

CAUSE NO. D-1-GN-16-004769

DAVID A. ESCAMILLA,
Travis County Attorney
Plaintiff

v.

KEN PAXTON
State of Texas Attorney General
Defendant

§ **IN THE DISTRICT COURT**
§
§
§
§ **OF TRAVIS COUNTY**
§
§
§ **261st JUDICIAL DISTRICT**

**INTERVENOR/CROSS-PLAINTIFF TARA CORONADO CUNNINGHAM'S
FIRST AMENDED PETITION**

Tara Coronado Cunningham (“Tara”) has Intervened in this matter and now files this First Amended Petition seeking public disclosure of the Deferred Prosecution Agreement that she requested from the Travis County Attorney and that is at issue in this case.

SUMMARY

1. a. This is an important case that not only generally implicates a lack of transparency in our criminal justice system about deals made in writing by prosecutors with defendants to defer prosecution, but also raises serious issues about how victims of family violence are informed about such deals. Tara is such a victim who wanted to see the written deal the Travis County Attorney made with the perpetrator/criminal defendant in her case. When the deal was signed, the County Attorney dismissed the criminal charges against the defendant subject to being refiled if the defendant did not comply with the terms of the deal—a deal that was known only to the County Attorney and the defendant.

b. The County Attorney refused to supply the “Deferred Prosecution Agreement” (DPA) to Tara upon her multiple requests. The Attorney General ruled that the DPA is subject to disclosure, but the County Attorney filed suit to prevent its disclosure. On the one hand, the County Attorney says that revealing the terms of the DPA would interfere in the potential

prosecution that would occur if the charges are refiled. On the other hand, the County Attorney says that the DPA can be withheld because, since the case was dismissed—pending completion of the deferred prosecution time period—it “did not result in conviction or deferred adjudication.” That is ironic considering that if deferred adjudication had been used in this case, instead of the secretive deferred prosecution agreement, the criminal defendant’s plea of guilty and the terms of the probation would be readily disclosed to the public, including the victim.

c. The Travis County Attorney does not closely guard the standard form and terms it uses for a DPA, and a copy of the DPA was easily located online. *See* Cross-Plaintiff’s Exhibit CP-1. Apparently, defendants sign a confession in the DPA, making it hard to understand how disclosure of the DPA would interfere with prosecution if the charges are refiled. In addition, other prosecutors—such as the U.S. Justice Department (who operates under a very similar “law enforcement exception” in the federal FOIA) ¹—not only routinely divulge their DPAs, *they post executed copies them online.* ² One must wonder why the Travis County Attorney claims disclosure of DPAs will interfere in prosecution or is otherwise improper while the U.S. Justice Department seems to have no such qualms.

d. Discovery in this case is intended to be conducted under Level 2 of TRCP 190.3. ³

PARTIES

2. a. Intervenor/Cross-Plaintiff, Tara Coronado Cunningham, is a resident of Travis County who may be served through her attorney of record in this case. Pursuant to Tex. Civ. Prac.

¹ 5 U.S.C. A. § 552(b)(7) (2000)

² *See e.g.,*
<https://search.justice.gov/search?query=Deferred+Prosecution+Agreements&op=Search&affiliate=justice>

³ Plaintiffs’ First Amended Petition seems to err in asserting the discovery will be under “Level 1” (which would be TRCP 190.2) but citing the Level 2 rule 190.3. Intervenor/Cross-Plaintiff agrees that Level 2 under TRCP 190.2 is the appropriate discovery control plan for this case.

& Rem. Code section 30.014, the last three numbers of her Driver's License is 582; last three numbers of her Social Security Number is 823.

b. Plaintiff/Cross-Defendant is Travis County Attorney David A. Escamilla and has been served.

c. Defendant is the Attorney General of Texas Ken Paxton and has been served.

JURISDICTION & VENUE

3. As the Requestor of the information at issue in this case, Tara has standing to bring suit, as she does, pursuant to TPIA ⁴ § 552.321 and to intervene pursuant to TPIA § 552.325(a). TPIA § 552.321 gives this Court jurisdiction over Tara's claims and makes venue mandatory in this Court.

CLAIM FOR RELIEF

4. Pursuant to TRCP 47(c)(2), Intervenor/Cross-Plaintiff gives notice that she seeks monetary relief of \$100,000 or less and nonmonetary relief, *i.g.*, mandamus pursuant to TPIA § 552.321.

FACTS

5. Tara is the Requestor of the DPA and has standing to bring this mandamus action against the Travis County Attorney. As admitted by the County Attorney (1st Amended Petition at ¶ V), Tara made requests for the DPA at issue in this case on April 11, 2016; May 11, 2016; and June 1, 2016. In addition, the County Attorney admits that on July 12, 2016, the County Attorney received a request from attorney Laura Bates for the same document. As is demonstrated by the attached affidavit from Laura Bates (Cross-Plaintiff's Exhibit CP-2), Ms. Bates was acting as Tara's attorney and submitted the request for solely for Tara, who was the Requestor. In addition, Tara submitted a request to the County Attorney for the DPA on September 27, 2016, the day after

⁴ References to the Texas Public Information Act (TPIA) are to Tex. Gov't Code ch. 552.

the County Attorney filed this lawsuit.

6. a. Despite the Attorney General's ruling, the Travis County Attorney has refused to supply Tara, the Requestor, with the DPA for criminal defendant Chet Edward Cunningham in the dismissed proceeding C-1-CR-13-180014, which is public information as well as information the Attorney General has determined to be public information.

b. To the extent that the County Attorney tries to justify concealing the DPA in this case, it should be noted that detailed information about the allegations against criminal defendant Chet Edward Cunningham is readily available in the court records of the above-cited case. For example, in the public record, there is an Affidavit For Warrant of Arrest and Detention in which a Bee Caves peace officer documented Tara's allegation of assault by Mr. Cunningham in May, 2013 and the officer's observation of lacerations and bruises on Tara's body. In addition, there is the information filed by the Travis County Attorney asserting Mr. Cunningham's assault on Tara.

c. The County Attorney filed a Motion to Dismiss the criminal case, which was granted (with a notation as to the reason being "Def. Pros. Agreement" (Deferred Prosecution Agreement) on April 6, 2016, the day the DPA was signed by Mr. Cunningham with the County Attorney. *See* (Cross-Plaintiff's Exhibit CP-3). The DPA at issue was provided to Chet Edward Cunningham, but not to Tara.

COUNT 1 – MANDAMUS PURSUANT to TPIA § 552.321

7. Cross-Plaintiff Tara seeks a writ of mandamus from this Court, pursuant to TPIA § 552.321, to order the County Attorney to supply a copy of the DPA at issue in this case. Cross-Plaintiff avers that the County Attorney refused to supply public information and information that the Attorney General determined was public information in Tex. Att'y Gen. OR2016-21139 (September 19, 2016).

8. To the extent that any other law gives Tara, as victim, a right of access to the DPA, Tara asserts such rights here as well.

CONDITIONS PRECEDENT

9. All conditions precedent to Cross-Plaintiff's claim for relief have been performed or have occurred.

ATTORNEY FEES

10. Cross-Plaintiff has retained the services of the attorney signed below. Cross-Plaintiff is entitled to recover reasonable and necessary attorney fees under TPIA § 552.323.

PRAYER

For these reasons, Cross-Plaintiff Tara Coronado Cunningham ask that the Court issue mandamus pursuant to Tex. Gov't Code § 552.321 to order the Cross-Defendant County Attorney to supply her with a copy of the Deferred Prosecution Agreement of Chet Edward Cunningham dated on or about April 6, 2016 and to grant Cross-Plaintiff all other relief to which she is entitled.

Respectfully submitted,



Bill Aleshire
Bar No. 24031810
AleshireLAW, P.C.
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Austin, Texas 78701
Telephone: (512) 320-9155
Cell: (512) 750-5854
Facsimile: (512) 320-9156
Bill@AleshireLaw.com

ATTORNEY FOR CROSS-PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on Defendants by e-mail on this 6th day of March, 2017.

ATTORNEYS FOR PLAINTIFF/CROSS-DEFENDANT

Tim Labadie
Texas State Bar No. 11784853
Assistant Travis County Attorney
P.O. Box 1748
Austin, Texas 78767
512 854-5864
512 843-9316 (fax)
tim.labadie@traviscountytexas.gov

ATTORNEYS FOR DEFENDANT

Matthew Entsminger
Assistant Attorney General
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: 512 475-4151
Fax: 512 457-4686
Matthew.entsminger@oag.texas.gov





CAUSE NO. C - 1 - CR - _____



THE STATE OF TEXAS

§

IN THE COUNTY

v.

§

COURT-AT-LAW # _____

§

TRAVIS COUNTY, TEXAS

DEFERRED PROSECUTION AGREEMENT

The parties to this agreement are the State of Texas, which is represented by the Travis County Attorney or his designated agent, and _____, the Defendant, whose date of birth is _____.

The Defendant agrees to waive certain rights and to comply with specified terms and conditions. The Defendant also confesses guilt of the offense(s) charged and stipulates to the admissibility of incriminating evidence. In return, the State of Texas agrees to conditionally dismiss the offense(s) charged.

Defendant's waiver of rights

I understand that I have the following rights:

- I have the right to a speedy trial.
- I have the right to a trial by jury.
- I have the right to confront and cross-examine the witnesses against me.
- I have the right to secure the appearance at trial of witnesses in my favor.

_____ I knowingly and voluntarily waive these rights.

I have also been advised of and fully understand that

- I have the right to remain silent and not make any statement at all. Any statement I make may be used against me at my trial.
- Any statement I make may be used against me in court.
- I have the right to have a lawyer present to advise me prior to and during any questioning.
- If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning.
- I have the right to terminate this interview at any time.



_____ I knowingly and voluntarily waive these rights, as well.

Attorney for Defendant

Defendant

State Bar Number

Defendant's Confession to the Charges

The State's information alleges that I committed the offense(s) of _____
_____ on [date] _____, in Travis County,
Texas. The State's information may be found in the Court Clerk's file, and it is
incorporated by reference into this agreement as though fully set out.

I am the person named as the defendant in the State's information. I understand
the allegations against me. I hereby voluntarily confess that they are true.

Attorney for Defendant

Defendant

State Bar Number

When the Agreement Begins, and How Long it Lasts

- This agreement begins when all of the following have occurred:
- the Defendant has initialed the waivers on pages 1 and 2;
 - the Defendant and the Defendant's attorney have signed page 2;
 - the Defendant, the Defendant's attorney and the attorney for the State of Texas have signed page 7 of the agreement; *and*
 - the Court has granted the State's conditional dismissal motion.

This agreement lasts for _____, starting the day the Court has
granted the State's conditional dismissal motion.

Defendant's Agreement to Specific Terms and Conditions.

By initialing the line beside each relevant term or condition, the Defendant shows that he or she understands that compliance with this particular term or condition is required. *If the Defendant has already complied with the condition when the parties enter into this agreement, the parties must attach documents showing that compliance.*

The Defendant must timely provide proof of completion of all terms and conditions, by either U.S. postage-prepaid mail, fax transmission, email, or hand-delivery to:

Street Address
Travis County Attorney's Office
Ned Granger Admin. Bldg.
314 West 11th, 3rd Floor
Austin, TX 78701

Mailing Address
Travis County Attorney's Office
Attn: Deferred Prosecution
(List cause number from page 1)
Post Office Box 1748
Austin, TX 78767-1748

Best way to communicate is by email:

tcaodfpr@co.travis.tx.us (email)

(512)854-9415 - telephone

(512)854-3377 – fax number

(512)854-4282 – alternative fax number

(List the cause number from page 1)

Keep a copy, for your own records, of any document(s) sent to the Travis County Attorney's Office. Make sure that the agreement's cause number is on all paperwork. (The cause number is on page 1 of this agreement.)

Proof is timely provided if it is mailed, fax transmitted, emailed, or hand-delivered within the specified duration of this agreement.

Mandatory: While this agreement is in effect, the Defendant shall not commit any other offense(s) above that of a Class C moving traffic violation. For purposes of this agreement, an offense is "committed" if the Travis County Attorney believes that probable cause to arrest the Defendant for that offense develops at any time during or after an arrest.

Counseling Requirements

- ___ Obtain a **Domestic Violence Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.
- ___ Obtain a **Non-Intimate Partner Violence Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.
- ___ Obtain an **Alcohol/Substance Abuse Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.

Complete the following course(s):

- ___ Assault (8hrs Misd. I) TCCES contact number (512) 854-9540
(*Only for Non-Intimate Partner violence*)
- ___ Multiple Offender/Felony (20hrs Misd.II) TCCES contact number (512) 854-9540
- ___ Theft/Shoplifting (8hrs. Misd.I) TCCES contact number (512) 854-9540
- ___ Austin Stress Clinic Level 1 (8hrs) ASC contact number (512) 326-1717
(*Only for Non-Intimate Partner violence*)
- ___ Austin Stress Clinic Level 2 (20hrs) ASC contact number (512) 326-1717
(*Only for Non-Intimate Partner violence*)
- ___ Any Baby Can Parenting Class ABC contact number (512) 454-3743

NOTES:

- *A Defendant who resides outside Travis County, Texas must be evaluated in Travis County before doing counseling equivalents in the state or county of residence.*
- *Evaluations MUST be completed within Two (2) months of starting the deferred prosecution agreement.*
- *On-line courses are NOT acceptable.*
- *If the Defendant has already complied with the condition, the parties must attach documents showing that compliance.*

____ Have no contact through any means with _____,
and do not go within 200 yards of the following location: _____
_____.

____ Provide proof of a valid Texas driver's license and automotive liability-insurance coverage by the term date of this agreement.

____ Provide proof of completing a certified Texas Alcohol & Beverage Commission Seller/Server, training course. **TABC contact number (512) 451-0231.**

____ Forfeit the weapon. ***The ORIGINAL "Forfeiture of Weapon's Agreement" must be attached to this agreement.***

____ Provide proof of \$_____ restitution paid to _____.
Payable only through the Travis County Attorney's Hot Check Division. (A restitution sheet is required.)

____ Provide proof of the Defendant's pleading to the Class C offense of _____,
and paying a \$_____ fine and court costs.

Alcohol Monitoring Requirement

****Any indication of the consumption of alcohol is a violation of this agreement.***

____ Provide proof of installing and maintaining the following alcohol monitoring device(s) for a period of _____.

____ **IID** ____ **SoberLink** ____ **SCRAM** ____ **IN-HOM**

**** The ORIGINAL "Alcohol Monitoring Device Agreement" must be attached to this agreement.***

If the Defendant complies with all the specified terms and conditions for the duration of this agreement, the Travis County Attorney agrees not to prosecute the Defendant further for the offense(s).

*Consequences of Defendant's Non-Compliance with or Violation of
the Agreement's Terms and Conditions*

If the Defendant fails to comply with or violates any of the specified terms and conditions of this agreement, then the Travis County Attorney is no longer subject to the agreement and may refile the charges and prosecute the case to the full extent of the law.

The Defendant hereby agrees to the following if the Travis County Attorney refiles the charges:

- The Defendant agrees to plead guilty or no contest to the refiled charges, as shown by the Defendant's signing the attached plea form.
- The Defendant agrees and stipulates that this agreement, including the written confession of guilt that it contains, is admissible against him or her in court.
- The Defendant agrees and stipulates that affidavits, written statements of witnesses and other documentary evidence--including but not limited to the police offense report--are admissible against the Defendant at trial.
- The Defendant waives any statute-of-limitations objection to the refiled charges.
- The Travis County Attorney's burden of showing the Defendant's non-compliance with this agreement is by a preponderance of the evidence.
- If the parties agree to continue the deferred prosecution agreement after the County Attorney refiles the charges, then the agreement is extended for the same period as the original agreement, without the need to draft and sign a new document. For example, if the initial agreement was to last six months, then the extended agreement will last yet another six months from the date of the second dismissal.

I, the Defendant, have fully discussed this case and the evidence with my attorney. I am satisfied that he or she has properly represented me. **I have received a copy of this Deferred Prosecution Agreement.** I waive any further time to prepare for trial to which my attorney or I may be entitled.

Attorney for Defendant

Defendant

State Bar Number

Date: _____

Assistant County Attorney
Travis County, Texas

State Bar Number

Defendant's Plea of Guilty or No Contest

I have consulted with my attorney, who has advised me of the consequences of pleading guilty or no contest. I understand these consequences. I plead guilty/no contest to the offense(s) of _____.
My plea is given freely and voluntarily.

Defendant's signature

Printed name

Date



**Alcohol Monitoring Device Agreement
Travis County Attorney's Office
Deferred Prosecution Program**



I, _____ agree to obtain and maintain the below indicated alcohol monitoring device for a period of _____, as part of my agreed upon Deferred Prosecution Agreement Program of the Travis County Attorney's Office.

**Any indication of the consumption of alcohol is a violation of this agreement.*

_____ IID _____ SoberLink _____ SCRAM _____ IN-HOM

- I will notify the Travis County Attorney's Office **within ten(10) working days** from the date of the conditional dismissal, with the name of my chosen vendor, through the communication methods listed on page 3 of the Deferred Prosecution Agreement.
- I will inform my chosen vendor that the Travis County Attorney's Office's is the monitoring agency for my case. Making sure that the monthly monitoring reports are:

Emailed: TCAODFPR@co.travis.tx.us

or

Fax no.: (512) 854-3377 Attn: Deferred Prosecution (C-1-CR-_____)

- I will direct any questions about my financial burden and device responsibility directly to my chosen vendor.

I understand that **only** the Travis County Attorney's Office will be allowed to give removal authorization for any device being monitored under the Deferred Prosecution Agreement. Judges **do not** have the authorization to remove any device monitored under the Agreement. Any removal of a device other than through the Travis County Attorney's authorization will be considered a violation and subject to the refiling of the original charges for continuing prosecution of the case.

I understand that if I failure to adhere to any of the Deferred Prosecution Agreement's conditions concerning the alcohol monitoring devices, it can result in subsequent time added to the monitoring period, added time to the deferred prosecution agreement, and/or refiling of the original charges and continued prosecution of the case.

Defendant

Date

Attorney for Defendant

Date

CAUSE NO. D-1-GN-16-004769

DAVID A. ESCAMILLA,
Travis County Attorney
Plaintiff

v.

KEN PAXTON
State of Texas Attorney General
Defendant

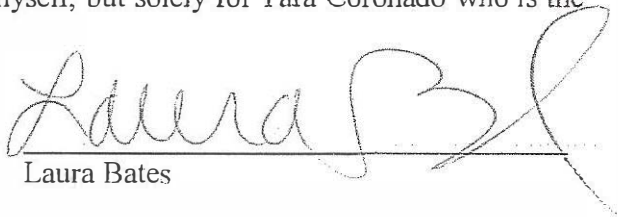
§ IN THE DISTRICT COURT
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§ OF TRAVIS COUNTY
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§ 261st JUDICIAL DISTRICT

AFFIDAVIT OF LAURA BATES

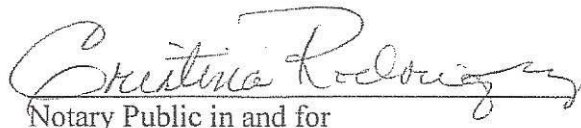
STATE OF TEXAS §
TRAVIS COUNTY §

Before me, the undersigned notary, on this day personally appeared Laura Bates, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. "My name is Laura Bates. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts states in this affidavit are within my personal knowledge and are true and correct.
2. As an attorney, I represented Tara Coronado on a limited scope matter by filing on her behalf an emailed request pursuant to the Texas Public Information Act to the Travis County Attorney's Office for, *inter alia*, a copy of the Deferred Prosecution Agreement involving Ms. Coronado's ex-husband, Chet Edward Cunningham during part of 2016. This public information request was the subject of Attorney General ruling OR2016-21139 that is pertinent to the above-reference lawsuit.
3. I did not make the public information for myself, but solely for Tara Coronado who is the principal requestor of the information."


Laura Bates

Sworn to and subscribed before me by Laura Bates on March 2nd, 2017.


Notary Public in and for

The State of Texas

My commission expires: 3/31/2020



Cause No. C1CR13-180014

THE STATE OF TEXAS

C-1-CR-13-180014

IN THE COUNTY COURT

VS.

Chet Edward Cunningham

AT LAW NO. 4 OF

TRAVIS COUNTY, TEXAS

MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her Attorney, and respectfully requests the Court to dismiss the above entitled and numbered criminal action in which the defendant is charged with the offense of Assault - family violence, for the reason:

- ☐ The evidence is insufficient;
- ☐ The defendant was convicted in another case;
- ☐ The complaining witness has requested dismissal;
- ☐ The case has been refilled;
- ☐ The defendant is unapprehended;
- ☐ The defendant is deceased;
- ☐ The defendant has been granted immunity in light of his testimony;
- ☐ Restitution made;
- ☒ Other: Def. Pros. Agreement

and for cause would show the Court the following:

FILED FOR RECORD
2016 APR -6 PM 1:35
DANA DEBEAUVOR
COUNTY CLERK
TRAVIS COUNTY, TEXAS

WHEREFORE, it is prayed that the above entitled and numbered cause be dismissed.

Respectfully submitted

[Signature]
Assistant County Attorney
4/6/16 Date Signed

ORDER

The foregoing motion having been presented to me on this the 6 day of April, A.D. 2016 and the same having been considered, it is, therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed.

I, Dana DeBeauvoir, County Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 5/3/16



Dana DeBeauvoir, County Clerk

By Deputy: [Signature]

[Signature]

Judge of the County Court At Law

No. 4 of Travis County, Texas

2179-176

COUNTY CLERK—WHITE: DEFENDANT'S COPY—YELLOW: STATE'S COPY—PINK: SHERIFF'S COPY—GOLDENROD

