The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

July–August 2022 • Volume 52, Number 4

"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

The nightmare before Christmas

December 20, 2019, started like so many other brisk December mornings. The sun came up. The hope and joy of Christmas were near. Little 4-year-old Christian Redmond woke up for school.

He was a sweet boy, and he was excited to see his friends—and to see the guy who was making his list and checking it twice: Santa would be at his school party that day. Christian wanted to make sure Santa knew what to bring for Christmas this year: a monster truck and a new video game. At school, Christian saw his friends, ate cookies, and sang "Jingle Bells." Christian was happy because Santa had listened to his Christmas gift requests.

But this is no happy holiday story. People whom Christian trusted and loved, people who should have cared for him, failed him.

Migel Matthew, a longtime family friend who had been at the hospital when Christian was born, had spent the morning drinking with Christian's mother, Tyneshia Chatman. She, Tyneshia, and two of their children got into Matthew's car to retrieve Christian and his three siblings from school. Then they took the five kids to pick up Matthew's own daughter from the bus stop. On the way, Matthew crashed the car while going 103 miles an hour. Christian was killed instantly, never living to see Christmas morning.

By John Gillespie
Criminal District Attorney in Wichita County

Visiting the scene

At the courthouse, December 20 seemed like just another day right before the holiday. The courthouse had slowed to a crawl. A few of us went to lunch at a Mexican restaurant on the south side of Wichita Falls. We took the loop northbound on our way back. Unbeknownst to us, a drunk driver was flying down the loop in the southbound lane carrying precious cargo. When we got back to the courthouse, we heard about the crash that killed 4-year-old Christian and sent his four siblings, all under age 8, to the hospital. Only a few minutes separated us from crossing paths with the drunk driver.

Continued on page 13

Hinton scholarships awarded

We are very pleased to report that the Foundation awarded five TDCAA members with full scholarships to attend our Annual Criminal & Civil Law Conference in September.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

I want to thank **Chuck Rosenthal**, former District Attorney in Harris County, who organized the fundraising behind the **Michael Hinton Memorial Scholarship Fund**. Mike was quite a figure in the courthouse, and I am sure he'd be pleased that prosecutors who otherwise couldn't get the training they need will be at the conference this September.

TPS invitations are out!

It's that time of year. Yes, much like the anticipation those in Hollywood feel when Oscar nominations are made public, you might be eagerly anticipating your nomination to join the Texas Prosecutors Society. In 2022, several lucky current and former prosecutors will get the golden envelope in the mail with their invitation to join this august group. The Society exists to honor those who have contributed to prosecution with a passion, and to continue that passion by contributing $2,500 over 10 years to an endowment fund to support TDCAA's training efforts. That endowment fund is closing in on $700,000 and represents the promise of excellence in training and support for the profession well into the future. Congratulations to these chosen few! ❇

Recent gifts to the Foundation*

Charles Crain, III *in memory of Mike Hinton*
Rusty Hardin Jr.
Allison Harrell *in memory of Mike Hinton*
Lucinda Hinton *in memory of Mike Hinton*
Jo Ann Linzer
Lance Long
Lyn McClellan *in honor of Joe Vinas*
Lyn McClellan *in honor of Spence Graham*
Mindy Montford
Beth Toben
John Wakefield, III

* gifts received between April 2 and June 3, 2022

Texas District and County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701 • www.tdcaa.com

About *The Texas Prosecutor*

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, staff, and TDCAA members.

Table of Contents

The school shooting in Uvalde and lessons learned

When I got the call from **John Dodson**, County Attorney in Uvalde County, that his town was in the middle of an active shooter situation at an elementary school, my heart sank.

By Rob Kepple
TDCAA Executive Director in Austin

As the "not again" thoughts raced through my mind, I recounted in my brain the number of Texas prosecutors who have led their communities in the aftermath of such tragedies, whether the attacker survived to be prosecuted or not. I sadly offer to you now some of the wisdom that other prosecutors and staff have shared when facing a horror like that in Uvalde and how to be prepared, lest something similar happen in your community. Search our website for two articles: "taking action after a mass shooting" and "Sutherland Springs." I wish you didn't need to read them.

VAC heroes

On Friday May 26 at about 1:30 p.m. I received a telephone call from an elected prosecutor asking for help. It was the Friday before the Memorial Day weekend, so it was surprising that the phone rang at all. But this was important: Our friends in Uvalde County needed seven to 10 additional victim assistance coordinators (VACs) to come to Uvalde right then—over the holiday weekend—to help the families of the victims complete their Crime Victims' Compensation forms. Given the lateness of the day and the urgency of the matter, I didn't think just calling around to various offices would get us folks as quickly as we needed them, so I did something I have never done in 31 years at TDCAA: I sent an email to all of the VACs in our database. It seemed like I was asking a lot of people to give up the holiday, so I figured sending out a call for help to hundreds of people might lead to a few folks being able to drop their plans and head to Uvalde.

The response brought tears to my eyes. Within a matter of minutes of sending the email, I was overwhelmed with dozens upon dozens of replies from VACs who were ready to go right then. In fact, one VAC was getting ready to hook up her travel trailer so she'd even have her own place to stay! Suffice it to say that our friends in Uvalde had all the help they needed over a nightmare of a weekend. I honor our victim assistance coordinators for their selfless sacrifice and willingness to put the victims of crime first when the call comes in. I am so proud to work for you!

Rule 3.09 update

If you have been following the work of the State Bar Committee on Disciplinary Rules and Referenda (CDRR), you know that its meeting on May 4 to discuss the testimony offered at the April 6 meeting (summarized in the May–June edition of this journal) was, well, a bit of a mess. The forceful testimony from the many prosecutors who offered thoughtful commentary on exactly what this rule would mean for Texas prosecutors seemed to divide the committee into three camps. Some members wanted to approve the proposal and send it to the Bar's board for further consideration. Others wanted to postpone the matter to give the committee time to fine-tune the proposal based on the public comments. And still others wanted to indefinitely table the issue due to a lack of consensus. As a result, the com-

mittee postponed any decision until the June 1 meeting.

A week before the June 1 meeting, **Professor Vincent Johnson** floated another version of a Rule 3.09 amendment that says a prosecutor has the duty to "remedy" a wrongful conviction, but then defines "remedy" to include a disclosure to the proper people. In addition, the committee briefly discussed the proposed compromise offer from **C. Scott Brumley**, County Attorney in Potter County, who sent a letter detailing his proposal to the committee on May 2—a letter that most of the committee members admitted they had yet to read. (A good lesson here for anyone seeking to influence a governing body or the legislature: A letter alone *never* works. It won't even get read most of the time.)

Faced with a continued lack of consensus, the committee voted to end the current rulemaking effort and re-initiate the process with two competing proposals in the initial publication. The first proposal would be a combination of Johnson's new proposal and one made by **Mike Ware** of the Texas Innocence Project. The second is Brumley's proposal, and all three are published below.

Committee member **Rick Hagen** of Denton volunteered to chair a committee and invited prosecutors to be a part of it. We anticipate Scott Brumley will be invited, but as this issue goes to print, we don't know who else will be on it. Oddly enough, the person who got this ball rolling last year and offered another proposal last week, Professor Johnson, declined to be on the committee. He also walked out of the meeting at which prosecutors testified, which may make one wonder why everyone else is working so hard on a proposal whose own author won't defend it in a meeting of prosecutors.

The next CDRR meeting at which the committee can consider this issue will be August, and of course members must once again go through the comment period, publication, and a public hearing after that.

I want to thank Scott Brumley and everyone on the committee working on Rule 3.09 who have bird-dogged this issue. There is still work to be done, so keep an eye out for future updates.

The Johnson proposal:

(f)1 When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comments: [7]2 Under paragraph (f), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted. [9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (f), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

The Ware proposal:

The former prosecutor complies with this duty by disclosing exculpatory and mitigating evidence as provided by this Rule and constitutional and statutory authorities to the following: 1) The current District Attorney or prosecuting authority in the jurisdiction where the conviction occurred, and 2) the current judge of the court of conviction.

The Brumley proposal:

Proposed Rule 3.09 (Special Responsibilities of a Prosecutor)

The prosecutor in a criminal case shall:

...

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, ex-

In a matter of minutes of sending the email, I was overwhelmed with dozens upon dozens of replies from VACs who were ready to go right then. In fact, one VAC was getting ready to hook up her travel trailer so she'd even have her own place to stay!

cept when the prosecutor is relieved of this responsibility by a protective order of the tribunal; [and]

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07; and

(f) when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

(1) if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to:

(i) the defendant or defendant's counsel of record, if any, and

(ii) the Texas Indigent Defense Commission, if it is a state conviction, or the appropriate federal public defender, if it is a federal conviction; or

(2) if the conviction was obtained in another jurisdiction, promptly disclose that evidence to the appropriate prosecutor in the jurisdiction of the conviction.

(g) A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

Comment: 7. When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a person was convicted in that prosecutor's jurisdiction of a crime that person did not commit, paragraph (f)(1) requires disclosure to the defendant and the defendant's counsel of record (if any) and to an appropriate state or federal office or agency. If the person was convicted outside of the prosecutor's jurisdiction, paragraph (f)(2) requires disclosure to the appropriate prosecutor in that jurisdiction, thereby triggering the duties required under paragraph (f)(1) for the latter prosecutor. For purposes of this comment and section (f), the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense, either deliberately or inadvertently. The term "credible" means evidence a reasonable person would find believable. The term "material" means that there is a reasonable probability that the disclosure of the new, credible evidence would have led to a different result in trial or sentencing.

Kenda Culpepper on the State Bar's Board

Congratulations to **Kenda Culpepper**, Criminal District Attorney in Rockwall County and past President of the TDCAA Board, on her election as an At-Large Section Representative during the State Bar Council of Chairs meeting on May 16. Kenda took office in June and will serve in that capacity until June 2025. (You might also recall that Kenda was awarded the Criminal Justice Section State Bar Prosecutor of the Year award in 2021!)

As one of six Section Representatives who serve on the State Bar's Board of Directors, Kenda will represent the interests of members of 48 different State Bar Sections, including Family Law, Real Estate & Probate Law, Criminal Justice, the Judicial Section, Appellate Law, and the Litigation Section. Kenda has most recently served as the Chair of the Criminal Justice Section and the State Bar Professionalism Committee. She also currently serves on the Board of Directors for the Texas Bar College and the Texas Bar Foundation.

I know that Kenda is not a voting member of the State Bar Board, but because the Bar (through the CDRR committee) has been in our business of late, I am glad we have a strong advocate for our profession in the room!

Justice the DA Cat

An update on the resident purr-alegal in the Criminal District Attorney's Office in Cameron County: Justice the DA Cat, who was featured in the last issue of this journal, has a new Instagram handle: @i_amjusticeccdacat. Follow him to keep up with his latest antics.

Robert Trapp appointed administrative judge

Congratulations to **Robert Trapp**, former Criminal District Attorney in San Jacinto County, who has been appointed by **Governor Greg Abbott** as Presiding Judge of the Second Administrative Judicial Region, effective May 21, for a term set to expire four years from the date of qualification. Robert served as an elected prosecutor twice, first as the County Attorney in San Jacinto County from January 1984 until December 1989, and second as the District Attorney since July 2014 until his appointment. In between he served as the judge of the 411th District Court for Polk, Trinity, and San Jacinto Counties. Robert has served his community well as both a prosecutor and a judge, and we know he will do a fine job in his new administrative role. Good luck, Judge, times two!

And welcome to Todd Dillon

Congratulations to **Todd Dillon**, whom the governor has appointed as the Criminal District Attorney in San Jacinto County. Todd was serving as the first assistant in that office prior to his appointment and has also prosecuted in Polk, Harris, and Angelina Counties. Welcome to the ranks of elected prosecutors!

Goodbye to Stephanie Huser

I want to offer a heartfelt thanks to **Stephanie Huser**, the TDCAA Research Attorney who has recently departed for the General Counsel's Office at the Texas Municipal League. I am sure you all agree that Stephanie did a fine job when you called her with a legal question. She was fast, thorough, and on target! We are sure going to miss her, but it is good to know we now have a resource when someone calls with a municipal law question.

If you have any interns who might be interested in working for TDCAA as a Research Attorney, please have them contact me. ❇

Deadline for the Investigator Section scholarship is July 31

The Investigator section of TDCAA offers two $1,000 scholarships each year to dependents of TDCAA members.

The first is awarded at the February Investigator Conference and is open only to dependents of members of the Investigator Section. The second is awarded at the Annual Conference in September. This scholarship is open to dependents of TDCAA members.

The eligibility requirements are simple: Students must be under legal guardianship of a current TDCAA member, less that 25 years of age, and currently enrolled in an accredited college, university, or vocational-technical school in the United States as of the application deadline. The student also must have a cumulative high school or college grade point average of at least 3.0 or equivalent. The student must also write an essay of no more than two pages in response to a prompt.

The scholarship committee selects a recipient about a month before each conference, and each are encouraged to appear or make a video to be presented at each conference; however, it is not a prerequisite. The scholarship application is posted on the TDCAA website (search for "scholarship"), or you may contact any TDCAA Investigator Section Board member, and we will be happy to provide an application. ❇

"Boilerplate" in a cellphone warrant requires a connection to the crime

I was curious about the origin of the term "boilerplate," so I looked it up on Wikipedia, which, as we all know, is never wrong.

Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

Boilerplate refers to the rolled steel used to make boilers; by analogy, it also refers to the typeset metal printing plates that 19th-Century news magnates distributed to small local newspapers.[1] The term eventually came to mean text that can be reused in general applications without significant changes to the original, typically in contracts.

In *State v. Baldwin*,[2] the Court of Criminal appeals recently addressed the use of boilerplate in cellphone search warrant affidavits, with the admonition that it's not enough standing alone—there must be a nexus to the offense.

Background

The case involved the capital murder of Adrianus Michael Kusuma in Harris County. On September 19, 2016, Mr. Kusuma's brother Sebastius was at Adrianus's home and heard a loud banging downstairs, which was someone kicking in and shattering the back door. When he ran to investigate, he was confronted and assaulted by a masked black man who was armed with a handgun and who demanded money. Sebastius heard a gunshot from the kitchen and saw another masked black man running from the back of the house. The two masked men grabbed a box of receipts and money from the Kusamas' family business and fled through the front door. Sebastius followed the two and witnessed them getting into a white four-door sedan and fleeing. When he went back inside, he found his brother Adrianus unconscious and unresponsive, with a fatal gunshot wound to the chest.

One of Mr. Kusuma's neighbors also reported a white four-door sedan leaving the neighborhood at a very high rate of speed. Security footage from three nearby houses also showed a white sedan circling the neighborhood on the day of and the day before the murder, entering the cul-de-sac, driving to the Kusuma residence, and then turning around. A neighbor came forward and told investigators that a white Lexus sedan driven by a black man passed by his residence three times shortly before the murder, and another neighbor saw a white sedan occupied by two black men "casing" the neighborhood the day before the offense; this neighbor contacted police thinking the men may be involved with the murder. The neighbor took a picture of the white sedan, including the license plate.

The license plate was registered to John Wesley Baldwin's stepfather, who told police that he had sold the sedan to Baldwin. Police found and followed Baldwin in his Lexus and arrested him after committing traffic violations and failing to identify himself. He gave police a lengthy statement and consented to a search of the sedan, and a cellphone was found inside. Baldwin gave police the number to the phone but refused to allow police to search it.

Police applied for a search warrant; the attached affidavit detailed the facts surrounding the offense, the witnesses who saw the white sedan, and the traffic stop and arrest of Baldwin in the white sedan (with some omissions, as discussed below). The affidavit further contained the following statement:

> Based on your Affiant's training and experience, Affiant knows that phones and "smartphones" such as the one listed herein, are capable of receiving, sending, or storing electronic data and that evidence of their identity and others may be contained within those cellular "smart"

phones. Affiant also knows it is possible to capture video and photos with cellular phones. Further, Affiant knows from training and experience that cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and email or application programs such as Google Talk or Snapchat. The cellular telephone device, by its very nature, is easily transportable and designed to be operable hundreds of miles from its normal area of operations, providing reliable and instant communications. Affiant believes that the incoming and outgoing telephone calls, incoming and outgoing text messaging, emails, video recordings and subsequent voicemail messages could contain evidence related to this aggravated assault investigation.

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he [sic] has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime.

Affiant further knows, based on training and experience, oftentimes, in a moment of panic and in an attempt to cover up an assault or murder, that suspects utilize the internet via their cellular telephone to search for information. Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense. Based on Affiant's training and experience, as well as the totality of the circumstances involved in this investigation, Affiant has reason to believe that additional evidence consistent with robbery and/or murder will be located inside the cellular telephone, more particularly described as: a Samsung Galaxy 5, within a red and black case, serial #unknown, IMEI #unknown. Affiant believes that call data, contact data, and text message data may constitute evidence of the offense of robbery or murder. Affiant marked the phone with the unique identifier HC16-0149834 and it is currently located at 601 Lockwood, Houston, Harris County, Texas.[3]

Baldwin filed a motion to suppress both his statement to the police and the search of the cellphone. The trial court judge granted the motion as to the cellphone, orally making note of three omissions in the affidavit:

1) the affiant reported that one witness had identified the driver of the sedan as a "large black male," but the affiant merely described Baldwin as a "black male," without identifying his size;

2) the affiant did not explain how investigators had tracked down Baldwin to his girlfriend's apartment, even though that information was known to them; and

3) the affiant did not indicate that Baldwin was the actual owner of the sedan where the cell phone was found.

The State appealed the suppression. The 14th Court of Appeals, in a rehearing en banc, upheld the trial court's suppression of the cellphone search.[4] The State had asserted that under *Ford v. State*,[5] there was a nexus between the white sedan Baldwin was driving after the incident and the white sedan seen by witnesses before and during the offense, but the 14th Court noted that in *Ford*, the vehicle was described in greater detail (Chevy Tahoe with roof rack and horizontal stripes), and a "plethora of other specific facts linked the defendant to the incident, such as DNA, witness testimony, and surveillance photos of the vehicle on the night of the incident."[6] The intermediate court concluded that the affidavit contained only generic recitations about abstract cellphone usage and held that it was not reasonable for the magistrate to connect the cellphone to the offense because there was no connection between 1) Baldwin's sedan and the vehicle ob-

In State v. Baldwin, *the Court of Criminal appeals recently addressed the use of boilerplate in cellphone search warrant affidavits, with the admonition that it's not enough standing alone–there must be a nexus to the offense.*

served leaving the scene of the offense, 2) Baldwin and the offense, or 3) the cellphone and any communication or evidence surrounding the incident.

The dissent noted multiple witnesses connected a white four-door sedan to the scene of the murder and criticized the majority for turning a blind eye to the portion of the affidavit that demonstrated the sheer unlikelihood the witnesses saw three different sedans. The majority criticized the dissent in turn by saying that under its reasoning, "any time more than one person is involved in a crime, police officers would have probable cause to search a cellphone. That is not the law in Texas. Our binding precedent requires a connection between cellphone usage and the offense." The concurring opinion split the difference, disagreeing with the majority that there was no nexus between Baldwin's car and the murder, but agreeing that there was no probable cause connecting the cellphone to the murder.

While the Court agreed with the State that the court of appeals's analysis failed to give deference to the magistrate's implied finding of a nexus between the white sedan and the murder, the lower court was nonetheless correct in concluding that the "boilerplate language" of the affidavit was insufficient to establish a fair probability that evidence of the murder would be found on the phone.

As the Court of Criminal Appeals judges saw it

An en banc opinion with a vigorous dissent on a granted suppression in a State's appeal is exactly the sort of case likely to be heard by the Court of Criminal Appeals. The Court granted the State's PDR to answer two questions:

1) Did the court of appeals depart from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause? and

2) Did the court of appeals employ a heightened standard for probable cause, departing from the flexible standard required by law?

The Court answered both questions in the negative and narrowly upheld the 14th Court in a 5–4 split. Despite upholding the ruling, the majority opinion by Judge McClure, joined by Judges Hervey, Richardson, Newell, and Walker, did not wholly agree with the en banc opinion. Rather, it appeared to side more with the concurrence (and in part, the dissent), saying that while the Court agreed with the State that the court of appeals's analysis failed to give deference to the magistrate's implied finding of a nexus between the white sedan and the murder, the lower court was nonetheless correct in concluding that the "boilerplate language" of the affidavit was insufficient to establish a fair probability that evidence of the murder would be found on the phone.

Regarding the white sedan, Judge McClure observed that the magistrate considered evidence from the homeowner's brother, neighbors, and security footage and made an implied finding that all three witnesses saw the same vehicle; and that while the brother did not describe the car he saw in detail, he was able to narrow the class by color and number of doors, which fit the description of the car driving by the victim's house multiple times the day before the murder and captured on camera. Judge McClure agreed with the lower court's dissent that the separate sightings were too similar and too coincidental to be unrelated, and that the lower court's majority ignored the portion of the affidavit that described the neighborhood as branching cul-de-sacs having only a single point of entry. From that, he reasoned, a magistrate could reasonably infer that:

1) because thru traffic is not possible in this neighborhood, there is a reasonable probability that the vehicles seen most frequently there belong to residents, which would also tend to explain why two separate neighbors became suspicious of an unfamiliar sedan circling the area;

2) because the neighbors' suspicions were raised on two consecutive days about sedans that were similar in appearance, there is a reasonable probability that the neighbors witnessed the same sedan and that its driver was deliberately circling the neighborhood in preparation for the capital murder; and

3) because the sedan was positively linked to Baldwin through the license plate, there is a reasonable probability that Baldwin was the driver witnessed by the homeowner's brother and that Baldwin participated in the capital murder.[7]

The cellphone itself was a different matter. As Judge McClure put it, "Is generic, boilerplate language about cell phone use among criminals sufficient to establish probable cause to search a cell phone? We hold it is not." He reasons that if the Court were to hold otherwise, all parties suspected of participating in an offense would be subject to a search of their cellphones, "not because they used their phones to commit the crime, but merely because they owned cell phones." The possibility the men might have used their cell phones to coordinate the offense was a bridge too far for Judge McClure; he found there "are simply no facts within the four corners of the affidavit that tie [the] Appellee's cell phone to the offense."

Presiding Judge Keller dissented, joined by Judges Yeary, Keel, and Slaughter. Judge Keller agreed with the majority that there must be a nexus between "so-called" boilerplate language and other facts and reasonable inferences connecting the phone to the offense, but she dis-

agreed there was no such nexus here. She reasoned that if the car was connected to the murder and the phone was found in the car, then the phone's presence in the car was itself a fact that linked it to the crime. As Judge Keller wrote, "The crime here—capital murder—was committed by two people, acting together over the course of two days, and it was the kind of crime that involves coordination, so cell phone use would be expected. There could be crimes that would be less likely to involve the use of a cell phone and might not support probable cause to search. But it should come as no surprise that a cell phone would be used in the planning and commission of a crime such as the one before us, at least when the defendant had an accomplice." She quoted with approval the lower court's dissent observing that the capital murder was committed not by a lone wolf, but by two men acting in concert, who prepared for the offense over the course of two days—which required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone.

Judge Yeary joined with the dissent but wrote separately to say that "boilerplate" should not be considered a dirty word, but rather an expression that some standardized language will be applicable in certain situations far more often than not. He also expressed the majority should have limited itself by saying the warrant's search authority was too broad given the limited information in the warrant. In Judge Yeary's view, the majority opinion would have been better served had it focused more narrowly on whether the affidavit was at least sufficient to search some applications on the phone, in particular the identity of the phone service provider so that the geolocation information for the times at or near the offense could be obtained.

The takeaway

What does this mean to me, the hard-working front-line prosecutor? I'm so glad you asked. As we said at the outset, the Court's unanimous finding that the lower court erred in not upholding the portion of the warrant regarding a vehicle seen by neighbors casing a closed-off neighborhood for days that matched the car seen by the murder victim's brother at the time of the offense will be useful for the State in future cases. The remainder of the opinion—regarding the warrant as it pertains to the cellphone—has less utility, for a number of reasons.

Chief among them: the opinion (by no fault of the judges or parties) raises perhaps as many questions as it settles. The opinion addressed cellphones, but wasn't expressly limited to them; are there scenarios where the same logic could be applied beyond phones? For instance, was the intervening time a factor, or would the result have been the same had the car been stopped on the day of the offense?

Another such question jumps out: Is there language that in hindsight could have saved the affidavit? The affidavit, and therefore the opinions, focused on a cellphone's general use between co-conspirators as a device of communication and coordination, which the majority said was boilerplate and not enough to support probable cause. A cellphone has many other uses, however, including one that Judge Yeary's dissent touches on: geolocation, which is mentioned but not explored in the affidavit. The little device we call a "phone" is so much more than that; it's essentially a geolocation and tracking device we carry around with us. It's also a world map, and given the driver's behavior in the neighborhood, it seems a fair probability that a look at the search history or map application could have turned up a search for the victim's address. The possible use of geolocation data also arguably makes the intervening time more of a factor; had the white sedan been stopped close in time to the offense, there's a stronger argument that the phone was at the scene and could have been used for geolocation evidence.

Those questions will have to wait for another day (and quite possibly for the motion for rehearing and writ of certiorari that still may come in *Baldwin*), so for the time being we'll have to be content with simpler advice: Tie the cellphone to the facts. ❇

The opinion (by no fault of the judges or parties) raises perhaps as many questions as it settles. The opinion addressed cellphones, but wasn't expressly limited to them; are there scenarios where the same logic could be applied beyond phones?

Endnotes

[1] en.wikipedia.org/wiki/Boilerplate_text (retrieved June 3, 2022).

[2] *State v. Baldwin*, –- S.W.3d –-, No. PD-0027-21, 2022 Tex. Crim. App. LEXIS 321 (Tex. Crim. App. May 11, 2022).

[3] *Baldwin*, 2022 Tex. Crim. App. LEXIS 321, at *8.

[4] *State v. Baldwin*, 614 S.W.3d 411 (Tex. App. Houston 14th Dist., Dec. 10, 2020).

[5] 444 S.W.3d 171, 193 (Tex. App.–San Antonio 2014), aff'd, 477 S.W.3d 321 (Tex. Crim. App. 2015).

[6] *Baldwin*, 614 S.W.3d at 417 (citing Ford at 193).

[7] *Baldwin* at *23.

Photos from our Civil Law Conference

Gerald Summerford Award winner

Craig Stoddart (right), an ACDA in Rockwall County, was honored with the Gerald Summerford Civil Practitioner of the Year Award at May's Civil Law Conference. His boss, Kenda Culpepper (left), CDA in Rockwall County, presented him with the award. Congratulations!

The nightmare before Christmas (cont'd from the front cover)

Hearing that a child was dead, a few of us went to the scene. The 2008 Chevy Cobalt was severely smashed from where it had left the roadway and flipped over and over and over in the single-vehicle crash. Looking into the car, Jonny Zellner, one of our DA investigators, turned ashen: "I wrapped that present last night," he told me, pointing to a gift box in the tiny car covered in Rudolph the Reindeer paper. Little Christian was in Jonny's wife's Head Start class at Booker T. Washington Elementary School, and Jonny had helped her prep for the Christmas festivities the night before.

Later that day, we learned that James Carpenter, another DA investigator assigned to our Drug Enforcement Division, was one of the first responders and had attempted CPR on Christian. That little boy's death five days before Christmas shook Wichita Falls, and it shook our office.

The investigation

An investigator with the Wichita Falls Police Department took statements from Migel Matthew and Tyneshia Chatman. Before the children's early release at 1:00 p.m. for the holiday, the two women were drinking together at Chatman's house. Chatman's 1-year-old baby boy and 5-year-old daughter were at home with them, while her three other kids, including Christian, were at school.

At about 10:30 a.m., Matthew ran to a liquor store and purchased a pint of Hennessy cognac and a bottle of Smirnoff Ice Screwdrivers. Later, Matthew agreed to give Chatman a ride to Booker T. Washington school, which was less than a mile from Chatman's house. Not only was Matthew drunk, but there were also no car seats in her vehicle. With Matthew driving, Chatman was in the passenger seat holding the baby, and the 5-year-old girl was in the backseat. Chatman left the car to pick up her other three children from the school.

Parked next to them, Mr. Larry Sankey was there to get his nephew. Sankey noticed that the driver in the car next to him, Ms. Matthew, was slumped over the console. He saw Chatman return, put her three kids in the car, and jostle Matthew to wake her up. Sankey then saw them drive off. (Later, Mr. Sankey provided key trial testimony about what he'd seen.)

According to Matthew's statement, her daughter went to a different school and was riding the bus to their apartment. Matthew wanted to drive across town to pick her up and add an eighth passenger to their already crowded vehicle. The crash happened at 1:27 p.m. on their way to pick up Matthew's daughter. Miraculously, neither Matthew, Chatman, nor the other four children were seriously injured.

Police took a consent blood draw from Matthew at 4:40 p.m. and a warrant draw at 5:15. When Matthew was released from the hospital later that day, officers arrested her for intoxication manslaughter. "Why am I being arrested? I wasn't drunk," she declared. "I only had a few shots of Hennessy."

Finding the appropriate charge

The day of the crash, I was considering felony murder, with DWI with child passenger as the underlying felony, as a charge, and I wanted to know the results of the blood draws. Several months later, the consent draw came back at .155 and the blood warrant draw came back at .147.

I also contacted a professional crash reconstructionist. I wanted to make sure we could prove an act or acts clearly dangerous to human life, as required by the felony murder statute.[1] His reconstruction supported the airbag control module data that recorded the car travelling at 103 miles per hour (mph) immediately before the crash. In his expert opinion, taking the steep curve in the road at 103 mph, where the posted speed limit is 55, was clearly dangerous to human life, especially because the driver was carrying five children under the age of 8, none of whom were in car seats. Thus, we recommended a felony murder charge for Matthew to the grand jury.

Further, we did not believe that five counts of endangering a child (a state jail felony) sufficiently expressed Chatman's (the mother's) liability for putting her five children in a car with a clearly drunk driver and no car seats, so we recommended that the grand jury indict Chatman for felony murder as well. Chatman's predicate felony was endangering, and for the acts clearly dangerous to human life, we alleged both placing Christian in the car with a drunk driver and not having Christian in a car seat. The grand jury indicted both Matthew and Chatman for the felony murder of Christian.

His mother pleads

In November 2021, Chatman's attorneys offered a manslaughter plea. In considering the difficul-

ties in having her children testify against her, we wound up negotiating 15 years in the Texas Department of Criminal Justice (TDCJ) to manslaughter with a deadly weapon finding. Normally, we would not plead out Chatman before trying Matthew for fear of capping our sentence on the latter. However, two things changed our mind: for one, the COVID-19 backlog, and second, an admonishment from W. Clay Abbott, TDCAA's DWI Resource Prosecutor, who said during a presentation at the 2021 Annual Criminal & Civil Law Conference: "Take pleas—because after COVID, you don't have time to mess around." These two things convinced us to plead Chatman.

I was thankful that the defense ridiculed the application of felony murder with DWI with a child passenger and even bordered on making a jury nullification argument. I did not object because I wanted to find out who on the panel agreed with the defense. This exposed the panelists the State needed to strike, which we did.

The punishment case gets a lot better

It was nearly two years to the day from the indictment until our trial of the driver, Migel Matthew. Usually, a passage of that kind of time helps the defense. This case was an exception.

First, there were never any serious plea negotiations. Matthew apparently believed she had a good shot at intoxication manslaughter and probation. I had offered 35 years to murder but never received a counter.

Second, we indicted Matthew at the height of the COVID lockdown in April 2020. At the time, one prosecutor was presenting only the most important grand jury cases, and the grand jury was meeting in our largest courtroom so jurors could spread out. Somehow, we failed to obtain a SCRAM ankle-monitor bond condition, which we would normally seek, and a magistrate had imposed the standard conditions of an ignition interlock and no drinking for Matthew's original arrest.

In preparing for trial, I asked one of our investigators to go to Matthew's apartment complex and find out where the bus would have dropped off her daughter. When he went to obtain that information, he discovered that Matthew was regularly intoxicated at the apartment. She had even stabbed a guy (in self-defense), someone she'd been drinking with, in March 2022. He also confirmed where Matthew's daughter would have been dropped off, which established that Matthew's motive in driving across town was to retrieve her daughter.

Though the trial was only two weeks away, I filed for her bond to be revoked for violating a condition imposed for the safety of the community. At the bond revocation hearing, we proved up five drinking violations and two violent altercations in the previous six weeks, which the investigator discovered from the apartment complex manager. Judge Meredith Kennedy revoked the defendant's bond and remanded her into custody. In investigating the stabbing, police had taken photos of the defendant's apartment, which showed two empty liquor bottles: one on the floor in the corner of the kitchen and the other on a kitchen cabinet.

Framing the case

For jury selection, I used a photo of a "Baby on Board" sign in the back window of a car. This was to symbolize why the charge was felony murder. I explained felony murder with DWI with a child passenger as the predicate felony, and I committed the panel that they could apply felony murder in that way. When I asked if anyone thought it was an inappropriate application of felony murder, I got no responses.

I was thankful that the defense ridiculed the application of felony murder with DWI with a child passenger and even bordered on making a jury nullification argument. I did not object because I wanted to find out who on the panel agreed with the defense. This exposed the panelists the State needed to strike, which we did.

Guilt–innocence

In addition to the various investigators and first responders, some of the most riveting testimony came from Christian's sister and two brothers who had been in the car. Even though two years had passed, they all remembered the crash vividly. Our felony prosecutor Misty King expertly handled the children's testimony. They testified about how fast the defendant was driving and that people in the car warned her about the speed, but she ignored them. The children's testimony visibly impacted the jury.

Because we were alleging acts clearly dangerous to human life, it was crucial for the jury to understand Matthew's extreme level of intoxication. She had not merely had a few shots like she claimed. I hired Dr. Troy Walden with the Center for Alcohol and Drug Education Studies of the Texas Transportation Institute at Texas A&M University. Dr. Walden testified that at a blood alcohol concentration (BAC) of .15 and above, a driver has impaired braking time, impaired dynamic vision, loss of peripheral vision,

loss of judgment, increased risk taking, loss of muscle control, impaired judgment, and impacted divided attention (which is essential for driving). Dr. Walden converted Matthew's hospital serum draw about 90 minutes after the crash to a .188. Then he used our other data points to calculate a .017 elimination rate. That indicated a BAC of around .20 at the time of driving. Dr. Walden described this as "a significant level of impairment—stuporous."

In the middle of trial, Donnie Cavinder, one of our DA investigators, found a jail call where the defendant claimed, "I know the reports say I was f-ed up. I wasn't f-ed up. I only drank a pint of Hennessy that day. I've had a fifth before and not been f-ed up. That happened because I was speeding to get my child." After hearing the jail call, I dispatched my secretary to purchase a pint of Hennessy. Dr. Walden calculated that there were approximately 10½ shots in the bottle and that drinking a pint would put the defendant well above .20—Hennessy is 80 proof, like Jack Daniels. This evidence was also key when the defendant decided to testify at punishment and claim she didn't feel intoxicated.

The defense conceded that Matthew was intoxicated but argued that intoxication manslaughter was the appropriate charge. As the defense attorney said, "Sure, Mr. Gillespie in jury selection talks about a security guard who gets hit in the head during an aggravated robbery and dies. That's a felony murder. This is not a felony murder. This is just intoxication manslaughter." The court's charge contained counts for intoxication manslaughter and DWI with child passenger as lesser-included offenses. The defense requested both, and we thought it was safer not to object to their inclusion.

During opening argument, I pulled out a red crystal vase that once belonged to my mother. "This vase was my Mom's," I told the jury. "It means something to me because she liked it. She passed away a few years ago. I keep it on my mantle and think of her when I look at it. It's not particularly valuable, but it's important to me. When I cleaned out my parents' house in Burkburnett, I had to drive with this vase from Burkburnett to Wichita Falls. It is fragile and breakable. I was very careful with it. But at the end of the day, it's just an object. Think about how much more breakable, how much more fragile, and how much more valuable Christian's life was."

Then during closing argument, I reminded jurors that they had each given me their word that they could apply the law to the facts. I said while this was a terrible case because nobody wants to think about a dead 4-year-old, it was an easy case for applying the law to the facts. The State proved Migel Matthew was driving while intoxicated with five children in the car. The judge had instructed them that DWI with a child passenger is a felony. The State proved Matthew was travelling 103 miles an hour when she took that turn. There was no question that the high rate of speed at that level of impairment with that precious cargo were acts clearly dangerous to human life. Our reconstructionist said speed caused the crash, and the medical examiner testified that Christian died from blunt force trauma from the crash. All these facts pointed to the same thing: Matthew committed acts clearly dangerous to human life in the course of committing a felony that caused Christian's death.

"Each of you gave me your word that you could apply felony murder in this situation. I hold you to that now—it is the law, and you are bound to apply it," I argued. "But you should feel good about applying it. It is a good law. It is an important law. If the security guard in my hypothetical deserves protection—and he does—then how much more does a little child deserve the full protection of the law?"

It took the jury only 55 minutes to find Matthew guilty of murder.

The punishment phase

In opening statement, I told my go-to story about Lou Holtz. In the late 1970s, when Holtz was the football coach at the University of Arkansas, the Razorbacks went to the Orange Bowl. Coach Holtz had a rule that if a player broke curfew, the player did not play in the next game. While in Miami for the Orange Bowl, several of his star players stayed out too late. When word got out that they would not play in the big game, fans protested. Asked by a reporter why he would bench them, Coach Holtz responded, "They knew the rules. They chose the conduct. I didn't bench them. They benched themselves."

"Ladies and gentlemen," I said to the jury, "do not let anyone make you feel guilty for doing your job. You are not sending the defendant to prison. She testified she knew it was dangerous to drive drunk. She testified how valuable those children's lives were. She chose her conduct, and she alone is responsible for the consequences."

In the middle of trial, Donnie Cavinder, one of our DA investigators, found a jail call where the defendant claimed, "I know the reports say I was f-ed up. I wasn't f-ed up. I only drank a pint of Hennessy that day. I've had a fifth before and not been f-ed up. That happened because I was speeding to get my child."

The defense expert, a psychologist, admitted that the defendant's repeated failures–to stop drinking after the crash, obtain any alcohol treatment, or take her meds for bipolar disorder–were concerning risk factors.

In addition to proving up all the instances the defendant was drunk in the past few months, we called the children's principal from school, who took the kids to Walmart to buy them funeral clothes. She testified that one of the little boys fell asleep in the shopping cart, and he awoke in a panic. "Slow down! Slow down!" he was screaming while hyperventilating.

The defense called the defendant to the stand. She testified to the crushing poverty of her childhood in Saint Kitts, an island in the Caribbean. She also suffered multiple acts of sexual abuse as a child. She said she "took full responsibility" for her actions. She also admitted that she had never stopped drinking after the crash.

In preparing for cross, I did not want to come across as harsh. I wanted to focus on all the defendant's actions that caused Christian's death. My goal was to either force the defendant to admit her extreme indifference to the lives of all those children in her car or to show she didn't really take full responsibility for her actions. She opted for the latter path.

On cross, she denied that she felt drunk after drinking that much: "I know what the reports said, but I felt fine to drive." She admitted that if she had just driven the kids back to their house, less than a mile from school, Christian would likely have been safe, and she was the one who wanted to drive across town. She admitted there were no car seats in her car, but she tried to blame the children's mother for that. She denied that she was traveling 103 miles an hour, as recorded by her car's airbag control module, and claimed instead, "I was only going 80 to 85." She also denied that anybody in the car had warned her about her dangerous speed, even though the children had testified she was going so fast that they were begging her to slow down.

She also claimed to have had only had three shots of Hennessy. After that declaration, I played her jail call for the jury. I pulled out a fifth of Hennessy and compared it to a smaller pint bottle. She said that what she meant in the jail call was that she had been drinking a fifth with friends before, so drinking a pint would not impair her.

"You were making a comparison from the greater (the fifth) to the lesser (a pint)?" I clarified.

"No," she replied.

"You were saying, 'I've drank a whole fifth before and not been "f-ed up" so when I only had a pint, I wasn't f-ed up.'"

"No, I was only saying I had shots out of a fifth before and shots out of a pint."

The jury got the picture. Having a fifth and a pint as visual aids was helpful.

The defense also called a psychologist who testified the defendant was bipolar, had post-traumatic stress disorder (PTSD) from her childhood, and suffered from Alcohol Use Disorder (AUD). In crossing psychologists, I find that tying them to the DSM (Diagnostic and Statistical Manual of Mental Disorders) is useful. I noted that the DSM gives examples of AUD in spousal abuse and child abuse, and I gave the psychologist hypotheticals of a husband abusing a wife to death and a father abusing a son to death in a drunken rage. "So, in both hypotheticals, the DSM and you would recognize that AUD can be a contributing factor in many murders?" I asked. The psychologist also admitted that the defendant's repeated failures—to stop drinking after the crash, obtain any alcohol treatment, or take her meds for bipolar disorder—were concerning risk factors.

During closing argument, I showed a slide with the range of punishment for murder on a timeline: five years to life in prison. On the next slide, I added the word "child" in front of "murder," and I put a hash mark on the timeline at 45 years. I recommended the jury start at 45 years for the sentence because the defendant murdered a child. I suggested they make a list of facts that would move them lower than 45, such as her sad childhood, and the facts that would move them over 45, such as her continued drinking, her disregard for the children's safety, and the infinite value of Christian's life. It took the jury about two hours to return a 60-year verdict.

While I was thankful that the jury recognized the priceless value of Christian's life, no verdict could replace what Matthew had destroyed. Our office will never forget Christian or that terrible December day when, in the words of author L.M. Montgomery, "at sunset, the little soul that had come with the dawning went away, leaving heartbreak behind it." ❇

Endnote

[1] Tex. Penal Code §19.02(b)(3).

Walking a family through tragedy

Every child looks forward to winter break from school: Christmas, presents, no school for two weeks—it's perfect.

By Ebonie Daniels
Victim Assistance Coordinator in Wichita County

For the Redmond children, though, the winter break of 2019 was anything but perfect. A family once whole was irrevocably broken because on that day, a son, a brother, and a child only 4 years old, Christian, was needlessly killed in a rollover car crash. (You can read an account of the trial by our elected Criminal District Attorney John Gillespie starting on the front cover of this journal.)

The day of Christian's death

December 20, 2019, was the last day of school for Christian, Jadin (7 years old), and Zaydin (6) Redmond before winter break. Their sister, Maya (5), was home sick with their baby brother, Kaydin (1 year old), and their mother, Tyneshia Chatman. Ms. Chatman's friend Migel Matthew was at the house as well. The adults had been drinking alcohol to celebrate Christmas since the morning hours.

Ms. Chatman had to pick up her children from school and needed a ride from Ms. Matthew. The two women, Maya, and Kaydin got into Matthew's sedan. Not only were the adults intoxicated, but there were also no car seats in the vehicle. Matthew drove them to pick up Christian, Jadin, and Zaydin, and instead of dropping the children off at home, Matthew decided to pick up her daughter across town. None of the children wore seatbelts. On the highway, she rounded a 55-mph curve at over 100 mph, and the car flipped several times—all five children were ejected from the vehicle. Only 4 years old, Christian lost his life that day. Miraculously the rest of the children went to the hospital with only minor injuries, but all their lives were forever changed.

I learned of this case in early 2020 before I even began working at the Wichita County Criminal District Attorney's Office—I read about the crash in a news article. My first thought was why? Why be so reckless and careless? My heart went out to those children.

Once I started at the DA's Office in August 2020, I learned more about the case after reading my predecessor's notes and files. I then read the police report. I have four children and three siblings, and this case hit me hard. It's unfathomable to lose a son, daughter, brother, or sister.

The children were removed from the home after Ms. Chatman was arrested in May 2020 on felony murder charges in relation to the crash. Their father, Christopher Redmond, had to take parenting classes before he was able to get the children back. These children obviously had gone through a lot in less than a year, and it was important for me to make contact as soon as possible.

Victim contact

I called Mr. Redmond to convey my condolences and to let him know that I was the new victim assistance coordinator (VAC) on the case. We discussed the case and the resources available to him and the children. Mr. Redmond previously applied to the Crime Victims' Compensation (CVC) program to pay for ambulance and hospital services, but the medical bills had not been paid. I followed up with CVC and re-sent the bills and insurance verification.

I also followed up with Mr. Redmond about funeral expenses, which had been paid through donations and out of his pocket. I informed him that CVC also covers funeral expenses. I contacted the funeral home to get the receipt and forwarded it to CVC. I told Mr. Redmond what was needed regarding the bills, but he never fol-

lowed through. This is pretty common with CVC benefits, especially if a victim needs to contact various medical facilities, which Mr. Redmond had needed to do. I keep track of victims' claims through the CVC portal and try to follow up weekly. In most cases I contact medical facilities to get all the needed information but sometimes due to HIPAA regulations, I am unable to get everything.

It was difficult to assist Mr. Redmond with victim services. He wanted his wife freed and felt that she should not face criminal charges for her role in Christian's death. He called me numerous times demanding that charges be dismissed or bond reduced. His moods changed frequently. Some days he was cooperative with me, and other days he would lash out or refuse to talk to me. When that happened, I would give him some time and then follow up with him. I made sure to check in about the children to ensure they were in therapy. He informed me they were seeing the school counselor. Mr. Redmond was in grief counseling as well.

It was difficult to assist Mr. Redmond with victim services. He wanted his wife freed and felt that she should not face criminal charges for her role in Christian's death. He called me numerous times demanding that charges be dismissed or bond reduced. His moods changed frequently. Some days he was cooperative with me, and other days he would lash out and refuse to talk to me.

Almost a year after I initially met him, Mr. Redmond was charged with DWI with a child passenger. Although his children were with him during the incident, Child Protective Services (CPS) did not take them away, and his arrest did not impede my communication with him. I stayed in contact more than ever to ensure that the children were receiving counseling and to provide anything else they might have needed.

A couple of months after Mr. Redmond's arrest, his wife, Ms. Chatman, took a plea for manslaughter for her part in the crash. As part of the agreement, she was sentenced to 15 years in prison. Mr. Redmond was very upset about the sentence and told me we were taking his children's mother away. Ultimately, I let him vent his feelings and I gave him space afterwards.

After giving Mr. Redmond some time, I contacted him about completing a Victim Impact Statement (VIS) for Ms. Matthew's upcoming felony murder case. We previously discussed his VIS for his wife's case, but he did not want to complete one for it. I advised him to write from his heart and to really detail how Christian's death affected the entire family. It took him a few months to complete the VIS as it was very hard for him to even think about Christian.

The trial

Leading up to the trial, District Attorney John Gillespie, Executive Prosecutor Misty King, Investigator Jonny Zellner, and I went to Booker T. Washington Elementary to interview Jadin, Maya, and Zaydin for trial prep. We had discussed with the principal that the school would be the best place to conduct the interviews. We went over the crash with each child individually, and Mr. Redmond was also present. The kids were nervous at first but were able to recount the crash pretty well. I gave each of them a challenge coin with our office seal as a souvenir, which is our normal practice with child victims and witnesses before trial or after interviews.

The trial was scheduled for the week of April 18, 2022. During jury selection, I stayed in the office and remained in contact with Mr. Redmond to let him know when the children would be needed to testify. Jadin, Maya, and Zaydin came in on the afternoon of the second day of trial. (At the time of the crash, Kaydin was a baby so he did not testify.) Mr. Redmond and the children stayed in our conference room until it was time for them to enter the courtroom. I made sure the children had snacks and water. They colored and we talked about school and the activities they liked. I then took them to the 78th District Court's witness room.

Before testifying, Mr. Redmond asked the children if they wanted him in the courtroom while they were on the stand. Maya and Zaydin did not, but Jadin wanted him there. I brought Maya into the courtroom to testify first. Right before she began her testimony, Mr. Redmond wanted to speak to me. He was very agitated and on the verge of tears. He told me he wanted to be in the courtroom with his child. I told him he could absolutely watch Maya testify, but I reminded him that Maya did not want him in the courtroom while she was testifying. I asked him if he could respect her wishes. He agreed to stay in the witness room.

I reminded Mr. Redmond of Maya's wishes because I did not want her to freeze up during her testimony. Understandably, Mr. Redmond wanted justice for the death of his son and for the hurt and pain caused to his other children, but I did not want Maya to feel pressure from his expectations of her. Also, he was very emotional, which could have affected her.

After Maya, Zaydin testified and then Jadin. Each child elected to not have Mr. Redmond in the courtroom. The children did well on the stand. The jury was able to get a glimpse of their personalities and the pain they went through from the wreck and losing their young brother.

After their testimonies, Mr. Redmond took the children home. Matthew was eventually convicted of felony murder, and I informed Mr. Redmond of the verdict. During the punishment phase, Mr. Redmond listened to closing arguments in the courtroom gallery. He was crying during Mr. Gillespie's closing argument, and I sat near him to lend my support. Matthew received a sentence of 60 years. After the jury was dismissed, I read Mr. Redmond's Victim Impact Statement in court at his request. I read about how his life and his surviving children's lives were forever changed, but they had to keep on living.

Conclusion

Because my involvement in this case spanned nearly two years, there were many lessons that I implement even today. The case was ongoing during the height of COVID-19, and the CVC staff were working remotely. I discovered the fastest and most efficient way to submit applications and supporting documents was online and through fax. CVC usually sends letters to claimants and medical facilities for the documents CVC needs, and I found out that calling CVC to ask what was needed and informing the claimant and service providers decreased processing time significantly. I urge all VACs to sign up for Presumptive Eligibility Certification, which offers a streamlined application process for compensation.[1]

Although I have been a VAC for some time, this was a devastating case. I remember driving on that same highway picking up my children around the time of the wreck in 2019. Watching the children testify was memorable—describing the crash and how they witnessed their little brother's death was heart-wrenching. I am in awe of their strength and resilience—they are still able to smile and enjoy life. As their father said in his VIS, his other children constantly remind him that they will be all right. Some cases stay with a person, and I believe this one will stay with me. I think of Christian every time I drive around that curve on the highway. I am pleased that the jury made the right decision in Matthew's conviction and punishment, and I am honored to work with a team who fights to see justice done. ❇

Endnote

[1] You can obtain Presumptive Eligibility Certification for Crime Victims' Compensation via Zoom training sessions by contacting the Office of the Attorney General Crime Victims' Compensation Training Coordinator, Gloria Clark, at gloria.clark@oag.texas.gov.

Some cases stay with a person, and I believe this one will stay with me. I think of Christian every time I drive around that curve on the highway.

‘Remember Wendy and Jenny’

Johnnie McKissack shot his roommate Bill Parker on January 17, 2021, and Bill subsequently died. Sounds simple enough.

By Derek Estep
Chief Felony Prosecutor, and
Julie Renken
District Attorney, Washington County

Except Bill died a year after being shot, 200 miles away from where he was shot, of causes unrelated to being shot, less than two months before trial.

Needless to say, we were not prepared for the death notification from our Texas Ranger: We had no depositions, no pre-trial conferences, and no video-recorded statements from the deceased victim. A fairly routine aggravated assault case turned into a “how well do you know your hearsay exceptions” contest, a change of direction a month before trial, and the chance for one of the defendant’s long-ago victims to finally tell her story to a jury.

The crime

The facts of the case were not overly complicated. The victim, Bill, and the defendant, Johnnie McKissack, lived together as roommates after McKissack’s on-again, off-again girlfriend, Wendy Adamek, moved out. One night, Wendy stayed over so that she could finish getting her belongings. Bill drank through the evening and into the next morning, and he was without question intoxicated at the time of this offense, which was prompted by what we can describe only as “childish picking” or possibly a game of “I’m not touching you.”[1] Wendy said she saw McKissack holding a gun and waving it at Bill, but she wasn’t watching them nonstop. She heard two quick shots, and she turned around to see Bill on the floor holding his hip and bleeding. McKissack handed Bill’s cell phone to him and told him to blame someone else. Wendy ran for her car, McKissack got in, and off they went. A few days later Wendy was contacted by law enforcement and gave McKissack up. He was arrested at a hotel several counties away.

Bill survived the shooting. He was able to call 911 and all but listed the elements of the crime to the dispatcher: “My roommate shot me in the hip ... name is Johnnie McKissack ... he left with his girlfriend ... I’ll just lay here and bleed out ... no, I don’t have a weapon, he shot *me*. ...” He didn’t sign off with “against the peace and dignity of the State,” but the recording provided powerful evidence. He was taken to the emergency room, but due to his injuries he was flown to another hospital and ultimately had his hip replaced. Many hours after the attack, a sober (albeit medicated) Bill gave law enforcement and medical personnel multiple versions of what happened. However, he was consistent in what mattered: Johnnie McKissack shot him.

From preparing the indictment to preparing for trial, Julie Renken, one of the co-authors of this article, focused on how best to prepare Bill to testify. Obviously, Bill was not the most sympathetic of victims given the facts of the case, but like all victims, his story deserved to be heard. Bill moved to Abilene shortly after recovering from surgery because he was terrified of McKissack. Julie and our victim assistance coordinator, Amanda Horak, kept in touch by phone to make sure we understood his story and to keep Bill engaged and ready to testify. Amanda and Julie had a trip to Abilene planned to meet prior to trial, but Bill had become harder to get a hold of. We lost touch with him completely in August 2021.

Hitting a snag

In November 2021 we were contacted by a detective from the Abilene Police Department (APD).

She explained that she was working a missing person case on Bill, and she had heard he was a victim in our case. His family out of state had contacted APD because he hadn't checked in like he normally did. In January we received word that Bill had been found deceased. During one of the winter's extremely cold weekends, he had frozen to death in a tent.

We had not had contact with him since August, and we had already started contingency plans because we knew he was missing. But no one wants to try an assault case without a live victim testifying.

After Bill died, we had to pivot and figure out which of his statements could and should be admitted without his presence in the courtroom. It required brushing up on non-hearsay and admissible hearsay, including availability. Luckily, there was ample corroborative evidence to support Bill's 911 call, which was crucial because it explained almost the entire crime. Bill told the troopers and paramedics who arrived on scene the same story. They described finding him in a chair bleeding from a gunshot wound, as he told the dispatcher. There was a puddle of blood on the floor in front of the chair, as if a person bleeding was sitting there. Officers on scene located two complete rounds and fragments of another in places consistent with Bill's description of where he was when McKissack shot him.

Wendy's story

Wendy, McKissack's former girlfriend, originally told law enforcement a story that didn't make sense and mitigated McKissack's involvement—she lied to them. Later in her statement, she finally broke down and told the truth. Unsurprisingly, the same thing happened at her pre-trial interview. In both instances she described the two men standing in front of their recliners, McKissack shooting Bill in the hip, and Bill laying on the floor bleeding by the chair. One strange detail Wendy recalled was that they left so fast she grabbed only two of her dogs because the third wouldn't come out of hiding. When officers arrived, they found a dog but had no idea where it came from.

In addition to initially helping and lying for McKissack, we knew Wendy drank heavily with him and had not fully "left" him romantically. We knew she possessed many of the same traits that jurors often find unsympathetic in victims: substance abuse, going back to her abuser, making excuses for the abuse, and so on. After meeting with her, we could tell she would come off gruff, and she was still trying to cover for McKissack, even lying for him in the beginning.

Without Bill, we had to rely heavily on Wendy's testimony and the physical evidence that corroborated her statement. With over a year having passed since the shooting, we had some concerns about tracking her down—but those concerns were quickly set aside. She told us immediately, "I knew this day was coming. I'll be there with bells on." Wendy was rough around the edges but on the right path. After seeing McKissack shoot Bill, she was terrified. She helped McKissack escape by leaving him in another county and never looking back. After telling law enforcement a few low-quality lies, she ratted out the man who just shot his roommate for being an annoying drunk.

It's never a good idea to think of a trial as a "sure thing" or an "easy case," but we always felt good about our evidence. And given what we were learning about McKissack's past, punishment would be our time to turn it up to 11.

Finding Jenny

Neither Wendy nor Bill was particularly sympathetic as victims. Assault is assault is assault, but we know the importance of having a connection with the jury. And we were concerned about Wendy.

We knew McKissack had a past. Because the file was still in our basement, we knew that in Washington County in 1998 he shot his girlfriend, Jenny. At that time, we believed he was on parole from California for killing his uncle, possibly as a juvenile. We didn't really have any details—we heard that McKissack shot him—but there was some suggestion that he burned him. We managed to find a 1978 burglary probation order from California in the old file, but nothing on a homicide. If you've ever looked at a criminal history from California, you know how hard it can be to understand. If you've tried to call anyone in California government since March 2020, you know that they aren't answering the phone. Without McKissack on the stand, that was a dead end.

But there was Jenny—if we could find her.

She has a common first and last name, Fisher, and no record in our system since 1999. Our investigator, Brian Taylor, is a retired Texas Ranger with a knack for finding people, so as he says, we

We had not had contact with the victim since August, and we had already started contingency plans because we knew he was missing. But no one wants to try an assault case without a live victim testifying.

"put the horse to the plow." As expected, he tracked her down. No one is entirely sure how Brian does this;[2] we just give him a name and sometimes after only a few hours he'll be the person's new best friend. For Jenny, he had a name, date of birth, and a 20-year-old connection to Brenham. He compiled a list of possible numbers and quickly got an answer.

When Derek Estep, the other co-author of this article, first spoke with Jenny, she said she knew what the call was about as soon as she saw "Washington County" on her cell phone. She agreed to come to Brenham and meet with us. Surprisingly, she was ready to testify about the shooting from the start—for the very first time. According to the file, she didn't testify at McKissack's 1999 trial because she could not be located. Jenny told us her probation officer had put her in a rehab in Dallas to get away from McKissack. Regardless, she had never sat in the witness chair to tell her tragic story.

Jenny told us many times that God had put her in this position at this time for a reason, and she wanted to help.

Jenny's story

In 1998, McKissack and Jenny were living together. They met at her job, and after a few months she and her kids moved in with him. It didn't take long for McKissack to go from charm to abuse. Jenny had never been in trouble in her life until meeting McKissack. During her time with him, she began abusing alcohol and cocaine. Her kids told their father what was going on, so he came to move them out. He left with the children in tow—at the barrel of McKissack's pistol. McKissack told Jenny, "No one else would ever have you," and quickly cut her off from her family and friends. She described him taking "my sense of self." He punched her in the mouth, pushing her teeth through her lip. He broke beer bottles on her head. One night he threw a knife at her, stabbing her in the back. But for Jenny, staying felt safer than leaving.

One night in November 1998, they stayed out very late drinking and continued with some friends when they got home. McKissack, at one point, pulled a pistol and shot at the dog because it was barking. Early in the morning McKissack and Jenny got into an argument, and Jenny left with one of the other girls to go get cigarettes. McKissack walked out with his lunchbox to go to work, but he stopped at the passenger side of the truck Jenny was driving. He reached in his lunchbox, pulled out the pistol, and fired multiple rounds through the window at Jenny. One went through the back of her shoulder, out the front, and through her wrist. Another ricocheted off the door panel and grazed her leg. He put the gun back in his lunchbox, got in his car, and rode to work with a friend. Jenny was taken to the hospital where she told the staff she didn't know who shot her. Of course no one believed her, and the friend who drove her there quickly cleared it up, even giving a statement to police. This was the hold McKissack had on her, that she would lie to protect him even after he shot her.

McKissack was arrested later that same day, never posted bail, and was sentenced by a jury to 19 years in prison.[3] With him eventually gone, Jenny tried to kick her habits but couldn't. She was haunted by the abuse and his words that no one else would have her. For years she bounced around, picking up typical cases for criminal trespass, burglary of vending machines, and drug possession.

Then in 2008, while facing a joint cocaine possession case with her then-boyfriend, she had enough. She met a neighbor who asked her out, and Jenny's life was saved. Jenny never touched coke again. She got married. She became a certified nursing assistant. She reunited with her family and children. When we contacted her, she was taking a break from work because both the elderly woman she was caring for and her father, who lived with her family, had just passed away. She told us many times that God had put her in this position at this time for a reason, and she wanted to help.

Confronting McKissack

During hours of trial preparation interviews, Wendy confided in Julie what we expected: years of emotional and physical abuse from McKissack. McKissack had come across as charming and charismatic—until he wasn't. When the abuse turned physical, it was too late: He had already isolated her from family and friends. He would assault her and then go stay with another woman (whom he was also abusing) until he apologized and Wendy would take him back.

We wondered if McKissack knew that we'd found either of his victims or if they would show up to trial. Our courtroom is set up like a church, with pews on either side of an awkwardly long center aisle. As the two women made their way down that aisle as each was called to testify

(Wendy at guilt and punishment, Jenny at punishment only), McKissack did his best to stare holes right through them.

Neither woman truly caved to McKissack's attempts at intimidation. He may have mitigated some of the damage Wendy could have done, but it was a pyrrhic victory—the jury had borne witness to his actions as well. What was on full display was his true character as a bully with no regard for human life. He was as cold and uncaring sitting at counsel table as he was in 1998 when he casually left for work after shooting Jenny, and as he was 25 years later when he casually tossed Bill a phone and left him in a pool of blood.

Plot twist

The defense claimed self-defense at trial. Bill was drunk and had been pestering McKissack all night. Wendy described it as Bill "swatting" at McKissack but never actually hitting him. She explained that she was watching them the whole time but was looking away during portions of their argument. However, she never mentioned a knife and said that Bill was unarmed. Bill was clear on the 911 call that he wasn't armed, and officers located no weapons at the scene. But at the hospital, emergency room staff found a pocket knife in Bill's pocket. In the thousands of pages of medical records, we missed the inventory and got caught flat-footed by the self-defense claim. The proposed theory was that Bill had a knife and was getting physical with McKissack. McKissack was older and smaller than Bill, so he grabbed his gun to shoo Bill out and Bill came at him before he could raise it any higher than Bill's hip. (Insert self-defense instruction here.)

It took almost four hours for a jury to convict Johnnie McKissack for shooting Bill. We later found out from a juror that there was one person on the jury who was buying into the self-defense, which was the reason deliberations took so long.

The punishment trial

Derek told the jury during opening of the punishment trial, "Johnnie McKissack is the least important person we're going to talk about today. You can forget his name after today. But remember Jenny and Wendy." We didn't want jurors to focus on the defendant anymore because you never know which Sunday School teacher, jail house minister, or drinking buddy will show up as a character witness. We wanted the jury thinking about Jenny and Wendy because their stories are so tragic.

Jenny was a star on the stand. We had her go first because we knew her story would put Wendy's gruff, angry exterior in context. (We feared Wendy would become emotional and she would ramble, and indeed she did.) If the jury could only hear from Jenny how McKissack was in 1998, they'd surely sympathize more with what Wendy went through in 2020. Jenny described the relationship and all the gruesome details to the jury. Her voice broke only once or twice, and she pushed on. The jury heard all about the drugs and booze and about the new life she's living now. Jenny was strong even when talking about the events leading up to her being shot. To us, the saddest, most powerful part of her testimony was that days before being shot, she had bought McKissack the bullets.

Then it was Wendy's turn. As she sat in the witness chair, she frequently moved back to change the line of sight so that McKissack couldn't see her. He moved his chair to match. In retrospect we should have noticed a dangerous man on trial for his life suddenly moving around and possibly addressed it with the witnesses. But we assume the jury noticed because their position looks right at the defendant. Externally, Wendy was loaded for bear and ready to fight. But that façade didn't last once she began talking about her experiences to the jury. She vacillated from anger and wanting to point at McKissack, to waving dismissively and answering questions with a frustrated "never mind."

Additionally, we tracked down a couple of other misdemeanor family violence convictions. The victim in one of them was the same "other woman" Wendy had testified about.

Closing the punishment trial, Julie implored the jury to "be the 'they' who took a stand for Johnnie McKissack's string of victims." It took only half an hour for them to do so, sentencing McKissack to life in prison, with a $10,000 fine just to send a message.

Two women on the same path

Undoubtedly, there are some scholarly lessons to be learned here from dealing with victims who up and die before trial, as well as working with reluctant victims. It is also no great surprise that we're happy about the life sentence for Johnnie McKissack. What truly struck us about the case was

It took almost four hours for a jury to convict Johnnie McKissack for shooting Bill. We later found out from a juror that there was one person on the jury who was buying into the self-defense, which was the reason deliberations took so long.

These two women required different approaches from us, different tones of voice, and different support. Jenny testified for herself, and Wendy testified for "the next one"–a future victim. To say no two victims are the same is obvious; to see it play out like this was eye-opening.

Jenny and Wendy: two women assaulted by the same man and abused in the same ways, both on the same road to peace and renewal—just at very different points. Wendy was still angry and raw. She was still processing the trauma. Before testifying, she told us, "I kinda feel sorry for him; he doesn't have anybody." To an outsider such a statement sounds absurd, but not us. For Wendy, despite the abuse and having a new boyfriend, the connection was still there.

Jenny, on the other hand, was 20 years removed from the trauma. She had actually worked with other women in similar situations by telling her story, and she still regularly attends counseling. She had cast aside that dark sliver of her past and spent almost 15 years making a bright, new life. There was still pain and sadness in her as she talked, but it was mostly for the lost time with her family. She hugged us all and thanked us for the opportunity to finally tell her story in court.

These two women required different approaches from us, different tones of voice, and different support. Jenny testified for herself, and Wendy testified for "the next one"—a future victim. To say no two victims are the same is obvious; to see it play out like this was eye-opening.

When they first crossed paths in our office, their strange sense of camaraderie was palpable. They had both told us they had no idea how they had gotten mixed up with someone like McKissack. There was certainly some trepidation between them initially, given the nature of their common bond, but the meeting impressed upon both of them that "you are not alone." At the end of the trial, they swapped some stories including multiple versions of "Oh, he did that to you? He did this to me." It wasn't one-upmanship—it was empathy. Wendy ultimately told Jenny that she was her hero and that meeting her was "the best thing to come out of all of this. I had started to believe you didn't exist." McKissack had started to convince Wendy the entire 1998 shooting was a lie and never happened.[4]

Jenny and Wendy both left knowing what we all hope comes from a trial like this, what we all say in closing, what we all write in press releases: Johnnie McKissack's trail of victims stopped because someone came forward with the bravery to say "No more." ❇

Endnotes

[1] For those unfamiliar, this game involves waving one's hands as closely as possible to the other's face without making contact while saying, "I'm not touching you." Typically, the game stems from one person's assertion, "Don't touch me."

[2] Our investigator Brian Taylor is the stuff of legend. He'll call the operator at a hospital asking for records, and someone will deliver them that the afternoon. He once successfully served a subpoena in Antigua and got records back. Frankly, we weren't surprised at all when he came in with a sticky note with Jenny's phone number and email.

[3] At that time, the Penal Code did not contemplate the succinctly titled first-degree felony we have now, aggravated assault with a deadly weapon causing serious bodily injury against a family or household member. Consequently, the jury was left with the standard punishment range of two to 20 years. Judging by the contents of the old file, we could not locate any paperwork regarding a homicide in California.

[4] The very definition of gaslighting, which means (according to Merriam-Webster Dictionary) "psychological manipulation of a person usually over an extended period of time that causes the victim to question the validity of their own … perception of reality."

I love it when a plan comes together

Achieving justice is not easy. Even the best investigated criminal cases, few and far between as they may sometimes seem, require careful preparation on the prosecutor's part if success at trial is to be an option.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

And as a prosecutor, nothing quite beats the feeling when all your hard work and preparation bears fruit in the form of a successful jury trial.

Some of us haven't been before a jury in a long time, and some of us haven't been before a jury *ever*. Yet all of us are tasked with going into our respective courtrooms on home invasions, sexual assaults, and DWIs at the top of our game—we owe it to the victims and the communities we represent. Anything less takes a difficult job and pushes it toward the impossible.

As we return to the courtroom en masse, it's important to remind ourselves what goes into preparing for our first jury trial (or our first jury trial in a long time).

A note on basic assumptions

The vast majority of criminal cases are resolved by dismissal, pre-trial diversion, or plea bargain. Before we begin to prepare a case for trial in earnest, I assume that at least some attempt at resolving the case via one of these three methods has occurred. An attempt to resolve a case without trial requires at least a cursory understanding of the underlying facts of the case. Everything you read from here on out presumes that you have done at least this much before preparing for trial.

This article also assumes you are complying with your office's policy on discovery. *Brady*, Art. 39.14 of the Texas Code of Criminal Procedure, and the Texas Disciplinary Rules of Professional Conduct are not things to take lightly. Every office has their own policies and procedures to ensure that it is complying with the obligations placed upon our profession. If you don't understand the policies, ask a supervisor for clarification. Triple-check your work in this area.

Plea bargains

Some people come out of law school thinking that the inability to settle a case with a plea bargain is a failing on the attorneys' part, that selecting a case for trial is evidence of their shortcomings. This is false.

There are plenty of reasons why a trial is a necessary, sometimes inevitable, outcome of a case. Certain cases have underlying facts so egregious that justice requires a punishment more severe than the defendant is willing to accept in a plea agreement. In, say, a continuous sexual abuse of a child case with strong evidence for both guilt-innocence and punishment, it is perfectly reasonable to make a high plea recommendation and stick to it. There is nothing about our duty to see justice done that compels us to reduce a plea recommendation simply for the sake of avoiding a jury trial.

Other times, a defendant may reject a generous plea recommendation because he is confident a jury will acquit or assess a lesser punishment. If you have given the issue of punishment a lot of consideration and are confident that your recommendation is fair, but the defendant still wants to see what a jury will do, let him do it. Every trial is an opportunity to sharpen litigation skills, and letting a jury decide a particular set of facts will inform your future case evaluations and plea negotiations. You may find that your recommendations are too stiff or too lenient when viewed in light of a fresh jury verdict.

Finally, your office may have a policy that restricts your authority to make certain recommendations for certain offenses. For example, the elected district or county attorney may have decided that the office won't recommend probation in burglary of a habitation cases. There will be times that the policy will keep you from reaching an agreement in a case. When that inevitably happens, tee that case up and give it your best. Don't be afraid of the defendant "beating the offer" or other similar nonsense. Put forth your best effort and use the experience of trial as an opportunity to test and improve your trial skills.

A lesson from my experience: Rusk County has three state jail facilities. Crimes within them are investigated by the Office of the Inspector General (OIG). At some point in 2016, instances of an offender bribing a guard to smuggle contraband items inside became a regular occurrence. When a particularly egregious instance of bribery was submitted to our office, we sat down with OIG investigators and they really impressed upon us the danger that contraband creates for both correctional officers and offenders.

Beginning with the jury charge gives you clarity on the elements of the offense that you have to prove and, when appropriate, the elements of a defense you have to disprove beyond a reasonable doubt. It also has the added benefit of forcing you to spend time with the charging instrument.

Based on that conversation, I decided not to recommend probation for correctional officers who accepted money in exchange for bringing prohibited items into the jails. Guards and offenders alike deserved the benefit of a safe and secure facility free from contraband.

For a while, this change in our policy rocked along without issue. I was careful to explain the rationale behind it to the local defense bar and made reasonable plea recommendations within the context of that policy. Eventually, though, a correctional officer was accused of supplying offenders with smokeless tobacco at a substantial markup. The guilt-innocence evidence was very strong, but like most of our bribery cases, the punishment evidence was weak. The defendant was young, had no criminal history, and was unwilling to agree to a prison sentence of any kind. His defense attorney made it very clear, though, that his client would agree to any term of community supervision.

Because recommending probation violated office policy, we tried the case. The jury agreed that the defendant was guilty beyond a reasonable doubt, but it did not put much stock in the argument that the smokeless tobacco created an unsafe environment for correctional officers and inmates. They sentenced the defendant to the minimum two years' confinement and recommended the sentence be suspended and the defendant placed on community supervision. The verdict was a far cry from what we asked for.

It would have been easy to declare my decision to try the case a mistake and my unwillingness to agree to probation as a failure. Instead, we re-evaluated our "no probation" policy on bribery in light of the clear message the jury delivered with its verdict, and we relaxed the policy. The change resulted in many more such cases resolving via plea bargain. This verdict also allowed us to go back to the OIG investigators with clear justification for the reversal of our policy.

The jury charge

The jury charge is one of the last things a jury will hear before they retire to deliberate, but it is always the first step I take when preparing a case for trial. Why? Beginning with the jury charge gives you clarity on the elements of the offense that you have to prove and, when appropriate, the elements of a defense you have to disprove beyond a reasonable doubt. It also has the added benefit of forcing you to spend time with the charging instrument.

Another good reason to start with the charge is the application paragraph. It authorizes jurors to convict the defendant of the charged offense should they find that each element of the crime has been proven beyond a reasonable doubt. If you really think about it, the application paragraph is the culmination of all our efforts at trial. It makes sense that our entire trial plan would be constructed with this critical moment in mind.

In some instances, the court will prepare the charge. In others, the prosecutor's office will prepare a draft of the charge and present it to the court. Top-notch defense attorneys may also submit proposed jury charges for the court to consider. Regardless of who prepares it, the jury charge can't be truly finalized until all the evidence has been submitted to the jury, but trial prosecutors should still figure out what the application paragraphs in their instructions will look like. This information lets them approach the task at hand with clarity and purpose that simply isn't available without an understanding of the application paragraph.

A lesson from my experience: When I was a newer prosecutor, I was at home working on a case. I had already picked the jury and evidence was to begin the next morning. Here in Rusk County, the trial prosecutors are generally the ones who draw up proposed jury charges, and I was hard at work on a draft because I anticipated

a relatively quick trial. I wanted opposing counsel to have an opportunity to review the proposed charge first thing in the morning so that the jury and court staff weren't stuck waiting around, after the close of evidence, for that first draft to be completed.

I was midway through my work when I realized an egregious error in the assault on a public servant indictment. It completely lacked the required *mens rea* element—there was nary an "intentionally" or "knowingly" to be found. I was horrified. Luckily, I was saved from what I thought (at the time) was entirely fatal error thanks to some very on-point caselaw.

If I had started trial preparations with the jury charge as I suggest you do, I would have found this error *much, much earlier.* Errors in the charging instrument are never fun, but the earlier you catch them, the more remedies available.

Marshalling evidence

Once you know the elements to prove at trial, it's time to figure out how you are going to prove them. You are not doing enough as an advocate if your plan is to blindly call every witness, publish every picture, and play every video. Every witness called, every question asked, and every exhibit admitted into evidence needs to play a clearly defined role in the trial plan. The decision about what to admit and what to leave out needs to be a thoughtful one.

Thoughtful consideration of the evidence requires a thorough understanding about what evidence is available. Read every report and witness statement. Watch body camera and dash-cam videos in their entirety. Trials can take unexpected turns. Speaking with jurors post-trial has taught us that deliberations can often revolve around issues that neither attorney anticipated. You don't want to gloss over a body cam video or witness statement believing that it isn't substantive, only to have some obscure fact or comment within it be the deciding factor in the case.

Actually thinking about the evidence is pretty important too. You'd be surprised how often new trial attorneys forget to think critically about the evidence available to them. Here are a few points that I regularly encourage our young prosecutors to consider when developing their trial plans.

The defendant's statements. Remember, not every recorded statement of a defendant is a confession. Sometimes, criminal defendants just want to put their defense out there in the hope that law enforcement will find it persuasive and end or redirect the investigation. Many of these statements are admissible under the rules of evidence, but that does not mean they help the case. Sometimes, the statement is entirely self-serving and few, if any, helpful admissions are made. If the defendant's version of events, or at least critical portions of it, cannot be disproved, it is likely not worth offering.

When this type of recorded statement gets into evidence through a law enforcement witness, the defendant is getting the benefit of the jury hearing his side of the story without ever having to take the stand and being subjected to cross-examination. Really listen to what the defendant is saying in his recorded statements. If the benefit of his admissions doesn't outweigh any harmful, self-serving statements in the same recording, don't be afraid to leave it out. This is especially true if the defendant's admissions can be conclusively proved by other witnesses.

Repetitive witnesses. Contacting all witnesses prior to trial and preparing them for the possibility of testifying is an important part of every prosecutor's preparation. In some rare instances, you may find multiple witnesses who all made similar observations related to your case and, consequently, would all give similar testimony at trial.

This is a great situation to be in. If you try cases long enough, you will inevitably encounter a witness who ignores the subpoena and no-shows a trial setting. If you have contacted all your witnesses and the others comply with their subpoenas by coming to court, you can simply elicit the necessary testimony out of one of the others.

If it seems likely that all these similarly situated witnesses will come to court, consider calling only one or two instead of the whole group. Don't ask the court to release them from their subpoenas—just hold them back as insurance policies. Jurors are just as prone to short attention spans as the rest of the population, and if they hear a parade of witnesses who all testify to essentially the same facts one after another, they might end up tuning out the evidence and missing something important. You may also run the risk of a skilled defense attorney capitalizing on a relatively minor difference in their testimony and creating a fact issue where there is none.

The idea of not calling each and every witness can be intimidating. Resist the urge to overwhelm jurors with multiple witnesses saying the same thing. Hold your "bonus" witnesses in re-

Thoughtful consideration of the evidence requires a thorough understanding about what evidence is available. Read every report and witness statement. Watch body camera and dash-cam videos in their entirety.

serve and call them if a fact issue comes into dispute or if opposing counsel uses her cross-examination to cast doubt on the credibility of another witness's testimony.

Selecting photos and videos. Be selective with pictures. Pick enough photos to give the jury a good understanding of the crime scene, the victim's injuries, or whatever else is relevant to the charge at hand. If some of the images are particularly inflammatory and you anticipate a Rule 403 objection, be prepared to offer any unused photos for purposes of the record only. Your appellate attorney will appreciate the ability to counter this type of objection on appeal by showing you introduced only X number of gruesome images when Y total images existed.

It's just as important to be choosy about what videos include. These days every patrol officer has a camera on his body and on his dashboard. If more than a single officer responds to a given crime scene, hours upon hours of video can quickly pile up. Again, just because it's there doesn't mean you have to play it all. Rather, watch it all and then decide which cameras captured the best video and audio.

A lesson from my experience: I was trying a driving while intoxicated (DWI) case early on in my career. The arrest was made before body cameras had been widely adopted. In my preparation, I carefully watched the video of the DPS trooper interviewing the defendant about her alcohol consumption and conducting field sobriety tests. After he arrested the defendant and relocated her to his patrol vehicle, I stopped the video and turned my attention to other matters—I had a written copy of his vehicle inventory, and no alcohol, dangerous drugs, or controlled substances were listed on it, so I didn't feel the need to continue watching. The defendant declined to provide a sample of her breath and the officer did not seek a warrant for a sample of her blood, so my entire case would revolve around those standardized field sobriety tests.

At trial, my opposing counsel was quite a bit more experienced and an all-around better lawyer than I was at that time. I was worried about stopping the trooper's dash cam video before the inventory search out of concern that the jury would think I was hiding something. I also worried about defense counsel's ability to convince them I was hiding something. So I let the video play. Several minutes later, as the trooper diligently performed his inventory search, the defendant groaned loudly and said to herself, "Man, I'm going to be hungover in the morning." Had I been more diligent in preparing for trial, I would have heard this wonderful *res gestae* statement and could have made the admission a large part of my opening statement.

Meeting with witnesses, whether that be in person, over the phone, or via Zoom, is crucial. Video conferencing is so easy thanks to Zoom, FaceTime, and Skype that I'm hard pressed to think of an acceptable excuse for not having a "face-to-face" meeting with witnesses at least once prior to trial.

Meeting with witnesses

I pity the foolish prosecutor who doesn't meet with witnesses in a case prior to trial. Reviewing videos and reading offense reports and witness statements is not a substitute for a real-life conversation. Meeting with witnesses, whether that be in person, over the phone, or via Zoom, is crucial. Video conferencing is so easy thanks to Zoom, FaceTime, and Skype that I'm hard pressed to think of an acceptable excuse for not having a "face-to-face" meeting with witnesses at least once prior to trial.

These conversations build trust between you and witnesses. It can build the confidence of victims who are apprehensive about testifying. It gives them a chance to discuss any worries they have about the pending trial. Don't deny them a chance to increase their comfort level with the criminal proceedings.

Plus, the simple fact is a lot of time passes between the crime and the trial, even more so in this post-COVID backlog. If you are relying on year-old witness statements and offense reports to inform you about what a witness's testimony will be today, you are setting yourself up for trouble. Meeting with witnesses prior to trial allows you to see and hear first-hand just how well they remember the events in question. If their memories have faltered, allow them to review their statements to refresh their recollection. Only after meeting with witnesses can you truly predict what their testimony at trial will be.

Choosing witness order

There is nothing inherently wrong with calling witnesses in an order that allows you to tell a story chronologically. The narrative will be easy for jurors to follow. It is not, however, the only way.

You can also put the primacy and recency effect to work for you. Put simply, the primacy and recency effect means that people remember the information at the beginning and the end of a learning episode much better than they remember what is presented in the middle.

If a trial has a couple of witnesses whom you expect to stand out above the others, perhaps the crime victim and a key law enforcement officer,

consider setting up the witness order so that it begins with one and ends with the other. Is there a necessary witness who could be subjected to tough cross-examination or has credibility concerns of some kind? Consider calling him in the middle of the case in chief.

Voir dire

Ryan Calvert, of Brazos County fame, is The Man when it comes to voir dire. He's written a series of incredible articles for *The Texas Prosecutor* journal on the topic.[1] When that wasn't enough, he literally went out and wrote the book on voir dire.[2] By the time you read this article, Ryan will have finished up his duties as the course director for Baylor Law School's first "Voir Dire Bootcamp."

I can't tell you how to prepare for a voir dire any better than Ryan has, so I'm not going to try. Check the endnotes and read his articles. Have your office order a few copies of his book if you haven't already. It's all great stuff.

What I will tell you about voir dire is that it is absolutely worth preparation time. As you work through the evidence in a case in detail, the weaker elements and possible defenses will make themselves apparent. Use your preparation time to devise a strategy for addressing these issues during voir dire. The opportunity for advocacy begins the minute you enter the same room as the prospective jurors. Don't waste a golden opportunity like voir dire by not preparing properly. Going into a criminal trial of any kind with a "canned" voir dire that you snagged off another prosecutor an hour before court may not lose the case for you, but it definitely will not win it.

I've encouraged all the young attorneys I've worked with to start voir dire preparations with a clean slate. There isn't anything wrong with taking some of the big "cornerstone" points from an earlier voir dire and re-working them to fit your current case, and it's perfectly fine to look to other prosecutors' work for inspiration. However, you need to get a good outline of the important topics your particular voir dire needs before you begin looking to anyone else's work. Use voir dire to address the weaknesses in a case and don't be afraid to question whether a certain topic is worth dedicating time to. Don't forget that you are as smart as anybody else in that courtroom. There is always room for innovation in our line of work, and there is no reason to be wedded to a particular "script" for voir dire just because other people in your office have done so.

Cross-examinations

It is difficult to prepare for cross-examination, partly because Texas doesn't require mutual discovery in criminal cases. The only witnesses a defendant is required to notify the State about are experts, and that happens only if we request the notice. Prosecutors will never truly know beforehand whom the defense will call to testify, but that doesn't mean we can't make some educated guesses.

As you work through the audio and video recordings in a case, as well as any written statements, make note of witnesses whose statements stand in contrast to the observations of the victim and law enforcement witnesses. These people may not end up being called as witnesses for the defense, but unless you are absolutely certain a suspected defense witness will not be called, develop a rough outline of areas of expected testimony that will be ripe for cross-examination.[3]

Personally, I always prepare an outline for cross-examining the defendant. Most of the time this is wasted effort on my part because the defendant doesn't testify, but when the rare opportunity to cross-examine a criminal defendant comes along, the preparation always pays off.

Opening statements

The prosecution's opening statement is the first chance for jurors to learn something about the case. It's a critical moment in the trial, and you want to put in the effort necessary to make it really shine. Hilary Wright with the Dallas County Criminal District Attorney's Office wrote a really comprehensive article on the topic for the November–December 2020 issue of *The Texas Prosecutor* that I highly encourage you to read.[4]

When it comes to preparing your opening statement, I do have a few tips to pass along. First, I encourage you not to mention evidence that you are not 100 percent certain will come in. Opening statements should set up the State for an "under-promise, over-deliver" situation. Tell jurors a simple, concise story that prepares them for the evidence they are about to hear, just like Ms. Wright suggests in her article, but do so without promising any facts that may not make it into evidence. If you create an expectation about what evidence you are going to deliver and then fail to meet that expectation, you will lose credibility with jurors and make a just outcome that much more difficult to reach.

You can also put the primacy and recency effect to work for you. Put simply, the primacy and recency effect means that people remember the information at the beginning and the end of a learning episode much better than they remember what is presented in the middle.

Also, practice delivering your opening statement and seek feedback from other members of your office, especially anyone without a legal education or law enforcement experience. An opening statement should be easily understood by jurors, and it's very unlikely that any jurors will see the world through the same lens that another attorney or peace officer would. The more you work on delivering your message, the better you will become at distilling that message into a form that the entire jury, with their diverse education and life experiences, can understand.

Repeatedly practicing the opening statement will get you away from standing behind the lectern and reading as if it were some kind of prepared statement at a press conference. Everyone is going to have his or her own style when it comes to opening statements: Some prosecutors take a more reserved tact and deliver a measured, even-keeled statement from behind the lectern. Others go with a more dynamic approach that is full of the energy that so often accompanies a jury trial. Many alternate between these two approaches as the situation calls for it. Whatever your style, execute the opening statement without relying too heavily on notes. A top-notch opening statement will establish a good rapport between you and the jurors—don't lose their attention by breaking eye contact and reading from your notes as if from a book.

An opening statement should be easily understood by jurors, and it's very unlikely that any jurors will see the world through the same lens that another attorney or peace officer would. The more you work on delivering your message, the better you will become at distilling that message into a form that the entire jury, with their diverse education and life experiences, can understand.

Closing arguments

I really love closing arguments. Of all the exciting and interesting things we prosecutors get to do, nothing gets the adrenaline flowing quite like closing arguments in a hotly contested criminal trial. I can count on one hand the things I enjoy more than nailing the landing on a well-delivered closing argument. Like opening statements, too much goes into closing arguments to talk about it all here,[5] but there are a few points worth getting to, if only briefly.

First and foremost, be a storyteller.[6] A good closing argument should summarize the evidence, but it shouldn't be a bland recitation of the various witnesses' testimony. Nothing is going to cause a jury to lose focus quite like 20 minutes of "Witness 1 told you A, B, and C. Witness 2 told you D, E, and F." Remember primacy and recency? Closing argument is the last thing a jury will hear before retiring for deliberations. They will remember it better than probably anything else. Transform the testimony of your witnesses into a cogent story that holds jurors' attention as much it persuades them.

Punishment

The punishment phase of a trial deserves its fair share of time and attention. Depending on the case, the amount of time we spend preparing for punishment might rival the time we put in preparing for guilt-innocence. The bulk of punishment evidence is going to fall into two categories: prior convictions and unadjudicated offenses.

Prior convictions. Get your hands on a defendant's prior criminal convictions as soon as possible. You (or more likely an investigator in your office) will do this by requesting "pen packets" from the Texas Department of Criminal Justice (TDCJ) and certified copies of judgments from any county where the defendant has previously committed an offense.

You want these documents early for two reasons. First, you need to decide whether you can *and* should file a notice to seek higher punishment under Chapter 12 of the Texas Penal Code. Different counties have different policies when it comes to seeking punishment enhancements, so make sure your actions are in line with those policies. Second, obtaining those judgments gives you a chance to hunt down some of the witnesses to those earlier crimes. At the end of the day, pen packets and judgments are just lifeless documents—there is persuasive value in the words those documents contain, but the degree of persuasiveness dramatically increases when you call a flesh-and-blood witness to give the jury insight into the underlying crime detailed in those documents.

The pen packets and judgments should be self-authenticated, certified public records under Texas Rule of Evidence 903, so you won't need a sponsoring witness to get them admitted. If the defendant refuses to stipulate that he was convicted of those offenses, you will likely need to request a court order for a latent fingerprint examiner to take a fresh 10-print card from the defendant to compare his prints to those on the judgment.

Unadjudicated offenses. Sometimes a defendant will go to trial on one charge while having other unadjudicated offenses waiting in the wings. During punishment, you can get into those unadjudicated offenses if you have provided proper notice.

It's important to consider whether getting into additional unadjudicated offenses is to the State's benefit. If you already plan to introduce a string of prior criminal convictions, adding hours of additional testimony related to the unadjudicated offenses might make the jury think you are piling on. Think about the nature of the unadjudicated offense versus the nature of the charged offense. Does it make sense to put on evidence of an unadjudicated DWI charge when the defendant has just been convicted of continuous sexual abuse of a child? Maybe not. On the other hand, does the jury, after convicting a defendant of domestic violence, need to hear about a string of similar offenses that were allegedly committed while he was on bond and awaiting trial for the current offense? Probably so.

Achieving justice at punishment doesn't always revolve around the presentation of prior convictions or other unadjudicated offenses. Sometimes, achieving justice in the punishment phase begins long before punishment ever begins.

A lesson from my experience: Several years ago, I tried a sexual assault where a police officer was accused of sexually assaulting on older, intoxicated woman. The officer in question responded to the apartment complex where his victim lived after she had, as a result of her intoxication, become convinced that a friend and neighbor was ill and needed medical attention. Once that situation was resolved, the officer briefly returned to his patrol vehicle. After a few moments, he turned off his body camera, returned to the victim's apartment, and perpetrated the sexual assault. The next morning the victim had the wherewithal to make a police report and get a SANE exam. DNA was recovered that linked the police officer to the sexual assault.

At trial, I allowed myself to be drawn into the defense attorney's well-crafted attack on DNA science. The testimony of the forensic scientist who performed the DNA comparison became a focal point of my case in chief and my closing argument. The jury deliberated for a very, very long time before returning a guilty verdict. The defendant was young and had never been in any previous trouble, so we had no additional evidence at punishment. The jury deliberated for a short while before returning a verdict recommending community supervision.

I spent days upon days replaying the trial in my head and trying to understand how the jury could have unanimously decided that community supervision was appropriate in a case where I had argued for the full 20 years' confinement. Ultimately, I concluded that I began losing the punishment portion of the trial way back in guilt-innocence. I focused on defending DNA science and did nothing to challenge the "troublemaker" and "town drunk" perception that so many witnesses had of the victim. Had I done more during guilt-innocence or at punishment to establish that the victim didn't share in the responsibility for what happened to her and that she deserved the protection of the law as much as anybody else, I suspect the verdict might have been very different.

Conclusion

Like many professionals, a talented prosecutor can make the execution of a jury trial, from voir dire to punishment, look easy to the outside observer. But the countless hours of planning and practicing are not as easily observed. As our profession charges into the second half of this year, those hours will be more important than ever. There are going to be a lot of eyes on us as we tackle a backlog of serious cases that hold a lot of importance to the communities we serve. Whether you are joining this endeavor for the first time or after a long layoff, I hope you have found this primer helpful as you prepare to see that justice is done. ❇

Achieving justice at punishment doesn't always revolve around the presentation of prior convictions or other unadjudicated offenses. Sometimes, achieving justice in the punishment phase begins long before punishment ever begins.

Endnotes

[1] Find them at these links: www.tdcaa.com/journal/always-be-closing-using-voir-dire-to-argue-misdemeanor-cases, www.tdcaa.com/journal/voir-dire-on-punishment, and www.tdcaa.com/journal/special-issues-in-voir-dire.

[2] www.tdcaa.com/product/jury-selection-2020.

[3] This article from a past issue of the journal is a good starting point: www.tdcaa.com/journal/%ef%bb%bfa-plan-for-cross-examination.

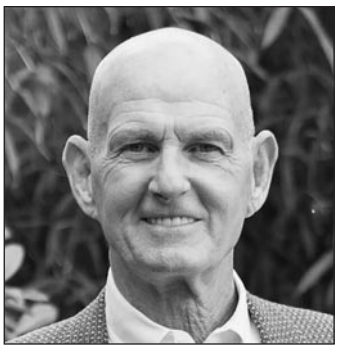
[4] www.tdcaa.com/journal/starting-out-ahead-with-an-opening-statement.

[5] www.tdcaa.com/journal/%ef%bb%bfthe-last-words-a-jury-hears-before-deliberations.

[6] www.tdcaa.com/journal/how-macho-man-randy-savage-made-me-a-better-prosecutor.

Links to the past, lest we forget

A few months ago, Rob Kepple, TDCAA's Executive Director, told me that Tom Hanna had passed away in February.



By Tom Krampitz
TDCAF Board member and former TDCAA Executive Director

I am honored to write about Tom for this edition of *The Texas Prosecutor*; I remember him as a quiet titan.

Chances are you're wondering, "So who was Tom Hanna?" For a detailed biography, I recommend you go to his obituary at www.tlie.org/tlie-celebrates-tom-hanna. There you will learn lots about Tom's life and accomplishments.

My history with Tom began in 1976 when I joined the TDCAA staff. At the time Tom was the Criminal District Attorney of Jefferson County. He became a mentor and guiding light, not just for me, but for legions of lawyers throughout his lifetime. During his tenure in office, a wellspring of talent flowed from Beaumont, with many of his charges establishing long and distinguished careers, both bench and bar.

Tom Hanna

Tom's leadership abilities weren't confined to his perch in Jefferson County, for soon after taking office he quickly became the go-to legislative voice for Texas prosecutors. Here's how it happened.

Prior to 1970, TDCAA was an informal group that met once a year in September in conjunction with something called the Attorney General's Law Enforcement Conference. There was no professional staff or office for TDCAA. But in 1970, two things occurred: First, Carol Vance, then District Attorney of Harris County, approached then-Governor Preston Smith and requested that some new federal dollars available for state law enforcement support be directed to training and technical assistance for Texas prosecutors. At the same time this was happening, the Legislature was preparing to conduct a long-needed codification of all the penal laws spread throughout Texas statutes for the first-of-its-kind Penal Code.

Governor Smith saw an opportunity. He offered that Texas prosecutors could be the guiding force in preparing the draft Penal Code for the Legislature to consider, and he would give them training funds. Texas prosecutors responded, and the Texas District and County Attorneys Association entered its modern era.

And here's where Tom Hanna entered the picture as well. One of his law school classmates, Terry Doyle, was a member of the Legislature, and he knew of Tom's brilliance as both an attorney and strategist. He asked Tom to lend his talents to the Penal Code revision process, and rather than this being a State Bar-directed effort, Tom engaged his prosecutor brethren. From thence was birthed the famous (and at times perhaps infamous) exploits of the TDCAA Penal Code Committee.

The Committee met nearly continuously for the better part of two years, convening in Austin for weekend meetings that would sometimes extend long into the evening. (There's a scan of an old photo on the opposite page; Tom is on the far end of the table wearing a white shirt and facing the camera.) The work could be tedious as legal scholars among the group would parse over the nuances of legal doctrines and words and phrases. Photographic evidence from those meetings revealed that on occasion there might be an adult beverage or two provided to calm nerves and temper strongly held positions.

That same social lubricant could inspire some equally creative and mischievous results. For instance, would you have considered it necessary that the definition of "club" in Chapter 46 include a "mace" or a "tomahawk?" Remember, we're talking about 1971–73, not the dark ages or the frontier days. Or what about Chapter 46 defining an illegal knife (up until recently) to include a "bowie knife, sword, or spear" as well as a "dag-

ger, including but not limited to a dirk, stiletto and poniard?" When's the last time your evidence in a weapons case included any of those instruments?

Tom remained the steady and guiding hand for the entirety of the process. His talents as a leader were evident throughout, as he encouraged and accommodated all points of view, while holding steadfast to the notion that no proposal would emerge from the committee without unanimous approval. He understood that while individual viewpoints were important, the goal was to produce a document that was balanced and that would stand the test of time. The culmination of these efforts resulted in the Legislature approving the draft in 1973 and the new Code taking effect on January 1, 1974.

As the years roll by I've found myself increasingly in the position of providing a link to the past. And it's important that we maintain those connections because that's where the power of legacy resides. That was the case a few years back when Rob asked me to write a column upon the passing of TDCAA and TDCAF stalwart Dan Boulware. (Find it at www.tdcaa.com/journal/in-memory-of-dan-mahanay-boulware.) It's important to Rob that we celebrate and keep current the legacy of our past leaders, for it is because of their foundational efforts that we are the relevant and vibrant organization that we are today.

I'm pretty sure Tom wouldn't have cared for much being made over his lifetime of achievements, his adherence to a code of personal integrity and excellence, his selfless efforts on behalf of his community and profession—the list goes on and on. But I'm equally sure that there'd be a gleam in his eye when he mused over tomahawks and the like.

God bless you, Tom Hanna. The Lord gifted us all when he placed you in our paths. ❇

Editor's note: As this issue was going to press, Carol Vance, who is mentioned in this article, passed away at the age of 88. We will write more about Mr. Vance in an upcoming issue.

A photo of members of the Penal Code Committee in the early 1970s. Tom Hanna is in the long-sleeve white shirt at the far end of the table. Other committee members include Dain Whitworth (by the blackboard); the late John Quinlan, an ACDA in Bexar County at the time (on the right holding a cigar); former Court of Criminal Appeals judge Michael McCormick (on the far right in the dark-framed glasses and holding a cigarette); Jim Vollers, former State Prosecuting Attorney (in the striped shirt on the left), and George Dowlen, onetime 47th Judicial District Attorney (in the left lower corner looking down).

Still alive—but a life lost

Five-month-old Kiryn Vincent experienced extreme, rapid, back-and-forth whiplash on July 25, 2016.

By Staci Johnson (at left) and Kristen Duron
Assistant Criminal District Attorneys in McLennan County

Some might refer to this type of injury as "shaken baby," but the medical community has shied away from this term of art in more recent years. While the symptoms remain the same, doctors now recognize that shaking is not the only cause of such injuries. Similar injuries can result from high impacts, such as a speeding car hitting a solid object or someone's head slamming into a solid surface. Consequently, law enforcement had to answer some questions after examining Kiryn Vincent's injuries to determine if they were accidental.

As with all injury to a child cases, the primary inquiries were:

1) What is the nature of the injury?
2) When did the injury occur?
3) Who had access to the child at the time of the injury? and
4) Are there any plausible explanations that this injury was an accident? Or must it have been on purpose?

Timeline of events

Lauryn Mundie and Melvin Vincent met while working at an assisted living facility in Waco. In 2015, Mr. Vincent moved into Lauryn's apartment. She spent quite a bit of time in the relationship tending to Vincent during his frequent bouts with sickle cell anemia, a painful, inherited disorder where some red blood cells are misshapen and can cause infection and even stroke. Things were relatively good until Kiryn's birth in March 2016. Vincent began to get jealous of the attention Lauryn was giving their son. He referred to Kiryn as a "cry baby" and told her that she "babied him too much." Their relationship went off and on, with periods where Vincent would leave the apartment for a couple days at a time. Lauryn trusted him with Kiryn and did not think he was capable of violence. However, she had seen him, on occasion, throw and slam household objects when frustrated.

Leading up to the day of his injuries, Kiryn slept poorly, which led to a disagreement between the couple. Lauryn decided that the relationship was over and asked Vincent to pack his things and leave. She had a double shift at the assisted living facility that day, and they agreed Vincent would keep the baby. For the first time since Kiryn's birth, Vincent took his son to his mother's home to spend the night.

Vincent's mother, Lolita Stallworth, later said that upon his arrival, Kiryn seemed happy. At some point, Vincent went to the back patio to talk with his stepfather. Lolita described a moment where she held Kiryn up to the window and he was smiling and responding to Vincent's gestures through the glass. She emphasized this to prove the strength of the relationship between Vincent and Kiryn, but we also noticed that Kiryn was not crying, nor was he unconscious or expressionless—all responses that immediately follow a shaking-type brain injury.

Lolita and her husband, Kawam Stallworth, said Vincent and Kiryn went to sleep in the family room that evening. When they woke up and got ready for work, nothing was out of the ordinary. Vincent fed Kiryn a bottle and Lolita saw Vincent changing a dirty diaper before she left for work at 9 a.m. Everyone agreed Kiryn was healthy and normal when left in Vincent's sole custody.

The defendant's story

Later that day, Lolita and her son brought Kiryn to Providence Hospital in Waco in an unresponsive state. He was immediately intubated before diagnoses could begin and displayed no outward signs of trauma.

Vincent was interviewed by the police at the hospital. He initially claimed he had no idea what

caused Kiryn's condition and later mentioned a cough or teething as the source. Pressed further by the detective, Vincent stated the day before (Sunday), Kiryn needed a diaper change and was laying on the couch. Vincent ran upstairs to get a fresh diaper when Kiryn rolled off the couch on to the carpeted floor. Vincent stated Kiryn cried for a minute or so and then appeared normal. In addition, Kiryn had finished a full bottle and had a normal bowel movement afterward, which was substantiated by evidence in the house. Vincent later added to the original version of events by saying that Kiryn fell from the couch and landed on a large glass ashtray. Later we measured the height of the couch cushion, which was just 18 inches from the floor.

Medical evaluation revealed no exterior signs of trauma. Kiryn had subdural brain hematomas on both the right and left side as well as a significant midline shift of the brain. His optic nerve was severed, rendering him permanently blind. Months of significant medical intervention were required to preserve his life. These major injuries could result from landing on one's head after falling off a building or from a large TV falling from a height onto one's head. But with major internal injuries and no reasonable explanation of cause or corresponding external injuries, the only explanation was nonaccidental trauma.

Based on these considerations, the State charged Melvin Vincent with intentionally or knowingly causing serious bodily injury by causing the child to strike an unknown object or by manner and means unknown to the grand jury.

Another charge

The police report mentioned that Vincent went to an unidentified neighbor's house to use the phone to call his mother. Some additional work by our office investigator, James Pack, led us to neighbor Crystal Stanfill. She told us that Vincent showed up at her front door with a cell phone in his hand and holding Kiryn, and he asked to use her telephone—he said that his child wasn't breathing and he needed to call his mother. Crystal did not know the defendant and she found it very suspicious that a man holding a cell phone was asking to use her house phone. He explained that he was out of minutes. Crystal had sleeping children in her house, so she closed the door and went inside to retrieve her phone. By the time she returned, Vincent was talking to a utility worker across the street asking to use his phone. When Crystal approached, she asked Vincent if he wanted her to call 911 and he told her no. He only wanted to call his mom.

Vincent's mother, Lolita, took anywhere from 15 to 45 minutes to arrive, depending on whose testimony you believe. Vincent admitted it took 45 minutes from the time he noticed Kiryn was having difficulty breathing to his mother's arrival. Doctors said that a child who was not breathing would be sustaining significant brain damage due to oxygen deprivation and any delay in medical care would have lasting effects. We felt Vincent's training as a medical aide would have taught him as much, and it compounded his culpability. He performed CPR in response to Kiryn's erratic gasps for air and loss of skin color. Despite the need for lifesaving measures, he chose to seek his mother's help instead of medical professionals. Armed with this information, we decided to add a count of injury to a child by omission.

A challenging relationship

During trial preparation, we met with Kiryn's mother, Lauryn Mundie, to discuss the case and to tell her what to expect. It became evident that she had been involved in a dysfunctional relationship with Mr. Vincent, and as a result, some of her perspectives were warped. For example, she innocently described several narcissistic characteristics in Vincent. Much of their relationship involved Lauryn trying to appease him and taking care of him during his frequent illnesses.

And like anyone in a relationship, Lauryn was not perfect either. She admitted that she still struggled with believing Vincent could have harmed their child. We did not want to influence her testimony but generally outlined why we felt confident pursuing our case against him. She then confessed that even after Vincent was arrested, she reignited the relationship a couple of times. This is a phenomenon we see so often as prosecutors. In our experience, jurors may not understand it, but we can attempt to explain it to them and at the very least put it out there to soften any defense arguments resulting from it. However, we found that Lauren was willing to be completely open and honest to do right by her son.

At trial

In our case-in-chief, when Lauryn testified, we had her admit her continued relationship with the defendant. As an interesting side note, testimony showed that neither the defendant nor his

Medical evaluation revealed no exterior signs of trauma. Kiryn had subdural brain hematomas on both the right and left side as well as a significant midline shift of the brain. His optic nerve was severed, rendering him permanently blind. Months of significant medical intervention were required to preserve his life.

family made any effort to continue a relationship with or support Kiryn, which furthered our argument about his selfishness and guilt. It also underlined that Lauren's family was not vengeful and out "to get" the defendant. Lauren explained that she loved Vincent and had struggled with believing he could hurt their child. She knew what the evidence showed and felt he should be held accountable, but her emotions made it hard for her to truly accept it. This softened the defense's arguments that "even the mother didn't believe the defendant did it" and "she continued a relationship with him—surely a mother wouldn't be in a relationship with someone who hurt her child." The defense asserted these arguments but did not highlight them as would've happened had we not couched Lauren's actions in terms of a dysfunctional relationship.

Dr. Harris did not pinpoint the time of the injury, but he was able to explain to the jury that blood of different ages has different colors and consistencies, and based on his training and experience, the blood in Kiryn's brain was relatively fresh.

We called three doctors to testify in this case: a neurosurgeon, an ophthalmologist, and a pediatric forensic doctor. All doctors worked at McLane Children's Hospital in Temple, which provides high-level trauma care for Central Texas, where Kiryn had been transferred by helicopter as soon as possible.

Dr. Frank Stephen Harris, a neurosurgeon with 49 years of experience, testified first. He explained to the jury what Kiryn's head looked like when he arrived at the hospital. Kiryn's brain had swollen so much that a portion of his skull had to be removed to give him relief. Even after the piece of skull was taken away, his brain began to spill out of the skull. Most important to Dr. Harris's testimony was that he noted no active brain bleeding, that Kiryn's brain bleed appeared to be acute—meaning it was six to 12 hours old. (Dr. Harris operated on Kiryn about six hours after the child first arrived in the Providence emergency room in Waco.) Obviously, Dr. Harris did not pinpoint the time of the injury, but he was able to explain to the jury that blood of different ages has different colors and consistencies, and based on his training and experience, the blood in Kiryn's brain was relatively fresh. This type of injury would not lurk silently like an aneurysm for hours or days before suddenly rupturing.

Dr. Harris also provided the jury with an idea of what types of behaviors and symptoms a child with this type of brain bleed would exhibit: He would be unable or unwilling to eat or poop, and he would be lethargic, if not unconscious. This testimony was important to our timeline of events leading up to Kiryn's injury.

Dr. Luke Potts, an ophthalmologist, was our rock star. As we began trial preparations and reviewed his report with him, we learned that not only was the doctor an expert in ophthalmology, but he also had a Ph.D. in an extremely specialized field: retinal microcirculatory physiology. In other words, we had hit a gold mine in Dr. Potts because he had the highest possible level of education in retinal anatomy. Dr. Potts testified early in our case so the jury had a good idea what types and degrees of injuries Kiryn sustained. He said this was a textbook case of what would have been called "shaken baby syndrome." In his years of practice, Kiryn was the best example of a "shaken baby" that he had ever seen. Kiryn's retina was so damaged that when Dr. Potts viewed it through his specialized retinal camera, he was unable to make out the basic structure of the eye. Dr. Potts contrasted Kiryn's eye photos with photos of a normal retina to show the jury what they should be seeing and what was absent in Kiryn's retina. Without some obvious source of external injury, the only explanation was nonaccidental trauma. The movement Kiryn experienced was so violent that it ripped the optic nerve from his eyeball. It came as no surprise to Dr. Potts that Kiryn remains completely blind five years after this injury—his pupils do not even respond to direct light.

Our case concluded with Dr. Erika Ward, a pediatric forensic doctor, who reviewed all of Kiryn's medical records. She determined that his injuries appeared to be nonaccidental in nature. She summarized the previous medical testimony and findings as well as provided the jury with a future prognosis, which is grim. It included probable paralysis, developmental deficits, blindness, and even potential death. This prognosis was relevant to prove that Kiryn sustained serious bodily injury.

All our doctors indicated that a fall of 18 inches onto a glass ashtray could not have caused Kiryn's injuries. In addition, he behaved normally for several hours after falling off the couch, including eating, drinking, and responding to visual events around him. These normal behaviors contradicted the fall as the source of his injuries.

The defendant's testimony

After our case-in-chief, the defendant decided to testify on his own behalf. His testimony highlighted his self-centered view of things. He spent more time bemoaning his medical issues as a person with sickle cell anemia than he did discussing his child. It became incredibly clear that he did

not have any regrets or angst over his child's permanent damage. He admitted he even left the hospital after being told that Kiryn was unlikely to make it through the night because Vincent was cold. The defendant established he was the only person who had care and custody of Kiryn during the timeframe of his injury. Vincent also admitted that he should've called 911 sooner—even if his cell phone was out of minutes, the 911 feature would still function. He stated his mother's house was "a couple of blocks" from the hospital, but he felt that it was too far to walk in the heat while holding his child.

The defendant never admitted to getting angry with Kiryn or abusing him. He stated Kiryn was fussy in the days leading up to his injuries but "he never got under my skin or anything." Vincent maintained the baby spontaneously turned pale and started gasping for air, which prompted the defendant to seek out his own mother's assistance.

The jury returned guilty verdicts on both Injury to a Child counts in less than an hour.

Punishment arguments

With permission from Kiryn's mother, Lauryn, we allowed the jury to see Kiryn for the first time. Lauryn pushed Kiryn, who had recently turned 6 years old, in his wheelchair into the courtroom where he remained until punishment concluded. It was a powerful moment for us and the jury. What was most shocking during this moment was the defendant's complete lack of reaction. Vincent did not look at his own child.

Once argument began, we summarized testimony explaining to the jury that Vincent sentenced Kiryn to an existence some would find worse than death. Kiryn will undergo a series of surgeries as long as he lives. Lauryn told jurors it was particularly difficult after the surgeries because they never knew if he was receiving enough pain medication, as he was unable to communicate. We told jurors that Kiryn was trapped inside his body, unable to interact or communicate effectively with the outside world. What worse torture could there be than being in pain and unable to tell anyone?

We asked jurors to think about the word "life." What does "life" mean to them? We suggested that life may make one think of relationships and certain milestones. Doctors do not expect his injuries to shorten his lifespan (they say he could and probably will outlive his mother, and she worries about who will care for him when that happens); however, he will not get to experience any of life's major milestones, and neither will his mother. He will never have a girlfriend, go to prom, graduate high school, get a job, get married, or have children.

Particularly poignant was the photo that we showed the jury of Kiryn at school; it's reprinted below. To be clear, testimony explained that while Kiryn goes to school, he doesn't do anything meaningful during the day and certainly doesn't receive what most people would think of as education. However, one photo from school was everyone's favorite one of Kiryn. In the photo, a classmate is handing him a dandelion, and Kiryn's head is thrown back with what appears to be a smile on his face.

A photo of Kiryn and a classmate from school handing him a dandelion.

We argued that everyone likes that picture because it makes *us* feel good. We tell ourselves that Kiryn can experience happiness and relationships. But the reality is much darker. The smile on his face is probably not associated with any emotion at all and is rather a muscular tic. He cannot see, so the expression on his face has nothing to do with the dandelion in front of his face. To cope with the fact that a child exists under these circumstances, we trick ourselves to feel better. We smile because we believe he is smiling. And all of this occurred because the defendant couldn't handle being a father. He was having some relationship difficulties and health problems. As a result of his stress, the defendant took out his frustration on the one person who could not defend himself. During testimony he told jurors that he currently works at an assisted

living facility. How can a man who snaps on the weak and defenseless be trusted in daily situations with our elderly?

Ultimately, we asked jurors what the life of Kiryn and his mother were worth. The defendant, in his act of selfishness, robbed them both of what we consider life. They are living and breathing but that's not the measure of a meaningful existence. Meanwhile, the defendant took no responsibility and showed no remorse.

Trial outcome and social media backlash

We were not certain how the jury would assess punishment on a defendant with no criminal history or other bad acts. However, neither of us were prepared for the sentence: The jury assessed punishment at eight years in prison on Count I, first-degree injury to a child, and seven years on Count II, first-degree injury to a child by omission. It was difficult to fathom that a jury who saw Kiryn and believed that his medical issues were caused by the defendant's action and inaction would assess a single-digit term of years.

If Kiryn had been only slightly more injured, the jury could well have been listening to the facts of a capital murder trial—a point we made in punishment argument. The defendant's actions robbed Kiryn of any quality of life and all normal milestones. The defendant sentenced Kiryn's mother to a lifetime of intensive care for her son, who will never progress. Where was the sense of compassion one expects from a father who sees his son in the courtroom in a persistent wakeful but unaware state? How can a man weep on the stand for his own sickle cell diagnosis and not his son's devastating injuries? As a point of comparison, we tried a multi-county evading with a vehicle that same month and received 50 years in prison. While that defendant was habitual, it was still hard to comprehend how justice was meted out equally in both cases.

Kiryn and his mother, Lauren.

Making matters worse, we read the social media comments on a news article about the case. The community seemed outraged that this defendant received what they deemed a light sentence. Unfortunately, the judge did not let us speak with jurors before they were released, and we continued to wonder what had happened. Then we saw a post that said the following:

> "I sat on the jury for this case. I know most of the others probably won't say anything, but I feel compelled to say my peace [sic]. 10 out of 12 of us wanted a much harsher sentence. The remaining 2 wanted probation. I can assure you the outcome that was reached is the only one that included time. I am incredibly disappointed and honestly heartbroken for the family. It was hard for each and every one of us in that room. My heart goes out to everyone involved."

To say that this explanation was both a source of comfort and frustration would be an understatement.

We would love to say that we have peace about this case, but we cannot help comparing every case that receives a long sentence with the facts of this case. Yet, for a defendant with no previous criminal history, eight years is still a win. The jury could've easily sentenced him to probation, but we convinced a jury with two holdouts to give him prison time. Despite our disappointment in the verdict we can be proud to know that Kiryn did receive a form of justice. Perhaps the way that justice was meted out in this case is a sign that our system isn't perfect. Nevertheless, Kiryn Vincent continues to be loved by his mother and support system. Their care for him provides an example of the preciousness of life and all that we take for granted. ❇

Texas District & County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701

PRSRT STD
US POSTAGE PAID
PERMIT NO. 1718
AUSTIN, TEXAS

RETURN SERVICE REQUESTED