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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

Pushing past red tape, getting to the truth

When a file about a sexual assault on Baylor University's campus landed on McLennan County prosecutors' desks, they found themselves stymied by heaps of paperwork, lying witnesses, and denials at every turn in their search for justice. But they persevered.

While many Baylor fans were celebrating a homecoming victory on the night of October 19, 2013, something horrible was happening to Rae (not her real name). She'd agreed to grab a bite to eat after a dance with Sam Ukwauchu, a football player who was sitting out a year after transferring from Boise State University. Instead of heading to a fast food place, Ukwuachu headed to his apartment—he told Rae he wanted her to see his new puppy. Rae, also a student athlete on scholarship, had met Ukwuachu in a class they shared and at Baylor's center for student athletes. She even had a bible study group with Ukwuachu, and she had studied with him a couple of times at his apartment. Rae trusted Ukwuachu and she wasn't in the least worried about a brief stop.

By Hilary LaBorde and Robbie Moody
Assistant Criminal District Attorneys in McLennan County

While petting his puppy and sitting on his bed, Rae listened as Ukwuachu argued angrily with a friend from Boise who was in town to visit him. Ukwuachu was telling his friend to stay away from his apartment—he had something going on. Rae became nervous and wanted to leave. She began texting her friends asking someone to come get her. Nobody was responding.

When Ukwuachu finally turned his attention to Rae, he was angry. He didn't care that she had been clear about what kind of relationship she wanted with him (friendship only). He didn't care that she clutched her dress to her body and fought him with all her strength. He didn't care that her head violently hit his desk as forced himself on her. Ukwuachu felt entitled to take what he wanted. He ignored her screams and her sobs.

As quickly as she could after the sexual assault, Rae retreated to a bathroom and locked herself in. She began furiously texting and calling friends to pick her up. (We later presented her texts in trial as excited utterances.) Almost immediately, Rae began blaming herself for what Ukwuachu had done. "I am so stupid," she texted one friend. Finally a new friend checked her phone, drove Rae's car to Ukwuachu's apartment complex, and picked her up. Rae rushed out of the apartment and climbed in the backseat. When asked what had happened, Rae quietly whispered, "He raped me," and insisted that she just wanted to go home and go to sleep.

Rae awoke the next morning to a group of girlfriends pounding on her door—they were on a mission.

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Are you ready for CCP Art. 42A.054?

By Rob Kepple
TDCAA Executive Director in Austin

The world of prosecuting violent offenders revolves around the universally understood moniker, the "3g" offense. We all know what that means: Article 42.12 §3g of the Code of Criminal Procedure. That is the engine of sentencing when it comes to violent offenders because it drives who cannot get probation from a judge for a violent offense, and usually it identifies who must do half of their sentences or 30 years before he is eligible for parole. It is indeed the heart and soul of our Texas sentencing scheme.

But not for long. Get used to casually talking about an "054" offense, as in Article 42A.054 of the Code of Criminal Procedure. (Doesn't really roll off the tongue like "3g," does it?) Last session, the Legislature rewrote the entirety of Article 42.12 in what is called a "non-substantive revision." The idea was to clean it up and reorganize it after decades of legislative tinkering. Chapter 42A goes into effect January 1, 2017.

The good news is that TDCAA's Publications Director, **Diane Beckham**, with grant funding from the Texas Department of Transportation, has sent you the 2017 edition of *Punishment and Probation*. This book contains the new Chapter 42A, plus detailed disposition charts (which are so good that the legislative folks who wrote this thing asked to use *her* charts!). And in painstaking fashion, every footnote in the book references both Article 42.12 and Chapter 42A.

One danger with "non-substantive revisions" is the dreaded unintended consequence. What if the legislature unintentionally *did* change something in the law? Well, that is why the effective date for this new law is January 1, 2017. If there is a mistake, it can be quickly fixed in the 2017 Session, which starts in January. To help flush out any possible problems, I am making the following offer: If, as you study the new article, you find an unintended, substantive change or mistake, let me know. Your prize is a free TDCAA book of your choice!

Are prosecutors key to reforming justice?

In May, *The Atlantic* magazine published an article titled, "Are Prosecutors the Key to Justice Reform?" (Find it here: http://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252.) The article trumpets the recent missives by Professor John Pfaff, who argues that one cause of "over-incarceration" is that prosecutors are simply indicting more people than in the past. (See my report on his arguments in the November–December 2015 edition of this journal, which is online at http://www.tdcaa.com/journal/2015).

The Atlantic article's author discusses prosecutorial discretion and doesn't appear to be very comfortable with it, but the author's conclusion is right on: Prosecutors play a key role in improvements to the justice system—if we want to.

It is good to be reminded that as the state's attorney, you have an obligation to be part of the discussion on how our criminal justice system can be improved. Indeed, the role of Texas prosecutors as advisors to our state leaders on matters of criminal justice was solidified in 1971 by the actions of Texas prosecutors and the work of legendary Harris County DA **Carol Vance**. That was the year that the State Bar advanced a new Penal Code (to replace the 1925 Code) at the legislature that was perhaps not quite ready. Prosecutors, who had not really participated in drafting the State Bar's proposal, came to the Capitol and objected to its passage. It didn't pass. That's when Carol Vance stepped in and worked out a deal with the governor: In exchange for funding for prosecutor training, TDCAA would organize a committee to draft a Penal Code for passage in 1973. So in a very real way, our professional association was founded on a promise that we would assist our state leaders in criminal justice reforms.

And y'all have followed through. The 1993 Penal Code reforms and creation of the state jail felony system would not have happened but for the work of prosecutors. Former Dallas County CDA **Craig Watkins** is credited with pushing the concept of conviction integrity units. Prosecutors in Texas have been leaders in creating drug courts and handling offenders with mental health issues. **Jennifer Tharp**, Comal County CDA, and **Nico LaHood**, Bexar County CDA, are working on a proposal for a

deferred adjudication option for DWI. Most recently, Harris County DA **Devon Anderson** was instrumental in securing a MacArthur Foundation grant to study and overhaul her jurisdiction's pre-trial detention system.

So as we get closer to the 85th Regular Session, remember that your job description isn't just to handle the cases that land on your desk. You are the attorney for the state, and if our system is going to improve, our leaders will continue to need your advice and counsel.

What's in a name?

The U.S. Department of Justice and Bureau of Justice Assistance in Washington D.C. drive a lot of criminal justice policy through the grants they offer to states, law enforcement, and others with a stake in our criminal justice system. One recently caught my eye: It was asking for proposals to study trauma in "justice-involved individuals." (That is, criminals.) And more recently, one author has taken to calling folks with prior convictions for things like murder "formerly violent individuals." Perhaps these efforts to re-badge bad guys are just part of efforts to reduce the stigma associated with having a criminal past. We shall see if they begin to take hold in our criminal justice lexicon. If it does, what is the "re-imagined" term for victims of crime?

Welcome, new prosecutors

This is election season, so we will have many new elected prosecutors come January. Today we welcome some new prosecutors who have taken the elected position in the last couple months. They include **James Hicks**, CDA in Taylor County, **John Best**, 119th DA in Tom Green County, **Ken Bellah**, CA in Terrell County, and **George Poage**, CA Pro Tem in Sterling County. Congratulations, and let us know what we can do to help you settle in!

The final report from the Prosecutorial Oversight Tour

In March the Innocence Project issued its final report on the Prosecutorial Oversight Tour that it began back in 2011. You can read it here: http://kzqb-2dp8.accessdomain.com/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

If you missed it, you were not alone. As you may recall, when the issue of prosecutorial misconduct was bubbling back in 2012, TDCAA did some ground-breaking work examining the issue in Texas and issued our own report. You can read it here: http://www.tdcaa.com/reports/setting-the-record-straight-on-prosecutorial-misconduct. After our report issued, the Prosecutorial Oversight Coalition promised to get with us and discuss our findings and proposals for action, but we never heard from them again. That is, until we got this final report in our mailbox recently.

If you read the report, you may get the feeling that I had when I reviewed it: It is stale, frozen in time from about four years ago. Perhaps that is why you didn't hear much about it. Indeed, the report ignores the corrections to the record that we made in our report and does not mention the significant actions that Texas prosecutors have taken since 2012 to address the issue of misconduct:

- Prosecutors pushed, worked for, and supported full discovery in Texas, now called the Michael Morton Act (MMA).
- Michael Morton was our keynote speaker at TDCAA's Annual Criminal and Civil Law Update following the passage of the Act.
- We have multiple trainings on cognitive bias, including another scheduled at our 2016 Annual.
- A prosecutor wrote and passed a bill mandating *Brady* training for all prosecutors.
- TDCAA designed and delivered that mandatory training and has provided additional *Brady* and MMA training at every seminar for four years.
- Prosecutors did not object to legislation mandating that reprimands against prosecutors be public.
- TDCAA is in the middle of designing a whole new course on management to address issues raised by the wrongful conviction experiences in the '70s and '80s.

What is great about our profession is the dedication y'all have shown to making it better. You have a tough job, but your dedication to getting it right is inspiring. ❇

The Boulware challenge

I want to thank all of you who have donated to the Foundation's endowment fund in memory of **Dan Boulware**, former Johnson County DA and former President of both TDCAA and the Foundation. Dan was a great leader, and your gifts serve his memory well. Thank you.

By Rob Kepple
TDCAA Executive Director in Austin

The Management Training Institute is taking shape

In the last few months we have made significant progress in designing the management training initiative that the Foundation supports. With a lot of research, discussion, and consultation we will begin development of the most pressing training need for our offices: a first-time manager course. There are lots of things that will come about as part of the institute, of course, but the most pressing need is to create training for all first-time managers, whether it be a first-time elected prosecutor in a smaller county or a first-time court chief in a medium or large county. As part of this development, we will identify the "core competencies" of each position to develop training targeted for our profession. The goal is to begin piloting actual courses in early 2017 and expansion of the training all around the state after that. Thank you for all of your support for this effort.

TPS invitations are in the mail!

In May the Foundation Board arrived at its invitee list for the Texas Prosecutors Society's Class of 2016. The minimum qualifications for membership in the Society are: at least five years as a prosecutor, professionalism in the career and otherwise, and, if the person has left prosecution, he or she must have continued to contribute to society in a meaningful way (including as a criminal defense attorney honored as part of the "loyal opposition"). I continue to believe that the Society will be a wonderful engine of productivity in the criminal justice world in years to come, and the endowment the members support will provide meaningful services for Texas prosecutors for generations. Thanks to all of the current members, and thanks in advance to the Class of 2016! ❇

*Recent gifts to the Foundation**

Isidro R. Alaniz
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Anton E. Hackebeil
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The Honorable W.C. "Bud" Kirkendall *in memory of Dan Boulware*
Doug Lowe
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Robert and Kim Mayfield *in memory of Dan Boulware*
Robert and Kim Mayfield *in memory of Tim Curry*
Lyn McClellan *in memory of John Holmes, Jr.*
Micheal Brandon Murray
John Neal
Jack Roady
Vincent R. Ryan, Jr.
Stephen B. Tyler

* gifts received between April 11 and June 3, 2016

Announcement of free future training!

By Jalayne Robinson, LMSW
Victims Services Director at TDCAA

TDCAA is pleased to announce an award of funds from the Office of the Governor to provide targeted individual training, group training, written materials, regional training, and website resources about domestic violence, sexual assault, and fundamentals of victim services for prosecutors and victim assistant coordinators (VACs) who focus on domestic violence and sexual assault victims and criminal prosecution of these cases.

This 24-month grant will allow us to offer a whole host of goodies to our members:

1) two training sessions exclusively for newly elected prosecutors in Texas;

2) training sessions exclusively for newly hired assistant prosecutors at four different seminars;

3) training sessions exclusively for newly hired VACs on fundamentals of victim services in Texas;

4) four regional seminars for prosecutors and VACs on sexual assault cases, domestic violence cases and victim dynamics, and voir dire in domestic cases; and

5) written materials to educate elected prosecutors and VACs on basic victim service mandates and recommendations, protective orders, and a more general overview of victim services and how to best administer them. These will be shipped directly to all elected prosecutors and VACs in Texas and distributed at all other trainings. Our first sessions will be offered on Tuesday afternoon, September 20 at our 2016 Annual Criminal and Civil Law Update in Galveston, so keep an eye out for that brochure, and register online to attend this high-quality, free training.

In-office visits

Recent travels have taken me all over this great state of ours. First stop was McKinney to the Collin County Criminal District Attorney's office. It is housed in the beautiful Collin County Courthouse, and the office is so nice. After a warm welcome from CDA Greg Willis and his Administrative Manager Della Bryant, I was given a tour of their victim assistance division, which was very impressive. I then spent the day with VACs

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ABOVE, from left to right: Audri Graham, Victim Assistance Coordinator; Collin County Criminal DA Greg Willis; Jalayne Robinson, TDCAA Director of Victim Services; and Michelle Meli, Victim Assistance Coordinator.

ABOVE, front row, from left to right: Kori Del Los Santos, Investigator; Carrie Arrington, Office Manager; Kristen Barnebey, Aransas County DA; Kristy Silva, Administrative Assistant and VAC; Dayna Justice, Paralegal; Kelsey Downing, felony ADA; and Angela Trevino, part-time CJIS.

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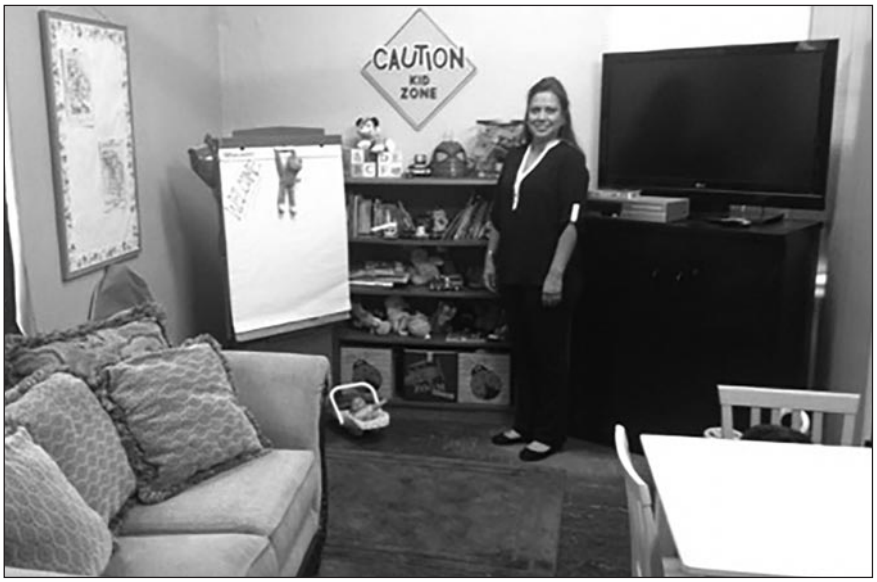
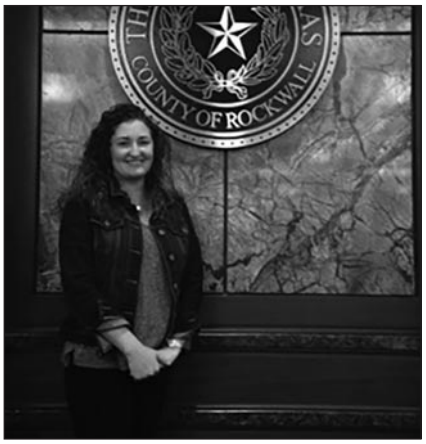
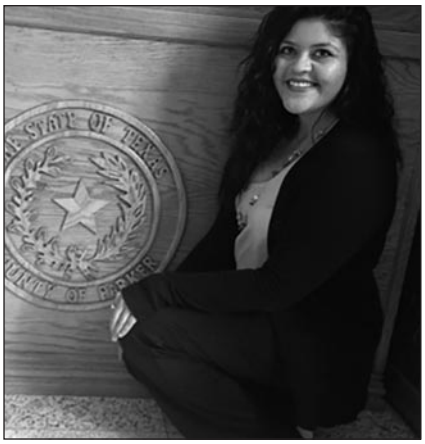
ABOVE, from left to right: Rumaldo Solis, Jr., ADA; Baldemar F. Gutierrez, Duval County Attorney; Venessa Lopez, VAC; Jalayne Robinson, TDCAA Director of Victim Services; and County Judge Rocky Carrillo. BELOW, Venessa Lopez in the new victims' waiting room in Duval County.





Mackenzie Lozano, VAC in Rockwall County Criminal District Attorney's Office.



Lucia Martinez, VAC in the Parker County District Attorney's Office

Audri Graham and Michelle Meli discussing and sharing ideas for their victim services program. Audri is a brand-new VAC, having worked there for only one week the day I visited. It was so exciting to work with Audri and Michelle!

I also visited Aransas County; the DA's Office there has a new VAC, Kristy Silva. Upon invitation, I traveled to that office to offer victim services assistance in-person. Kristy learned more about how her Odyssey database program can help her track contacts with crime victims and assist her in completing the quarterly VIS report and the VIS, CVC, and VINE processes. She also received tips on assisting and identifying crime victims early in the criminal justice process and got answers to other questions a new VAC would naturally ask. Kristy was such a quick study and will do great in her new position.

After an invitation to go out to Duval County for an in-office victim services visit, my travel day was scheduled for one of our recent days of heavy rain. While driving to Duval County, there were flashing billboard warnings along the highway due to flooding and high water. Luckily, I did not run into any high water across the highway and I was able to proceed on to San Diego, Texas. It was a memorable trip for sure! Upon arriving, I was greeted by the smiling faces of everyone in the Duval County Courthouse and such sincere gratitude for TDCAA coming out to visit.

I also got to see their new waiting area for victims. Under Texas Code of Criminal Procedure Art. 56.02(a)(8), a victim, guardian of a

Susan Fisher, VAC in the 8th Judicial District Attorney's Office.

victim, or close relative of a deceased victim is entitled to a waiting area, separate or secure from other witnesses, including the offender and relatives of the offender, before testifying in any proceeding concerning the offender. Duval County has done just that. To create this separate waiting area for crime victims (see a photo on the opposite page), Duval County DA Omar Escobar and VAC Venessa Lopez sought donations from area merchants. (Venessa serves as the VAC for both the District Attorney and County Attorney's Offices, as well as on TDCAA's Key Personnel Board.) It was my pleasure to visit and assist Duval County.

I also stopped by the Rockwall County Criminal District Attorney's Office to visit Mackenzie Lozano, the new VAC for CDA Kenda Culpepper. I enjoyed providing Mackenzie with victim services tips and touring their beautiful new courthouse.

I also visited Susan Fisher, a new VAC for District Attorney Will Ramsay in the 8th Judicial District Attorney's office in Sulphur Springs. Susan is doing great in her new position and exhibits a sincere compassion for helping crime victims through the criminal justice process.

Lucia Martinez is new to the Parker County DA's Office and serves as a VAC. She is very eager to learn about victim services. Lucia and I have corresponded by e-mail since my visit to her office in Weatherford for additional victim services assistance.

If you need any help in your office to train new or seasoned victim assistance coordinators, please reach out to me and I will develop either group or individualized victim services training for your office. Email me at Jalayne.Robinson @tdcaa.com for inquiries, support, or scheduling an in-office consultation.

National Crime Victims' Right Week events across Texas

During the week of April 10–16, communities across the United States observed National Crime Victims' Rights Week (NCVRW). This year's theme—"Serving Victims. Building Trust. Restoring Hope"—underscores the importance of early intervention and victim services in establishing trust with victims, which in turn begins to restore their hope for healing and recovery.

Numerous communities across Texas observed NCVRW, and we would like to share photos and stories submitted by several of our members.

Dalia M. Arteaga
38th Judicial District Attorney's Office

Our event took place in Medina, Uvalde, and Real Counties. We had young kids release balloons in recognition of child abuse awareness. The community came together and we had a huge turnout.

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Dana Bettger
Bell County District Attorney's Office

The Bell County Crime Victims Coalition (BCCVC, pictured at right) planned a special event in recognition of National Crime Victims' Rights Week in April. Bell County Crime Victims Coalition members and supporters placed pinwheels on the Bell County Justice Complex lawn (pictured at bottom) in recognition of crime victims. BCCVC membership includes individuals from several victim service related agencies and organizations within Bell County and the surrounding areas.

Cyndi Jahn
Bexar County Criminal District Attorney's Office

Here are a couple of pictures from various events we held during NCVRW: the Kick-off Press Conference and the Victims Call-in Hotline at KSAT-TV studios. We also had our Victims' Tribute, which has a wreath-laying, candle-lighting, and dove release.

TOP PHOTO: Bexar County Criminal District Attorney Nico LaHood (at the podium) kicks off NCVRW in San Antonio. ABOVE: A group mans the Victim Call-in Hotline. Front row, left to right: Rachael Garcia, VAC in the DA's Office; Dwayne Larimore, VAC in the DA's Office; Yolanda Valenzuela, Assistant Executive Director of Child Advocates of San Antonio; Thelma Sepulveda, Child Protective Services. Back row, left to right: Caroline Carasco, VAC in the DA's Office; Cyndi Jahn, Director of Victim Services in the DA's Office; and Jane Shafer, Director of SAPD Victim Advocacy.

Bea. D. Salazar
Cameron County Criminal District Attorney's Office

The band in the photo, below, consists of federal agents who so willingly assist us each year free of

cost. They are comprised of Border Patrol and Customs Agents and the band is called Los Federales. We had over 300 people show up to our event, and it was an amazing collaborative effort with our community. Families made wreaths (as in the photo below) to reflect their family member who lost their life in a violent crime and displayed the wreaths at the event; there was also a balloon release (with biodegradable balloons) as Josh

Groban's song, "You Raise Me Up," played in the background, in honor and remembrance for those who have been victims of violent

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crime. Numerous businesses provided pizzas, pulled-pork sandwiches, and ice cream, and H.E.B. grocery store supported our efforts tremendously by accommodating our event on their grounds and providing all of the drinks, snacks, and raffle gifts that were given out to those who attended. We even had a wonderful H.E.B. partner, Brenda Vasquez, assigned to assist us throughout the event, and she was one heck of a blessing to us all.

There are many sad moments in a bereaved family members daily life; this event brings many people together to remember, honor, and celebrate their loved ones' memories, making it a point that their loved one is never forgotten.

ABOVE: Cameron County District Attorney Luis V. Saenz (second from left) with members of Behavioral Health Solutions of South Texas.

Della Bryant
Collin County Criminal District Attorney's Office

On Wednesday, April 13, the Collin County District Attorney's office together with the Collin County Crime Victims Council hosted its annual Crime Victims' Rights Week Luncheon. The luncheon was a special time to honor victims, victim advocates, law enforcement, and others who serve victims throughout their journey. The 250 in attendance—mostly victims, victim advocates, and law enforcement—enjoyed this year's theme of the importance of building trust and restoring hope in crime victims. (See the photo below.)

District Attorney Greg Willis asked Second Assistant District Attorney Bill Wirskye to share a victim-centric perspective on the Kaufman County capital murder cases. Mr. Wirskye also spoke of one of his first serious cases involving a female sexual assault victim (that's him in the photo at bottom). She couldn't have been more unlike him—racially, socioeconomically, and educationally. Despite those differences, he learned more from her and her strength than she ever could have learned from him. It was then that he realized that it was fighting for a victim that gave meaning to prosecution.

Finding meaning by fighting for and supporting victims also resonated with the victim advocates and police officers in attendance. Along those same lines, awards were presented in the categories of courageous victim, outstanding victim advocate, and outstanding investigator of the year. Most importantly, the many victims who attended expressed sincere appreciation. They said that they were made to feel important and supported. And that's what it's all about!

Brandy Johnson
Coryell County Criminal District Attorney's Office

Coryell County National Crime Victims' Rights Week was a huge success. We kicked off the week early with our Cookies for Cops. We had our local high school culinary arts class bake 25 dozen cookies, and the Crime Victims Office took these cookies and divided them among four different law enforcement agencies. This was our way of saying "thank you" to each agency for all the work they do for the victims in our community.

We also sponsored a poster contest with our local Boys and Girls Clubs and schools. We had several posters turned in to us and put on display at the Gatesville Public Library. Along with the poster contest, four of our local preschools participated in a coloring contest with pictures that pertained to "Speaking out when you are afraid, not keeping secrets, and your body belongs to you." We had four people from our community come in and judge the contest, and prizes were rewarded to first, second, and third places.

To end our week, we sponsored a 5K Fun Run and Day in the Park (there's a photo of it below). We had close to 50 participants in the Fun Run, and many families come out and spent the afternoon in the park. We provided free food, games, live music, arts and crafts, and information booths for the families. At the conclusion of the event we released balloons in honor and memory of all the victims in our community.

Laurie Gillispie
Erath County District Attorney's Office

We teamed up with CASA, Paluxy River Children's Advocacy Center, Cross Timbers Family Services (a local crisis center), juvenile probation, Stephenville Police Department, and Tarleton State University (the TSU Plowboys, a team spirit group, are pictured below) for a "Stop the Silence" rally in the downtown plaza. It was a combined rally for Child Abuse Prevention Month, Crime Victims' Rights Week, and Sexual Assault Awareness.

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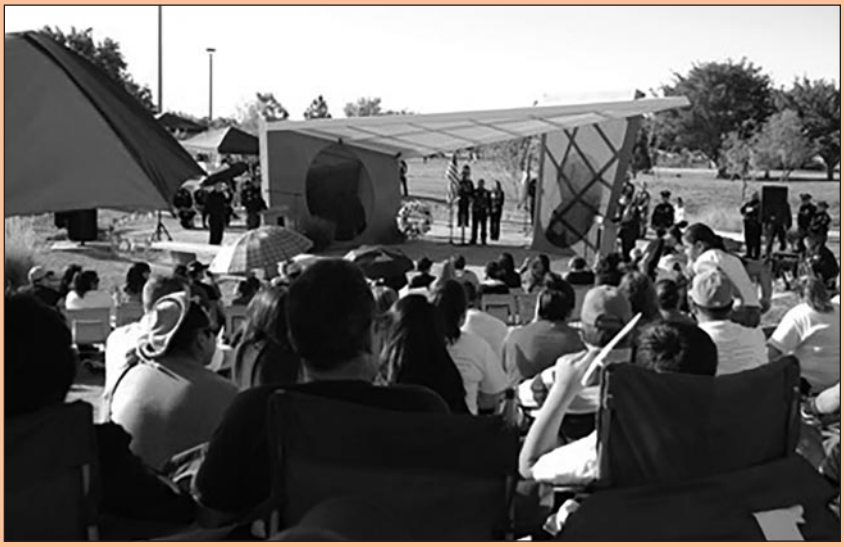
Claudia Duran
El Paso County District Attorney's Office

On Sunday, April 10, the District Attorney's Office hosted the annual Crime Victims' Memorial Reading to kick off National Crime Victims' Rights Week. Jaime Esparza is a district attorney committed to advocating for victims' rights and understands the importance of outreach to victims (that's him in the top photo addressing the crowd, which is pictured in the middle). In 2009, Esparza, along with staff members from his office (we're pictured in the bottom photo) and community leaders, inaugurated the Memorial Reading Garden in Yucca Park.

Today, the wall in the Memorial Reading Garden includes over 1,500 names of those have died due to crime and each year, more names are added. During the Crime Victims' Memorial Reading event hosted annually, the name of the crime victim is read followed by the ringing of a bell.

This event is truly a special one. The District Attorney's Office, the community, and hundreds of family members come together at this event each year to pay tribute and to support and comfort to those who lost their lives because of crime. The Memorial Reading Garden is a place to dream, a place to be with family and friends, and a place to reflect and remember.



Provoking the difficulty: a limitation on the right to self-defense

In a recent murder case, *Elizondo v. State*, the Court of Criminal Appeals addressed jury charge error in the context of self-defense and provocation. Upon the State's request, the trial court limited the defendant's assertion of self-defense, but the Court of Criminal Appeals held this to be harmful error. Consequently, the defendant is getting a new trial.

By Jessica Akins
Assistant District Attorney in Harris County

In the summer of 2010, defendant Jose Elizondo, accompanied by his wife and brother, went to the Punto 3 nightclub in Mission. Elizondo, a U.S. Customs and Border Protection agent, got into an altercation with the owner of the nightclub, Fermin Limon, and some of the security personnel. During the quarrel, Elizondo was able to escape outside to his truck, where he was followed by three men. He got into a physical fight with them and at some point retrieved his handgun. Limon approached Elizondo during this time, also armed with a handgun. Elizondo shot Limon and claimed self-defense. The jury found Elizondo guilty of murder and sentenced him to 25 years' imprisonment.

Self-defense and deadly force

Under §9.31 of the Texas Penal Code, a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect him against the other person's use or attempted use of unlawful force.[1] With regard to deadly force, §9.32 provides that a person is justified in using deadly force against another if he would be justified in using force under §9.31, and when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.[2]

A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense.[3] But a defendant may forfeit his right to self-defense.[4]

Provoking the difficulty

Provoking the difficulty, as the doctrine of provocation is commonly referred to, is a concept in criminal law which acts as a limitation or total bar on a defendant's right to self-defense.[5] The phrase "provoking the difficulty" is legalese that simply translates to "provoked the attack." The concept has its roots in common law, founded upon the theory of estoppel and based on the legal tenet that a man may not take advantage of his own wrong to gain favorable interpretation of the law.[6]

The State is not entitled to a jury charge on provocation precluding the assertion of self-defense unless there is sufficient evidence that:
1) the defendant did some act or used some words that provoked the attack on him;
2) such act or words were reasonably calculated to provoke the attack; and
3) the act was done or words were used for the purpose of and with the intent that the defendant would have a pretext for inflicting harm upon the other.[7]

An instruction on provocation should be given only when there is evidence from which a rational jury could find *all three* of the provocation elements beyond a reasonable doubt.[8] If the facts do not support including an instruction on provoking the difficulty, a trial court errs by submitting it to the jury, because it has limited the defendant's right of self-defense.[9]

The Court in *Elizondo* cautions trial courts that they are not to make assessments regarding witnesses' credibility or strength of the evidence, nor encroach on the jury's role as factfinder.[10] The standard for provoking the difficulty simply requires the trial judge to determine whether evidence has been presented that *could* support a jury's finding of all three elements of provocation beyond a reasonable doubt.[11]

Murder or self-defense?

Like any good whodunit, there are

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six versions of what happened at the Punto 3 nightclub. Don't worry—they will be summarized for our purpose here: to critically look at the evidence and see where the State and the trial judge made the wrong call on provoking the difficulty.

Two men who worked bar security at the nightclub testified at trial. They recalled that Elizondo's wife was causing a scene with another woman inside the bar and then tried to take her drink outside. The owner's son, Junior, tried to facilitate her leaving the bar, but she was belligerent and disrespectful to him. This prompted Elizondo, as well as the security officers, to get involved.

According to the security officers, there was a physical scuffle between them and Elizondo, and then he ran to his truck. The security guards claimed that once they figured Elizondo was going for a gun, they backed away and only Junior approached his truck, banging on the window and demanding that Elizondo exit the vehicle. They testified that they saw Elizondo get out of the truck and hit Junior in the head with a handgun. They tried to get the gun away from Elizondo but were unsuccessful. This is where the victim, Fermin Limon, enters the story.

Limon, concerned about Elizondo's treatment of his son, approached Elizondo carrying a handgun. The security guards characterize his approach as peaceful, with a goal of conflict resolution. They attribute these statements to the parties:

> Limon: "Hey, calm down. Let's settle this problem."
> Elizondo: "Get to the ground, son of a bitch. Get to the ground … you dog."

Before Limon could respond, Elizondo shot him. Both security guards saw Limon carrying a gun and gesturing with his other hand, but only one of them testified Limon pointed his gun at Elizondo.

Junior testified he had gotten into a verbal altercation with Elizondo and his wife and that afterward, he saw Elizondo run toward his car and heard him yell, "Vas a ver" in Spanish, which translates to, "You will see." Junior followed Elizondo to his vehicle and testified that he merely tapped on the vehicle to get the defendant's attention. The next thing Junior knew, he was being beaten, but he wasn't sure by whom. Junior initially told police he saw his father approach Elizondo and pull out a gun, but he conceded at trial he did not see this—he only heard gunshots.

Elizondo, his brother, and his wife testified at trial as well. In their version of the initial altercation, Junior pushed Elizondo's wife and was aggressive with her for no reason, prompting Elizondo to get involved. The security guards intervened, forcing Elizondo to flee to his truck—this fact is consistent among all the parties. Elizondo tried to escape the men by getting into his truck, but Junior opened the door and forced him back out. When he saw Limon approaching with the gun, he claimed that he twice yelled out to Limon, "U.S. Customs—drop your weapon." This was corroborated by both Elizondo's wife and brother. Limon did not lower his weapon. Elizondo testified he was convinced Limon was about to shoot him, so he fired two shots at him in self-defense.

There was more shooting going on than any of the witnesses admitted. Four shell casings were recovered from Elizondo's .40 caliber handgun, and five shell casings were recovered from Limon's 9-millimeter handgun. The officer initially at the scene noted that he did not find Elizondo's self-defense story very credible in that he did not look physically roughed-up.

The jury instruction

The Court of Criminal Appeals held that based upon the facts of this case, the trial court erred by including the "provoking the difficulty" jury instruction limiting the defendant's assertion of self-defense because he provoked the attack. The Court recognized there was sufficient evidence of the first two elements; a reasonable jury could have believed Elizondo's acts or words (intervening in the altercation with his wife, scuffling with security, yelling out about future violence while running to his car to retrieve his weapon, and hitting Junior with his handgun) did in fact provoke or were reasonably likely to provoke the attack.[12]

However, the Court drew the line on the third element: evidence that Elizondo's acts or words were executed for the *purpose* and with the *intent* that Elizondo would have a *pretext* for inflicting harm upon Limon. The Court acknowledged that intent may be inferred from words, acts, and conduct occurring before, during, and after the provocation, but Elizondo did not know Limon and did not seek him out. There was no evidence that Elizondo initiated the argument as a ruse to get Limon to attack him so he would have reason to kill Limon in self-

defense. And similarly, there was no evidence that by running to his truck, Elizondo was goading Limon into following him and attacking him. Simply put: There was no evidence that Elizondo orchestrated a set of events as a ploy to kill Limon, a man he did not know. Thus, there was no evidence of the third element of provocation.

Conclusion

Every trial judge of any experience knows that submitting a charge to a jury on provocation is fraught with difficulty and that the chance of error is great.[13] The Court of Criminal Appeals has wrestled with the notion of provoking the difficulty since 1908.[14] It's not a simple concept. The next time you have a murder case where provocation may apply, reviewing cases where an instruction on provoking the difficulty was properly included, in addition to *Elizondo*, will guide you to a correct charge.[15] ❇

Endnotes

1 Tex. Penal Code §9.31(a).

2 Tex. Penal Code §9.32(a)(1); Tex. Penal Code §9.32(a)(2)(A).

3 *Elizondo v. State*, No. PD-1039-14, 2016 WL 1359341 *6 (Tex. Crim. App. April 6, 2016).

4 Tex. Penal Code §9.31(b)(4) (the use of force against another person is not justified if the person provoked the other person's use or attempted use of unlawful force).

5 *Smith v. State*, 965 S.W.2d 509, 512 (Tex. Crim. App. 1998).

6 *Elizondo*, 2016 WL 1359341 at 8.

7 *Smith*, 965 S.W.2d at 513; *Elizondo*, 2016 WL 1359341 at 8 (all of these elements are questions of fact).

8 *Id.*

9 *Id.*

10 *Elizondo*, 2016 WL 1359341 at 6.

11 *Id.*

12 There is a good discussion about the lower court's mistaken reliance on the issue of abandonment in the context of the provocation elements. *Elizondo*, 2016 WL 1359341 at 8-11.

13 *Dirck v. State*, 579 S.W.2d 198, 203 n. 5 (Tex. Crim. App. 1979).

14 *Young v. State*, 110 S.W. 445, 447 (Tex. Crim. App. 1908) (there is some uncertainty, if not confusion, in the books in respect to the doctrine of provoking a difficulty); *Flewellen v. State*, 204 S.W. 657, 664 (Tex. Crim. App. 1918) (Morrow, J., dissenting) (there is often great difficulty in determining just when a combination of facts justifies a charge on the law of provoking a difficulty).

15 *Smith*, 965 S.W.2d at 520 (trial court properly submitted the issue of provoking the difficulty); *Matthews v. State*, 708 S.W.2d 835 (Tex. Crim. App. 1986) (evidence was sufficient to raise the issue of provoking the difficulty as a limitation to the defendant's right of self-defense); *Juarez v. State*, 961 S.W.2d 378 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (charge on provoking the difficulty as limitation on self-defense was properly given).

NEWS WORTHY

Upcoming TDCAA seminars

Advanced Trial Advocacy Course, August 8–12, 2016, at Baylor School of Law in Waco.

Advanced Criminal & Civil Law Update, September 21–23, 2016, at the Galveston Island Convention Center in Galveston. The host hotel, the San Luis Resort & Spa, is sold out, but TDCAA has contracted with others:

Hotel Galvez & Spa, a Wyndham Grand hotel, 2024 Seawall Blvd. The rate is $99 plus tax for run-of-house rooms. Call 409/765-7721 and identify yourself with TX District & County Attorneys or TDCAA by August 19 to get this rate.

Hilton Galveston Island Resort (next to Convention Center), 5400 Seawall Blvd. Rates are $99 for a single and $149 for a double (plus tax). Call 409/744-5000 and identify yourself with TX District & County Attorneys or TDCAA to get these rates by August 20.

Tremont House, a Wyndham Grand hotel, 2300 Ship's Mechanic Row. Rates are $99 for a single, $129 for a double, and $139 for a triple (plus tax). Call 409/765-7721 and identify yourself with TDCAA by August 26 to get these rates.

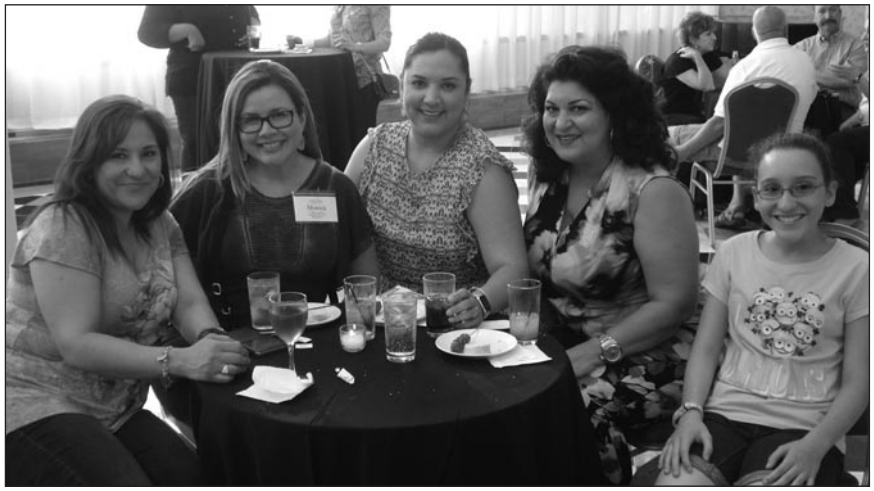
Harbor House, 221st Street. Rates are $99 for a single, $129 for a double, and $139 for a triple (plus tax). Call 409/765-7721 and identify yourself with TDCAA by August 26 to get these rates.

The Holiday Inn Resort on the Beach, 5002 Seawall Blvd. Rates are $99 for single and $149 for double occupancy (plus tax). Call 877/410-6667 and identify yourself with TX District & County Attorneys or TDCAA to get these rates by August 20. ❇

Photos from our Crimes Against Children Conference

Photos from our Civil Law Seminar

Photos from our Evidence Seminar



A roundup of notable quotables

"I'm just talking here without a lot of knowledge."

—A Washington County criminal defense attorney during a hearing on a motion to lower bond. The State had objected during the defense's closing argument regarding a clear misstatement of fact, and defense counsel conceded that he had misspoken. (submitted by Derek Estep, Assistant District Attorney in Washington County)

"About a month after I moved here, a 41-year-old man named Mark Stroman told Texas that he loved Texas, just before Texas killed him. … It was a jaw-dropping moment that set a theme for me."

—Manny Fernandez, reporter for *The New York Times* newspaper based in Houston since 2011, in an article entitled, "What Makes Texas Texas." In it, the Brooklyn transplant marvels about Texans' deep pride in being, well, Texans, even those on Death Row. (http://www.nytimes.com/2016/05/08/us/what-makes-texas-texas .html)

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone who contributes one to this column will receive a free TDCAA T-shirt!

"We decided to throw the book at him—we might as well throw the whole library."

—A Haskell County jury foreman, explaining the jury's sentence for a habitual DWI offender who went to trial on his fifth felony DWI charge. (He also had robbery and escapes in his criminal history.) The jury had no trouble deciding on a life prison sentence but had wavered on whether to give the defendant a fine. They ended up returning with a $10,000 fine on top of prison. (Submitted by Luke Griffin, DA investigator in Haskell County)

"Justice 1, Hollywood 0."

—Shanna Nugent, granddaughter of Marjorie Nugent, who was shot and killed by Bernie Tiede in 1996. Nugent was speaking to reporters while surrounded by her family outside the courthouse in Longview, where Tiede had been re-sentenced to 99 years in prison for murder. The story of the murder and its first trial had been made into a movie, *Bernie*, in 2012, and its director, Richard Linklater, had long lobbied for Tiede's release from prison. Prosecutors from the Office of the Attorney General secured another long sentence during his resentencing trial. (http://trailblazersblog.dallasnews.com/2016/04/how-the-family-of-bernie-tiedes-victim-helped-send-him-back-to-prison.html)

"It was the worst injury in my six-year career as a police officer, but it was pretty funny."

—Dan German, one-time peace officer with the Bryan Police Department and now a Blinn College Criminal Justice professor. In 1975, German and another officer were investigating a call about a prowler. The women who made the call told the officers that it wasn't a prowler but a ram—the 200-pound mascot for Allen Academy—that had gotten loose. As German was writing up the report, the ram rounded the corner, smacked German in the knees, knocked him down—and sent his partner into hysterical laughter. German was fine once he could ice his knees. (http://www.blinn.edu/news/2016/may/criminal-justice-professor-inspires-students.html)

"They want the job, but they still want to be in that lifestyle. And they have to choose."

—Kevin Canty, 55, an employee of Gaster Lumber and Hardware in Savannah, Georgia, on how hard it is for certain industries to hire workers who can pass drug tests. The percentage of U.S. workers who tested positive for illicit drugs has crept up since 2013 (to 4.7 percent), and employers gripe about the shortage of drug-free workers—many can't fill their job openings because of it. http://ireader.olivesoftware.com/Olive/iReader/DMN/SharedArticle.ashx?document=DMN\2016\05\18&article=Ar00301)

Pushing past red tape, getting to the truth (cont'd)

One gal was Rae's close friend from home who had come to Baylor with her. After a couple hours talking it over, her friends had convinced her that Ukwuachu shouldn't get away with what he had done. The group helped Rae call her parents and drove her to the hospital for a rape exam. The hospital then contacted the Waco Police Department. Her friends stayed with her until her parents arrived from several hours away, and all of them gave their names to the patrol officer. When she finally saw her mom, Rae allowed herself to cry for the first time—something all of her friends tearfully remembered and recounted when they testified in court. Her parents insisted she come home, and she reluctantly agreed. Rae's mom emailed Baylor's Judicial Affairs department that Rae would be missing some school because of what happened. In response, the Judicial Affairs officer requested Rae provide an emailed statement about "the incident," which she did.

Our involvement

Prosecutor Hilary LaBorde, in the Crimes Against Children unit at the time, was assigned Rae's case several months later, after Rae's athletic scholarship had been slashed and she'd had little choice but to leave Baylor. Rae had injured her knee just after she arrived at school, and she was unable to recover as her coaches expected, especially after she was coping with the sexual assault and keep up with her classes. While Rae had found significant support at Baylor's counseling center through individual and group therapy with other rape survivors, the internal Baylor investigation had determined that her rape couldn't be proved by "a preponderance of the evidence." This devastating news was delivered via a joint email to Rae and Ukwuachu. The Waco Police Department Special Crimes detective had followed suit, later telling Hilary, "I just couldn't decide who to believe." No arrest was made.

The case packet arrived at the McLennan County Criminal District Attorney's Office with the single most important piece of evidence, the SANE results. The DNA had been processed, and it matched Ukwuachu (these results were available even before the detective transferred the case to our office). Hilary noted vaginal injuries consistent with penetrating trauma and Rae's account of the brutal rape given mere hours after the crime. For a child abuse prosecutor used to delayed outcries and no medical evidence, it was a mountain of evidence.

Pushing past the police report

Hilary began working on the case by requesting a meeting with Rae and her parents. After meeting with all three together and then separately, it was no longer just another sexual assault case with really good evidence. It was a horribly tragic, life-changing event for Rae and her parents. Rae had been living her dream—a college athlete on scholarship at her dream school—and then overnight, it morphed into a nightmare. Neither the school nor the police had believed that she'd been raped, and after a two-month investigation, Baylor had lifted restrictions on Ukwuachu, leaving him free to cross Rae's path whenever he wanted. These random encounters sent her into a tailspin; hiding from him in stairwells and behind soda fountains and crying uncontrollably were common occurrences. Seeing her rapist all around campus and constantly feeling unsafe, Rae's life had unraveled.

Hilary questioned Rae and her parents not only about the crime and her trip to the hospital but also about her struggle to recover. They had been unable to tell her little brother, then a high school freshman, what had happened. (It was a secret they kept from him until the trial.) They were a close family now hiding a horrible secret. Rae slept with her mom for a week following her rape, unable to sleep alone. Rae had anxiety attacks if men approached her from behind and startled her—even the most trusted men in her life, her father and grandfather. Simply put, the girl who came home from Baylor was not the same one who'd left for college mere months earlier.

Hilary continued working on the case by requesting all of Baylor's investigative records and all records relating to Ukwuachu. She also requested Rae's counseling records from the university. Rae had been through intensive post-traumatic stress disorder (PTSD) therapy with her counselor. It took several months and many emails to get all of these records. We learned that if there's been a school investigation of allegations of sexual violence, prosecutors should start getting those records as quickly as possible. Federal privacy laws require all students mentioned

in school records to be advised that their records may be released and allow those students to protest that release, and the process can take months to complete. Changes with Title IX's requirements also meant many changes in how our office obtains student records. With every case, there seems to be a new and more arduous process to retrieve investigative and counseling records. Our advice is to start early and be persistent.

Baylor's investigative records—their volume and complexity—made it obvious that two prosecutors needed to work on Rae's case to properly prepare for trial, so Robbie Moody, a felony court prosecutor, agreed to help as it became clear that a trial was in Rae's future. Ukwuachu was not allowed to play football following his indictment, but he remained a student on full scholarship waiting to be cleared to play his remaining years of eligibility. A plea to any felony would kick him off the team, so we were headed to court.

Pushing past Baylor's red tape

In Baylor's investigation, Ukwuachu had provided school officials with only one witness: Peni Tagive, another football player. Tagive told school officials that he had been in the apartment that evening and had heard Ukwuachu and a girl arrive. Tagive claimed that he heard no other sounds that evening and had slept until morning. His story contradicted Rae's assertion that she had been screaming for help.

There was also one glaring problem with Tagive's story: He did not report to Baylor that he had been present that night for more than a month after Baylor notified Ukwuachu of the investigation. This delay never seemed to raise questions during Baylor's in-house investigation, but it raised red flags for us.

Robbie suspected that Tagive's story could have substantial holes and knew he needed to talk to him as soon as possible. We scheduled a meeting between Tagive and an investigator at the McLennan County Sheriff's Office so the interview could be visually recorded. At the appointed time, our investigator was present, but Peni Tagive was nowhere to be found. When we contacted him, he informed Robbie that he no longer wished to talk with us—the defendant told him not to come to the interview or talk with us anymore. Knowing that the defendant could be committing a new felony (witness tampering), Robbie obtained a grand jury subpoena.

The grand jury is a tool that prosecutors often underutilize. It is a tool we rarely use in McLennan County, but we will use it with witnesses who refuse to talk to detectives during the initial investigation or when we suspect witness tampering, as in this case. In front of the grand jury, we confirmed that the defendant's alibi was an outright lie that had been concocted long after the sexual assault and that Peni Tagive was nowhere near Ukwuachu's apartment that night. He testified that the defendant had instructed him not to attend the grand jury proceedings (which might explain why it took a writ of attachment and some sheriff's deputies to secure his testimony). We found out where he was and who he was with the evening of the rape and obtained his cell phone records and his friends' cell phone numbers. (This made a huge difference at trial because cell phone data showed that Tagive was not asleep the night of the assault, as he claimed, because he was making phone calls long after he said he was in bed.) We also locked him into his story so that we could prepare his cross-examination well in advance of trial, effectively neutralizing him as a defense witness.

Pushing past Boise State's red tape

A fellow Baylor athlete had told Rae that the rumor at Boise State University (BSU) was that Ukwuachu had been dismissed from the football team due to violence against a female student. Rae had informed Baylor officials of this during their investigation, but the BSU registrar had told Baylor officials that Ukwuachu had left in good standing and was free to re-enroll. Robbie believed he must have committed some significant wrong in Idaho—it is certainly rare for a freshman All-American defensive end to be dismissed from a football team.

When we first reached out to Boise State, we were informed that the school had no records of discipline problems for Ukwuachu. He had not been expelled or suspended from the university. But based on reports we had read in the Boise media, we knew that this was not the whole story.

Abdon Rodriguez, one of our investigators, contacted the athletic department at Boise State and was told that it would be worth his while to obtain a subpoena for

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Ukwuachu's student records. This proved to be more difficult than normal because the subpoena had to come via interstate compact, but the Ada County (Idaho) Prosecutor's Office helped us get those records. They contained a wealth of information. We learned though handwritten notes from athletic directors that the defendant had had a violent relationship with his then live-in girlfriend. His roommate, another football player, had been so scared of the defendant and his violent tendencies that he had called the police. Ukwuachu had been taken to a mental hospital more than once while a student at BSU; the school had also sent him to anger management classes to try to help him.

Through this process we got the names of Ukwuachu's roommate and ex-girlfriend, and they would prove to be extremely valuable at trial. The information in the records led us to contact the Boise Police Department (BPD). When we spoke with the custodian of records there, he repeatedly informed us that BPD had not responded to the roommate's call to police, that there was no record of an interaction that night with Sam Ukwuachu, and there was no trip to a mental hospital. When we gave him the names of specific officers who were said to have been on scene (according to the Boise State records), we were informed that they were indeed employed by the Boise Police Department (BPD). When we asked for contact information for those officers, we were referred to the city attorney.

We were thankful that the city attorney ended up being extremely helpful and began looking into the matter for us. He discovered that no reports or dispatch logs existed for the evening in question but that officers had preserved body microphone recordings from that night. (It has been difficult for us to understand why BPD was so unhelpful. They seemed to go to considerable lengths not to document Boise State students when it came to alcohol violations, but Ukwuachu's conduct resulted in his mental commitment—yet there wasn't any documentation to tell us who took him to the mental hospital. It is impossible with the information we have to speculate as to whether this was special treatment for an athlete or just for students in general.) Regardless, the city attorney quickly emailed copies of the recordings to us.

The contents of the recordings were incredibly useful. In them, we heard the defendant's roommate, Elliot Hoyte (an offensive lineman for Boise State and a rather large person) express that he was terrified of Ukwuachu discovering that he had called the police. In fact, Hoyte had called an assistant athletic director who called the police in fear of Hoyte's safety. Officers on scene later advised Hoyte to move out and stay away from the defendant until the semester ended. We also heard the defendant screaming and crying while talking with the police. His statements that night helped us prepare for cross-examination in our trial. We learned that the defendant's mood could turn on a dime. Finally, it confirmed to us what we had long suspected: The defendant has violent tendencies and becomes quite agitated when he is unable to get what he wants.

This whole process transpired over the period of several months. At every turn we hit another wall. People consistently did not want to cooperate or told us they remembered nothing. Through constant pushing and refusing to accept these initial statements and claims, we began to finally uncover facts and witnesses giving us a clearer picture of Sam Ukwuachu. We now knew that he had a violent relationship with a former girlfriend and that his old roommate had been so scared of him that he had called police and moved out of the apartment.

Keeping Rae's parents informed

We cannot stress enough how invaluable it was to keep Rae's parents in the loop—it was very much a joint effort. Her parents were going through their own mourning process as we prepared for trial. We believe they channeled some of this grief into helping us prepare.

Hilary exchanged emails and texts with Rae's mother frequently and spoke periodically to Rae's dad on the phone (he much preferred to talk rather than email). Whenever any of us had news about the case, we communicated it to each other. As a group we were puzzled by Baylor's Defensive Coordinator Phil Bennett announcing to the media that he expected Ukwuachu to return to the football team when his trial was still a couple of weeks away—it was a very disheartening comment, and we think it helped all

involved to lean on each other as we felt sometimes like it was us against the world.

Rae's parents also acted as another set of eyes and ears. While the Boise State records detailed the violent relationship Ukwuachu had with his ex-girlfriend, she was identified only in handwritten notes as "Jackie." We also knew from the records that Jackie, like Rae, was a student athlete. While we went through Boise State rosters looking for female athletes named Jackie, Rae's mom found a Jacquelina Wonenberg, a track athlete, who, according to her Facebook page, was friends with Ukwuachu and had visited him in Waco (after he left Boise State, in the fall of 2013). Robbie got Jackie's phone number through Elliot Hoyte, Ukwuachu's one-time roommate in Boise.

The trial

In the summer of 2015, Ukwuachu pushed for a trial date so he could get back on the football field. By this time, Rae wanted no plea deals. In her opinion, everyone had let Ukwuachu get away with what he had done. She wanted no part of allowing that to continue, even if it meant a not-guilty verdict in court.

All of our legwork leading up to the trial paid off. We had interviewed the one witness that Baylor had determined discredited Rae's story, Peni Tagive, and found him completely unreliable and his story inconsistent with both Rae and Ukwuachu's accounts of their relationship. After reading and re-reading Baylor's investigative reports, we found several instances where what Rae had written in an email differed from how Baylor interpreted her words later in their reports. The school's investigator into Rae's rape was an academic who had long been involved in Judicial Affairs investigations at the university, though she had no investigative training. She didn't record any of her interviews, she didn't interview all available witnesses, and she didn't consider any of the biases any of the witnesses may have had. After a lengthy gatekeeping hearing because the defense had designated this investigator as an expert witness, the defense withdrew its request to offer the investigator's findings. In her last answer to the court, the investigator admitted: "I'm not an investigator."

Our persistence in acquiring Rae's counseling records from Baylor also paid off in that we were able to offer her counselor's diagnosis of PTSD and her subsequent therapy as expert testimony. A trial prep meeting with the counselor required no fewer than 40 emails to arrange with the university's lawyers—and was worth every bit of effort. While Hilary and Robbie may have demanding trial schedules, it was obvious Baylor's lawyers were hoping we would give up on calling the counselor if they made meeting with her difficult—the lawyers insisted they needed to be present for any trial prep meeting (even though we had the records)—so, whenever we were available, Baylor's lawyers would be busy. Eventually we got our meeting (after Robbie discussed the stonewalling with a member of the firm) that a lawyer sat in on. Once we told her we had designated her as an expert, she felt she could speak freely with us about her opinions of Rae's case. From their sessions through the trial, Rae's counselor supported her 100 percent—she testified about all the details of the rape that Rae recounted in her therapy sessions.

Similarly, our persistence in subpoenaing and successfully getting three witnesses from Boise—Ukwuachu's ex-girlfriend Jackie, a police officer, and an athletic director—proved worth all the headaches after the defendant insisted during cross-examination with Robbie that he "respected women" and would never have raped Rae. Our first witness in rebuttal was Jackie, who recounted how he'd strangled and struck her and destroyed her property during their relationship. The jury now knew the defendant not only was a liar, but he was also a violent abuser.

Ukwuachu was found guilty and later sentenced to eight years with a recommendation of probation. Our judge sentenced Ukwuachu to 10 years on probation and 180 days upfront in jail (as a condition of his probation). Ukwuachu was released from jail on an appeal bond after he filed a notice of appeal. As of press time, we have received his appeal but not yet filed our response. Ukwuachu never played a down as a Baylor Bear.

Advice for other campus sexual assault cases

What is unique about prosecuting college rape cases is the number of statements survivors make during the investigative process. If a victim makes an immediate report, often many of her friends are involved in getting a SANE exam and calling

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News Worthy

Prosecutor booklets available for members

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

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police. Prosecutors must talk to all of those friends, but we should not assume that they are all still friends with the victim after months of waiting for a trial date. Also, be aware that some of those friends may be victims of sexual assault themselves and might resent the attention police and prosecutors are paying to the current victim. Make it a practice to ask all outcry-type witnesses about whether they themselves are sexual-assault survivors, and think critically about how that may bias their testimony.

There is also a great number of statements to procure through university investigations. Baylor now has a Title IX office, so we can now request records from Athletics, Title IX, and Judicial Affairs in addition to academic records. Make sure to ask for handwritten notes as well as typed records, as we need to make sure that whatever is typed up matches what the investigator wrote down. We found instances where the two did not match, and it was key in showing the investigation was unreliable. Handwritten notes also may include a university employee's personal opinion. In the Boise State records, the assistant athletic director had underlined twice that Ukwuachu's relationship with Jackie was "not healthy"—one of our initial clues as to what Jackie might reveal about Ukwuachu.

We also know that Title IX investigators have numerous conversations with survivors and suspects, as they are tasked not only with the investigation but also with providing accommodations to the survivor while the investigation is ongoing (things like changing class schedules, offering counseling, postponing tests, etc.). The interactions a crime victim has with a detective are much more formal and less frequent. Don't ever assume because a university official has "documented" something as a statement from a survivor that it is accurate. These conversations can be very casual and documented long after the actual conversation occurred. Investigators may later refer to these notes as inconsistent statements and in fact not be able to testify to the survivor's exact words, only how investigators interpreted them.

Conclusion

The victory for us was not the conviction for sexual assault. It was the opportunity to be a small part of Rae's journey. We watched in awe as she testified not only in the State's case, but also when the defense attorney called her back in his case. Rae stood at our courtroom's white board, confidently drew the crime scene, and walked the defense attorney through all of Ukwuachu's actions, again and again, backwards and forwards, until he gave up. Rae dominated the room. That day the defendant could not ignore her. He heard her words, and all he could do was bow his head in defeat. ❇

"Does the defendant have to register?"

An all-in-one guide to the sex-offender registration requirements

As the defense attorney walked toward me with widened eyes, Code of Criminal Procedure in hand, I knew what was coming. "How do I explain to him that what he is charged with requires lifetime sex offender registration?" she asked on her client's behalf. "Is there something I can point to in the code?" This was not the first (nor would it be the last) time I've fielded such questions from a criminal defense attorney. I'm sure many prosecutors have been in the same position many times. Having tiptoed through the minefields that are the sex-offender registration laws, I thought I would share what I have learned for the day that you find yourself in just such a situation.

By Hilary Wright
Assistant Criminal District Attorney in Dallas County

Where to start

There are two steps to figuring out if an offense requires sex offender registration and for how long. First, it is important to understand what offenses fall under the registration requirement, which is found in Code of Criminal Procedure Art. 62.001(5). See the chart on the next page for an at-a-glance list of offenses and their registration requirements.

A reportable conviction does not have to be a final conviction or result in a prison sentence. Offenders given deferred adjudication for any offense listed in this section are subject to the registration requirements except with regard to the second violation of Indecent Exposure and any out-of-state offenses (as noted in the chart). This includes an adjudication of delinquent conduct as a juvenile offender.

When does the registration expire?

The rules about when registration requirements expire are found in Code of Criminal Procedure Art. 62.101. An adjudication of delinquency will have a 10-year registration requirement. Offenses that have a lifetime registration requirement are either Sexually Violent Offenses (that list is set out in CCP Art. 62.001(6)) or specifically enumerated offenses under Code of Criminal Procedure Art. 62.101(a). All other offenses that are designated as reportable convictions or adjudications in Art 62.001(5) that do not fall into the lifetime registration requirement list will have a 10-year registration requirement.[1] The 10 years begins at the conclusion of the latest part of an offender's sentence—in other words, the duty expires on the 10th anniversary of the offender's release from a penal institution, discharge from community supervision, or dismissal of the proceedings and offender's release, whichever is latest in time. For a juvenile, the duty expires on the 10th anniversary of the case's disposition or the completion of the terms of that disposition, whichever is later in time.

Note: Second-degree obscenity[2] is laid out as a lifetime registration offense under CCP Art. 62.101(a)(5), but it is *not* listed in Art. 62.001(5) as a reportable conviction or adjudication. A reasonable conclusion based on the detailed list of reportable convictions and adjudications is that this offense does *not* require sex offender registration. But let's keep an eye on this one to see if the legislature reconciles this discrepancy in the future.

Charges *not* requiring registration

One might guess that any offense involving sexual conduct and a minor would have a registration requirement, but that is not the case. In fact, some cases involving prostitution and children fall under the category of reportable convictions or adjudications, and some do not. Here are some (but not all) of the Penal Code offenses that do *not* have any registration requirement (i.e., they are not specifically enumerated in CCP Art. 62.001(5)):

- §20A.03 Continuous Trafficking of Persons (even though 20A.02(3), (4), (7), and (8) Trafficking of Persons offenses have a lifetime registration requirement),
- §21.12 Improper Relationship between Educator and Student (even if the student is a child),
- §39.04 Improper Sexual Activity with Person in Custody (even if the

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Convictions and adjudications that require sex-offender registration

Offense (Penal Code section)	Length of Registration
Unlawful Restraint of a victim under 17 (§20.02)	10 years (lifetime if already a sex offender as an adult)
Kidnapping of a victim under 17 (§20.03)	10 years (lifetime if already a sex offender as an adult)
Aggravated Kidnapping of a victim under 17 (§20.04)	10 years (lifetime if already a sex offender as an adult)
Aggravated Kidnapping involving intent to violate or abuse the victim sexually (§20.04(a)(4))	Lifetime
Trafficking: Sex labor through force, fraud, or coercion (§20A.02(a)(3))	Lifetime
Trafficking: Benefit from sex labor (§20A.02(a)(4))	Lifetime
Trafficking: Sex labor of child under 18 (§20A.02(a)(7))	Lifetime
Trafficking: Benefit from sex labor of child under 18 (§20A.02(a)(8))	Lifetime
Continuous Sexual Abuse of young child or children (Penal Code §21.02)	Lifetime
Indecency with a Child by contact (§21.11(a)(1)	Lifetime
Indecency with a Child by exposure (§21.11(a)(2)	10 years (lifetime if already a sex offender as an adult)
Sexual Assault (§22.011)	Lifetime
Aggravated Sexual Assault (§22.021)	Lifetime
Prohibited Sexual Conduct (§25.02)	Lifetime
Burglary with intent to commit sexual felonies[1] (§32.02(d))	Lifetime
Compelling Prostitution by force, fraud, or coercion (§43.05(a)(1))	10 years
Compelling Prostitution of a child under 18 (§43.05(a)(2))	Lifetime
Sexual Performance by a Child (§43.25)	Lifetime
Possession or Promotion of Child Pornography (§43.26)	Lifetime
Any attempt, conspiracy, or solicitation to commit *any of the above offenses* (§§15.01–15.03)	10 years
Indecent Exposure upon a *second* violation (which cannot be a deferred adjudication) (§21.08)	10 years
Online Solicitation of a Minor (§33.021)	10 years
Prostitution if the person solicited is younger than 18 [as of September 1, 2015] (§43.02(c)(3))	10 years
A violation of the laws of another state, a foreign country, federal law, or the Uniform Code of Military Justice for or based on the violation of an offense containing elements substantially similar to *any offense as listed above, but* not if the violation results in a deferred adjudication	Lifetime for substantially similar offenses to those listed as "sexually violent offenses in CCP Art. 62.001(6); otherwise, 10 years
Adjudication of delinquency for *any offense above*	10 years

[1] §21.02 Continuous Sexual Abuse of young child or children, §21.11 Indecency with a Child, §22.011 Sexual Assault, §22.021 Aggravated Sexual Assault, §25.02 Prohibited Sexual Conduct, or §20.04(a)(4) Aggravated Kidnapping involving intent to violate or abuse the victim sexually

person in custody is a juvenile),

- §21.15 Improper Photography or Visual Recording (even if the complainant is a child),
- §43.03 Promotion of Prostitution (even involving a person under 18 engaging in prostitution),
- §43.04 Aggravated Promotion of Prostitution (even when using as a prostitute one or more persons younger than 18 years of age), and
- §43.23(h) Obscenity, when the obscene material depicts or describes activities engaged in by a child under 18, a person indistinguishable from a child under 18, or an image depicting an identifiable child (see the note above about obscenity).

It could be important to note these distinctions in the code when reviewing a case pre-indictment to determine whether the appropriate offense is being alleged. They can also be useful bargaining chips in plea negotiations.

Charging strategies

Often, the sticking point of a plea for a reportable conviction or adjudication offense ends up being the sex offender registration requirement. Attorneys will try to negotiate for a 10-year registration instead of lifetime—or for none at all. Sex offender registration will apply to all of the offenses listed in CCP Art. 62.001(5) even if the outcome is deferred adjudication.

Occasionally the facts of an offense will merit an indictment for an attempt of a sexually violent offense. While this lowers the punishment range one level, it will also remove that offense from the list of sexually violent offenses which are enumerated in CCP Art. 62.001(5)(G). Therefore, because attempted offenses are not otherwise listed in CCP Art. 62.101(a), the lifetime registration requirement would not apply. An attempt of an offense requiring sex offender registrationwould then fall under CCP Art. 62.101(b), which is the 10-year registration requirement.

Sometimes we might look to a lesser-included offense of a reportable conviction or adjudication when making charging decisions. For instance, when it comes to Penal Code §20A.02 (Trafficking of Persons) and §43.03 (Compelling Prostitution), there are many such possibilities, and taking into consideration whether sex offender registration will apply can make all the difference in charging different parties to an offense, trial strategy, or plea negotiations. Trafficking involving prostitution is a lifetime registration offense no matter the age of the victim. Compelling prostitution also requires lifetime registration if the victim is under 18 but requires only a 10-year registration for an adult victim. Both Aggravated Promotion of Prostitution (§43.04) and Promotion of Prostitution (§43.03) can be lesser-included offenses for both Trafficking and Compelling Prostitution, neither of which have a registration requirement regardless of the age of the victim or victims. However, a §43.02 Prostitution offense involving a minor child (a second-degree felony) *does* have a 10-year registration requirement as of September 1, 2015. Because there are a vast number of options, it is worth combing through the code book and considering the registration requirements of different charges and lesser-included offenses to find the most appropriate charge for your case.

Admonishment

Texas law requires that trial courts admonish defendants of Chapter 62's registration requirements if they are convicted of or placed on deferred adjudication for an offense for which a person is subject to registration under that chapter.[3] The admonishment must be done prior to the court accepting the defendant's plea of guilty or *nolo contendere*, and it can be either oral or written. If the admonishment is in writing, the court must receive a signed statement from the defendant and his attorney that the admonishment and consequences of the plea are understood. If the defendant is unable to or refuses to sign, the court must perform the admonishment orally. Failure to comply with the admonishment rule is not a ground for the defendant to set aside the conviction, sentence, or plea.[4] Nor would it be considered a violation of due process or render the defendant's plea involuntary.[5]

Many of you may be familiar with the Adam Walsh Act, which went into effect in June 2015. This federal act includes the early termination law with regard to sex offender registration and can be found in Code of Criminal Procedure Chapter 62 Subchapter I. This law allows an offender whose minimum required registration period exceeds the one under federal law for the same offense to petition the trial court for early termination after an individual risk assessment is completed. The admonishment rule about sex offender registration does not, at this time, require that the defendant be made aware of this law or the possibility of early termination of the duty to register. This is true even though the hearing as to whether the early termination should be granted or denied would take place in the same trial court as that which sentenced the defendant.

Conclusion

Whether it is for plea-bargain negotiations, indictment strategy, or showing off at cocktail parties, knowing your way around the sex offender registration laws is a big help to prosecutors and criminal defense lawyers alike. If it is difficult

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for an attorney to comprehend, you can imagine how hard it might seem to a defendant. My hope is that this article and the accompanying chart will guide you past the minefields on a safe path through this treacherous ground. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 62.101(b).

[2] Tex. Penal Code §43.23(h).

[3] Tex. Code Crim. Proc. Art. 26.13(a)(5).

[4] *Id.* at Art. 26.13(h).

[5] *Thomas v. State*, 365 S.W.3d 537 (Tex. App.—Beaumont 2012, pet. ref'd).

Hey, hey, hey—goodbye!

A primer on contested interstate extradition and the appeal therefrom

When an interstate extradition packet comes to my office and finds its way to my desk, I have a fairly typical reaction: I ask, "Where's Fred?" Fred Felcman is our first assistant and generally knows how to do esoteric things that come up once in a blue moon that no one else knows (or can remember) how to handle. But Fred Felcman doesn't work in every office, and sometimes he's at Disneyland and unavailable when unfamiliar issues crop up. Having done my own research on the subject, I am writing this article in the hopes that what I learned will give other prosecutors a resource regarding the general outlines of contested interstate extradition proceedings and the appeal process that follows.

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

The rules of interstate extradition

Interstate extradition is a "summary and mandatory executive proceeding" derived from the language of Article IV, §2 of the United States Constitution.[1] In Texas, this procedure is codified by the Uniform Criminal Extradition Act.[2] The summary and mandatory nature of the extradition proceeding is summed up by §2 of the governing statute, which states that "it is the duty of the Governor of this State to have arrested and delivered up to the Executive Authority of any other State of the United States any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State."[3] Under the Act, the term "fugitive" also encompasses persons charged with committing an act intentionally resulting in a crime in the demanding state, even if they have not actually fled the demanding state.[4] The term "demanding state" means the state where the crime was committed and which is requesting the return of the fugitive. The "asylum state" is the state where the fugitive was found.

Though interstate extradition proceedings are summary and mandatory, they can still be challenged, as provided for by the governing statute.[5] The statute allows the person being sought to challenge the extradition by way of a writ of habeas corpus.[6]

Contested hearings

My own recent brush with a contested extradition came when Fred handled a case in which the fugitive's defense team sought to convince the trial judge to inquire into the underlying facts of the demanding state's case.[7] Fred did a masterful job of keeping the trial court on track and directing the inquiry solely at the propriety of the extradition packet and the limited evidence the fugitive's defense team was able to put on to contest identity.[8]

When prosecutors are faced with a contested hearing on a writ of habeas corpus in this context, it is incumbent to remind the court, as Fred did in our case, that the scope of its inquiry is severely limited. As detailed below, there is really very little that the habeas court can consider beyond the facial validity of the extradition documents. Habeas counsel will no doubt seek to expand that inquiry, but knowledge of the precedents below should help the prosecutor quash that attempt.

The United States Supreme Court has enumerated the procedure in a contested writ of habeas corpus challenging an extradition order as follows:

> Whatever the scope of discretion vested in the governor of an asylum state, the courts of an asylum state are bound by Art. IV, §2, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Once the governor [of an asylum state] has granted extradition, a court considering release on habeas corpus can do no more than decide: a) whether extradition documents on their face are in order; b) whether petitioner has been charged with a crime in the demanding state; c) whether the petitioner is the person named in the request for extradition; and d) whether the petitioner is a fugitive.[9]

This scope of review on the part of the court that is tasked with the habeas writ explicitly disallows the courts of the asylum state from making their own inquiry into the propriety of the charges in the demanding state. "When a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination."[10] This rule is also codified in §20 of the Uniform Criminal Extradition Act.[11]

However, there is one way the petitioner may go beyond the assertions of the extradition paperwork during the hearing and introduce extrinsic evidence, and that is if he is making a challenge to the assertion that he is the person demanded in the extradition paperwork.[12] In that scenario, once the State has introduced into evidence the Governor's Warrant, which is the document signed by the asylum state's governor commanding that the fugitive be arrested and subjected to extradition proceedings, the burden then shifts to the petitioner to present some evidence that he is not the person demanded.[13]

If the prosecutor effectively presents these precedents and the extradition documents are in order,[14] then extradition is all but assured (assuming you have the right person). The question then becomes, if extradition is granted and the application for relief by way of habeas corpus is denied, what happens on appeal of that order?

In our case, the trial court found the extradition documents in order, rejected the fugitive's contest as to the issue of identity, and ordered his extradition. The fugitive then appealed the trial court's order.

Appealing the denial

After receiving a notice of appeal on denial of a writ of habeas corpus contesting extradition, a prosecutor's first question might well be, "Can he appeal this?" The answer is yes.[15] On appeal, the habeas court's ruling is reviewed for an abuse of discretion.[16] The appellate court will give almost total deference to the trial court's determination of facts as long as they are supported by the record.[17]

In our case, the fugitive appealed, arguing that he should have been allowed to go behind the assertions on the face of the extradition paperwork, that his identity had not been sufficiently proven, and that he should have been able to confront his accuser at the extradition proceeding (or more precisely, the prosecutor who swore to the documents in the demanding state).[18]

That's all well and good, you might say, but what if the appeal is on some novel legal issue, rather than a factual dispute? Texas courts have addressed numerous challenges to extradition that turned on legal rather than factual disputes. The following is a non-exclusive examination of these challenges and their resolutions, which I hope will provide guidance should you face a legal challenge to an extradition proceeding.

Equity is no bar to extradition. The Texas courts have consistently held that equitable considerations are no

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bar to extradition and that the trial courts are "without authority to consider equitable issues" in extradition proceedings.[19]

The Supremacy Clause. The principles of extradition, while now enshrined in the Uniform Criminal Extradition Act, are derived from the United States Constitution.[20] In light of that, courts have held that state law principles cannot be invoked to avoid extradition without running afoul of the Supremacy Clause of the United States Constitution.[21]

Delay is no bar to extradition. The State is not required to act as soon as possible to secure extradition, and the fact that the demanding state did not pick the fugitive up as soon as possible, or even after having repeated opportunities to do so, is no bar to extradition.[22]

Limitations, laches, and estoppel may not be invoked against the State. The Texas Supreme Court has held that in the civil law context, "the State in its sovereign capacity, unlike ordinary litigants, is not subject to the defenses of limitations, laches, or estoppel."[23] That principle has since been explicitly applied to the extradition context.[24]

In our case, the appellate court upheld the trial court's order granting extradition and rejected the fugitive's arguments, including his argument that his Sixth Amendment confrontation rights applied at the extradition proceeding.[25]

Conclusion

Interstate extradition may be a relatively rare animal in your practice, but when it does appear, it should present few problems and little fear as long as you have some basic knowledge of the legal standards underpinning it. I hope this article has been helpful to you. Please feel free to contact me if I can be of any assistance. ❇

Endnotes

1 *Michigan v. Doran*, 439 U.S. 282, 288 (1978).

2 Tex. Code Crim. Proc. Art. 51.13.

3 *Id.* at §2.

4 *Id.* at §6.

5 *Id.* at §10.

6 *Id.*

7 *Ex parte Rhodes*, No. 14-15-00618-CR, slip. op., 2016 WL 889169 (Tex. App.—Houston [14th Dist.] Mar. 8, 2016, pet. ref'd).

8 *Id.*

9 *Doran*, 439 U.S.at 288-89; see also *State ex rel Holmes v. Klevenhagen*, 819 S.W.2d 539, 542-43 (Tex. Crim. App. 1991) and *Ex parte Walker*, 350 S.W.3d 417, 419-20 (Tex. App.—Eastland 2011, pet. ref'd) (adopting and endorsing this procedure and scope of review in Texas).

10 *Doran*, 439 U.S. at 290; see also *Ex parte Gust*, 828 S.W.2d 575, 576 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (adopting this language from *Doran*).

11 Tex. Code Crim. Proc. Art. 51.13, §20.

12 *Id.*; *Rentz v. State*, 833 S.W.2d 278, 280 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

13 *Rentz*, 833 S.W.2d at 280.

14 See Tex. Code Crim. Proc. Art. 51.13, §§3, 7 (setting out requirements for extradition paperwork).

15 *Green v. State*, 999 S.W.2d 474, 476 (Tex. App.—Fort Worth 1999, pet. ref'd), citing *Ex parte McCullough*, 966 S.W.2d 529, 531 (Tex. Crim. App. 1998).

16 *Ex parte Roldan*, 418 S.W.3d 143, 145 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

17 *Id.*

18 *Ex parte Rhodes*, No. 14-15-00618-CR, slip. op. at 1, 2016 WL 889169 at *1 (Tex. App.—Houston [14th Dist.] Mar. 8, 2016, pet. ref'd).

19 *Klevenhagen*, 819 S.W.2d at 543.

20 See *Doran*, 439 U.S. at 290.

21 See, e.g., *Brooks v. State*, 91 S.W.3d 36, 40 (Tex. App.—Amarillo 2002, no pet.) (holding that principle of comity could not be invoked to void extradition without violating Supremacy Clause of United States Constitution).

22 *Ex parte Sanchez*, 987 S.W.2d 951, 953 (Tex. App.—Austin 1999, pet. ref'd untimely filed) (11 year delay in picking up fugitive did not bar extradition); see *Brooks*, 91 S.W.3d at 38 (deportation of fugitive who was arrested for extradition proceedings and released three times because demanding state did not send an officer to get him was not barred).

23 *State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993).

24 *Brooks*, 91 S.W.3d at 40.

25 *Ex parte Rhodes*, No. 14-15-00618-CR, slip. op. at 8, 2016 WL 889169 at *3 (Tex. App.—Houston [14th Dist.] Mar. 8, 2016, pet. ref'd).

Trauma for the tough-minded prosecutor

As a profession, lawyers consistently rank high for stress, depression, and suicide. Those in prosecutor's offices are hit with the double-whammy of repeated secondary trauma (exposure to other people's trauma). Here's how to recognize these stresses and care for yourself in the midst of seeking justice for our communities.

By Stacy Miles-Thorpe, LCSW
Victim Assistance Coordinator in the Travis County District Attorney's Office

Several months ago I began to have a series of violent nightmares. In one, I went out with my investigator to a dangerous area of town to find a victim for a trial we were working on. In the dream, my investigator walked up to the door to see if it was the correct house while I stayed in the car. I watched as a man burst through the front door and shot her, then stood over her while I screamed frantically from the car. I got on the radio and called in, yelling, "Officer down, officer down!" The next day at work, I begged her not to go out looking for this victim, that there must be some other means to find him.

I'm sure many of us who work in prosecution can relate to the creeping feeling of vulnerability we experience. Some of it can be attributed to real threats and dangers we face in our roles, but other fears are more likely because of our exposure to trauma. When you can't reach a loved one on the phone, for example, do you tend to think her phone must not be charged, or do you imagine that something awful has happened to her? When you see a man holding hands with a little girl, do you think it's a sweet image, or do you wonder if the man is molesting her? Even putting these examples in writing sounds crazy, but I have had these thoughts, and other people in my office have confided the same.

Most people are familiar with burnout, which is mental, physical, and emotional exhaustion due to prolonged stress. Burnout can happen to anyone. And those of us in prosecutor's offices are also prone to secondary trauma, also referred to as vicarious trauma or compassion fatigue. It is a condition unique to professionals repeatedly exposed to the trauma of others, such as law enforcement officers, firefighters, nurses, social workers, judges, and criminal lawyers (among others). While burnout is the result of general stress and frustration over a long period of time, secondary trauma has a much more pervasive impact. It likely includes physical and emotional symptoms and disruption of one's social life and spiritual beliefs.

Vulnerabilities in the legal profession

Lawyers are particularly vulnerable to burnout and stress, and as a professional group they are at a high risk for depression, substance abuse, and suicide. The problems can be observed in law school and continue throughout one's career.

According to the Dave Nee Foundation, whose program Uncommon Counsel helps combat depression and suicide among law students, stress among law students is reported at 96 percent, compared to 43 percent for other graduate students. Chronic stress can trigger the onset of clinical depression, and depression among law students is 8–9 percent prior to matriculation and 40 percent after three years. Lawyers are 3.6 times more likely to suffer from depression than non-lawyers. Lawyers also rank fifth in incidence of suicide by occupational group.[1] In a survey conducted by the American Bar Association and the Hazelden Betty Ford Foundation of 15,000 American lawyers, 21 percent acknowledged a drinking problem, 28 percent battle depression, and 11.5 percent reported suicidal thoughts.[2]

Not only does the work of prosecution itself induce stress, but the legal culture can also create conditions that exacerbate stress and prevent people from seeking support.

Attorneys are in an adversarial position most of their working hours and are expected to be tough-minded and strong. Emotional vulnerability is viewed as a weakness and a problem. Perfection is expected, as any mistake or oversight can dramatically change the outcome of a case or a trial. This expectation leaves little room for the very normal human experience and error. Spending most of the work day in the "lawyer" mindset can establish the habit of viewing the world through the lens of pessimism and perfectionism. When you take that legal persona into the grocery store, your child's school, or dinner with your partner, the stress permeates your entire life.

Secondary trauma

Secondary trauma (also called secondary traumatic stress) is defined as "the emotional duress that results when an individual hears about the firsthand trauma experiences of another. Its symptoms mimic those of post-traumatic stress disorder (PTSD)."[3] Exposure to a single traumatic incident can induce a reaction in some people—victims of crime experience PTSD to some extent. But secondary trauma is the cumulative effect of repeated exposure to trauma that can impact us in numerous ways and ultimately erode our sense of self, damage our outlook on life, and harm our overall well-being.

Exposure to constant trauma and violence is an added burden that attorneys and other professionals in criminal law shoulder. The victims we work with aren't in our office because they're having a great day. We meet to talk about what is most likely the worst or most horrifying thing that has happened to them. During trial preparation meetings, the devastating or terrifying facts are laid out before us, accompanied by the victims' powerful and raw emotions. Our role in these times is to listen objectively, assess our case, and analyze how to present it to a jury. Naturally we are deeply moved or upset by the victims' pain, but the role demands a professional persona. In addition to this continual exposure to trauma, prosecutors shoulder the enormous expectation that they alone will be responsible for bringing justice about, both for the victims and the offenders.

While everyone responds differently to trauma, in their book *Trauma Stewardship*, authors Lipsky and Burk explore 16 of the most common responses people have to trauma exposure:[4]

- feeling helpless and hopeless,
- a sense that one can never do enough,
- hypervigilance,
- diminished creativity,
- inability to embrace complexity,
- minimizing,
- chronic exhaustion or physical ailments,
- inability to listen or deliberate avoidance,
- dissociative moments,
- sense of persecution,
- guilt,
- fear,
- anger and cynicism,
- inability to empathize or numbing,
- addictions, and
- grandiosity (an inflated sense of importance related to one's work).

Many of these are self-explanatory, but I'd like to explore a few in more depth. **Hypervigilance** is the sense of being "on" at all times—it can be exhausting and leave a person frazzled. Some of my colleagues feel nervous about being in large crowds and have said they constantly watch people's hands in case somebody tries to make a sudden move for a weapon. Prosecutors and investigators sometimes fear going to everyday places like the grocery store or restaurants because they may run into a defendant or defendant's family.

The **inability to embrace complexity** can result in black-or-white thinking: that there is good and bad, that this person is right and that person is wrong. In the workplace this can take the form of gossip and negativity. It's harder to assess and understand others' perspectives or situations than it is to label others with sweeping generalizations. This polarization is easy to slip into when you work within the criminal justice system, where the set-up is us vs. them, guilty or not-guilty, and good guys vs. bad guys.

Minimizing occurs when we get so flooded with others' pain that we have difficulty relating in an empathetic way to less-serious situations. Once, when my teenage daughter expressed frustration at my husband and me for being too attentive and overly involved in her life, I proceeded to tell her about a girl her same age who had run away from her group foster home to fall into the hands of a sex trafficker. Boy, didn't *she* wish she had involved parents who loved her?! My response was clearly not helpful or empathetic.

Inability to listen or **deliberate avoidance** may manifest at work or

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in our personal lives. I know a number of people who can't stand answering the phone and have a difficult time going to social engagements because they are so drained. At work, you may find yourself longing for distractions or shuffling files without making any progress. My personal nemesis is the message light blinking on my phone. I find myself putting off checking it, stealing glances at the message light with guilt and dread.

Dissociative moments may sound severe, but this can be anything from checking out in a meeting, to realizing that you've had to read the same sentence five times, to finding yourself running scenarios in your head over and over. You may be in the middle of dinner and images from a crime scene keep coming up. This can be especially difficult for those who have experienced trauma themselves, as certain types of cases may bring back a flood of memories.

As I've worked with colleagues over the years, I've seen secondary trauma manifest in countless ways. Do any of these sound familiar?

"I would feel really bad right now if I had any feelings left."

"I used to be such a happy person—I wish I could be like that again."

"When I drive around town, I see crime scenes everywhere. Over there is where that child was raped. This is the field where that woman's body was found."

Addressing the trauma

If there's anything I would stress here, it's that these are all normal reactions to being exposed to such intense pain and horror. And these are things we won't talk about with our non-prosecutor friends because we think they won't understand or would think we are losing our minds. What do you do with the evil you've seen? How can you possibly process with loved ones when what's bothering you is that you spent the day sorting through child pornography to prepare for a trial? Or that you sat all afternoon with a man whose wife was murdered in their home and had to ask him question after question about it?

This work will change us, but by recognizing its impact and employing strategies to address the secondary trauma, we can hope to avoid or transform the damage it does. Authors Karen Saakvitne and Laurie Anne Pearlman break down the trauma response into two categories and recommend addressing each.[5] First, secondary trauma creates day-to-day stress. Then, at a deeper level, secondary trauma can cause demoralization, which impacts our core beliefs, strips our lives of meaning and hope, and leads to despair.

Addressing day-to-day stress

First, how do we address the everyday stress we feel? Doing so involves self-care, nurturing activities, and escape. It's critical that we're intentional about putting in place habits and activities that sustain us and reduce stress. For each of us, this picture will look different. Healthy habits are an important foundation, so we can start by making a commitment to improving our diet, moving our bodies more, and spending time with people who nurture us.

Nurturing and escape aren't long-term solutions to secondary trauma, but they are absolutely critical to our well-being. What do you do that brings you pleasure? Is it renting a kayak and spending time on the water alone? Going on a hike in a beautiful place? Getting a massage? Having a get-together with friends? Make sure you are doing these things regularly. Be careful about letting work constantly bleed into your personal life. Some of this, such as working a long weekend to meet a deadline or making some calls after office hours, is necessary, but when you don't have to be "on," drop your work persona and don't check your email. If a reminder of a work task pops up, jot a note and put it aside for later. Be fully present in your life and with your family and friends. And use those vacation hours!

Transforming despair

Secondly, how do we turn our despair into something hopeful? The strategies Saakvitne and Pearlman suggest for transforming despair involve:

1) creating meaning or infusing an activity you currently engage in with meaning,
2) challenging your negative beliefs and assumptions, and
3) participating in community-building.

To find or reclaim meaning, think about why you got into prosecution. You could have chosen a different course involving more money and no interaction with crime victims or criminals, but here you are. Perhaps there are more frustrations, hassle, and bureaucracy than we anticipated, but the meaning in and

importance of our jobs is still present. We do make a difference, and we matter a great deal to the crime victims and communities we serve. I regularly start the day by asking myself, "Who do I want to be today in the midst of any difficulties?" It's a good centering question and helps me focus less on my bursting inbox and more on providing a caring presence for crime victims. Outside of work, you can sit on the playground with your kids checking Facebook, or you can soak up the joy of their play and delight in the feel of the sun and that particular shade of green in the trees and grass. It's all a matter of perspective, so figure out what you already do as a part of your daily life, and focus on the grace and beauty in the moment. Allow yourself to experience awe and relish it, whatever that may be for you.

Challenging negative beliefs and assumptions begins with becoming aware of them. As you experience frustration or anger, pay attention to your internal dialogue. Thinking patterns can become a habit, just as water rushing down a slope will form a groove over time. When you find yourself furious at someone who cut you off during this morning's commute, pause to reflect: Is it really true that all the other drivers are idiots, or could some of them be tired and distracted like we all are? Is the world actually a terrible and dangerous place, or do terrible things happen along with the millions of wonderful acts? Asking such questions is part of "mindfulness," which simply means being fully present and aware of your reactions. The "mindfulness movement" has been embraced by numerous fields in recent years—there are even a number of legal professionals bringing mindfulness and meditation into their law practice. (Attorney Jeena Cho, for example, is a partner at her firm, an author, and the host of the podcast "The Resilient Lawyer." She is a strong advocate for mindfulness and meditation and has a number of good resources for attorneys, including her book *The Anxious Lawyer*, which I highly recommend.[6]) It's an effective and proven way to build resiliency in ourselves and control our reactions to outside stimuli.

Participating in community-building is an important way to connect with others at work and personally and to build meaning in your life. Friendships on the job contribute a great deal of job satisfaction and provide the camaraderie that helps reduce stress. If you are able to cultivate the kind of friendships at work that allow for vulnerability and

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Helpful resources

Books

- *The Anxious Lawyer: An 8-week Beginner's Guide to Meditation and Mindfulness* by Jeena Cho and Karen Gifford
- *In the Body of the World: A Memoir of Cancer and Connection* by Eve Ensler
- *Transforming the Pain: A Workbook on Vicarious Traumatization* by Karen Saakvitne and Laurie Anne Pearlman
- *Trauma Stewardship: An Everyday Guide to Caring for Self While Caring for Others* by Laura van Dernoot Lipsky and Connie Burk

Organizations

- The Compassion Fatigue Awareness Project promotes awareness and understanding of compassion fatigue and its effects: http://compassionfatigue.org.
- *Psychology Today* has a therapist finder to assist in locating a therapist in your area and can narrow down by topic, such as trauma, depression, and substance abuse: https://www.psychologytoday.com.
- Suicide Prevention Lifeline is a 24-hour crisis hotline and website offering a chat option: http://www.suicidepreventionlifeline.org.
- Texas Lawyers' Assistance Program provides confidential help for lawyers, law students, and judges https://www.texasbar.com/TLAP.

Other goodies

- *Above The Law*, a blog providing news and commentary about the U.S. legal profession: http://abovethelaw.com.
- The Professional Quality of Life Scale is a self-scoring instrument that measures compassion satisfaction, burnout, and secondary traumatic stress. Take the assessment at http://proqol.org.
- *The Resilient Lawyer* podcast is available on iTunes. ❇

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emotional support, these connections can be a lifeline. Think also about the kind of support and encouragement you can provide your colleagues. It doesn't have to be sappy or sentimental, but it helps to have someone you can talk to when a case really gets under your skin. Outside of work, make space for connections. Friends, family, and even volunteer work can help you feel that there is more to life than your work persona and that life is more meaningful than the crime and punishment we're mired in every day.

I also remember a quote by Fred Rogers of "Mister Rogers' Neighborhood," which resonated with me. When he was a child and he saw something frightening on the news, his mother would try to find out who was helping the people who were hurt. "'Always look for the people who are helping,' she'd tell us," he said in an interview. "'You'll always find somebody who's trying to help.' So even today, when I read the newspaper and see the news on television, I look for the people who are trying to help."[7]

This incredible piece of wisdom has become part of my strategy to transform despair when I work on a case or navigate a family through a trial. I intentionally pay attention to the many acts of kindness and compassion that usually surround tragic events. We had a case in our jurisdiction of a horrible auto-pedestrian crash where the defendant drove through a crowd of people, killing four and injuring many others. (You can read about it at http://www.tdcaa.com/journal/charging-capital-murder-sxsw-tragedy.) It was overwhelming to think of the tidal wave of pain this man caused. In hearing stories from witnesses and victims, I reminded myself that one person did something evil and created a horrible tragedy, but in the midst of that were dozens, even hundreds of people whose compassion moved them to act: a bystander holding the hand of a stranger lying on the ground; people taking off their shirts to cover injured victims because it was a chilly night; a man waiting at the hospital for someone he didn't know, just so that that injured victim wouldn't be alone; people donating money for funerals and therapy; and hundreds praying earnestly for total strangers.

Emergency measures

Given the statistics on depression, substance abuse, and suicide in our field, it is important to know how to reach out for help, either for yourself or for someone else. One of the best resources for attorneys practicing in Texas is the Texas Lawyers' Assistance Program (TLAP), a service of the State Bar of Texas. TLAP provides confidential help for lawyers, law students, and judges by phone or email. They are peers who are passionate about helping others in the field and provide life-saving peer support programs and CLE. You can call for yourself or call if you're concerned about a colleague at 800/343-8527.[8]

If you work for a governmental entity, you likely have access to an employee assistance program that can provide crisis intervention and resources for ongoing support. The same therapy appropriate for crime victims is also recommended for help with secondary trauma, so finding a therapist who specifically treats trauma is important. Lastly, if there is a concern about suicide, the National Suicide Prevention Lifeline is available 24 hours a day at 800/273-8255.

Conclusion

You are here for a reason, whether you believe you were called to this work or just find it exciting and interesting. We aren't going to change the nature of it, but we do have control over who we are in the midst of it. Don't run from your feelings. Pushing them underground doesn't eliminate them, it just buries them. Much healthier is to recognize in the moment that you're sad, horrified, or overwhelmed by whatever is going on around you, and you can then focus on breathing and staying present. Find one or two safe people at work to debrief with, and be available for them when they need to talk as well. Using the suggestions above, create a plan for yourself to manage stress, take care of yourself, and cultivate hope and meaning.

I'd like to close with a quote from Iain Thomas: "Be soft. Do not let the world make you hard. Do not let the pain make you hate. Do not let the bitterness steal your sweetness. Take pride that even though the rest of the world may disagree, you still believe it to be a beautiful place." ❇

Endnotes

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The changing state of DNA analysis

Recent changes to how labs analyze DNA mixtures caught prosecutors by surprise last fall, but there's really nothing to worry about. Here's the latest on these analyses, the lab reports, and how to get the information in front of a jury.

By Kevin Petroff
First Assistant Criminal District Attorney in Galveston County

I kept going back and forth between the two documents. In one hand, I was looking at a DPS Crime Lab DNA report from 2014. It said that the DNA found in the fingernail clippings from my murder victim contained a DNA mixture that included my victim, and that my defendant could not be excluded. In fact, the report stated that the probability of selecting an unrelated person at random was 1 in 152.1 million—which sounded like pretty good odds that it was my defendant. This was great evidence and had been a basis for my indictment.

But in my other hand was a 2015 DNA report from the same agency that said the DNA profile from the very same fingernail clippings was consistent with a mixture, but that "no interpretable DNA profile was obtained." This was troubling.

My panicked phone call to the DPS crime lab put me in touch with DNA Technical Leader Andrew McWhorter. As we spoke, he walked me through the problems with the method of statistical analysis that DPS and other labs around the country were using. The new lab results came from a re-analysis in response to these problems.

But there was some good news also. First, there hadn't been any issues in the actual testing of the DNA. The process of extracting and developing DNA profiles has not changed. And secondly, a new method of statistical analysis for DNA was being put in place that would give me more accurate, consistent results. I asked McWhorter to help me understand what had caused this shift and how the new testing would result in better evidence, and this article is intended to help other prosecutors understand what has changed and how that affects admitting DNA evidence in court.

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The problem

The first indication that there was a problem came in late 2015, when DPS sent a letter notifying the criminal justice community about issues with the Combined Probability of Inclusion (CPI) method of calculating statistics for DNA mixtures.[1] Now, I have presented DNA evidence to juries many times, and I never remember hearing the term "CPI" or having much understanding as to how these numbers were generated. What I do remember was the language used in lab reports that we emphasized before the jury: "The probability of selecting an unrelated person at random who could be the source of this DNA profile is approximately 1 in 357.3 quintillion. …"

Upon introducing this language to the jury, I had learned to have the analyst write that number on a large white pad in front of the jury so we could all count the zeros. It was dramatic and convincing testimony. Often, the report would conclude with an even better statement: "To a reasonable degree of scientific certainty, [the defendant] is the source of the profile (excluding identical twins)."

And that was all I knew about DNA statistics. But in speaking with scientists at DPS and after attending a few forensic science seminars, I began to have a layman's understanding of the problems in this analytical method.

The CPI analytical method initially worked simply by looking at the DNA data at a specific location, then using that data in its comparison with another profile. This method was used by most labs across the country. But in an effort to demonstrate consistency in forensic DNA testing, the National Institute of Standards and Technology (NIST) ran a study in 2005 involving 69 different DNA labs.[2] The labs were asked to analyze four two-person DNA mixtures. The NIST found a wide range of variation in results between labs, and even within labs.[3] This variation created concern for some in the scientific community.

Five years later, the Scientific Working Group on DNA Analysis Methods (SWGDAM) released guidelines for using the CPI method.[4] One of the recommendations was that labs use a threshold (known as the Stochastic Threshold) in its DNA analysis. Using this threshold would mean that when looking at the DNA data at a specific location, the analyst would use only data that rose above the new threshold in comparing it with another profile. Data below the threshold would be ignored.

But the guidelines from SWGDAM were only that—guidelines. Not every lab incorporated a threshold, and those that did placed the threshold at different levels. Consistency became a serious problem. In 2013, NIST ran another study with far more complex mixtures sent to 106 labs from 45 states and Canada.[5] The results weren't any better, with findings that were "all over the place."[6] This included significant variations in statistics and some erroneous inclusions and exclusions in the more complex cases. Then, in 2015, the new Washington D.C. Crime Lab was shut down after an audit by the National Accreditation Board found that the lab's interpretations on DNA mixture cases were not in compliance with FBI standards.[7] At that point, the media began taking notice.

Naturally, I had several concerns after hearing all of this. First, inconsistency between labs was a huge problem. I had been under the impression that statistical analysis in DNA was far less subjective than it apparently was. Secondly, I didn't want to be using data that was suspect or that analysts weren't confident in. But on the other hand, I also didn't like the sound of simply ignoring data in a DNA mixture just because it was below a certain threshold. What if the evidence in that mixture exonerated my suspect or defendant? That was something I needed to know.

The response

Now, to be clear, this problem wasn't the result of scientists cutting corners or trying to be misleading. As the Texas Forensic Science Commission wrote:

> This finding does not mean laboratories or individual analysts did anything wrong intentionally or even knew the approaches fell outside the bounds of scientific acceptability, but rather the community has progressed over time in its ability to understand and implement this complex area of DNA interpretation appropriately.[8]

In fact, labs in Texas began to work closely with the Texas Forensic Science Commission to address these problems. In September 2015, the Texas Department of Public Safety issued the notification that there was an issue with CPI statistics and gave each jurisdiction a list of DNA cases

potentially impacted by the issue.[9] In November 2015, TDCAA issued a letter to prosecutors on how to notify defendants and defense attorneys with cases potentially affected by this issue.[10] Many DA offices across the state have been providing that notice since then. In addition, attorneys at the Harris County Public Defender's Office are performing an initial screening for those defendants asking for re-testing.[11]

Which all leads back to that second lab report for my fingernail scrapings. The reason that my results went from "1 in 152.1 million" to "no interpretable profile" is that DPS, like many labs, re-analyzed cases using a much higher threshold. In fact, some critics argued that it was moved too high. In February, after prosecutors expressed concerns that the threshold was so high that results in a significant number of cases lost any evidentiary value at all, DPS lowered the threshold to a level that was still in accordance with SWGDAM guidelines.[12] In my case, the second set of lab results had come before the threshold was adjusted in February, so I needed to decide whether I wanted a third set of CPI results in my case with the new threshold.

A proposed solution

The good news is that most Texas labs are moving toward a new type of statistical analysis called Probabilistic Genotyping. This is a major shift from the statistics focusing on the "probability of inclusion" to a "likelihood ratio" calculation. It helped me to understand this difference by looking at the new language that would be used in lab reports. Instead of the "*probability of selecting an unrelated person at random*" language of CPI, the likelihood ratio in a DNA mixture would read as:

> The DNA profile is interpreted as originating from two individuals, and KMP [the victim] is an assumed contributor. Obtaining this profile is 26.1 quintillion times more likely if the DNA came from KMP [the victim] and Edgar Q [the suspect] than if it came from KMP [the victim] and one unrelated unknown individual.[13]

So in a nutshell, instead of comparing the odds of finding an unrelated person at random who matches a suspect, we are looking at how much more likely it is that the suspect is present than not present. While this distinction in the type of statistics might not seem like a big deal for the jury, how those numbers are obtained is important. Unlike with CPI, an analyst will no longer have to ignore data from a DNA mixture if it falls below a set threshold. Instead, all the data available will be considered and given a weight according to the levels of DNA present. Those weights are then used to calculate statistics in a likelihood ratio. The biggest advantage of using likelihood ratios is that analysts are no longer ignoring data; rather, they're using everything they find in their analysis.

The way that a likelihood ratio works is that opposing scenarios are compared. For instance, the comparison on a DNA mixture analysis from a rape kit might look like this:

Scenario 1: known victim + suspect

(as opposed to)

Scenario 2: known victim + unknown individual[14]

The numbers in the lab report state how much more likely the first scenario is (suspect is included) than the second scenario (suspect is not included) in this particular mixture. In all calculations, the software concedes all doubt and uncertainty to the suspect. DPS also dropped the language regarding the "reasonable degree of scientific certainty" language at the end of the CPI reports. There are some limitations, however. Currently DPS cannot obtain a likelihood ratio in a DNA mixture with more than four people in it.[15]

That's about as much of the science as I understand. Practically speaking, this analysis is run with software and computers. The software uses algorithms to compare every likelihood of these different scenarios. Currently there are at least two competing brands of software that can provide a likelihood ratio: STRmix (pronounced Star Mix) and TrueAllele. While DPS and the FBI have chosen to use STRmix, some counties have used TrueAllele on a case-by-case basis. While I am sure there are some differences between these two products, the biggest issue that has arisen is that the STRmix creator is willing to share the "source code," or the ingredients of the program, with the State or the defense if requested in a case. At this time, TrueAllele is refusing to provide that information.[16] I know that some in the defense bar have made an issue of this, so keep that in mind.

Currently, all DPS labs have implemented STRmix and most have completed validation and training. Other labs in larger cities are also following this approach. The Southwestern Institute of Forensic

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Sciences in Dallas County is currently in the validation stage of using likelihood ratios, and the Harris County Institute of Forensic Sciences is in the contract negotiation process for this software. While the Bexar County Criminal Investigation Lab has not yet begun that process, I was told that they are moving in that direction in the next couple of years. The Texas Forensic Science Commission is also working to move all labs in this direction.

If you are using a lab that isn't yet using likelihood ratios, you needn't fear. None of this means that CPI analysis is no longer valid science or evidence. But expect to prepare your analyst on whether or not the lab is following the SWGDAM guidelines regarding thresholds, and anticipate some cross-examination on the issues that labs across the country have had with CPI. The Texas Forensic Science Commission is an incredible resource in obtaining some of this information.

The courtroom

Of course, all of this change is useless if we can't present these results in the courtroom. But there is some good news here as well. Likelihood ratios from DPS labs using STRmix have been admitted into evidence already in Smith and Bexar Counties. Additionally, prosecutors in Harris County have successfully admitted likelihood ratios from TrueAllele. Courts in several other states have also found this evidence to be admissible, including New York, Michigan, and California. The thing to remember is that nothing has changed in the actual DNA testing, so predicates that prosecutors have been using for years will change only in terms of the statistical analysis.

I spoke to Brazoria County Assistant Criminal District Attorney Brian Hrach, who successfully admitted STRmix analysis in trial after a *Daubert/Kelly* hearing in April. Because he had both CPI results and STRmix results in his case, he had Houston DPS Crime Lab Analyst and DNA Technical Leader Andrew McWhorter testify about the limitations of CPI and the shift towards using likelihood ratios. McWhorter drew a diagram for the jury explaining thresholds where data falling below would be ignored and compared it to the new method of weighing all the data present. At that point, Hrach focused on the following predicate issues:

- validation studies the lab had done on STRmix;
- other states and countries that have used STRmix where it has been accepted in court;
- training by the analyst and within the lab on STRmix;
- changes in reporting the statistics;
- peer-review journals regarding STRmix; and
- source code availability with STRmix.

Over time, as this evidence is admitted in more Texas jurisdictions and prosecutors are trying cases where there are not multiple lab reports with different statistics on each, the process should be even more streamlined.

The defense in Brian Hrach's *Daubert/Kelly* hearing, however, focused on a couple of interesting issues in his cross of McWhorter. First, the defense attorney referenced a letter from TrueAllele's parent company, Cybergenetics, to the FBI in response to the FBI's notice of intent to purchase STRmix.[17] In that letter, the author makes several claims against STRmix and sets forth why TrueAllele is a better product. While such a letter may be business as usual for competing scientific companies, make sure to have a copy of the letter and discuss it with your analyst.

The second issue that the defense attorney raised was in regards to software and hardware requirements and issues in using STRmix. These issues were raised in both the hearing and before the jury, and it seemed to be a strategic decision to reduce this complex analysis to the simple product of a government computer in order to alienate those judges or jurors with a distrust of the government or technology. Fortunately, DNA analyst Andrew McWhorter and prosecutor Brian Hrach were able to explain that the computer was simply using complex algorithms to quickly compare multiple scenarios to generate a likelihood ratio, which seemed to put the jury and judge at ease. The likelihood ratio statistics were admitted over objection, and the defendant was found guilty of aggravated robbery and sentenced to 55 years in prison.

In conclusion

In the end, my concern over my shrinking DNA results is alleviated by the knowledge that my fingernail scraping evidence is being re-analyzed using all the potential DNA data, and that I'll receive that report with likelihood ratio statistics in a few weeks. I'm also encouraged by

the growing number of counties that are preparing to present this evidence in courts soon. Our goal as prosecutors is to always seek out the most accurate evidence possible, regardless of how it affects the case.

It's also important to understand that Texas has led the way for the rest of the country in addressing these issues in crime labs, and Texas prosecutors have set the standard for providing notice to defendants and requesting re-analysis in these potential problem cases thanks to the assistance of TDCAA, the Texas Department of Public Safety, the Harris County Public Defender's Office, and the Texas Forensic Science Commission. We really have nothing to fear with these new methods of statistical analysis. ❇

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11 February 25, 2016, letter to Robert Kepple from Bob Wicoff, Chief, Appellate Division, Harris County Public Defender's Office, www.tdcaa.com/content/texas-dna-mixture-review-project.

12 Interview with Andrew McWhorter, DNA Technical Leader, DPS Crime Lab in Houston.

13 Texas DPS Mixture Interpretation Update 2016, Andrew McWhorter, Technical Leader, DPS Crime Lab in Houston.

14 *Id.*

15 *Id.*

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17 Letter to Jerry D. Varnell, Contract Specialist, Federal Bureau of Investigation dated April 1, 2015, from Mark Perlin, Chief Scientific and Executive Officer, Cybergenetics, www.cybgen.com/information/newsroom/2015/may/Letter_to_FBI.pdf.

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Gerald Summerford Award winner

Congratulations to Sherine Thomas, an assistant county attorney in Travis County and outgoing Civil Committee Chair (on the left in the photo) who was honored with the Gerald Summerford Civil Practitioner of the Year Award at TDCAA's Civil Law Seminar in May. Jim Collins (at right in the photo), also an assistant in Travis County, presented the award.