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

"Keep it down—I'm trying to sleep"

A Collin County jury found Michelle Smith guilty of aggravated sexual assault of a child even though she never actually touched her daughter. Nevertheless, after permitting her common-law husband to abuse the child almost daily for years, she'll spend up to 210 years in prison.

The bed was shaking as Glen Bracy perversely rocked back and forth on top of his toddler daughter, Carey (not her real name). Michelle Smith, Bracy's common-law wife and Carey's mother, rolled over on the bed and told her baby girl to "keep it down" because she was "trying to sleep."

By Crystal Levonius and Shannon Miller
Assistant Criminal District Attorneys in Collin County

This was just one night of many when Bracy sexually abused Carey and her mother didn't stop him.

Before meeting Smith, Bracy was already a two-time convicted sex offender. He was first convicted of lewd and lascivious contact with a deaf and mute child in California, which is the equivalent to indecency with a child here in Texas. He was then convicted of indecency with a child in Collin County after molesting his under-5 stepdaughter.

Bracy, who was on parole at the time, met Smith through his mother; the two worked together. At the beginning of their relationship, Bracy's licensed sex offender treatment provider warned Smith that he was a dangerous pedophile who would never change. His primary sexual attraction would always be to young children. Even after that warning, Smith began a long-term relationship with Bracy, held him out as her common-law husband, and had children with him. When Smith found out she was pregnant with Carey, she met with the licensed sex offender treatment provider for a second time. The treatment provider said that Bracy could never be alone with the child, could never bathe the child, and could not even fold the child's

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Also in this issue:

Looking ahead to an outstanding 2010

By Jennifer Vitera
TDCAF Development Director in Austin

The last year has proven busy for the Texas District and County Attorneys Foundation, and with your continued support we look forward to continued milestones in 2010. We've highlighted a few successes and upcoming events below for your review.

• We are proud to announce that we have 100 percent participation from the Foundation Board of Trustees in the 2009 Annual Campaign.

• Our first golf tournament (in September 2009), held in conjunction with the Annual Criminal and Civil Law Update in Corpus Christi, raised $11,000 in unrestricted funds. More than 30 golfers participated.

• In January 2010, TDCAA will have on staff a senior appellate attorney and soon thereafter, a victim assistance coordinator. Both of these positions are funded by the foundation.

• Back by popular demand: The foundation will partner with the Anheuser-Busch Companies to provide a free, one-day training on intoxication-related investigations and prosecutions to law enforcement and prosecutors in November 2010. The training, Guarding Texas Roadways, will take place at A-B distributorships across Texas and will be broadcast via satellite, just like the first such conference in 2008.

• The foundation will host the Champions for Justice event in honor of Carol Vance, former Harris County District Attorney, on April 22, 2010, in Houston. The purpose of this annual event is to raise awareness of the importance and local impact of excellence in prosecutorial education and training. Money raised from sponsorships and ticket sales will benefit the Foundation's Annual Fund.

• Private foundations have been indentified and proposals will be submitted monthly to fund educational publications, program development, and general operating expenses.

• The Foundation Board of Trustees and TDCAA members have taken an active role in increasing community awareness for the foundation by speaking on behalf of TDCAF in their communities and at TDCAA trainings across Texas.

Again, thank you to our TDCAA members, TDCAA's Board of Directors, and TDCAF's Board of Trustees and Advisory Committee for their continued support of the foundation. We will kick off our 2010 Annual Campaign in the next few months so keep an eye out for more information. Please check out our website at www.tdcaf.org for updates and partnership opportunities. I am looking forward to visiting with each of you soon. Please feel free to call me at 512/474-2436 with any ideas or questions. ❇

Hmmmm, sounds like we've got a contest a-brewin'! The Key Personnel Board has challenged the Investigator Board to a fundraising contest between support staff and investigators across the state! We are still working out the details, so stay tuned to the next issue for more information, but we are thrilled to see how these two groups will duke it out to raise money for the foundation!

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National Advocacy Center back in business

Some good news from the National District Attorney's Association. The National Advocacy Center (affectionately known as the NAC) has received $1.175 million in federal appropriations for 2010. That means the NAC is once again open for business and is accepting applications for winter and spring courses.

By Rob Kepple
TDCAA Executive Director in Austin

As you know, the NAC puts on great courses at the Ernest F. Hollings National Advocacy Center in Columbia, South Carolina. This new funding allows the NAC to continue to significantly subsidize your travel and subsistence while at the course. You will get up to $550 in airfare; lodging at the NAC; and breakfast, lunch, and snacks during the day. To review the courses and apply, visit www.ndaa.org. There is an allotment of slots for each state, and the NAC is asking that no more than one application per course be submitted from any given office.

Federal student loan forgiveness is funded

I put this headline second because this is great news, but I didn't want anyone to get too excited just yet. The John R. Justice Prosecutors and Defenders Loan Repayment Program has been funded to the tune of $10 million. That's good because now the feds can design the mechanism for distributing the funds. But it's also not so good because $10 million is not likely to go very far, considering it is to be spread to all prosecutors and public defenders in the country. When the plan is fully funded, it is intended to help repay up to $60,000 in student loans for those in criminal prosecution and defense. Nevertheless, I am told that by August there may be a plan for distribution of the funding, and that means there is something to build on for the future. Thanks again to the National District Attorneys Association for working on this important initiative.

Interlock devices and friendly reminders

Ever think a judge isn't reading the law the same way you are? Frustration with the perception that judges aren't following the law took on a whole new meaning this summer when Mothers Against Drunk Driving sent a letter to the Texas Judicial Conduct Commission complaining that a Texas judge had not followed the law regarding ignition interlock. A defendant with an extremely high blood alcohol concentration (BAC) conviction did not get the mandated device and later caused a fatal crash—while packing another very high BAC.

Now, a complaint to the Judicial Conduct Commission can get a judge's attention in a hurry, so if the use of interlock comes up in your court, you might want to help out your judge by mentioning Article 17.441 of the CCP (relating to bond conditions) and Article 42.12 §13(i) CCP (relating to probation conditions).

Richard Alpert wins NHTSA award

As you know, **Richard Alpert** (ACDA in Tarrant County) was named the 2009 State Bar of Texas Criminal Justice Section Prosecutor of the Year along with **John Bradley** (DA in Williamson County) for his work battling DWI. Richard has been the force behind the emerging trend to use blood, not breath, in DWI investigations.

Richard's work has attracted the attention of the National Highway Traffic Safety Administration (NHTSA) in Washington D.C.; that group honored him with the 2008 Traffic Safety Prosecutor of the Year Award, which is presented each year by the National Association of Prosecutor Coordinators to the outstanding prosecutor in the area of traffic safety and DWI. (He is pictured below with me.) Thanks, Richard, for your hard work and dedication!

Best of luck, Ashlee

TDCAA members have been blessed to have had a number of dedicated meeting planners who organize and plan our seminars in recent years. I

am sad to report that **Ashlee Myers** will be leaving us at the end of January, though I am thrilled to say that she is leaving in expectation of her first child due in March! Thanks, Ash, for all of your hard work and the joyous spirit you have shared with us. Now, if we can only find a way to keep you on the TDCAA ping-pong team. …

TAC leadership changes

On January 1, **Karen Norris** retired as the Executive Director of the Texas Association of Counties. Karen has been a great friend of county and district attorneys and of TDCAA, and we will miss her.

The good news is, TAC's new Executive Director is **Gene Terry**, former Marion County judge and TAC Assistant Executive Director. Gene has had a wealth of experience in both the public and private sectors. He was educated at Southwestern University and St. Mary's Law School and had a career in finance as well as private practice in criminal law, probate, and oil and gas. Gene worked as the general counsel for the Texas Scottish Rite Hospital for Children for 10 years before he became the Marion County judge in 1994. Gene helped build TAC's judicial education programs, including its DWI training program, before being appointed as the director. Welcome, Gene, and we look forward to working with you.

Goodbye to Gail Ferguson, voice of TDCAA

For 20 years, those who have called the association offices more than likely connected with a warm drawl: "Good morning, Texas District and County Attorneys Association, this is Gail." **Gail Ferguson** always enjoyed saying the full name of this outfit when she answered the phone, which was just one small way that she made callers, visitors, and conference attendees feel special and cared for.

It is with both a happy and a heavy heart that I congratulate Gail on her retirement from TDCAA. I have worked with her for 19 years and have come to view her as the gold standard of membership services; I can guarantee you got the best of her work for two decades. And what's more, I can guarantee you that she put a lot of love for you into every phone call, every email message, and every package. Thank you, Gail, for being my co-worker and being my friend. Best wishes to you in your retirement! ❇


Gail Ferguson

Editor's note: See Gail's farewell note in the box below.

Dear TDCAA Board and members: After 20 years at TDCAA, it is with a sad heart that I write this to say goodbye. I have such wonderful memories and have made so many great friends that leaving is bittersweet. My retirement came a little earlier than I had planned due to health issues, but I am moving into the next stage of my life with great anticipation. TDCAA, its staff, and its members will always be in my heart.

Thank you for 20 great years.

—Gail Fergu-

Hidalgo County steps up for the foundation

The District Attorney's Office in Hidalgo County recently shipped off a thick envelope full of checks and five-dollar bills to our headquarters in Austin. The elected CDA, Rene Guerra, who is also on the TDCAA board, had asked for donations of any amount for the Texas District and County Attorneys Foundation.

"At the last board meeting, they were asking for 100-percent participation from every office," Guerra explained, "and I felt that it was time to step in and ask people not just to talk about donating but to actually do it." He himself kicked in $100 to prime the pump, then Roy Cazres and Roxana Segovia went around to collect money from everyone else. The office raised more than $600 for the foundation.

He noted that times are tough everywhere—Hidalgo County is operating at deficit spending right now, and no one is getting a salary increase this year—but that "you have to step up. Anybody in any office in this state can afford five dollars," Guerra said adamantly. "That's less than one drink at a bar after work. A hamburger at a restaurant is more than five dollars! You can go without the hamburger. Five dollars isn't going to kill anybody.

"I hope everybody gets in the spirit."

We are so grateful to the Hidalgo County CDA's Office for this generous display—thank you so very much! ❇

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The bigger the jackpot, the harder the bluff

By Scott Brumley
County Attorney
in Potter County

If you haven't given thought to how a gambling case in your jurisdiction can play out, consider this (fictional) back-and-forth between two poker match announcers.

Announcer Bob: Tonight, from the mostly-crime-scene-tape-free Giddy Up Motel, the Sedentary Quasi-Sports Network brings you "Poker Is So Much Easier When You Can See the Other Guy's Hand in the Screen-Corner Inset." This promises to be a real barn-burner, not just because of all the hyphenated phrases I'm using, but also because we'll be treated to a gut-check clash between the sport's juggernauts.

Announcer Jim: Bob, I don't think you can talk like that on network television.

Bob: Forgive my partner. He doesn't know that a full house is more than a showcase for the talents of the incomparable Bob Saget.

Jim: And did you just say this is a "sport," Bob? Did I miss something in the green room refreshment line? Or have you been drinking the Kool-Aid from that Todd Smith guy in Lubbock?

Bob: I'm sorry, but I have to interrupt your mindless drivel, Jim. There seems to be a number of rather assertive new players coming to the table.

Jim: Those are cops, Bob. This appears to be a raid. Our ratings are going to be phenomenal.

Bob: Right you are, Jimbo. This looks an awful lot like the work of that pinheaded bald county attorney. That guy should loosen his tie before it cuts off all the circulation to his ganglia. I haven't seen anything like this since the Slot Machine World Series of '98. It's a sad day when honest folk who sport gold chains and indoor sunglasses look can't have good, wholesome, family fun.

Jim: Yeah. What's with that guy? It's OK in every other county in Texas. I'll bet his mother doesn't even like him.

Bob: I'm sure she doesn't, Jim. Right now, let's go back to the studio for a red zone update from the quarterfinals of the Apathy Cup backgammon tournament.

Some in my county would be inclined to agree with our imaginary broadcast team when it comes to gambling prosecution in our fair state. While prosecution and controversy generally go together like a straight flush and an all-in bet, few issues can test our fidelity to the oath of office like gambling. It comfortably fills the bill as the poster child for the "who cares" class of offenses. Indeed, even grandmothers who would cheer you on as you prosecute a 20-something student for having three joints in her purse may call you a soulless Nazi for suggesting that there might be even a hint of illegality associated with the neighborhood 8-liner parlor. And imagine how many friends you can make when you tell a local charity (heaven forbid that it be one associated with law enforcement) that its proposed poker run might portend a showdown with chapter 47 of the Penal Code.

Have no illusions. Your office will get calls asking or grousing about gambling. Although some of you may rightly discount much of what I say as the prattling of a former civil geek with more starch in his shirt than George Strait, I speak here from experience. Aside from sundry dust-ups with charities about their casino night fundraisers and a few injunction suits by 8-liner operators around the turn of the last decade, our office spent the better part of last year (and I use "better" rather loosely) litigating against Aces Wired and its corporate offspring about the legality of a "stored value card" scheme. That scheme allowed 8-liner enthusiasts to earn credits on what amounted to a debit card without cash withdrawal availability. A jury found the scheme was gambling but did not find in our favor on the common nuisance issue. (I suppose you could call it a push.) In any event, the vigor with which the case was defended is testament to what's really at stake: money, and lots of it. How much? It's hard to say exactly, but since 2002, our office—in a county that surpassed only 110,000 souls in 2000—has handled cases resulting in just over $1 million in seized funds. And we certainly don't have a seat at every game in town.

To be sure, there will be push-back. People want to gamble. Those same people will remind you, in some form, of the truism passed along to me by TDCAA's executive director, Rob Kepple, and the inimitable Tom Krampitz: Sin ain't sin if good people do it.

But there's the rub. Just as our office has been pilloried for keeping folks from having a little good, clean, "victimless" fun, we've also caught flak for letting gambling operations parasitize the community. We've

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even been accused of prosecutorial laziness at best and, at worst, playing favorites. (Perhaps that makes us the Texas version of Harvey Dent, the two-faced DA in the Batman comics.) Ironically, the latter complaints sometimes originate from anonymous sources who, shall we say, have something of a vested interest in ensuring a measure of surgical gambling prosecution. The only thing worse than law enforcement scrutiny is competition. Then there's the 800-pound joker in the corner. Sometimes—shocking as it may seem—gambling can get mixed up with the O.C. (That's organized crime, not Orange County.)

How to respond to gambling and inquiries about the interest your office may take in it is largely a function of your office's prosecutorial approach. "Go fold yourself" is certainly one way you can go, but it's not going to be good for PR. On the other hand, nice guys tend to leave the table early, so your office is likely to enjoy an array of presentations on how certain operations fit within the nooks, crannies, and loopholes of chapter 47. The popularity that comes with the perceived authority to deal get-out-of-jail-free cards can be flattering, and flattery of the opponent is but one tool of the proficient gambler. Regardless of how cool your office really may be, I would suggest that dealing those cards is a bad bet for at least three reasons.

First, giving opinions on the potential legality of a gaming operation is like responding to inmate mail. If you do it once, you'll do it a lot, and the end game will always be the same.

That's where we reach the second reason your office should decline to be dealt into the game. It's so nice to hear what a reasonable and scholarly legal thinker you are. *I* believe that about your office. Gambling operators don't, even though they say they do. They're not interested in your view, your life experiences, or your family. They want the jackpot: a mistake-of-law defense for their particular scheme. If you choose to give them what they want, though, at least bear in mind that the represented method of operation doesn't always match how the game really works in practice. The fuzzy animals in the prospectus have a strange way of becoming cold, hard cash in the casino.

Finally, there's the ethical angle of the proposition. "I knew it," you're saying to yourself. "Here comes the sermon." And you're right—but bear with me. It may be true that the only ethics in a game are those encompassed in its rules. As we lawyers know, however, the ethical rules we have to comply with carry serious consequences. Here, the relevant consideration is Rule 2.02 of the Disciplinary Rules of Professional Conduct. In substance, that rule prohibits a lawyer from evaluating a matter affecting the lawyer's client if the evaluation is for the use of a non-client and the client has not consented. Who, you may ask, is the pertinent client in this scenario? Why, it's none other than the Great State of Texas. So, when asked for an opinion on a particular gaming scheme, you would do well to ask yourself whether the State would consent to giving the opinion. And who would consent on behalf of the State? If your answer to that question is "me," you should give some thought to what a Mother Superior at a Catholic school might say will happen to you if you choose to take that self-paved road.

How you choose to play the issue is, naturally, up to you. In closing, I can only offer a few "tells" you may use to chart your strategy.

1) If you believe an operator is lying to you about a gambling issue, it's probably because he is. These folks are in it to make money, not to improve the quality of life in your county. That is best accomplished if they're not under your microscope.

2) If an operator offers you a stack of attorney general opinions and court cases from other states attesting to the legality of his operation, it's because there aren't any from Texas. When prosecutors lose gambling cases here, it's generally on procedural points, not on the merits.

And, 3) if you're pestered about why you're picking on this wholesome fun industry, the response should be simple: It's against the law. Basically, running a lawful game of chance in Texas and making money at it are mutually exclusive propositions. Meanwhile, we don't write the laws. We enforce them, and we don't get to pick which ones we want to enforce. My mother gets that, and so should Jim, Bob, and the gambling apologists in your community. If they don't want to, they have a choice of where to go: the jail in your county or the casinos across the borders in Oklahoma, Louisiana, and New Mexico. ❇

Photos from our Key Personnel Seminar

Oscar Sherell winner

Denise Boyd of the Criminal District Attorney's Office in Wichita Falls was given the Oscar Sherell Award at the Key Personnel Seminar. Above, she is pictured with Barry Macha, TDCAA President and the CDA in Wichita Falls. Congratulations on this honor!

Photos from our Elected Prosecutor Conference

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"Keep it down—I'm trying to sleep" (cont'd)

clothes without getting aroused. Unfortunately, Smith ignored these warnings.

It was just before Carey turned 2 that Smith came home from work early and found Bracy "licking" her baby's genitals. She said she did not want to confront Bracy in front of the child, so she closed the bedroom door, let Bracy finish what he was doing, and talked to him about it later. It was at this same age that Carey's baby-sitter noticed that Carey refused to wear clothing and had yeast infections that seemed incurable. The sitter questioned Bracy about both oddities, and he never took the child to daycare again.


Michelle Smith

Carey became a very sexualized child. Bracy and Smith did not wear clothing in their home and made sure that Carey did not either, further isolating and sexualizing her. At night, they all slept together in the nude. Smith and Bracy skewed the child's normal boundaries and raised her without modesty or knowledge that her body was her own.

Her parents rarely left Carey alone with anyone. At age 4, Carey was allowed to play with kids from the house down the street, but not by herself—Smith or Bracy accompanied her at all times. The parents of those children down the street had no idea that Bracy was a sex offender, although they had noticed creepy behavior. They had confronted Smith and Bracy for allowing Carey to play at a park without panties under her dress and about the way Bracy held neighborhood children between their legs while he spun them in circles. When they were finally told by another neighbor that Bracy was a registered sex offender, they decided to ask Carey and their own children about "private touches."

The rare opportunity presented itself when Smith asked her neighbor to watch Carey while she ran out to get laundry detergent. The neighbor then asked her own children in front of Carey whether anyone had ever touched them inappropriately. Carey volunteered that her dad did and that her mom knew about it. The neighbors then filed a report with Child Protective Services (CPS). CPS responded immediately and contacted law enforcement. Investigator Billy Lanier with the Collin County Sheriff's Office was already familiar with Bracy, as he had been in charge of sex offender registration in the county at one time. Once Bracy was arrested, CPS and the sheriff's office began working on the case.

Jerry Wright and Delia Guillamondegui began the investigation for CPS. They secured information from Smith that indicated that she knew that Bracy had been molesting her child and that she had done nothing to end Carey's continuous nightmare. CPS was also concerned for Carey's 4-month-old sister, Laura (not her real name). After reviewing the history and staffing the case, CPS took the unusual step of pursuing "aggravated circumstances" with the court. Generally, CPS' goal is reunification of the family; however, pursuing aggravated circumstances means that reunification is no longer an option. In this case, Bracy and Smith's disturbing behavior was so ingrained and repeated and their lifestyle so appalling that CPS could do nothing to fix it. Ultimately, CPS and prosecutor Alyson Dietrich insured that parental rights from both Bracy and Smith were terminated.

Investigator Lanier was the lead law enforcement officer in this case. While he secured a confession from Bracy, Smith was interviewed by Deputy Scott Morrison, who was gathering valuable information that Smith knew her husband had been molesting Carey. Deputy Morrison confronted an agitated Smith and emphasized that she needed to stand up for her child. Smith was very careful in the interview about her choice of words and often answered a question with a question, but she finally admitted to seeing her husband "lick" Carey on one occasion.

After Investigator Lanier secured Bracy's confession, Bracy was left no option but to plead guilty to five counts of aggravated sexual assault of a child. He admitted to at least 50 different acts of sexual abuse over two years, though Carey relays she was treated brutally on an almost daily basis. The only issue was whether Judge James Fry would stack the sentences. Former prosecu-

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tor Barnett Walker handled the case against Glenn Bracy. Evidence was presented that Bracy could not remember all of his victims but that there were at least 20; he had been prosecuted for only two. After the information was presented, Bracy received five life sentences to run consecutively.

How to charge Smith

After Bracy was sent to prison, the focus of Investigator Lanier's investigation shifted to Smith. Our office had never prosecuted someone for another perpetrator's sexual abuse, let alone charged the child's mother as a party to an offense. But the facts in this case seemed ripe for prosecution—a prosecution that would tell every other unprotective mother that we would have zero tolerance for this behavior. This was also a case where CPS and law enforcement had already done what they could to insure Smith would never have access to her child again. It was now up to the District Attorney's Office to follow their lead.

As far as charging goes, failure to report child abuse is just a misdemeanor. With these facts, that seemed like too little punishment for too much bad behavior. Even endangering a child—a state jail felony—did not adequately address Smith's hideous inaction. After numerous discussions with representatives of CPS and law enforcement, we all believed that this was a case where we could not back down. We all felt so much compassion for a wonderful child and such disdain for an evil woman that we felt a call to duty. It seemed evident that God put our team together to protect this child and every other child that came into Smith's path, and we had to seek the maximum punishment to accomplish that goal.

We knew this from the moment we met Carey. We know from our training not to show emotion as a child is describing abuse so the child does not shut down. When Carey first described what had happened to her, it took everything we had inside not to break down. In past cases, we had seen horrific pictures, but the picture that Carey painted for us was far worse than anything we had seen or heard. Tribulations in our own lives would never compare to what this little girl had experienced. Also, when this case went to trial, Crystal was seven months pregnant, which was another sort of sign for us: It reminded us what a mother's love should be. We feel that sort of love for our own children, while Smith felt nothing. We were moved and inspired to be better mothers and protectors in our own lives, and that brought about our unwavering need protect a child who had not been protected by her own mother.

Preparing the indictment was tricky. Our indictment charged Smith with three counts of aggravated sexual assault of a child, two counts of indecency with a child, five counts of injury to a child (including a first-degree count for causing mental injury to a child), and three counts of endangering a child. When the grand jury handed down the indictment, Judge Greg Brewer found Smith's bond insufficient and she was arrested at a CPS hearing where she was trying to get custody of her third child, an infant. (Smith got pregnant soon after Bracy went to jail. She met a man online who was looking to have sex with someone who had been married to a psychopath. After our trial, Smith relinquished her parental rights to that child.)

Jury selection

We knew from the beginning that picking the jury was going to be integral to this case. One of our main concerns was making sure the jury understood the law of parties and how a person could be held criminally responsible when they did not physically commit the aggravated sexual assault or indecency themselves.

Voir dire was conducted by Shannon Miller, who first went through and explained the elements and definitions of all the offenses and the typical questions we would ask for each of these offenses. Toward the end, we began discussing the different ways the State could prove a person is criminally responsible, with law of parties as the main theme. Crafting examples for the law of parties that would help the jurors understand and see the intricacies and distinctions within the law was difficult. We wanted them to understand overt actions as well as actions that encouraged and aided an offense. We used two examples: one of overt actions of a person who could be held criminally responsible and another where a person aided and encouraged another to commit a crime. The first example was about a nurse helping a friend steal from patients at a nursing home by supplying information about whom to steal from, when and where opportunities for stealing exist, giving her

friend access to the home, and encouraging her friend to commit the crimes—even though the nurse herself did not gain anything. The second scenario we posited was the typical bank robbery example where someone is injured during a hold-up and the getaway driver is held criminally responsible for the robbery as well as the assault.

The panel had very few questions and concerns after hearing the two examples. They appeared to understand and have no real trepidation about how a person who does not actually commit the crime itself but assists, aids, or encourages another to commit a crime can be convicted. They all agreed that the person aiding or encouraging the other was just as responsible and liable for the crime and the consequences. We had hoped that by discussing this immediately before talking about probation, we would not lose many jurors who could not consider probation in child abuse cases. Although we still lost quite a few, much of the panel was in favor of having the large range of punishment because they understood that Smith may not have committed some of the crimes herself.

Our first concern going into trial was Carey's ability to testify in front of the woman who had been her mother. The girl, now 7 years old, had come to the courthouse to meet with us on several occasions but had emotional difficulties each time. Most of the visits did not involve talking about the case, but merely playing and hanging out so that Carey would come to know and trust us. However, masturbation had become a coping mechanism for Carey, and each time she left the courthouse her masturbation increased. We were not confident that this little girl would testify if she saw Smith in the courtroom. We filed a motion requesting that the court allow Carey to testify via closed-circuit television during the trial pursuant to Article 38.071, §3 of the Code of Criminal Procedure. Appellate lawyer Emily Johnson Liu found caselaw to support the need for this type of testimony and to help us convince a judge that this case was so traumatic for the child that the closed-circuit television was the best option. We also had to keep in mind the new trends in caselaw that focus on the confrontation clause. While we knew this would ultimately be a concern on appeal, it was a risk we had to take for Carey's well-being. Dan Powers, Senior Director of Clinical and Administrative Services at the Collin County Children's Advocacy Center, provided valuable testimony during which he explained that if Carey had to face Smith in court, it would be the equivalent of making her jump off of a cliff. Ultimately, Judge Vicki Isaacks, a visiting judge from Denton County, agreed. Judge John Roach Jr. (son of our elected DA) demonstrated the equipment that was available in the courthouse, and Investigator Kenny Newton from our office made sure it worked when we needed it. Carey testified from a conference room in our office with only a bailiff in the room with her. She was able to see the judge and the attorneys but not Smith. Everyone in the courtroom could see her as she described her experiences with Bracy and Smith.

Carey expressed in heart-wrenching detail the sexual relationship she had with Bracy and how her mother knew about it. She talked about how her daddy got bored with putting his wiener in her wiener hole, so he put his wiener in her butt. She began bleeding from her anus, and her mother put medication and a Band-Aid to cover up the wound, and it made Carey feel "much more better." Carey noted that she was thankful for her mother's kindness, but everyone in the courtroom knew this was just a way for Smith to clean up the crime scene.

After we rested, we were giddy as Smith took the witness stand. Up to that point, the defense had tried to portray Smith as a woman manipulated by her sex-offender husband. They even used our experts on cross-examination to talk about how manipulative sex offenders can be. Fortunately, we had been reading her jail mail and listening to her phone calls for over a year. Our secretary, Kathy Schroeder, had completed a spreadsheet that broke down all the phone calls and highlighted important conversations in the mail. When Smith tried to portray herself as a meek woman, we used her calls and letters at trial to reveal the mean and nasty person she truly was. For example, during her initial interview with police after Bracy's arrest, Smith described being afraid of him and lying to the police about him licking her daughter to get him arrested, and she explained that the arrest was how she intended to break free of him. She also claimed that Officer Morrison had badgered her during her interview, but we had a recording of

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that proceeding, and Morrison was always professional and polite. She denied having any idea that her child had been molested and even denied that she had seen Bracy licking Carey as she had told law enforcement and CPS. Observers in the courtroom, including members of the jury, were not persuaded and were shocked when she stated that five life sentences for Bracy were excessive—she believed that Bracy was entitled to a second chance. And, although Smith was seeing other men, she still maintained in jail records that Bracy was her husband and remained in constant contact with Bracy's mother.

At the close of our case, we abandoned three counts that we believed could cause a problem on appeal. We abandoned counts eight, nine, and 10 charging the defendant with injury to a child causing a serious mental deficiency, and two counts that charged her with putting Carey in imminent danger of both bodily injury and mental impairment. We felt that our remaining injury to a child count that charged Smith with causing serious mental injury adequately addressed Carey's injuries but was more specific on how Smith's actions made her responsible. Additionally, we wanted to be sure that each count was a separate offense supported by independent evidence and did not charge Smith more than once for the same actions.

As we began argument, we focused on all the facts that were within Smith's knowledge—yet she still put her naked child in a sex offender's bed. The defense astutely encouraged the jury to find Smith guilty of endangering a child. They argued that the facts fit endangering the best. In less than two hours, though, the jury came back with guilty verdicts on all remaining counts. It was a tremendous relief to know that the jury saw Smith as the same malevolent person we had come to know.

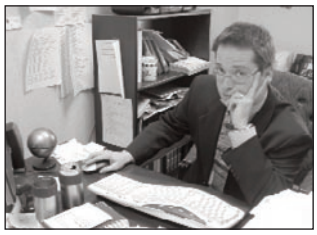
In punishment we argued that jurors had a duty, like soldiers, to hold the line. We had to make sure that before Smith could ever get to another child, she would have to come through us. Because the case was so intense, we also included some humor and described ourselves as the Dallas Cowboys' offensive line (Crystal was 320-pound Andre Gurode because she was seven months pregnant and felt just as large as he is), and Smith was not going to get past our team without a fight. The jury came back with 70 years on the three counts of aggravated sexual assault of a child, 70 years on injury to a child causing serious mental injury, 20 years for indecency with a child, 10 years on injury to a child causing bodily injury, and two years on each count of endangering a child, plus $10,000 fines on each count. We requested that the aggravated sexual assault counts run consecutively, and Judge Isaacks granted it. We were very pleased with the sentences.

Carey and her sister have since been adopted by a wonderful, caring family. They joined a brother who is not biologically related but who had also been adopted by the same family. For the first time Carey has been able to know what it is like to have a real mommy whose love for her child exceeds all else. She may have began life as Smith's daughter, but her real mother, the one who gives her love and support and nourishment, is the one who adopted her. ❇

New rules on lesser-included offense instructions from Grey v. State

To get a lesser-included offense instruction, the State no longer has to show there is evidence that negates the greater offense. That's the holding of the recent case, *Grey v. State*.[1] The Court of Criminal Appeals could have put it out on Twitter it's so simple. Indeed, you can stop reading this article right now, and you'll still get the gist of the decision.

But if you're like me and want to know why the court did what it did, read on for an explanation that won't fit in 140 characters.



By David C. Newell
Assistant District Attorney in Harris County

Hey look! A prosecutor who's not overly zealous!

In *Haynes v. State*, the Court of Criminal Appeals held that an appellate court could not reform a judgment to an unrequested lesser in part to discourage prosecutors from "going for broke" by not requesting a lesser-included offense instruction raised by the evidence.[2] Sure, there was more to the opinion, but the interplay between the majority and the dissenting opinion focused upon speculation about prosecutorial motives for not requesting a lesser, suggesting the court's concern for unchecked prosecutorial zeal.[3] Well, looking at the facts of *Grey*, you can see how this latest opinion bookends *Haynes* quite nicely.

The State charged Steven Grey with aggravated assault by causing bodily injury and using a deadly weapon, namely his hand. Grey had gone over to the victim's house to discuss her relationship with Grey's girlfriend. The discussion turned into a confrontation, and Grey choked the victim up against the doorframe of the house while punching her in the eye. The prosecution prepared the jury charge and included a lesser-included instruction on simple assault. The prosecutor said on the record that she had no objection to the charge, but the defense did object. The jury convicted the defendant of misdemeanor assault. Or more simply, the prosecutor in *Grey* wasn't "going for broke." Shocking, I know.

Unfortunately, the court of appeals could not find any evidence that would have allowed a rational juror to convict only on the lesser-included offense of misdemeanor assault. As you know, a trial court *must* give a lesser included offense instruction where the lesser offense is included within the proof necessary to establish the greater offense *and* there is some evidence that provides a valid rational alternative to the offense originally charged. Under the Court of Criminal Appeals case *Arevalo v. State*,[4] this latter requirement, or second prong, applies to both the defense and the State. Here, the evidence showed that the way Grey had used his hand was capable of causing serious bodily injury or death even though he claimed he intended only to make the victim pass out. Because a defendant does not have to intend to use something as a deadly weapon, the court of appeals held that the State could not point to evidence showing that if Grey were guilty, he was guilty only of the lesser. Consequently, the trial court should not have instructed the jury on the lesser-included offense of misdemeanor assault, according to the court of appeals.

Overruling *Arevalo v. State*

Lisa McMinn, an attorney in the State Prosecuting Attorney's Office, petitioned the Court of Criminal Appeals for discretionary review to see if the court would reconsider whether this second prong should apply to the State.[5] Presiding Judge Keller, writing for the five-judge majority, first considered the reasons for overruling precedent and ultimately focused on whether *Arevalo* produces inconsistent and unjust results and whether the reasoning of the *Arevalo* rule was flawed from the outset.

The majority noted that the remedy for an erroneously granted lesser-included instruction produces inconsistent and unjust results in every case. When a lesser-included offense is submitted in violation of *Arevalo* (because there's no evidence

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to negate the greater offense) and the defendant is convicted of that offense, the case is remanded for new trial on the same offense that the defendant claims should never have been submitted. Of course, the alternative would be a retrial on the greater offense, but the jury's acquittal of the defendant for that offense would make such a retrial constitutionally impossible.

The majority also considered the origins of the "guilty only" rule in *Arevalo*. While the court acknowledged that there may be constitutional underpinnings for when a lesser-included instruction is *required*, those requirements may not come into play when such an instruction is merely *permitted*. These constitutional requirements came from capital murder cases and were designed to prevent the inclusion of lesser-included instructions even where there was no evidence raising the lesser offense. The rationale behind such cases was that automatic inclusion of lesser-included instructions might invite jurors to convict of a lesser when the evidence warranted a conviction on the greater offense. However, the Supreme Court developed this rationale in response to a capital murder scheme where the imposition of the death penalty was mandatory and the only vehicle for juror discretion was the submission of lesser-included offense instructions. Thus, the Supreme Court's concern with the automatic inclusion of an instruction on a lesser offense was that such instructions do not give the jury enough guidance and flexibility in making decisions in the context of a death penalty case. In situations where the death penalty is not mandatory and the jury is allowed to consider the full range of mitigating evidence, there's no constitutional concern, according to the court, because the jury has sufficient guidance in making its decisions.

The court also rejected the idea that the "guilty only" requirement in *Arevalo* comes from Article 37.08 or 37.09 of the Texas Code of Criminal Procedure. Neither of those statutory provisions suggest an application of the "guilty only" requirement. While a lesser-included offense instruction may become the "law applicable to the case" under Article 36.14 of the Texas Code of Criminal Procedure when it is raised by the evidence, the court felt this begged the question of what it means for a lesser-included to be "raised by the evidence." Thus, the court held that this "guilty only" requirement came from common law. According to the rationale for the rule in *Arevalo*, the second prong is necessary to preserve the integrity of the jury as a factfinder by ensuring that it was instructed on a lesser-included offense only when that offense constitutes a valid rational alternative to the charged offense. Moreover, *Arevalo* explained that this second prong should apply to the State's request for a lesser-included offense so that it does not constitute an invitation to the jury to reach an irrational verdict.

Hunh?

Well, that's kind of how the majority felt about the rationale behind *Arevalo*. According to the majority, there's nothing irrational about the jury reaching a decision based upon a charged lesser-included offense. The State is responsible for deciding which cases should be prosecuted and can abandon elements without prior notice to drop the case down to a lesser-included offense. If the State can abandon the greater offense without notice, there's no logical reason that it can't ask the jury to consider both the greater and the lesser in the alternative.

Indeed, the court goes on to explain how applying the "guilty only" requirement to the State may place a prosecutor in a position where any decision he makes carries a high risk of error. If the prosecution requests a lesser-included, the State risks reversal under *Arevalo*. If the prosecution does not request a lesser-included, the State runs the risk of an outright acquittal by a jury or an acquittal for legal insufficiency on appeal. There can also be a legitimate dispute about the meaning of the language of the aggravating element that distinguishes the greater offense from the lesser. There's also the possibility that an aggravating element can render a charged offense unconstitutional, as was the case with the previous version of the stalking statute.[6]

All of this suggests that prosecutors should take the cautious approach and request the lesser-included offense instruction. It furthers society's interest in convicting and punishing criminals by enhancing the prospects of securing an appropriate criminal conviction. It also lets the jury decide whether a lesser offense is more appropriate, even if the prosecutor thinks he might secure a conviction on the greater offense, when the choice is all or nothing.

Judge Hervey wrote a short con-

curring opinion joined by Judges Meyers and Keasler to reiterate that the trial court has no discretion *to deny* a request for a lesser-included instruction when both prongs of the lesser-included test are met. However, nothing precludes the trial court from submitting an instruction even when this test is not met. The only concern is that the first prong of the test is met so that the defendant has adequate notice because the elements of the lesser are included within the elements of the greater.

Judge Cochran also wrote a concurring opinion ostensibly to provide guidance on when a trial court *must* provide a lesser-included instruction and when it *may* provide one. According to Judge Cochran, a defendant is *entitled* to a lesser-included instruction only when he can point to some evidence that negates the greater offense. The State is entitled to such an instruction in similar circumstances. However, the trial court may still give a lesser-included instruction with or without request (even over a party's objection) in the interest of justice and to uphold the integrity of the jury system. A defense attorney may seek to take an "all or nothing" approach by not requesting a lesser-included offense instruction, but he is not entitled to that gamble, and a trial court is not required to play this game. A trial court should give an instruction whenever a particular view of the evidence would support conviction of the lesser-included offense as a valid, rational alternative to the charged offense, and his discretion should be upheld particularly if he notes on the record his reasons for doing so.

So what happens next?

Well, my tea leaves are weak from overuse, but this opinion does bring a few things to mind. The entire majority opinion is couched in terms of releasing the State from its previous obligation to satisfy the "guilty only" rule to get a lesser-included instruction. Will this distinction hold up against defense requests for lesser-included offense instructions that don't satisfy the second prong of the test? In other words, if the defendant wants a lesser-included and the State objects that he cannot point to evidence that suggests the defendant is guilty only of the lesser offense, can the State still argue the defendant is not entitled to the instruction? Sure. But if the trial court decides to give the instruction over the State's objection, would that be error? By the plain language of the opinion it should be, but we may never get an appellate answer to that question.

This opinion was a five-judge majority opinion with Judge Johnson concurring without an opinion and Judges Price, Womack, and Holcomb dissenting without an opinion. Judges Hervey, Keasler, and Meyers wrote to simply note the distinction between when the trial court must give an instruction and when it may. This is consistent with Judge Meyers' separate dissent in *Arevalo* where he wrote that this benefit "would inure to the benefit of either party." Judge Cochran's concurring opinion is also written expansively in favor of judicial discretion. Thus, several members of the court do not appear hostile to giving a trial court discretion to instruct on a lesser-included over a State's objection even though the "guilty only" prong is not met.

However, it seems procedurally difficult to ever have this distinction tested in an appellate court. Nothing in any of these opinions suggests that the court is uncomfortable with a trial court denying a defendant's request for a lesser-included where he can't point to evidence to negate the greater offense. For the State to complain about the trial court exercising its discretion to include a lesser-included instruction, the State would also have to raise the matter on a cross-point of appeal, which appellate courts rarely consider. More importantly, many prosecutors already opt for the more cautious approach of including lesser-included offense instructions in close cases, so this distinction may never be assailed.

It is also worth mentioning that this opinion abrogates *Hampton v. State*.[7] There, the Court of Criminal Appeals held that the appropriate remedy for the erroneous inclusion of a lesser-included instruction where the defendant is acquitted of the greater offense and the "guilty only" prong of the test has not been met is retrial on the lesser. Obviously, this case is no longer good law as it appears it is no longer error for the trial court to simply instruct on a lesser-included offense whose elements are contained in the elements of the greater regardless of whether the "guilty only" prong has been met. However, nothing in *Grey* undermines the discussion in *Hampton* that double jeopardy bars retrial of a defendant on the greater offense after a jury has acquitted him of the

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greater and convicted on the lesser.

Conclusion

So again, we come back to the holding, the State no longer has to show there is evidence to negate a greater offense to get a lesser-included offense instruction. While the court crafted an opinion that relieves only the State of this requirement, several judges on the court seem amenable to affording the defendant the same benefit. However, the court still requires that the elements of a lesser-included offense be contained in the elements of the greater offense so as to provide the defendant with adequate notice. And the trial court has no discretion to deny a lesser-included when both prongs have been met.

But instructing the jury on a true lesser-included offense, even over objection, isn't likely to make courts of appeals all a-twitter anymore. ❇

Endnotes

1 *Grey v. State*, ___ S.W.3d ___; 2009 WL 3837313 (Tex. Crim. App. November 18, 2009)

2 *Haynes v. State*, 273 S.W.3d 183 (Tex. Crim. App. 2008).

3 I do not mean to suggest that the prosecution in *Haynes* did anything other than seek justice. I just note, as Judge Cochran did in her concurring opinon, that the court in *Haynes* seemed to analyze the issue as if the prosecution approached the decision to request a lesser-included instruction as if it were a game of chicken. *Haynes*, 273 S.W.3d at 197 (Cochran, J. concurring).

4 943 S.W.2d. 887 (Tex.Crim.App. 1997).

5 In fact, the ground for review was even tweet-worthy in its simplicity: "*Arevalo v. State* should be overruled."

6 *Long v. State*, 931 S.W.2d 285, 294 (Tex. Crim. App. 1996).

Digging deep for punishment evidence

What seemed like a case of aggravated sexual assault turned into the trial of a serial killer, thanks to dogged investigation into a criminal's dark past.

By James Haugh
Assistant Criminal District Attorney in Galveston County

I didn't know what kind of offender Thomas Viser was when I first looked at his file. I knew that he'd been charged with aggravated sexual assault against a woman he had been dating in 2005. The offense was pretty awful by itself, but I had no idea what kind of monster Viser was until much later.

I was given Viser's file as part of my job as the Violence Against Women Act (VAWA) Prosecutor with the Galveston County District Attorney's Office, a position funded partially by a federal grant under VAWA. The case file described an aggravated sexual assault in which Viser, in February 2005, assaulted his then-girlfriend, Wendolyn, at knifepoint. The offense occurred in Wendolyn's home in Galveston County, and the defendant used a kitchen knife as his weapon of choice. Viser and Wendolyn had been dating for a few months. In her mind, the relationship was not serious, but Viser definitely thought it was and had even asked her to marry him several times. Wendolyn had always declined.

On the night in question, she had had enough of Viser's obsessing over her. She became upset with him for looking at some of her personal mail and told him to leave the house. Viser became enraged. He refused to leave and began to chase her, flipping over a table and grabbing her. When she fought back, hitting him with a phone, Viser grabbed a kitchen steak knife and held it over his head, about to stab her. Wendolyn dropped the phone and stopped fighting—she didn't want to die. Over the next several hours, the defendant forced Wendolyn to perform several sexual acts with him at knifepoint, occasionally holding the knife to her neck and saying that he would slice her throat. Afterward, he told her he was sorry and pleaded with her to not call the police. Wendolyn told him she wouldn't, but later, when she was alone with her adult daughter, Wendolyn broke down in tears and told her everything. The daughter convinced her to report the crime.

Viser delayed a charge by repeatedly telling the detective that he'd come in to give a statement but never showing up. This went on for 10 months. It took even more time for

the lab to complete the DNA analysis and conclude that the DNA on all the gathered evidence was Viser's. There are, of course, more details about this offense and the trial, but this article isn't really about the crime or the trial in chief—his guilt was obvious. It's about punishment.

When I first got the file on Viser, his criminal history was unclear. The TCIC/NCIC printout showed that he had been convicted way back in 1986 for involuntary manslaughter in Harris County and sentenced to 20 years in the Texas Department of Criminal Justice (TDCJ). The history also showed an arrest in 1980 for manslaughter, with a note indicating that he'd gone to the Mississippi Department of Corrections, but there was no disposition or disposition date. I had no idea what any of this meant, if these two offenses were related, or even whether he had been convicted of the manslaughter in Mississippi or possibly some lesser offense. So I began to look into these two priors.

Gathering the records

I first requested a pen packet from TDCJ, but of course pen packets don't really say too much. The judgment was interesting in that it read that the involuntary manslaughter in Harris County was reduced from murder.

I then called the Mississippi Department of Corrections to see if I could get a pen packet on the offense from 1980. I was advised that the crime was so old that any paperwork on it was kept at Parchman Penitentiary, so I faxed Parchman a request. It took a while for them to find the file on Viser because they had to go into the archived records, which were in boxes. The ladies from Parchman who helped me were very nice and got the information to me as requested. The Mississippi pen packet showed that Thomas Viser was convicted of manslaughter, as reduced from murder, in 1980, and sentenced to 20 years in the Mississippi Department of Corrections. So I had my second enhancement, making this defendant habitual, facing 25 to 99 years or life. And both of these offenses had been reduced from an original offense of murder. I filed and served a notice of enhancement, listing both offenses.

But wait a minute: How did Viser get 20 years in prison in 1980 in Mississippi for manslaughter and then commit another manslaughter six years later in Houston and get another 20 years?

I called TDCJ and found out it has a Time Section, which keeps track of how long offenders stay in TDCJ custody, when they are paroled, how long they are on parole—that kind of thing. Authorities there told me on the phone that Viser was released from TDCJ confinement on October 21, 2003. That meant that he'd been out of prison only a year and a half when he sexually assaulted my victim in February 2005! This was pretty shocking and damning for the defendant, but it wasn't the biggest bombshell. I asked the Time Section to prepare a certified document showing Viser's dates of incarceration and release and send it to me.

The bombshell

Around this time I also requested a copy of all records regarding Viser from the TDCJ Board of Pardons and Parole in Austin. I was originally just trying to find out who Viser's parole officer was, but I also wanted to find out why Viser was paroled and whether any specifics about the offenses were in these records. The results blew me away.

The parole records contained details about both prior offenses. They showed, among other things, that in 1980 Thomas Viser caught his wife, Sandra Viser, cheating on him. The next day he bought a handgun, went to her workplace (a school in Mississippi), and shot her to death outside the school. This crime was the Mississippi manslaughter reduced from murder. Then, in 1986, while on parole for the manslaughter conviction, Thomas Viser killed his wife, Ineta Viser, by stabbing her in the neck with a kitchen knife. The facts in that case read that the victim was a drug addict and intoxicated and that when Viser told her to leave, she threatened him with a knife. He then grabbed another knife and "acted on impulse and stabbed her, striking her in the neck, killing her almost instantly." The parole records stated that Viser was tried in the Harris County case for murder, but after the jury deadlocked, he pleaded guilty to involuntary manslaughter in exchange for a 20-year sentence.

So his two prior victims were his wives. On top of all that, in 1999, while on parole for the Harris County killing, Viser assaulted another woman—once again, his wife (whom I won't name here)—at the VA Medical Center Hospital, the same place where he had met Wendolyn. This assault was not serious, but it was enough to revoke Viser's Texas parole.

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He went to prison for the next four years until he was paroled again in 2003. Records show that his parole officer feared that Viser would kill again. (I don't know why, given his violent history, that he was paroled again, except that he apparently had no disciplinary problems in prison.)

These parole records were unbelievably helpful to me in prosecuting Thomas Viser. With them, I knew with whom I was dealing. It was around this time that I began to construct a timeline to help put in perspective the crime I was prosecuting in relation to Viser's other crimes. As I put the timeline together using the pen packets, parole records, prior convictions, and TDCJ's Time Section record, I began to realize something: The more I thought about it, the more I knew that Wendolyn hadn't just been a victim of aggravated sexual assault, as horrible as that was. She was almost the victim of a serial killer.

Before going to trial, I requested some help from the Harris County District Attorney's Office, and investigator Don Cohn there provided me with everything the office had from Viser's 1986 case, including the defendant's written statement, certified copies of the indictment, other pleadings from the court file, photographs of the victim from the crime scene, and a newspaper article from the *Houston Chronicle* in 1986. Again, this information was extremely helpful. As I read Viser's statement, I wanted a way to present it to the jury, so I contacted the Houston Police Department and got in touch with the retired officer who took that statement. (He even testified in court for us.)

I also contacted others from Viser's past who ended up not testifying. I spoke with Viser's wife from the 1999 assault that led to his parole revocation and one of his former parole officers. I also attempted to contact Ineta Viser's family members who were named in the Houston Police Department offense reports, but I was unable to track them down.

At some point before trial, I also requested copies of the judgment and indictment regarding the Mississippi conviction from the Pike County District Clerk's Office in Magnolia, Mississippi. I even made a trip to the public library to look up and get good copies of a couple of articles regarding the Houston case that I had found on the local newspaper's online archives.

Punishment

We began the trial on September 28. After the jury found Viser guilty of the aggravated sexual assault, we began the punishment phase. We recalled Wendolyn, who testified about how this crime has affected her and her view of men in general. We introduced certified copies of pen packets, judgments, and indictments from both prior cases, publishing portions of them to the jury by reading them aloud. I wanted them to hear the allegations in both indictments and that the victims were both women and both had the last name Viser. Retired Houston PD officer Thomas Murray testified, allowing us to introduce Viser's written statement in the Harris County killing of Ineta Viser.

At about that point, I could begin to see the effect this evidence was having on the jury. I had Officer Murray read Viser's 1986 statement in which he described how Viser killed his wife Ineta Viser, *with a kitchen knife,* how he then went to a bar and got drunk, and how he left her body in his apartment for a week before telling his parents and then the police what he'd done. I could see members of the jury in complete shock as Officer Murray read the statement, and one juror lowered her head completely and covered her face with her hand. She wasn't asleep, she just couldn't look.

Of course, not everything I had gathered was admissible or was admitted at punishment, but a lot of it was. *Enough* of it was. In the end, we made the jury aware of who Viser's other victims were and what kind of offender they were deciding punishment on.

Closing and sentencing

I split my closing statement with Assistant DA Reese Campbell, who was a huge help and sat second chair during the trial. Our closings really gelled. Reese told the jury that the victim didn't know and couldn't know what Viser was. When she met him, he wasn't wearing a sign around his neck or a tattoo on his forehead that said, "I kill women." She didn't meet the real Thomas Viser until that night in February 2005. Reese had talked about deterrence in jury selection, but at closing he didn't want to talk about deterring others. He asked the jury to deter one person, Thomas Viser. He asked them to do what Mississippi failed to do, to stop him from ever hurting another woman. After Reese finished, the defense argued that Viser was not

that bad a guy, specifically saying that he wasn't a "serial child molester" or "serial rapist."

In the second half of our closing, I presented the jury with a timeline I had specially prepared for punishment (see it in the orange box below), limiting it to the details of the evidence that was admitted. I specifically asked them to note the time periods that Viser was in prison and not in prison and his age when he committed each of these offenses. In response to the defense argument, I told the jury what Viser really was: He was a serial *killer*. What is the definition of a serial killer? An offender who kills someone, a period of time passes, and then he kills again. And, I argued, Thomas Viser would have killed Wendolyn if she hadn't done just what he wanted her to do that day. If she hadn't submitted to him, if she had kept fighting, I argued, she would be dead. She would be Thomas Viser's third murder victim. I stressed that Thomas Viser, now 62 years old, is not going to change. Why, I asked, was he out there, walking around, so that he could do this to Wendolyn after all he'd already done? I didn't know. But I told the jury that if he ever gets out of prison, Thomas Viser will kill again. He almost killed Wendolyn, and when the next woman gets him angry, he will kill her. This is who he is, and it will not change.

The jury retired. They had taken almost four hours to find Viser guilty of aggravated sexual assault, but they took a mere seven minutes to decide that his sentence should be 99 years in prison.

Victim Impact Statement

Anyone who's ever seen a victim impact statement knows how emotional they can be and how virtually anything can happen. Wendolyn told us she wanted to give a victim impact statement. She had been through a lot in this trial, and I was glad she wanted to do this as well.

It's important to note that I had not told Wendolyn about Viser's criminal history before the trial. I didn't want to influence her testimony or have her blurt out something in the guilt phase about what he'd done in the past. Because she didn't already know, I told her I would tell her about his prior convictions after the trial. She had heard that he had gone to prison for possibly killing someone, but she had convinced herself that it was probably an intoxication manslaughter where he'd been drunk and killed another driver or something like that. She found out about the true nature of his priors by listening to closing arguments in punishment. And apparently she memorized the other victims' names.

Though I don't have the transcript of the trial, I wrote down Wendolyn's victim impact statement word-for-word right after she said it. It was definitely the shortest and most memorable victim impact statement I've ever heard and maybe will *ever* hear. According to my notes, she said: "The only thing I have to say is, on behalf of Ineta Viser and Sandra Viser and me: Sayonara, butthole! And I hope you rot there!" ❇

Thomas Viser timeline

8/28/47	Defendant Thomas Viser is born.
2/15/80	At age 32, the defendant kills Sandra (Williams) Viser in Mississippi.
4/4/80	The defendant is convicted of manslaughter for killing Sandra Viser in Mississippi and sentenced to 20 years in the Mississippi Department of Corrections.
2/21/80 to 2/4/85	Viser is incarcerated for five years, then paroled by the Mississippi Department of Corrections.
4/22/86	At age 38, the defendant kills wife Ineta (Baker) Viser in Texas.
10/10/86	The defendant is convicted of involuntary manslaughter for killing Ineta Viser and is sentenced to 20 years in TDCJ.
4/26/86 to 10/22/92	The defendant is imprisoned in Texas, then paroled.
10/23/92 to 3/14/97	Viser's Mississippi parole is revoked, and he is imprisoned in Mississippi.
3/14/97	The defendant is discharged from the Mississippi Department of Corrections, his sentence completed.
10/21/99	At age 51, the defendant's parole in Texas is revoked for assaulting his wife.
8/25/99 to 10/21/03	The defendant is incarcerated in TDCJ for parole violation.
10/21/03	The defendant is released on parole from Texas incarceration.
2/5/05	At age 57, the defendant sexually assaults Wendolyn.
5/8/08 to 8/8/09	The defendant is incarcerated in Texas awaiting trial.
8/2009	Viser is tried and convicted for aggravated sexual assault.

From 1980 to 2009, a 29-year period, Thomas Viser spent a total of 21 years and five months incarcerated. That's 74 percent of the time.

Cleaning up after a slick, fraudulent 'oil man'

How attorneys with the Texas State Securities Board helped Collin County prosecutors try a man for fraud, theft, and money laundering in a scheme that bilked oil investors out of $400,000

William Seelye told investors he was a successful oilman in the classic Texas mold. Using investor funds as working capital, he was reportedly able to deliver significant returns through drilling or reworking wells throughout Texas and Oklahoma. Investors anted up more than $400,000, but their monies often didn't make it to the oilfield. Seelye instead used their funds to make payments to his mortgage and credit card companies and to sustain his lifestyle. Not surprisingly, his oil drilling program turned out to consist mostly of phantom projects and low-producing wells. The only return on the investments was a 99-year state prison sentence, which we secured in a Collin County courtroom earlier this year.

By Joseph J. Rotunda
Enforcement Division Chief, Texas State Securities Board, Austin

The State Securities Board works with many prosecutors' offices to facilitate the prosecution of white-collar criminal cases. These types of cases frequently involve voluminous evidence and a commitment of otherwise limited resources. The State Securities Board frequently assists prosecutorial authorities in addressing these challenges by subpoenaing records, analyzing financial data, interviewing victims who live all over the state, participating in court proceedings, and providing expert witnesses.

Seelye's oil and gas scam

The scam that led to Seelye's conviction and sentence started in 2002. Seelye and a business partner formed Seel-Mac LLC. The partner put up money and credit to obtain an operator permit from the Texas Railroad Commission, the entity that regulates oil and gas in Texas, and to purchase oil leases. The partnership didn't last long. His business partner filed suit against Seelye in state district court in Denton County in 2004, alleging that Seelye used cash from Seel-Mac's operating account to pay his personal credit bills and monthly payments for utilities and personal automobiles, among other expenses.

State District Judge Vicki Issacks entered a restraining order against Seelye on March 25, 2004. Just two weeks later, after the business partner complained that Seelye was violating its terms, Judge Issacks ordered the company into receivership and appointed Ricky Perritt, a Denton County attorney, to act as a receiver.

With the company he co-founded in receivership and at odds with his former partner, Seelye nonetheless continued to solicit investors for other oil and gas projects. He formed Rasher Energy Inc., after Seel-Mac was ordered into receivership, to assist in soliciting these new investors. The use of a new corporate entity concealed the legal and operational history associated with Seelye's activities, as new investors were far less likely to learn about Seelye's troubled past.

Lewis Jue, an insurance agent, knew Seelye because he at one time employed Seelye's mother-in-law. Seelye first approached Jue in September 2004, soliciting funds for a drilling venture. Jue declined because of the risk in starting a new drilling venture from scratch. The next month Seelye came back with another, presumably less risky, proposal to drill existing wells in Cooke County. That way, he told Jue, the oil and revenue would flow more quickly. Jue became one of 18 people who eventually invested approximately $400,000 in Seelye's oil ventures over the next three years.

Seelye followed a well-worn path in oil and gas fraud. He sold interests in drilling projects he didn't own and failed to drill on leases in which he held an interest. He also failed to provide investors with a true and accurate portrayal of his business reputation, qualifications and operating history—disclosures that would have made potential investors run the other way. For example, he did not disclose the lawsuit that McKenzie, his one-time partner, filed against him in 2004 that forced Seel-Mac into receivership. He falsely claimed that Rasher Energy

owned rights in leases that it did not.

Then there is the way Seelye lined up investors: one connection at a time, methodically transforming members of the public into victims named in an indictment. Lewis Jue told State Securities Board attorneys he told a friend from Houston about Seelye's projects, and the friend promptly invested $6,500. In 2005, Seelye approached another friend of his insurance agent and convinced him to invest. Seelye also successfully solicited more than $85,000 from his dentist.

Not surprisingly, none of these investors were provided with material information regarding the receivership, the false claims related to the ownership of mineral leases, and his use of investor funds. The state securities statutes require that promoters provide investors with material and relevant information in connection with the offer and sale of securities, which often include oil and gas investments. These statutes also provide that promoters who intentionally fail to disclose material facts and knowingly misrepresent relevant facts commit felonies.

Seeyle was therefore indicted in Collin County for securities fraud (first degree), theft (first degree), and money laundering (second degree). His trial started April 28, 2009, and lasted five days.

Prosecuting such crimes

The prosecution was a collaborative effort between the State Securities Board and the Collin County Criminal District Attorney's Office. The State Securities Board has an established relationship with Judge John Roach, the elected Criminal District Attorney for Collin County, who is an accomplished and demonstrated leader in prosecuting cases involving investment fraud and white collar criminal activity. The DA's office had received complaints from investors in and around Collin County and asked the State Securities Board to help investigate because of our experience in these types of trials.

The Seelye case was investigated by the State Securities Board and the Special Crimes Division of the Collin County DA's Office, and tried by Dale Barron, a veteran enforcement attorney for the State Securities Board, assistant criminal district attorney Christopher Milner, and fellow Collin County prosecutor Kelly Crowson. Judge Roach appointed Barron as an assistant district attorney to prosecute the case against Seelye.

Evidence in white-collar criminal prosecutions is largely banking and financial records—evidence that isn't limited by someone's memory or any of the challenges associated with eyewitness testimony. These records frequently provide a succinct and straightforward roadmap that demonstrate how a defendant received money from investors and spent it on expenses that were not related to the underlying investment program. In the Seelye trial, for example, a State Securities Board financial examiner conducted an analysis of the defendant's bank accounts and used the records to connect the multiple companies he established. The financial examiner testified about these aspects at trial and showed the jury exactly how Seelye used investor funds as part of a criminal scheme.

As important as they are, financial records tell only part of the story. Although this type of evidence frequently proves the source and use of victims' money, it does not necessarily depict the cunning practices defendants use to deceive the victims or the significant harm that can be caused through white-collar criminal activity. Victimized investors must testify to bring home the impact of turning over their money—even money set aside for retirement—to the defendants. Their testimony often complements the financial records, providing a global sense of the overall nature of these schemes.

The case against Seelye

Even in cases involving many witnesses who can testify about the significant harm caused by the theft of accumulated life savings and retirement funds, some jurors may view white-collar crimes as inherently civil in nature. These views tend to associate white-collar offenses with crimes against property and draw a clear distinction between these offenses and violent ones such as murder or sexual assault. For this reason, it is imperative to develop special questioning in voir dire to expose potential biases or prejudices that may result in some form of jury nullification or preclude the rendering of a lawful verdict. For example, prosecutors often lead discussions designed to ensure a jury will fairly apply the law to the evidence, can render a felony conviction based upon nonviolent conduct, and, upon conviction, will consider the full range of punishment for such conduct, including incarceration. These discussions, coupled with the

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efficient use of preemptory challenges and challenges for cause, can address a number of potential issues before the issues impact the prosecution.

At the Seelye trial, the parade of investors brought cumulative weight to the prosecution's case. The victims painstakingly explained how Seelye approached them, detailed his false promises and the misrepresentations associated with his background, and explained what happened to the money they invested. In short, one by one, the witnesses chipped away at Seelye's persona as a self-made man who could deliver riches from the Texas oil patch.

In these white-collar cases, the con man's appearance and persona is often an integral component in the criminal scheme. Slick hair, fancy clothes, and sophisticated lingo are frequently tools to convince investors to part with their nest egg. At Seelye's trial, for example, one duped investor told the court, "I thought his appearance was, and his language was, someone very knowledgeable. And, of course, again, I didn't have a whole lot of knowledge about oil wells, but he looked very professional."

The witness continued, "You know, I fell for trustworthiness, I guess, because I viewed it that way. … He communicated a lot to me. He called, told me what was happening with the wells. So I had a comfort level."

In the Seelye case, another kind of expert was needed, one who can clearly explain the often complex language of oil and gas production. Our staff frequently works with Sheila Weigand, a 30-year veteran of the Texas Railroad Commission. Her testimony was invaluable because she was able to compare the operations of a legitimate oil and gas company to those Seelye ran. Weigand's trial testimony made clear that Seelye was not, as he often told investors, a successful oilman with a long track record and respect from his peers in the industry. She testified about Seelye's numerous violations of the state's Natural Resources Act—pollution violations, failure to plug abandoned wells, unpaid fines for previous violations—and the eventual revocation of his operator permit.

Seelye did not take the stand, but his defense was two-fold: He intended to do the work on existing wells and eventually produce profits for investors, and he believed he was entitled to sell interests in Cooke County leases owned by his family's oil-and-gas company, called DSB Energy LLC.

As for Seelye's contention that he intended to work the existing wells, Texas Railroad Commission records showed that most of his operations produced no or little oil, and certainly not an amount that could reward investors. The manner in which he spent investors' monies completed the picture because investment funds used for personal effects rarely result in profitable drilling programs. And Seelye's brother undercut the latter argument, telling the jury that Seelye did not hold any ownership interests in the family-owned wells and had no right to sell interests in them.

Not only did Seelye's brother testify against him at trial, but Seelye's wife also testified on behalf of the State. The Collin County District Attorney's Office sought an indictment for money laundering against Mrs. Seelye for her role in her husband's oil and gas drilling venture. She was not offered a plea agreement but nevertheless testified at her husband's trial and gave the jury a unique perspective on his activities and the underlying criminal operations. She pleaded guilty to the charge in July 2009 and was later ordered to serve five years' deferred adjudication and spend 60 days in county jail.

Even the best juries can return the worst verdicts when the State is unable to reduce voluminous evidence to a format that can be easily understood and comprehended. We therefore work with prosecutors in condensing voluminous financial records—often running tens of thousands of pages in length—to easily understood charts and graphs. These visual aids can effectively show the categories of funds received by the defendant (the source analysis) and the categories of goods or services purchased with the money (the use analysis). We discuss specific aspects of these when appropriate. For example, Seelye used investor funds to make payments for his mortgage and to credit card companies. This type of evidence is almost always useful in white collar criminal cases because it is relatively easy to convey and can readily demonstrate the criminal nature of the defendant's activity.

The case in chief allows us to present evidence of the criminal activity, but the punishment phase permits us to offer evidence that often expands on the scope of the

crime and the defendant's other bad acts. In Seelye's case, he owed back child support payments to children by two women, a fact that undercut his lawyers' contention he should receive a relatively short sentence so he could pay restitution to his investors.

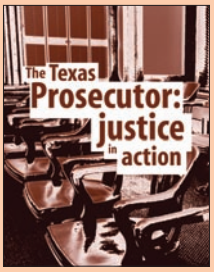
Prosecutors offered Seelye a plea bargain involving a 50-year sentence early in the case, and the offer stood until trial. Seelye did not accept this offer, and he was ultimately convicted at trial and sentenced by a jury to serve 99 years in prison. This sentence was the maximum punishment permitted by law, and it should send a clear message to would-be con men and other crooks: False promises of monthly production and annual returns can quickly transform into years of incarceration. ❇

Editor's note: Joe Rotunda has served as the Director of the Enforcement Division of the Texas State Securities Board since March 2007. Joe previously served as an Assistant District Attorney for the Travis County District Attorney's Office, where he was assigned to both the Trial Division and the Insurance Fraud Division. For more information on the State Securities Board, please contact Robert Elder in Communications at 512/305-8386 or relder@ssb.state.tx.us.

Prosecutor brochures available for free to members who need them

We here at the association recently produced a 16-page brochure that discusses prosecution as a career. We hope it will be helpful for law students and others who are considering jobs in our field.

Any TDCAA member who would like copies of this brochure for a speech or a local career day is welcome to e-mail the editor at wolf@tdcaa.com to request free copies. Please put "prosecutor brochure" in the subject line, and allow a few days for delivery. ❇



Official swearing in

Judge Cathy Cochran of the Court of Criminal Appeals was so kind as to swear in TDCAA's newest lawyer, Seth Howards, our research attorney. He's official now!

The police report says he choked her—how do I prove it?

The 81st Legislature changed the domestic violence statute to enhance strangulation to a third-degree felony. Here's how to use the powerful new tool against family violence.

By Shelly Wilbanks
Assistant Criminal District Attorney in Wichita County

Tina (not her real name) came to my office to apply for a protective order against her husband of almost 20 years. A petite woman with stylish, spiky blonde hair and brown eyes, she had a cluster of bruises blooming and coloring both sides of her neck. The bruises were a little like constellations—if you connected them visually, you could almost see the shape of his hands. Her voice was hoarse and her throat and body sore. She let the tears roll down her face while she described to me how she bit, scratched, and kicked out her bedroom window as she fought back against him, eventually losing consciousness. Not surprisingly, her husband contested the PO, but the pictures we took of her injuries that day said it all. The judge granted the protective order, and I had a strong start on building the criminal case.

Unfortunately, while these cases are frighteningly common, the evidence of strangulation I was able to collect for this particular case is rare. We all know that proving regular family violence assault cases is challenging enough because of the relationship between victim and offender, but proving domestic violence strangulation cases falls into an exceptionally difficult class. Police affidavits and reports often cite "choking" or describe strangulation as part of the assault but rarely note any visible injuries or symptoms, leaving us to rely on either victim testimony or pictures of bruises from a non-strangulation injury to prove up the case.

Now that the legislature has elevated the assault of a family member by strangulation to a third-degree felony,[1] according it the level of severity it deserves considering the high risk of death associated with strangulation, we as prosecutors should know how to look for and record evidence of such assaults for use in court. The new provision defines the offense as "impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth." Note that though "choking" is generally used to describe strangulation cases (and, indeed, police reports and victims themselves might use that word), most of these assaults are more accurately defined as strangulation cases because, while true choking happens when something becomes lodged in a person's throat blocking the airflow, strangulation is clinically defined as a lack of oxygen characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck.[2]

So, now that we have the new provision, how can we successfully prosecute these cases?

The National District Attorneys Association (NDAA) recently held its 19th Annual National Multidisciplinary Conference on Domestic Violence in San Antonio, and I attended. One session focused on strangulation cases; it was presented by Gael B. Strack, a former prosecutor of more than 15 years out of San Diego, now the Executive Director of the National Family Justice Center Alliance. Ms. Strack has been studying and working to improve prosecution of assault family violence strangulation cases since 1995. She discussed a study of 300 randomly selected cases over five years in which the victims reported being "choked." The study showed what most of us already know: that visible injuries were present in only a minority of cases. Even when they were visible and pictures were taken, often the photos were useless because they did not adequately reflect the injuries. The study also showed that only 3 percent of these victims

obtained medical attention and that symptoms of strangulation, such as hoarseness, voice changes, sore throat or neck, memory loss, nausea, loss of consciousness, defecation, uncontrollable shaking, and hyperventilation, were rarely documented.

The good news: There *is* evidence of strangulation

Though I wished that Ms. Strack's session had not been scheduled right after lunch—it included autopsy photos that graphically illustrated physical effects of strangulation on the brain—the information she provided was well worth any queasiness. These autopsy photos clearly showed that there is physical evidence of strangulation; we just have to know (and train law enforcement) where to look for it.

Here are important things to know about strangulation and how to detect and photograph it:

- Bruising may not be apparent until a couple of days later, so follow-up photographs are often beneficial.
- Bruising may also be visible *under* the skin, which can be found and photographed using ultraviolet light or infrared photography.
- Alternatively, bruising and other injuries may be visible in unexpected places, depending on how the defendant attacked (from the front or back, using one or both hands, with an instrument such as a cord, rope, or hose, for instance); bruising could be present on the victim's shoulders, back, chest, or even behind her ears.
- The victim may have scratch marks on the neck or under the chin from trying to remove whatever the defendant was using to cut off the blood or oxygen flow. For this reason, always ask the victim to remove clothing and makeup so bruises and scratches will be visible and can be photographed.
- The defendant's arms or hands may have bite marks, bruising, or scratches from the victim's attempts at self-defense. Again, take pictures of this evidence.
- The victim may be hoarse; her throat may be sore or swollen; her neck muscles may be pulled, strained, or otherwise damaged; or she may have trouble swallowing. Obtain 911 tapes, which can provide evidence of voice changes that can follow strangulation.
- Changes in breathing can also be indicative of neck or throat injuries; even if breathing changes seem minor, they may be due to underlying injuries that can kill the victim hours or days later. If these symptoms are present, it is important for investigators to observe and document them, and it's important to the victim's health and safety for her to submit to a medical evaluation.
- Petechiae—tiny red spots due to ruptured capillaries—are a signature injury of strangulation. At times, they may only be found under the eyelids, but they may also be found around the eyes and anywhere on the face and neck, including the victim's scalp. Petechiae can be present in a pattern easily mistaken for a rash. Blood-red eyes, the result of ruptured capillaries in the white part of the eyes, are indicative of a "particularly vigorous struggle between the victim and assailant."[3]

Conclusion

Our legislature has given us a powerful tool. Now it is up to us to use it in the fight against domestic violence and this particularly lethal form of assault. Prosecuting strangulation assaults presents unique evidentiary challenges, but the evidence is there if we know where to look. Because many of us do not have the opportunity to be on the scene during the investigation, it is important that we work closely with law enforcement to educate them about the new provision and what we need to successfully prosecute strangulation assaults. ❇

Editor's note: Special thanks to Gael Strack for her permission to use her research and presentation as the basis for this article.

Endnotes

1 Tex. Penal Code §22.01(b)(2)(B).

2 *Strangulation: a full spectrum of blunt neck trauma.* Ann Otol Rhinl Laryingol. 94:6:1, Nov. 1985, 542-46. Strangulation: a review of ligature, manual, and postural neck compression injuries. *Annotated Emergency Medicine*, 13:3, March 1984, 179-85. K.V. Iserson.

3 NDCAA Presentation on How to Improve Your Investigation and Prosecution of Strangulation Cases. Gael B. Strack, JD. Executive Director, National Family Justice Center Alliance. Prepared with the Assistance of Dr. George McClane, Oct. 1998, updated Jan. 2003 and Sept. 2007.

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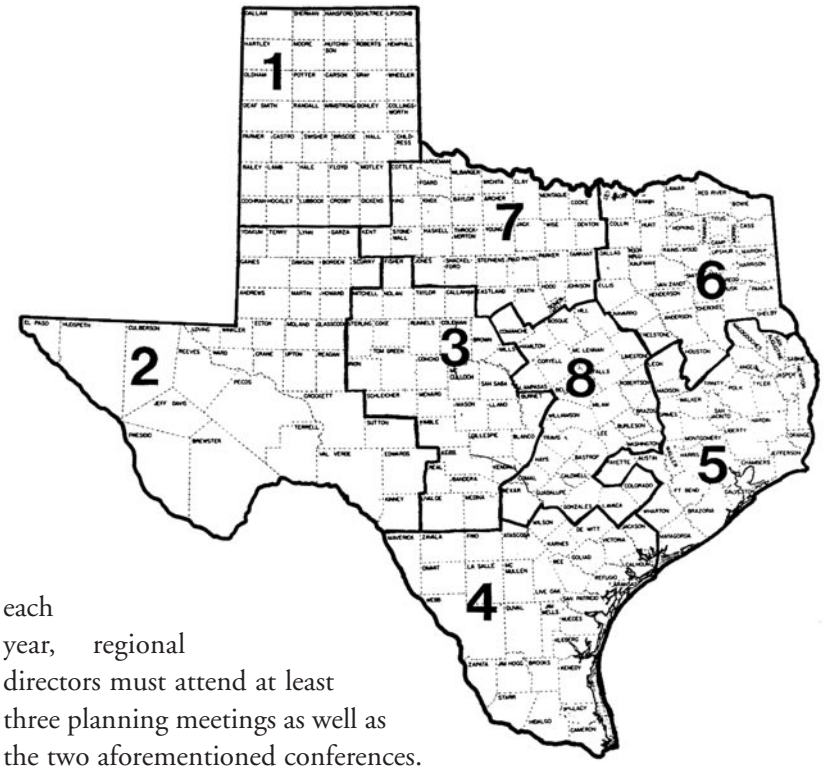
Investigator Section Board Elections

At a special meeting of the Investigator Section at TDCAA's Annual Criminal & Civil Law Update, we voted to hold Investigator Board Elections by regional caucus. What does that mean, you ask? Board member positions will now be elected by regions instead of at-large. To kick off this new procedure, we will be electing board members (now called regional directors) for Regions 1,2, 3, and 6 at the Investigator School on Thursday, February 11 at 12:30 pm after the awards ceremony. See the map, right, to find your region.



What do regional directors do? They are responsible for planning training for the Investigator School and Annual Criminal and Civil Update each year and must commit to at least a two-year term. During each year, regional directors must attend at least three planning meetings as well as the two aforementioned conferences. Come one, come all—join the camaraderie and help train your fellow investigators!

Please feel free to contact the Chair, Maria Hinojosa, at maria.hinojosa@dentoncounty.com; Vice Chair Charlie Vela at charlie.vela@da.co.hidalgo.tx.us, secretary Melissa Hightower at mhightower@wilco.org, or any other board member if you have questions. We look forward to having you on the team! ❇