endnotes

[1] Tex. Penal Code §6.03(d).

[2] ___ S.W.3d ___, No. PD-0215-16, 2017 WL 2562799 (Tex. Crim. App. June 14, 2017).

[3] *Id*. at *1-2. All facts of the case are taken from the Court of Criminal Appeals's opinion.

[4] *Queeman v. State*, 486 S.W.3d 70, 71-72 (Tex. App.–San Antonio 2016), aff'd, 2017 WL 2562799 (Tex. Crim. App. 2017).

[5] 369 S.W.3d 188 (Tex. Crim. App. 2012).

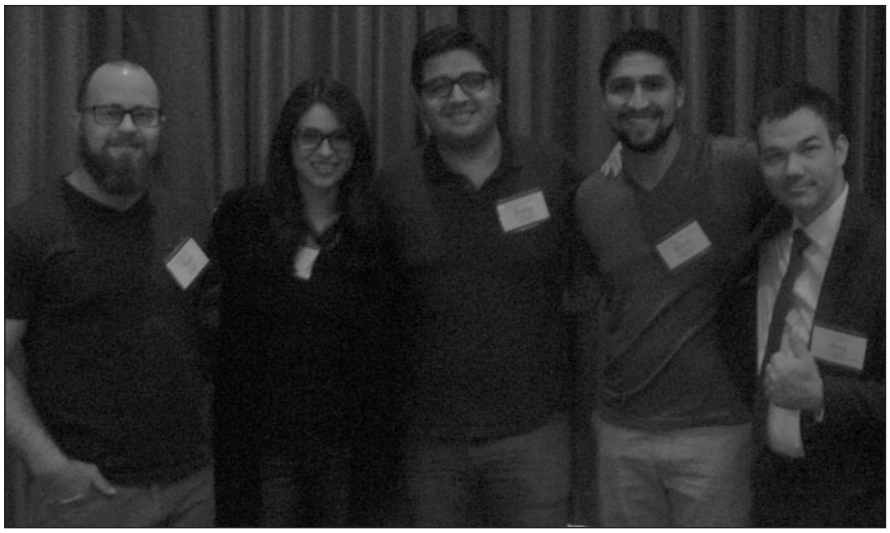
[6] 180 S.W.3d 150 (Tex. Crim. App. 2005).

[7] 555 N.E.2d 253 (N.Y. 1990).

[8] *Queeman*, 486 S.W.3d at 77 (quoting *Boutin*, 555 NE.2d at 255-56).

[9] The court never specified what would constitute "excessive" speeding, but it cited two cases, one a manslaughter case and the other a criminally negligent homicide conviction, where speed had been a factor in

Photos from our Prosecutor Trial Skills Course



Photos from our Advanced Trial Advocacy Course

A round-up of notable quotables

"The idea behind it is only about how many people are still breathing each day when we're finished."

—Jeffrey Smith, director of the nation's first opioid crisis intervention court in Buffalo, New York. http://www.chron.com/news/medical/article/Goal-of-nation-s-first-opioid-court-Keep-users-

Got a quote to share? Email it to Sarah .Wolf@tdcaa .com. Everyone who contributes will get a free TDCAA ball cap!

"In law schools, we don't just teach our students to know the weaknesses in their own arguments. We demand that they imaginatively and sympathetically reconstruct the best argument on the other side."

—Heather Gerken, dean of Yale Law School, in an essay published in Time *magazine, explaining why law schools haven't seen the ugly and violent protests that other college campuses have. http://time.com/4856225/ law-school-free-speech*

"I guess I got spun up a little bit."

—Wise County Sheriff Lane Akin, about the Department of Public Safety's decision in July to start charging law enforcement for forensic evidence testing. In a response on Facebook, Akin threatened to start charging DPS $50 per night for each state prisoner in the county jail, as well as for prisoners' medical costs, court transport, extra blankets, toiletries, and other costs. Other response statewide was so swift and the outcry so indignant that DPS reversed itself within a week. http://www.star-telegram.com/opinion/opn-columns-blogs/bud-kennedy/article164363482.html

"Apparently, I must be a little bit of one, yes."

—Defendant Kevin Coffey, former chief of the Maypearl Police Department, during his trial for sexual assault of a child and indecency with a child by contact. He was answering Ellis County prosecutor Ricky Sipes' question, "Are you a pervert?" (Submitted by Ellis County and District Attorney Patrick

"It was on my mind all the time. I thought the drugs would stop it, but I don't think it did."

—Melvin Knox, as he testified on his own behalf in a Tarrant County courtroom. Last year, Knox, now 59, pled guilty for the 1973 murder of his best friend; both boys were teens at the time. Knox told Judge Wayne Salvant that he never spoke of the murder and had turned to drugs and alcohol hoping to forget what he'd done. Judge Salvant sentenced Knox to 40 years in prison. http://www.star-telegram.com/news/local/community/for

ŇYes, there are other stressful professions. Being a surgeon is stressful, for instanceŇbut not in the same way. It would be like having another surgeon across the table from you trying to undo your operation. In law, you are Ţnancially rewarded for being hostile.Ó

—Wil Miller, who practices family law in the offices of Molly B. Kenny in Bellevue, Washington, in a New York Times *article on how common drug addiction is among lawyers. Miller spent 10 years as a sex crimes prosecutor, the last six months of which he was addicted to methamphetamines. https://www.nytimes.com/2017/07/15/busi*

The devastation of driving while drugged (cont'd from the front cover)

one. An entire family smashed together in such a way that none of them were easily identifiable, including two little kids. It was horrific and shocking to even the most experienced first responders on scene that day.

In looking at the crash evidence and talking with witnesses, we learned that Cooper was driving in the same direction as the Sedlmeier family when he left his lane and clipped the back end of the family's compact sedan. This caused the Sedlmeiers' car to skid into the oncoming lanes, where they were hit head-on by a young man driving a Jeep Wrangler. This young man and his passenger had also just left church and were headed to a local restaurant to have lunch with his family. His Jeep struck the Sedlmeiers' car broadside and caused significant damage, while the two men in the Jeep walked away with only minor injuries.

Although the crash was fairly involved, the two of us began to focus our attention on Ronald Cooper. At the time, he was a 67-year-old man driving alone in his car, the same vehicle that had been reported for reckless driving by 911 callers and other witnesses. The initial witnesses and law enforcement officials noticed fairly quickly that something seemed "off" with him. Some of the witnesses characterized it as a "likely medical condition," such as diabetes or low blood pressure, while others said he just seemed to be "dazed" from the crash. Some onsite witnesses told law enforcement that they did not smell any alcohol so they knew that he "wasn't drunk," but other witnesses and officers described Cooper as having slurred speech, slowed reactions, and unsteady balance, as well as being confused. One of the more experienced CPD officers believed that Cooper's signs of impairment were probably from prescription medication. Another CPD officer on scene discovered several prescription pill bottles in the center console of Cooper's car. The prescriptions were recently filled, and the bottles for Valium and oxycodone still had pills inside.[1] A crime scene investigator collected the pills as evidence.

At this point, we decided to call a Drug Recognition Expert (DRE) to the scene to do the initial follow-up and intoxication investigation with Cooper. Cooper was still being evaluated by EMS, and one of the paramedics stepped out of the ambulance to talk with us. She believed that Cooper was impaired, and he had admitted to taking Valium and oxycodone that morning. She also said that he appeared to have substantial medical history, although all his vitals and other signs were checking out just fine. We learned that he had not suffered any injuries in the crash and that his blood pressure and blood sugar were both within normal range.

Soon thereafter, DRE Michael Dean arrived. We decided that it would be best for this investigator to interview Cooper and determine the extent and likely cause of his impairment. Cooper had previously been read his *Miranda* warnings by one of the patrol officers before getting into the ambulance. He had also been read the DIC-24 and had consented to a blood sample. This initial blood sample was taken in the back of the ambulance by one of the paramedics, who was also a registered nurse.

Following the DRE's initial interview and collection of the blood sample, paramedics consulted with law enforcement and decided that Cooper should be transported to the emergency room to be checked out, a decision we highly encouraged. Because of Cooper's age, the fact that he had admitted to taking multiple prescription medications, and the numerous "medical conditions" and "prior injuries" he had mentioned to the paramedics, we just knew that in any future prosecution, his defense would attempt to raise those issues as causes of the crash. It was important that Cooper be seen by a medical doctor to rule out any of those factors from playing a role in this case. And frankly, as seekers of the truth, we wanted to make sure there was in fact no medical event that could have contributed to this crash.

Cooper was transported to the ER and seen by a medical doctor and nursing staff. Other than noting impairment from the prescription drug use, they found nothing wrong with him. At the ER, the DRE also conducted his full evaluation, including taking a second blood sample. The DRE determined that Cooper was intoxicated on a narcotic analgesic. Following the

medical screening at the emergency room and the DRE evaluation, Cooper was arrested and charged with four counts of intoxication manslaughter for the Sedlmeier family and two counts of aggravated assault with a deadly weapon for the injuries to the two young men in the Jeep. Our investigation into this crash was well underway.

CooperŐs medical history

Understandably, the crash garnered a lot of attention from local news outlets, and Ronald Cooper's wife and daughter-in-law both spoke to various news organizations the evening after the crash and in the days following. They claimed that Mr. Cooper's conduct had to be the result of his health issues, which include diabetes and a blood clot on his brain.[2] We knew that we needed to talk with both women to investigate the details of Mr. Cooper's ailments and injuries and obtain whatever information we could from them.

In our crash investigations, it is normal practice for our Vehicular Crimes Team to rely heavily on the grand jury to obtain records and interview witnesses to lock down testimony and gain insightful information for the investigation. Several of Cooper's family members were interviewed at grand jury. From their testimony, we learned generally about Cooper's numerous prior crashes, his hospitalizations, his medical history, his previous doctors, his family's concern about letting him drive and letting people ride in the car with him, and all of the prescription medications he was taking (in addition to the ones that he admitted to and which were found in his car after the crash). One of the drugs is called Gabapentin, which is an anti-epileptic medication that affects the body's chemicals and nerves that are involved in the cause of seizures and some types of pain. His family expressed concerns that Gabapentin was the primary cause of any impairment they had seen in him before the crash. Having never heard of Gabapentin, we did some research into it and found that it also causes central nervous system (CNS) depression. We reached out to our usual lab[3] to find out if it could test for Gabapentin and were told that it couldn't but that the National Medical Service Labs in Pennsylvania could conduct the testing we needed. Our office uses NMS occasionally for blood testing, as it is often the only lab in the country that will test for certain substances. There can be significant costs associated with independent testing at private labs like NMS, but given the serious nature of this case, we felt it was necessary and well worth it to spend the additional funds. A few weeks later, we received a report showing that Gabapentin was in Cooper's blood in a low, therapeutic amount.

Next, we zeroed in on Cooper's medical history and other prescription drug use. We subpoenaed his medical records from those hospitals that Cooper admitted to visiting in the last couple of years, as well as the hospital he visited on the day of the crash. To expedite things, we had an investigator serve those subpoenas at the hospital and pick them up once they were ready. Based on the information obtained in these records, we discovered additional hospital stays and identified Cooper's primary care and pain management doctors. We then subpoenaed records from these doctors and the records about Cooper's prescriptions.

We also ran Cooper through the statewide prescription drug database and found all the other (numerous) doctors that he had visited, along with the prescription history from each visit. That finding led to additional grand jury subpoenas and follow-ups with other pharmacies in the area. As these records came in, we put together a fairly extensive timeline and spreadsheet that included a number of other crashes that Cooper had been involved in, as well as several hospital visits going back as far as 2001. Again, anticipating that his attorney would surely use Cooper's medical history and health issues as defenses in the trial, we studied all of these records in great detail and became very well-versed in Cooper's medical conditions, their causes, their treatments, and the drugs he was taking. This process took lots of time and organization, as the records accumulated into thousands of pages.

Generally, these records obtained through the grand jury were a goldmine of information. To better understand them, Tyler reached out to the director of our county-wide EMS service, a medical doctor who had some involvement in the case. We arranged for several meetings to review the medical records together so that Tyler could better understand what the medical conditions were and the best practices for treating them, including what prescription drugs we

would expect to see. Tyler found these meetings to be very informative. With this doctor's help, he understood what we needed to prepare for and what would likely be an issue at trial.

Also during this time, Tyler pulled Cooper's medical records from his time in jail. (He spent about a year in jail before trial, where he was treated by a doctor for his basic medical needs.) These records were incredibly valuable. We discovered that Cooper was able to function perfectly for an entire year in jail without taking any type of controlled substance for alleged pain from prior injuries. He went an entire year in the jail never once requesting pain medication and often describing his overall condition as "very good." We felt his medical progress and abilities to function without pain medication would be an important point during the trial (and it was). We were confident that if the defense decided to open Pandora's Box of prior medical conditions as either causes of the crash or as mitigation, we were prepared to defend such claims. We subpoenaed many of Cooper's doctors for trial and were ready to truthfully explain his medical history and the fact that none of it was the cause of (or even relevant to) this particular crash. We probably knew Cooper's medical history and prescription drug use better than he did!

Jury selection

During voir dire, in addition to the typical intoxication manslaughter topics, our biggest hurdles to overcome involved:

1) misperceptions surrounding "legally prescribed" prescription drug use, intoxication, and driving;

2) how drugs affect the body,

3) lack of *per se* limits; and

4) signs of impairment being attributed to prior injury and age.

In all honesty, this was the first case we had seen in some time that involved a defendant who was taking prescription medication based on a valid prescription for what appeared to be legitimate medical conditions. Of course, we have had our share of drug-related DWI cases, and a number of those involved prescription drugs as the intoxicant. But most of the time, DWI offenders are taking prescription drugs without a valid prescription and for the "high" effect rather than for any legitimate medical purpose. In Cooper's case, we had to overcome the public's perception that a person cannot commit DWI (or any other crime) if he has a legitimate medical condition, goes to a legitimate doctor, is prescribed a drug, takes the drug as prescribed, and then drives. If you ask around, many laypeople assume that if someone has a valid prescription from a doctor and he takes the drug as prescribed, that person can safely operate a motor vehicle. Although laypeople might not perceive the consequences up-front, usually once we remind them about the warnings on the pill bottles against operating machinery and driving and then discuss the effects of certain drugs on the body and mind, they come around to understanding that such practice could be criminal. We addressed these issues head-on in voir dire.

We began with the definition of intoxication manslaughter and what it means to be intoxicated generally. We turned the conversation to drugs and of course, no one was surprised to learn that drugs (of any caliber) can cause intoxication. Before we jumped too far into the details of prescription drug use, Tyler wanted to test the waters with a general question so to start off, he asked something like, "Do you believe that a person could be legally intoxicated on prescription medication even if taking it as prescribed by their doctor?" He went person by person gauging gut reactions to this question. This helped with identifying those who might need more persuasion (or evidence) as to this element in the case. We then carefully transitioned the conversation to prescription medication and asked whether certain prescription medications might cause someone to be intoxicated. This question led to follow-up questions about types of prescription medications that might be an issue and experiences some people on the panel had had with taking certain medications. This conversation led to responses running the gamut from those who had never taken these types of drugs to those who were taking them right then for medical issues. Panelists also talked about the effects of these drugs and why medications have warnings on their labels.

Most of the conversation led to the group educating itself and coming to grips with the ramifications of taking these types of drugs while driving. To address this issue, we asked a series of basic questions so the panel would consider a number of scenarios, such as "whether it is legal to take prescription medication and drive," as

compared to "driving while intoxicated on prescription medication." We ended the discussion with explaining Texas Penal Code §49.10, which states that "the fact that the defendant is or has been entitled to use the alcohol, controlled substance, drug, dangerous drug, or other substance is not a defense." It was a good ending point, as it reaffirmed the discussion and the logical conclusion in prescription drug cases.

The voir dire process on *per se* limits on drugs and potential medical conditions that could affect an intoxication investigation were no different from in any other DWI case. It is important for the jury panel to know and understand why we do not have *per se* limits for drugs like we do for alcohol. In our voir dire, we found a nurse on the panel who spoke about the basics on prescription drug use and how these drugs affect the body and most importantly, how they vary with half-lives, etc. This could lead to a complicated discussion if prosecutors are not careful, but it is important that the panel understand the differences in our procedures and abilities between alcohol and drugs. The panel must also understand that medical conditions and other injuries might affect an officer's ability to test for intoxication. In this voir dire, we discussed field sobriety tests, how they are used, and what would happen if someone was unable to complete them because of a medical condition (i.e., what other ways an officer might check for intoxication). Included in this discussion were questions about how police officers could exclude certain medical conditions, such as diabetes or high blood pressure, from indicating impairment (for example, consulting with medical professionals during a DWI investigation). Of course, getting the panel to under- stand the totality of the circumstances is an important part of jury selection in a case like Cooper's, and overall, this voir dire was more educational than most we might do in an intoxication manslaughter case. But educating the jury and dispelling related myths are very important.

Proving intoxication

We knew that to prove Cooper was intoxicated and that his intoxication caused a crash that killed four people, we needed to explain to the jury the medical reasons a doctor would prescribe oxycodone, Valium, and Gabapentin to a patient, how these drugs affect the human body, and that those effects impaired Cooper's ability to safely operate a car.

It was paramount to proving our case to connect the side effects of the drugs in Cooper's system with his driving, appearance, and actions at the time of the crash and during the investigation. About a month before trial, we sat down with our DRE and our toxicology expert, Dr. Sarah Kerrigan.[4] When we first retained Dr. Kerrigan, we provided her with several important items from the case file: the police report, EMS records, DRE evaluation report and video, videos of the EMS and officers interviewing Cooper at the scene, toxicology reports, and Cooper's prescription records. We prepared for this first meeting by reviewing the DRE evaluation and police report to familiarize ourselves what officers, first responders, and civilians witnessed at the crash scene.

We discussed our concerns and what we thought would be potential issues at trial. A person intoxicated on prescription drugs can often look nothing like the stereotypical drunk, and Cooper was no exception. On the various videos of his interactions with EMS and officers, the evidence of Cooper's intoxication often appeared subtly. When Cooper was engaged in conversation, he would generally respond appropriately and maintain his focus; however, when he was not being engaged, he had trouble keeping his eyes open and displayed one of the classic indicators of narcotic analgesic impairment, being "on the nod" (that is, the semi-sleep state that narcotics users experience while on the drug).

We also discussed some of the evidence that our toxicology expert believed to be inconsistent between the DRE evaluation and toxicology reports. The amount of oxycodone in Cooper's blood was above the therapeutic range, the amount of Valium and its active metabolite was around the middle of the therapeutic range, and the amount of Gabapentin was in the low end of the therapeutic range. Our toxicology expert would have expected Cooper to display horizontal gaze nystagmus (HGN) because of the Valium, a CNS depressant, but neither our current DRE nor the DRE officer who interviewed and administered tests to Cooper at the scene saw HGN in his eyes. Our toxicology expert explained that although Cooper did not have HGN, that did not mean that the Valium and its metabolite were not contributing to his intoxication.

The fact that our DRE did not see HGN

would also allow us to respond to the confirmation bias argument that defense attorneys often make against DREs. Defense attorneys often argue that DREs claim to observe clinical indicators of impairment consistent with the type of substance the arresting officer tells them the suspect admitted to taking. But though our DRE was told that Cooper admitted to taking Valium and oxycodone and he would have expected to see HGN, he didn't actually observe nystagmus, and he documented only what he observed.

We ended our first meeting with a plan to meet again in another week; Andrew would prepare direct examination questions for both the DRE and our toxicology expert, our DRE would review his materials, and the toxicology expert would delve into the scientific studies and literature on oxycodone and Valium, peak concentrations and dosages, and how they affect driving. The three of us met once more, and after that Andrew met with the DRE and tox expert separately (to review the videos of the DRE's evaluation of Cooper and to finalize the questions that we would ask her and what her answers would be, respectively). Our tox expert also provided me with several studies to use during cross-examination of the defense expert.

The trial

Everyone who interacted with Cooper immediately after the crash, from civilian witnesses to first responding officers and paramedics, noted that his speech was slurred, his reactions were slow, his balance was unsteady, his pupils were constricted, his thought disorganized, and that he was "on the nod." We knew that narcotic analgesics and CNS depressants typically cause all of these signs, and we decided to highlight this intoxication evidence throughout the trial by calling all of the witnesses who made these observations.

The civilians and most of the officers couldn't say whether Cooper's behavior and appearance was due to intoxication on prescription drugs or whether it was caused by a medical condition. The paramedics, the ER staff, and the DRE, however, could make that distinction. We felt that it would help the jury understand that Cooper's impairment was due to drug intoxication by walking them through the same analysis that we did on the day of the crash and eliminating medical impairment as a possibility.

We started by calling a close friend of the Sedlmeiers who saw them leaving church that morning and who could tell us what the typical Sunday was like for the family. We then went straight into the good Samaritans who called 911 and followed Cooper for more than 5 miles trying to get him off the road, the first two responding officers, paramedics, the DRE who interviewed Cooper and administered SFSTs right after the crash, and emergency-room personnel. At this point the jury had heard from numerous people who believed Cooper was intoxicated and that his impairment was not caused by any sort of injury, ailment, or illness.

We then called analysts from SWIFS and NMS who tested Cooper's blood. We asked only about the testing process and the results of the testing and did not ask the analysts to interpret their findings or get into detail about how those drugs affect the human body. We wanted all the interpretation testimony to come from our toxicology expert, Dr. Kerrigan, so there would be only one, consistent line of testimony for the jury to consider.

Next up was our DRE, who went through the details of his evaluation. His testimony combined what jurors had already heard regarding the physical manifestations of the drugs in Cooper's system (from civilians, other officers, and medical personnel) with the known drugs in his system. Jurors had already heard, "I observed slurred speech, unsteady balance, constricted pupils, and the nod," as well as that Cooper had oxycodone, Valium and its active metabolite, and Gabapentin in his system. The DRE could then say that oxycodone is a narcotic analgesic and that such drugs cause constricted pupils and being "on the nod." The DRE could do the same thing for the other drugs, explaining their effects on the body.

We followed the DRE with our toxicology expert, who built on and reinforced the DRE's testimony. Dr. Kerrigan gave meaning to the amounts of each drug in the defendant's system and explained that although Cooper had likely developed some tolerance to these drugs after taking them for years, he wouldn't have been showing impairment if he had a tolerance to the drug amounts in his system. She also explained the additive effect that narcotic analgesics and CNS depressants often have when taken together and that even though two of the three drugs in his system were in the therapeutic range, their combined effect was impairing.

At this point in the trial we transitioned

from putting on evidence to prove intoxication to proving that Cooper's intoxication caused the crash. We did so by explaining how these three drugs can and do impair someone's ability to safely operate a car. The jury heard about common driving mistakes made by people intoxicated on Valium and oxycodone, such as an inability to maintain a single lane or overcorrecting, the same things Cooper was doing that caused the crash. We also wanted to show the jury the aftermath of how these drugs impair driving by calling the medical examiner to testify as to the horrific injuries sustained by each member of the Sedlmeier family. We followed the medical examiner by calling crash reconstruction officers to explain how the crash happened, and we ended our case by putting one of the Sedlmeiers' family members on the stand to identify their bodies from the autopsy photos.

Countering the defense

Starting at the crash scene on that Sunday afternoon, we anticipated that the defense would try to attribute Cooper's behavior to a medical or age-related explanation. It was the only plausible defense available to them. They could attempt to minimize and provide innocent explanations for the observations that the witnesses made of Cooper's person, but they would have a difficult time explaining away his driving.

The defense initially provided us with notice of eight potential defense experts, including some of the more well-known names in the industry, and we provided it to our toxicology expert. We learned which one of these experts the defense actually had lined up to testify, and with that information our toxicology expert determined the avenue of attack that defense expert would pursue: that Cooper had developed a tolerance to the oxycodone and Valium because he had been taking them both for years and, therefore, those drugs did not cause impairment—the crash had to be caused by either medical or age-related issues. We also expected that the defense would talk about the various drugs in isolation and avoid discussing any additive effects. We were confident that several factors—our work early on in the investigation, Cooper having been evaluated by EMS and ER staff the day of the crash, and our obtaining so many of Cooper's medical records—would pay dividends at trial by allowing us to disprove the defense claims. We were right.

Conclusion

Ronald Cooper was convicted of intoxication manslaughter for each of the four deaths in this case and was also found guilty of two counts of aggravated assault. The defense elected to have the judge assess punishment, and Cooper was sentenced to 20 years in prison on each count. The judge stacked the sentences for a total of 80 years.

This case highlights the dangers with drug impaired drivers, especially those who take legally prescribed medication and drive, thinking they are all good. Like it or not, prosecutors cannot approach one of these cases like we would an alcohol intoxication case or even an illegal drug intoxication case. They are different, and juries will see them as different until we spend time educating them through voir dire, researching the defendant's medical history and reasons for taking the drugs, shoring up State's experts, and addressing anticipated defenses head-on and up-front. But all of that work is worth it. The Sedlmeiers' deaths were not the result of an accident. Ronald Cooper drove while intoxicated, and it was his intoxication that killed them. Justice requires that we take up these challenges for the victims, and it is well worth the fight in any prescription drug intoxication man-slaughter case. ❇

Endnotes

[1] The discovery of these pills led to an entirely separate criminal investigation into the doctor who prescribed them. By happenstance, a police officer on scene recognized the doctor's name on the pill bottles and knew that the Drug Enforcement Administration (DEA) had been investigating him for operating a "pill mill" in our county. I reached out to the DEA and discovered that authorities there had been waiting for two years for the U.S. Attorney's Office to move forward on the case. Our office decided that the safety of the public required immediate action, so the next day (two days after this crash), we ran a search warrant on the doctor's office and shut it down. The doctor and others were subsequently charged with various counts of insurance fraud and prescription fraud. Those cases are still pending.

[2] www.houstonchronicle.com/neighborhood/woodlands/news/article/Wife-of-retiree-charged-in-deadly-crash-says-he-6520435.php and www.desertsun.com/

‘Drugs don’t work in patients who don’t take them’

The legal ins and outs of administering psychiatric drugs when a civilly committed patient or defendant refuses to take them willingly.

By Christopher W. Ponder
Assistant Criminal District Attorney in Tarrant County

The world of mental health issues pervades both criminal and civil law. The great axiom of the day is that jails have become the *de facto* mental institutions. What so often causes detention in a jail facility for a penal code violation or in a mental health facility under a civil function is the fact that a mentally ill person has, for some reason, stopped taking her medication.

Advances in medication for the mentally ill have advanced dramatically in the last 60 years, beginning with the first “magic bullet” medication for mental illness: Thorazine. More than 60 years ago, *Time* magazine called Thorazine the “wonder drug of 1954.” Its development and other early psychotic medications set the stage for the deinstitutionalization of the mentally ill. The proliferation of psychiatric medications has exploded, with spending in the United States going from $400 million in 1987 to $40 billion today.

Pharmaceuticals as the magic bullet for mental illness is not a position everyone accepts. Personal liberty considerations always arise when there is a discussion of the government forcing medical treatment. On more than one occasion I have heard ad litem attorneys citing a book titled *Anatomy of an Epidemic* by Robert Whitaker, which questions why the number of people suffering from mental illness has skyrocketed in the last 50 years despite the advances in medications.[1] The book suggests that the widespread use of psychiatric medications could actually be fueling the epidemic.

Psychiatrists and medical professionals whom I’ve encountered, however, believe that the consistent use of psychiatric medications is an essential part of treating mental illness. But, as former U.S. Surgeon General C. Everett Koop observed, “Drugs don’t work in patients who don’t take them.”[2]

Studies suggest that the mentally ill most often cease taking medication due to anosognosia, or a lack of awareness of their illness.[3] It would seem that in a clinical setting like an inpatient mental health facility or a jail that a person could be more easily encouraged to appreciate the depth of her mental illness and the consequences of failing to abide by the prescription regimen. Covert or surreptitious administration of psychiatric medication is not an option; such actions are inconsistent with medical ethics. It should be noted that medications to treat a psychiatric emergency are not affected by the procedural and substantive laws discussed in this article.[4]

Laws allow forced medication

Setting aside the issue of the ethics, both medical and legal, and medical efficacy of forced psychiatric medications, constitutional and statutory law both authorize the administration of psychiatric medication irrespective of the patient’s refusal.[5]

For patients who are under a court order to receive inpatient mental health services (i.e., civil commitment), a treating physician may file an application in a probate court (or a court with probate jurisdiction) for forced psychiatric medica- tions, if: 1) the patient lacks capacity to make the decision for herself; 2) the medication is the proper course of treatment; and 3) the patient refuses to take the medication voluntarily.[6] Although the medication application can be filed before the patient has been committed, the order may not be granted until after the court orders the patient to receive inpatient mental health services.[7]

Once the application is filed, the patient is entitled to receive a copy of the physician’s application and notice of the hearing “immediately

after the time of the hearing is set."[8] Further, the court must appoint an attorney who is knowledgeable in the subject area, and the patient is entitled to meet with the attorney "as soon as is practicable" to answer questions and prepare for the hearing.[9] As with all mental health hearings, the patient has a right to be present at the hearing, but she may waive that right and allow the court to proceed on the application at the hearing.

If the court finds by clear and convincing evidence that the patient lacks capacity to make a decision regarding the proposed medication and that the proposed medication is in the patient's best interest, the court may order that the medications be administered over the patient's objection.[10] The authorization, however, is limited to those classes of medication that the doctor requested in the application.[11] The typical classes of medication, within which many individual medications fall, are antidepressants, antipsychotics, anxiolytics/sedatives/ hypnotics, and mood stabilizers.

Section 574.106(b) of the Health & Safety Code offers a list of considerations for the court in determining the patient's best interest. The court shall consider:

- the patient's expressed preferences regarding treatment with psychoactive medication;
- the patient's religious beliefs;
- the risks and benefits, from the patient's perspective, of taking psychoactive medication;
- the consequences to the patient if the psychoactive medication is not administered;
- the prognosis for the patient if she's treated with psychoactive medication;
- alternative, less intrusive treatments that are likely to produce the same results as treatment with psychoactive medication; and
- less intrusive treatments likely to secure the patient's agreement to take the psychoactive medication.

Using this list of factors, if the court finds that the administration of the medication is in the patient's best interest and the patient lacks capacity to make a decision regarding the use of the medication, the court may authorize medications to be administered without regard for the patient's consent.[12] The order is in effect as long as the underlying commitment order is in effect.[13]

Incompetency to stand trial

This relatively straightforward process is contrasted by the more convoluted one in the criminal realm for defendants found incompetent to stand trial. Article 46B.086, titled "Court-Ordered Medication," sets forth a process by which defendants may be forcibly medicated if medication is part of the treatment plan to restore competence. Before these procedures can be utilized, however, the incompetent defendant must first have had a hearing under Texas Health and Safety Code §574.106 and been found not to meet the necessary criteria.[14]

This requires that any effort to administer psychiatric medication to an incompetent defendant who is refusing that medication must begin with an application to the probate court with proceedings in the Health and Safety Code. The provisions for the incompetent defendant in the probate court are slightly different from those for the civilly committed.

Like the civil proceeding, the physician providing mental health services to the incompetent defendant makes application to the probate court and, pursuant to Texas Health and Safety Code §574.106(a)(2), the probate court may issue an order to administer psychiatric medications to a person who "is in custody awaiting trial in a criminal proceeding" who has been ordered to receive mental health services as part of her competency restoration.

For the probate court to order administration of the medication, however, the court must find more than a lack of capacity and the patient's best interest. The probate court must find by clear and convincing evidence that treatment with the proposed medication is in the defendant's best interest *and* the defendant presents a danger to herself or others.[15] The probate court analysis is conducted in the court's capacity as guardian of wards of the state without regard to any specific interest of the State of Texas, which differs from what analysis comes in the later proceeding in the criminal court.

The requirement that the defendant be a danger to herself or others creates an added element of difficulty in obtaining an order to medicate. Many incompetent defendants are not actively psychotic but remain resistant to medication, which hinders their competence restoration. If the incompetent defendant is not a danger to herself or others, the probate court must deny the application.

Once the probate court denies this application, the clock begins to tick. Not later than the 15th day after the probate judge denies the ap-

plication, the prosecutor may file a written motion to compel medication in the court that retains jurisdiction over the defendant,[16] and within 10 days of filing the motion, the criminal court must hold a hearing on the application.[17]

The hearing in the criminal court differs, procedurally and substantively, from the one that occurred in the probate court. Most importantly, the State no longer must prove that the defendant is a danger to herself or others. It remains a clear and convincing standard, but the criminal court need only find:

1) the prescribed medication is medically appropriate, is in the defendant's best medical interest, and does not present side effects that cause harm to the defendant that is greater than the medical benefit;

2) the State has a clear and compelling interest in the defendant obtaining and maintaining competency to stand trial;

3) no other, less-invasive means of obtaining and maintaining the defendant's competency exists; and

4) the prescribed medication will not unduly prejudice the defendant's rights or use of defensive theories at trial.[18]

The two-step process for incompetent defendants has its roots in the U.S. Supreme Court's decision in *Sell v. United States*.[19] In *Sell*, the Court held that the government may pursue forced medication requests but should evaluate the defendant's dangerousness initially. If the defendant is not a danger to herself or others, then further inquiry should be made.

The focus in the criminal court proceeding is on weighing the State's interest in bringing to trial someone accused of a "serious crime" against the defendant's right to not be administered medication that will produce side effects that will interfere with her ability to assist in trial defense. Expert testimony from physicians on the effects of the medication, both beneficial and deleterious, is the key to success in this hearing.

Unlike the initial hearing in the probate court, the hearing in the criminal court requires the testimony of two physicians.[20] One should be the doctor who prescribed the medication and the other one should be "not otherwise involved in proceedings against the defendant."[21] To satisfy *Sell*, it is imperative to obtain testimony from both doctors regarding the medications' effects on the defendant's ability to communicate with trial counsel and appropriately react to trial developments.[22] If the doctors can testify that the administration of these medications will enhance, rather than impair, the defendant's ability to participate in her own defense, courts will often defer to the professional judgment of the testifying doctors. Also, ensuring that there are not any alternative, less-intrusive means of achieving substantially same results is essential to satisfying *Sell*'s requirements.[23]

Given the health and liberty issues at stake, it stands to reason that the procedures for securing an order to administer psychiatric medications over a patient or defendant's objection are complex. Successfully securing the order, however, will result in shortened stays in inpatient mental health facilities and state hospitals, which is in everyone's best interest. ❇

Endnotes

[1] Whitaker, R. (2010). Anatomy of an epidemic: Magic bullets, psychiatric drugs, and the astonishing rise of mental illness in America. *New York*: Crown Publishers.

[2] Osterberg L, Blaschke T. Adherence to medication. *New England Journal of Medicine*, 2005; 353(5):487–497.

[3] See Kessler RC, Berglund PA, Bruce ML, et al. The prevalence and correlates of untreated serious mental illness. *Health Services Research*. 2001;36(6 Pt 1):987-1007.

[4] 25 Tex. Admin. Code §414.410.

[5] See *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Tex. Health & Safety Code §574.106; Tex. Crim. Proc. Code Art. 46B.086.

[6] Tex. Health & Safety Code §574.104(a).

[7] Tex. Health & Safety Code §574.106(a).

[8] Tex. Health & Safety Code §574.103.

[9] *Id*.

[10] Tex. Health & Safety Code §574.106.

[11] Tex. Health & Safety Code §574.106(h).

[12] Tex. Health & Safety Code §574.106.

[13] Tex. Health & Safety Code §574.110(a).

[14] Tex. Crim. Proc. Code Art. 46B.086(a)(4).

[15] Tex. Health & Safety Code §574.106(a-1)(2)(B)(ii).

[16] Tex. Crim. Proc. Code Art. 46B.086(b).

Taking time credits seriously

Even if a case is "finished" and an inmate is confined, prosecutors still have a continuing duty to seek justice. This includes addressing incorrect time credits.

By Andréa Jacobs
Assistant Criminal District Attorney in Tarrant County

Please note: This information is regarding requests made after conviction *for time credit. For information regarding requests made at the time of conviction, please see Articles 42.0199, 42.03, 42A.302, 42A.559, 42A.603, and 42A.755 of the Texas Code of Criminal Procedure.*

I cannot imagine being confined in prison. I could not bear the bars, the restrictions, or the constant monitoring. Considering how much I like my privacy and my independence, prison sounds like hell on earth to me. I would not want to serve a single minute longer than required, and I think that is why I take time credits so seriously.

Fun fact: Inmates write *a lot*. They file motions, pleadings, and writs. They send letters to judges, sheriffs, and district attorneys. They complain about food, treatment, paper choices, and cellmates. Because of this, it is easy to just brush the letters aside, but I would implore you to read them before sending them to the circular file.

Our criminal justice system is one of checks and balances. And while our part in the case may be "finished" and the defendant is now the "problem" of the sheriff, court, or Texas Department of Criminal Justice (TDCJ), prosecutors still have a continuing duty to seek justice. The reality is that sometimes people fall through the cracks.

In February 2014, a letter from a misdemeanor defendant crossed my desk. He had been convicted in 1999 and received a 180-day sentence. However, in December 2013, he was pulled over for a traffic violation and arrested on an outstanding warrant arising from that *discharged* 1999 conviction. When I received his letter, which had been bouncing around the office, he had been held for nearly three months on a warrant that should have been cleared when he was convicted.

A few months later, I found a letter from a felony defendant who pled guilty for time served. She should have been released the day she pled but, due to another clerical error, she had been sitting in jail for an additional month.

I share these stories to highlight that clerical errors do happen and that pro se defendants may be entitled to release. For those reasons alone, we should take a claim of missing time credits seriously.

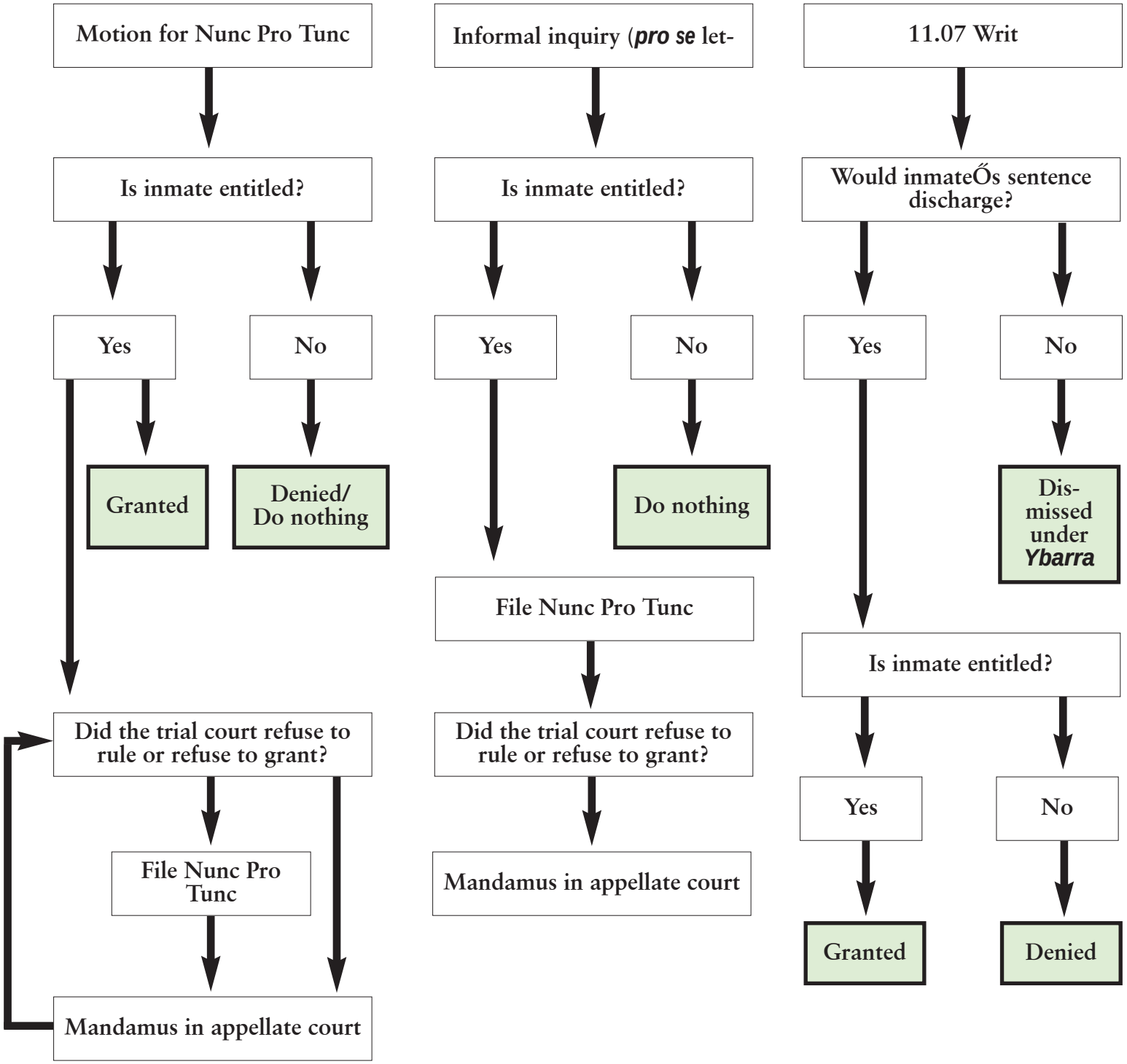
At the post-conviction stage, time credits are divided into pre-trial and post-trial. Generally, the trial court awards pre-trial credit and the Texas Court of Criminal Appeals awards post-trial credit in felony[1] cases. Therefore, the vehicle for relief for each is different.

Pre-trial credits

A request for pre-trial time credit may arrive in the form of an Art. 11.07 application for writ of habeas corpus (called an "11.07 writ" for this article's purposes), a motion for nunc pro tunc, or an informal inquiry, such as a *pro se* letter. (See the chart at right for an overview of the process.)

11.07 writ. If raised in an 11.07 writ, the issue is not cognizable (and the writ will be dismissed) unless the applicant alleges specific facts that he would have discharged his sentence if awarded the complained-of credit because such a claim rises to the level of a due process violation.[2] These claims are called *Ybarra* claims because they are dismissed pursuant to *Ex parte Ybarra*.[3] In most cases, a simple online check and calculation is sufficient to respond to these claims. For example,

An at-a-glance guide to post-conviction requests for pre-trial time credits



Key terms for pre-trial credits

Nunc pro tunc order: Order signed by the trial court amending clerical errors in the judgment so that the judgment correctly reflects what happened at the time of the conviction.

Pre-trial time: Time from date of offense to date of conviction. Also called pre-sentence time.

TDCJ website: Website updated with inmate's discharge date, parole eligibility date, mandatory supervision date, and sentence(s). Currently located at https://offender.tdcj.texas.gov/OffenderSearch.

***Ybarra* claim**: A Texas Code of Criminal Procedure Art. 11.07 claim for pre-trial time credits. *Ex parte Ybarra*, 149 S.W.3d 147 (Tex. Crim. App. 2004).

> Inmate states that he has been denied 365 days of pre-trial credit (reason irrelevant). A check to the TDCJ website shows that inmate has two years left on his sentence. Even if granted the pre-trial credit requested, he would not discharge his sentence. DISMISSED UNDER *YBARRA*.

That being said, I suggest taking a look at his claim to see if it has merit. If it is clear[4] he is entitled to the pre-trial credit, file a motion for judgment nunc pro tunc to correct the judgment to accurately reflect the time to which the inmate is entitled. The trial court will then send the judgment nunc pro tunc to TDCJ, and the inmate's time credits will be updated. If it is not clear, the inmate still can file a motion for nunc pro tunc himself.

Most pre-trial credits raised in 11.07 writs are dismissed as not cognizable.

Motion for Judgment Nunc Pro Tunc. The proper vehicle for relief for pre-trial credits is a motion for judgment nunc pro tunc.[5] While there are no deadlines for the State's answer or the trial court's order, I have found that the trial court may rule before I have even been served a copy of the motion for nunc pro tunc. Even when this happens, the State should still review the filing and make sure the trial court ruled properly. If the trial court denied relief, the State should file an answer recommending that relief may be granted and include a proposed nunc pro tunc order. If the trial court granted too much time, the State should decide whether the erroneous time is worth fighting for. The granting of a motion for nunc pro tunc may be appealed by the State.[6]

When is a defendant entitled to pre-trial credit? Pursuant to Art. 42.03 of the Texas Code of Criminal Procedure, a defendant is entitled to credit for confinement:

- in any jail for *this*[7] case from arrest until sentence;
- in a mental health facility, residential care facility, or jail pending competency determination or while restoring competency;
- in a substance abuse treatment facility if the inmate successfully completes the treatment program at that facility;[8] and
- *except* the first 180 days of confinement served as a condition of community supervision.[9]

Also, it should be noted that a defendant does not have to spend a full 24 hours confined to receive a full day credit; a partial day may be sufficient.[10] But, as different entities calculate time differently, the best way to insure that the defendant receives the amount of time the court intended is to list the amount of credited time as the number of days, not by date range. For ex-

✓ Time Credited: 100 days (YES!)

✗ Time Credited: 1/5/17–2/4/17
5/20/17–6/29/17
7/1/17–7/31/17 (NO!)

Both would technically work, but depending on how the date range is calculated, the actual amount applied may not be 100 days. Explicitly stating the number of days is clearer.

What evidence can be used? The following evidence can be used to determine if an inmate is entitled to pre-trial time credit:

- records from a sentencing proceeding (judgment, plea papers, docket sheet, criminal proceedings, plea record, etc.);
- jail records;
- letter or affidavit from jail;
- TDCJ website;
- admission or discharge records from a substance abuse treatment facility, mental health facility, and residential care facility; and
- demonstrative table or graph breaking down and explaining the times confined (with supporting evidence).

But remember: While correcting time credits may be done through a nunc pro tunc order, the nunc pro tunc is still limited to clerical errors and not judicial errors. That is, the trial court may grant additional time through a nunc pro tunc order only if it "is so obviously spelled out that the judge would not have any discretion about whether" to grant the time.[11] The judge may not later decide discretionary credit should have been granted and grant the credit through a nunc pro tunc order. For example, the first 180 days of confinement as a condition of community supervision is purely discretionary and, unless the trial court indicated on the record *at the time of sentencing* that it was awarding this credit, the defendant cannot be awarded it through a nunc pro tunc order.

But again, if the trial court grants the defendant too much time, is this something the State

should appeal? If the trial court refuses to rule on or grant a proper motion for nunc pro tunc, either party may file a petition for writ of mandamus in the intermediate appellate court.[12]

***Pro se* letter.** As expected, a *pro se* letter does not require any action by the State or the trial court. However, like an Art. 11.07 writ, I would suggest looking into it to make sure the inmate is not entitled to relief. If he is entitled, file a motion for judgment nunc pro tunc so that the judge may properly award him time and TDCJ will apply it to his sentence.

Post-trial credits

Like a request for pre-trial credit, a request for post-trial time credit will arrive in the form of a motion for nunc pro tunc, an 11.07 writ, or an informal inquiry, such as a *pro se* letter. (See the chart on page 36 for an overview of the process.)

11.07 writ. This is the proper vehicle for filing a request for post-conviction time credit. But the inmate is required to:

1) file a complaint through the time credit dispute resolution system first and

2) receive a written decision or let 180 days pass without receiving a written decision.[13] The only exception is when the inmate is within 180 days of his presumptive parole date, date of release to mandatory supervision, or date of discharge.[14] If this is not done, the writ will be dismissed.[15]

There are several types of post-conviction time credits. An inmate may request:

- good time or work time credits;
- blue warrant or flat time credits; and
- street time credits.

Good time/work time. These credits are in the within the sole discretion of TDCJ. A denial claim is not cognizable in an article 11.07 writ.[16]

Blue warrant time/ßat time. An inmate is entitled to all the time he was confined on a blue warrant even when the blue warrant is withdrawn.[17]

Street time. In 2001, street time credits were created. According to Tex. Gov't Code §508.283(c), an eligible inmate may be entitled to credit while on parole or mandatory supervision release if on the date a blue warrant was *issued* (not executed), the remaining portion left on his sentence was less than the amount of time on release. See the chart below for an example:

But the inquiry does not stop there because certain people are ineligible for street time credit. First, street time credits apply only to "any revocation that occurs on or after September 1, 2001."[18] And persons who are listed as ineligible for mandatory supervision pursuant to the version of Tex. Gov't Code §508.149(a) in effect at the time their parole or mandatory supervision was revoked are not eligible.[19] *Note: An inmate eligible for release to mandatory supervision may still be ineligible for street time credits.*

In most cases, an affidavit from a TDCJ representative is needed to explain what time credits the inmate has received. The affidavit will typically also include why the inmate has been denied certain credits, e.g., street time credits. Other evidence that can be used:

- TDCJ website;
- local jail records;
- other jail records;
- other judgments; and
- a demonstrative table or graph breaking down and explaining the times confined (with supporting evidence).

This information may show:

1) when a blue warrant was executed,

2) when a blue warrant was withdrawn, and

3) the amount of time confined on a blue warrant.

But, this information will *not* show:

1) when the blue warrant was issued or

Release to parole	Sentence left at release	Blue warrant issued	Blue warrant executed	Eligible for street time?
1/1/2000	10 years	1/1/2004	1/2/2005	No (four years on parole versus six years left on sentence)
1/1/2000	10 years	1/2/2005	2/1/2005	Yes (5 years and 1 day on parole versus 4 years and 364 days left on sentence)

Key terms for post-trial credits

Blue warrant: Warrant issued for parole violations. Also called a parole violator warrant or pre-revocation warrant.

Post-trial time: Time from date of conviction to discharge of sentence.

Street time credits: Credits for time while on release to parole/mandatory supervision.[1]

TDCJ General Counsel: Counsel who handles affidavit requests and who can answer the State's time credit, parole, and mandatory supervision inquiries. The phone number is 936/437-6700, and the email address is ogchabeaswrits@tdcj.texas.gov.

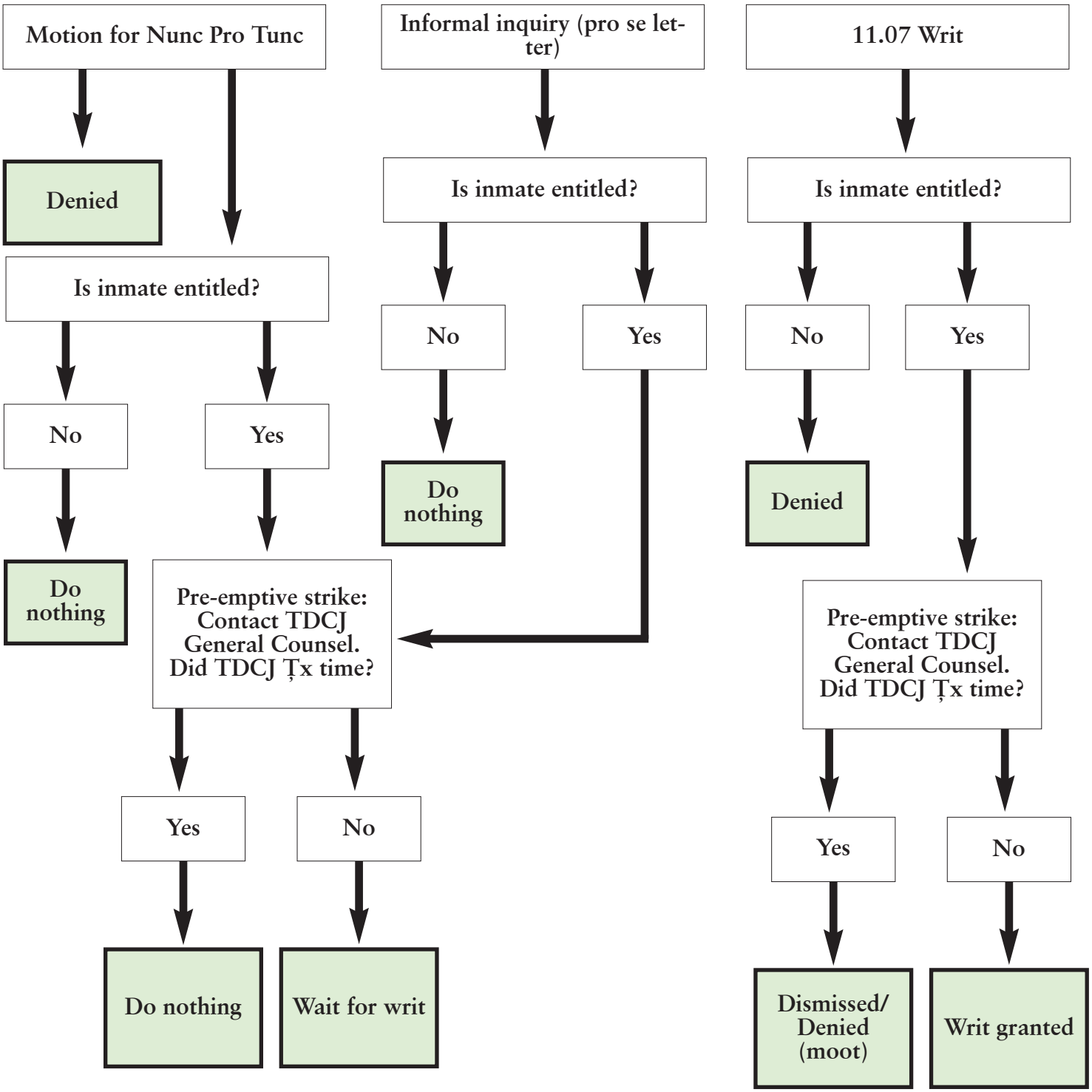
Warrant issued: When TDCJ issues a blue warrant.

Warrant executed: When an inmate is arrested or held on a blue warrant.

Endnote

[1] Tex. Gov't Code §508.283.

An at-a-glance guide to post-conviction requests for post-trial time credits



2) when the inmate was released on parole or mandatory supervision.

For this information, an affidavit from TDCJ will be needed. In short, when in doubt, request an order designating issues (ODI) and an order for an affidavit from TDCJ.

Typically, if there is an error with TDCJ's calculations for time credit, TDCJ will discover the error when it is preparing its affidavit. However, if officials there miss the error, contact the general counsel to let her know. If TDCJ does not correct the issue, request that relief be granted.

Motion for Judgment Nunc Pro Tunc. Generally, the Texas Court of Criminal Appeals has exclusive jurisdiction to grant post-conviction relief from a final felony conviction.[20] And post-conviction time credits are included under this umbrella of post-conviction relief.[21] Therefore, a motion for judgment nunc pro tunc is not the appropriate vehicle for relief.[22]

If an inmate files a motion for judgment nunc pro tunc requesting post-conviction time credits, it should be denied. That being said, if it is obvious from the record that the inmate has been denied post-conviction time credits, bringing the error to the attention of the TDCJ general counsel may fix the issue.

***Pro se* letter.** Again, a *pro se* letter does not require any action by the State or the trial court. However, the error may be fixed without the need for an 11.07 writ or court intervention. If there is a clear error, consider notifying the general counsel of TDCJ.

Conclusion

No matter how few, any time credits are important. Even if it is for just one day, the inmate should be given credit.[23] That is justice. ❇

Endnotes

[1] In misdemeanor cases, the trial court retains the authority to resolve post-conviction issues. See Tex. Crim. Proc. Code Art. 11.09.

[2] See *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010).

[3] 149 S.W.3d 147, 148 (Tex. Crim. App. 2004).

[4] Only if the inmate is clearly entitled by statute or there is documentation in the record that the trial court awarded the credit.

[5] See *Ex parte Ybarra*, 149 S.W.3d at 148.

[6] See *Collins v. State*, 240 S.W.3d 925 (Tex. Crim. App. 2007).

[7] If a defendant who is currently on bond in the present case is arrested on a separate case, he is not entitled to credit on the present case unless bond has been surrendered or a hold is placed on the defendant in the present case.

[8] This includes credit even when the defendant does not successfully complete the other stages of the substance abuse treatment program.

[9] See Tex. Code Crim. Proc. Art. 42.03, §2.

[10] I typically agree to time for a day even if the defendant spent any time on that calendar date confined because my records do not clearly demarcate specific hour and minute of admission and release.

[11] *Collins v. State*, 240 S.W.3d at 928.

[12] See *Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010).

[13] See Tex. Gov't Code §501.0081(b).

[14] See Tex. Gov't Code §501.0081(c).

[15] See *Ex parte Stokes*, 15 S.W.3d 532 (Tex. Crim. App. 2000).

[16] See *Ex parte Palomo*, 759 S.W.2d 671, 674 (Tex. Crim. App. 1988) (good time credits); Tex. Gov't Code §498.003(d) (work credits are treated as good time credits).

[17] See *Ex parte Canada*, 754 S.W.2d at 668.

[18] See §11 of Acts 2001, 77th Leg., ch. 865.

[19] See Tex. Gov't Code §508.283(c); *Ex parte Noyola*, 215 S.W.3d 862, 867 (Tex. Crim. App. 2007).

[20] See *Bd. Of Pardons & Paroles ex rel. Keene Eighth Court of Appeals*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995); Tex. Code Crim. Proc. Art. 11.07, §5.

[21] See *Ex parte Canada*, 754 S.W.2d 660, 663 (Tex. Crim. App. 1988).

[22] *In re Alexander*, No. 12-10-00233-CR, 2010 WL 3000029 (Tex. App.–Tyler Jul. 30, 2010) (orig. proceeding)

Giving victims a voice (without saying a word)

After serving on the Victim Impact Statement (VIS) Revision Committee one year, a Lubbock County VAC was prompted to change how her office—and, as it turns out, the whole county—handles VISes.

By Laney Dickey
Victim Assistance Coordinator in Lubbock County

I served as the only victim assistance coordinator (VAC) in the Lamb County and District Attorney's Office for more than 20 years before moving to the CDA's Office in Lubbock County. I went from working closely with just two judges in Lamb County, both of whom I knew personally, to dealing with 14 judges in Lubbock, none of whom I knew.

I've been in the Lubbock office for about two years now, and at the beginning of my tenure I served on Texas Department of Criminal Justice (TDCJ) Victims Services' Victim Impact Statement Revision Committee. This committee meets every two years to discuss changes to the Victim Impact Statement (VIS), a written form sent to victims of certain crimes, which they can fill out so that prosecutors, judges, the probation department, and finally TDCJ have a sense of how a crime has affected their lives.

Two main takeaways

Serving on the revision committee was eye-opening. For one thing, the return rate for the VISes we sent to crime victims was dismal. Early in the revision committee's work, we examined the statistics for the previous biennium's VISes, which showed how many forms are sent to crime victims, how many are returned to the prosecutor's office, and how many then go to judges, probation, and TDCJ. The numbers got smaller and smaller as the timeline went on, and I was determined that we do something in our office to get a better return rate on our VISes. We have since set up a system where each VAC in our office takes a turn to make follow-up calls two or three weeks after we send out the VISes to gently remind victims how important these forms are and to ask them to please fill them out and send them in. It's been extremely beneficial in getting people to return the forms.

Some of them come back with really heart-wrenching stories. So much of the time we'll look at, say, an assault case, and it looks pretty simple when we read the offense report. But then when we call the victim to talk about it or we get the VIS back, we find out there's way more to it than just a black eye or some injuries. Maybe the assault made the victim miss work, lose her car, or get Child Protective Services involved in the family. There is often lots more than what the responding officer includes in his initial offense report, and sometimes VISes give us the background of the story.

VISes are meant to go from the prosecutor's office, then to the judge, then to the probation department, and finally to TDCJ. It's supposed to follow the offender, in other words, wherever he goes so that authorities at each stop in the system can "hear" from the crime victim. Our office had been scanning the VISes when we received them from victims and putting them in the appropriate case files, but the forms hadn't been getting into the hands of the local judges, and we needed to increase the number of VISes furnished to probation and to TDCJ. Our office started to clearly label the VISes and have the prosecutors hand them directly to the judges in each case.

Filling in the judges

To explain our new procedure to the judges, my coworkers, Lois Carmichael and domestic vio-

lence attorney Jennifer Slack, helped me search for the best way to give all 14 of the judges the same information at the same time. We discovered that they hold a weekly meeting where they discuss the business of the courthouse, and I requested to be placed on the agenda of a future meeting so I could address all of the judges at once. It took two months for various scheduling reasons, but I finally had my chance.

Go to www.tdcaa.com to download the packet.

We prepared a packet for my presentation and brought enough copies for each judge. (You can download a copy of my notes at www.tdcaa.com.) The packet explained what a VIS is and the process it should go through, and it included a blank VIS, a copy of the Crime Victims' Rights we send to crime victims, and a photocopy of Chapter 56 of the Texas Code of Criminal Procedure outlining crime victims' rights. As I gave my presentation to the judges, a couple of them told me that they were unfamiliar with the VIS—one even said he'd never seen one before, and another asked if the VIS is the same as the oral allocution.

It turns out that Lubbock County judges were accustomed to crime victims giving oral allocutions at guilty pleas or at sentencing, but VISes were unfamiliar. The only input they'd had from crime victims who didn't testify in court was from oral allocutions, and a recent case had ruffled some feathers. We'd just completed a very difficult, long-delayed trial where emotions on both sides ran high. At sentencing, the adult son of a deceased victim gave an oral allocution that included ugly language and that verbally attacked the defense attorney. Defense attorneys voiced their complaints of the allocution to the judges, so both the defense attorneys in town and the judges were upset.

I explained that the VIS is different from an allocution. While an allocution is oral and is given only when a crime victim can attend a guilty plea or the sentencing portion of a trial, the VIS is a written form that crime victims can fill out and return. I told the judges that the VISes would really help them "hear" from every victim—even those who can't make it to a trial or who don't want to stand up and give an oral

What the dog-catchers saw

Unattended children led Animal Control officers to stumble upon a violent domestic assault in progress. How a bizarre sequence of events and a difficult trial ultimately resulted in justice.

By Stephen Rancourt and Dobie Kosub
Assistant Criminal District Attorneys in Wichita County

"My dad is trying to kill my mom!" Those were the first words Officer Donald Cole with the Wichita Falls Police Department heard upon knocking on the front door of a house, where he'd been sent—not by a victim or neighbor, as is typical in most family violence cases, but by the most unlikely of sources: Animal Control officers.

Amber Bernal and Chad Parker with Wichita Falls Animal Control were on patrol at the intersection of Avenue F and Fillmore just after noon on August 21, 2015, when they saw something concerning: twin toddler boys, clad only in diapers, wandering in the front yard of a house. Assuming they simply didn't see the adults on the wraparound porch, the two officers circled

the block and parked directly across the street from the small, two-story Craftsman. When they saw the toddlers wander between the porch and sidewalk unsupervised, they called dispatch and asked for a peace officer to check welfare.

Seven minutes after Animal Control appeared on scene, Officer Cole arrived in his patrol unit. Having patrolled the rough area of town known as "The Avenues" for nearly a quarter of a century, he was used to these types of calls. "I was just going up there to let the parents know that their kids had gotten outside," Cole later testified. He had no idea what was actually going on inside that house.

Upon knocking, the door immediately opened, and two children, ages 10 and 12, rushed passed him. "My dad is trying to kill my mom!" screamed the girl. "In the kitchen!" cried the boy. The children rushed passed the officer and fled, barefoot, down the street. Stunned, Amber Bernal and Chad Parker stood next to their patrol unit and watched as the children turned the corner and disappeared.

Officer Cole drew his duty weapon and slowly entered the cluttered house. In the back hallway, adjacent to the kitchen, he was met by Scott Paul Wayne, a 40-year-old unemployed HVAC technician. "My wife went crazy and tried to stab me," Wayne declared, as he vigorously shook his hand in pain. Unable to see into the kitchen from where he was standing, Cole ordered Wayne to the front room and made his way toward the kitchen.

Lying partially under a fold-up card table in a kitchen covered in a combination of trash, dirty dishes, and debris, was Lacy Shoffit (not her real name), Scott Wayne's wife. She was on her back, shaking, with her hands clenched above her and a look of terror on her face. Cole would later say that it took Lacy the better part of 10 minutes to open her hands, almost as if they had been locked shut into half-closed fists. Wayne's pinkie fingernail would later be found in Lacy's hair. Officer Cole tended to the woman for a few moments before returning to the front room. Scott Wayne, however, was nowhere to be found. Seconds earlier, Animal Control had witnessed Wayne scoop the two toddlers off the porch, walk them to his pickup, place them in the backseat without car seats or even seat belts, and drive off.

A marriage in crisis

Lacy Shoffit and Scott Wayne had met at a motorcycle ride on Memorial Day weekend 2010 and were married that same Halloween. Lacy had two children from previous relationships, Michael and Ashley (the 10- and 12-year-olds who fled the house), and Wayne treated his new stepchildren as his own. It wasn't long, however, before things began to go downhill. Wayne's HVAC business struggled, and after the death of his best friend in late 2011, Wayne became increasingly erratic and difficult to be around. Not long after their twin boys were born in December 2012, Wayne began living in the travel trailer parked in the backyard. He also grew increasingly paranoid, delving into various conspiracy theories and installing security cameras on the house. By 2015, Scott and Lacy were barely on speaking terms.

The toddlers were often a point of contention. One time, Wayne took their single set of car seats from Lacy's van, loaded his sons in the pickup, and took off for their lake cabin while Lacy was in the bathroom. Upon seeing her husband and toddlers missing, Lacy and her two older children made the hour drive to Lake Kemp and confronted her husband, who acted as though nothing was wrong. When Wayne tried to take the twins to the lake in July 2015 instead of accompanying the family to Lacy's grandmother's funeral, Lacy drew a line in the sand. After Lacy threatened divorce, Wayne finally acquiesced to her insistence and silently brooded in the backseat of the van as the family made the trip to Alabama.

On August 18, the two had another blowup. Through a series of texts, Wayne brought up the divorce his wife had warned him of, and for the next two days he stayed at the lake by himself, with no communication between the two. By the time he arrived home in the late morning of August 21, he was ready for a fight.

Lacy and her son Michael were in the kitchen when Scott Wayne walked through the back door. Without acknowledging his wife or stepson, Wayne found his toddler boys in the front room and asked them if they were ready to go to the lake. Overhearing this, and knowing that the only set of car seats were in her vehicle,

Lacy grabbed her key fob and locked the van. When Wayne found the car seats inaccessible, he was enraged. He went back inside to confront his wife, barely noticing that his toddlers had followed him outside. They watched as their father shut the front door behind him and disappeared. Not five seconds later, Animal Control officers made their first pass by the house.

In the kitchen, an infuriated Wayne screamed at his wife. When Lacy reached for her phone to call the police, he snatched it out of her hand. The two were struggling over the phone when Wayne reached up and grabbed Lacy's hair. Michael ran upstairs to his sister when he saw Wayne yank his mother's head back, forcing her to the ground.

Ashley was watching TV when Michael came into her room. They had seen plenty of arguments between their mom and stepdad, but it had never been physical. When they heard a loud bang, however, they rushed downstairs. Ashley peered into the kitchen doorway to see Wayne on top of her mother, screaming profanities. In his hand was a kitchen knife. "Call 911!" Lacy cried to her daughter. Wayne turned and looked at Ashley. "No!" he commanded. "If you call 911, I'll kill your mom, and you're next!" Wayne ordered his stepdaughter to sit on the couch, and Michael, who had fled back upstairs, came down and sat with her. The two pre-teens sat there, unsure what to do, when moments later Officer Cole knocked on the door.

The investigation

The case was assigned to Detective John Laughlin, a 21-year WFPD veteran who had spent the past nine years in the Crimes Against Persons unit. Detective Laughlin, a dogged and meticulous investigator, took detailed statements from Lacy, Ashley, and Michael, as well as the Animal Control officers and other family members. Detective Laughlin also obtained audio recordings from CPS investigator Amanda Moreno, who interviewed the children nine days after Laughlin.

Scott Wayne was arrested two weeks after the incident, and five days after going into custody, Detective Laughlin paid a visit. After waiving *Miranda*, Wayne insisted that his wife had pulled a knife on him after he threatened to call CPS based on the state of the house and Lacy's lack of proper supervision of his children. After Lacy pulled the knife, Wayne used the hand-to-hand combat techniques he learned during his time in the Air Force to take her to the ground and disarm her. During this struggle, daughter Ashley came into the doorway of the kitchen, and Wayne claimed she simply misinterpreted what she had seen. He denied threatening the child and insisted the struggle had begun only after his stepson Michael had left the kitchen. He also contended that he had picked up his twins and set them down inside the house and had never left them outside unsupervised.

Most importantly, Wayne mentioned a piece of evidence that patrol officers had overlooked: the surveillance videos taken from cameras on the home's roof. The videos, Wayne insisted, would prove his innocence. Laughlin tracked down the DVR, now in Lacy's possession, and obtained consent to search from both Wayne and Lacy. It wasn't until nearly a month after the incident that Detective Laughlin was able to review those videos, which would prove to be Wayne's downfall.

A problematic victim

By the time the case was submitted to our office, Lacy Shoffit had already come in and applied for a protective order. Unfortunately, the misdemeanor prosecutor who handled the protective order had allowed Lacy to testify at both the ex-parte and final hearings instead of simply asking for a stay-away order as a condition of the bond. Defense counsel had two separate transcripts of her testimony.

The protective order suits were not the only hearings at which Lacy testified before trial. After Wayne was arrested, she followed through on her divorce threats, and by January 2016, against the wishes of our office, she testified once again at her divorce proceeding. Lacy had now given no fewer than six statements: to patrol officers, CPS investigators, WFPD detectives, and then three in-court statements under oath. We knew that each facet of her portrayal of events would be scrutinized in detail.

We were thankful that each account of her ordeal was almost universally consistent. After Wayne forced her to the ground by her hair, he had pulled a foot-long bread knife from the butcher block and attempted to stab her with it. With all her might she grasped his wrist with her hands, as Wayne continued to move the knife from her face to her chest, stomach, and back to her throat. "I thought that was the end. That my

children would find me dead in a puddle of blood on the kitchen floor," Lacy testified at trial.

Lacy's problems as a witness did not end with her multiple statements. When her son Michael's father had died years before, Lacy became the trustee for the boy's inheritance: a $250,000 life insurance policy and monthly veteran's survivor benefits. Instead of investing the money for her son's benefit, Lacy used the money to purchase the lake cabin, jet skis, a travel trailer, and nearly a dozen assorted minibikes and four-wheelers. Even their house was in the boy's name. The jury later heard that information, as it played to the defense's theory that Lacy was the aggressor when Wayne threatened to call CPS: If the children were removed from the home, they argued, Lacy's main source of income would dry up, and the misappropriation of her son's money would be exposed. There was no way around it: The jury was not going to like her.

Lacy's detailed account of her marriage to Wayne also presented a third problem. In most family violence cases, there is a trajectory of abuse that escalates into increasingly violent behavior. The "cycle of violence," as many of us know it, is the reason that Code of Criminal Procedure Art. 38.371 exists: Most family violence cases require the jury to understand all relevant circumstances, including the nature of the relationship between the defendant and victim. Normally, that opens the door to other acts of the defendant's physical abuse. Here, however, there was no allegations of any other physical abuse: Scott Wayne had just snapped in a one-time fit of murderous rage. A family violence expert, normally vital in these types of cases, would be of no value here. We had to make the jury focus elsewhere.

We decided to concentrate on Ashley's excited utterances and make the case about what the meek and reserved 12-year-old had witnessed. Although Detective Laughlin had done an excellent job conducting his investigation, we realized we needed to talk to one more person. When the children fled down the street, they headed to a relative's house three blocks away. It took our investigator, Donnie Cavinder, a half day to find her the week before trial. Brenda Rodriguez still remembered the exact words Ashley screamed when Brenda swung the door open: "He's got a knife to her throat! He told me he would kill her and me if I called 911!" We supplemented our witness list with Brenda's name two hours before the court-ordered deadline.

Lacy wasn't the only one who had provided multiple statements. In addition to Scott Wayne's statement to Detective Laughlin, Wayne had also testified at the divorce hearing. He again lied about leaving the toddlers in the yard, but his claims of self-defense were mostly consistent with his custodial interrogation. After going back and forth, we decided that his statements were too self-serving to let the jury hear, and we moved to exclude them under *Allridge v. State*.[1] If the defense wanted the jury to consider Wayne's version of events, he would have to take the stand.

The defense also knew the timeline limited its options. Arguing that Lacy conspired with her children to set up Wayne would fall flat, so the defense focused instead on concept of memory and children's misperceptions. By the time they gave notice of a psychologist expert, we knew that the theory of "false memories" was going to be a major point of contention. Fortunately, Stephen had recently tried a child sex abuse case where the concept of false memories was at issue with another well-known forensic psychologist defense expert. And thanks to the generosity of the Dallas County Criminal District Attorney's Office, which had compiled nearly 1,300 pages of opposition research on the topic, we were prepared. Tailoring a cross-examination to fit this particular set of facts only took a few days of brushing up.

The trial

When the time came for trial, we knew that we needed to get as much evidence out as possible before calling Lacy to the stand. We decided to mostly follow a linear sequence of events. Animal Control Officer Amber Bernal was first, followed by Officer Cole. Michael and Ashley followed. We decided not to show the children their prior statements, not wanting their testimony to be tainted by any allegation they were overly coached by our office. Two years later, Michael remembered only seeing his mom taken to the ground and not much else. He was, however, appropriately emotional on the stand. Ashley did better, remembering the knife in her stepdad's hand, that the blade was silver, and

one of the words Scott yelled repeatedly after ordering Ashley to sit on the couch: "whore." The defense cross of the children was relatively short and passive.

During trial prep, we had gone over just about everything with Lacy. On cross, we told her, be respectful, not argumentative. Don't disagree when confronted with a transcript of your prior statements. And above all else, sit up straight, make eye contact, and tell the jury what happened.

All our preparation, however, went out the window the moment Lacy took the stand. For the entirety of her testimony, she sat hunched, angling away from her husband, her eyes closed tight. Even preliminary questions took her many seconds to answer, as she trembled in a kind of faux-horror. She was clearly under a lot of stress, and perhaps we're just cynical people by nature, but it was almost as if Lacy was embracing the moment and milking the attention. And though we had requested she wear her "Sunday best" to court, the pink leopard-print tank top she chose for the day of her testimony did us no favors. In our combined 22 years as prosecutors, she was the most challenging victim-witness we had seen take the stand. A juror would later tell us that, within moments of retiring to deliberate, they decided to discount Lacy's testimony in its entirety.

On a positive note, Lacy was not our last witness. Brenda Rodriguez, to whose house the children had fled, testified to what Ashley told her, giving us two excited utterances to hammer home at close. After calling the arresting officer and an ID tech to explain why there were no prints on the knife, we ended with Detective Laughlin.

For an hour, the detective walked the jury through his investigation, concluding with the piece of evidence we had teased the jury with during opening statements: the surveillance video from Wayne's own home. Using a demonstrative timeline, Laughlin walked the jury through every bit of that video and its two camera angles. The jury watched the defendant attempting to get the car seats from his wife's vehicle, then disappearing into the house and leaving his toddler sons in the yard. Eight minutes later, they saw Ashley and Michael emerge from the house and run south. And approximately one minute after that, they observed footage of the defendant walking deliberately to his pickup with a child in each arm, place the children in his back seat, and drive off. Eleven seconds after Wayne turned the corner, the jury saw Officer Cole's backup arrive.

The wealth of material from the Dallas DA's Office was sufficient to neutralize defense expert Dr. David Sabine. Although affable and charming, the doctor had to admit that children's memories are, generally speaking, as good as adults by the time they reach age 10. Based on the timeline, he also conceded that there was no way Lacy had either conspired with or pressured her children into bearing false witness. At most, the stress of witnessing the events combined with the children's love of their mother and dislike of Wayne had resulted in a false memory: Ashley and Michael were testifying to their perceptions of the truth, he surmised, but their perception could be different from reality.

After going back and forth, Scott Wayne elected not to testify. Because we had kept all the defendant's statements out of evidence, the jury was not provided a self-defense instruction.

The jury was out four and a half hours before returning their guilty verdicts on both counts. Although probation-eligible from the jury, the defense decided to take the risk that our visiting judge would be more lenient. After proving up some minor misdemeanor convictions and the defense calling two character witnesses, the judge sentenced Wayne to 10 years on the aggravated assault with a deadly weapon and five years on the obstruction count. At our request and pursuant to CCP Art. 42.013, a family violence finding was included in the judgment.

Conclusion

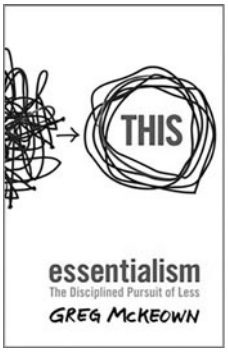
Domestic violence cases are among the most difficult cases to win. Usually, victims either don't want to testify, or they have something to gain from their abuser's conviction. Because protective order hearings will come more quickly than trial, our office has taken measures to ensure we catch these cases when victims come into our office to apply for protective orders, and we have worked to add bond conditions in lieu of allowing multiple opportunities for in-court cross-examination.

Ultimately, however, cases need to be won with victims. Lacy is a victim of a horrible crime, but we underestimated how unlikeable she would come across to the jury. In retrospect, we didn't do nearly enough to make Lacy fully appreciate how her demeanor, eye contact, and

Getting more by pursuing less

Rather than doing more, more, more, *Essentialism: The Disciplined Pursuit of Less* advocates that we deliberately seek to do less.

By Shanna Redwine
Assistant District Attorney in Montgomery County



Published by Crown Business, *Essentialism* is available in hardcover and audiobook starting at $15 and in ebook format from Google Play and Amazon for $12.99.

In a society constantly pursuing more, *Essentialism: The Disciplined Pursuit of Less* promotes a drastically different approach. Stanford graduate, New York Times bestselling author, and accomplished leadership consultant Greg McKeown compels readers to get the most out of life by deliberately seeking less. After reading *Essentialism*, I found that while its methods are unorthodox, they can greatly aid finding balance in our high stress profession, and I have incorporated some of them into my own life.

McKeown's idealism challenges readers to identify and pursue only those activities and commitments in life they deem essential through a process of prioritization and evaluation. By eliminating distractions, we can devote our best time and resources to the things we care about most and that achieve the most good. McKeown emphasizes that every activity and commitment is a choice, not only to participate in that activity but also to take time and resources away from something else.

Essentialism draws heavily from the author's personal experience. In one meaningful example, McKeown recounts an event that caused him to realize that his personal desire for more was damaging his family. On the day his daughter was born, against his better judgment, McKeown left his wife at the hospital and attended a client meeting. Expecting the client to be impressed with his commitment, McKeown instead saw disappointment in the client's eyes. McKeown's unwillingness to prioritize the essential caused him to lose his client's respect and miss out on a pivotal moment for his family. Further examples offer credibility and context from academic research, business case studies, and historical analysis.

The author employs logical arrangement of claims, reason, and evidence to make a case for his philosophy, providing specific tips and practices for implementing essentialism in various facets of life. McKeown concedes that his approach is extreme—and its implementation tedious—but asserts that in the dogged pursuit of less, the reader will achieve her best, most satisfied self, all while achieving the highest good.

Of important distinction to prosecutors, *Essentialism* celebrates autonomy; the privilege of choice occupies a central role in McKeown's strategy. Learning to evaluate and prioritize activities will enable prosecutors to seek the highest good in their caseloads and improve their work-life balance. Similarly, the author provides powerful rationale for learning to tactfully say "no." Both skills are valuable tools in a career with high stakes and high stress.

One of my own personal takeaways from *Essentialism* is the power and importance of personal choice. I have often, after taking on way too much at work, made the statement, "I don't have a choice—this has to be done." The fact is I *chose* to take on too much, *chose* to add unessential tasks, and *chose* to prioritize one area of my life over another. After reading *Essentialism*, I now try to consciously remind myself when taking on a new task at work or in my personal life, no matter its importance, that by choosing to accept it, I am necessarily choosing to take time and resources away from something else. By taking responsibility for *my choices*, I am better able to analyze whether the new task is essential, personally and professionally. I am

trying to be more deliberate about work hours (Am I staying late because I *have* to or because I'm accustomed to it?), taking work home (I try not to check emails until my kids are asleep), and taking on extra-curricular tasks at work that are not essential to the assignment I have been given. As a habitual non-essentialist, this shift does not come easy for me, but I have already seen the benefits of owning my choices and narrowing my priorities. As prosecutors, our choices about which tasks to prioritize and which to let go have important implications, so we must ensure that

Letter to my Baby-School self

Editor's note: He is now the First Assistant Criminal District Attorney in Collin County, but over his nearly 25-year career as an attorney, Bill Wirskye has also worked as a prosecutor and as a criminal defense attorney in Dallas County.

By Bill Wirskye
First Assistant Criminal District Attorney in Collin County

He's a sought-after speaker and presenter for TDCAA and other entities because his knowledge and experience on both sides of the bar give him a perspective that most attorneys practicing criminal law simply don't have. This column, which debuts with this issue of the journal, will feature Bill's take on whatever topic might interest him at the moment—and believe us that while you might not see things as he does, he will always, always *make you think.*

Dear 1994 Self,

Hi Bill, it's your future self writing to you from the year 2017. The reason for this letter is that you've been on my mind a lot this week. Right now I'm serving as a Faculty Advisor at TDCAA's July 2017 Baby School, and I'm feeling strangely sentimental about you. When I first saw the earnest and eager young faces of the new prosecutors at my table, I swear I saw you staring back at me. Between seeing that youthful image of you, recalling all my treasured memories of "our" Baby School experience, and downing a few adult beverages, I decided to put pen to paper and give you some advice. I want to share with you the many lessons I've learned from this noble profession and the people who do this difficult job the right way, every day.

First, let's get a few things out of the way. Your hair will fall out in your 30s so enjoy it now. Your metabolism will slow down in your 40s so watch what you eat. The Texas Rangers still haven't won a World Series. And O.J. Simpson will be found "not guilty" of the murders he just committed. (And it's a long story.)

Despite all this, though, you turn out OK. You have a great family and a few close friends. You work for a great elected DA, but in a different county from where you started. You will try some big cases. You will be a defense lawyer for a while, and you will love it—but not quite as much as being a Texas prosecutor, so you will return to prosecution. All things considered, everything turns out all right, but not quite in the way you have planned. And it won't be without some heartache and pain, most of which will be your own doing.

The fundamentals come first. Be honest. This job is far too important to be anything less than 100-percent honest. You will spend a career earning your reputation as an honest and trustworthy prosecutor. No case is worth more than your integrity. Be nice to everyone. A law license is not a license to mistreat people. Treat people the right way on the way up, because you

will see them again on your way down. And they will help you get back up again.

Always keep an open mind. Never become too rigid in your views. Never become cynical. Never view this job as "us versus them." And while you keep your mind open, keep your heart open as well. There are so many ways to help people in this job, and I don't want you to miss one of those opportunities because you are hardheaded or hardhearted.

You're going to need to learn how to be a good teammate, and this will not be easy for you. Don't gossip—it's toxic to both you and your team. Honor those who are not present. Learn that a team is only as strong as its weakest member. Never look down on a teammate unless you are looking down to offer a hand up. Pay it forward. Soon you won't be the newest guy in the office, so help those who come behind you just as you were helped by those who came before. The people you are meeting now will become lifelong friends, so be forgiving of their faults. As you move forward in your career, you will need good friends. These friends will help you celebrate victories, but more importantly, they will commiserate with you in defeat. You won't learn exactly how important good teammates and friends are until much later in your career when you will fail at an impossible task in a very public way. Your friends and former teammates will step up for you in a big, big way.

Let's talk about anger. You will spend your early years getting angry. Angry at defense lawyers, judges, cops, witnesses, coworkers, and even yourself. There will be times your anger will consume you. But as you get older you will realize that you don't have to fight every fight. You will realize that your anger almost always leads to self-pity, and you're a better person than one who feels sorry for himself. You will realize what a colossal waste of time and energy anger is, and you will slowly grow into a gracious and happy warrior. But promise me that if you ever stop being that joyful warrior—gracious both in victory and in defeat—do everyone a favor and leave the profession.

Next, let's visit about your ego. You will shortly come to believe that you have it all figured out. You don't. And you will learn that lesson the hard way. After about five more years in the business, you will again think that you have it all figured out and that you're God's gift to prosecution. You don't and you aren't. And you'll learn that the hard (and embarrassing) way. You'll realize that you will never have it all figured out—this job is too complex and you're just not that smart. No one is. If after all this, you ever start to think you're "all that" or that you have finally figured it all out, do everyone a favor and leave the profession.

And for a young man with such a healthy ego, you will be surprised just how much time you will spend being afraid. Terrified, actually. I know, it sounds weird—how does the guy who thinks he knows so much spend all that time being afraid? I'm sorry, I can't explain it. I just know you will be scared, and that will never change. And oftentimes it will be that type of fear that almost paralyzes you. You will learn to push through that fear and get the job done, but the fear will never leave. You will learn to welcome that fear, and you will start the long process of harnessing your fear to fuel a sense of dedication to grind at properly preparing a case. If you ever lose this fear—that awesome fear of trying to do justice—do everyone a favor and leave the profession.

You will make mistakes. You'll make lots of them. And no matter how long you do this job, you will never stop making mistakes. So let me tell you a few things about mistakes. Don't fear making them so long as they are not mistakes borne of dishonesty or laziness. Just try not to repeat the same mistakes. New mistakes are good—they are a sign you are making progress, a sign of growth, a sign that you are pushing yourself to do new things. But always remember: Own your mistakes, and own them immediately. Make no excuses for them, especially when the excuses are true. Learn from them, and then move on. But promise me that if you ever stop making mistakes or start making excuses for them, you'll do everyone a favor and leave the profession.

As I've mentioned already, you *will* actually move on at some point and leave prosecution. Even though it was probably long overdue (for all the reasons I told you to leave the field that I've listed already), you won't have the courage to do it on your own. It will take an election that didn't turn out as you had hoped to make you take that leap into private practice. While it will be fulfilling work, the idea of once again working as a prosecutor will never quite leave your mind.

Years later, you will be given that rare second chance. This time though, instead of just prosecuting big cases, you will relish sharing lessons you've learned with others. You will try to atone for past mistakes by being an FA at Baby School and writing letters like this. And you will savor it all with a special intensity, because you will be one of those lucky few who get a do-over in life. It all turns out OK.

So congratulations on making it through Baby School 1994 and starting your career as a prosecutor. I've never once regretted the decision you just made to join the ranks of Texas prosecutors, so welcome to the profession, and buckle up for a wild ride.

Sincerely,
2017 Bill ❇

Upcoming TDCAA training

Key Personnel & Victim Assistant Coordinator Seminar, Nov. 8–10, at the Westin Oaks Hotel at the Houston Galleria, 5011 Westheimer at Post Oak, in Houston. The room rate is $134 plus tax per night for single or double occupancy; this rate is good until October 17 or until sold out. Call 713/960-8100 or 888/627-8514 for reservations, and reference the 2017 TDCAA Key Personnel & Victim Assistance Seminar to get the group rate.

Elected Prosecutor Conference, Dec. 6–8, at the Omni Southpark Hotel, 4140 Governors Row, in Austin. The room rate is $130 plus tax for single or double occupancy; this rate is good until November 14 or until sold out. Call 512/447-2222 or 800/843-6664 to make reservations; reference the 2017 TDCAA Elected Prosecutor Conference to get the group rate.

Prosecutor Trial Skills Course, Jan. 7–12, 2018, at the Holiday Inn San Antonio Riverwalk, 217 N. St. Mary's St., in San Antonio. The room rate is $119 plus tax. Call 210/224-2500 to make reservations.

Investigator School, Feb. 11–15, 2018, at the San Luis (5222 Seawall Blvd.) and Hilton Galveston Island Hotel (5400 Seawall Blvd.) in Galveston. The room rate is $119 plus tax. For reservations at the San Luis, call 409/744-1500; for reservations at the Hilton, call 409/744-5000. ❇

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'Where can I hold court after a disaster?'

Following a disaster like Hurricane Harvey, many courthouses are temporarily unusable.

By Stephanie Wawrzynski
TDCAA Research Attorney in Austin

If another space within the county seat is available, the commissioners court may designate any building in the county seat for use as a court.[1] In situations where there is no viable space within the county seat, the Government Code has special provisions for coastal counties that allow court proceedings to be held outside the county seat.

All three statutes (one each for district courts, constitutional county courts, and statutory county courts) have the same two requirements.[2] First you must be in a "first tier coastal county" or "second tier coastal county."[3] A full list of these counties is at left.

Second, a disaster that precludes the court from conducting proceedings in the county seat must occur. The definition for disaster is expansive, and it includes "the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action … or other public calamity requiring emergency action."[4] If both of these requirements are met, the presiding judge of the administrative judicial region may designate an alternate location for court proceedings anywhere within the judicial district with consent of the appropriate judge for that court.

Finally, the Supreme Court of Texas and the Court of Criminal Appeals can authorize modifications and suspensions of court procedures following a disaster.[5] On August 28, 2017, the Courts issued a joint order authorizing all courts in Texas to consider disaster-caused delays as good cause for modifying or suspending all deadlines and procedures in any case.[6] (Find a copy of it at our website, www.tdcaa.com.) The order expires September 27, 2017, but may be extended by the Courts. ❇

First-tier coastal counties[1]

Aransas	Kennedy
Brazoria	Kleberg
Calhoun	Matagorda
Cameron	Nueces
Chambers	Refugio
Galveston	San Patricio
Jefferson	Willacy

Second-tier coastal counties[2]

Bee	Jackson
Brooks	Jim Wells
Fort Bend	Liberty
Goliad	Live Oak
Hardin	Orange
Harris	Victoria
Hidalgo	Wharton

Endnotes

[1] Tex. Ins. Code §2210.003(4).

[2] Tex. Ins. Code §2210.003(11).

Endnotes

[1] Tex. Local Gov't Code §292.001.

[2] Tex. Gov't Code §§24.033, 25.0019, 26.009.

[3] *Id.*

[4] Tex. Gov't Code §418.004(1).

[5] Tex. Gov't Code 22.0035(b).