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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

Fentanyl dealer sentenced to 45 years for felony murder

"This is the punishment verdict form that you will fill out, but it's also something else," Matt Shelton, an assistant criminal district attorney in Wichita County, told a recent jury.

By John Gillespie
Criminal District Attorney in Wichita County

Quizzically, the jurors watched as Matt folded and twisted the jury form into a cone. He raised it to his mouth: "This is also your megaphone. With your verdict, you can say 'Enough!' to those who deal fentanyl in our community. And they are listening."

While watching Matt's punishment closing, I reflected on a conversation from August 2022, a year before. Wichita Falls had been awash in fentanyl overdose deaths in the summer of 2022, one after another after another. All senseless. Many young. Often overdoses on one pill. Users thought they were getting street Percocet but were instead ingesting deadly fentanyl.

To address the crisis, Sergeant Brian Sheehan, in charge of homicide investigations for the Wichita Falls Police Department (WFPD), and several narcotics officers met with me on a sweltering August day to pitch charging dealers with manslaughter.

"Manslaughter is fine," I told them, "but if you really want to get their attention, light them up for felony murder," and I outlined why such a charge would fit. The officers liked that approach. With the strategy in place, WFPD Chief Manuel Borrego and I held a joint press conference to put dealers on notice and to implore parents to talk to their kids about fentanyl. In the months that followed, the WFPD announced the arrest of three fentanyl dealers for three separate murders where the pills they dealt could be traced to the fatal overdoses.

Now, a year later, a jury had taken about an hour to convict one of those dealers, Jasinto Jimenez, of felony murder. Then, they took their megaphone and returned a 45-year sentence.

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2023 Annual Conference wrap-up

With nearly 1,000 attendees and speakers, TDCAA hosted one of our largest Annual Conferences ever in September at the Kalahari Resort and Convention Center in Round Rock.

By Rob Kepple
TDCAA Executive Director in Austin

The Kalahari was very nice, the food was great, and the line-up of speakers was outstanding. I want to thank everyone on the TDCAA staff for a great effort. Led by **Brian Klas, LaToya Scott,** and **Andie Peters**, we produced a quality conference.

As always, let us know what you think by completing your evaluations and picking up the phone and calling us!

Annual award winners

We honored some very special people at the Annual Conference this year. Here are our worthy 2023 award recipients:

State Bar Criminal Justice Section Prosecutor of the Year: **Randall Sims**, former 47th Judicial District Attorney (retired). Randall served as TDCAA President in 2017, as a regional director, and as the President of the Special Prosecution Unit. He always answered the call when his profession needed help. In a shining moment, in the 2000s he and a band of prosecutors dove in and negotiated the difficult journalist shield law. Randall is pictured below, on the right, with **Brian Klas** (left), TDCAA's Training Director.

Oscar Sherrell Award: **Jack Roady**, CDA in Galveston County. The Oscar Sherrell Award recognizes someone who has served the association and our members. In 2023 Jack wasn't just the Chair of the Board—he also showed up at the capitol whenever the call went out, and he guided the efforts of the TDCAA Rule 3.09 Committee with the State Bar Committee on Disciplinary Rules and Referenda. Jack is pictured below, at right, with **Erleigh Wiley** (left), TDCAA Board President-Elect.

Lone Star Prosecutor Award: **Beth Toben**, Assistant County and District Attorney in Limestone County. This award recognizes a prosecutor or staff member who has done great service but may not always get the statewide recognition they deserve. Beth has had a quiet yet stellar career as a prosecutor, trainer, and mentor. She has tried over 225 felony jury trials in McLennan and Limestone Counties. A longtime first assistant in

Waco, she specialized in child abuse cases. She is a regular faculty member with TDCAA and teaches at the Baylor University School of Law. She was honored to have been the first female president of the McLennan County Bar Association. Beth is pictured below, in the center, with **Kriste Burnett** (at left), TDCAA Board Secretary–Treasurer, and **Rob Kepple** (at right), TDCAA Executive Director.

C. Chris Marshall Award: **Jarvis Parsons**, District Attorney in Brazos County, and **Jessica Frazier**, ACDA in Comal County. This award is for distinguished faculty: It recognizes a person who has made significant contributions to TDCAA's training efforts. It was a tie this year with both Jarvis and Jessica winning the award.

Jarvis was an instrumental player in TDCAA's recent efforts to focus on overcoming bias in the analysis and prosecution of cases. As part of our Prosecutor Trial Skills Course faculty, he introduces these concepts to new Texas prosecutors and expertly contextualizes them in an understandable and immediately applicable way.

Jessica is a fixture of TDCAA training. While she can be seen at an array of events, her work with our TxDoT (Texas Department of Transportation) training on DWI and intoxication-related offenses, plus her regular DWI caselaw updates, have become foundational learning blocks for new prosecutors.

Pictured in the photo at right are Rob Kepple (left), TDCAA Executive Director; Jessica Frazier, and Jarvis Parsons.

Thanks to everyone for your dedication to the profession!

Thanks to Kane Handford

Over the past year and a half, y'all have enjoyed the great legal support of our research attorney, **Kane Handford**. Kane did a great job for our members, and he is joining the ranks of Texas prosecutors as he begins his career as an assistant DA in Midland County. Congratulations, Kane. Glad to know we will still see you around at TDCAA conferences!

Welcome, Joe Hooker

We are excited here at TDCAA to welcome our newest staff member, **Joe Hooker** (pictured at right). Joe is now our Assistant Training Director. He is an experienced prosecutor from the CDA's Office in Bexar County and has been deeply involved in TDCAA training for years. Joe will bring substantial firepower to our legal support for you, but his main focus is producing TDCAA's online and distance learning offerings. Welcome, Joe!

Welcome, Jimmy Granberry

We would like to welcome a newly appointed Texas prosecutor to our ranks: **James (Jimmy) Granberry**, who has been appointed as the District Attorney in Nueces County to replace Mark Gonzalez, who stepped down to run for other office. Jimmy has been an attorney in private practice and previously served as an assistant district attorney and felony prosecutor for the Nueces County DA's Office from 1990–1994. He is a member of the State Bar of Texas and a former member of its district grievance committee. Jimmy received a Bachelor of Arts from Trinity University and a Juris Doctor from Texas Tech University School of Law.

Henry Garza announces retirement

It is that time of year: People are making their decisions on whether to seek another term of office.

I am very proud of the work TDCAA has done in creating the Prosecutor Management Institute (PMI). These management courses have been wildly popular.

It is with a hearty "job well done!" and a hint of "oh no!" that I congratulate **Henry Garza**, our DA in Bell County, on the announcement that he will not seek another term. Henry has served 23 years as the elected district attorney in Bell County, and he is ending a 40-year run as a Texas prosecutor. Along the way Henry led our association at the Texas capitol and on the national level as part of the National District Attorneys Association board of directors. Thank you, Henry, for your service!

On another note, we will be watching the newspapers across the state for announcements concerning who is running and who may not be; please keep us informed.

Recognizing your staff—with the Bloated Beaver Award

I am very proud of the work TDCAA has done in creating the Prosecutor Management Institute (PMI). These management courses have been wildly popular. By offering real-world insights and solutions for managing people and leading an office, we can all be better at administering justice in our communities.

At a recent PMI training, we had a lively discussion about how offices might recognize the good work of staff members. I can't say we finished the discussion—there was lots of back and forth about how to do it right, and not just pass around something that amounts to a "participation trophy." I will say that one office, the County Attorney's Office in Chambers County, may have nailed it—with the coveted Bloated Beaver Award.

As explained by **Ashley Land**, the elected County Attorney, the idea came from a newspaper article that included a photo of a dead, bloated beaver that had been found at Lake Travis. People were surprised that Texas does, in fact, have beavers. And with a Buc-ee's in Chambers County, it took no time for Ashley, et al., to buy a furry little creature to represent the Bloated Beaver Award, which may end up on the desk of a worthy staff member.

We will continue to consider how to best recognize excellence in an office, but I am thinking that nothing says "job well done" like a bloated beaver on your desk.

Thanks to TDCAA's leadership

This last year has been a strong one for TDCAA. Under the steady hand of Board President **Bill Helwig**, CDA in Yoakum County, your leadership navigated a legislative session that produced new financial resources for prosecutor offices, adopted a new five-year long-range plan, launched a review of the TDCAA bylaws, and increased our ability to train by prioritizing the funding of the Assistant Training Director position and the Domestic Violence Resource Prosecutor (more on that new position in later editions of this journal). I want to thank Bill, who will transition to Chair of the Board in January, as well as some board members who are concluding their current terms: **Isidro "Chilo" Alaniz**, 49th Judicial District Attorney; **Sunni Mitchell**, ADA in Fort Bend County; **Andrew Heap**, County Attorney in Kimble County; **Steve Reis**, DA in Matagorda County; **Will Ramsay**, 8th Judicial District Attorney; and **David Holmes**, County Attorney in Hill County. Your dedication is much appreciated. ❇

Helping our friends at the DPS lab with an avalanche of blood kits

In October 2004, I started in this position at TDCAA.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

For the first several years, much of my time was spent crisscrossing the state of Texas pleading with prosecutors and police to get search warrants for blood in DWI cases. And we did. Things got even more lively in 2013 when the Supreme Court of the United States returned *Missouri v. McNeely*.[1] Suddenly it was easy to convince police to get blood search warrants. Every jurisdiction in Texas started doing just that.

There is always a downside and unintended consequences to any great change. Only in 2014 did I start to wonder just what a massive influx of blood kits would do to our labs. And the answer is: We buried them alive. (I am lucky anyone at the DPS Lab still speaks to me.) More blood kits require more testing, and DPS has also expanded the number of substances it tests for in toxicology. These blood cases also go to court.

All of which has led to this request, below, from Trevis Beckworth at the DPS Lab in Austin. It is probably way overdue. Please give it a careful read.

From Trevis Beckworth
Assistant Lab Director
Department of Public Safety in Austin

In addition to analyzing thousands of blood toxicology cases annually, the Texas DPS Crime Laboratory also serves as the permanent storage facility for all toxicology kits collected by the Texas Highway Patrol. These kits present a unique challenge because they must be refrigerated until their final disposition. Over time, the crime lab has accumulated more than 50,000 kits due to a lack of authorization for disposal. This high volume nearly maxes out the lab's storage capacity, making it crucial for Texas prosecutors to help expedite the authorization process for their destruction.

Following the implementation of Article 38.50 in the Code of Criminal Procedure in 2015, the lab adopted a disposition process that mandated a judge's signature, ensuring compliance with all notice and retention requirements. This prevented officers and prosecutors from authorizing the destruction of toxicology kits.

In September 2021, SB 335 came into effect, modifying and clarifying these provisions. Consequently, the crime lab transitioned to a process allowing prosecutors to grant destruction authorization. However, any case with an offense date before September 1, 2021, still requires a judge's signature for authorization. This requirement has resulted in a significant number of cases in inventory that necessitate judicial attention and likely already exceed the immediate destruction eligibility date.

District and county attorney's offices can play a role in addressing the current critical storage situation and preventing its recurrence. For older kits, the crime lab can provide your office with a list of aged cases in storage, which can then be routed to the appropriate court for disposition. These cases can be authorized for destruction either by using a Toxicology Disposition Form, or in bulk through a court order. For current cases, it's highly advisable to consider waiving evidence preservation, as destruction can be authorized immediately upon case adjudication.

If you need information on cases in storage in your region or assistance with disposition documentation, please reach out to your nearest regional crime laboratory; find contact information for each one at www.dps.texas.gov/section/crime-laboratory/contact-information.

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Answering the call

In response to Mr. Beckworth's request, remember that labs and prosecutors must exercise great care so we don't destroy important evidence. Yet we clearly need to help—take a look at the photos, below, of the stacks of blood kits DPS is storing! Reach out to your local lab and help them make space—without accidentally damaging the lab's (and prosecutors') credibility by destroying a needed blood kit.

In addition to blood kits that are tested for alcohol, the DPS Toxicology Lab tests blood kits for drugs and tests in those cases where there was a fatality. Like the alcohol testing lab, the DPS Toxicology Lab is seeking to shrink the size of the backlog by removing kits that no longer need testing. If you have cases that are not going to be prosecuted for whatever reason (no-file, the defendant went to the pen on other charges, or other reasons), please reach out to the DPS Toxicology Lab to remove them from the queue. Otherwise, those blood kits are still in line and delaying every other case where a prosecutor is waiting on a lab report for a plea or trial.

DPS has made great inroads in the last couple years in blood alcohol testing. There was some pain (moving kits around to address backlog) and some new contacts and procedures, but the process got better and faster. The legislature just sent the first big surge in funding to toxicology since we started burying them in blood kits in 2004. But that means change and a bit of discomfort.

For instance, Toxicology will be outsourcing some of the backlog to NMS Labs. This will not be permanent, and effort is being made for DPS to keep cases involving injury and death. But some equalization is necessary to help the new funding, personnel, and equipment really work their magic.

On the opposite page is some info reprinted from NMS about the upcoming outsourcing. Watch our website at tdcaa.com/resources/dwi for additional information about labs.

Better communication gets everyone faster results. Better communication with the lab also means when your county's name comes up at the Toxicology Lab because of a special request, there are good feelings and not frustrated ones. We constantly preach kindness and understanding for offenders and victims—how about some for our friends in the labs?

And please remember: The only folks in criminal justice who have a backlog greater than our misdemeanor divisions are those at the DPS laboratory. That fact alone should make us understanding allies. ❇

Endnote

[1] 133 S. Ct. 1552, 185 L. Ed 2d 696 (2013)

Unraveling speech and conduct in stalking and harassment cases in *Counterman v. Colorado*

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

I love writing the As the Judges Saw it column, but occasionally it can be difficult to choose a case to write about.

Sometimes there are so many recent cases on important topics that it's difficult to pick just one, other times many recent cases are in very niche and esoteric areas, and still other cases are simply error corrections.

When I have trouble choosing, I often ring up my friend (and co-presenter at TDCAA's Annual Conference) Emily Johnson-Liu of the State Prosecuting Attorney's Office, and that's what I did this month. "How about *Counterman v. Colorado*?"[1] she suggested. "People need help with it." She was right, of course: As soon as the U.S. Supreme Court case came down—reversing the stalking conviction of a Colorado defendant on First Amendment grounds—we began seeing it argued in our own cases.[2]

So, what is *Counterman* all about? The short version is this: to avoid a chilling effect on protected speech, a pure true-threats prosecution requires that the defendant be at least reckless that he is threatening his victim. Here's the long version.

Background

Billy Ray Counterman somehow became obsessed with C.W., a Colorado musician, and sent her hundreds of disturbing Facebook messages between 2014 and 2016. Each of her attempts to block him were futile, as he would simply create a new account each time. Some of the messages would have seemed harmless except that they were coming from a total stranger, such as, "Good morning sweetheart" and "I am going to the store would you like anything?" Others suggested she was being followed or watched, such as "Five years on Facebook. Only a couple physical sightings"; "Was that you in the white Jeep?"; "A fine display with your partner"; and "Your response is nothing attractive. Tell your friend to get lost." Still others were hostile and threatening: "F*** off permanently"; "Staying in cyber life is going to kill you. Come out for coffee. You have my number"; "I've had tapped phone lines before. What do you fear?"; "[y]our arrogance offends anyone in my position"; "[h]ow can I take your interest in me seriously if you keep going back to my rejected existence"; and "[y]ou're not being good for human relations. Die. Don't need you."

Mr. Counterman was charged with the offense of "stalking—serious emotional distress" under Colorado law (another count of stalking—credible threat was dismissed prior to trial). The charge required the prosecution to prove that "directly, or indirectly through another person," Counterman knowingly:

> [r]epeatedly follow[ed], approach[ed], contact[ed], place[d] under surveillance, or ma[de] any form of communication with [C.W.], ... in a manner that would cause a reasonable person to suffer serious emotional distress and d[id] cause [C.W.] ... to suffer serious emotional distress.

At trial, Counterman moved to dismiss, arguing that the Colorado stalking law was unconstitutional as applied to him because his statements were protected speech, not unprotected "true threats." U.S. Supreme Court jurisprudence has long permitted content-based restrictions on speech when the expression is a "true threat," meaning a statement "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[3] The term of art originally comes from a 1969 case, *Watts v. United States*,[4] in which the Supreme Court held that a crude threat made at an antiwar

rally against President Lyndon Johnson in an unserious, hyperbolic, and conditional manner did not constitute a "true threat."

The Colorado stalking law in question had an "objective reasonable person" standard, meaning that the State had to show that a reasonable person would have viewed the Facebook messages as threatening; there was no need to prove that the defendant had any subjective intent. The trial court found that Counterman's statements were "true threats" and were not protected speech. Counterman appealed to the Colorado Court of Appeals Second Division, arguing that the First Amendment required proof that he was aware that his communications were threatening. The court of appeals declined to find that a subjective intent to threaten was necessary under the First Amendment,[5] and the Colorado Supreme Court denied review. Counterman petitioned the Supreme Court of the United States for a writ of certiorari, and the Court granted review.

As the SCOTUS judges saw it

The U.S. Supreme Court vacated and remanded 7–2. Justice Kagan, writing for the Court, observed that "true threats" are historically unprotected speech, as opposed to statements made in jest or mere hyperbole, as in the *Watts* case. The Court had recently held in *Elonis v. United States*[6] (also involving Facebook threats) that whether a statement is a threat depends not on the mental state of the person making it, but instead on what the statement conveys. Still, Kagan reasoned here that the First Amendment may require a showing of a subjective mental state to avoid what we commonly call a "chilling effect," when a prohibition on unprotected speech has the effect of deterring people from engaging in protected speech out of fear of running afoul of the law.

To avoid forcing people to self-censor protected speech out of fear of prosecution, the Court has in the past created a prophylactic "buffer zone" of sorts by requiring a showing of a culpable mental state when the First Amendment is implicated criminally or civilly. For example, the Court held in *New York Times Co. v. Sullivan*[7] that although defamation is not constitutionally protected, a public figure cannot sue for defamation unless the speaker acted with "knowledge that it was false or with reckless disregard of whether it was false or not"; the same standard was held to apply to unprotected criminal libel in *Garrison v. Louisiana*.[8] It was similarly held in *Brandenburg v. Ohio*[9] that unprotected incitement may not be held to criminal or civil liability without a showing that the speaker intended to produce imminent disorder, to prevent a chilling effect on protected "mere advocacy" of actions that may be illegal. One fascinating example of this last one is gangster rap. In *Davidson v. Time Warner*,[10] musician Tupac Shakur and his label Time Warner were sued for gross negligence in inciting "imminent lawless action" after a man blamed his shooting of a state trooper on listening to Shakur's album *2Pacalypse Now*. A federal court for the Southern District of Texas found that although the album was "both disgusting and offensive" and "an indication of society's aesthetic and moral decay," it was not intended to incite imminent lawless action and was therefore protected by the First Amendment.

Justice Kagan reasoned that the same logic the Court had used to require a subjective intent element in defamation, obscenity, and incitement cases to avoid a chilling effect on protected speech applies to the "true threats" doctrine in Counterman's case, while recognizing that doing so made the prosecution of dangerous communications harder. She found that the standard required should be recklessness, saying that standard offers enough "breathing space" for protected speech without sacrificing too many of the benefits of enforcing laws against true threats.[11] Because the State of Colorado was required to show only that an objectively reasonable person would understand Counterman's statements as threats, and the State did not have to show any subjective awareness on his part, the law could not be defended solely on the basis of unprotected true threats.

Justice Sotomayor concurred in part and concurred in the judgment, joined by Justice Gorsuch. Justice Sotomayor agreed that a *mens rea* was required in true-threats cases and agreed that, particularly in prosecution for stalking involving threatening statements, a recklessness standard was "amply sufficient." She did not agree that recklessness should be the required standard in pure true-threats cases, but she argued that "this case does not require resort to the true-threats exemption to the First Amendment" because Counterman was prosecuted for stalking for a combination of threatening statements and repeated, unwanted, direct contact with C.W.

Because the State of Colorado was required to show only that an objectively reasonable person would understand Counterman's statements as threats, and the State did not have to show any subjective awareness on his part, the law could not be defended solely on the basis of unprotected true threats.

That offense involved much more than pure speech; in fact, the content of the communications is often irrelevant. She intimated that there were numerous reasons Counterman's conduct could be criminalized consistent with the First Amendment. As she explained, "True threats doctrine came up below only because of the lower courts' doubtful assumption that [the] petitioner could be prosecuted only if his actions fell under the true-threats exception. I do not think that is accurate, given the lessened First Amendment concerns at issue. In such cases, recklessness is amply sufficient."

Justice Barrett dissented, joined by Justice Thomas. Justice Barrett disagreed with the majority's application of a recklessness *mens rea* to threatening speech, arguing that it unjustifiably grants "true threats" preferential treatment over other categories of unprotected speech, such as fighting words; "false, deceptive, or misleading" commercial speech; or obscenity (further arguing here that the majority misstates the obscenity standard). Justice Barrett referred to the majority's reliance on the actual-malice standard of *New York Times v. Sullivan* as "cherry picked," and although she agreed that the specific intent requirement in incitement cases "helps draw the line between incitement and 'political rhetoric lying at the core of the First Amendment,'" she noted that the majority had not contended that targeted threats and political commentary share the same close relationship. She summed up with an affirmation of originalism, noting that *Counterman* had fallen short of it: "At the end of the day, then, the best historical case for Counterman does not add up to much. He is plainly not asking the Court to enforce a historically sanctioned rule, but rather to fashion a new one."

Although Justice Thomas fully joined Justice Barrett's dissent, he also wrote separately to address the majority's reliance on perhaps his least favorite decision: *New York Times v. Sullivan*. He lamented that "it was unfortunate that the majority chooses not only to prominently and uncritically invoke *New York Times*, but also to extend its flawed, policy-driven First Amendment analysis to true threats, a separate area of this Court's jurisprudence." Justice Thomas has long argued that the case should be jettisoned; in 2019 he wrote a lengthy concurrence to a nine-word denial of certiorari in *McKee v. Cosby*[12] (yes, *that* Cosby), calling the decision and cases following it "policy-driven decisions masquerading as constitutional law" and describing the constitutional actual-malice requirement as "meddling" in State law affairs "with little historical evidence suggesting that [it] flows from the original understanding of the First or Fourteenth Amendment." Safe to say he is not a fan.

Fortunately, many of our statutes involving criminal threats have the subjective mens rea that the Colorado statute lacks, in many cases higher than the defendant's recklessness about whether his words threaten violence.

The takeaway: What's this mean to the rest of us?

So, what does the *Counterman* decision mean to the trial and appellate prosecutors down here on the front lines in Texas? Fortunately, many of our statutes involving criminal threats have the subjective *mens rea* that the Colorado statute lacks, in many cases higher than the defendant's recklessness about whether his words threaten violence. Penal Code §36.06, Retaliation, requires a subjective mens rea showing that the person intentionally or knowingly harmed or threatened to harm another by an unlawful act in retaliation for the service or status of another. Penal Code §42.07(a)(2), Assault by Threat, requires that the State prove that the accused intentionally or knowingly threatened another with imminent bodily injury; post-*Counterman*, bear in mind that this has to take into account the actor's conscious awareness of the threatening nature of the statement, not merely awareness of the words he is saying. One common way Penal Code §22.07, Terroristic Threat, is charged is by alleging the accused threatened to commit an offense involving violence against a person with the intent to place any person in fear of imminent serious bodily injury. All of these require a greater showing than *Counterman* requires.

But not every offense—and certainly not every manner and means of every offense—will comply with *Counterman*'s requirement for constitutionally prosecutable true threats. That's OK. Just remember that there are often many more bases for why the conduct can be constitutionally criminalized, and we should argue *those*, unlike the State of Colorado did by putting all its eggs in the "true threats" basket.

The few Texas cases handed down since *Counterman* have implicitly recognized that stalking and harassment statutes do not have to be limited to true threats made recklessly to comport with the First Amendment.[13] In both *Ex parte Ordonez*[14] and *State v. Chen*,[15] the Fourteenth Court of Appeals concluded that *Counterman* did not invalidate the Texas electronic harassment statute because the "repeated sending of electronic communications" is noncommunicative conduct that doesn't implicate the First Amend-

ment at all. *Ordonez* and *Chen* relied on two Court of Criminal Appeals cases decided before *Counterman*, *Ex parte Sanders*[16] and *Ex parte Barton*,[17] which drew the same distinction between protected speech and unprotected non-speech conduct.

So, even though Penal Code §42.07, Harassment, requires a mental state of "intent to harass, annoy, alarm, abuse, torment, or embarrass another"—and it does not necessarily encompass the fear of violence that a true threat would likely require—that is not the end of the story. *Sanders*, *Barton*, and Justice Sotomayor's concurrence in *Counterman* provide numerous other reasons that the statute is constitutional, chief among them that harassment is typically about conduct, not speech.

Similarly, Penal Code §42.072, Stalking, can be charged as engaging in conduct that the actor "reasonably should know that the victim will regard as threatening bodily injury." This is a criminal negligence standard and, standing alone, would not pass muster under *Counterman*. Prosecutors can avoid the constitutional argument by choosing the "knowing the victim will regard as threatening bodily injury" manner and means and thus encompass only a defendant's prosecutable true threats. But realize that there are many more reasons that the conduct of stalking can be criminalized entirely consistent with the First Amendment, and that requiring the State to prove a defendant's reckless mental state will seldom be a necessary step. ❇

Endnotes

[1] 600 U.S. 66 (2023).

[2] Emily's input was instrumental in writing this article but she is very modest, so I am sticking her thanks in the endnotes.

[3] *Virginia v. Black*, 538 U.S. 343, 359 (2003) (holding Virginia's ban on cross burning does not violate the First Amendment, so long as the prosecution proves the intent to intimidate with additional facts).

[4] 394 U.S. 705 (1969).

[5] *People v. Counterman*, 2021 COA 97, 497 P.3d 1039 (Colo. App. 2021).

[6] 575 U.S. 723 (2015) (involving the federal anti-threat statute, 18 U.S.C. § 875(c)).

[7] 376 U. S. 254, 280 (1964).

[8] 379 U. S. 64, 74, 85 (1964).

[9] 395 U.S. 444 (1969).

[10] No. V-94-006, 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. 1997); see also *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991) (analyzing Ozzy Osbourne song "Suicide Solution" under *Brandenburg*), *aff'd*, 958 F.2d 1084 (11th Cir. 1992) (unpublished opinion), *cert. denied*, 506 U.S. 916 5 (1992); *Yakubowicz v. Paramount Pictures Corp.*, 404 Mass. 624, 536 N.E.2d 1067, 1071 (Mass. 1989) (the movie *The Warriors* did not incite gang violence under *Brandenburg*).

[11] *Counterman*, 143 S. Ct. at 2119 (quoting *Elonis*, 575 U. S., at 748).

[12] 139 S. Ct. 675 (2019) (J. Thomas, dissenting).

[13] The amicus curiae brief of Kent S. Scheidegger and Kymberlee C. Stapleton of the Criminal Justice Legal Foundation argued this point to the Court in *Counterman*: "[p]roceeding directly to the true threat question without stopping to consider if a content-based regulation is involved is a plain error…a decision in this case that proceeds directly to the true threat issue could be taken to imply that stalking statutes are limited to true threats. The statute in this case and similar stalking statutes throughout the nation would be imperiled, and the value of their protection to stalking victims would be largely eliminated." Brief for the Criminal Justice Legal Fdn. as Amicus Curiae, pp. 24-25, 600 U.S. 66 (2023); see also https://fedsoc.org/events/courthouse-steps-decision-counterman-v-colorado (retrieved Oct. 20, 2023) (interview with Mr. Scheidegger criticizing majority opinion for failing to clarify this point).

[14] No. 14-19-01005-CR, 2023 Tex. App. LEXIS 5389 (Tex. App.–Houston [14th Dist.] July 25, 2023, no pet. h.).

[15] Nos. 14-19-00372-CR, 14-19-00373-CR, 2023 Tex. App. LEXIS 6654 (Tex. App.–Houston [14th Dist.] Aug. 29, 2023, no pet. h.).

[16] 663 S.W.3d 197 (Tex. Crim. App. 2022).

[17] 662 S.W.3d 876 (Tex. Crim. App. 2022).

In both Ex parte Ordonez *and* State v. Chen*, the Fourteenth Court of Appeals concluded that* Counterman *did not invalidate the Texas electronic- harassment statute because the "repeated sending of electronic communications" is noncommunicative conduct that doesn't implicate the First Amendment at all.*

Photos from our Annual Conference

Photos from our Regional Conferences in Amarillo and Midland

Photos from our Regional Conferences in Laredo and Tyler

Fentanyl dealer sentenced to 45 years for felony murder (cont'd from front cover)

The murder of Andres Diaz

The events that led to the murder of Andres Diaz started on July 14, 2022, when the 21-year-old texted his friend Leigha Smith, asking if she wanted to hang out. Andres had struggled with substance abuse for years. Leigha, also 21, agreed to meet up, driving to his house to pick him up.

Andres and Leigha chatted, deciding they wanted to get high. Andres had used coke earlier that week and he tried to contact his cocaine hook-up. That dealer didn't answer. Leigha called her dealer, Jasinto Jimenez, who sold weed and "percs" (street Percocets), and they set up a deal. Pooling their money, Andres and Leigha came up with $80 for their hits.

Leigha drove them to Jimenez's house. In his driveway, Jimenez sold them two percs and some marijuana at $30 a perc and $20 for the marijuana. Leigha passed one of the percs to Andres. Then she drove to a 7-Eleven to buy cigarillos to roll blunts and a Gatorade, which she used to gulp down her perc. Andres then, fatefully, took the Gatorade bottle, crushed his perc, and snorted it. Next, they rolled blunts and smoked the marijuana.

Jamming to music, Leigha drove them to a spillway at Lake Wichita. On the way, Andres fell asleep. With him sleeping, Leigha headed back to her house. Andres was snoring. When she tried to wake him, he wouldn't stir, so she rolled down the windows and left him snoring in the car. Leigha then went inside and watched a movie. During the night, she checked on Andres several times but could not wake him. At 5:00 a.m., she noticed his snoring had stopped. She ran inside to get her mom, who checked Andres with a stethoscope, but she could not detect a heartbeat. Leigha rushed Andres to the emergency room, where resuscitation attempts were futile. Andres was pronounced dead at 5:30 a.m.

Powerful evidence of knowledge

To apply felony murder to a fentanyl dealer, our office wanted the iron-clad ability to trace the lethal dose back to the dealer and overwhelming evidence of guilt. The investigation into Jasinto Jimenez developed powerful evidence of both.

Under 19.02(b)(3) of the Texas Penal Code, felony murder requires that the defendant:

1) while in the course of committing or attempting to commit a felony,

2) commits an act clearly dangerous to human life that

3) causes the death of another.

Delivery of fentanyl is a felony under the Texas Controlled Substance Act.[1] Further, the evidence to prove causation and trace the fentanyl back to Jimenez was solid. Leigha was an eyewitness. She cooperated with law enforcement and provided her texts with Jimenez setting up the sale. While she was charged with manslaughter for her role, Leigha testified without a deal and without immunity.[2] She could connect the perc that killed her friend to Jimenez. Further, Jimenez had admitted in a jail call that he had sold them the lethal dose. The autopsy concluded Andres's death was caused from the toxic effects of fentanyl.

Importantly, the Jimenez investigation demonstrated strong evidence that he knew his actions were clearly dangerous to human life. Previously, Jimenez had emerged as a target of WFPD narcotics investigators. Investigators executed a search warrant on his residence on June 29, 2022, two weeks before Andres's homicide. In the search, they found a pill under his bed, which testing revealed to be fentanyl.

During an interview with investigators immediately following the execution of the June 29 search warrant, Jimenez admitted he knew the pill was fentanyl, but he initially denied dealing. "I wouldn't deal fentanyl—that's dangerous," Jimenez declared. Then he started crying while discussing people he had heard of who died from fentanyl overdoses. Later, he finally confessed that he was dealing percs that he knew were fentanyl. Jimenez had no job and had not worked in a while. He purchased the percs for $10 a pop and could double or triple his money, selling them from $20–35 each.

Jimenez's admissions that he knew he was dealing fentanyl and he knew how dangerous it was were crucial evidence that he was committing acts clearly dangerous to human life. Notably, the Texas Court of Criminal Appeals has held that the underlying felony can also constitute the act clearly dangerous to human life in a felony murder prosecution.[3]

Strategy for jury selection on felony murder

For jury selection to be successful, the prosecution wanted jurors who were comfortable with applying felony murder, who could convict of murder without intent to kill, and who understood concurrent causation.

I handled voir dire, taking the panel through the law on felony murder and providing examples. I asked a commitment question: "If you believed the evidence established the elements for felony murder beyond a reasonable doubt, but there was no intent to kill, would you return a verdict of guilty?" This is a proper commitment question because panel members who were unwilling to convict without the defendant's intent to kill were elevating the standard of proof above what Texas law requires. This exposed multiple bad panelists and set up successful challenges for cause.

For jury selection to be successful, the prosecution wanted jurors who were comfortable with applying felony murder, who could convict of murder without intent to kill, and who understood concurrent causation.

To illustrate how dealing fentanyl could be an act clearly dangerous to human life, I put up a photo of the Corner Drug Store in Burkburnett and my father, Joe Gillespie, a pharmacist. "My dad took his job very seriously," I told them. "One story he always told was about two drugs that had similar names, one being a dangerous heart medicine. Once, Dad filled a prescription. After the customer picked it up, Dad had a nagging feeling. He rechecked the handwritten prescription and realized he had misread the doctor's writing. Then he bolted from the pharmacy and rushed to the customer's house. Dad had dispensed the wrong, dangerous heart drug by accident. Thankfully, he caught his error before the customer had taken any. Even though he was meticulous about his job as a pharmacist, he always feared how deadly such a mistake could be."

This story illuminated why Texas law utilizes licensed pharmacists to dispense drugs pursuant to prescriptions by doctors. I also discussed the quality control measures for drug manufacturers so people had confidence they were getting the proper dosage, helping establish why dealing street fentanyl without a prescription, not under a doctor's care, and with no quality controls was an act clearly dangerous to human life.

For causation, this case presented three concurrent "but for" causes: Jimenez for dealing fentanyl, Leigha for purchasing it and giving it to Andres, and Andres for snorting it. Section 6.04 of the Penal Code explains a person "is criminally responsible if the result would not have occurred *but for* his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient."

To help the panel understand that legal mouthful, I used a photo of a Coke machine and asked what were the "but for" causes for a Coke to drop. A venire-member thought about it and answered: 1) put money in and 2) push the button.

"If you put the money in and push the button, you are both 'but for' causes to the Coke dropping. But what if you have a child with you, and you put the money in but tell him to pick what he wants? In that situation, you and the child are both 'but for' causes acting concurrently. If you put money in, but nobody pushes a button, a Coke won't drop. Or if you push a button, but you don't insert money, nothing happens. Both actions are operating together to cause a Coke to drop."

This hypothetical illustrated that while Andres was a "but for" cause in snorting the deadly perc, he would have no fentanyl to snort "but for" Leigha buying it and "but for" Jimenez dispensing it. Thus, there were three concurrent "but for" causes to Andres's death that operated together. Like the Coke machine example, none of the "but for" causes were sufficient to cause the result operating alone.

Expert testimony is key

Fentanyl skyrockets past standard street drugs such as cocaine, meth, and even heroin in lethality. For success at trial, ADA Shelton believed a jury needed to be educated about fentanyl's unique and dangerous toxicity. Dr. Stacey Hail, who teaches emergency medicine at UT Southwestern and is a nationwide poison control and fentanyl expert, provided key testimony.

Dr. Hail explained opiates, opioids, and synthetic opioids. Morphine has a baseline of 1 as to potency. Codeine, a weak opioid, is a 0.1. Oxycodone (the generic name for Percocet) has a potency between 1.5 and 3.5. Heroin measures a 2.5–5 potency. Astonishingly, fentanyl is 100–150 times more potent than morphine.

While Dr. Hail agreed with the slogan "one pill can kill," she testified that the most common fatal fentanyl overdose she sees is from a *portion* or

fragment of one pill. She further explained that due to fentanyl's potency, tiny changes in the dose render fentanyl incredibly lethal.

"Socrates said, 'The dose makes the poison,'" Dr. Hail testified. "The higher the potency, the higher the lethality. Because fentanyl is such a potent opioid, that makes it so very dangerous."

Prescription fentanyl is produced by drug manufacturers with rigid quality controls and dispensed by pharmacists. In hospitals, doctors use prescription fentanyl for surgical procedures and pain management following surgery. But illicit fentanyl has no quality controls and often comes from Mexico or China.

"Because there are no quality controls, a drug dealer has no idea the dose of fentanyl in any pill," Dr. Hail said. Her testimony set up the prosecution's argument that the act of dealing such an incredibly potent, toxic drug was clearly dangerous to human life. The jury agreed, convicting Jimenez of murder after only an hour of deliberations.

Punishment testimony shows dealers listen

Punishment evidence demonstrated that the murder charges against Jimenez impacted the availability of fentanyl in Wichita Falls. Narcotics investigator Andrew Schenk said that after the felony murder charges were announced, it became nearly impossible for his confidential informants to set up buys of percs, which were usually laced with fentanyl. "The dealers did not want to take the risk of murder charges," Schenk testified.

Sergeant Brian Sheehan also vouched for the impact on Wichita Falls. "Before we announced the fentanyl felony murder arrests, we were responding to at least one fatal overdose a month, sometimes more," he testified. "After the arrests, that dropped way off."

Sheehan believed the drop was multi-causal, also including the education push in the community as well as the greater availability of Narcan, the fentanyl antidote. However, Sheehan identified the timing of the felony murder arrests as when the overdose deaths started to decrease.

Referencing their testimony, ADA Shelton argued that the jury had more power than the President to impact fentanyl in this community by sending a message. He also emphasized the defendant's depraved indifference to human life: "He knew how dangerous it was. You heard him say that. He knew he was dealing fentanyl. You heard him admit that too, just two weeks before. He showed a depraved indifference to human life by continuing to knowingly deal this poison in our community. Money was all he cared about."

After three hours of deliberations, the jury returned with a 45-year-sentence, which was significantly higher than the 25-year sentence the defense attorney had requested.

The new fentanyl murder law

In response to the fentanyl crisis, the Texas legislature amended the murder law to create a fentanyl-specific murder offense. Under new Penal Code §19.02(b)(4), a person commits an offense if he or she knowingly manufactures or delivers fentanyl and an individual dies as a result.

While Wichita County had an acute crisis in our community and needed to use the tools we had in 2022 to respond, our case provides some important guidance on how to present a case under the new law:

Reserve murder charges for cases with powerful proof that clearly and indisputably traces the overdose to the fentanyl dealt by the defendant. If your proof is shaky, then opt for a lesser charge, such as delivery.

Evidence, evidence, evidence. Like location in real estate, compelling evidence provides the key to success. Reserve murder charges for cases with powerful proof that clearly and indisputably traces the overdose to the fentanyl dealt by the defendant. If your proof is shaky, then opt for a lesser charge, such as delivery. Section 481.141 of the Health and Safety Code enhances delivery that caused death or serious bodily injury one degree; however, the enhancement is not available if a defendant is also being prosecuted under the new fentanyl murder law.[4]

Use an expert. A jury must understand that fentanyl is dramatically more toxic than standard street drugs. Dr. Hail was key in educating the jury on the unique danger: Fentanyl is 50–60 times more potent than heroin. The extreme danger justifies the murder charge to a jury.

Explain causation. Because these cases are likely to involve a drug-seeker or addict who purchased and ingested the illicit drug, a jury must understand Texas law on "but for" causation and concurrent causation. Criminally, Texas does not have a proportional responsibility law that exists in civil cases. It is critical to explain that while the user paid the ultimate price for his crime, the dealer is still a "but for" and concurrent cause and therefore still criminally liable.

Commit the jury on convicting with no intent to kill. Under either felony murder or the new fentanyl murder law, there is no requirement to prove intent to kill. Such evidence is unlikely to exist in these cases. Therefore, explain to the jury that there are various ways to prove murder, and some do not require intent to kill. Then commit the panel that if the evidence proved all the elements beyond a reasonable doubt, but there was no proof of intent to kill, they would convict. This is a valid commitment question, as those who refuse to convict cannot follow the law. Remind the jury at closing that each gave their word under oath that they would convict if the elements are proven, without intent to kill.

Consider charging fentanyl murder and felony murder as alternative paragraphs. Because it is unclear whether the new law in §19.02(b)(4) requires proof that the defendant knew he was delivering fentanyl (as opposed to illegal contraband in general), felony murder may provide another option for situations where the dealer hasn't admitted he was dealing fentanyl. Many dealers may claim they are dealing Percocet, may deny they are dealing fentanyl, or may be silent. The proof will often involve texts about "percs." Percocet is oxycodone, which is in Penalty Group 1, while fentanyl is in Penalty Group 1-B. Felony murder would let the State allege that the defendant "attempted to commit" the felony of delivering oxycodone and/or fentanyl. It would also permit the allegation that not knowing what he is dealing is itself an act clearly dangerous to human life. If a dealer who is not a pharmacist is dealing a drug with no quality controls not pursuant to a doctor's prescription, that act would be clearly dangerous to human life, regardless of whether the dealer knew he was actually dealing fentanyl. The alternatives to committing murder do not constitute separate offenses; thus, they may be alleged as alternative paragraphs and a jury can still return a general verdict on murder.[5] The smartest practice will often be to allege alternative paragraphs with felony murder and the new fentanyl murder.

Many dealers may claim they are dealing Percocet, may deny they are dealing fentanyl, or may be silent. The proof will often involve texts about "percs."

Spread the community danger at punishment. Because a victim likely was a drug-seeker or addict, expand the community danger: "This defendant did not care who ended up with the fentanyl so long as he got his money. Sure, it was Andres Diaz who ingested it and died, but this defendant didn't know where the perc was going. It could have been to any college student in our community, any high school student, any junior high student, or even, God forbid, an elementary school student. Dealing those pills like he did was playing Russian roulette with so many lives. And the defendant showed a depraved indifference to them all." Jurors will think of their kids and grandkids and ratchet up the punishment number.

We must do something

Our case demonstrated that juries are sick of the fentanyl death epidemic and are eager to hold accountable those who peddle this poison in our communities. The extreme toxicity of fentanyl justifies examining these cases as homicides.

While aggressive investigation and prosecution is not a magic solution to the fentanyl crisis, law enforcement plays an important part in a multi-pronged, community-wide response.

"The felony murder charges have definitely had an impact," Sergeant Sheehan said. "It's the only time in my career when I've seen something have that drastic an impact. We've significantly increased the cost of doing business to street-level dealers. Now, the jury has backed us up. I believe this 45-year murder sentence will save lots of lives in our community." ❇

Endnotes

[1] Health & Safety Code §481.1123.

[2] Charges are still pending against Leigha for manslaughter, and she is still in custody.

[3] See *Johnson v. State*, 4 S.W.3d 254 (Tex. Crim. App. 1990) (upholding a conviction for felony murder where the underlying felony was injury to a child and the acts clearly dangerous to human life were the same acts that comprised the injury to a child felony).

[4] See Health & Safety Code §481.141 (d).

[5] See, e.g., *Bundy v. Texas*, 280 S.W.3d 425 (Tex. App.–Fort Worth 2009, pet. ref'd) (explaining jury unanimity is not required as to alternative means of committing murder with different mental states).

In praise of followers

Effective followers share a number of essential qualities:

1) They manage themselves well.
2) They are committed to the organization and to a purpose, principle, or person outside themselves.
3) They build their competence and focus their efforts for maximum impact.
4) They are courageous, honest, and credible.

By Robert Kelley

Reprinted with permission from the Harvard Business Review, *November 1988 issue*

Editor's note: We ran across this article in a book on leadership and thought it was pertinent to TDCAA's mission and the importance of continuing education, so we are reprinting it here with permission. Don't let its age deter you from reading it and learning from it!

Self-management

Paradoxically, the key to being an effective follower is the ability to think for oneself—to exercise control and independence and to work without close supervision. Good followers are people to whom a leader can safely delegate responsibility, people who anticipate needs at their own level of competence and authority.

Another aspect of this paradox is that effective followers see themselves—except in terms of line responsibility—as the equals of the leaders they follow. They are more apt to openly and unapologetically disagree with leadership and less likely to be intimidated by hierarchy and organizational structure. At the same time, they can see that the people they follow are, in turn, following the lead of others, and they try to appreciate the goals and needs of the team and the organization. Ineffective followers, on the other hand, buy into the hierarchy and, seeing themselves as subservient, vacillate between despair over their seeming powerlessness and attempts to manipulate leaders for their own purposes. Either their fear of powerlessness becomes a self-fulfilling prophecy—for themselves and often for their work units as well—or their resentment leads them to undermine the team's goals.

Self-managed followers give their organizations a significant cost advantage because they eliminate much of the need for elaborate supervisory control systems that, in any case, often lower morale. In 1985, a large midwestern bank redesigned its personnel selection system to attract self-managed workers. Those conducting interviews began to look for particular types of experience and capacities—initiative, teamwork, independent thinking of all kinds—and the bank revamped its orientation program to emphasize self-management. At the executive level, role playing was introduced into the interview process: how you disagree with your boss, how you prioritize your in-basket after a vacation. In the three years since, employee turnover has dropped dramatically, the need for supervisors has decreased, and administrative costs have gone down.

Of course not all leaders and managers like having self-managing subordinates. Some would rather have sheep or yes people. The best that good followers can do in this situation is to protect themselves with a little career self-management—that is, to stay attractive in the marketplace. The qualities that make a good follower are too much in demand to go begging for long.

Commitment

Effective followers are committed to something—a cause, a product, an organization, an idea—in addition to the care of their own lives and careers. Some leaders misinterpret this commitment. Seeing their authority acknowledged, they mistake loyalty to a goal for loyalty to themselves. But the fact is that many effective followers see leaders merely as coadventurers on a worthy crusade, and if they suspect their leader of flagging commitment or conflicting motives they may just withdraw their support, either by changing jobs or by contriving to change leaders. The opportunities and the dangers posed by this kind of commitment are not hard to see. On the one hand, commitment is contagious. Most people like working with colleagues whose hearts are in their work. Morale stays high. Workers who begin to wander from their purpose are jostled back into line. Projects stay on track and on time.

In addition, an appreciation of commitment and the way it works can give managers an extra tool with which to understand and channel the energies and loyalties of their subordinates.

On the other hand, followers who are strongly committed to goals not consistent with the goals of their companies can produce destructive results. Leaders having such followers can even lose control of their organizations.

A scientist at a computer company cared deeply about making computer technology available to the masses, and her work was outstanding. Because her goal was in line with the company's goals, she had few problems with top management. Yet she saw her department leaders essentially as facilitators of her dream, and when managers worked at cross-purposes to that vision, she exercised all of her considerable political skills to their detriment. Her immediate supervisors saw her as a thorn in the side, but she was quite effective in furthering her cause because she saw eye to eye with company leaders. But what if her vision and the company's vision had differed?

Effective followers temper their loyalties to satisfy organizational needs—or they find new organizations. Effective leaders know how to channel the energies of strong commitment in ways that will satisfy corporate goals as well as a follower's personal needs.

On the grounds that committed incompetence is still incompetence, effective followers master skills that will be useful to their organizations. They generally hold higher performance standards than the work environment requires, and continuing education is second nature to them, a staple in their professional development. Less effective followers expect training and development to come to them. The only education they acquire is force-fed. If not sent to a seminar, they don't go. Their competence deteriorates unless some leader gives them parental care and attention.

Competence and focus

On the grounds that committed incompetence is still incompetence, effective followers master skills that will be useful to their organizations. They generally hold higher performance standards than the work environment requires, and continuing education is second nature to them, a staple in their professional development.

Less effective followers expect training and development to come to them. The only education they acquire is force-fed. If not sent to a seminar, they don't go. Their competence deteriorates unless some leader gives them parental care and attention.

Good followers take on extra work gladly, but first they do a superb job on their core responsibilities. They are good judges of their own strengths and weaknesses, and they contribute well to teams. Asked to perform in areas where they are poorly qualified, they speak up. Like athletes stretching their capacities, they don't mind chancing failure if they know they can succeed, but they are careful to spare the company wasted energy, lost time, and poor performance by accepting challenges that coworkers are better prepared to meet. Good followers see coworkers as colleagues rather than competitors.

At the same time, effective followers often search for overlooked problems. A woman on a new product development team discovered that no one was responsible for coordinating engineering, marketing, and manufacturing. She worked out an interdepartmental review schedule that identified the people who should be involved at each stage of development. Instead of burdening her boss with yet another problem, this woman took the initiative to present the issue along with a solution.

Another woman I interviewed described her efforts to fill a dangerous void in the company she cared about. Young managerial talent in this manufacturing corporation had traditionally made careers in production. Convinced that foreign competition would alter the shape of the industry, she realized that marketing was a neglected area. She took classes, attended seminars, and read widely. More important, she visited customers to get feedback about her company's and competitors' products, and she soon knew more about the product's customer appeal and market position than any of her peers. The extra competence did wonders for her own career, but it also helped her company weather a storm it had not seen coming.

Courage

Effective followers are credible, honest, and courageous. They establish themselves as independent, critical thinkers whose knowledge and judgment can be trusted. They give credit where credit is due, admitting mistakes and sharing successes. They form their own views and ethical standards and stand up for what they believe in.

Insightful, candid, and fearless, they can keep leaders and colleagues honest and informed. The other side of the coin of course is that they can also cause great trouble for a leader with questionable ethics.

Jerome LiCari, the former R&D director at Beech-Nut, suspected for several years that the apple concentrate Beech-Nut was buying from a new supplier at 20 percent below market price was adulterated. His department suggested

switching suppliers, but top management at the financially strapped company put the burden of proof on R&D.

By 1981, LiCari had accumulated strong evidence of adulteration and issued a memo recommending a change of supplier. When he got no response, he went to see his boss, the head of operations. According to LiCari, he was threatened with dismissal for lack of team spirit. LiCari then went to the president of Beech-Nut, and when that, too, produced no results, he gave up his three-year good-soldier effort, followed his conscience, and resigned. His last performance evaluation praised his expertise and loyalty, but said his judgment was "colored by naiveté and impractical ideals."

In 1986, Beech-Nut and LiCari's two bosses were indicted on several hundred counts of conspiracy to commit fraud by distributing adulterated apple juice. In November 1987, the company pleaded guilty and agreed to a fine of $2 million. In February 1988, the two executives were found guilty on a majority of the charges. The episode cost Beech-Nut an estimated $25 million and a 20-percent loss of market share. Asked during the trial if he had been naive, LiCari said, "I guess I was. I thought apple juice should be made from apples."

Is LiCari a good follower? Well, no, not to his dishonest bosses. But yes, he is almost certainly the kind of employee most companies want to have: loyal, honest, candid with his superiors, and thoroughly credible. In an ethical company involved unintentionally in questionable practices, this kind of follower can head off embarrassment, expense, and litigation. ❇

Law & Order Award

TDCAA recently presented State Rep. Four Price (R-Amarillo) with a Law and Order Award in recognition of his steadfast support of local Texas prosecutors. In addition to serving as a past chairman of the House Calendars Committee, Rep. Price has passed helpful legislation to address forensic mental health backlogs, opioid addiction, and child abuse. Presenting the award to Rep. Price (center) at our recent Amarillo Fall Regional were Shannon Edmonds, TDCAA Director of Governmental Relations (left), and Bill Helwig, CDA in Yoakum County and current TDCAA President.

Wanted: prosecutor volunteers to help develop standards for forensic sciences

Have you ever been preparing an expert witness in a forensic field to testify and wondered why she must couch the answers to your questions in a certain way?

By Jeff Swain
District Attorney in Parker County

The reason may be that her field of expertise has limitations on the words she is permitted to use to convey her opinions. That may be the case even though the examiner could better describe the persuasive value of her test results or opinions with different word choices or descriptions that would also line up with the science in her field.

Why would forensic standards be written this way?

One reason may be that only 10 percent of the attorneys who volunteer to participate alongside the scientists in the organization that writes these rules are prosecutors. The vast majority are criminal defense attorneys, and the balance are in academia. These people do not have prosecution's interests in mind when they are creating forensic science standards.

This article, then, is my call for prosecutors with some expertise—or even just an interest—in any forensic science fields to step up and help with the group that creates these standards, the Organization of Scientific Area Committees for Forensic Science (OSAC).

I myself do not presently serve on any of these OSAC committees, but I do serve on a forensic science working group with the National District Attorneys Association alongside some prosecutors who volunteer with OSAC. These prosecutors explained the need to me in a recent meeting. There are a variety of participation levels for interested prosecutors, ranging from several hours for a public reviewer or commenter, to an OSAC Affiliate or full committee member, each of which would require a greater commitment over a longer period of time.

Interestingly, OSAC officials want prosecutors' input and involvement as well. One OSAC official who recently reached out to our group said that he knows there is an imbalance of what types of attorneys make up the committees, but if no prosecutors apply for the positions they need to fill, they have to appoint the defense attorneys or academics who do.

What OSAC does

OSAC is responsible for developing standards for 22 forensic disciplines. Its subcommittees focus on each of these disciplines and are comprised of practitioners, researchers, lawyers, and other stakeholders. OSAC rules impact forensic testing in all areas, including DNA, crime scene, firearms and toolmarks, autopsy evidence prosecutors may admit in a murder case, the testing of the drug exhibits in a narcotics case, blood testing in a DWI case, and the fingerprint testimony we use to prove up an enhancement.

Not only do the established standards require testing or examination to be conducted in a certain manner with particular equipment or facilities, but they may also limit the testimony permitted by the expert witness. A demonstration of the need for prosecutors on OSAC subcommittees is the fact that, at present, the only legal representation on the DNA and Friction Ridge (fingerprint) Subcommittees is by criminal defense lawyers.

You may be familiar with the 2016 report of the President's Council of Advisors on Science and Technology (PCAST), which questioned the foundational validity of forensic fields such as DNA, fingerprints, firearms and toolmarks, bitemarks, and hair comparison. The report purported that, in some of these areas, large scale, black box studies have not been completed, reviewed, and published in peer-reviewed journals. (Read an article on this topic from a 2018 issue of this publication here: www.tdcaa.com/journal/responding-to-pcast-based-attacks-on-forensic-science.)

Many new studies of the exact type the report recommended have been conducted in some of these fields, confirming their validity. For example, this past May, a black box study involving 228 firearms examiners was published in the Proceedings of the National Academy of Sciences and showed that true-positive and true-negative identification of firearms cartridge-case comparisons exceed 99 percent accuracy.[1] In the wake of the PCAST report and with these latest studies in mind, new standards are being developed. It is in our interest as prosecutors to have a seat at the table so that the standards developed are workable for practitioners and will allow us to accurately depict the science and its data in court.

The results of this latest research have also caused some introspection about the use of testimony and evidence in some fields that have fallen more into disrepute. For example, forensic odontology and forensic hair comparison have both been re-examined and found to be lacking in some significant regards. As we strive to see that justice is done, it is equally in our interest to assist in the development of standards in fields such as these. In some instances, there is nothing wrong with the science, but rather the way it was presented in court led to its value being misunderstood, not only by jurors but also by prosecutors and judges who may have limited scientific backgrounds.

There is probably not a DA's or CA's Office in the state of Texas that doesn't have a staff of overworked prosecutors. So, when I am asking for volunteers, I know it's a big ask. But given the importance of forensic science to modern-day prosecutors, this is an important area that deserves some of our time. Please consider volunteering to be an OSAC member, affiliate, or public reviewer or commenter. For more information, email forensics@nist.gov, and see the OSAC flyer reprinted on pages 26 and 27. ❇

Endnote

[1] Guyll, Max, et al., "Validity of forensic cartridge-case comparisons," May 8, 2023, *Proceedings of the National Academy of Sciences*, www.pnas.org/doi/10.1073/pnas.2210428120.

OSAC
Organization of Scientific Area Committees for Forensic Science

Strengthening the nation's use of forensic science by facilitating the development of technically sound standards and encouraging their use throughout the forensic science community

Legal Experts: Join OSAC and Help to Shape Forensic Science Standards

ABOUT OSAC

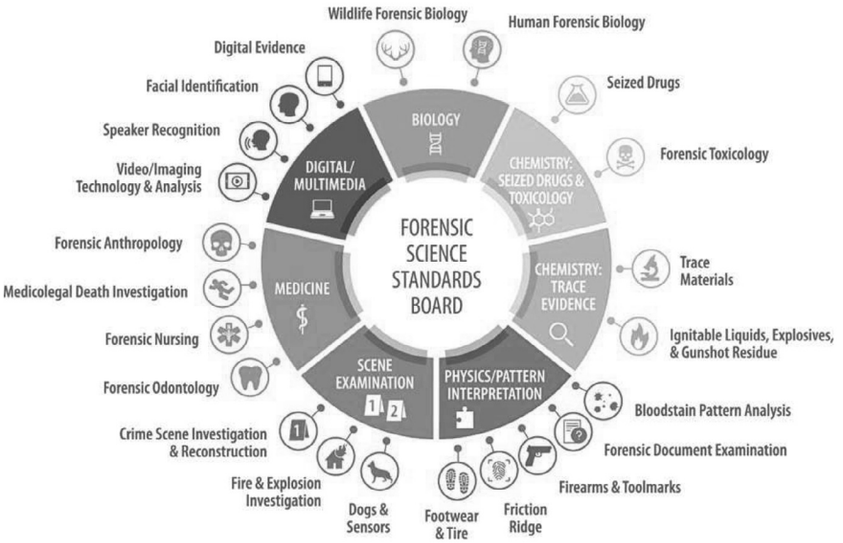
Administered by the National Institute of Standards and Technology (NIST), OSAC was created in 2014 to address a lack of discipline-specific forensic science standards. To fill this gap, OSAC:

- **Drafts** proposed standards and sends them to standards developing organizations (SDOs), which further develop and publish them.
- **Evaluates** and approves standards for the OSAC Registry.
- **Promotes** the use of standards on the OSAC Registry throughout the forensic science community.

Forensic science standards define minimum requirements, best practices, standard protocols, and other guidance to support the production of high-quality results in crime laboratories. Legal experts are an important stakeholder group that can assist in the development of forensic science standards as crime laboratory outputs are a significant component of the criminal justice system.

OSAC's STRUCTURE

OSAC's 450+ volunteer members and 350+ affiliates work in forensic laboratories and other institutions around the country and have expertise in 22 forensic disciplines, as well as scientific research, measurement science, law, quality, human factors, and policy. These experts work together to draft and evaluate forensic science standards via a transparent, consensus-based process that allows for participation by all stakeholders.



CONTACT US: forensics@nist.gov

OPPORTUNITIES FOR LEGAL EXPERTS TO ENGAGE

OSAC volunteer members have dedicated thousands of hours annually to drafting and evaluating forensic science standards! Legal experts (e.g., prosecutors, defense, judges, academics) participate in the development process as members of OSAC Subcommittees and also as representatives on OSAC's Legal Task Group. Legal experts interested in participating are required to complete an OSAC application. When applying, indicate any areas of expertise in the online application, including selecting "legal", which provides OSAC with important information to consider when filling positions. Legal experts are typically considered for two different types of positions, an OSAC member or OSAC affiliate. More information about these roles, the time commitments, and responsibilities are in the table below.

Opportunity to Engage	Description of Role	Time Commitment and Responsibilities
OSAC Member	You'll be appointed to a specific OSAC subcommittee (as a voting member) to serve as a legal subject matter expert and also receive a secondary appointment as a member of the OSAC Legal Task Group. This role has specified minimum participation requirements.	3-year term; renewable for another 3 years. You'll attend regular unit meetings (virtual and optional in-person). NIST provides travel support for members invited to attend in-person meetings.
OSAC Affiliate	You'll be appointed by an OSAC unit chair to serve in a specific capacity. Legal experts are typically appointed as Affiliates in the Legal Task Group where they can provide useful knowledge to aid task groups and subcommittees when drafting standards and participate in commenting activities, however they do not have an official vote in any subcommittee.	No defined end date (Note: Standard drafting and balloting can take 1-2 years.) You'll attend virtual task group meetings. Affiliates may be invited to in-person meetings depending on the level of travel support available for the event.
Public Reviewer/ Commenter (No OSAC application needed)	You'll share your expertise by reviewing and providing technical comments on OSAC proposed and published standards to help strengthen them during open/public commenting periods.	~ 3-4 hours to read the standard, formulate comments, and submit them.

BENEFITS OF VOLUNTEERING

- **Contribute your legal expertise to help improve forensic science.** Share your knowledge and provide a legal perspective in the drafting and review of standards and other OSAC work products.
- **Raise your awareness.** By volunteering in the OSAC process, you'll be more aware of what is happening in the field of forensic science standardization.
- **Help to educate members of the court about standards on the OSAC Registry.** When courts become more aware of standards listed on the OSAC Registry and their use by the forensic science community, the OSAC Registry can become a helpful tool in the criminal justice system.
- **Network and find your place in a community of practice.** Meet people from different organizations, working in a variety of forensic science disciplines, and with diverse expertise.

GET INVOLVED

Apply to become an OSAC member or affiliate (one application applies for both member and affiliate positions) www.nist.gov/osac/apply-join-osac

Sign up for OSAC communications to get the latest news and updates about forensic standards. https://public.govdelivery.com/accounts/USNIST/subscriber/new

Provide your input on standards that are open for comment. https://www.nist.gov/organization-scientific-area-committees-forensic-science/standards-open-comment

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Forming a crimes against children task force

The idea for a task force on crimes against children began in 2021 while I was discussing the difficulties of prosecuting child sexual abuse cases with Major David Faught at the Henderson County Sheriff's Office.

By Jenny Palmer
District Attorney in Henderson County

I asked Major Faught if he thought Sheriff Botie Hillhouse would be interested in a specialized group of investigators handling all crimes against children for all of Henderson County.

For some background, Henderson County is East Texas (about 60 miles southeast of Dallas) and encompasses 948 square miles with a population of 85,511.[1] We have 19 law enforcement agencies (including three school district police departments), some of which are larger, like the Henderson County Sheriff's Office. Some of them, however, have only one or two officers.

The problems getting thorough, complete investigations in crimes against children cases are not unique to Henderson County, or even to rural counties. Investigations involving sexual and physical abuse of children are often complex and take an enormous amount of specific training, time, and resources. But a swift investigation is vital, or evidence is lost and children's families become uncooperative. It is especially difficult for smaller agencies where the sole investigator also has to work traffic and take calls in addition to trying to investigate. Many of our agencies could not afford to send an officer to observe a forensic interview, let alone attend a multi-disciplinary team (MDT) meeting.

Not long after my initial conversation with Major Faught, he called to say the sheriff was on board and wanted to meet to discuss a task force. I brought several examples with me, and we discussed the problems that we faced, spit-balling ideas for about an hour. We left that meeting excited but unsure of how to proceed.

Luckily, I knew someone who could help. Sheila Davis is the Chief Operations Officer with Maggie's House, the Children's Advocacy Center (CAC) in Henderson County. Sheila has been with Maggie's House since 2006 and has relationships with CACs all over the state. She is a forensic interviewer, an expert witness, a program manager, and a mentor to many. Sheila mentioned that she knew Dan Powers, the Chief Operating Officer for the Children's Advocacy Center of Collin County, which has a rural task force. Sheila said she would reach out to Dan to see if he would visit with us about how their task force worked.

Soon after, on a cold morning in January 2022, Sheriff Hillhouse, Shelia, and I met in Plano with officers from multiple jurisdictions, along with a prosecutor who sat with us for over an hour explaining how the task force worked, walking through the problems that office faced getting started, and patiently answering our endless questions. They were gracious enough to meet with more of us in Henderson County via Zoom in March 2022 when others had questions. Dan Powers shared examples of interlocal agreements and made himself available to offer guidance and advice. Without the Collin County CAC, I don't think our task force would have had a chance to get off the ground. They truly set the

bar for how all agencies can work together to better protect children.

Baby steps

Once we were confident that a task force could work, we needed to develop a blueprint of what we wanted it to look like. Sheila ran numbers and percentages of how many forensic interviews of children Maggie's House conducted every year. Sheriff Hillhouse had already committed to assigning one investigator to be housed at the Help Center (the umbrella organization under which Maggie's House sits) prior to the task force being established. While I had already assigned a prosecutor, Katy Colts, to crimes against children only, I also committed to prioritizing her being present to observe the forensic interviews and for all MDT meetings and rotating on-call with me for after-hours interviews.

The numbers were staggering. In 2021, Maggie's House conducted 416 forensic interviews. This increased to 452 for 2022. When I came into office in January 2021, we were coming off a COVID backlog with large numbers of both unindicted and indicted cases. The DA's office has seven total prosecutors, including me, and we knew we had our work cut out for us.

We set our goals first. We knew we wanted the task force to begin no later than January 2023. Sheriff Hillhouse committed to assigning an additional three of his investigators to the task force and for them to be housed at the Help Center, a location that was several miles from the sheriff's office. Sheila spoke with Executive Director Leslie Saunders, and they committed to a secure office space for these investigators. Sheriff Hillhouse assigned one of the team members to handle all phone and data dumps and paid for the equipment and training so that we did not have to send our phones to other jurisdictions, which was a big asset.

We looked at the percentages of forensic interviews that came out of each of our law enforcement agencies and developed a model based off those percentages as to how much money each city would contribute to the county. Our goal was to use those funds for two additional investigators so the task force had six investigators total.

Sheriff Hillhouse developed the model of how agencies refer their cases for investigation to the task force. A participating agency would take a simple initial report and immediately contact the captain at the sheriff's office, who would then assign an investigator with the task force. This investigator would set up the forensic interview, observe it, and work with the task force throughout the investigation until the case was filed with the DA's office. Each of these investigators would be sent to training specific to crimes against children. This would cut down on officers interviewing children in the field and make sure the forensic interviews occurred close in time to the initial outcry.

Our hope was that cases would not only be thoroughly investigated, but also the time from investigation to disposition would be faster.

The traveling trio

We knew from the outset it would be a large project to get each of our many municipalities and departments on board. My greatest fear was that the agencies would not want to give up control of "their cases" or admit that there was a need for assistance. However, we came across this problem only twice throughout the whole endeavor. Other than those two locations, we had almost unwavering support. We traveled to Athens, Brownsboro, Chandler, Eustace, Gun Barrel City, Log Cabin, Tool, Trinidad, Seven Points, and our school districts. The police chiefs, along with their city managers and mayors, all recognized and welcomed the need for the task force. They asked intelligent, articulate questions and volunteered to help however they could.

My second fear was that many of these areas would not have the ability or desire to contribute financially toward salary for an investigator who was not one of their own. Again, we realized very quickly that our fears were unwarranted. Sheila ran reports each month so that we could give concrete numbers and examples to each city on the benefit of participation and the resources the task force could offer. City after city determined that it was a good use of their budgets.

Sheila, Sheriff Hillhouse, and I spent close to a year traveling across the county, usually more than once, to talk to various city councils. There were many evenings we missed ball games and

The three of us who traveled across the county to form the task force (left to right): Jenny Palmer, DA in Henderson County; Sheriff Botie Hillhouse; and Sheila Davis, Chief Operations Officer at Maggie's House.

dinner with our families as we sat through city council meetings that lasted well into the night and listened to citizens mull over issues within their city. At times, we would leave one city council meeting to drive to another one across the county. This travel meant meeting countless people across our jurisdiction and educating them about the child abuse epidemic in Henderson County and explaining the realities that our children face in the legal system. Everyone was free to ask questions of us, and we got to really hear from the people in our community.

Our first presentation to the councils was simply asking members to consider signing a resolution in support of the task force. We would then present them with a Memorandum of Understanding (MOU) and answer any questions before coming back before the council a second time to ask them to sign the MOU. Several cities requested a special workshop with the three of us so that they could ask more in-depth questions, so we did that as well.

In April 2022, the City of Chandler became the first city to sign our resolution, followed the next month by the City of Athens, which is the biggest municipality in our county.

During this process, we received great news. Authorities at Children's Advocacy Centers of Texas had heard about what we were doing and wanted to help. Leslie Saunders and Sheila Davis worked with Hannah Gibson-Moore, Strategy Development Principal with Children's Advocacy Centers of Texas, on a one-time grant through the Children's Justice Act to help with startup. This grant started in February 2023 and will run through the end of the year.

Even before January 2023, we started training the investigators. Although several of them were already seasoned, everyone wanted to receive the most up-to-date training possible. Maggie's House organized a training that also included investigators from Child Protective Services (CPS) and attorneys from the District and County Attorney's offices. At the training, our Sexual Assault Nurse Examiner, Meghan Richardson, taught everyone why SANEs are so vital and how they can be utilized in every case, whether acute or non-acute. A forensic scientist from the Texas Department of Public Safety taught a class about the types of testing that investigators should be aware of. We also used the training as a chance for everyone to get to know each other and network to build relationships across all our departments. We very much wanted to make sure everyone across all disciplines (CPS, law enforcement, and prosecution) worked in tandem to protect kids. The District Attorney's office also put on a training for CPS and law enforcement about testifying in court. This eight-hour course offered practice testifying on the stand about a fictional case, both on direct and on cross, in a real courtroom where they may testify. It also helped the prosecutors practice their technique in questioning witnesses.

I have been so impressed to see several of the investigators working together on one case to quickly get it to the District Attorney's Office. At any given time we may have one investigator watching a forensic interview and relaying information to another investigator who is working on search warrants or questioning the suspect and getting outcry statements.

Off and running

Once we had as many agencies as we could get on board, the county commissioners and county judge had to approve the MOUs between the cities and our county. County Attorney Clint Davis was central in helping draft the MOUs and being present for all commissioners court meetings to discuss the plan. The support of County Judge Wade McKinney, as well as all four of our commissioners (Wendy Spivey, Scott Tuley, Chuck McHam, and Mark Richardson) was vital. They also approved salary for a second victim assistance coordinator (VAC) to help with the influx of cases we were anticipating involving crimes against children.

Not even one month after the formal date that the task force was created, a capital murder of a young child occurred in the county. It followed on the heels of several other child deaths. Our task force quickly jumped into action and worked together to conduct a detailed, thorough investigation.

I have been so impressed to see several of the investigators working together on one case to quickly get it to the District Attorney's office. At any given time we may have one investigator watching a forensic interview and relaying information to another investigator who is working on search warrants or questioning the suspect and getting outcry statements. They can quickly bring electronics to another team member to download phone data and write preservation letters, and getting results is happening faster every day. Having a prosecutor observing the forensic interview from the get-go has improved our ability to spot issues more quickly, and our VAC reaches out to the family of the victim or CPS immediately after the investigation is complete so we can start building relationships to see prosecution through. Any team member can request a

special MDT meeting for issues that arise and to check in with all departments about the status of the case or any updates.

The task force today

Today, the task force is made up of six investigators from the Henderson County Sheriff's Office, and it handles cases filed in 13 different law enforcement agencies. Maggie's House has conducted 362 forensic interviews from January to the end of September 2023. All six investigators, along with Assistant District Attorney Katy Colts and Child Protective Services personnel, meet weekly to staff cases and address issues that may come up. Everyone communicates consistently and constantly to make sure nothing is missed. Katy has been handling this caseload since January 2022. The District Attorney's office has had 154 new cases involving crimes against children from January through August 2023, which is an average of nearly 20 per month. Katy currently has 116 indicted cases involving child abuse and an additional 30 unindicted cases. Katy handles all cases from intake through appeal, so she has a heavy load.

The investigators with the Henderson County Task Force (from left to right): Megan Hogan, Michael Massey, Jerry Moore, Dustin Smith, Eduardo Gonzalez, and Cayce Shue.

Active participation in MDT meetings has also increased exponentially. Additionally, camaraderie amongst the team has increased, which we hope will boost the longevity of these officers. Maggie's House has hosted a team-building day with the CAC staff, and the task force and hopes to do another one soon.

For our part, County Attorney Clint Davis and I have ramped up our education efforts and have been going into schools to discuss not only child abuse, but also sexting and the dangers of online communications and "Romeo and Juliet" relationships that can result in dire consequences for kids. Sheriff Hillhouse has allowed officers from the task force to go with us into schools for the presentations, and we have been met with overwhelming support.

Children's Advocacy Centers of Texas did a six-month survey regarding the task force for all police chiefs in the jurisdictions that have joined the task force, along with an MDT member survey. The results have been positive. The most common reasons why agencies chose to be a part of the task force was the cost-effectiveness for their jurisdiction by sharing the time commitment required for investigations and staffing issues. MDT members also felt that the investigators have more knowledge of trauma-informed approaches.

Our hope for the future is to eventually have 100-percent participation amongst all agencies in Henderson County. We have noticed a big difference in the quality of cases filed from the task force versus non-task force cases. I hope that every child eventually gets the justice they so deserve; I also hope that even those children whose cases don't see prosecution still receive the services they need to help them heal.

At my swearing in as district attorney for Henderson County on January 1, 2021, County Judge Wade McKinney told me, "County government is all about relationships." Having been through this process with Sheila and Sheriff Hillhouse, I could not agree more. We have built relationships across our county that benefit our county every day. ❇

Endnote

[1] According to numbers from the U.S. Census Bureau, https://data.census.gov.

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