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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

A new ICE age

With the Immigration and Customs Enforcement's recent crackdown on illegal immigrants, many crime victims are scared. Here's how one prosecutor office continues seeking justice when victims and witnesses are hesitant to come forward.

"No quiero problemas." *I don't want problems.* As prosecutors along the Texas-Mexico border, we hear this statement with increasing frequency from our undocumented immigrant community. In our first years of working at the office, most prosecutors could assure our undocumented crime victims and witnesses that they could attend court settings and testify in the State's case without fear of being taken into immigration custody. This is no longer true along the border and across the State of Texas.

By Michael Morris and Lauren Renee Sepulveda
Assistant Criminal District Attorneys in Hidalgo County

On February 9, 2017, shortly after President Donald Trump signed an executive order expanding the categories of undocumented immigrants eligible for deportation, Immigration and Customs Enforcement (ICE) agents showed up outside an El Paso County courtroom and detained Irvin González, a transgender woman and undocumented immigrant, who was in court seeking a protective order against an abusive ex-boyfriend.[1] After the hearing, she was taken into custody, and the story exploded internationally. Several media outlets reported that González's abusive ex-boyfriend was the person who called immigration authorities on her. El Paso County Attorney Jo Anne Bernal was quoted in media stories that she couldn't remember a time in her 23 years at the courthouse that immigration officials ever targeted a person seeking a protective order in court.[2] Many prosecutors in our office worried that the newly enforced immigration guidelines might mean that undocumented crime victims and witnesses would be reluctant to report crime and cooperate with investigations. We were also concerned that defendants had new incentive to call immigration authorities to report their victims.

Predictably, amid this backdrop of growing deportation fears among the undocumented community, the reporting of crime—especially sexual assaults and domestic violence—in the Hispanic community has fallen.[3] This past March, Houston Police Chief Art Acevedo reported that the number of Hispanics reporting rape in his city is down 42.8 percent, and the reporting of other violent crimes has dropped 13 percent from the first quarter of 2016.[4] These numbers fell despite an overall increase in crime reporting in the Houston area.[5]

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Foundation golf tournament

By Rob Kepple
TDCAA Executive Director in Austin

Every year, in conjunction with TDCAA's Annual Criminal and Civil Law Update, the Foundation hosts a golf tournament on the Wednesday morning before the conference. I want to thank **Nelson Barnes** and **Mike Waldman**, ADAs in Bell County, for being the longtime directors of the tournament. We could not do it without them!

This year TDCAA golfers are in for a treat. The Foundation will host the tournament at the historic Brackenridge Park Golf Course just north of downtown San Antonio. The course is the oldest 18-hole public golf course in Texas, has hosted numerous PGA tournaments, and was the first course inducted into the Texas Golf Hall of Fame. Your $65 green fee is a great way to support the Foundation.

As usual, we will have a shotgun start at 8 a.m. A flyer was mailed to all staff members in Texas prosecutor offices with the brochure for the Annual Update; you can also download one by clicking on this link. Just fill out and return the flyer to register.

The likes of Byron Nelson and Sam Snead have won the Texas Open there, so sign up for the tournament today and have the chance to walk (swing?) in the footsteps of the greats! ❇

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The Annual Update is heading to San Antonio!

By Rob Kepple
TDCAA Executive Director in Austin

Our annual conference in September (this year it's September 20–22) has grown to a 1,000-person event in the last five years. Our challenge has been to find convention space that can accommodate our crowd—and on a modest, government-funded budget. That has meant going to the coast in hurricane season, which has actually worked out pretty well for us. We have loved Galveston, South Padre Island, and Corpus Christi, and we have been washed away only twice in the last 20 years. But, when surveyed, y'all have said loud and clear that you'd like a shot at heading to San Antonio and Fort Worth every now and again for our Annual Criminal & Civil Law Update.

I am thrilled that our meeting planning team has worked hard to get us on the San Antonio River Walk this year. Because we are meeting in the heart of a tourist district, we have made some changes in our social event schedule. The conference will be at the Henry B. Gonzalez Convention Center on the River Walk, which is within walking distance of our host hotels, restaurants, and entertainment (we will still have shuttle buses running from the hotels to the convention center so attendees can easily get from one to the other). The Texas District and County Attorneys Foundation will again sponsor the Wednesday night reception, which will be our main gathering. To make it even more special, we have rented out the entire Dave & Busters location on the River Walk, which promises food, drink, and a great time.

On Thursday, we are going to change it up: We will not seek to compete with the charm of the River Walk by holding a separate dinner reception in a convention center room or hotel ballroom. Instead, we have worked with a number of restaurants on the River Walk to serve as TDCAA "host" venues for Annual attendees to gather and socialize. These venues will offer various discounts for conference attendees, and you'll be able to enjoy an evening with your fellow prosecutors and staff up and down this historic location.

This is going to be a great training and a great gathering for our members! I look forward to seeing you there.

Hate crime enhancements

In this legislative session, the legislature passed **HB 2908**, which adds law enforcement officers to those protected by the Texas hate crimes statutes. There was a lot of debate about the efficacy and utility of doing that. Earlier this year we spent some time talking to a reporter who was doing a story on hate crimes and the statutes themselves. He ended up publishing a thoughtful piece on the subject, which you can read at www.texastribune.org/2017/04/12/hate-crime-law-results-few-convictions -and-lots-disappointment.

Because we were deeply involved in the passage of the Texas hate crimes statutes, I thought I would share a historical perspective. First, the issue raised by the reporter in the article is not new: Why don't prosecutors use the hate crime enhancements more? After all, it is a pretty straightforward enhancement statute. If the judge or jury makes a finding that the offense was committed because of bias or prejudice under Art. 42.014 of the Code of Criminal Procedure, the penalty is enhanced under §12.47 of the Penal Code. In addition, there are some mandatory prison and jail time conditions for those defendants getting community supervision in the Code of Criminal Procedure's Art. 42A.501 (although that article contains some outdated language relating to the eligibility for probation for those who commit murder). So, is the dearth of hate-crime indictments and trials simply because proving a hate crime is too complicated and prosecutors aren't educated about this enhancement?

The short answer is no. When the James Byrd Jr. Hate Crimes Act was passed in 2001, there was a good public discussion at the legislature about the realistic ability of law enforcement and prosecutors to use the statute. The law does indeed offer some good enhancement potential; the best opportunities are when prosecutors have the chance to enhance a Class A misdemeanor assault to a felony, or an aggravated assault from a second-degree to a first-degree felony. But on the flip side, the legislature knew that: 1) police seldom have a suspect in hate crimes; 2) we will often not have suf-

ficient evidence to prove the bias motivation beyond a reasonable doubt; or 3) we can already get a great punishment range under the current Penal Code scheme. So why pass a statute that won't be used very often?

Let's look at it from our legislators' perspective. Their job is to address problems, and they can do that only by passing legislation. Even if the penal law they pass won't be used often for any number of reasons, the issue of hate crimes is real. If nothing more, they want to make a policy statement through our criminal laws. Indeed, a lead senator back in 2001 said just that: If nothing more, they will make a statement about the state's view of hate crimes.

To that I say, "Fair enough." I have come to see the Penal Code as a two-thirds/one-third deal. Two-thirds of the code belongs to prosecutors—that's the stuff we use on a regular basis. One-third of the code belongs to the legislature, which uses it to make policy statements. As long as their one-third doesn't mess up our two-thirds, that works fine. And in the case of the hate crimes statute, we have a valuable policy statement that sometimes we can actually use in some cases, so it is a win-win.

Let's turn back to HB 2908. This bill was motivated in part by the dark events in Dallas last summer, where five officers were killed and another seven wounded during a protest. We know that even if there had been a suspect to prosecute for the hate-motivated murder of five police officers, we wouldn't need a hate crime enhancement law to do it. (The suspect in the Dallas ambush was killed after authorities cornered him in a parking garage the night of the crime.) Our legislators knew that too, but they wanted to make a policy statement about such attacks, and from that perspective their action makes sense. So next time you look at an enhancement statute or other newfangled crime that you don't think you will use much, keep in mind the legislature's message and motivation.

This is also a good reminder that you as a prosecutor can use the statute, and there may be a time and a place for you to send a message as well by following through with an enhanced case. Indeed, the Harris County DA's Office recently filed an aggravated assault case that is enhanced with the hate crimes law to a first-degree felony. It sounds from the news report that it was the perfect time to unleash the law: www.chron.com/news/houston-texas/article/Suspected-member-of-Aryan-Brotherhood-arrested-11118877.php.

Our crime-writers are at it again

I like to read the (written) work of prosecutors who draw on their experience to write crime novels. I have talked about **John Bobo**, a former prosecutor who started with "The Best Story Wins—and Other Advice for New Prosecutors." He caught the bug after that success and has written a couple of good crime novels since then. But his forte may be in short stories. You really need to go to Amazon.com and check out his two latest offerings: "Taser-Burned Badass: A Short Story," and "My PTSD Diary: A Short Story of Homicide, Washing Hookers' Feet, and Mandatory Police Counseling."

And mark August 22 on your calendar, because that is when Travis County ADA **Mark Pyror**'s fifth book in his Hugo Marston series hits the bookshelves. It is titled *The Sorbonne Affair*, and I'm looking forward to it for some late-summer reading.

Evolution of our Key Personnel and VAC Boards

In 2006, the TDCAA Long Range Planning Committee recommended that our association enhance its ability to help prosecutor offices deliver timely and accessible victim services. We did so by creating a victim services section, complete with its own governing board. The Victim Services Board has done a great job of helping our offices with their delivery of services to victims of crime and of guiding our victim Services Director, Jalayne Robinson, in how to serve and train offices.

Fast-forward 10 years. We have discovered that although there are some different issues, the work of the key personnel staffers and VACs intersect on a daily basis. By separating the groups into two boards, we lost some of the communication that is the cornerstone of good governance. So representatives of the two boards gathered in Austin to discuss a solution. After a great discussion, they agreed to bring the two boards back together with some additional structure to be sure that key personnel and VACs are well-represented and can work together as a team. (You can read more about it on page 16.) In my view, this is a great solu-

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tion that makes our association more effective. Thanks for your work and dedication to the cause!

Toward more picturesque speech

You don't see a hard copy of *Reader's Digest* in your doctor's office waiting room anymore, but many of us recall one of the best parts of that magazine, the regular feature called "Toward More Picturesque Speech." Because words are a lawyer's stock in trade, my ears perk up when I hear a great turn of phrase or an innovative use of our language. If you want to learn from the best, you need only listen to English soccer announcers during a match. I heard one who had turned his trade into an art form when, enthusiastically announcing a player scoring a goal, he shouted: "Ahhh, he's wrapped himself in glory!" *That* is the way to bring people along with you.

I don't think we are doing near as well these days in our public discourse. Most of our new words sound more like advertising soundbites: words like "re-imagined," "re-invented," "re-accommodate" (thank you, United Airlines). And during this last legislative session, we heard some new ones: "transactivists" (activists on transgender issues), "re-calibration" (reducing penalties for crimes), and being "evidence-informed" and "evidence-based" (do you know the difference? You're evidence-informed if you've read up on a subject; evidence-based practices are validated by some form of scientific data). And if we take one more "deep dive" into an issue (that term surfaced over and over again at this year's legislative session), I am giving up my Professional Association of Diving Instructors card and not going near the water ever again.

So, prosecutors, let's step it up with our words. Let's wrap ourselves in glory somehow!

Congratulations, Kenda Culpepper

Congratulations to our Rockwall County Criminal District Attorney **Kenda Culpepper**, who was recently honored with the Standing Ovation Award for contributions to the State Bar of Texas' continuing training efforts. Kenda has been involved in state bar training since 2011, and she capped her service as the Course Director for the 2016 Advanced Criminal Law Course. A job well done!

Tom Moore Jr.

We lost a prosecutor legend when former McLennan County District Attorney **Tom Moore Jr.**, passed away in April. Tom was a well-respected prosecutor and long-time practitioner who earned the singular right in his storied career to appear in court without a tie. I recommend you take a look at the article here: www.wacotrib.com/news/courts_and_trials/former-da-legislator-tom-moore-leaves-colorful-legacy/article_b4316007-93a1-59a2-ab7e-063db020b8cc.html. We can only hope to have careers as rich.

My favorite anecdote recounted in the article is not a prosecutor story but one from his days in the legislature—Tom introduced a resolution honoring **Albert DeSalvo** (also known as the Boston Strangler) for his "pioneering work in population control," to make the point that legislators frequently don't take the time to read bills before they vote. I like the message that even in serious business, there is a place for humor. ❇

Taking on mental health issues with what you have

By Randall Sims
District Attorney in Armstrong and Potter Counties

Our felony criminal justice system consists of this office and five district courts, three of which also have jurisdiction in Randall County, which is outside of my jurisdiction. In 2007, our jurisdiction started an accountability court for probationers with technical violations. After a couple of years, we realized that a vast majority of those in the program had drug problems, so we modified it into a drug court in 2009. In 2014, we added a re-entry court for those returning from Substance Abuse Felony Punishment Facilities (SAFPFs). So we have a history with specialty courts in this jurisdiction.

Most recently, in 2016, we implemented a year-long, felony-level, pre-trial diversion program for veterans and those with mental health issues—using no additional funding. To get it off the ground, we included people from the offices of the district attorney, probation, county jail, the local mental health community (Texas Panhandle Center), Veterans Affairs, community mental health care providers, graduate students at West Texas A&M University, and the local defense bar. It has been a huge win for all involved, and it hasn't cost taxpayers an extra penny.

Launching the program

When District Judge Nancy Tanner ran for office a couple of years ago, one of her top priorities was to work on the huge mental-health issues in our county jail. Upon taking office January 1, 2015, she hit the ground running with this issue by gathering us stakeholders to come up with a plan for helping defendants (whether they'd committed misdemeanors or felonies) with mental illness.

After about a year of development, a mental health docket for misdemeanors was launched. As for felonies, we considered both a veterans' court and a mental health court. Both offered features we liked, but both would have required additional funding that was nonexistent in our county. We didn't even have enough money for one, much less two, specialty courts. Plus, if we chose one over the other, we would be leaving out people who needed help. That was unacceptable to me and to Jason Howell, an assistant district attorney whom I hired in June 2015. Jason came to us from the Galveston County Criminal District Attorney's Office, where the elected CDA, Jack Roady, had Jason working on that office's mental health program. Jason and I (mostly Jason) decided to develop our own mental health program utilizing the assets available to us.

We wanted to address the increasing number of defendants who are either veterans or who have a diagnosed mental health condition or traumatic brain injury. After investigating the traditional mental health and veterans court programs, we decided to implement a home-grown, pre-trial diversion treatment program on a small scale (to gather data and work out the kinks before launching a massive system). We reached out to various groups to be part of the program (more on that later), and not one person turned us down! From the beginning, Jason and I were very optimistic about the plan we developed. Each team member was very excited and glad to be a part of the group that would implement this program.

We intentionally kept the number of participants low (just five people) to see how the idea would work and to keep it manageable. We also limited eligibility to those charged with nonviolent offenses. (Those offenders charged with assaults are also allowed to apply but are very heavily scrutinized. We made this exception because mental health issues are sometimes the root of violence.)

The first call

Our first step in building the program—the most important—was to contact West Texas A&M University. We have found that local colleges and universities are a severely under-utilized resource for the criminal justice

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system, and we needed the buy-in of those at the university or we were dead in the water.

Students who are working on their master's degrees in counseling must have at least 300 hours of actual counseling experience to earn their degrees, and it can be difficult for them to fulfill this requirement. We had the idea to use these graduate students as the counselors for our diversion program, which would serve the dual purpose of earning counseling hours for them and providing (free) therapy to those participants in the program. The students and their professors leapt at the chance to help.

Our program utilizes graduate students as counselors and case managers for the participants, and a professor oversees their work. The goal is to keep this as a treatment-based plan rather than a criminal-justice-based one. By employing counselors (rather than law enforcement or probation officers) as the main point of contact, participants are more inclined to be honest with the staffing committee (more on that in a bit) when failures occur, and they get access to mental health treatment that they may not otherwise receive in the community. Participants can also visit with counselors via video calls if an in-person visit is too difficult. It is a win-win for both the grad students and the program participants. It has also saved tax dollars in allowing defendants to participate without having to pay for mental health services.

Staffing committee

The next step was deciding who should be on our staffing committee; this is the group of people making decisions about the program and its participants. They meet with the participants outside of court, make recommendations to the judge, and propose changes and improvements to the program as a whole. We wanted to include a diverse group to get as much input from all of the different parties as possible and to show participants that an entire community is behind helping them to succeed. The staffing committee includes prosecutors from our office, probation officers, professors and grad students from West Texas A&M, mental health staff from the sheriff's department and county jail, VA officials, medical professionals, and the Panhandle Defense Bar. Having a large and diverse committee was problematic at first because everyone has his own perspectives and experience, and it is difficult to bring everyone together for meetings, but the program has wider support with a larger staffing committee because so many groups have "skin in the game."

Traditional veterans' and mental health courts typically have an administrative or overseeing judge, but we chose a different path for our jurisdiction. Because we started this treatment program as a pilot, we went to all of our district court judges and gave them a brief overview to let them know what we were doing. They have given their support, and at least one participant has come from each of the district courts. Because there is no overseeing judge, when the staffing committee makes a decision to approve a participant, impose a sanction, or to discharge someone (which luckily has not happened to date), the defense attorney and prosecutor simply hold a hearing in the originating court and present the decision to the judge for approval. Thus far, this approach has worked very well.

Where participants come from

Our program gets recommendations for participants from several sources. The VA Justice Outreach Program contacts our office when a veteran who might be a good candidate for the pre-trial diversion is incarcerated. Judges and trial prosecutors can alert the prosecutor in charge of the program (Jason Howell) that someone may be an eligible participant. Law enforcement, usually from the jail, are a source of referrals to this program as well, as is the defense bar.

After receiving notice of a potential candidate, we give the defense attorney the application to go over with her client. (There's a sample application on TDCAA's website.) To enter the program, we require a signed judicial confession because candidates must be competent to participate. If there is a question concerning competency, that issue must be taken care of before the process can continue. If a defendant declines to sign the confession, he will not be allowed to participate in our program.

The defense attorney turns in the application, any records she has obtained, and a signed HIPAA (Health Insurance Portability and Accountability Act) release. We require the HIPAA release so the staffing committee can talk with the counselors and medical professionals to come up with an individualized

treatment plan for each participant and to modify it as needed. Once the application, records, and HIPAA release are received, Jason gathers any documentation that will help in screening and assessing the candidate.

Once all the documentation is gathered, the staffing committee meets to discuss the candidate's entry into the program. We work with the candidate's current medical and mental health providers to write an individualized treatment plan. If there is no current treatment provider, the local mental health group and our West Texas A&M partners develop the treatment plan. After the plan is worked out and the staffing committee has given its stamp of approval, the prosecutor and defense attorney sit down with the candidate to verify that he wants to participate. The candidate must sign a contract with a judicial confession. (Again, there is a sample contract at www.tdcaa.com.)

Once all that has happened, there is a hearing in the original court with jurisdiction over the criminal case. The judge reviews the contract and treatment plan and then grants or denies the candidate's enrollment in the program. (There is a sample of the admonishments that the judge should give to the candidate at www.tdcaa.com.) The program lasts for one year, and after the participant has successfully completed the requirements, there is a graduation and dismissal hearing in the original court.

Not the easy way out

Some might think that a treatment program is an easy way out for defendants, but that is far from the truth. This is definitely not a "get out of jail free" card. Participants still have to meet with probation at least once a month, stay in constant contact with a counselor and case manager, keep up with medication, make VA appointments, attend Alcoholics Anonymous meetings or post-traumatic stress disorder (PTSD) treatment, and whatever else might be in his treatment plan. On top of all that, many times we include family counseling in the plan to develop a support network for the participant and teach him how to deal with the rigors of everyday life. Once a month, the participant must also talk to the staffing committee to report on his progress, any problem areas, and any necessary changes to his treatment plan. All of this is on top of any work and family responsibilities the participant may have.

We have had to address several issues to get participants on track and make the program run more smoothly. Generally, that has involved tweaking participants' treatment plans. For example, one participant attended a drug program three times a week and began showing signs of PTSD. We modified his plan to only two drug classes per week so we could add a session of family counseling for the PTSD; addressing the PTSD will also help with his drug issues. Another participant wasn't doing well in group therapy sessions, so we modified his plan to include only individual sessions to see if that works better for him.

Success so far

The pilot program is proving successful. Our first mental health treatment participant successfully completed the program and graduated in May, and our first veteran graduate is close to completion too—he was scheduled to graduate in June. All in all, it is a big win for our local community in tax-dollar savings, for graduate students receiving real-world counseling experience, and in reduced incarceration of veterans and those with mental health issues.

The 47th Judicial District Attorney's Office is in the process of expanding our program so that more defendants can access the treatment plans, get the support they need, and lighten the load on an already heavy-burdened criminal justice system. The future is very bright for our diversion program, and there is no reason why prosecutors in other jurisdictions can do something similar to what we've done. We took a vision and built a program the cowboy way: using what we had available. It took some effort, but know that there are others out there who can and will help—all you need to do is ask.

And that includes us. If you'd like to start a community-based treatment program in your area, feel free to contact us with questions—we'll be glad to help you. Included with this article at www.tdcaa.com are a few documents we prepared for this program. Feel free to use them in any way you wish, and don't forget to keep your white hat clean. ❇

National Crime Victims' Rights Week (NCVRW) events across Texas

By Jalayne Robinson, LMSW
TDCAA Director of Victim Services

During the week of April 2–8, 2017, communities across the United States observed National Crime Victims' Rights Week (NCVRW). This year's theme—"Strength. Resilience. Justice."—reflects a vision of the future where all victims are strengthened by the response they receive, organizations are resilient in the face of challenges, and communities are able to seek collective justice and healing.

The Office for Victims of Crime offers a resource guide each year that includes everything needed to host an event in your community. The resource guide may be obtained at http://ovc.ncjrs.gov/ncvrw/index.html, or materials may be requested by mail by signing up for the NCVRW mailing list at https://puborder.ncjrs.gov/Listservs/Subscribe_NCVRW.asp.

Numerous communities across Texas observed National Crime Victims' Rights Week (NCVRW). TDCAA would like to share photos and success stories submitted by a few of our members.

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

This year the Victim/Witness Division of the Harris County District Attorney's Office hosted our second annual painting event. We called the event Paint a New Path and invited victim service providers, crime victims, and their families to attend. Participants designed and painted on blank canvases an inspirational picture or message that will be displayed in our office. We provided lunch, and everyone enjoyed themselves in a relaxed, intimate setting. District Attorney Kim Ogg joined us and visited personally with everyone.

Jane Adams
Victim Assistance Coordinator, Lamar County and District Attorney's Office

Agencies that advocate for victims gathered in historic downtown Paris at the Culbertson Fountain to show support for victims of crime. The Third Annual Walk of Hope included law enforcement, CASA for KIDS, Shelter Agencies for Families in East Texas, Inc. (SAFE-T), our office's VAC, Junior CrimeStoppers, Boy Scouts, Big Brothers Big Sisters, the Children's Advocacy Center, the Department of Family and Protective Services, the Child Welfare Board, and members of the commu-

ABOVE: Harris County DA Kim Ogg (right) with VAC Jessica Ayala (left) visiting NCVRW event attendees. LEFT: Participants painted blank canvases that will be displayed in the Harris County District Attorney's Office.

ABOVE: Lamar County Detective Chris Bean (center) leads the Third Annual Walk of Hope. LEFT: Paris Police Department Officer Curtis Graham speaks at the Lamar County NCVRW event.

nity. We gathered for a hot dog lunch; a program including guest speaker Tom Gresham, the legal program director from SAFE-T; and live music with Krissy Green. The event culminated with a peaceful, one-mile walk with over 200 people carrying signs in support of victims.

Claudia Duran
Project Administrator, El Paso County District Attorney's Office

As National Crime Victims' Rights Week began, the El Paso County District Attorney's Office joined victim advocates, local law enforcement, families, and friends to pay tribute to crime victims and advocate for victims' rights through "Strength. Resilience. Justice." The annual memorial honored each victim who lost his or her life due to violent crime by ringing a bell after each name was read. To date, there are 1,596 names engraved on the Crime Victims' Memorial Wall.

Each year, the El Paso County District Attorney's Office hosts this event to bring the community together, raise awareness, remember loved ones, and provide support and comfort for one another. The Memorial Reading Garden continues to be a place for families and friends to reflect and remember, and it is our hope that we no longer add names to the wall.

RIGHT: People visiting El Paso County's Crime Victims' Memorial Wall. BELOW: El Paso County District Attorney Jaime Esparza (far right) speaking at an NCVRW event.

Cynthia L. Jahn, CLA, PVAC
Director of Victim Services, Bexar County District Attorney's Office

The Bexar County Criminal District Attorney's Office was privileged to collaborate with 40 different agencies this year to plan and participate in National Crime Victims' Rights Week. During the week, organizations that assist and serve crime vic-

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tims in Bexar County joined together to honor victims of crime and promote greater public awareness about their rights and needs.

We kicked the week off on Monday with a press conference announcing the start of National Crime Victims' Rights Week. Agency members gathered in a united community to bring awareness about crime and its aftermath, to advocate for victims' rights, and to educate the public concerning the services available to survivors of crime.

Later that day, members of the coalition participated in a Call-In Victim Hotline sponsored by our local ABC affiliate, KSAT 12. The public was given an opportunity to call in for information concerning the criminal justice system and referrals for victim services. We were able to assist over 200 callers.

On Tuesday, we all gathered in commissioners court to receive a proclamation dedicating this special week to victim's rights and services. It was an honor for the agencies present to receive a heartfelt thank-you for a job well done by our county's leadership.

Thursday was a busy day for us as more than 40 agencies gathered for our annual Victims' Tribute. This is a very special service dedicated to victims of crime and includes a memorial wreath-laying ceremony and the lighting of our victims' flame. The event was held in front of the historic Bexar County Courthouse where we were heard from the Honorable Crystal Chandler, Judge of County Court-at-Law No. 13. She shared with us her knowledge and experience in dealing with domestic violence cases and her work in seeing that justice is served for the thousands of victims of these cases annually.

As part of our Victims' Tribute, 40 individual wreaths were presented in honor of victims and victim service providers as our San Antonio Police Department and Bexar County Sheriff's Office Honor Guards stood at attention. A candle was lit by the family of a young homicide victim to honor him and all victims of crime in Bexar County. The release of 12 white doves was a beautiful moment. Individuals who represented an aspect of the criminal justice system released the doves: a victim; prosecution and law enforcement; social services; and the medical community. The event was concluded with a moment of silence, a special 21-bike salute from Bikers Against Child Abuse, and a peaceful adjournment as a bagpiper played "Amazing Grace." This is an extremely solemn but uplifting event.

ABOVE: Bexar County Criminal District Attorney Nico LaHood (and other leaders) held a press conference for NCVRW. RIGHT: "Cardboard Kids," where each figure represents abused children, were set up to bring awareness to child abuse in Bexar County. BELOW RIGHT: At the hotline (seated from left to right): Richard Loza with Texas Rio Grande Legal Aid; Linda Miranda with the Bexar County Sheriff's Office; Bridget Guzman with Bexar County Adult Probation; Maria Ledesma with Bexar County Adult Probation; and Cyndi Jahn with the Bexar County Criminal District Attorney's Office. Standing from left to right: Nico LaHood, Bexar County Criminal District Attorney, and Ursula Pari with KSAT 12 News.

Other events throughout this special week and the month of April included special activities for children within our local shelters; the "Cardboard Kids" campaign where over 70,000 cardboard figures representing abused children were revealed to bring awareness to child abuse in our community; National Denim Day; and various other agency events highlighting specific crimes such as DWI, domestic violence, child abuse, and sexual assault.

Although all this activity can be exhausting, I know it was worth all of the effort. Not only is it such a special time to honor victims, but the planning and events also really brings all the participating service providers together, allowing us to work as a cohesive unit. Is it hard work coordinating and planning NCVRW? It can be—but at the same time, we know that this week has truly made a positive impact on our community! So don't sit by next year and watch National Crime Victims Rights Week pass you by—reach out and make a statement, honor victims ,and say thank you to your community's service providers! Don't hesitate to contact me if I can ever be of assistance with ideas or planning tips for NCVRW.

Claudia Arnick
Victim's Assistance Coordinator, Dallas County Criminal District Attorney's Office

A grant given to Trauma Support Services of North Texas (a counseling center for local crime victims) allowed us to post a billboard to make the general public aware of National Crime Victims' Rights Week. We highlighted the stories of four crime victims, asking them to share a snippet of their story or journey from the crime and then emphasize how they were helped and how now they are overcomers. We asked them to tell us what got them to the point of having courage to talk about it. Dallas County Criminal District Attorney Faith Johnson attended and spoke words of encouragement to all who attended.

From left to right: Tiffany Lopez, Abigail Rodriguez, Deborah Carrion, and Claudia Arnick, all from the Dallas County Criminal District Attorney's Office.

Supporters and community resources were present too: the Crime Victims' Council of Dallas County, The Family Place, police agencies, victims' advocates, Texas Department of Public Safety, Texas Department of Criminal Justice's Victims Services Division, our regional coordinator of the North Texas area from the Office of the Attorney General's Crime Victims' Compensation, and Mothers Against Drunk Driving's North Texas Division, just to name a few.

Jack Roady
Criminal District Attorney in Galveston County

The Galveston County District Attorney's Office took part in a number of National Crime Victims' Rights Week events. This year's theme—"Strength. Resilience. Justice."—highlighted the need for victims of violent crime to have the necessary resources to allow them to heal and receive the fundamental justice they deserve. The events also recognized crime victims, survivors, and their family members in our community.

This year's NCVRW activities kicked off with a candlelight vigil and balloon release at the Texas City Police Department. Other events included a community ceremony observing the 20th anniversary of the disappearance of 12-year-old Laura Smither from Friendswood; a resource fair hosted by the League City Police Department featuring victim service providers from across the county to create awareness and distribute resource information; and

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a Crime Lab and Sexual Assault Examination Kit training session for law enforcement and criminal justice personnel. The week's observances concluded with a Crime Victims' 5K Walk along the Seawall in Galveston, in which survivors and family members, service providers, and District Attorney staff members and their families participated.

Amy Varnell
Victims Assistance Coordinator, Cass County District Attorney's Office

On March 28, the Cass County Commissioners' Court proclaimed the week of April 2–8, 2017, as National Crime Victims' Rights Week by signing a proclamation to reaffirm Cass County's commitment to victims' services and criminal justice responses. I set up an information booth in the foyer of the Cass County Law Enforcement and Criminal Justice Center during the week to make the community aware of crime victims' rights and the services available to them.

ABOVE (from left to right): County Commissioner, Precinct 1, Brett Fitts; County Commissioner, Precinct 2, Jon Borseth; Victim Assistance Coordinator Amy Varnell; County Judge Becky Wilbanks (seated); County Commissioner, Precinct 4, Darrell Godwin; and County Commissioner, Precinct 3, Paul Cothren, all in Cass County.

ABOVE: Folks gathering for the Annual 5K Walk in Galveston County. RIGHT (from left to right): Jack Roady, Galveston County Criminal District Attorney, and Gina and Ernest Mathews, Texas City Crime victim advocates, at a candlelight vigil and balloon release in remembrance of crime victims. BELOW RIGHT: Participants in the Annual 5K Walk in Galveston County.

Victim Impact Statement revision

This summer I have been invited to serve on the TDCJ-Victim Services Division's VIS Revision Committee. The committee will meet several times to review the format of the VIS form, VIS Quarterly Activity Report, "It's Your Voice" brochure, and VIS Recommended Processing Procedure. If you have suggestions that could aid our committee in making these documents user-friendly for victims as well as criminal justice professionals, please share your suggestions with me by email at Jalayne.Robinson@tdcaa.com.

VictimConnect resource

The VictimConnect Resource Center is a referral helpline where crime victims can learn about their rights and options confidentially and compassionately. VictimConnect can speak with victims in over 200 languages, and services are provided anonymously. The National Center for Victims of Crime operates VictimConnect, a nationwide victim resource center, under a grant from the U.S. Department of Justice Office for Victims of Crime.

Victims can reach VictimConnect by phone, text, or online chat, and VictimConnect can refer victims to over 15,000 local victim service providers. You can learn more at https://victimconnect.org or by phone at 855/4-VICTIM.

In-office visits

Thanks again to each of the offices who invited me to come out for victim services assistance. (Check out photos from my travels at right.) Traveling across Texas and visiting each of your offices is so exciting to me! It is such an honor to be able to help VACs and prosecutors recognize services and resources available for crime victims and to share ideas on how VACs may assist the prosecutors for which they work.

Please reach out to me via email at Jalayne.Robinson@tdcaa.com or phone at 512/474-2436, and I will develop either group or individualized victim services training for your office. ❇

TOP PHOTO: Assistant County Attorney Paige Pattillo and VAC Holly George in the Nacogdoches County Attorney's Office. ABOVE LEFT: County & District Attorney Patrick Wilson and VAC Barbara Anglen in Ellis County. ABOVE: VAC Shana Bullard in the 35th Judicial District Attorney's Office. LEFT: VAC Shea Clossin in the Leon County DA's Office.

Key Personnel and Victim Services Boards to merge

This fall, TDCAA's Key Personnel and Victim Services Boards will begin the process to merge the two boards back into one unified board.

By Diane Beckham
TDCAA Senior Staff Counsel in Austin

In 2011, as part of TDCAA's five-year, long-range plan, the Victim Services Board was created to allow for a more focused approach to planning training unique to Victim Assistance Coordinators (VACs). Like the Investigator and Key Personnel Boards, the new Victim Services Board elected representatives from each of the eight TDCAA regions. (A map of the regions is below.)

The Victim Services Board's primary responsibility was planning training for the VAC track at TDCAA's KP-VAC conference and for half of the courses on the KP-VAC track at the Annual Criminal & Civil Law Update. The Key Personnel Board met separately to plan the KP track at the KP-VAC conference and the other half of the courses for KPs and VACs at the Annual Update.

But about four years ago, the two boards began to come together in a single meeting to allow for better brainstorming to plan training, especially for the general session courses aimed at both KPs and VACs. The joint meeting went well, and the two groups found they had great chemistry. The board members worked so well together, it was difficult to tell which board members came from the KP board and which came from the VS board—members of both boards came to the annual spring planning meeting with great ideas for both tracks. Additionally, many members of the KP board actually worked either part-time or full-time as VACs—the KP bylaws define "member of key personnel" to include someone working as a VAC. (In fact, all four members of the current KP board are actually designated as VACs.)

At the same time, the two boards had a difficult time keeping all the positions filled, primarily because of turnover but also with frequent vacancies in a few TDCAA regions with smaller-sized offices. So when a new Long Range Planning Committee gathered in 2016 to map out TDCAA's plans for the next five years, one of the issues the committee addressed was the difficulty in filling both boards. Knowing the groups' track records of working well together, the Long Range Planning Committee—which included KP and VAC representatives familiar with the challenges in filling both boards—directed TDCAA to work on merging the two boards back into one, but to make sure the new board had representation from both KP and VAC segments.

This spring, a subcommittee of the KP and VAC boards met to plan what the new merged board would look like (there's a photo of everyone below). The group decided that to ensure representation from both segments, half of the seats on the board should be elected, and half should be appointed. The new board selection would work like this:

Elections will be held in four "areas," with TDCAA's eight regions to be grouped in pairs to form four "areas" as follows:

- West Area: Regions 1 & 2
- East Area: Regions 5 & 6
- North Central Area: Regions 3 & 7
- South Central Area: Regions 4 & 8

Elections in the East and South Central Areas will happen in odd-numbered years. Elections in the West and North Central Areas will happen in even-numbered years.

The other four at-large board members (two KP representatives and two VAC representatives) will be selected by the TDCAA board president and the chair of the merged KP-VS board. In odd-numbered years, the president of the TDCAA board will appoint one KP member, and the chair of the KP-VS Board will appoint one victim services member. In even-numbered years, the TDCAA board president will appoint one victim services member, and the KP-VS chair will appoint one key personnel member.

The first election under the new board would happen on Thursday, Nov. 9, 2017, at the KP-VAC Conference in Houston. All current KP and VS board members will be allowed to serve out their full term on the two boards. Formal approval of the new bylaws for the combined key personal and victim services section of TDCAA requires the following steps:

- approval of the draft bylaws by the TDCAA board of directors at its meeting on June 30.
- approval of the bylaws by a two-thirds vote of all key personnel and victim services section members present at a regular meeting called for 1 p.m. on Wednesday, Nov. 8, 2017, at the KP-VAC Seminar in Houston.

It is our hope that the new method for selecting board members will lead to continued high levels of participation and collaboration by key personnel and victim services members while ensuring the number of board positions is realistic. A copy of the proposed bylaws can be found on the TDCAA website by clicking this link.

If you have an interest in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board or expressing interest in one of the appointed positions. The board meets twice a year: once in Austin sometime in the spring and once the day before the start of the KP-VAC conference in November. TDCAA staff makes hotel reservations for board members for the spring meeting and will reimburse board members for other travel expenses (airfare or mileage and parking, plus a per diem for meals).

If you have any questions about running for the board, please email TDCAA's Victim Services Director Jalayne Robinson at Jalayne.Robinson@tdcaa.com. If you have any questions or concerns about the bylaws or the election process, please email Jalayne or me at Diane.Beckham@tdcaa.com. ❇

Highlights of KP-VS Board merge

- One set of bylaws will govern KP and VS. Current KP and VS bylaws will be repealed.
- The new, merged board will include four elected and four appointed board members, plus a chair and immediate past chair (ex officio).
- Terms remain two years each for the eight elected and appointed board members; one year for the chair. Terms are staggered: two elected and two appointed each year.
- Elections will happen in four "areas," which are composed of two TDCAA regions:
  - —West Area: Regions 1 & 2
  - —East Area: Regions 5 & 6
  - —North Central Area: Regions 3 & 7
  - —South Central Area: Regions 4 & 8
- Four at-large members will be selected by the TDCAA board president and KP/VS board chair:
  - —One VAC and one KP selected each year
  - —TDCAA board president selects KP in odd-numbered years and VS in even-numbered years
  - —KP/VAC chair selects VS in odd-numbered years and KP in even-numbered years
- KP and VS boards have approved the merger plan.
- TDCAA's parent board must vote on the bylaw amendments and merge at June 30 meeting.
- KP and VS sections will vote on bylaws at a Nov. 8 general meeting in conjunction with the KP-VAC conference. The bylaws require a two-thirds vote to pass.
- If passed, the first elections under the new plan would happen Thursday, Nov. 9.
- All current board members will serve out their full terms. The board will have two past chair ex officio members and only one extra member (two representatives from Region 1) in 2018. ❇

When the rules change: The good-faith exception to the exclusionary rule

Texas' strict exclusionary rule has only one narrow exception: for good-faith searches conducted pursuant to a warrant based on a probable cause. But what happens if officers secure a warrant and conduct a good-faith search, but later law invalidates the basis of the warrant? Is an officer's "good faith" enough if probable cause for the warrant is shaken?

By Andrea L. Westerfeld
Assistant Criminal District Attorney in Collin County

In *McClintock v. State*, the Court of Criminal Appeals considered this issue and applied the good-faith exception to cases where officers had a reasonable, good-faith belief that the warrant was based on probable cause, even if it wasn't.

The facts

Bradley Ray McClintock lived in an upstairs apartment over a business, which was accessed by a stairway at the back of the building.[1] The police took a drug-sniffing dog to his doorway at the top of the stairs, where it alerted. The dog's alert was included in a search warrant for McClintock's home, and the ensuing search turned up a felony amount of marijuana.

At trial, McClintock argued that the dog sniff was illegal because it was an unconstitutional search of the curtilage of his home, but the trial court upheld the search based on existing law. While the case was pending on appeal, *Florida v. Jardines*[2] came down, tightening the rules on dog sniffs. The appellate court overturned the search, finding that the dog sniff was illegal and without that fact, the search warrant did not contain probable cause.[3]

The State argued to the Court of Criminal Appeals that, even if the dog sniff should have been excluded under *Jardines*, the officers were still acting in good-faith reliance on a search warrant. Because the police were relying on then-existing precedent that the dog sniff was *not* an illegal search, the State argued the exclusionary rule should not apply.

Texas's exclusionary rule

Texas has its own unique exclusionary rule in Article 38.23, one that is in many ways more stringent that the federal rule upon which it is generally based.[4] Under Article 38.23, any evidence that is unlawfully obtained must be excluded. The only exception to this rule is found in Article 38.23(b), holding the rule does not apply if the evidence "was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause." This requires four distinct findings: there must be 1) objective good-faith reliance upon 2) a warrant 3) issued by a neutral magistrate that is 4) based upon probable cause.[5] Thus, before the exception can apply, there must be a finding of probable cause. A warrant not based on probable cause will not invoke the rule.

The first three requirements are easily met in this case. The question comes with interpreting the fourth factor. What should be considered in deciding whether there was probable cause? If information in the warrant affidavit came to light only because of an illegal search, does that mean it cannot be considered for determining probable cause? Or should all information in front of the magistrate be considered? In this case, there is no question that the affidavit as a whole held sufficient probable cause to justify a search warrant. It is only if the dog sniff is excluded that the warrant becomes insufficient. Because Article 38.23 does not address—much less resolve—this issue, the CCA turned to federal law.[6]

Federal law and the Texas rule

Federal law may be considered when interpreting the Texas exclusionary rule as long as it is "consistent with" the text of the statue.[7] The CCA looked at a number of federal courts that had attempted to interpret the issue, some under cases very similar to *McClintock*.

Three Circuits—the Ninth, Tenth, and Eleventh—have unequivocally declared that the good-faith exception does not apply if the information before the magistrate was illegally obtained.[8] The Second

Circuit, by contrast, held that the issuance of a search warrant wholly forgives any previously illegally obtained evidence.[9] But the CCA seemed most persuaded by a more recent Fifth Circuit opinion that, it determined, was an "acceptable synthesis of the federal caselaw" with respect to balancing the fruit-of-the-poisonous-tree doctrine with the good-faith exception to the exclusionary rule.[10]

In *United States v. Massi*, the Fifth Circuit developed a two-part test.[11] First, the law enforcement conduct that uncovered the previous evidence must have been "close enough to the line of validity" that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information was lawfully obtained. In other words, if it was obvious that the evidence was illegally obtained, a warrant will not cure the defect. Second, the search warrant must have been sought and executed in good faith. The Fifth Circuit later applied this two-part test in a recent decision very similar to *McClintock*, where the warrant relied on evidence from a dog-sniff that was later invalidated by *Jardines*. The court concluded that the question of whether the drug dog had invaded the curtilage of the home was "close enough to the line of validity" to support the conclusion that the police acted in good faith in seeking and executing a warrant.[12]

Applying the rule in Texas

The CCA concluded that the *Massi* rule was consistent with the text of Article 38.23. An officer who included information in a search warrant that he knows or should have known was illegally obtained cannot be said to have acted in good faith. But if the officer believed that the information submitted to the magistrate was lawfully obtained, there is no reason for him to believe that the warrant was invalid. Thus, the CCA adopted the new rule in Texas:

> The good-faith exception of Article 38.23(b) will apply when the prior law enforcement conduct that uncovered evidence used in the affidavit for the warrant was close enough to the line of validity that an objectively reasonable officer preparing the affidavit or executing the warrant would believe that the information supporting the warrant was not tainted by unconstitutional conduct.[13]

The only remaining question was whether the officers in *McClintock* acted in good-faith reliance on the search warrant. In other words, was the reliance on the drug dog's alert "close enough to the line of validity" that officers could reasonably believe it was valid? There was no binding precedent before *Jardines* that a dog sniff on the curtilage of a home was constitutional—but there was none concluding that it was unconstitutional either.[14] The distinction *Jardines* made was subtle: A dog sniff is generally legal because people have no reasonable expectation of privacy in possessing illegal substances, *but* officers cannot intrude upon the curtilage of a home to conduct the sniff. And what constitutes the curtilage in an apartment setting remained contentious until the CCA issued a later opinion two years later.[15]

Thus, at the time the officers here performed the dog sniff at the appellant's apartment, the law was unsettled enough that an objectively reasonable officer could believe the evidence was lawfully obtained. Because the legal question was "close enough to the line of validity" and a search warrant was obtained from a neutral magistrate, the good faith exception of Article 38.23(b) applies.[16]

Going forward

What does the *McClintock* decision mean going forward? Most importantly, it does *not* give police free reign to do whatever they want and clean up the mess with a warrant afterward. The *McClintock* rule excuses only conduct that is close to the line, so that a reasonable officer would have believed it was legal. (This is an objective, not subjective, test.)

But this decision can come in extremely handy in areas of law that are changing, such as cell phone searches. It will also be useful when either the U.S. Supreme Court or the Texas Court of Criminal Appeals issues a surprising opinion that holds behavior previously widely accepted as unconstitutional or contrary to statute. The bottom line is, if officers reasonably believe that their behavior was lawful at the time *and* had a magistrate review that behavior and issue a search warrant, the *McClintock* rule prevents the resulting evidence from being thrown out simply because a later change of law or clarification of murky law. ❇

Endnotes

[1] *McClintock v. State*, __ S.W.3d __, No. PD-1641-15, 2017 WL 1076289, at *1 (Tex. Crim. App. Mar. 22, 2017).

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2 *Florida v. Jardines*, 133 S.Ct 1409 (2013).

3 *McClintock v. State*, 405 S.W.3d 277 (Tex. App.—Houston [1st Dist.] 2013).

4 *McClintock*, 2017 WL 1076289, at *2; *Miles v. State*, 241 S.W.3d 28, 32 (Tex. Crim. App. 2007).

5 *Curry v. State*, 808 ws.W.2d 481, 482 (Tex. Crim. App. 1991).

6 *McClintock*, 2017 WL 1076289, at *3-4.

7 *Baker v. State*, 956 S.W.2d 19, 23 (Tex. Crim. App. 1997).

8 *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987); *United States v. Scales*, 903 F.2d 765 (10th Cir. 1990); *United States v. McGough*, 412 F.3d 1232 (11th Cir. 2005).

9 *United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985).

10 *McClintock*, 2017 WL 1076289, at *6.

11 *United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014).

12 *United States v. Holley*, 831 F.3d 322, 326-27 (5th Cir. 2016).

13 *McClintock*, 2017 WL 1076289, at *7.

14 *Id.* at *8.

15 *State v. Rendon*, 477 S.W.3d 805 (Tex. Crim. App. 2015).

16 *McClintock*, 2017 WL 1076289, at *8.

Photos from our Cybercrime seminar

Photos from TDCAA's Civil Law Seminar

Civil Practitioner of the Year

Holly Lytle, Assistant County Attorney in El Paso County, was honored with the Gerald Summerford Award at TDCAA's Civil Law Seminar. She is pictured (at left) with Sherine Thomas, Assistant County Attorney in Travis County and member of the civil committee (at right), who presented the award. Congratulations, Holly!

A roundup of notable quotables

"You know, when I was coming up, people loved and respected the police, the deputies. And I want to be the one to bring that back, especially in the community I serve."

—NBA Hall of Famer Shaquille O'Neal, announcing his intention to run for sheriff in 2020. During his basketball career, he sometimes acted as a reserve police officer, and these days he is an honorary deputy in Georgia's Clayton County. http://bleacherreport.com/articles/2708625-shaquille-oneal-announces-he-will-run-for-sheriff-in-2020

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

"My question was, 'Why didn't you do all that when he was 14?'"

—Victoria County District Attorney Stephen Tyler, in response to a defendant's mother, who pled with jurors to give her son the minimum sentence and promised she would keep him out of trouble. Her son, 23-year-old Luz Albert Hernandez, was sentenced to 25 years for aggravated assault with a deadly weapon. www.victoriaadvocate.com/news/2017/apr/27/man-gets-23-years-for-assault-organized-criminal-a/

"I feel like justice was never served. He was given the death penalty, and then he stayed in there all those years. They ended up fixing his teeth, spending a bunch of money on him. He got taken care of and lived out his life until he died. What a waste of taxpayers' money."

—James Romero, talking about Los Angeles serial killer Ricardo Ramirez, who was nicknamed The Night Stalker and terrorized L.A. in the 1980s. As a 13-year-old boy, Romero came face-to-face with the killer as he stalked the boy's home, and his identification of Ramirez led to the killer's capture. Ramirez spent 23 years on California's death row before dying of lymphoma in 2013. www.lamag.com/citythinkblog/13-year-old-boy-brought-down-notorious-serial-killer-richard-ramirez-night-stalker

"He had a little bit of blood on him, so I think he took a bite out of crime. We're hoping."

—Neil Curry, director of the Witt Stephens Jr. Central Arkansas Nature Center, about a 3-foot alligator that was stolen during a late-night burglary. Three inebriated men broke into the nature center late one night and stole the alligator, which was later recovered by police in one suspect's car. http://keyetv.com/news/offbeat/cops-after-being-thrown-out-of-bar-men-stole-gator-from-nature-center

"I fought in Iraq. But covering crime in Houston gave me PTSD."

The headline of a recent *Houston Chronicle* column by reporter Mike Glenn. He wrote about the trauma of 15 years of writing about crime in Texas' largest city and is well worth a read. www.houstonchronicle.com/local/gray-matters/article/I-fought-in-Iraq-But-covering-crime-in-Houston-11169945.php

"Jury selection is exactly like 'The Bachelor.' You don't choose the perfect one, you just get rid of all the crazies."

—unnamed TDCAA staff attorney

"Helpful tip: Before going to jail to bail someone out, make sure you don't have an outstanding warrant."

—Twitter user @lawyerthoughts

Continued from the front cover

A new ICE age (cont'd)

We've also noticed that undocumented witnesses and victims have become less likely to cooperate with ongoing criminal investigations; jurisdictions to the north are reporting similar issues.[6] In this new climate of increased fear among undocumented victims and witnesses, what can prosecutors do to assure the administration of justice *and* protect witnesses and victims?

When the undocumented victim or witness is *not* in ICE custody

When our office's Victims Assistance Unit first contacts undocumented victims and material witnesses who are not in immigration custody, we take a proactive approach in educating them about their immigration situation. Our victim advocates give them information and documentation showing they are a victim or witness in an ongoing criminal investigation. We ask that the person tell someone trustworthy where that documentation is, should he or she be taken into immigration custody, so that those documents can be turned over to immigration authorities. Our Victims Assistance Unit notifies victims that if they are taken into ICE custody, they should not sign any voluntary removal paperwork because they are a necessary witness to an ongoing criminal case and that they should immediately notify the agency and their deportation officer of the situation. At that first meeting, our victim advocates begin screening for possible immigration relief in the form of U-visas, T-visas, or the Violence Against Women Act (VAWA) (more about all of these later).

The Travis County District Attorney's Office in Austin has started a more formal program in which undocumented victims and witnesses are given letters from the prosecutor's office to carry with them. These letters explain they are victims or key witnesses in the prosecution of an ongoing case and are to be presented if they are approached by a law enforcement officer or questioned as to their immigration status.[7] While Travis County's program is new, we should note that these letters—as well as any of the documents provided by our own office's Victims Assistance Unit—do not give the holder legal immigration status or have any legal authority whatsoever. ICE has issued a statement about the Travis County program, saying: "ICE continually strives to work with our law enforcement partners to increase public safety. All immigration cases are reviewed on a case by case basis."[8] ICE officials have not guaranteed they would honor these letters or documents.

U-visas. If an undocumented victim or witness qualifies to apply for a nonimmigrant U-visa under the Victims of Trafficking and Violence Act, our victim advocates begin the paperwork as soon as possible. The U-visa is a form of immigration relief that allows victims and witnesses of certain crimes[9] who have been certified as helpful to the prosecution by a law enforcement agency, to apply for legal status in the United States. (Read more about U-visas in this article that ran in a previous issue of the journal: www.tdcaa.com/journal/understanding-u-visas.)

As deportation fears have risen, so has the number of U-visa applications. In the spring of 2016, our office was receiving about 12 applications a week—that number has risen to 30 a week as of late. U-visas, however, are often not the magic answer that undocumented victims, witnesses, and prosecutors may be looking for. Some prosecutor offices will not certify an immigrant's U-visa application until the case is disposed of—which can take months or even years, thus leaving the witness or victim exposed to immigration enforcement. Even after an immigrant is certified and files the application, it takes two to three years before he receives permission to work legally in the United States and about four to five years before he receives legal immigration status. These waiting periods may be further increased given the volume of applications in recent months. Additionally, the number of available U-visas is capped by federal law at 10,000 per fiscal year.[10] As of January 2016, there was a backlog of 64,000 applications—a number likely to swell even further.[11]

T-visas. Our Victims Assistance Unit also screens victims for T-visa eligibility under the Victims of Trafficking and Violence Act, which is meant for victims of severe human

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trafficking crimes.[12] Unlike U-visas, T-visas do not have legislated caps for distribution, and their time table for issuance of work visas and legal status is much faster.[13]

VAWA petitioning. If the victim does not qualify for a T-visa, we also screen for self-petitioning under VAWA. Unlike the U-visa program, a petitioner under VAWA must be a victim of a crime committed by a U.S. citizen or legal resident. VAWA's timetables are much shorter than the U-visa or T-visa programs—most applicants, if accepted, receive their letter of approval within three months and can begin to apply for public benefits at that time. Within six to eight months, they are issued a work permit and legal documentation, such as a Social Security number. There is no legislated cap to the number of applicants who can qualify under VAWA.

Prosecutors should note that any application by a victim or witness for any of these adjustments of legal status would be need to be disclosed to defense counsel pursuant to Tex. Code Crim. Proc. Art. 39.14.

When the undocumented victim or witness *is* in ICE custody

Once someone has been detained for removal purposes, prosecutors have a couple of options to secure their appearance so we can continue the prosecution of our case.

Some offices may ask ICE for a Deferred Action (DA) or an Administrative Stay of Removal (ASR) of witnesses or victims who have been taken into immigration custody. A law enforcement agency can request a DA on an undocumented person whether he is in or out of ICE custody. Receiving a DA for an undocumented immigrant means the government has decided it is not in its interest to arrest, charge, prosecute, or remove an individual at that time for a specific, articulable reason. The authority of ICE to grant a DA is discretionary, and officials review several factors in each case.[14] Unlike a U-visa, T-visa, or an adjustment of status under VAWA, a DA does not confer any immigration status upon the holder and does not cure any defect in his immigration status, and ICE can commence removal proceedings against the holder at any time. If a DA is granted for an undocumented immigrant currently in ICE custody, then the grantee can be transferred to state custody. A DA is granted for a specific period of time determined by ICE.[15]

If the undocumented witness or victim is subject to a final order of removal but has yet to be removed from the United States, the State can request an Administrative Stay of Removal (ASR). An ASR is also a discretionary tool used by ICE to release those needed to testify in the prosecution of a case involving a violation of federal or state law.[16] An undocumented person who is granted an ASR may be released from immigration custody upon the filing of an approved bond, an agreement to appear, and other prescribed conditions.[17] Much like a DA, an ASR does not cure any immigration status defect, and after the case is disposed, the grantee will again be subject to removal.

In past cases where witnesses and victims were already in removal proceedings and an ASR or a DA was not deemed appropriate, ICE has allowed us to file a writ to remove them from immigration custody to testify at trial. However, it should be noted that ICE indicated that if the writ is for a future trial date, the undocumented person is still subject to removal and could be deported in that time frame. It is up to ICE officials, in other words, whether they want to honor the writ.[18]

Perhaps the greatest tool a prosecutor has once a witness or victim has been taken into immigration custody is the consulate from his country of origin. Our Victims Assistance Unit maintains a good relationship with local consulates and lets those officials know once we've found that a victim or witness has been taken into immigration custody. If a witness has suddenly stopped communicating with our office, the consulates can help determine if that person is in an immigration detention center. Once the consulate is made aware that one of their citizens has been detained, that person will be provided with legal help through the consulate, commonly known as a *proteccion familiar*. If a victim or witness is incarcerated at an immigration detention center, our Victims Assistance Unit may also attempt to connect the person in custody with immigration services through Texas RioGrande Legal Aid (TRLA) or another local agency.

When a victim or witness has already been deported

Even if the victim or witness has been deported, the State of Texas still has some options that can allow us to proceed with prosecution.

Once an undocumented crime victim or witness is removed from the United States, it may be hard to find her in her country of origin. However, prosecutors can request the help of that person's consulate in locating her once she's been removed. If the victim or witness has been removed from the United States but is an admissible alien (that is, she does not fall into one of the classes of aliens ineligible to receive visas or ineligible for admission),[19] she can still apply for status through a U-visa from her country of origin with the help of her consulate.

Law enforcement agencies may request a Significant Public Benefit Parole (SPBP) to bring a removed person into the United States.[20] SPBP is a temporary measure that allows an otherwise inadmissible alien into the United States temporarily, but it does not constitute formal admission into the country.[21] However, much like a DA or an ASR from ICE custody, the victim or witness who is granted SPBP must return to her country of origin once the case is disposed.

What if a defendant has successfully had a victim or witness deported to keep her from testifying against him in court?

Texas law may allow the State to proceed in certain cases. Texas Code of Criminal Procedure Art. 38.49, the Forfeiture by Wrongdoing statute, states that a party to a criminal case who wrongfully procures the unavailability of a witness or prospective witness may not benefit from the wrongdoing by depriving the trier of fact of relevant evidence and testimony. The party then forfeits the right to object to the admissibility of evidence or statements based on the witness's unavailability.[22] Texas' statute goes beyond the common-law doctrine of forfeiture by wrongdoing and allows the State to use testimonial hearsay of an absent witness or victim, getting that testimony around any *Crawford* or hearsay objections.[23] To qualify for forfeiture by wrongdoing, the defendant's action that procured the witness' unavailability doesn't need the sole intent to keep the victim from testifying, and the defendant's action does not have to be a criminal offense or threat.[24] (Read an article on the forfeiture by wrongdoing article from a past issue of this journal at www.tdcaa.com/journal/forfeiture-wrongdoing-%C2%ADdoctrine-nine-years-after-crawford.)

Although we could find no caselaw directly on point in Texas or any other state, we did find some indication that the doctrine of forfeiture by wrongdoing would apply where a defendant procured the unavailability of a victim by having her deported. In *State of New Mexico v. Mario Hector Alvarez-Lopez*, the defendant was spotted at the scene of a burglary but evaded capture.[25] The victim of the burglary caught the defendant's accomplice, who implicated the defendant in the crime. The defendant absconded before trial and, in the years that passed, the accomplice was convicted and deported from the United States. When the defendant was finally captured and tried, an officer read the accomplice's statement into evidence. When the defendant appealed the conviction, the State of New Mexico contended that the defendant forfeited the right to confront his accomplice because his absconding had procured the accomplice's deportation.[26]

The Supreme Court of New Mexico found, based on the common-law doctrine of forfeiture by wrongdoing, that although the deportation may, in an indirect sense, have been a consequence of the defendant absconding, the causal relationship between the two was not sufficient to satisfy the common-law forfeiture by wrongdoing doctrine.[27] The opinion suggests that to use the forfeiture by wrongdoing doctrine, the State had to show that the act of absconding had intended to procure the accomplice's unavailability. In the absence of facts that showed the defendant's motive in absconding was to silence his accomplice, the State failed to meet its burden of proving that the defendant intended or was motivated to produce the accomplice's unavailability.[28] *Alvarez-Lopez* seems to suggest that if the State could prove a defendant was motivated to procure a witness's deportation and committed an act that did so, the defendant would have waived his right to confrontation under the forfeiture by wrongdoing doctrine. Because Texas' forfeiture by wrongdoing statue is more expansive than the common-law doctrine explored in *Alvarez-Lopez*, it stands to reason that prosecutors could use the doctrine to introduce testimonial hearsay of a victim or witness deported by a defendant's actions.

Conclusion

As we navigate the growing fear of

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deportation in immigrant communities, it is important that prosecutor offices across the state—in border regions and elsewhere—continue to communicate and share techniques for prosecuting crimes that involve undocumented immigrants. In 2011, ICE notified its agents that they should exercise discretion in cases involving victims and witnesses of crime to minimize the effect immigration enforcement may have on the willingness of victims, witnesses, and plaintiffs to call police and prosecute crimes.[29] Absent special circumstances or aggravating factors, it was against ICE's policy to initiate removal proceedings against an individual known to be the immediate victim or witness of a crime.[30]

Due to the recent executive order expanding the categories of undocumented immigrants subject to deportation, it is unclear whether ICE's policies remain the same as they were in 2011. In this time of uncertainty, by using pre-existing tools to secure the availability of our witnesses and by blazing new paths using forfeiture by wrongdoing, we must continue to encourage undocumented immigrants to keep reporting crime and participating in prosecutions. The looming threat of deportation complicates—but does not obstruct—that goal. We must continue to strive to seek justice for our community, both documented and undocumented. *(A special thanks to Victims Unit Program Director Rosie Martinez for her help in researching this article.)* ❇

Endnotes

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14 Id. at 5.

15 Id. at 6.

16 Id. at 7.

17 Id.

18 Id. at 9.

19 www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-2006.html.

20 Id. at 24.

21 Id.

22 Tex. Code Crim. Pro. Art. 38.49(a).

23 See *Gonzalez v. State*, 195 S.W.3d 114, 117-19 (Tex. Crim. App. 2006).

24 See Tex. Code. Crim. Proc. Ann. art. 38.49(d)(1); *Shepherd v. State*, 489 S.W.3d 559, 575 (Tex. App.—Texarkana 2016, pet. ref'd); *United States v. Jackson*, 706 F.3rd 264, 269 (4th Cir. 2013).

25 *State of New Mexico v. Mario Hector Alvarez-Lopez*, 98 P.3d 699, 702 (N.M. 2004).

26 Id. at 703.

27 Id. at 704.

28 Id. at 705.

29 Ryan Autullo, Immigration advocates hopeful ICE honors Travis DA's letter program, *Austin American-Statesman* (May 30, 2017), www.mystatesman.com/news/local-govt—politics/immigration-advocates-hopeful-ice-honors-travis-letter-program/wlxMolkrpEnKmOTH7w48qK/.

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Don't give credit to identity thieves

How to properly charge criminals who steal credit cards and other people's identifying information with intent to commit fraud

When peace officers investigate cases involving multiple credit cards, they frequently focus on the Credit Card Abuse statute (Penal Code §32.31) because, after all, it has "credit card" in its name. Prosecutors will often make this same mistake when accepting charges involving credit cards. The problem is that the Credit Card Abuse statute does not adequately punish or meet the elements of crimes involving true identity thieves. Correctly charging and proving large-scale identity theft is time-consuming and labor-intensive, but the effort is worth it.

By Robert Buss
Assistant Criminal District Attorney in Galveston County

I recently indicted a prolific identity thief for Engaging in Organized Criminal Activity based on the underlying charge of first-degree felony Fraudulent Use or Possession of Identifying Information. (I will refer to him as John Doe because his case is not yet resolved.) While researching John Doe, I learned that he was previously charged with and convicted of Credit Card Abuse. The offense report that supported the earlier Credit Card Abuse charge showed he had been caught with hundreds, if not thousands, of credit card numbers. When interviewed, he freely admitted to using the credit card numbers and sharing them with more than three other people. He had victimized legions of people and businesses but received only a 10-month state jail sentence for his crimes. I listened to Doe's jail calls, and he was not fazed by this level of punishment. In fact, he continued to encourage others to engage in the same activities while he was serving time in jail. When released from custody, he once again continued the same scheme.

This case is not an outlier. I have run across numerous instances where intake prosecutors approved Credit Card Abuse charges on defendants caught with sophisticated card skimmers or notebooks full of credit card numbers. There is a common lack of awareness of how to effectively charge these cases among prosecutors who do not specialize in fraud. This article is meant to guide prosecutors to the right charge, depending on a case's facts.

The problem with charging Credit Card Abuse

Credit Card Abuse (Penal Code §32.31) is a state jail felony offense unless the victim is elderly (then it is a third-degree felony). There are multiple ways to run afoul of this statute, but generally it is for presenting or using another person's credit or debit card without the cardholder's effective consent.

If prosecutors funnel serious identity theft cases involving credit cards through this statute, then a person who uses or presents the credit card 50 times without the cardholder's consent could at best be indicted for 50 separate state jail felonies. That is not an efficient approach to case management, and it does not adequately charge the defendant with the severity of the crime.

Worse yet is when a defendant is arrested with more than 50 different credit card numbers in his possession but there is not very strong evidence linking him to specific, unauthorized uses of all of the cards. The defendant appears to be a major identity thief, but charging him with Credit Card Abuse does not fit the facts because the evidence does not satisfy the element that the card was presented or used by the defendant himself.

The better charge

The Texas Penal Code offense that best covers identity theft is in §32.51 (Fraudulent Use or Possession of Identifying Information). This statute criminalizes using or possessing another person's identifying information without that person's consent with the intent to defraud. (It also criminalizes obtaining and transferring identifying information, but those variations of the statute will not be covered here.) The severity of the offense for §32.51 depends on the number of items of identifying information that the defendant used or possessed. Using or possessing

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more than 50 items is a first-degree felony.

One of the key points to remember for this offense is the statute's definition of "identifying information." Identifying information includes information that alone, or in conjunction with other information, identifies a person. Identifying information includes: name and date of birth; unique biometric data such as retina scans and fingerprints; electronic identification numbers, such as a bank account number or financial institution account number; account authorization transfer numbers; Social Security numbers, driver's license numbers, and other government-issued identification numbers. Caselaw tells us that identifying information also includes credit card numbers.[1]

When a defendant possesses 10 items of identifying information, it does not matter whether there are 10 victims or just one. The defendant possessed 10 items of identifying information either way. The number of victims does not affect the severity of the charge, but when a person possesses the identifying information of three or more victims, there is a presumption of intent to defraud.

The number of items of identifying information charged against a defendant also does not depend on the number of documents where the information is found. I prosecuted a man named Michael Grimm who used multifarious methods to exploit identities. One involved a number of rental contracts containing customer information that Grimm had taken from an RV rental business. Each contract had at least one Social Security number and a victim's name and date of birth,[2] and many had other identifying information such as credit card numbers. There were around 40 contracts holding a total of well over 80 items of identifying information. The Fourteenth Court of Appeals held that the number of documents containing the identification information was not important. If a single contract had four separate items of identifying information, then that counted as possession of four items instead of just one.[3] A jury sentenced Michael Grimm to 30 years in prison.

The statute of limitations for Fraudulent Use or Possession is seven years. That is helpful because these investigations can take some time. If a suspect has not been arrested or has been arrested on a different crime, prosecutors may want to hold off on presenting the ID theft case to the grand jury until they have the evidence for a potential trial. Financial institutions can take a month or more to respond to a subpoena deuces tecum, and that information has to be analyzed.

Charging Fraudulent Use

I charge large Fraudulent Use of Identifying Information cases as a criminal episode occurring pursuant to a common scheme or continuing course of conduct (beginning on or about the start date and continuing to on or about the last date of use). This charge works well when the defendant is not caught holding a lot of different credit cards but there is evidence of him using the same credit card (or cards) repeatedly.

The venue for Fraudulent Use of Identifying Information can be any county in which the offense was committed or the county of residence for the person whose identifying information was fraudulently used.

I routinely discover cases where a person has used a credit card account without consent on 10 or more occasions but was charged with credit card abuse (a state jail felony). The same facts could have supported a second-degree felony charge under Fraudulent Use. That's because it does not matter that the same card number was repeatedly used so long as there are separate uses. That being said, the State will need to prove each use it relies on to get to the level of offense indicted.

A common ID theft scenario involving credit cards includes a defendant using an innocent victim's identifying information without that victim knowing about the fraudulent account. In such a scenario, a defendant uses a victim's identity information to take out a credit card online. The defendant will then add his own name as an authorized user to get a new (physical) card issued to himself. The defendant, who is not in the business of making regular payments on the balance, will use the card until it just won't work anymore. When prosecuting this scenario, remember that even if a credit card was procured without the victim's knowledge, the account was set up with the victim's unique identifying information, and it still identifies the victim, so any use of the account can be charged against the defendant.

When prosecutors get such cases, subpoena all of the application information from the credit card company, as well as detailed billing

statements for the life of the credit card account. The application information will show the identifying information that was used to set up the account, and it might include the address the card was mailed to (also known as the defendant's house). The identifying information used to set up the account and the defendant's transactions on it are all fraudulent uses. This whole scenario is pursuant to a common scheme or continuing course of conduct, so add up every use and include them in the charge against the defendant.

I had an unfortunate experience when I took a Credit Card Abuse case to trial. The case had been indicted as Credit Card Abuse for a single listed instance of "abuse," but there were really well over 20 uses of the credit card number. The card had been obtained online by the victim's former friend who happened to know the victim's name, date of birth, and Social Security number. After she got a card in the victim's name, she added herself to the account and had a separate card (with her own name on it) sent to herself. I thought the case would be a fairly easy guilty verdict, but I was wrong. Members of the jury were confused by the definition of "cardholder" in the Credit Card Abuse statute. "Cardholder" means the person named on the face of a credit card or debit card, the person to whom or for whose benefit the card is issued. The jury believed they could not convict if there was not a physical card in the victim's name introduced into evidence (impossible because the defendant had it mailed to herself and likely destroyed it). The jury also felt the credit card itself never really belonged to the victim because the defendant took it out for her own personal benefit instead of the victim's benefit. The trial resulted in a hung jury.

I re-indicted the case as a second-degree Fraudulent Use of Identifying Information, and after gathering more evidence that contradicted the defendant's trial testimony, the case pled. I believe that if this case had been originally indicted as Fraudulent Use, it would have never have gone to trial or would have at least made it easier to secure a guilty verdict.

Charging Fraudulent Possession

The Fraudulent Possession of Identifying Information variation of Penal Code §32.51 is preferable when a defendant is caught possessing a large amount of identifying information pursuant to a lawful search or the information is found at a location or vehicle under the defendant's control. Fraudulent Possession of Identifying Information is usually not committed pursuant to a common scheme or continuing course of conduct because the items typically are all possessed at the same time.

The offense level depends on the number of different items of identification information the defendant possessed. While the same credit card number can be counted against a defendant multiple times in a Fraudulent Use of Identifying Information case, in a possession case, the card number can be logically possessed only once, even if the defendant possesses multiple copies of the same card number at the same time.

As mentioned earlier, there is a presumption of intent to defraud if a person possesses the identifying information of three or more people. This presumption helps us prosecute this type of crime, but prosecutors still need more than a mere presumption to convince a jury to lock the defendant up and survive appeal.[4] There are multiple venue options for this variation of the offense, but for practical purposes the venue should be the county where the identifying information was possessed. Prosecutors could pick the victim's county of residence if all of the victims have the same county or residence, but there is no caselaw on using the county of residence to establish venue when there are multiple victims from separate counties.

Proving the identifying information

Proving Fraudulent Possession in trial is less burdensome in many ways than Fraudulent Use because prosecutors do not need to call witnesses to prove every use of the identifying information. We still have to prove intent to defraud, so I believe it is helpful to introduce some evidence that shows improper use of at least some of the identifying information the defendant possessed.

For both Fraudulent Use and Fraudulent Possession of Identifying Information, the State must prove that the identifying information identifies a real person. A defendant who uses fictitious identifying information to defraud others has not committed an offense under §32.51.[5]

When I prosecuted Michael Grimm, he had created numerous

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temporary driver's licenses with a computer. The licenses included some information that accurately identified real people, but he would mix it in with fabricated information. Some of the fictitious numbers ended up getting listed in the manner-and-means portion of Grimm's indictment, which could have spelled trouble. The only reason this error was not fatal was because there was sufficient evidence of other manners and means in the indictment to support the conviction. I no longer take anything associated with an identity thief at face value, and I check that all of the identifying information, including credit card numbers, dates of birth, and Social Security numbers, match real people before they are listed in an indictment.

An identity thief does not always need to know the name of the person to whom a credit card number belongs to in order to use that credit card number. It is not unusual for the thief to possess credit card numbers without accompanying information. Identity thieves will substitute their own name or a fake name on a card with a real credit card number. They will also often put real people's credit card numbers on gift cards. Either way, the credit card number itself uniquely identifies a real victim. The issue is figuring out who the credit card number belongs to for the indictment.

Finding the person identified by a credit card number is a lengthy, labor-intensive process, but it can be done if you're armed with this information.

Most (not all) credit and debit cards have 16 digits. The first six digits of any credit or debit card (in orange here: 1234-5678-0987-6543) identify the account's financial institution. These first six digits are commonly known as a BIN (Bank Identification Number) or IIN (Issuer Identification Number).

BINs are public knowledge. You can search for a card number's six-digit BIN on the internet to figure out the financial institution that holds that number. That financial institution knows the identity of the person to whom that credit card belongs.

Send a subpoena deuces tecum to the financial institution (Chase, Wells Fargo, Synchrony, etc.) for the full account number. Make sure to ask for the application for the credit card, account holder information, and billing statements from the time you believe the defendant used or possessed the account.

Request a notarized business records affidavit so you can introduce these records without a live witness. You do not want to fly in a witness from out of state who knows nothing about your case for the sole purpose of laying the predicate to introduce business records.

Proving "without effective consent"

One of the more daunting hurdles to going to trial on an ID theft case is proving the identifying information was held or used without the owner's effective consent. If there are just a few victims, call them as witnesses whenever possible. If the defendant possessed a large amount of identifying information, there is the potential for an overwhelming number of witnesses, possibly one for every credit card number the defendant possessed.

Try to plan ahead before the indictment to reduce the number of witnesses to call. In many of my identity theft cases, the defendants incorrectly assumed they were smarter than everyone else and agreed to talk with police. They invariably try to minimize their involvement but will often admit that they do not know the people the credit card numbers belong to, or, even better, that they did not get permission to possess the credit card numbers. This saves me from calling an army of witnesses in trial.

In the Michael Grimm case, the RV rental business owner testified that Grimm did not have permission to keep the rental contracts. The rental contracts alone contained more than 50 items of identifying information. There had been a good deal of testimony regarding how the contracts were found and where they originated, and I did have some victims testify as witnesses, but I did not have to call most of them. The appellate court held that circumstantial evidence proved lack of effective consent for all the RV contract victims, and each victim did not need to testify to that effect.

In closing

Fraudulent Use or Possession of Identifying Information is an effective charge against identity thieves. Our communities want law enforcement to take a stand against such thieves, and sentencing a defendant to county jail time for Credit Card Abuse does not adequately deter or

punish large-scale identity theft. If we correctly charge identity thieves with Fraudulent Use or Possession, we can put them in prison and send a message to the community that identity theft will be aggressively prosecuted. ❇

Endnotes

[1] *Cortez v. State*, 469 S.W.3d 593 (Tex. Crim. App. 2015); *Brown v. State*, 354 S.W.3d 518 (Tex.App.—Fort Worth 2011, pet. ref'd); *Richardson v. State*, 328 S.W.3d 61 (Tex. App.—Fort Worth 2010, pet. ref'd).

[2] A person's name alone does not count as an item of identifying information. The Penal Code requires the name and another piece of information that identifies the victim. *Ex parte Harrington*, 499 S.W.3d 142, 147 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd).

[3] *Grimm v. State*, 496 S.W.3d 817 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

[4] *Ramirez-Memije v. State*, 466 S.W.3d 894 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

[5] *Ford v. State*, 282 S.W.3d 256 (Tex. App.—Austin 2009, no pet.).

Determinate sentencing for juveniles

What do we do with children who commit serious, violent crimes but who may benefit from the rehabilitative resources available in the juvenile system?

In the juvenile system, where we balance the sometimes-conflicting interests of community safety with the rehabilitation of today's youth, what do we do with children who commit serious violent crimes? Must we always seek to certify a juvenile for the more egregious offenses? Is there another avenue to seek justice for our victims without consigning the juvenile to the adult court system? What about a child under the age of 14 who commits an aggravated offense but who cannot be certified to stand trial as an adult? Is the State limited to a sentence that ends at age 18 or 19?

By Sarah Bruchmiller
Assistant District Attorney in Williamson County, and
Hans Nielsen
Assistant District Attorney in Harris County

The route that allows juvenile offenders to receive a chance at rehabilitation while maintaining an incentive of keeping them out of the adult system is a determinate sentence. For the State, this alternative allows for a broader punishment range for certain offenses than what is permissible under the juvenile system, along with the possibility of transferring the juvenile post-adjudication to adult probation or prison if he does not avail himself of all of the rehabilitative resources provided by the juvenile system.

When Hans was initially assigned to a juvenile court, he struggled with trying to understand the difference between a determinate and an indeterminate sentence (disposition). While there are many differences between the two, a determinate TJJD (Texas Juvenile Justice Division) disposition for juveniles is similar to an adult court sentence in that they both involve a definite number of years or months, as in any plea bargain agreement. A determinate TJJD disposition also has specific parole eligibility dates, like an adult sentence, and its length can extend past the juvenile's 19th birthday. An indeterminate TJJD disposition, on the other hand, does not have a number of years or months as part of any plea bargain, and there are no definite parole eligibility dates—except for the fact that TJJD cannot keep a

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juvenile in its facilities or on parole past his 19th birthday.

There's also a major difference between a juvenile on a determinate sentence and one in the adult system. Sarah knows of a situation where two juveniles committed an aggravated robbery. One was 16 years old, and his case was handled in juvenile court, whereas the other turned 17 five weeks before the offense and faced the adult system. The juvenile was placed on a determinate sentence probation, where he was intensely monitored. During that probation, he graduated high school, began online college courses, successfully completed intensive, inpatient drug treatment, received individual trauma-based therapy, participated in court-ordered family counseling, and completed community service hours. The juvenile system worked with the offender—and his family, because in the juvenile system, courts can impose conditions on a juvenile's family—to provide extensive resources that positively impacted his life.

As an adult in the criminal system, the 17-year-old was presented with far fewer opportunities than his co-actor. Once he was placed on probation, his court-imposed conditions included evaluations for drug treatment and counseling, and he was responsible for paying the cost of those programs. Additionally, because the defendant was an adult, the court could enforce requirements only on him, not his family. While the adult defendant was given a second chance via probation, he was provided much less support, guidance, and resources compared to what was afforded the juvenile. While the juvenile system embraced the youth to provide structure and facilitate change in the offender's mindset and behavior, the only slightly older co-actor was expected to stand on his own. Though these two individuals were very close in age, their sentences—and possibly their futures—were worlds apart.

Age is not a factor

When it comes to determinate sentencing, it is important to understand that age is not a factor under this law like it is for certifications, where a juvenile court is waiving its exclusive jurisdiction over the child. The option of a determinate sentence is controlled by *the type of offense* the juvenile allegedly committed and can be filed against a juvenile as young as 10 years old. The legislature has delineated a specific set of felony offenses eligible for this alternative sentencing route in §53.045 of the Texas Family Code. The list is inclusive and allows a determinate sentence for habitual felony conduct as described by Texas Family Code §51.031 and for several aggravated offenses.[1]

The State may seek *certification* for any felony once a juvenile reaches age 15, including those specifically delineated in the determinate statute listed in Endnote 1; however, the State is limited to seeking a *determinate sentence* only for those offenses enumerated. While a determinate sentence may not be sought for robbery or burglary of a habitation alone, the State may seek it for robbery, burglary of a habitation, and any other third-degree or higher felonies if the juvenile has significant prior history under the habitual felony conduct statute.[2] This Family Code statute is the equivalent of the adult habitual offender statute but with one major difference: If a juvenile has a pending charge of a third-degree felony or higher and has two prior third-degree felony or higher adjudications, *even if they resulted in a probated sentence*, the State may seek a determinate petition.[3] Similar to the adult felony habitual statute, the two prior adjudications must not have been served concurrently. The second adjudication must be "for conduct that occurred after the date the first previous adjudication became final" and in addition, "all appeals have been exhausted."[4] Unlike the 25 to 99 years or life punishment range for an adult habitual offender, the felony level of the charged offense dictates the disposition sentencing range for a determinate sentence.[5] A first-degree felony that has been approved as a determinate habitual felony conduct offense would have a disposition (punishment) range of up to 40 years, a second-degree would have a range up to 20 years, and a third-degree would be up to 10 years.

For jurisdictional purposes, either a determinate or an indeterminate petition alleging that a juvenile committed one of the enumerated offenses must be filed in the juvenile court before the juvenile turns 18.[6] While it is preferable to obtain grand jury approval before the juvenile's 18th birthday for a determinate petition, as long as an indeterminate petition was filed before age 18, any amended pleading relates back to the date of the original petition's filing.[7] It is also best to serve the juvenile

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Determinate sentences at a glance

Who is eligible?

- juveniles who commit habitual felony conduct (Texas Family Code §51.031); murder; capital murder; manslaughter; aggravated kidnapping; sexual assault; aggravated sexual assault; aggravated assault; aggravated robbery; injury to a child, elderly individual, or disabled individual; felony deadly conduct involving discharge of a firearm; first-degree controlled substance; criminal solicitation; indecency with a child; criminal solicitation of a minor; criminal attempt of murder; capital murder or an offense listed under Code of Crim. Proc. Art. 12.12 §3g(a)(1) (now Art. 42A.054); arson resulting in SBI or death; intoxication manslaughter; or criminal conspiracy.
- juveniles with a pending charge for a third-degree or higher felony with two prior consecutive third-degree or higher adjudications, even if they resulted in probated sentences

Court jurisdiction

- only a juvenile court judge may hear a determinate petition case (*not* an associate judge or referee)

Timing issues for filing a determinate petition

- must be before juvenile turns 18 unless an indeterminate petition for the same offense was filed before age 18 and the subsequent determinate petition is filed as an amended petition.
- State must show due diligence in trying to resolve the case before and after age 18

Right to jury

- juvenile is entitled to a jury of 12 persons for adjudication hearing and the disposition hearing
- each side has 10 peremptory strikes
- the State does not have the right to a jury trial

Punishment range

- confinement in TJJD for a specific (determinate) sentence
- no minimum sentences
- no automatic sentence for a capital offense
- for a first-degree felony: up to 40 years
- for a second-degree felony: up to 20 years
- for a third-degree felony: up to 10 years
- upon 19th birthday (and if the disposition is to TJJD, not probation, as early as age 16 if his conduct requires it based on TJJD's recommendation and referral to the juvenile judge who committed the juvenile) juvenile can be transferred to adult prison, adult parole, or adult probation to complete the duration of the sentence.

Probation

- sentence of 10 years or less may be probated by a judge or jury, even for capital murder
- a juvenile's prior felony adjudication history does not affect probation eligibility
- judge may extend probation before it expires for an additional 10 years
- probation ends when the juvenile turns 19 unless the court transfers the probation to an appropriate adult district court before juvenile's 19th birthday
- for a transferred determinate probation for aggravated robbery, the judge can sentence juvenile to less than five years; for a second- or third-degree felony, judge can assess less than two years in prison

Parole

- for capital murder, minimum period of confinement before parole eligibility is 10 years
- for a first-degree felony or an aggravated controlled substance felony, the minimum period of confinement is three years
- for a second-degree felony, it is two years
- for a third-degree felony, it is one year
- TJJD may not parole a juvenile before he has served the minimum without approval of the juvenile court that entered the order of commitment
- TJJD may parole a juvenile after the minimum as long as he has completed TJJD's rehabilitation programs
- juvenile gets credit for time served in any detention facility before he is adjudicated

Transfer to the adult system (TDCJ)

- juveniles on probation can be transferred to the adult system only on the prosecutor's request
- juveniles in TJJD can be transferred to TDCJ only by TJJD's request
- juveniles who are 18 at the time of disposition and sent to TJJD on a determinate sentence must be transported and committed to TJJD before turning 19

Other considerations

- Determinate sentencing is not available in a consensual sexual assault case unless the child is more than three years older than the victim or he uses threats or force.
- The record cannot be sealed unless there's a "not true" (not guilty) verdict or a nonsuit by the State.
- Juvenile adjudications of delinquency are not convictions and may not be used as priors.
- A determinate TJJD sentence for a third-degree felony or higher can serve as an enhancement paragraph in an adult case.

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with the amended determinate petition. However, if the original petition was personally served on him and the amended determinate petition does not charge him with a different offense, serving him again is not required.[8]

A juvenile court retains jurisdiction over a child on a felony indeterminate petition only until he becomes an adult (at age 18).[9] Therefore, probation for an indeterminate offense ends at the age of 18.[10] A child adjudicated delinquent for an indeterminate felony can remain in TJJD only until age 19. For example, imagine a case involving a juvenile who is almost 17 years old when he commits an aggravated robbery. The juvenile court will have very little time to provide him rehabilitative services before he reaches age 18 if the juvenile is charged only with an indeterminate petition. Likewise, TJJD will have time constraints addressing the juvenile's rehabilitative needs if he is serving an indeterminate TJJD sentence due to the requirement of release at age 19. A determinate sentence provides the judicial system more options to expand the range of time permitted to continue to work with the offender.

Going before the grand jury

To seek a determinate sentence, the State must obtain approval of the determinate petition from a grand jury.[11] A petition containing the criminal allegations is presented to a grand jury in a similar way as an adult defendant's indictment. A grand jury may approve the petition for a determinate sentence just like in an adult case: by a vote of nine members.[12] The petition is presented prior to any adjudication, and the grand jury determines whether probable cause exists for the allegation(s) just as it would for an indictment in an adult case. The grand jury merely grants permission for the State to proceed on the case with the possibility of a determinate sentence; it does not indict the case. Furthermore, just as an adult defendant can waive a grand jury indictment for a noncapital offense and plead to that offense, a juvenile *and his attorney* can also waive the right to grand jury approval for a determinate petition, and the court may then proceed with a determinate disposition for the case.[13]

When presenting a case to a grand jury, in addition to probable cause, be prepared to explain what a determinate sentence is and why it is an appropriate avenue for a case. Whenever we have presented juvenile determinate cases to a grand jury, jurors usually have numerous questions. Many grand jurors initially think that we are asking them to determine whether the juvenile should be tried as an adult. We usually take a few moments to explain the law surrounding the determinate statute and highlight the differences between certification and a determinate sentence. (For more about certifications, read our article in a past issue at www.tdcaa.com/journal/juvenile-certifications.) Additionally, we emphasize that if the grand jury denies the determinate petition, the case is not dismissed. The indeterminate petition will still be pending and the juvenile will still face the charges against him even if the grand jury declines to approve the determinate petition. Include in the presentation to the grand jury the differences in ability to seal each type of petition, the ranges of potential disposition sentences, and the possibility of transferring the disposition sentences at age 19 to the adult system (all of which we discuss later in this article; also see the chart on page 33). Taking a few minutes to explain the law is critical to educate the grand jurors on this unique juvenile alternative and to prevent any misunderstandings in their decision-making.

Why determinate sentencing is a good option

There are a number of scenarios in which a determinate sentence might be the more appropriate option for a case. In some situations, a case may not merit certification to adult court. For example, a juvenile who commits a serious felony but is lacking a criminal history in the juvenile system or other factors set out in Texas Family Code §54.02 for certification may be prosecuted more fittingly with a determinate sentence. This would allow the offender to receive vast rehabilitative resources offered in the juvenile system while maintaining the option of possibly transferring his sentence to the adult system.

Hans had a serious case in which a 14-year-old shot a woman in the arm with a shotgun, and he was charged with aggravated assault. While the victim's arm was not amputated, she effectively lost the use of it and her career as a nurse ended. Because the juvenile was 14

at the time of the incident and the crime was only a second-degree felony, the State could not certify him to stand trial as an adult. In addition, he was able to reset his case repeatedly and was over age 16 when we finally settled his case, so a determinate petition was the best option to ensure that justice was served.

One of the main reasons for utilizing a determinate petition is the sentencing range that is available. A juvenile adjudicated for a burglary of a habitation (again, an offense not eligible for a determinate petition) who receives an indeterminate TJJD sentence can remain in TJJD until the age of 19. Even though he will be assigned a minimum length of stay before he is eligible for release based on the severity of the offense and the danger he poses to the community, there are other factors that determine when a juvenile sentenced to an indeterminate sentence may be released. Therefore, the amount of time he may remain in TJJD before he paroles out is not as certain as with a determinate sentence.[14] The difference between a TJJD commitment (or sentence) on an indeterminate case versus a determinate case is that on an indeterminate sentence, the juvenile is committed to TJJD for an unstated length of time. On a determinate sentence, the juvenile is sentenced to a specific sentence, such as 10 years at TJJD. Therefore, the plea bargain offer on a determinate petition is similar to plea bargain negotiations in an adult felony court. For example, a juvenile charged with an aggravated robbery on a determinate petition could have a plea bargain recommendation of up to 40 years.

Parole eligibility

There are minimum periods of confinement that a juvenile must serve on a determinate TJJD sentence before he is eligible for parole from TJJD. The laws that govern parole eligibility for adult offenders do not apply to juvenile offenders while they are in TJJD. For capital murder, the minimum period of confinement before parole eligibility is 10 years.[15] This means that a juvenile sentenced to 10 years on a capital offense will not be able to serve his minimum period of confinement except in the unlikely event that he committed the offense on his 10th birthday, was arrested, and continuously detained for the next 10 years. Any sentence less than 10 years on a capital offense would have to be served in full. For a first-degree felony or an aggravated controlled substance felony, the minimum period of confinement is three years.[16] For a second-degree offense, it is two years, and for a third-degree offense, it is one year.[17]

TJJD may not parole a juvenile before the juvenile has served minimum period of confinement without the approval of the juvenile court that entered the order of commitment.[18] It is possible for TJJD, without any approval from the committing juvenile court, to parole a juvenile from TJJD for a first-degree felony, even murder, after having served only three years of his sentence (the minimum length of confinement) as long as the juvenile successfully completes TJJD's rehabilitation programs.[19] Note that a juvenile gets credit for the time served in any detention facility before he is adjudicated. This credit is used when computing eligibility for parole and discharge on a determinate petition similarly to an adult defendant.[20] There is no similar provision in the law for giving credit for time served in detention on an indeterminate TJJD sentence prior to adjudication.

Probation

There are other similarities between a juvenile determinate case and an adult court case. For instance, a determinate sentence of 10 years or less may be probated by a judge or jury.[21] Additionally, a judge may extend the determinate probation, before that probation expires, for an additional 10 years. However, a determinate probation ends when the juvenile turns 19 unless the court transfers the probation to an appropriate adult district court before the juvenile's 19th birthday.[22] Once that probation is transferred to an adult district court, that court shall place the juvenile on probation for the remainder of the probation period and impose conditions consistent with those ordered by the juvenile court.[23] In cases in which a juvenile court has ordered a child to register as a sex offender or for an offense that is eligible for registration as a sex offender, the adult district court has the authority either to order sex offender registration or excuse registration.[24]

One question Hans often receives from adult-court prosecutors deals with motions to revoke determinate probations, namely the punishment range of a transferred determinate probation. It is hard for prosecutors to believe that the adult district court judge can assess a sentence less than the normal statutory

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minimum. However, for a transferred determinate probation for aggravated robbery, the judge can assess a sentence less than five years, and for a second- or third-degree felony, the judge can assess less than two years in prison.[25]

Differences between determinate and indeterminate petitions

One important difference between determinate and indeterminate petitions concerns the juvenile's right to jury disposition (sentencing) and who may preside over the case. A juvenile who faces a determinate petition offense is entitled to a jury of 12 persons for both the adjudication hearing and the disposition hearing. Because a jury must be "selected in accordance with the requirements in criminal cases," each side is entitled to 10 peremptory strikes.[26] A juvenile and his lawyer must file a written election for jury disposition prior to the beginning of voir dire.[27] A juvenile facing an indeterminate petition does not have the right to a jury trial for the disposition hearing. And unlike in the adult system where the State has the right to a jury trial, the State does not have that right for either a determinate petition or for an indeterminate petition.

Furthermore, an associate judge or referee may not hear a determinate petition case.[28] In fact, only the juvenile judge may preside over the adjudication, disposition, modification of disposition (violation of probation hearing), and TJJD or probation transfer hearings (see the discussion on TJJD and probation transfer hearings below for more on these) on a determinate petition case. These major differences between a determinate and an indeterminate petition highlight the importance that the legislature afforded a determinate petition.

Because there are no minimum sentences for any determinate offenses, a judge or jury is not bound to assess a first-degree felony adjudication with a five-year sentence.[29] In addition, there is no automatic sentence for a capital offense. In fact, a judge or jury may decide that no disposition should be imposed if the judge or jury does not find it true that the juvenile "is in need of rehabilitation or the protection of the public or the child requires that disposition be made."[30] In the event of a negative finding to this question, the judge "shall dismiss the child and enter a final judgment without any disposition."[31] No disposition on a juvenile's case is similar to a "time served" plea in the adult world. The juvenile has been adjudicated delinquent, but there is no further court supervision with probation, nor is there any TJJD confinement.

A juvenile may also be placed on probation for any offense, including capital murder, for which the sentence is 10 years or less. And unlike in the adult system, a juvenile's prior felony adjudication history does not prevent him from being eligible for probation; there is nothing in the Family Code that matches the limits on probation eligibility that adults face in Texas Code of Criminal Procedure Chapter 42A. It can be a challenge for a prosecutor trying a juvenile for capital murder, murder, or an aggravated offense to qualify a jury panel on both the issue of considering probation as punishment and answering "not true" to the disposition question. A determinate murder case tried in Harris County many years ago—of a 10-year-old—required weeks of individualized voir dire before a jury could be seated because of many of these issues.

Transfer to the adult system

Before a juvenile reaches age 19 and after already having been sent to TJJD or placed on juvenile probation for a determinate petition offense, he can be transferred to adult prison, adult parole, or adult probation to complete any remainder of his sentence. In fact, a juvenile placed in TJJD can be transferred to adult prison as early as age 16 if his conduct indicates that the welfare of the community requires transfer.[32] These hearings can be conducted only by the juvenile court judge, not by the associate judge.[33] On a release or transfer hearing from TJJD, the court shall notify the juvenile, his parents, any legal guardian, the prosecutor, the victim in the case or a family member, and any other person who has filed a written request with the court to be notified of the hearing.[34] In Harris County, the court does not notify the victim or any family members of the transfer hearing date, so it generally falls on the prosecutor to make the effort to notify them or any other witness to give the court insight into the offender's conduct and its impact on the victim.

If the juvenile was placed on probation, it is the prosecutor's responsibility to request a hearing to transfer the juvenile before his 19th

birthday. Unless the incomplete proceedings statute applies (see below), the transfer hearing of the juvenile's determinate probation must happen before age 19.[35] There appears to be nothing that would prevent a juvenile judge from holding this hearing prior to the juvenile's 19th birthday (for example, three to six months before), but the actual transfer to an adult criminal district court cannot happen until the juvenile reaches age 19.[36] Prosecutors in Harris County have asked for earlier hearings so that we can try to prevent situations where the juvenile refuses to come to court and then ages out before the hearing can be held. However, after a hearing, the juvenile court may end the juvenile's probation by discharging him from probation, and this may happen prior to or on his 19th birthday.[37] If a situation arises where a juvenile absconds while on probation for a determinate petition, the court may hold the transfer hearing after age 19 under the Family Code statute that deals with incomplete proceedings.[38] The court must make a finding that the prosecuting attorney exercised due diligence in attempting to complete the proceeding before age 19. It would be imperative in any hearing held after the juvenile turns 19 for a prosecutor to put on evidence that regular attempts were made to find the juvenile to show due diligence.

Once a juvenile has been sent to TJJD, prosecutors cannot request a determinate sentence transfer hearing to transfer the offender to adult prison. TJJD must make the request by making a referral to the court that committed the juvenile.[39] The current representative for TJJD for these hearings is Leonard Cucolo. He travels around the state testifying in hearings, providing the juvenile's TJJD records for the hearings, and answering questions. He is an excellent resource for questions relating to TJJD. He will summarize for the court the voluminous records regarding the juvenile's behavior and any of his rehabilitative and educational efforts while at the facility. He will also provide the official recommendation from TJJD as to whether the juvenile should be sent to adult prison (Texas Department of Criminal Justice, or TDCJ) or placed on adult parole. TJJD may not transfer a juvenile to TDCJ on its own. Only the juvenile court that committed the juvenile to TJJD may transfer the juvenile to prison after TJJD makes a request and a hearing is held.

In the TJJD determinate transfer hearing, the juvenile court may consider several factors before making a determination as to whether to transfer the juvenile to the adult system. A list of those factors is contained in §54.11(k) and includes the juvenile's experiences and character before and after confinement at TJJD, the facts of the offense for which he was adjudicated, his abilities to contribute to society, protection of the victim and society, TJJD'S recommendation, the juvenile's best interests, and any other relevant factors.[40] TJJD offers committed juveniles many opportunities for rehabilitation and education. One TJJD facility offers a capital and serious violent offender's treatment program which, among other things, educates juveniles on how to respond to situations that can lead to reoffending. Treatment for sex offenders and drug abusers is also offered in several facilities. TJJD inmates can also earn course credits toward high school graduation, college credits, certificates of high school equivalency, and industry certifications for various trades. Therefore, it is important to offer evidence of the juvenile's behavior in the facility and to show his decisions and any lack of participation in these programs during the transfer hearing.

In those rare situations where a juvenile has been sent to TJJD on a determinate sentence and the juvenile is 18 years old at the time of disposition, it is imperative that he be transported and committed to TJJD before he turns 19. Any hearing to transfer a juvenile's determinate TJJD sentence must be heard before the juvenile reaches age 19 for all offenses that were committed after September 1, 2011. After he turns 19, TJJD cannot refer a juvenile to the court for transfer to TDCJ.[41] Again, it is important to note that only TJJD, not the court or prosecutor, may refer a juvenile for transfer to TDCJ.[42] In those unusual situations where a juvenile flees or escapes from custody and does not have a transfer hearing before he turns 19, a juvenile could dodge a lengthy TJJD sentence—even if he is caught after he turns 19. The legislature has not repaired the Texas Human Resources statute to deal with this situation, nor has it added TJJD transfer hearings to the incomplete proceedings statute mentioned above.

Unlike an "over-18" certification petition that is filed after a juvenile is 18, there is no similar law for determinate petitions. As stated above, an indeterminate petition or a

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determinate petition must be filed before age 18 for the juvenile court to gain jurisdiction. A juvenile who commits a determinate offense at age 13 or younger, other than capital murder or murder, and who is never charged with that offense before age 18, may never be charged and brought to justice. This is true even if sufficient evidence to charge the juvenile could not be discovered prior to age 18. The only exception to this law involves capital murder and murder. If a juvenile younger than 13 commits a capital murder or murder and the crime is not solved until after he turns 18, a determinate petition may not be filed against him, but an over-18 certification petition may be filed if certain requirements are met.[43] An over-18 certification petition cannot be filed for any other type of offense committed by a child who was under age 14, even if it can be shown that the crime could not be solved until after the juvenile had turned 18.

Demonstrating due diligence

For those juveniles who are close to 18 or over 18 and who are facing a determinate petition, the State must show due diligence in trying to resolve the case both before age 18 and before age 19. In fact, as noted above, if the juvenile receives a TJJD sentence after he turns 19, he can never be sent to TJJD or referred to TDCJ. After a juvenile turns 18, the Family Code gives a juvenile court jurisdiction over incomplete proceedings.[44] As long as the petition or a motion to modify was filed before the juvenile turned 18 and the court enters a finding that the State exercised due diligence in an attempt to complete the proceeding, the court retains jurisdiction. The Texas Family Code does not define due diligence, so the courts in juvenile cases have reviewed the manner in which it has been defined in other contexts. Courts have ruled that diligence is a question of fact that a trial court determines in light of the circumstances of each case.[45]

One method that we have used to show due diligence for juveniles close to age 18 or over 18 is to note on any reset forms that the resets were requested by the juvenile and his attorney. It is even better to note on those resets that the State was ready for trial. Another method is to put on the record in front of the judge at each setting that the State is ready and that the defense is asking for the delay, or to ask the court to make a docket entry to that effect. Having a documented record for the court and appellate court to review is very important. It is also critical to ask the court to make a finding on the record when the case is resolved that the State exercised due diligence in trying to resolve the case before the juvenile turned 18 or before he turned 19.[46] Unless the court's decision is arbitrary and unreasonable, this finding will not be overturned.[47]

Special legal issues

There are several unique legal issues with regards to determinate petitions. The State cannot obtain a determinate petition in a consensual sexual assault case "unless the child is more than three years older than the victim of the conduct,"[48] though the State may seek a determinate petition no matter the age difference if there is evidence of force or threats. In situations where a jury makes a finding of delinquency for a lesser offense that is not eligible for a determinate petition and the juvenile and his lawyer had, prior to voir dire, elected for jury disposition (punishment), the court will make the disposition decision instead of a jury.

In addition, a juvenile who has been adjudicated delinquent for a determinate petition offense cannot seal his record.[49] The only possible ways a determinate petition can be sealed is in the case of a "not true" (not guilty) verdict or a nonsuit of the case by the State. A nonsuit of the case could occur due to any of the State's normal reasons for dismissing a case and also after the successful completion of deferred adjudication probation. Because deferred adjudication probations may last only for a maximum of 180 days, and a court may impose one additional 180-day deferred after the completion of the first 180 days, this type of disposition does not happen often for these serious offenses.[50] Once the deferred adjudication probation is completed, a nonsuit would have to be filed and the juvenile would be eligible for sealing the determinate petition. In what has to be one of the biggest legislative omissions, the only determinate-eligible offense in which a juvenile cannot receive a deferred adjudication is intoxication manslaughter.[51]

A misconception that prosecutors sometimes have is that a determinate petition that results in a TJJD disposition is a conviction that may be used in adult court for offenses, such as felon in possession of a weapon. Juvenile adjudications

of delinquency are not convictions and may not be used as the underlying felony convictions for this statute and other statutes that require prior convictions. This is true even though a determinate TJJD sentence (and an indeterminate TJJD sentence) for a third-degree felony or higher can serve as an enhancement paragraph in an adult case.[52] Even though §12.42(f) of the Texas Penal Code says that the juvenile adjudication is a final felony conviction, it does not bar an adult defendant from being eligible for probation under Chapter 42A of the Code of Criminal Procedure. The only way a prior juvenile adjudication removes probation as a possible punishment is if a jury finds the juvenile adjudication true in the case of a first-degree felony and increases the minimum sentence to 15 years.[53]

Conclusion

Prosecutors practicing in juvenile law must remain cognizant of balancing rehabilitation of society's youth with seeking justice for our victims. While certification of an offender may be the more appealing option, it is not always the most just resolution to a case. There are many factors to consider when determining the best route for a case involving a serious offense, and the option of seeking a determinate sentence should be thoroughly weighed. Determinate sentencing offers the State an enhanced sentencing range and permanent adjudication while providing the juvenile the advantages of remaining in a system that recognizes his age limitations and his need for specific and extensive rehabilitative resources. ❇

Endnotes

1 Texas Family Code §53.045(a) (1)–(17). The following is the list of enumerated offenses:

- habitual felony conduct, Tex. Fam. Code §51.031
- murder, Penal Code §19.02
- capital murder, Penal Code §19.03
- manslaughter, Penal Code §19.04
- aggravated kidnapping, Penal Code §20.04
- sexual assault and aggravated sexual assault, Penal Code §§22.011 and 22.021
- aggravated assault, Penal Code §22.02
- aggravated robbery, Penal Code §29.03
- injury to a child/elderly individual/disabled individual (third-degree or higher), Penal Code §22.04
- felony deadly conduct involving discharge of a firearm, Penal Code §22.05(b)
- first-degree controlled substance, Health & Safety Code, Chapter 481, subchapter D
- criminal solicitation, Penal Code §15.03
- indecency with a child, Penal Code §21.11(a) (1)
- criminal solicitation of a minor, Penal Code §15.031
- criminal attempt of murder, capital murder, or an offense listed under Code of Criminal Procedure Art. 42.12, §3g(a)(1) (now Art. 42A.054)
- arson resulting in bodily injury or death, Penal Code §28.02
- intoxication manslaughter, Penal Code §49.08
- criminal conspiracy, Penal Code §15.02(1)–(16)

2 Tex. Fam. Code §51.031.

3 Id.

4 Tex. Fam. Code §51.031(a)(2)(3).

5 Tex. Fam. Code §54.04(m).

6 Tex. Fam. Code §51.0412(1).

7 Tex. R. Civ. P. 65 and *In re B.R.H.*, 426 S.W3d 163 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

8 *In the Matter of G.A.T.*, 16 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

9 Tex. Fam. Code §§51.02(2)(A)(B) and 51.04(a).

10 Tex. Fam. Code §54.04(l).

11 Tex. Fam. Code §53.045.

12 Tex. Fam. Code §53.045(b).

13 *In the Matter of A.R.A.*, 898 S.W.2d 14 (Tex. App.—Austin 1995, no writ).

14 37 Texas Administrative Code §380.8525 and 37 Texas Administrative Code §380.8555.

15 Tex. Human Resources Code §245.051(c)(1).

16 *Id.*

17 Tex. Human Resources Code §245.051(c)(3)–(4).

18 Tex. Human Resources Code §245.051(c).

19 37 Texas Administrative Code §380.8559.

20 Tex. Fam. Code §54.052.

21 Tex. Fam. Code §54.04(q).

22 Tex. Fam. Code §§54.04(q) and 54.051.

23 Tex. Fam. Code §54.051(e).

24 Tex. Fam. Code §54.051(g)–(h).

25 Tex. Fam. Code §54.051(e-2).

26 Tex. Fam. Code §§54.03(c) and 54.04(a).

27 Tex. Fam. Code §54.04(a).

28 Tex. Fam. Code §54.10(e).

29 Tex. Fam. Code §54.04(A)–(C).

30 Tex. Fam. Code §54.04(c).

31 *Id.*

32 Tex. Human Resources Code §244.014(a).

33 Tex. Fam. Code §§54.05 (a) and 54.10(e).

34 Tex. Fam. Code §54.11(b).

35 Tex. Fam. Code §54.051(b).

36 Tex. Fam. Code §54.051(d).

37 Tex. Fam. Code §54.051(c).

38 Tex. Fam. Code §51.0412.

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[39] Tex. Fam. Code §54.11(a).

[40] Tex. Fam. Code §54.11(k).

[41] Tex. Human Resources Code §244.014(a).

[42] Id.

[43] Tex. Fam. Code §54.02(j).

[44] Tex. Fam. Code §51.0412.

[45] *In re J.C.C.*, 952 S.W. 2d 47, 49-50 (Tex. App.—San Antonio 1997, no pet.).

[46] *In re B.R.H.*, 426 S.W 3d 163, (Tex. App.—Houston [1st Dist.] 2012, no pet.).

[47] Id.

[48] Tex. Fam. Code §53.045(e).

[49] Tex. Fam. Code §58.003(b).

[50] Tex. Fam. Code §53.03(a) and (j).

[51] Tex. Fam. Code §53.03(g).

[52] Tex. Penal Code §12.42(f).

[53] Tex. Penal Code §12.42(c)(1) and Tex. Code Crim. Proc. Art. 42.12 §4(d)(1) (now Art. 42A.056).

The Steve Harvey effect

What does a prosecutor do when the wrong verdict is read in court?

"Miss Colombia!" The Miss Universe Pageant winner from Colombia glowed with excitement and beamed the brightest smile she'd cast in her whole life—but only briefly.

"OK, folks, I have to apologize," host Steve Harvey spoke up. He said he'd made a terrible mistake and had read the results wrong. It was actually Miss Philippines who was the winner. The cascade of human emotions—the highs and the lows—rippled through everyone who saw the broadcast in December 2015.

By Brian Foley
Assistant District Attorney in Montgomery County

Such an error was repeated by Warren Beatty and Faye Dunaway at the 2017 Academy Awards when they announced that *La La Land* had won Best Picture. It took a few moments—and rearranging producers, actors, and directors of two different movie casts on stage—but finally *Moonlight* was correctly identified as the award winner.

Sometimes, in high-pressure, stressful moments, the wrong result is read aloud—but that doesn't change the truth, and it is easily corrected. Apparently that is also true in court when a prosecutor's nightmare turns into just a weird dream.

Hernandez v. State

Hector Vargas Hernandez stood in the 404th District Court of Cameron County waiting to hear the jury's verdict on first-degree felony charges of continuous sexual assault and two counts of aggravated sexual assault of a child.

For anyone who has tried even a misdemeanor DWI, let alone a serious felony, we know this is the most nerve-racking moment in the legal profession. In such a serious case, prosecutors can ratchet up the anxiety for the State, the victim, and certainly the defendant. Some even have a ritual to curb the mental stress. I've seen prosecutors who watch the jury to see if they make eye contact, trying vainly to eke out any sense of the verdict to come. Others stare blankly ahead or at a tablet or a case file, while still others bounce a heel with anticipation as they hold their pens poised against the file, ready to write the first vertical line of the dreaded capital "N" of "not guilty." They hold out hope that they can instead start with the rounded edge of a capital "G."

For the defendant, this moment has to include a flash of their entire lives, the crime itself, fear of a guilty verdict, and glimmers of hope for a not-guilty one. When the level of the charges is so high, again, these feelings must be magnified.

In Hernandez's case, the jury

returned from deliberations with its verdict. The defendant stood as the judge read it aloud:

> Court (reading): 'We the jury, find the defendant, Hector Vargas Hernandez, not guilty of the offense of continuous sexual assault of a young child."

For a moment, a brief moment, I'm sure the prosecutors' stomachs turned and the defendant's hopes raised. But then there was an interruption from the jury box.

> Foreperson: Excuse me. I think they—they double-checked if I wrote in the right area. I need to redo this, ma'am.
> Defense lawyer: Your Honor—
> Court: You made a mistake?
> Foreperson: Yes, ma'am. I made a mistake.
> Bailiff: All rise for the jury.
> Court: So you're saying you signed on the wrong form?
> Foreperson: Exactly.

At this point the jury retired to further deliberate and changed the verdict from "not guilty" to "guilty." You can almost hear the defense lawyer's inner child screaming, "Hey! No take-backs!"

Maybe it is from watching too much television drama or the understandable result of the pomp and tradition of courtrooms, but when the judge reads the verdict out loud in court, it seems pretty official. Well, it isn't. Just like during awards shows, the true result was known to those in charge, namely the jury, and when it was improperly conveyed, the remedy was simple: Correct the verdict. These jurors actually used Wite Out on the verdict form, and the judge then polled them as to the final verdict, noting that there had been a mere error in filling out the verdict form.

The law

When I saw that this mistake had happened, I could barely believe it. But alas, this isn't even the first time.[1] In *Reese v. State*, the trial court had to send the jury back *twice* for further deliberations due to confusion over the verdict forms.[2] The defendant in *Reese* was charged with sexual assault and compelling prostitution. The jury charge listed regular prostitution as a lesser-included offense jurors could consider instead of compelling prostitution. When the verdict came back the first time, the trial court noticed the jury had found the defendant guilty of sexual assault but neglected to return any verdict in the compelling prostitution case. The trial court told the jury, "You forgot to sign a verdict on one and all the jury needs to go back in there a minute."

The jury again returned from deliberation having found the defendant "guilty" of the compelling prostitution charge but "not guilty" of the lesser-included charge of regular prostitution. The judge had to send them back again because such a verdict created a conflict from a logical perspective: How could a defendant be not guilty of a crime that is subsumed in the greater crime of which he was found guilty? Jurors should not have considered the lesser-included charge because they had found Reese guilty of compelling prostitution. Finally, they struck through the not-guilty verdict on the lesser charge and the defendant was convicted on both higher charges.

The code even contemplates this conundrum. Texas Code of Criminal Procedure §37.04 reads, "The verdict shall be read aloud by the judge, the foreman, or the clerk. If in proper form and *no juror dissents therefrom* …" The very next section, §37.05, is about polling the jury. Polling asks each juror separately if the verdict is hers. The remedy proscribed is that "the jury shall retire again to consider its verdict," so the judge in the *Reese* case made no substantial error.

Other quirks

Another interesting quirk is that the judge has discretion on whether the verdict is unanimous.[3] In *Gutierrez v. State*, a juror testified at some point during deliberations that he wanted to change his vote on one charge to "not guilty." He testified that the foreman, who was a legal secretary, told him that he could not change his vote in that cause because she had already signed the verdict form and because she said the guilty verdict was final. The trial court was free to believe other juror testimony that there was no mistake and then determine that the verdict was unanimous.[4]

If a juror dies in the middle of trial and there is no alternate, "the remainder of the jury shall have the power to render the verdict."[5] This seems to imply that if more than one juror dies, perhaps 10 or nine could continue—but in such a case it isn't good enough that the foreman alone signs the verdict: "It shall be signed by every member of the jury. …"[6]

If jurors didn't die but merely became sick during deliberations, the jury can be disbanded with agreement from the State and defense or allow 11 jurors to render

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the verdict and assess punishment, also contingent upon agreement from the State and defense.[7]

Perhaps the most common-sense rule which was actually codified is that the sheriff shall provide a suitable room for the deliberation of the jury. … No intoxicating liquor shall be furnished them."[8] So according to statute, Jack Daniels is out, but perhaps a few Coors Lights could be considered to be outside the definition of "liquor"? ❇

Endnotes

1 *Ex parte McIver*, 586 S.W. 2d 851 (Tex. Crim. App. 1979; *Rodgers v. State*, 442 S.W.3d 547, (Tex. App.—Dallas 2014, pet. ref'd).

2 *Reese v. State*, 773 S.W.2d 314, 316 (Tex. Crim. App. 1989).

3 *Stanton v. State*, 747 S.W.2d 914 (Tex. App.—Dallas 1988, pet. ref'd) *Gutierrez v. State*, 851 S.W.2d 396 (Tex.App.—Eastland 1993 pet. ref'd).

4 *Gutierrez* at 397.

5 Tex. Code Crim. Proc. §36.29(a).

6 *Id.*

7 Tex. Code Crim. Proc. §36.29(c).

8 Tex. Code Crim. Proc. §36.21.

A new tool in the disclosure toolkit

Please allow us to introduce the Harris County District Attorney's Office disclosure database.

By Donna Cameron and Melissa Stryker
Assistant District Attorneys in Harris County

Every Texas prosecutor has the legal, statutory, and ethical duty to timely disclose to the defense any and all favorable[1] information, items, and evidence that the State possesses, under both the tenets of *Brady v. Maryland*[2] and its progeny; Texas Code of Criminal Procedure Article 39.14(h) and (k); and Texas Disciplinary Rules of Professional Conduct 3.04(a) and 3.09(d). Further, an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in a case, including the police.[3] The U.S. Supreme Court has explained that prosecution offices can meet this responsibility by establishing "procedures and regulations ... to insure communication of all relevant information on each case to every lawyer who deals with it."[4]

To meet this goal, the Harris County District Attorney's Office has created and maintains an electronic disclosure database, which serves as an enduring, centralized storehouse of information about recurring government witnesses[5] that is potentially favorable to an accused and therefore may need to be disclosed to the defense.

Among other things, creating a database of institutional *Brady* knowledge addresses the consequences that arise when employees leave the office, taking some or all of the *Brady* information concerning recurring government witnesses, which they have personally learned or acquired over their tenure, out the door. Future prosecutors are deemed to have imputed knowledge of that now-departed *Brady* information, regardless of whether that information was passed on to other members of the prosecution team before the employees left.[6] Hence, by creating and maintaining an electronic database of the information, our office can ensure that current and future prosecutors who need access to the office's entire wealth of known, potential *Brady* information about these recurring witnesses have this information for their use in seeking justice.

Though an electronic database like ours is certainly not the only way in which a prosecution office can ensure that its prosecutors have access to potentially favorable *Brady* information on recurring government witnesses that may be subject to disclosure—after all, there's really

no wrong way to compile information or to disclose it, so long as full and accurate disclosure is made when necessary—the database may serve as a helpful model or at least an example of how one large Texas county is tackling the issue.

What information is in the database?

As discussed above, our database compiles potential *Brady* information about recurring government witnesses that may be favorable to the defense and may therefore need to be disclosed. A "recurring government witness" is any person who may testify on behalf of the State of Texas regularly, such as peace officers, forensic experts, civilian laboratory personnel, probation and parole officers, juvenile detention officers, and jailers. The Disclosure Database Committee (discussed in greater detail later) determines on a case-by-case basis whether a particular individual should be classified as a recurring government witness.

Our office uses five categories to classify information in the database:

Category 1: The recurring government witness has a pending or disposed felony or misdemeanor offense, other than a Class C misdemeanor traffic violation, committed at any time, that resulted in a final conviction, deferred adjudication, or pretrial diversion.

Example:[7] Information that, on October 3, 2010, in Cause No. 123456, in the 226th Criminal District Court of Bexar County, Dr. Bud Wyzer, now employed as an assistant medical examiner in Harris County, was finally convicted of the third-degree felony offense of intoxication assault, committed on or about July 5, 2009.

Category 2: The recurring government witness is the target of a pending criminal investigation and is aware of the investigation.

Example: Information that the Public Corruption Division of the Harris County District Attorney's Office is investigating Houston Police Officer Frank Fourms for the offense of tampering with a governmental record, alleged to have been committed on three separate occasions when Fourms allegedly falsified his offense reports.

Category 3: A law enforcement or government agency has made administrative findings of untruthfulness or lack of candor on the part of the recurring government witness.

Example: Information that the Harris County Institute of Forensic Science has made an administrative finding that Dylan Deeinay, a former DNA technician, was untruthful—for falsifying information on a laboratory worksheet—despite that a Harris County grand jury subsequently no-billed him.

Category 4: The committee has received from any person potential *Brady* information regarding a recurring government witness's truthfulness.

Example: Information from Polly Prossequetor that Polly formed the opinion that Peter Probaytin, a community supervision officer in Harris County, is an untruthful person or has a bad character for truthfulness because Peter was dishonest while testifying in a community-supervision-revocation case that Polly handled.

Category 5: The committee has determined that a recurring government witness has other potential *Brady* issues based on misconduct—either on- or off-duty—or performance deficiencies related to his or her area of expertise.

Example: Information that the Texas Department of Public Safety conducted an internal affairs investigation of Joanna Breth, a technical supervisor responsible for managing and maintaining 10 breath-alcohol instruments, and found that she had performed deficiently in her post for approximately five years before being terminated.

If the recurring government witness's alleged conduct is classified under Categories 1, 2, or 3, the database administrator (more about this position later) will automatically input the information about the witness and her alleged conduct in the database. Conversely, if the recurring government witness's alleged conduct is classified under Categories 4 or 5, the administrator will list the information about the witness and her conduct as "pending" until the committee has voted to officially include or exclude the information. Category 4 or 5 information that is pending a final vote by the committee will still be disclosed to the accused.

Who decides what information is included in the database?

The Disclosure Database Committee in our office meets to discuss potential entries into the database, issues related to mass-disclosures (discussed in greater detail later), as well as other matters concerning

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database policy, function, and access. Committee members include upper-level prosecutors in the office's Felony, Juvenile, Misdemeanor, Special Crimes, Appellate, Post-Conviction Writs, Civil Rights, Public Corruption, and Conviction Integrity Divisions, as well as the Chief Investigator and the Disclosure Database Administrator, who serves as chair of the committee.[8] A quorum of six or more members is required for each meeting. A majority vote of the quorum determines inclusion or exclusion from the database, as well as deletion or removal from the database.

The standard of review that the committee uses to make these determinations is whether the information at issue has any tendency to be favorable to the accused, including to impeach the credibility of the government witness. As a matter of office policy, the committee resolves close questions in favor of inclusion in the database.

Who actually enters information into the database?

To ensure that all information in the database is uniform and consistent, the database administrator, Donna Cameron (a co-author of this article), is the only person who has full access to the database and is authorized to make or delete entries. Donna receives information for potential entry into the database from law enforcement and government agencies, individual prosecutors and investigators in our office, and prosecutors and investigators in our Civil Rights and Public Corruption Divisions, who, when they become aware of possible *Brady* information concerning recurring government witnesses or agencies, promptly alert her to information for her review, per office policy.

Who has access to the database?

Our office restricts access to only prosecutors and investigators, who must explicitly agree to the office's terms and conditions of use. "Using" the database does not mean that prosecutors and investigators have full, unrestricted access to it—only Donna , the administrator, has full access. Instead, prosecutors and investigators are permitted only to query the database for the recurring government witnesses involved in their cases, and they may conduct searches only for purposes of complying with our office's legal, statutory, and ethical disclosure responsibilities.

The database is not accessible by defense counsel, defendants, members of the public, or anyone else. Our office's Information Systems Technology Department is responsible for ensuring that the database is secure and inaccessible by unauthorized persons.

Do law enforcement and government agencies have a role?

Yes. Our office relies on law enforcement and government agencies to conduct internal investigations of officer and employee misconduct, and then to advise us promptly of the results of those investigations. Additionally, our office expects that all law enforcement officers and other recurring government witnesses will disclose potential *Brady* information—including impeachment information related to off-duty conduct—to the prosecuting attorney before the officers or witnesses serve as affiants or witnesses in any criminal case or matter.

As a practical matter, because a database of potential *Brady* information concerning recurring government witnesses and their agencies is only as good as the information that a prosecutor's office receives, it would be prudent to develop a cooperative, working relationship with all agencies in a jurisdiction regarding this issue. To do so, prosecutors might consider sending each agency a letter or a memorandum of law to explain what information they are seeking; why they are asking for the information, with specific references to the office's legal, statutory, and ethical disclosure requirements; how the office will categorize the information; how and when information might be removed from the database; and appropriate assurances that the prosecutor's office will use all reasonable and justifiable means to protect sensitive information, such as by asking the trial court for *in camera* inspection prior to disclosure, moving for a protective order or a motion to seal following disclosure, and arguing against the admission of any irrelevant or immaterial information or evidence in court. An example of a letter that our office sends to law enforcement and other agencies in our jurisdiction is available at www.tdcaa.com, along with a disclosure checklist that agencies can use when responding to requests for information.

Because the subject of potential

Brady information concerning officers and other government witnesses can be a sensitive matter, cooperative and mutually agreeable relationships with law enforcement and other agencies in a jurisdiction on this issue may take time to develop and will be ongoing and dynamic in nature.

Are the recurring government witnesses given notice that potential *Brady* information about them may be included in the database?

Yes. If Donna inputs information in the database concerning a recurring government witness for alleged conduct under Categories 1, 2, or 3, our office will provide the witness, as well as the witness's employer at the time of the conduct—even if the witness has since resigned or been suspended or terminated from that employment—written notice of the category of inclusion and a summary of the allegations.

For alleged conduct classified under Categories 4 or 5, our office sends notice of potential inclusion into the database to the witness and the witness's employer at the time of the conduct. Notice in this particular instance provides the witness an opportunity to submit any controverting information to the committee in writing within 20 days. The committee will consider any response or rebuttal when it votes on whether the pending information should be officially included or excluded from the database; however, if the committee votes to include the information in the database, the decision cannot be appealed.

Is inclusion of information in the database a concession of its admissibility?

No. It is critical to note that our office's disclosure of any information from the database to any party does not constitute a concession that the information actually fits the precepts of *Brady* or that it is relevant, material, or admissible in court. In fact, there are times when we disclose potential *Brady* information to the defense but argue strenuously against its admission, its further disclosure to other third parties or the public, or both.

Further, it is also important to mention that the mere fact that a recurring government witness has been added to the database is not an admission or comment by our office about that individual's credibility as a recurring government witness, on his reputation, or on his ability to serve in his current professional capacity. Similarly, a recurring government witness's inclusion in the database also does not signify that we have concluded that person has actually committed misconduct.

Is information ever removed or deleted from the database?

Yes. A recurring government witness may petition the committee for removal from the database with proof of a change in the status or disposition of his administrative findings or criminal charges. Except as provided below, a recurring government witness may be removed from the database upon exoneration; acquittal; a grand jury's no-bill; a grand jury's decision to take no action; or circumstances under which the allegations against the witness are found to be unsubstantiated, unsupported, unjustified, unproven, unverifiable, or overruled by administrative or court action.

Exceptions to removal from the database may occur in circumstances where the conduct of a recurring government witness tends to reflect negatively on his truthfulness or credibility or when the allegation in the exonerated or acquitted charge has nevertheless been sustained administratively.

How is sensitive or confidential information in the database protected?

Information in the database may be sensitive and require protection during disclosure for a variety of reasons. First, the information compiled in the database is an internal record prepared by our office in anticipation of or in the course of preparing for criminal litigation, and it reflects the mental impressions or legal reasoning of the attorney representing the State. Accordingly, the database entries—which are predominately summaries of information and documents that law enforcement and other agencies supply—are privileged work product, which our office seeks to protect from fishing expeditions and other broad, unspecific requests for disclosure.[9]

Second, the database may contain information that is related to an ongoing grand jury matter or a preliminary administrative investigation, or that is otherwise confidential by law or protected from public disclosure by statute.[10] Finally, there can be legitimate privacy concerns

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over information about recurring government witnesses in the database, given that the release of information pertaining to preliminary-stage criminal and administrative investigations may subject the recurring government witnesses to unnecessary public criticism and unwarranted impeachment. Because of these concerns, our office requires that prosecutors employ all reasonable, prudent, and case-appropriate measures to protect the confidentiality of database information during disclosure to the accused, such as by filing and obtaining a court ruling on a motion for *in camera* inspection, motion for protective order, motion *in limine*, or motion to seal.

How is disclosure made when a large number of cases may be affected by misconduct?

Sometimes an event, incident, or condition related to an individual witness or to an entire law enforcement or government agency requires our "mass" disclosure of the potential *Brady* information to a multitude of potentially affected defendants, as opposed to disclosure in an individual case by the trial prosecutor. For example, mass-disclosure-triggering events in a jurisdiction may include the application of different standards for DNA mixture calculations due to scientific advancements; the widespread destruction of evidence in a law enforcement agency's property room without court orders; the discovery that a law enforcement agency lacks a required legal policy, such as one for vehicle inventory; and alleged false testimony given by an expert witness who has testified in a large number of cases.

Our office requires that an individual who or agency that becomes aware of information that may require mass disclosure must convey that information to the database administrator or our office's chief investigator, who will bring the matter to the attention of the committee. The committee will then expeditiously review the information and make a recommendation as to whether mass disclosure is necessary. If the committee votes that mass disclosure is required and the elected district attorney concurs, the chief of the Conviction Integrity Division is responsible for drafting and disseminating mass-disclosure notices to the rest of the office; affected unrepresented defendants; current defense attorneys of record and, when deemed appropriate by the district attorney, the last-known attorneys of record on the affected disposed cases; the Harris County Public Defender's Office; the Harris County Criminal Lawyers Association; the Office of Capital and Forensic Writs; and the Texas Forensic Science Commission. Additionally, the Conviction Integrity Division will maintain a record of all mass-disclosure notifications issued, including the parties notified and the details of the disclosures provided.

Conclusion

An electronic database for potential *Brady* information regarding recurring government witnesses, like our office's disclosure database, is neither legally required nor the exclusive means by which a prosecution office can keep track of information for its prosecutors' use when making their legally, statutorily, and ethically required disclosures to the accused. It is also very important to note that such a database will not alter prosecutors' discovery obligations under Article 39.14(a);[11] absolve prosecutors of their ongoing legal, statutory, and ethical obligations to disclose information favorable to the defense concerning people and evidence not yet in the database or who may not be included in the database at all—such as civilian complainants and witnesses, confidential informants, and jailhouse informants—or eliminate the need for prosecutors to have open and candid conversations with all of the witnesses in their cases concerning potential *Brady* information about those witnesses that may be favorable to the defense and, so, may need to be disclosed.

However, despite these caveats, a centralized electronic disclosure database could serve as a useful, time-saving tool to aid prosecutors with their seemingly ever-increasing and potentially onerous discovery and disclosure burdens, and it might be worth considering for your office. For us, the database is the product of a lot of work by both our office and the law enforcement and other agencies in our jurisdiction, and, though it will always be a work in progress as we strive for full and transparent justice for all, we at the Harris County District Attorney's Office are proud of it. ❇

Endnotes

[1] Information or evidence is favorable to the accused when it is: 1) exculpatory—tending to justify, excuse, or clear the defendant from guilt; 2) useful for impeachment—anything offered to dispute, disparage, deny, or contradict; or 3) mitigating—useful to the defense during punishment

proceedings. See *Little v. State*, 991 S.W.2d 864, 866-67 (Tex. Crim. App. 1999), see also *Banks v. Dretke*, 540 U.S.668, 702 (2004)(explaining that prosecutors are obligated to disclose mitigating punishment evidence, such as a State's witness's status as an informant).

[2] 373 U.S. 83 (1963).

[3] *Kyles v. Whitley,* 514 U.S. 419, 437-38 (1995).

[4] *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[5] As explained later in greater detail, a "recurring government witness" is any person who may testify on behalf of the State of Texas on a regular basis.

[6] For purposes of the *Brady* doctrine, knowledge of favorable and material evidence is imputed to the prosecutor trying a case when the evidence is possessed by or known of by any member of the prosecution team—including law enforcement officers and employees of the prosecutor's office—even when that individual prosecutor does not have actual knowledge that that evidence exists. See *Kyles*, 514 U.S. at 437; *Giglio*, 405 U.S. at 153-55. Unlike under the *Brady* doctrine, Ethics Rule 3.09(d) is triggered only when the prosecutor has actual knowledge of the favorable information or evidence. See *Schultz*, No. 55649, at *10 (explaining that, "unlike *Brady*, Rule 3.09(d) limits the information to that actually known by the prosecutor," but cautioning that "under the disciplinary rules, actual knowledge may be inferred from circumstances").

[7] Please note that this and the other examples provided are intended to be hypothetical and any similarity to any actual persons or the names of any actual persons is purely coincidental.

[8] The committee chair is responsible for creating meeting agendas, record keeping, updating the disposition of criminal and administrative actions pending against recurring government witnesses, facilitating recurring government witnesses' notices and responses, and making all entries and deletions to the database upon committee approval.

[9] See generally Tex. Gov't Code §552.108(a)(4), (b)(3).

[10] See, e.g., Tex. Code Crim. Proc. Art. 20.02 (regarding grand jury secrecy); Tex. Loc. Gov't Code §143.1214(b) (providing that, in municipalities with a population of 1.5 million or more people, a police department may release information in the department's investigatory files for disciplinary actions against police officers only to another law enforcement agency or the office of a district or United States attorney).

[11] "Subject to the restrictions provided by §264.408, Family Code, and Art. 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the State shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the State in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the State or any person under contract with the State. The State may provide to the defendant electronic duplicates of any documents or other information described by this article. The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the State. This article does not authorize the removal of the documents, items, or information from the possession of the state, and any inspection shall be in the presence of a representative of the state." Tex. Code Crim. Proc. Art. 39.14(a).

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. ❇

Getting creative to train on voir dire

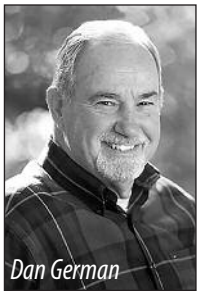
With the high stakes of felony trials, inexperienced prosecutors need help with jury selection. Brazos County has discovered a training ground that helps new attorneys *and* the community.

By Ryan Calvert
Assistant District Attorney in Brazos County

I believe that voir dire is the most important part of any jury trial. I also believe that the first voir dire of everyone's career tends to be pretty much a trainwreck. Mine certainly was, and for the last 15 years I've used that experience as a cautionary tale of what *not* to do. Voir dire is a skill best-learned by *doing*. For the last few years, our office has taken a creative approach to developing voir dire skills in our newest prosecutors by using a resource our community has in abundance: college students. As a result, many of our new prosecutors get an opportunity to make mistakes in a safe environment without jeopardizing the felony cases we handle. At the same time, we help educate students about the criminal justice system and about our roles as prosecutors.

Many new prosecutors throughout Texas begin their careers handling misdemeanors and spend months, or even years, experimenting with new techniques and finding what works for them. Most importantly, those new misdemeanor prosecutors get to make mistakes and learn from them in a setting where the stakes are relatively low. On the other hand, some offices, like ours, handle only felonies. As a result, our new prosecutors try more serious cases immediately. While prosecuting felony cases right away is exciting and rewarding, it can also be scary.

All veteran prosecutors know that an ineffective voir dire can sink even a strong case. Usually, that knowledge comes from hard experience. But experience can be difficult to get for brand new prosecutors in offices that try only felonies. Supervisors are understandably reluctant to jeopardize cases by turning voir dire over to a prosecutor who has never done it before. A few years ago, I had a talented (but inexperienced) prosecutor in my court who was preparing to try his first domestic violence case. As in most domestic violence cases, the victim was completely against us and had recanted her statement to police. Such cases are voir dire-intensive, and I wanted to find a way to get our new prosecutor some experience without simply throwing him into what I refer to as the "live-fire" environment of an actual trial.


Dan German

To train young prosecutors, our office sometimes conducts "mock voir dires" using other prosecutors and staff members as a jury panel. While these exercises can be useful, they sometimes devolve into many participants wanting to play the "problem juror" and trying to make it as difficult on the trainee as possible. The element of realism is lost and the training becomes less effective. I realized that what we needed was a captive audience comprised of individuals from diverse backgrounds who would be both unfamiliar with the voir dire process and honest in their responses, just as our jurors would be. Living in a college town, the answer was obvious: We needed to hijack a college class and use it as a jury panel.

I mentioned the idea to several coworkers and one reminded me that Dan German, a retired police officer and former bailiff in my court, was teaching criminal justice classes at Blinn College in Bryan. I contacted Professor German and asked him about the possibility of conducting a voir dire with his students. Dan was all for the idea, and we set up a date for it. We decided that the first half of the class would consist of the voir dire and the second half would be a question-and-answer session for the students, where we would explain what we were doing throughout the jury selection process and why we were doing it.

Our new prosecutor prepared the voir dire he would use in his upcoming domestic violence case, and we went to Blinn. When we arrived at the school, Professor Ger-

man had his students seated in order and gave us a seating chart with names filled in. (It helps to have a professor who was a bailiff!) Our new prosecutor went through his voir dire with the students and got valuable practice sharpening challenge-for-cause questions on issues such as the victim being against prosecution and the absence of visible injuries. The day was a success, and when the time came for our new prosecutor to conduct the actual voir dire on that case, it was polished and effective because he had already done it once before. We also heard from Professor German that the students enjoyed seeing a practical demonstration of what happens in the courtroom and getting an explanation of why we did what we did. Professor German asked me if we could come back each semester. I enthusiastically agreed. In the last few years, I have visited Professor German's class several times, always bringing our least-experienced prosecutors to conduct a voir dire before they had to do one in an actual trial.

From a prosecution perspective, these mock voir dires have paid off. New prosecutors have made mistakes that would've been disastrous in a real courtroom, and they've gotten to *see* how these mistakes can impact a case, as well as how to avoid them. One example occurred last year. Our newest prosecutor at that time was conducting a voir dire on a theft of less than $1,500 with priors to the class. He covered the elements well and made sure everyone understood the law. What he did *not* do is protect the panel on the issue of the prior convictions. Normally in the classroom, I do not conduct a defense voir dire after our prosecutors finish their presentations. On this occasion, though, I knew it wouldn't take long to make the point I wanted to make. After our new prosecutor finished, I got up as the defense lawyer and said:

Brazos County Assistant District Attorney Maritza Sifuentez-Chavarria walks Blinn College students through a mock voir dire as part of their criminal justice class.

"We obviously wouldn't be here in a felony court if my client hadn't been convicted of theft twice before. So, how many people here already believe my client is probably guilty?"

Every hand in the room went up. Then I asked:

"And if you hear evidence that my client has been convicted twice before of theft, there's no way you can disregard that in deciding whether my client is guilty of this charge—is that right?"

Again, every person in the room agreed, and our "panel" was busted.

Our new prosecutor was a bit deflated initially but learned a valuable lesson about what can happen if we don't protect a jury panel on issues like jurisdictional priors. And he learned that lesson in a setting that didn't result in an actual mistrial.

Anyone who has been through TDCAA's Train the Trainer Course knows that people retain far more information if they can *see it*, in addition to hearing about it. Practicing voir dire with the college students provides an opportunity for the senior prosecutor to demonstrate certain things with an actual panel for trainees to *see*, instead of simply describing to trainees what they should do.

In April of this year, I went to Professor German's class with a young prosecutor who had never picked a jury before. She conducted a domestic violence voir dire and was comfortable and confident in front of the panel. However, she structured most of her questions as, "The law is [fill in the blank]. The law is that way because [fill in the blank].

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Application forms for Investigator awards and scholarship

Updated applications for 2017's PCI certificates, Chuck Dennis Award, Oscar Sherrell Award, and Investigator Section scholarship are now posted online. Changes have been made to all the applications so please use the new forms (on our website in this issue of the journal), and do not use any old forms you might have. Applications must be postmarked by the deadline date or they will not be accepted.

The Professional Criminal Investigator (PCI) is open to district, county, and criminal district attorney investigators with at least eight years of full-time employment in a prosecutor's office (if holding an Advanced Certificate with TCOLE) or five years of full-time employment (if holding a Masters Certificate with TCOLE).

The Chuck Dennis Investigator of the Year Award is given annually to that investigator who exemplifies the commitment of the law enforcement community to serving others, serving his office, and remaining active with TDCAA.

The Oscar Sherrell Service to TDCAA Award recognizes those enthusiastic investigators who excel in TDCAA work. This award may recognize a specific activity that has benefited or improved TDCAA, or it may recognize a body of work that has improved the service that TDCAA provides to the profession.

The TDCAA scholarship program was initiated in 2002 by the Investigator Section Board of Directors with the objective of encouraging our future through the support of our present. Two $1,000 scholarships are awarded each year, one at the Annual Update in September and one at Investigator School in February. Funding for these scholarships is currently provided through the sales of TDCAA merchandise and Board fundraisers made available at approved training conferences. ❇

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Does anyone have any problems or concerns about that?" Panel members sat quietly and did not respond to her questions. As a result, she was doing almost all of the talking and thus, she wasn't learning anything about who the prospective jurors were or how they really felt about the issues discussed. After she finished, I got up and approached one of the panel members and the following exchange occurred:

"Ma'am, should we prosecute family violence cases even if the victim doesn't want us to?"

"Yes," she replied.

"Why?"

"Because family violence might get worse if nobody intervenes, and that can get people killed. It also can have an effect on other people like children who have to see it."

I repeated that process with several individual jurors and looped each one's responses around to others on the panel. I also pointed out that many people feel that what goes on in a relationship is not the government's business, and I then asked individual jurors to respond to that idea. Soon, a lively discussion began among the panel members.

After we left the class, our new prosecutor and I discussed why the panel did not answer her questions but did answer mine. She realized that asking direct but open-ended questions to individual jurors forces them to respond. She also learned that following up by asking "why?" forces panel members to think about their positions and justify them, thus allowing us to see who jurors really are. That lesson resonated far better through the process of trial, error, and demonstration than it would have if I simply told her to ask individuals specific questions because it's more effective.

Practicing voir dire with college students provides benefits well beyond valuable training for our prosecutors. As I wrote this article, Professor Dan German happened to stop by my office to visit and told me that our voir dire demonstrations are his students' favorite part of the class. They enjoy going through the process and come away with a better understanding of the criminal justice system than they had before we came. Helping the public see and understand what we do as prosecutors is more important today than perhaps it has ever been. I heard a colleague say recently that "as prosecutors we must define ourselves, lest we be defined by others." Going into classrooms and engaging with students gives us not only an opportunity to train, but also a chance to explain our ethical responsibilities, and it allows students to see us doing the right thing for the right reasons. Because there are universities and community colleges throughout our state, this is an activity that is potentially open to most Texas prosecutors.

Professor German always thanks us for coming to the college and teaching his students. I hope he realizes that they are teaching us far more than we are teaching them. And, in helping prosecutors learn to be more effective trial lawyers, those students are, themselves, helping to do justice. For that, we are grateful, and we look forward to many more visits. ❇

From *The Organized Mind*

An excerpt from Chapter 7: Organizing the Business World

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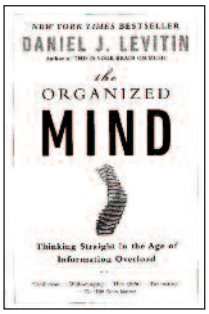
There is a critical point about differences between individuals that exerts arguably more influence on worker productivity than any other. The factor is locus of control, a fancy name for how people view their autonomy and agency in the world. People with an internal locus of control believe that they are responsible for (or at least can influence) their own fates and life outcomes. They may or may not feel they are leaders, but they feel that they are essentially in charge of their lives. Those with an external locus of control see themselves as relatively powerless pawns in some game played by others; they believe that other people, environmental forces, the weather, malevolent gods, the alignment of celestial bodies—basically any and all external events—exert more influence on their lives than they themselves do. (This latter view is artistically conveyed in existential novels by Kafka and Camus, not to mention Greek and Roman mythology.) Of course, these are extremes, and most people fall somewhere along a continuum between them. But locus of control turns out to be a significant moderating variable in a trifecta of life expectancy, life satisfaction, and work productivity. This is what the modern U.S. Army has done in allowing subordinates to use their own initiative: They've shifted a great deal of the locus of control in situations to the people actually doing the work.



By Daniel J. Levitin

Individuals with an internal locus of control will attribute success to their own efforts ("I tried really hard") and likewise with failure ("I didn't try hard enough"). Individuals with an external locus of control will praise or blame the external world "It was pure luck" or "The competition was rigged"). In school settings, students with a high internal locus of control believe that hard work and focus will result in positive outcomes, and indeed, as a group they perform better academically. Locus of control also affects purchasing decisions. For example, women who believe they can control their weight respond most favorably to slender advertising models, and women who believe they can't respond better to larger-size models.

Locus of control also shows up in gambling behaviors: Because people with a high external locus of control believe that things happen *to* them capriciously (rather than being the agents of their own fortunes), they are more likely to believe that events are governed by hidden and unseen outside forces such as luck. Accordingly, they are likely to take more chances, try riskier bets, and bet on a card or roulette number that hasn't come up in a long time, under the mistaken notion that this outcome is now due; this is the so-called gambler's fallacy. They are also more likely to believe that if they need money, gambling can provide it.

Locus of control appears to be a stable internal trait that is not significantly affected by experiences. That is, you might expect that people who experience a great deal of hardship would give up any notions of their own agency in the face of overwhelming evidence to the contrary and become externals. And you might expect that those who experience a great deal of success would become internals, self-confident believers that they were the agents of that success all along. But the research doesn't bear this out. For example, researchers studied small independent business owners whose shops were destroyed by Hurricane Agnes in 1972, at the time the costliest hurricane to hit the United States. Over 100 business owners were assessed for whether they tended toward internal or external locus of control. Then, three and a half years after the hurricane, they were reassessed. Many realized big improvements in their businesses during the recovery years, but many did not, seeing once-thriving businesses deteriorate dramatically; many were thrown into ruin.

The interesting finding is that on the whole, none of these individuals shifted their views about internal-versus-external locus of control as a function of how their fortunes changed. Those who were internals to begin with remained internals

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regardless of whether their business performance improved during the intervening time. Same with the externals. Interestingly, however, those internals whose performance improved showed a shift toward *greater* internality, meaning they attributed the improvement to their hard work. Those who were externals and who experienced setbacks and losses showed a shift toward greater externality, meaning they attributed their failures to a deepening of the situational factors and bad luck that they felt they had experienced throughout their lives. In other words, a change of fortune following the hurricane that confirmed their beliefs only caused them to increase the strength of those beliefs; a change in fortune that went counter to their beliefs (an internal losing everything, an external whose business recovered) did nothing to change their beliefs.

The locus-of-control construct is measurable with standard psychological tests and turns out to be predictive of job performance. It also influences the managerial style that will be effective. Employees who have an external locus of control believe their own actions will not lead to the attainment of rewards or the avoidance of punishment, and therefore, they don't respond to rewards and punishments the way others do. Higher managers tend to have a high internal locus of control.

Internals tend to be higher achievers, and externals tend to experience more stress and are prone to depression. Internals, as you might expect, exert greater effort to influence their environment (because, unlike externals, they believe their efforts will amount to something). Internals tend to learn better, seek new information more actively, and use that information more effectively, and they are better at problem solving. Such findings may lead managers to think they should screen for and hire only people with an internal locus of control, but it depends on the particular job. Internals tend to exhibit less conformity than externals, and less attitude change after being exposed to a persuasive message. Because internals are more likely to initiate changes in their environment, they can be more troublesome to supervise. Moreover, they're sensitive to reinforcement, so if effort in a particular job doesn't lead to rewards, they may lose motivation more than an external, who has no expectation that his or her effort really matters anyway.

Industrial organization scientist Paul Spector of the University of South Florida says that internals may attempt to control work flow, task accomplishment, operating procedures, work assignments, relationships with supervisors and subordinates, working conditions, goal setting, work scheduling, and organizational policy. Spector summarizes: "Externals make more compliant followers or subordinates than do internals, who are likely to be independent and resist control by superiors and other individuals. … Externals, because of their greater compliance, would probably be easier to supervise as they would be more likely to follow directions." So the kind of employee who will perform best depends on the kind of work that needs to be done. If the job requires adaptability and complex learning, independence and initiative, or high motivation, internals would be expected to perform better. When the job requires compliance and strict adherence to protocols, the external would perform better.

The combination of high autonomy and an internal locus of control is associated with the highest levels of productivity. Internals typically "make things happen," and this, combined with the opportunity to do so (through high autonomy), delivers results. Obviously, some jobs that involve repetitive, highly constrained tasks such as some assembly-line work, toll taking, stockroom, cashier, and manual labor are better suited to people who don't desire autonomy. Many people prefer jobs that are predictable and where they don't have to take personal responsibility for how they organize their time or their tasks. These workers will perform better if they can simply follow instructions and are not asked to make any decisions. Even within these kinds of jobs, however, the history of business is full of cases in which a worker exercised autonomy in a job where it was not typically found and came up with a better way of doing things, and a manager had the foresight to accept the worker's suggestions. (The sandpaper salesman Richard G. Drew, who invented masking tape and turned 3M into one of the largest companies, is one famous case.)

On the other hand, workers who are self-motivated, proactive, and creative may find jobs with a lack of autonomy to be stifling, frustrating, and boring, and this may dramatical-

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ly reduce their motivation to perform at a high level. This means that managers should be alert to the differences in motivational styles, and take care to provide individuals who have an internal locus of control with autonomous jobs, and individuals who have an external locus of control with more constrained job. ❇

Article 11.07 habeas litigation

The art of knowing when an affidavit from defense counsel is needed when he or she has been alleged ineffective

Routinely, affidavits are ordered in habeas corpus litigation, but let's be honest: Even if a prosecutor has answered hundreds of Art. 11.07 applications for writs of habeas corpus, whether to request an affidavit for responding to an ineffective assistance of counsel (IAC) claim is something we debate and consider on a case-by-case basis.

By Andréa Jacobs
Assistant Criminal District Attorney in Tarrant County

What is a writ?

An 11.07 writ, in its simplest terms, is a post-conviction vehicle for relief. While issues raised on direct appeal are confined to the four corners of the record, a writ gives the applicant a chance to supplement the record and raise issues that would not otherwise be available. However, writs are limited to constitutional, fundamental, and jurisdictional claims that were not (and could not be) raised on direct appeal.

What is an IAC claim?

Probably the most common writ claim is that the applicant received ineffective assistance of defense counsel. Not only is it better raised on a writ because the record on direct appeal is rarely sufficient to prove it, but also most non-cognizable errors can be magically transformed into cognizable claims if raised as part of an IAC claim. To prove an IAC claim, the applicant (who has the burden during habeas proceedings) must show:

1) counsel's representation fell below an objective standard of reasonableness; and

2) a reasonable likelihood exists that the outcome of the proceeding would have been different but for the alleged misconduct.

An IAC claim may be raised against trial and appellate counsel; one may be also raised when the defendant has pled guilty and is attacking counsel only during the punishment phase. How does the State respond to these claims? The answer is usually by requesting an affidavit from the complained-of counsel.

When is an affidavit necessary?

When I first started out nearly 15 years ago, I requested affidavits in almost every IAC case. Why? Was I playing it safe? Was I trying to buy

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Ten tips and suggestions for IAC affidavits

1) Request an affidavit if:

• the record before the trial court is not sufficient to resolve the IAC claim.

• the State is unable to supplement the record sufficiently to resolve the IAC claim.

• the claim defeats the attorney-client privilege.

2) Get an order from the court instead—it will:

• protect the defense attorney (see ABA Opinion No. 10-456),

• establish a deadline,

• establish what is requested of the attorney, and

• make options, such as Show Cause Orders, available.

3) Request plenty of time for filing. I suggest 60 days from the date the State's response is filed. Also make sure the trial court has enough time after the affidavit is due to determine whether the affidavit is sufficient or a hearing is needed.

4) Assist the defense attorney by:

• providing samples of the affidavit's form and format,

• making the State's file (minus work product) available,

• ordering RR/CR from the clerk's office (check it back in, and allow the attorney to check it out if he needs to take it with him),

• being available to answer questions,

• reading the affidavit and recommending whether additional information is needed to adequately address the issues (if asked),

• offering to file a motion for extension if the attorney needs more time to produce the affidavit, and

• *not* writing the affidavit for him.

5) If the trial court orders an affidavit, have the attorney file the affidavit with the district clerk's office; don't attach it to the State's pleadings.

6) If the filed affidavit does not sufficiently address the issue, request an order for an amended or supplemental affidavit.

7) If the attorney refuses to file an affidavit, request a Show Cause Order.

8) Remember that a hearing is an option even after getting an affidavit.

9) If it is apparent that a hearing will be held, regardless of the contents of any affidavit, consider not requesting an affidavit.

10) Even if you have requested the affidavit and it has been filed, do not cite to an affidavit that is not credible.

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some time to address the issues because the 15-day deadline for a response was not enough? Or did I just not know when one was truly needed? All of these reasons are probably partially true.

I quickly realized, though, that there are problems with requesting affidavits in all cases. First, before 2014, waiting on an affidavit could stall the habeas proceeding in the trial court for months or even years.[1] Even now, untimely affidavits can force a trial court to request an extension from the Texas Court of Criminal Appeals (CCA). Second, sometimes defense attorneys do not realize the importance of their affidavit. When a defense attorney tries to respond to claims without reviewing his files or the trial transcript, he runs the risk of getting the basic facts wrong: dates, guilty plea vs. trial, plea bargain vs. open plea, jury vs. bench, etc. In a proceeding where credibility is important, it is difficult to cite to an affidavit or support a witness who swears to incorrect facts that are easily verifiable by the record. Third, we sometimes forget that a defense attorney also works full-time. While an unnecessary affidavit may make our job easier, reviewing the record and drafting an affidavit may take hours away from the defense attorney's own work.[2] Therefore, occasionally, it is better to resolve the issues without an affidavit.

It is important to remember that the applicant has the burden of proof. However, if he merely alleges facts which, if true, entitle him to relief, the CCA is going to want some substantive response. Consider whether the allegations even rise to

the level of ineffective assistance. Most applications are filed *pro se*, so many of them fail to allege grounds that would even entitle the applicant to relief. For example, a claim that "my attorney failed to raise an insanity defense due to voluntary intoxication" does not need an affidavit because voluntary intoxication is not a defense.[3] Likewise, the applicant may raise an issue that, on its face, would be contrary to any reasonable trial strategy. For example, an applicant saying that "my attorney failed to cross-examine my probation officer during my revocation hearing on the fact that she let me continually violate the conditions of my community supervision for two years before she filed on me" would not need an affidavit because it is a reasonable defense strategy to avoid highlighting additional, repeated violations of the supervision contract during a revocation hearing. In short, if the applicant fails to allege facts, which, if true, entitle him to relief, no affidavit is needed.

To know when an affidavit is needed, one must understand the purpose of an affidavit—that is, to provide the court with sufficient evidence to dispose of the issue. Therefore, our question is: Is the evidence in the record sufficient to resolve the issue, or does the State have access to sufficient evidence with which to supplement the record? If not, an affidavit is needed.

Sounds pretty easy, but sometimes the answer is not that clear. That may be why the vast majority of remands from the CCA are for affidavits from attorneys addressing IAC claims.[4]

Are there magic words?

I used to advise that there were "magic words" for when an affidavit was needed. If the applicant used those magic words, an affidavit was needed regardless of alleged facts or supporting evidence. For example, words such as "failure to investigate," "failure to advise," and "improper advice" will likely need affidavits because the court's record typically does not speak to what investigation counsel completed or what advice she gave her client. That's what I used to say about magic words.

But I have since concluded that that should not be the end of the inquiry. First, we should not assume the record is silent. The attorney may have called her client to the stand before the plea or during the trial to discuss investigation and whether the client was happy with the representation on the record. The record may need to be ordered from the court reporter if the case was not appealed.[5] Also, if the attorney was appointed, her bill may shed light on how much time was spent on investigation. Another option is an affidavit from the prosecutor supporting counsel's actions. And, my personal favorite: An applicant may have written letters to the court prior to filing the application that may alleviate the need for an affidavit. For example, I once had an applicant complain that counsel promised him he would be eligible for parole after *two years* on a 40-year aggravated case. But in several letters to the judge, he told the judge his attorney advised him that he would need to serve 20 years before being eligible for parole.[6] The applicant even included a sworn statement from a fellow inmate concurring that counsel advised him he would need to serve 20 years. In that case, no affidavit from counsel was needed.

For ineffective assistance of appellate counsel (IAAC) claims, the appellate court's website may be helpful. A common claim is that appellate counsel failed to timely advise about the lower court's affirmance of the trial court's judgment, thus depriving the applicant of his *pro se* petition for discretionary review. But perhaps unknown to applicants, Rule 48.4 of the Texas Rules of Appellate Procedure requires a defense attorney to write a letter to the appellate court certifying that he advised his client of the court's opinion within five days by certified mail and to include a copy of the return receipt. As these letters are filed and made part of the record, they are routinely available for download from the appellate court's website. With that letter, no affidavit would be needed.

These, of course, are the easy examples. What if the appellate record, trial court's file, and State's file do not comment on counsel's representation? Another thing to consider is whether the records and files may resolve the second IAC prong of harm.

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. *If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.*"[7]

I will admit that, when analyz-

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NEWS WORTHY

Upcoming TDCAA seminars

Prosecutor Trial Skills Course, July 9–14, at the Omni Southpark Hotel, 4140 Governors Row, in Austin. Call 800/843-6664 to make reservations; reference the 2017 TDCAA Prosecutor Trial Skills Course to get the group rate.
Legislative Updates, in 21 locations across the state starting July 21 in Austin. Go to www.tdcaa.com/ content/2017-tdcaa-legislative-updates for a list of cities and dates and to register online.
Advanced Trial Advocacy Course, July 31–August 4, at Baylor Law School, 1114 South University Parks Drive, in Waco.
Annual Criminal & Civil Law Update, September 20–22 at the Henry B. Gonzalez Convention Center, 900 E. Market St., in San Antonio. Hotel information is on our website at www.tdcaa.com/ training/2017-annual-criminal-civil-law-update.
Key Personnel & Victim Assistance Coordinator Seminar, November 8–10, at the Westin Oaks Hotel at the Galleria, 5011 Westheimer at Post Oak, in Houston. Room rate is $134 plus tax per night for a single or double occupany and includes Internet access. To make reservations, call 713/960-8100 or 888/627-8514 and reference the 2017 TDCAA Key Personnel & Victim Assistance Coordinator Seminar to get the special group rate.
Elected Prosecutor Conference, December 6–8, at the Omni Southpark Hotel, 4140 Governors Row, in Austin. The room rate is $130 plus tax for single or double occupancy and includes self-parking and Internet access. Call 512/448-2222 or 800/843-6664 and reference the 2017 TDCAA Elected Prosecutor Conference to get the special group rate. ❇

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ing an IAC case, I tend to focus more on the first prong—but the applicant must prove both. And the State's file may demonstrate counsel was advised that the State was ready to re-indict for a higher offense right before the applicant pled guilty. The State's file may also show the evidence was strong and the plea agreement was lower than the minimum the applicant was facing at trial. The trial file may also include the State's notice of extraneous offenses, which would indicate how an applicant may have fared during a punishment hearing. All of this evidence can overcome a claim that a plea was involuntary due to ineffective assistance of counsel.

Now, the intent of this information is not to discourage the request for an affidavit. In a perfect world, all defense attorneys would review the trial record before filing an affidavit, all affidavits would respond completely to all IAC claims, and all defense attorneys would file their affidavits within one week of the request being made. And, when in doubt, *get an affidavit*. However, getting an unneeded affidavit may be more trouble than it's worth. Requesting an affidavit requires an Order Designating Issues unless the attorney is willing to provide an affidavit within a ridiculously short amount of time. Affidavits require judges to sign orders, clerks to mail orders, and defense attorneys to make time to review their files and write affidavits. And remember, an affidavit may also run the risk of hurting an attorney's credibility if he chooses not to review his files or the record before trying to remember what happened.

Checks and balances

Finally, what happens if you've chosen wrong? If the trial court recommends disposition without an affidavit and the CCA determines an affidavit was needed, the CCA will simply remand the case back to the trial court for an affidavit or a hearing. And the trial court also retains the right to either 1) order an affidavit even if not requested by the State or 2) deny the State's request if it finds an affidavit is unnecessary. If an affidavit is not needed but ordered, the affidavit will be filed and considered. If an affidavit is needed, it will be ordered.

Endnotes

[1] The CCA noticed that some cases were languishing in the trial court for far too long. As a result, the Court amended the Texas Rules of Appellate Procedure and limited the trial court's jurisdiction to 180 days. After that, the writ must be forwarded to the CCA unless an extension is granted to the trial court. See Tex. R. App. P. 73.5 (West 2014).

[2] More and more courts are compensating defense attorneys for the time spent obeying the trial court's orders for affidavits.

[3] *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997).

[4] Another possible reason for a remand may be that the writ transcript is forwarded to the CCA without any input from the State or trial court.

[5] I would suggest this only if the record is that of a plea and there is some indication that the record would address the issue. I would rather request an affidavit from counsel than have my office spend money on a record for a fishing expedition.

[6] His complaint to the trial court was that he was scared into pleading guilty because he was facing trial on a continuous sexual abuse case where he faced a 25-year-minimum, day-for-day sentence if convicted. Counsel had advised him that he did not stand a chance at trial.

[7] *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984) (emphasis added).

A Texas paw-secutor

Collin County recently "hired" a new staffer—Winston the English bulldog—as a therapy dog. His path to the DA's office is a little different from how most prosecutor's offices get therapy dogs, and his story just might be a help for smaller offices with limited funds or personnel.

By Katherine Nolden
Assistant Criminal District Attorney in Collin County

In May 2016, Collin County Criminal District Attorney Greg Willis began ruminating on the idea of getting a therapy dog for our office. A therapy dog is different from service dogs in many ways, but they boil down to one rule: A service dog is not a pet, while a therapy dog is. While both are trained animals, a service dog is specifically trained, according to re-quirements in the Americans with Disabilities Act, to provide assistance to one individual with a disability—think veterans suffering from post-traumatic stress disorder (PTSD) or vision-impaired people.

A prosecutor's office wouldn't need a service dog—a therapy dog is much more suited to the needs of, say, crime victims who come in for interviews or who are preparing to testify against an assailant. Mr. Willis knew that if his office was going to bring on a therapy dog, he wanted to do it right. He wanted a certified, trained, even-tempered dog that would help the victims in his county find peace during a scary time.

Completely separately from the therapy-dog discussions between our elected CDA and his first and second assistants, I had learned from a family member of a therapy dog working in Orange County, Florida. I did some late-night Googling and research on the subject, turned to look at the 50-pound, wrinkled pup next to me, and thought, "Winston could do that!"

Winston is my English bulldog. He met me, his human, at eight weeks old, during the end of my 1L year at Southern Methodist Law School. Throughout law school, he stayed by my side, usually snoring, for those long study sessions, brief-writing conferences, and all-nighters most of us have gladly blocked from our memories. He is also a proud graduate of the American Kennel Club's S.T.A.R. Puppy Program, AKC's Canine Good Citizen course, and Therapy Dogs International's therapy dog certification. (He is currently under consideration as an AKC Therapy Dog, but he is still waiting on those results—it's much like waiting to hear about passing the bar.)

After my night of Internet searching, the next day I enrolled Winston in a refresher obedience course because, let's be honest, his "sit" and "stay" had turned into "slouch" and "roll to the ground." We completed that refresher in October, and I then decided to test the waters at our office with the idea of a therapy dog. I made a comment to my Division Chief, Bill Wirskye, who told me to research using therapy dogs in the courthouse and what it would entail. As someone who likes specific, articulable directions, this broad request led me to accumulate a file full of information ranging from therapy-dog training to scientific research on "Therapeutic Aspects of the Human-Companion Animal Interaction" (written by one Sandra Barker—and yes, I smiled at her last name too).

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Winston in the hallway at work

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When our office returned from the holiday break and our court schedule was back in full force, I knew that the idea of a therapy dog to comfort crime victims would soon come up again. I decided unilaterally to take Winston to his therapy dog test. I looked up the first available test (because I had the confidence of a trial lawyer in Winston's abilities), saw it was scheduled in four days on a Saturday, and promptly signed both of us up. I had only skimmed over the testing requirements, and when I looked at them again that night, I groaned. Winston, an English bulldog, is 80 percent motivated by food and 20 percent motivated by back scratches, and two of the tests involve tempting the dog with a treat while commanding him to "leave it." This was going to be interesting.

The day of testing

The day of the test we made the drive out to Trophy Club, Texas, to the Zoom Room; we were in the second round of testing but arrived 15 minutes early (as my old law school professor used to say, "if you're on time, you're late") to check in, pay our $10 testing fee, and watch the first round of handlers and dogs go through the ringer. In each round, there were only five dogs with their respective handlers. As we watched pair after pair fail the two-phase, 12-part test, the pairs were released by the judge with a polite but firm, "You're excused."

When it came time for us to start the test, I was nervous, but Winston was as happy as can be. He trotted on into the testing area and immediately introduced himself to the judge. (I have no idea where he learned to be friendly to judges.) We began Phase I with fairly simple tests: The judge first checked to see if Winston was kept properly groomed, and then I had to leave him with a volunteer and exit the room, being completely out of sight for two minutes, to see if he grew anxious or wouldn't relax with people besides me. Winston had to keep his calm while being surrounded by people all wanting to pet him or talking loudly. I was starting to think this wasn't a test but basically a vehicle to inflate Winston's vanity—he sailed through with flying colors.

The last tests in Phase I were more what you would think of: commands to sit and stay, then my repeating those commands from 6 feet away, and finally having him stay in a down position while I walked 20 feet away, and then calling him to me. While all of the dogs before us bounded up and ran to their handlers, Winston lazily got to his feet and plodded over to me. He also made sure to heave a large sigh in the middle of his walk, drawing laughs from the other handlers and the judge.

Phase II was where I knew we could slip up. The easy tests in that phase included meeting another dog, being comfortable around loud noises (a volunteer threw a beam with hubcaps attached to it on the ground when the dogs were not looking to see how they'd react), and being comfortable around sights common in a hospital: people in wheelchairs, people walking with crutches, or people with rolling IV drip stands. Then came the dreaded hurdle: Winston was supposed to sit in front of the judge, who was holding a treat in front of him. I would command him to "leave it," and he would have to do just that. The dog before us, in a compromise to his owner's command to "leave it" and his own desire for that cheesy bacon treat, hadn't eaten it but licked it—and the pair was excused.

I thought we were in trouble when Winston's eyes lasered in on the treat. He heard my "leave it" command—did I mention I was allowed to say the command only once and without pulling on his leash?—and he started to lean in. Not a Sheryl Sandberg kind of "lean in," but an "Eve in the Garden of Eden gazing at the apple" type of "lean in." He eyes darted from the treat to me (I had a stern look on my face), back to the treat, then back to me. He came thhiiiis close to the treat, took a big ol' sniff, savored it, then sat back and looked up at me, clearly pleased with himself. I looked at the judge, expecting her to politely excuse us, but she just laughed and said, "He didn't eat it, so you can go on." I was ecstatic, especially because the next and last test involved simulated reading to children with Winston laying on the ground (his specialty). Three child volunteers came in, and we all sat in a group with Winston on the ground in front of me as I read two pages from *Le Petit Prince.* Winston passed his test, and we walked out as a newly minted handler with her just-certified therapy dog—a just-certified therapy dog with a huge bone in his mouth. It was an apology for the earlier treat he didn't get to eat.

Taking Winston to work

The Monday after his test, I turned in the packet of therapy dog information with a sticky note on the front, proudly underlining the fact

that the office had access to a ready and waiting therapy dog because Winston was certified. Mr. Willis reviewed the information I provided, along with the development of having a ready-to-go volunteer. Within two weeks I was called into his office, where Winston was officially offered the job. I promised Winston would wear his bowtie for his first day.

ABOVE: Winston the English bulldog in "his" office. BELOW: Winston is just as popular among staff in the DA's office as he is with crime victims and witnesses.

Winston's first Monday on the job was in March of this year, and we haven't looked back. His first trial was an aggravated sexual assault where the victim had to watch a video of the assault made by her rapist. Prosecutors had made the tough decision that the victim should watch the video before testifying, so while she worked up the courage to press "play" on the laptop, Winston sat next to her for hours. She watched the video with headphones and ended up moving from her seat (next to Winston on the couch) to the floor with the computer on the coffee table before her. Winston, still prone on the couch, had his head on her shoulder for part of the video and then moved to the floor to put his head in her lap for the rest. She asked for Winston to return every single day of her week-long trial. A smile crossed her face when she greeted him every morning and when she played with him while waiting for the trial to end. The only other time she smiled that week (in addition to when she was with Winston) was when the jury returned a guilty verdict and her rapist was sentenced to 40 years.

A normal day for Winston depends on the number of victims we have in the office. He once met four different victims all on one day; he needed a break in my quiet office at lunch because most of those victims were under 16 and very lively. He has a bed and toys in both my office and the Victim Assistance suite. One day he spent five solid hours sitting next to a victim who had to wait to testify and was in bad shape emotionally. He'll even work weekends if I need to too: I will take paperwork into an empty courtroom and sit on the witness stand going through case files. I'll have him stay by me the whole time so that he can practice sitting by a testifying victim. Each day Winston leaves the office exhausted; we don't make it out of the parking lot before the dulcet sounds of snoring emanate from the back seat. Winston loves working for the citizens of Collin County, but even a half day of work can leave him spent.

On those days when Winston has no victims to meet, he turns his attention to the employees in the office. He'll check in with his boss, Greg Willis, for a tummy rub, snooze on the floor of an investigator's office, or try and raid the fridge in the break room. He has played fetch in the hallways and tried his short legs at foot races. Everyone he passes comments on how their spirits have been lifted just by seeing his squished face peek in their doorway. Many days he lumbers from office to office or visits his friends in the cafeteria who always seem to have an "extra" hamburger for him. He has met the deputies, most of the judges, and court staff in the courthouse; he was even invited to sit in a judge's chair. (Unlike the rest of us, he did not appreciate the chair's swivel quality.)

An unconventional path

Winston's path to becoming the office's therapy dog was not standard. From all of my research, the "norm" is for an office to adopt a puppy from a shelter and train the puppy to be a therapy dog, or an office purchases an already-trained dog. Winston offered us a third way

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to get a therapy dog. Personally, I think Winston's way is the best (perhaps I'm biased): It means that an office doesn't need extra personnel to take care of a newly adopted or purchased pup, and it's cost-effective too. His refresher obedience course cost about $50, and the therapy-dog certification test was $10. Winston is also an unpaid volunteer, and I save money on doggie daycare. In terms of time, the refresher course and certification took about 15 hours (an eight-week obedience course at one hour a week, practicing commands in the intervening days, plus a two-hour certification test).

This time and money were well spent: Not only is Winston a certified therapy dog, but he is also a very well-behaved dog outside the office. I imagine there are many ADAs, investigators, and staff in offices around Texas who own and love dogs that might make be able to make a difference in a prosecutor's office. It's certainly an option I would encourage offices to consider because the benefits of an on-staff therapy dog far outweigh the costs.

Winston—and his happy-go-lucky demeanor and penchant for cuddling—has meant that traumatized victims, both child and adult, have walked into a courtroom calmer and more confident than they thought they would be. His presence lightens the atmosphere of the office so that the staff can better handle the burdens of our careers. He means the citizens of Collin County have another set of shoulders, those of a paw-secutor, that they can rely on. ❇