THE TEXAS PROSECUTOR

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"It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."
Art. 2.01, Texas Code of Criminal Procedure

Essential information for investigators, support staff, and victim assistance coordinators

A quick lesson on exculpatory evidence—also known as *Brady* material—for non-lawyer staff in a prosecutor's office

By Colleen Gaido
Assistant District Attorney in Harris County

When TDCAA asked me to write an article about *Brady* for prosecutor support staff, I thought, "What better way to begin the article than with stories from my favorite secretaries, investigators, and victim assistance coordinators about encountering *Brady* in their day-to-day work life?" After all, many of them have been at their jobs longer than I have been a prosecutor and are so great at what they do that I am half-convinced that they could come to court on any given day and be as effective a prosecutor as anyone.

So I sent out an email soliciting "a story about encountering *Brady*" to my favorite support staff. The response? Crickets. I sent the email to over a dozen people and got just one response. This response came from the best secretary I have had at any job I've ever held and that she's probably forgotten more about the workings of our office than I'll ever know.

She replied while she couldn't remember anything specific, there were many times where defendants had called and asked when they could get their guns back. I responded that while I didn't think that qualified as *Brady*, it was very funny. She in turn replied to say, "I thought the *Brady* law was the gun control thing. John Hinckley shot James Brady, and President Clinton signed the Brady handgun law into effect. Right?"

My first thought was that she clearly knew more about the Brady handgun legislation than I did. But my second was that I had my answer as to why nobody else responded to my email: Perhaps the support staff didn't know what I was talking about when I said "Brady." And really, why should they? It is one of those terms that we as prosecutors throw around casually while everyone who isn't a prosecutor looks at us like we are speaking Greek (see also *Batson, Crawford*, and *Miranda*). But much like police officers need to be familiar with *Miranda*, support staff (and police officers) need to be familiar with *Brady* and how to recognize it.

First things first

So what do we mean by "Brady?" Brady is the term that we use to describe evidence that is both favorable and material to the defendant. The term comes from the landmark United States Supreme Court case *Brady v. Maryland*.

In 1958 John Brady was

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A round of applause for the Investigator Section

By Jennifer Vitera
TDCAF Development Director in Austin

For the third year in a row, the investigators have won the Annual Campaign membership challenge. Thank you to our investigator membership for raising $4,000 in support of the 2012 Annual Campaign between the first-ever Investigator Golf Tournament and individual donations. Investigators celebrated their victory at a special happy hour in their honor at this year's Investigator School in San Antonio. Below are a couple of photos from that event.

Also, big thanks to **Terry Vogel**, DA's Investigator in Moore County, for crafting a pair of beautiful wood Criminal Investigator plaques (see the photo, right). Terry donated these to the Foundation so we could raffle them off at Investigator School, and we raised $600 in support of the 2013 Annual Campaign. Thank you so much, Terry!

Elder abuse manual

The Foundation is seeking funds in support of a new publication, the *Elder Abuse Investigation and Prosecution Manual*. Big thanks to our first sponsor, **IBC Bank**, for its donation of $2,500 toward the cost of this publication.

We are looking to raise $36,685 to pay for writing, printing, and distributing this book. We ask that you please think about organizations and people in your community who might have an interest in partnering with the Foundation on this project.

Tax letter reminder

Just like the last two years, in an effort to keep Foundation expenses down, we have been including Tax ID and IRS information on all thank-you letters for your generous donations. If you would like a copy of your thank you letter/receipt, please feel free to call me at 512/474-2436 and I will be happy to provide one.

Houston happy hour

Big thanks to our Houston TDCAF Board and Advisory Members for meeting in Houston for a Foundation Happy Hour. We sure enjoyed catching up with our board members as we travel across the State (see the photo below).

Annual Report online

We are honored to show you our 2012 Annual Report. It summarizes what we've accomplished in the last year, lists all donors, and explains plans for the next year and beyond. Please take a few minutes to review it at www.tdcaf.org.

5th Annual Golf Tourney

We are already planning our annual golf tournament and silent auction, both of which take place at our Annual Criminal & Civil Law Update in September, and we need your help. We are asking members to please help the Foundation identify

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TDCAF News

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corporations and individuals who might be interested in sponsoring or donating an auction item this event.

Please contact me at Jennifer .Vitera@tdcaa.com if there is someone in your area to whom we can send more information to regarding either one of these efforts.

2013 Annual Campaign

Albert Einstein once said, "Only a life lived for others is a life worthwhile." We at the Texas District and County Attorneys Foundation know this to be true, and we know you do too because of the many great things you do professionally to keep the people of this great state safe. We thank you for your dedication and service.

As we look into 2013, there are many more opportunities for the Foundation to enrich the training and educational resources for you our TDCAA members through publications, seminars, and more.

I am asking you to please consider supporting the Foundation by making a contribution of any size. Please keep an eye out for our Annual Campaign mailing. ❇

Executive Director's Report

In memory of Mark Hasse

Our profession was rocked on January 31 when we learned of the murder of Kaufman County Assistant Criminal District Attorney Mark Hasse. As you all know, Mark was ambushed by unknown (as of press time) assailants on his way to the courthouse.

By Rob Kepple
TDCAA Executive Director in Austin

In the days that have followed Mark's murder, there has been a tremendous outpouring of support from Texas prosecutors and indeed prosecutors from around the country. Mark was known as a hard-nosed career prosecutor who was dedicated to justice and the community he served. Mark was, in short, just like you: a superhero who had chosen to use the powers he had for good. To fight crime. To protect the public. To seek justice.

Like all of you, I have struggled with this horrible crime because I wanted to "do something." We all want to help in these times, even as we know there may be little we can do in the short term. We want to honor Mark, and as important, we want to show our support for his family, friends, and co-workers at the Kaufman County CDA's Office.

I believe Richard Alpert, an ACDA in Tarrant County, has expressed what we all may be feeling in this tough time. This from Richard's posting on the TDCAA user forum:

To be a prosecutor in Texas is to be part of a family
A family that fights for justice,
A family full of brothers and sisters that are not afraid to march forward
When the odds are against them and their only weapon is the heartfelt belief that
Their cause, no matter how hopeless, is just.
We do this not for fame, for most of the battles we fight are out of the public eye.
We do this not for money, for most in our profession are better compensated.
We do this because we are called to do this.
We do this because our hearts tell us we must.
When one of us wins a battle we all rejoice.
When one of our number fails we all grieve.
And when one of our family falls, dragged down by an enemy that fires and flees,
We all weep, we all pray, and we all know that the best way to honor the memory of our fallen brother's memory is to carry on.
His loss may scare us but it will not stop us.
It won't make us turn away from our calling.
I never met Mark but I feel his loss
And I'm comforted in my belief that with our loss
Heaven has gained an advocate, a voice that will speak for
those that are victimized by the anger, cruelty, selfishness
And horror that we call crime.
Rest in peace, Mark.
May the battles fought by your family
Bring honor to your memory.

Thanks, Richard, for finding words that I could not.

The independent and courageous prosecutor—the dénouement

In the last edition of *The Texas Prose-*

cutor, I discussed some recent examples of prosecutors who made the decision that justice demanded that they take on their judge with a mandamus. Prosecutors are often reluctant to battle their judge in this most direct fashion, but sometimes it is necessary if it seems that the court has overstepped the law in some form or fashion.

And so it was, as we reported, that David Weeks (CDA in Walker County) reluctantly filed a mandamus in the middle of a capital case to prohibit his judge from issuing, in David's opinion, an illegal and tragically flawed jury charge which would lead to an injustice. It seemed that the judge was not impressed with the State's prosecution of the "non-shooter" co-defendant in the death of a prison guard, and the judge's jury charge pretty much tanked the State's case.

And as it turns out, David wasn't the only one who didn't like the jury charge. The Court of Criminal Appeals weighed in and conditionally granted the mandamus to require the trial court to issue the proper jury instructions. (See page 6 for a more in-depth analysis of this case.)

To the surprise of all and on the motion of no one, the judge announced a mistrial on the ground that too much time had elapsed since the end of testimony, and it would be too hard for the jurors to finish their work. The judge did not poll the jurors before his actions. It's safe to say that no one could have predicted the judge's nuclear response to the mandamus.

The moral of the story? Mandamus does indeed remain the option of last resort for prosecutors, because as the old courthouse saying cautions us: "A judge can't always make you do something, but he can make you *wish* you had."

Research on prosecutor discretion

In December 2012, the Vera Institute issued a report titled: "Anatomy of discretion: An analysis of Prosecutorial Decision Making." This may be one of the first efforts to study not just the raw numbers involving the prosecution of cases—what cases come in and what happens to them—but to delve into a more qualitative analysis. That is, how prosecutors make their decisions.

The Institute performed the work in two unnamed, moderately large offices. One was called the "Northern County" and one the "Southern County." Both were jurisdictions of around a million people with equally diverse populations. The study covered the gamut, from initial screening to sentencing recommendations to dismissals.

You have to work your way through and around a lot of numbers, but it is worth the read. This won't surprise you as a prosecutor, but it is good to see it in print: Prosecutors make pretty rational decisions, and their primary concern is the strength of their case. The report notes that prosecutors are likely to judge their case with two questions, "Can I prove the case?" and "Should I prove the case?"

Are there variations on how cases are treated? Yes. Indeed, resources play a role in the disposition of cases, which should not surprise any Texas prosecutor. To read the report yourself or listen to some podcasts on the report, go to: www.vera.org/pubs/anatomy-discretion-analysis-prosecutorial-decision-making.

Guess the TDCAA staffer

I am honored to serve Texas prosecutors here at the Texas District and County Attorneys Association. And I think we have managed to put together a crack team of very talented people who are eager to help you be the best you can be.

But I had no idea just how deep our talent runs here. There is a lot more to this staff than you may see on a daily basis. For instance, we have one person on our staff who I can't believe even spends time with us. This person has had a career as a professional athlete and a professional actor. Oh, and this person is a champion weightlifter.

Can you guess who it is? (The answer on page 8.) ❇

A dire remedy for the proper jury charge

By Emily Johnson-Liu
Assistant Criminal District Attorney in Collin County

Judges sometimes rule against us, keep out important evidence, and overrule proper objections, but seldom do these decisions ever warrant the extraordinary act of asking a higher court to compel the judge to do as the State says. In a recent case, *In re State ex rel. David Weeks*, prosecutors in the middle of a capital murder trial concluded they had no option other than a writ of mandamus to get a fair shot at presenting their case to the jury.[1] And through their efforts, the Court of Criminal Appeals has clarified the law on accomplice liability, jury charges, and even mandamus itself.

And if that was not enough, for the very first time, the Court of Criminal Appeals favorably referenced the State Bar Association's new criminal pattern jury charges, stating that the pattern charges' "modern format may assist both the members of the jury and the advocates who must explain the jury instructions to the jury."[2]

Facts of the capital case

Jerry Martin and John Falk were prison inmates at TDCJ's Wynne Unit in Huntsville. While at work in the prison onion patch, Martin and Falk took a guard's revolver and made a run for it. Another guard, Susan Canfield, who was mounted on horseback, exchanged fire with Falk. When Canfield ran out of ammunition in her revolver, Falk jabbed the gun he had stolen into her side, forcing Canfield to give up her other weapon, a rifle. Falk took the rifle and backed away. Martin, meanwhile, had stolen a pickup truck, and he drove toward Canfield and struck her and her horse with the truck, ultimately killing her. Falk jumped into the truck, and the two men drove off, only to be captured later.[3]

Martin and Falk were charged with capital murder for killing Canfield while attempting to escape a penal institution.[4] Martin, as the principal actor in Canfield's death, was convicted and sentenced to death, and his conviction was affirmed on appeal. Then Falk's capital murder trial began. During the jury charge conference, prosecutors encountered two problems. First, the trial judge refused outright the State's request for an aiding-and-abetting law of parties instruction. The judge believed there was no evidence that Falk had aided Martin's offense of driving the truck into Canfield or her horse. Second, the trial judge severely restricted the jury charge on co-conspirator party liability under Penal Code §7.02(b). That statute provides that where multiple people act together in pursuit of a felony, each one is liable for a collateral crime, even though unplanned and unintended, if that crime is both committed "in furtherance" of the intended felony and "should have been anticipated as a result" of carrying out the conspiracy.[5]

In Falk's case, joining up with Martin in the escape would make him liable for Martin murdering a guard to further their escape—as long as the jury thought Falk should have anticipated the murder. But the judge in Falk's trial wanted to instruct the jury that to convict Falk, they would have to find that Falk should have anticipated not just that Martin would kill a guard but that Martin would kill her *by striking her with the truck*. Anticipating the precise method an accomplice would use to commit murder would be a significant increase in the State's burden of proof.

In the typical case, such as where the robber's gun-wielding accomplice actually shoots the victim instead of just scaring him, it would not matter too much if the State were required to prove that the robber should have anticipated both the murder and how it was committed. After all, in a typical robbery turned capital murder, the defendant often knows his accomplice has brought a gun or often carries one with him, and when the accomplice ends up killing the victim, it is usually by shooting him with the gun. Even where an accomplice brings a gun to a knife fight or a knife to a fist fight, just *how* someone might get killed in the process is still fairly foreseeable.

But predicting that Martin would run a guard down with a truck is not the usual course of events, even in a prison escape. The State was understandably concerned that jurors who believed Falk should have anticipated Martin would kill a guard to further their escape might not believe Falk could have anticipated the precise way Martin killed

Canfield. Also, in addition to the co-conspirator theory, the judge was denying the State the right to a conviction if the jury thought Falk intended to aid Martin in killing Canfield.

Faced with the risk that the jurors might acquit Falk based on the law the judge was going to give them, the State opted to file a petition for writ of mandamus in the court of appeals. In its petition, the State asked that the jury be allowed to convict under both theories of accomplice liability: aiding and abetting and co-conspirator party liability, without Falk having to anticipate the particular method Martin would use to commit the murder. The court of appeals granted the State a temporary emergency stay, putting the capital murder trial on hold. But while the intermediate court of appeals felt the State was probably right about the law, it held that the State could not meet the high burden of a "clear right to relief" required of a mandamus action. For mandamus, the State would have to show that 1) it had no adequate remedy at law, and 2) instructing the jury the way the State wanted was a ministerial act where the State had a clear right to relief. The court of appeals agreed that the State had no other adequate remedy because it could not immediately appeal the jury charge issue and would be barred by double jeopardy from appealing if the jury acquitted Falk. But the court of appeals did not believe the State established a clear right to relief.

The Court of Criminal Appeals rules

Fortunately for the State, the Court of Criminal Appeals disagreed. The court decided that the judge should have given the jury the chance to convict Falk of capital murder by aiding and abetting Martin. Falk's act of disarming Canfield, who had been shooting at the pair, was some evidence that he aided Martin in her murder, and the jury could infer he did so intending to assist Martin in committing the murder. Importantly for the mandamus petition, the court concluded a judge has the *duty* to submit a theory of party or accomplice liability when some evidence raises the issue, even though the judge may not himself find that evidence credible. And, although there may have not been a previous case spelling out that the State is entitled to mandamus relief where the judge refuses to instruct the jury on the law of parties and the evidence raises the issue, the court held the State was clearly entitled to relief.[6] The court reiterated that an issue of first impression can sometimes qualify for mandamus relief.[7] Also, the court suggested mandamus would be appropriate if the judge refused to include in the jury charge one of the indicted offenses, where some evidence supported it. Submitting instructions under those circumstances constituted a ministerial duty—not a matter of discretion with the judge.

The court also decided that the State was right on the law concerning the co-conspirator jury instruction. That result was not too surprising. Requiring Falk to anticipate that Martin would try to run down a guard with a stolen truck is like requiring a defendant to anticipate his accomplice to an armed robbery will end up strangling the victim instead of shooting him. Taken to the extreme, if he has to anticipate his accomplice's method, why not require that the defendant also anticipate exactly who the victim will be? But the defendant's culpability for his accomplice's crime seems to rest on the fact that he continues in the criminal enterprise despite his anticipation that his accomplice might kill *at all.* Surely he is no less culpable if the murder varies in the details from the one he imagined. If it varies too widely, a jury would still be free to find the defendant could not have anticipated the murder. But the judge in Falk's case would not even let the issue go to the jury, unless it first found Falk should have anticipated the way Martin committed the murder. In essence, he would be blameless for Canfield's death, unless he should have anticipated Martin driving a truck into her and her horse.

But while it was not so surprising that the State would ultimately prevail on what the law required for co-conspirator liability, it was surprising that the State would establish this in a petition for writ of mandamus. Remarkably, although no case or statute had ever addressed it, the court determined that this issue was so unequivocal, well-settled, and dictated by clearly controlling legal principles that mandamus was an appropriate remedy to compel the State's requested jury instruction. The court concluded that there was only one rational answer to the legal

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question presented based on the "combined weight" of the court's precedents. Specifically, in *Johnson*,[8] a case issued in the last year, the court explained that the method of committing murder is not relevant to determining sufficiency of the evidence for murder. Therefore, the State does not have to prove its allegation of how a murder was carried out (e.g., shooting, stabbing, or strangling). It is what we used to call surplusage, or what the court called in another recent case, "sheer lagniappe."[9] Because the State is entitled to the broadest submission of its theories of liability that are authorized by the indictment and supported by the evidence, a gratuitous allegation such as the manner and means of a murder should not be in the jury charge.[10]

So it seems that in Martin's trial, the allegation that Martin killed Canfield by striking her or her horse with a motor vehicle need not have been in the jury charge because the State did not have to prove it. And if it need not have been in Martin's jury charge for liability as a principal actor, it need not be in Falk's jury charge as an accomplice either.

In a single opinion, the court holds that mandamus is available to the State where the judge refuses to submit an offense to the jury or an instruction on the law of parties, that the State could establish a clear right to relief for mandamus by combining caselaw and logic, and that the manner and means in an assault or murder case need not be set out in the jury charge.

A word of caution

While the road to mandamus may seem a little easier after this case, it is a remedy that still must be pursued with extreme caution and only in the most egregious cases. For even in this case, after emerging victorious from the Court of Criminal Appeals, prosecutors returned to the trial court for the resumption of their capital murder trial only to have the judge order a mistrial on his own motion, creating new issues about whether there was a manifest necessity for such action and potentially jeopardizing a future prosecution.

A special thanks to my co-conspirator for As the Judges Saw It, the ever-witty and double-board-certified David Newell, for filling in for me last fall while I prepared for the board certification exam. ❇

Endnotes

1 *In re State ex rel. Weeks*, Nos. AP-76953 & AP-76954, 2013 WL 163460 (Tex. Crim. App. Jan. 16, 2013).

2 *Weeks*, 2013 WL 163460, at n.6.

3 *In re State of Texas ex rel. David P. Weeks*, No. 10-12-00443-CR, 2012 WL 6218205 (Tex. App.—Waco Dec. 12, 2012, orig. proceeding); *In re State ex rel. Weeks*, Nos. AP-76953 & AP-76954, 2013 WL 163460 (Tex. Crim. App. Jan. 16, 2013).

4 Tex. Penal Code §19.03(a)(4).

5 Tex. Penal Code §7.02(b); *Curtis v. State*, 573 S.W.2d 219, 223 (Tex. Crim. App. 1978).

6 *Weeks*, 2013 WL 163460, at *3-4.

7 *Id.*, at *3.

8 *Johnson v. State*, 364 S.W.3d 292, 296 (Tex. Crim. App. 2012). *Johnson* was an aggravated assault case, not a murder case, so strictly speaking, anything *Johnson* explained about murder could be considered dicta. But because both murder and assault are result-of-conduct offenses, Johnson's holdings concerning assault probably apply with equal force to murder.

9 *Daugherty v. State*, No. PD-1717-11, 2013 WL 85365 (Tex. Crim. App. Jan. 9, 2013). A lagniappe, according to the Cajun French-English Glossary hosted by Louisiana State University, is something extra given at no cost. See http://appl003.lsu.edu/artsci/frenchweb.nsf/$Content/Cajun+French+Glossary?OpenDocument

10 There had been some doubt among prosecutors about just what to include in the jury charge when the parties discovered during trial that there was an immaterial variance in pleading and proof. Should the court submit the theft charge with the corrected Go-Kart serial number or leave it as it was indicted? The court seems to indicate the remedy: Discard the gratuitous allegation that caused the variance and submit the offense broadly.

Executive Director's Report

Answer to the "guess the TDCAA staffer" question: William Calem, TDCAA Director of Operations and Chief Financial Officer. William spent a number of years as a professional waterskier, both in the United States and Germany. After his skiing career, he worked as an actor in Los Angeles. Doubtless you have seen him in many a toy commercial, though you may not remember it. Finally, William and his wife operate a Cross Fit school in Georgetown where he keeps in shape. It was only a matter of time before he won a regional competition in the clean and jerk, which he did last year! ❇

Recent gifts to the Foundation*

Richard B. Alpert
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* gifts received between December 13, 2012, and February 12, 2013

Applications for Investigator Section scholarship and awards due July 1

Turn in nominations and applications by July 1, 2013, for the Oscar Sherrell Award, Professional Criminal Investigator Certificate (PCI), and TDCAA Scholarship! Don't know if you qualify or what these are? Keep reading!

The Investigator Section Oscar Sherrell Award is given at the Annual Criminal & Civil Law Update in September to recognize an investigator with outstanding service to the association. Anyone can make this nomination; forms are available at our website (www.tdcaa.com/announcements/investigator-awards-deadline-july-1-2013).

The PCI certificate is for those investigators who have been employed with a prosecutor's office for a period of time and have achieved at least an Advanced TCLEOSE license or higher. Complete eligibility and requirements can be found on our website at www.tdcaa.com/announcements/investigator-awards-deadline-july-1-2013. You must meet the requirements (time/license) by the July 1, 2013, deadline to apply for the September award presentation.

Finally, the Investigator Section gives out at least two educational scholarships each year to children of TDCAA members and investigators. The upcoming award is open to eligible children of all TDCAA members. If you could use a little help with your child's education, check out the scholarship application online to see if you qualify! Again, this award is open to all TDCAA members: key personnel, victim assistance coordinators, attorneys, and investigators.

If you have any questions, please contact Terry Vogel at 806/935-5654 or 69thdainv@moore-tx.com. ❇

Continued from the front cover

Essential information for non-prosecutors (cont'd)

charged with murder along with a co-defendant named Donald Boblit for kidnapping William Brooks and killing him for his car. Both Brady and Boblit gave numerous statements to the police after their arrests, but in Boblit's fifth statement he admitted to being the one who actually strangled the victim. Brady's defense attorney asked for all of Brady's and Boblit's statements, but the prosecutors withheld Boblit's fifth statement. Both defendants were convicted of first-degree murder and sentenced to death.

The Supreme Court ruled that withholding that statement by Brady's co-defendant violated Brady's right to due process. While that statement had little to do with whether Brady or Boblit were guilty of first-degree murder (both clearly were), the Supreme Court stated that the issue of who had actually strangled the victim could have impacted the punishment phase of trial.

For evidence to be considered "*Brady*," it must be both favorable and material to the defense. In other words, it must be helpful to the defendant's case at either the guilt-innocence or punishment phase of trial. A good friend of mine describes *Brady* material as anything that makes the prosecutor say, "Oh, &%$#—that can't be good for us." While that may not be the standard that the courts use, it's a helpful way to think about *Brady*. There are countless cases on what is considered "favorable" and "material," but it is always better to err on the side of caution and over-disclose.

In the State's possession

The State is obligated to share with the defense attorney only the *Brady* material that is in our possession. If the State doesn't know about a piece of exculpatory evidence, then it isn't required to disclose it because, hey—we didn't even know it existed.

But—and here is why you are still (I hope) reading this article—the "State" is more than just the prosecutor. For purposes of *Brady* evidence, the State includes police officers, administrative staff, investigators, and victim assistance coordinators. Basically the courts look at all of us as being on the same team (we'll call it Team State) and if one person on Team State knows about a piece of *Brady* evidence, then that piece of evidence is in all of Team State's possession and must be disclosed.

That means that even if I as a prosecutor do not know that a certain piece of *Brady* evidence exists, I am *still* under a duty to disclose it to the defense attorney if someone else on Team State knew about it. That is why it is so important that we make sure that we share any *Brady* information that we learn about with one other.

Why it matters

The failure to disclose exculpatory evidence to the defense can result in a mistrial or in a guilty verdict being reversed on appeal. It can also result in State Bar sanctions at the least for the prosecutor who failed to disclose that evidence. Even without a formal sanction, withholding *Brady* evidence can hurt the reputation of a prosecutor and by association the office in which she works.

Beyond those undesirable repercussions, there is another important reason to make sure that every member of Team State knows about all *Brady* evidence. If our goal is to make sure that justice is done, then we must know *everything* we can about a case. We are as duty-bound to ensure that the innocent are not prosecuted as we are to make sure that the guilty are held accountable. We can fulfill that duty only when we have all of the information.

Let's look at some examples.

The recanting complainant

If you have been at your office longer than a week, you have no doubt encountered a recanting or minimizing complainant, most likely on a family violence case. Let's say you are the administrative assistant for a prosecutor, and the complainant—we'll call her Julia—calls to speak with the prosecutor assigned to her assault (family member) case. When you ask her what the call is regarding, Julia says, "I need to tell her that I want to drop charges. I was drunk, I overreacted, and he never actually hit me. I really need her to call me back." You take down her name and number and send the prosecutor an email telling her to call Julia back.

Both the fact that the complainant does not want to press charges and the fact that she said that the assault never took place fall under *Brady*. If you get a call like this, you should let the prosecutor

handling the case know *exactly* what the complainant said so that she can relay that to the defense attorney.

Now let's say that after speaking with Julia, you see the photographs of her face from the night of the assault and she is covered in bruises. You are convinced that she was, in fact, assaulted and that she is now lying because she doesn't want the defendant to get in trouble. Do you still need to tell the prosecutor? *Yes*. Even if you are convinced that what the complainant told you in her later message is not true, you still need to let the prosecutor know.

The second gunman on the grassy knoll

Many times our fearless investigators go out into the community to find our witnesses and end up finding witnesses we didn't even know existed. People who were scared to talk to the police the night of the murder suddenly can't stop talking about everything they know (or have heard) about what happened during the crime. We hope that a lot of the information they share is both helpful and true.

But what if you find a witness who swears she saw someone else shoot the complainant? Or says the defendant wasn't even there that night? Or even says the defendant shot the complainant but only because the complainant had picked up a gun and threatened the defendant first? All of that information is exculpatory and needs to be shared with the prosecutor immediately.

Now let's say that this new witness is 95 years old and legally blind; she has repeatedly run into things during your interview because she can't see 10 feet in front of her. You are pretty convinced that she couldn't see the biggest E on an eye exam chart, much less a shooting that took place 50 yards away. Do you still tell the prosecutor? *Yes*. Even if the exculpatory evidence does not seem credible to you, it must be disclosed.

The suddenly somewhat sympathetic defendant

There can be times when a complainant is reluctant to share everything with the prosecutor handling her case. Because many of us have talented victim assistance coordinators (VACs) who establish relationships with our complainants, we are able to learn more about what happened from the VAC's conversation with that complainant than we ever would have on our own.

Let's say that you are a VAC and you have been asked to sit with a 16-year-old complainant while she waits to testify in a sexual assault of a child case. The complainant has told the police and the prosecutor that she met the 25-year-old defendant only one time at a party and that after much intimidation and pressure on his part, she reluctantly had sex with him. Right before her testimony she confides in you that she and the defendant had actually been dating for a year prior to having sex. She also tells you that he repeatedly told her that he would not have sex with her because she was underage but she insisted and insisted until finally one night he gave in. Do you have to tell the prosecutor?

Clearly this does not change whether the defendant is guilty of sexual assault of a child. He still had sex with a girl under the age of 17 and he was more than three years older than she. But remember that *Brady* doesn't apply just to exculpatory evidence at the guilt-innocence stage of trial; it applies to mitigating evidence at the punishment phase as well. A jury is likely to have much more sympathy for the defendant who refused his underage girlfriend repeatedly than for the Lothario who pressured a 16-year-old girl he had just met into having sex. Therefore, the prosecutor needs to know about it and tell the defense about it.

Team State

For purposes of *Brady* evidence, it is helpful to think of all of us as being on one team, Team State. What one of us knows, all of us must know. And while that means we must be more diligent about sharing information with one another, I personally like the idea of all of us being on a team. The job we have is an important one, and none of us can effectively seek justice alone. We need the help of everyone on Team State to make sure that the right thing happens in every case we handle. By sharing exculpatory and mitigating evidence with each other we can help ensure that we achieve that goal. ❇

Writ-ing a wrong

Honoring our oath and obligation to seek justice rather than convictions sometimes takes strange turns and a lot of time. Here is the story of how one prosecutor's office corrected an illegal sentence 20 years after the fact.

By Justin Weiner
Assistant District Attorney in Henderson County

By his own admission, Gerald Lee McMorris was not a good person. His extensive criminal history demonstrates a routine disregard for social norms, morality, and the law as a whole. When he was only a bit over 30, McMorris was sent to his third trip to the penitentiary. He had been sentenced to serve a total of 52 years for various offenses including sexual assault, burglary of a habitation, and aggravated robbery.

On March 20, 1992, McMorris, on the advice of his attorney, waived his right to indictments and entered into a plea bargain for a robbery charge (for robbing a gas station) in which he agreed to a 35-year sentence—an illegal sentence, it turns out.

Taking advice over the years from various jailhouse lawyers, McMorris continuously sought review of his plea-bargain agreement. More than half a dozen attempts over the years, including letters and an 11.07 petition, ultimately fell on deaf ears. In fairness, we have all been there, reading what seems to be an incoherent letter from an inmate complaining about his trial and sentence. Courts and prosecutor offices receive hundreds and sometimes thousands of these letters every year.

But this one was different. I will never forget how I felt when I first read McMorris's letter and thought, "Well, this is a great legal argument that is probably 100-percent misguided." A short stint of due diligence later, and I felt an immense burden placed on my shoulders when I realized that he was actually 100-percent dead accurate.

Background

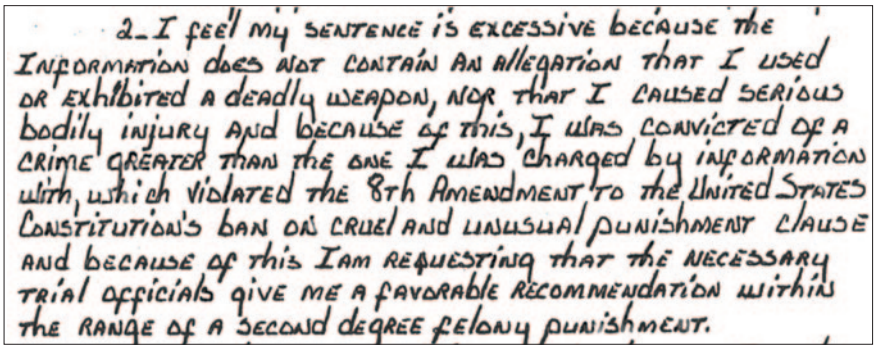
When I first became aware of McMorris's situation, I had been working for the district attorney's office for about six months. It was my first job with my shiny new bar card. I was fortunate to land a job prosecuting felonies right out of law school. Our office is what we call "semi-rural" and at the time consisted of our boss, the elected district attorney; five assistants; and a CPS attorney. There was no appellate attorney, grand jury attorney, or any other specialized attorney other than for CPS, which presented a tremendous wealth of opportunity and experience for a new prosecutor. It allowed me to play a role in every stage of the prosecution of an offense: writing warrants; assisting officers in the field; meeting with victims; presenting cases to a grand jury; conducting pre-trial hearings, jury trials, and bench trials; and filing appeals and writs. Our county has three district courts with felony jurisdiction. I was assigned to the 173rd Judicial District Court and managed the docket with my seasoned trial partner, Nancy Rumar.

The wrong charge

McMorris had written multiple letters to the previous district attorney and former judge who had presided over his plea bargain. The former DA and former judge responded to nearly all of the letters and motions McMorris filed; these response letters read like polite rejections that sweepingly disregarded the issue of an illegal sentence.

The letters and ultimately an 11.07 habeas petition clearly articulated that the information to which McMorris had pled alleged only a straight robbery charge; then, as now, it was a second-degree felony carrying a maximum sentence of 20 years. McMorris had pled to 35. After pulling the file from storage, I unearthed McMorris's letters, which were very well-written (see a portion of one, which he sent to the district attorney and district court on May 4, 1999, on the opposite page). Clearly he had received help from someone in prison who knew what he was doing.

The information alleged the


2_ I feel my sentence is excessive because the Information does not contain an allegation that I used or exhibited a deadly weapon, nor that I caused serious bodily injury and because of this, I was convicted of a crime greater than the one I was charged by information with, which violated the 8th Amendment to the United States Constitution's ban on cruel and unusual punishment clause and because of this I am requesting that the necessary trial officials give me a favorable recommendation within the range of a second degree felony punishment.

offense of robbery and tracks the language of the robbery statute by claiming that McMorris did "threaten and place L.W. in fear of imminent bodily injury, by actions and words." This clearly alleges that the fear of imminent bodily injury was caused by "actions and words," not by the use or display of a deadly weapon.

To complain about a substantive defect in an indictment or information, a defendant must make a timely objection prior to trial or it is otherwise waived. This includes the State's failure to allege an essential element of an offense.[1] This applies, however, only when the charging instrument fails to allege a complete offense.[2] In this case a complete offense *was* charged: robbery. Logically a charging instrument that facially charges a complete offense cannot be substantively defective, but the line between robbery and aggravated robbery had not been crossed. I felt like I had discovered a flat-out illegal sentence.

I reviewed all of the potential ways that the robbery could or should have been an aggravated charge. I looked up the age of the clerk who was working at the gas station to see if she were elderly (she was not). I checked whether a deadly weapon was referenced in any way (it was not). I checked whether serious bodily injury was alleged (it was not). And finally I looked for an enhancement paragraph (there was none). I came up short on the justification department and began to question whether robbery was same thing statutorily back in 1992. I pulled up the older version of the statute and of course it was practically the same.

Still hoping that I was incorrect in some way, I buried myself in the file, but the more I read the more uncomfortable I felt. I found letter after letter sent from McMorris, or at least on his behalf, detailing the exact malfeasance. And I noted that it was coming up on the 20th anniversary of the plea bargain.

Taking it to the higher-ups

I am very blessed to work with people I trust—especially coming right out of law school and prosecuting felonies. I never had to worry about being embarrassed or ridiculed for uttering the words that every young prosecutor loathes: "I don't know." My boss, Scott McKee, and his first assistant, Mark Hall, are always willing to let me bounce ideas and run trial strategy by them. I vividly recall sitting in Mark's office that day detailing my thoughts and explaining my findings on the McMorris case. The surprise and concern both Scott and Mark expressed justified and echoed the feelings that I had harbored since reading McMorris's letter.

The shock the three of us felt was not simply that a mistake had been made. Everyone makes mistakes, and they happen in every field. But McMorris had gone to great lengths to signal for help from anyone who would listen. Our file alone documented seven occasions that he had reached out.

The next step was to alert the judge to what I had found. The judge's reaction was consistent with everyone else up to that point, and he understood the urgency of the matter. He appointed local Athens attorney Brian Schmidt to represent McMorris in our efforts. We all knew that the Court of Criminal Appeals rarely hears a petition for a subsequent 11.07 petition for claims already raised.[3] And that was the biggest problem in McMorris' case: His previous writ was nearly flawless. The legal argument and rationale could not have been more accurate.

No quick fix

Brian and I put our heads together and began discussing various methods to fix this problem. We shared the same desire to right this wrong in the most legitimate and procedurally sound way possible, which was somewhat difficult considering that this mistake involved a former district attorney, former district judge, and deceased local defense attorney. We were not looking to blame anyone or point a finger; we just wanted to do the right thing. I guess I just

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assumed if there were a prosecutor, defense attorney, and judge all on board to correct something, there would be some magical and easy process to do it. It turns out that getting someone out of prison is much more difficult than putting someone into prison. After hours of discussion and polling a half a dozen other attorneys, we agreed on a plan and were ready to execute it. It would take 10 months to achieve our goal.

After filing a carefully crafted second 11.07 petition and agreed State's reply, the district court signed an order that tracked the proper 11.07 language that there were "controverted, previously unresolved facts material to the legality of the applicant's confinement." In an abundance of caution, we then decided to have McMorris brought up on a bench warrant for a hearing so he could testify about the facts surrounding his plea. The plan was for this testimony, along with jointly proposed findings of fact, conclusions of law, and the judge's order, to be sent to the Court of Criminal Appeals for its consideration.

However, after the order was signed—but before the hearing at which McMorris testified—the clerk sent the order and the petition to the Court of Criminal Appeals prematurely. We had to ask for everything to be sent back to the district court so we could go through with the hearing. Several letters, orders, dozens of phone calls, and a few anxiety attacks later, we were able to continue on with our original plan and conduct the hearing.

At the hearing, McMorris testified that not only could he not read or write at the time the plea was executed, he also didn't have a clue what he was pleading to back in 1992. McMorris discussed how he had come to accept his fate. Though he had taken a few years to settle in and decide that what he had done with his life was wrong, he eventually began to fight to get out of prison. But after multiple failed attempts to get some help from an outside source, he came to accept that he would probably serve the entirety of his sentence. The court signed our proposed findings and conclusions, which were shipped off with the hearing's transcript. From that point on, we did the only thing we could do at that point. We waited.

Relief finally granted

The next few months were difficult while awaiting a decision from the Texas Court of Criminal Appeals. I anxiously anticipated 9 o'clock each Wednesday morning when the court publishes its hand-down list of orders, opinions, and statements in hopes that all of this madness would be corrected by a higher authority. Brian and I coordinated checking the CCA website when the other was in court. I lost a lot sleep while waiting and I am sure Brian did as well. But at the end of the day, I had faith that even if we had made any minor technical mistake, the court would overlook it and do the right thing.

A few months passed, and McMorris was still in prison serving a sentence that, at the very most, should have already been completed. With the hopes that we wouldn't annoy the court, Brian and I filed a "Joint Motion for Expedited Consideration of Application for Writ of Habeas Corpus." It was a short motion, signed by the two of us, which simply pointed out that the maximum legal length of McMorris's incarceration had been exceeded. The court received the motion on May 3, 2012, and our wait from that point was less than a week.

On May 9, the Court of Criminal Appeals issued an opinion that granted the relief I had hoped for since I first became aware of the situation nearly a year earlier. Remember all that talk about subsequent writs not holding any water? Well, it turns out that the Court of Criminal Appeals is about as dedicated to procedure as one would expect. Though the court followed our logic precisely, its means to an end was pretty clever. Realistically, what I agreed to was a subsequent writ, which should have been kicked back or denied. The court clearly addressed the situation and responded by withdrawing its disposition in the original 2004 writ and on the court's own motion granted the relief we requested in the 2012 writ.[4] It was an interesting "I see what you did there" moment that truly highlights the importance of procedure to the court, as well as its commitment to justice.

Closure for everyone

With the backing of the Court of Criminal Appeals, this long journey was finally coming to an end. The very next afternoon we scheduled a re-sentencing for McMorris where he agreed to serve 20 years for the offense of robbery. He was awarded 7,371 days of credit toward his sentence, essentially sentencing him to time served. During the plea, I put on the record my gratitude to the judge, my boss Scott, and to defense

counsel Brian. I expressed how proud I was of all of the parts of the system coming together to correct this massive error. It was good to know that the system that had failed McMorris is the same one that would right the wrong. Without this correction, McMorris's expected release date was 15 years later. (We were told by TDCJ that he would have likely served the entire 35-year sentence. And up until that point he hadn't taken a single class or received an ounce of instruction in preparation for his eventual release back into the general public.)

Because he had spent the last 20 years in prison, I was surprised to see that he had nearly a dozen family members from the area in attendance to support him. McMorris was fortunate: He had a place to stay and family to help him get on his feet.

One of my favorite moments of this process was seeing McMorris's face when he saw Brian use his iPhone. It sent him reeling like a child in a magic show. Despite his criminal history leading up to this sentence, McMorris had no discipline record in prison, he had been the prison choir director for over 15 years, he had become an ordained minister, and he gained some vocational skills as well. Brian keeps in regular contact with McMorris and I check up on him through Brian occasionally. McMorris now lives with a family member, has joined a church, and maintains steady employment.

Where are we now?

This was not an actual innocence issue, thank God. But it was a justice issue, one that we as prosecutors hang our white hats on.

A local paper covered the whole thing with a four-article spread that ran over the course a week. The reporter characterized the fiasco in a way that put a nice bow on top of the whole situation. The stories explained that there was a good, a bad, and an ugly aspect to the circumstances. The ugly, obviously, was McMorris's criminal past—there is no way to minimize it, and it will always be there regardless of what he does the rest of his life. The bad? The polite rejections to McMorris's pleas that resulted in a severe injustice. But it is the good that really carries the day throughout this entire story. The good was the concerted effort by a handful of people and ethical lawyers to do the just and right thing.

I have a copy of the original information hanging on a board in my office. It serves as a reminder of many things to me on many levels: While there will always be a share of ugly and bad in our line of work, it is the good that is the lifeblood of being a prosecutor. We simply can't go wrong with doing the right thing. Regardless of his past, McMorris's rights are our rights. As tedious and difficult as the path may be, seeing that justice is done is not only our duty, but it is also what distinguishes our profession from others. And that is something that we should always be proud to hang our white hats on.

If you find yourself in a similar situation and need help, feel free to email me at jweiner@co.henderson.tx.us or call 903/675-6100. ❇

Endnotes

1 See *Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990); see also Tex. Code Crim. Proc. art. 1.14(b).

2 *Thomason v. State*, 892 S.W.2d 8-11 (Tex. Crim. App. 1994).

3 See generally Tex. Code Crim. Proc. art. 11.07 §4(a).

4 No. AP-76,790 (Tex. Crim. App. May 9, 2012).

NEWS WORTHY

A note about death notices

The Texas Prosecutor journal accepts information to publish notices of the deaths of current, former, and retired TDCAA members on a regular basis. Such notices must come from a Texas prosecutor's office, should be fewer than 500 words, can include a photo, and should be emailed to the editor at sarah.wolf@tdcaa.com for publication. We would like to share the news of people's passings as a courtesy but rely on our members' help to do so. Thank you in advance for your assistance! ❇

The forfeiture by wrongdoing doctrine nine years after *Crawford*

Caselaw since *Crawford* has limited the State's use of the forfeiture by wrongdoing doctrine. Here's what prosecutors need to know about it.

By Sam Katz
Chief Appellate Prosecutor in the Comal County Criminal District Attorney's Office and faculty member at the University of Phoenix

It's the Friday before a domestic violence trial is set to begin on Monday. As a prosecutor, you have just finished meeting with the patrol officer first on the scene and the detective who investigated; next, you are scheduled to meet with Susan, the victim, to talk about what happened that day and to discuss her testimony. You wait. Thirty minutes past the scheduled meeting time, you call your investigator and ask him to contact Susan to find out where she is.

Another 30 minutes goes by, and the investigator comes into your office to tell you that Susan's family said that she has left town, despite being subpoenaed. The family isn't sure where she went, but Susan has several friends in other cities and states where she could have gone.

Her family thinks that the defendant threatened her in some way to keep her out of court. In the past couple of weeks, she received several phone calls where she looked concerned during the conversations and said to the caller in a low voice, "You wouldn't dare." Family members had asked her if it was her boyfriend, the defendant, who had called, but she wouldn't say anything other than to shake her head no with tears in her eyes. Susan's brother said that she told him just before she left that she was afraid for her life if she testified; he also claims to have overheard the defendant stating to others in a bar that he is not worried about his upcoming trial because "it is all taken of." The investigator tells you that he asked the brother to come in to talk to you, and he is on his way.

"That's all OK," you think to yourself. "When the defendant claims in court that his Sixth Amendment right to confront his accuser have been violated, we'll just put the brother on to testify about the threats to his sister and to what he overheard. The judge will have to overrule his objection because the defendant waived his right to confrontation under the forfeiture by wrongdoing doctrine."

You're not worried—but should you be?

Nine years since *Crawford*

It has been several years since the Supreme Court of the United States issued its opinion in *Crawford v. Washington*[1] establishing that the Sixth Amendment's Confrontation Clause gives defendants the right to cross-examine witnesses who offer testimony or make out-of-court testimonial statements against them. To be inadmissible under *Crawford*, the testimonial statement must be made by a non-testifying or an otherwise unavailable witness whose statement was not subject to the defendant's cross-examination. Those rights of confrontation, however, were subject to waiver by a defendant under certain circumstances, one of which concerned the doctrine of "forfeiture by wrongdoing."[2]

The Supreme Court also alluded to this principle in *Davis v. Washington* after having reversed and remanded its companion case *Indiana v. Hammon*[3] back to the Indiana courts, noting that the state courts should examine Hammon's actions in light of the forfeiture by wrongdoing doctrine.[4] The doctrine is long established and based on the equitable principle that a defendant should not be allowed to profit from his misdoing if he is the reason a witness is unavailable. In 2008 however, the Supreme Court revisited the forfeiture by wrongdoing doctrine and more narrowly construed it and its availability to be used by the prosecution in a case.[5]

Forfeiture by wrongdoing as recognized by the U.S. Supreme Court in *Crawford* and in *Davis* is an equitable remedy divorced from the assessment of the reliability of hearsay statement(s) or out-of-court testimony and will, in essence, extinguish a defendant's constitutional

right to confrontation under the Sixth Amendment of the U.S. Constitution.[6]

The Texas Court of Criminal Appeals adopted this doctrine, applying it in a capital murder case in *Gonzalez v. State*.[7] Police had arrived at the victims' house, finding that both Maria and Baldomero Herrera had been shot. Maria Herrera described their assailant as a relative of the people who lived across the street; she had recognized him during the assault, and he had stolen the neighbors' truck. Police, acting on this information, found the stolen truck and set up surveillance. They saw the defendant, Ray Gonzalez, who matched Maria's description, get into the truck; he then led them in a high-speed chase. After he was apprehended and arrested, Maria's blood was found on his shoes.[8] Maria died from her wounds a few hours after giving her statements.

At his trial, the defendant objected to her statements as hearsay and as violative of his confrontation rights, but the statements were admitted under the excited utterance exception as well as present-sense impression. The jury convicted the defendant and sentenced him to life. The lower court of appeals, noting the Supreme Court's holding in *Crawford*, affirmed the conviction and ruled that Gonzalez was prohibited from benefitting, by his wrongdoing, in precluding Maria's statements because of her unavailability (death).[9] The Court of Criminal Appeals upheld and affirmed the lower court's ruling.[10]

Post-*Gonzalez*

As one would expect, soon after the Court of Criminal Appeals issued its opinion in *Gonzalez* other Texas intermediate appellate courts followed the forfeiture by wrongdoing doctrine.[11] For example, in *Sohail v. State*, the defendant allegedly struck his then-pregnant wife in the face after she had allegedly spilled hot tea in his lap. The victim left their home in Sugarland the following day and traveled to Carrollton, where her parents lived. She made a report to the Carrollton police at her parents' insistence, then went back to Sugarland with her mother to make a report there as well. The victim obtained a protective order against her husband, which she later dropped because the defendant forced her to (according to her mother).

At trial the victim refused to testify, even after being held in contempt of court. At a hearing conducted outside the presence of the jury to determine whether the victim's out-of-court statements would be admitted at trial, the State's theory was that they were admissible because the reason the victim was unavailable to testify was because of the defendant's threats against her. The defendant's theory was that the victim refused to testify because she feared that she might be prosecuted for perjury—she had previously given inconsistent statements about whether the defendant had intentionally struck her.[12] The Houston Court of Appeals, citing to *Gonzalez*, stated that "physical unavailability is not the only way to find forfeiture by wrongdoing. Intimidation is a well-recognized basis for employment of forfeiture by wrongdoing."[13]

In another post-*Gonzalez* case, *Carillo v. State*,[14] the Austin Court of Appeals looked at the trial court's admission of the victim's "dying declaration" during trial. The court ultimately did not address the applicability of the forfeiture by wrongdoing doctrine; however, after examining *Gonzalez*, the court stated: "The [forfeiture by wrongdoing] doctrine is often applied to situations in which the defendant committed the wrongdoing with the *intent* to procure the unavailability of the declarant as a witness" (emphasis added by the court), rather than one where the defendant killed someone out of sudden anger. However, the Court of Criminal Appeals is clear in *Gonzalez* that the forfeiture by wrongdoing doctrine "may apply even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable."[15]

Giles v. California

By 2008, however, the U.S. Supreme Court re-examined forfeiture by wrongdoing in *Giles v. California*.[16] Justice Scalia wrote the majority opinion which both narrowly construed the doctrine and limited its application, particularly when compared to the more expansive construction applied by the Texas Court of Criminal Appeals in *Gonzalez*.[17]

In *Giles*, the court reviewed the decision of a California trial court which was trying Giles for the murder of his ex-girlfriend, Brenda Avie. Over defense objections, the trial judge had allowed Avie's statements

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to a police officer, approximately three weeks before her death, when he responded to a domestic-violence call involving her and Giles. The statement to the officer described how Giles had grabbed and strangled her, how she then broke free and was punched in the face and head, and after breaking free again, that the defendant pulled out a folding knife, opened it, held it approximately three feet away from her, and threatened to kill her if he found her cheating on him.[18]

The California court of appeals ruled that the admission of the victim's testimonial statements at Giles's trial did not violate the Confrontation Clause as construed by *Crawford* because *Crawford* recognized the doctrine of forfeiture by wrongdoing; the court concluded that Giles had forfeited his right to confrontation because he had committed the murder for which he was on trial and because his intentional criminal act ultimately had made the witness (victim) unavailable to testify. The California Supreme Court affirmed the lower court's ruling on the same grounds.[19]

The U.S. Supreme Court examined Avie's statements in the context of whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court was a founding-era exception to the right of confrontation expounded in the Sixth Amendment.[20] The court noted that in its opinion in *Crawford*, there were only two forms of testimonial statements that were admitted at common law even though they were unconfronted. One of these are statements made by someone "on the brink of death and aware that he was dying." The court did not apply that particular historic exception in the *Giles* case because Avie's out-of-court unconfronted statements were made three weeks before her death.[21]

The second common-law doctrine, which they referred to as forfeiture by wrongdoing, allowed the introduction of statements of the witness who was "detained" or "kept away" by the defendant's "means or procurement." The terms used to define the scope of the forfeiture rule, the court pointed out, suggested that the exception applied only when a defendant "engaged in conduct designed to prevent the witness from testifying." The rule required that the witness "had been kept out of the way by the prisoner, or by someone on the prisoner's behalf, in order to prevent him from giving evidence against him."[22]

This majority opinion therefore found that the California Supreme Court's theory of forfeiture by wrongdoing was not an exception to the Sixth Amendment's confrontation requirement. It was not an exception established at the founding of the Republic, and it is not enough for a judge to determine that the defendant's wrongful act made the witness unavailable to testify at trial. The court restated that the Federal Rule of Evidence entitled "forfeiture by wrongdoing"[23] applied *only when* a defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" (emphasis added), further describing it as a rule "which codifies the forfeiture doctrine."[24]

The fundamental difference between the Texas Court of Criminal Appeals' "more broad" interpretation and application of the forfeiture by wrongdoing doctrine in *Gonzales*, and its limitation as recognized by the U.S. Supreme Court in its application by *Giles*, is that now (post-*Giles*) there has to be some showing that the defendant committed the wrongdoing with the *intent to prevent or cause a witness to be unavailable* to testify. Unless the State can somehow show or demonstrate that intent to the trial court, the defendant might prevail on his Confrontation Clause claim.

Garcia v. State

It would seem now that the rather broad interpretation of forfeiture by wrongdoing, such as in *Gonzalez*[25] or by the California courts of appeals in *Giles*,[26] will no longer suffice to allow the State to entreat the trial judge to deny a defendant's Sixth Amendment's right to confrontation and deny the admission of out-of-court testimonial statements made by a witness who is otherwise unavailable to testify at trial. As was foreshadowed by the New Mexico case *Romero*,[27] the best practice for prosecutors facing this situation is to establish and/or present evidence, during a hearing conducted outside the presence of the jury, to show the intent to wrongfully prevent the declarant from testifying at trial.

This analysis comports to the approach taken by the Third Court of Appeals in Austin in *Garcia v. State*.[28] It is a domestic violence case in which the defendant was accused of assaulting his common-law wife. Although subpoenaed, she did not appear to testify at the trial. The jury heard testimony from the victim's mother, the emergency room physician who had taken the victim's history during his examination and also

testified as to the extent of her injuries, and the officers who took statements from and/or interviewed her.[29]

Garcia objected to the admissibility of his victim's out-of-court statements as violating his right to confront her during the trial. The trial court conducted a hearing outside the presence of the jury considering the evidence presented by both Garcia as well as the State. The trial court ruled in favor of the State and entered written findings of fact and conclusions of law finding that "the acts of the defendant show that he intended to keep the witness from testifying. As a result, the defendant forfeited his confrontation claims."[30]

The Austin court, in reviewing the defendant's confrontation claim, reviewed the decisions of the U.S. Supreme Court in both *Crawford* and *Giles* and the Texas Court of Criminal Appeals in *Gonzalez*.[31] It also took into account the findings of fact and conclusions of law made by the trial court. The court found that while there was no evidence of direct threats to the victim not to testify, evidence tended to show that Garcia, through his misconduct, encouraged and persuaded her to violate the subpoena and not appear in court to testify. The court concluded that because of the evidence, as demonstrated in letters, other documentary evidence, and the testimony of people who had knowledge of the relationship between Garcia and his victim, it could not find that the trial court abused its discretion by admitting the victim's out-of-court statements. It found that Garcia had forfeited by wrongdoing his rights under the Confrontation Clause, thereby overruling his third point of error.[32]

In a post-*Giles* domestic violence case from Massachusetts, *Commonwealth v. Szerlong*,[33] the Supreme Judicial Court of Massachusetts found that an earlier opinion by its court in *Commonwealth v. Edwards*[34] did not violate *Giles* because the court required that there must have been evidence of intent to procure the unavailability of a witness to testify.[35]

What's a prosecutor to do?

Admittedly a trial prosecutor may not have much evidence for the trial court to make findings of fact and conclusions of law denying a defendant's confrontational right under the Sixth Amendment. However, in most domestic violence cases, the case that eventually goes to trial is not the first time the protagonists have quarreled. Due diligence means anticipating the possibility that a subpoenaed victim might not appear at trial and a defendant may raise a confrontation objection. Gather evidence from the present case and any threats or inferences made by the defendant to discourage or hamper his victim's appearance at trial. This should also include recordings of any jail calls. Keep that information and the list of witnesses who will testify regarding those circumstances in a separate part of your file but at the ready to counter any of the defendant's Confrontation Clause objections, and preserve the record as to the trial court's finding that the defendant waived his right to confront the witness by his wrongdoing. ❇

Endnotes

1 *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

2 "For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *Crawford*, 541 U.S. at 62, 124 S.Ct. at 1370.

3 *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266 (2006).

4 "While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds" (citations omitted). That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis*, 547 U.S. at 833, 126 S.Ct. at 2280.

5 *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678 (2008).

6 *Crawford*, 541 U.S. at 62, 124 S.Ct. at 1370; Davis, 547 U.S. at 834, 126 S.Ct. at 2280.

7 *Gonzalez v. State*, 195 S.W.3d 114 (Tex. Crim. App. 2006).

8 *Gonzalez*, 195 S.W.3d at 115.

9 *Gonzalez v. State*, 155 S.W.3d 603, 610 (Tex. App.—San Antonio 2004).

10 *Gonzalez*, 195 S.W.3d at 126.

11 See *Sohail v. State*, 264 S.W.3d 251 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd); See also *Carillo v. State*, 2007 WL 541598 (Tex. App.—Austin 2007, no pet.) (memo. op.) (not designated for publication) (statement made by victim before his death was a dying declaration exception to the hearsay rule and the court did not reach issue of forfeiture by wrongdoing even though acknowledging expansion of the doctrine by *Gonzalez*).

12 *Sohail*, 264 S.W.3d at 255-256.

13 *Id.*, at 259.

14 *Carillo v. State*, 2007 WL 541598, *6 (Tex. App.—Austin 2007, no pet.) (memo. op.) (not designated for publication).

15 *Gonzalez*, 195 S.W.3d at 125.

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16 554 U.S. 353, 128 S.Ct. 2678 (2008).

17 195 S.W.3d 114 (Tex. Crim. App. 2006).

18 *Giles*, 554 U.S. at 357; 128 S.Ct. at 2681–82.

19 *People v. Giles*, 40 Cal.4th 833, 55 Cal.Rptr.3d 133, 152 P.3d 433 (2007)

20 *Giles*, 554 U.S. at 358; 128 S.Ct. at 2682–83.

21 *Id.*, at 359.

22 *Giles*, 554 U.S. at 360-61; 128 S.Ct. at 2684.

23 Fed. R. Evid. 804(b)(6).

24 *Giles*, 554 U.S. at 367, 128 S.Ct. at 2687.

25 155 S.W.3d 603 (Tex. App.—San Antonio 2004).

26 554 U.S. 353, 128 S.Ct. 2678 (2008).

27 141 N.M. 403, 156 P.3d 694 (2007).

28 2012 WL 3795447 (Tex. App.—Austin 2012, pet. ref'd) (memo. op.) (not designated for publication).

29 *Garcia*, 2012 WL 3795447 at *1-*3.

30 *Garcia*, at *9.

31 *Id.*, at *7-*8.

32 *Id.*, at *9.

33 457 Mass. 858, 933 N.E. 633 (2010) (the defendant had been charged with committing an assault and battery on his girlfriend, they later got married and at a dangerousness hearing the victim refused to testify claiming her spousal privilege.The State successfully moved to admit hearsay statements made by the victim to her sister concerning the matter, before she married the defendant).

34 444 Mass. 526, 830 N.E.2d 158 (2005).

35 "We held that three factual findings are required for forfeiture by wrongdoing to apply: 1) the witness is unavailable; 2) the defendant was involved in or responsible for procuring the unavailability of the witness; and 3) the defendant acted with the intent to procure the witness's unavailability." *Szerlong*, 933 N.E. at 861.

Lights, camera, action!

A guide for prosecutors in dealing with the media

By Donna Hawkins
Assistant District Attorney in Harris County

For many years as a young prosecutor, I panicked when I heard those whispered words, "The press is waiting outside for you to talk about the case." What was I going to say? Was I going to get in trouble? Was I wearing lipstick? I usually tried to wait them out and often successfully escaped from the courtroom without being besieged by reporters. In fact, after about nine years with the Harris County District Attorney's Office and after dealing with several high-profile cases, I managed to appear on television only three times.

So when an opening came up in for someone to run the newly created Public Information Office and act as a spokesperson for the DA's office, you'd think I would be last in line. But as it happened, after several grueling trials in a row, I was ready to try something different. My undergraduate degree was in marketing, so I thought I could handle the responsibilities associated with such an endeavor.

In May 2008, Harris County became one of the first DA's offices in the state to open a Public Information Office. Our primary goal was to improve relations with the local media and increase positive coverage of the office. We had taken quite a beating in press coverage after an investigation into our elected district attorney and his eventual resignation. We suffered from a lack of confidence and trust in our office, and we found that jury pools were affected by the negative press coverage. During voir dire on a murder case, when the panel was asked if anyone could not give the State a fair trial, I was amazed to see how many hands were raised.

So how do you take an office that has been beaten down in the press and transform it into one that is respected and admired? We hoped that the Public Information Office would be an important part of the solution.

Turning the tide

The first real resistance we encountered came, somewhat surprisingly, from members of the media. They saw the Public Information Office as another layer of bureaucracy that would further stymie their efforts to get information and stories. Thus, the first task I embarked on was to develop positive relationships with the reporters, cameramen, and writers who worked in the courthouse. I made the rounds, introduced myself to everyone, and gave everybody all my contact information.

The next step was an attitude adjustment. It is extremely difficult to create positive relationships if you think of the press as the enemy. I had to remind myself that they are pro-

fessionals with a job to do, and they needed to be treated accordingly. I decided to ask them for a fresh start and wondered what I could do to make their jobs easier. I was surprised with how simple some of their requests were: return phone calls in a timely fashion, give them information about newly filed cases, and if I cannot answer a question, assist them with where to go for help.

One lesson I learned early on was to treat the press representatives with respect and kindness. Firsthand, I witnessed police officers, attorneys, and investigators talking down to reporters, and guess what? The resulting story did not present that interviewee in the most favorable light. If an interview lasts 10 minutes, usually only about 10 to 20 seconds of the conversation airs on the news or makes it into the story. The reporter usually selects which portion of the interview will be aired—and whether it's flattering to the office—so these relationships can be crucial. Having a positive encounter with the media certainly affects the resulting aired story.

Additionally, be honest with reporters. If we made an error, it's best to admit the mistake and try to correct the problem. A local investigative reporter once called to discuss a case in which the defendant accepted a plea deal of eight months in the local jail for assault. When I reviewed the file and saw the pictures of the complainant's injuries, I cringed. The complainant's head had been sliced open, and he had a large scar running across his entire scalp. While speaking with the (very frightened) young, misdemeanor prosecutor, we determined that the case should have been re-filed as an aggravated assault. When the reporter arrived for the interview, he thrust a microphone in my face and asked, "So, what do you have to say about *that* plea deal?!" I answered that the reporter was correct, we had made an error, and the case should have been filed as an aggravated assault. We actually had to redo the beginning of the interview because the cameraman began laughing. The reporter wanted a confrontation, a denial of wrongdoing, and a "gotcha" moment, but by admitting the error, we defused the situation. In fact, the reporter then let me expand on how we were working to correct the problem with additional training for our misdemeanor prosecutors about maintaining victim contact throughout the life of the case and by securing crime victim compensation and services for this particular complainant. (By the way, after the interview, the reporter spent about an hour teaching me the ropes of on-camera interviews and has become a media mentor of sorts.)

Learning how to work with the media effectively has greatly enhanced the positive news coverage of the office. Instead of ducking from the press, we have learned to embrace reporters by making prosecutors available for interviews and statements. If we cannot speak about a subject because of ethics rules or prohibitions, we will tell the reporter why we can't discuss the situation. Once the reporters understand that we wanted to speak with them but certain information is protected, they become more understanding about the whole process. Sometimes, for example, a reporter may be satisfied with a general statement about the range of punishment or the elements of murder.

Helping the local media

As with many others, the news industry has been met with staffing cutbacks and budget decreases. Thanks to the Internet and America's obsession with being the first to know information, deadlines have tightened. Realizing this, we make every effort to return calls as quickly as possible—even if it is just to let the reporter know that we received the call and are working on an answer. If the prosecutor handling the case does not want to or is unable to return a call, the Public Information Office will take over that duty. We have found that proactively sending out cases of interest to the media has earned us kudos and gratitude from reporters. Every morning, we look through recently filed cases to pull those that may generate public interest. By disbursing this information, we not only save ourselves response time, but we also make reporters' jobs easier by generating story ideas.

Whether you work in an office with hundreds of assistant district attorneys or one with a staff of five, the media is interested in the work you do. A small-town paper or local radio show would love to hear of a burglar getting prison time for a break-in or a probated sentence for a young offender who made a (criminal) mistake. Each story demonstrates the hard work you do to keep the community safe. You also can alert the public to a rash of criminal activity so that citizens can be alert to their surroundings. As a new case is filed, think for a moment if sharing

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the news would benefit the community.

The local media have also appreciated the additional support. They now have a centralized location where they can call to get information. If an assistant district attorney is not available to speak about a particular case, others can be called into service. We also regularly send out press releases so that smaller stations and community newspapers receive information about crimes, charges, and trials in their areas. By utilizing a news distribution service, our message is sent to over 180 local media outlets. However, an email contact list can accomplish virtually the same thing. Call local community newspapers, radio stations, television stations, and cable providers to get contact information and collate it into a distribution list. Many of the smaller papers and radio stations appreciate any news items that they can include in their publications. This is also a wonderful way to get recognition for a prosecutor who achieves a great result at trial or uses an innovative technique to help solve a crime.

Additional benefits

As reporters become more aware of our internal structure and operations, they have also taken the opportunity to present public interest stories about the office. One news segment highlighted our District Attorney Intake division and reported on the 24-hours-a-day operation. Another reporter wrote about our Cold Case/Fugitive Apprehension Unit, praising the prosecutors and garnering awards. Our Animal Cruelty section has been highlighted in the news for its proactive stance on preventing animal abuse.

This proactive stance has led to the arrest of dangerous fugitives and has actually strengthened some of our criminal cases. One reporter spoke with a man charged with aggravated sexual assault, and the defendant confessed to the offense on camera. Because the confession aired on the broadcast, the footage was easily obtained for trial. Another reporter investigated a barratry case, speaking with both the prosecutor and the defendant. He caught the defendant on camera answering his phone with the words, "Law office." This certainly proved advantageous to the resulting prosecution.

Camera confidence

I wish that I could give you a guaranteed way to feel comfortable and confident in front of the news cameras, but there is no such trick. The more you practice your skills in front of the camera, the better you become. As I first meet a cameraperson, I often joke with them about making me look younger and thinner (OK, I am not really joking!), but it serves to lighten the mood. I will dispel the validity of that old adage about picturing your audience naked—you would have to see some of our cameramen to realize that would *not* be a good idea.

As far as the nuts and the bolts, what is the best way to conduct an interview? First of all, relax. Many people (understandably!) tense up when a camera is aimed at them. Take your time. Take several deep breaths before you start an interview. Second, direct your attention to the left or the right of the camera—do not look directly into the lens. This makes the interview look more natural, and it also provides a much more flattering camera angle for most faces. Third, feel free to pause before answering a question. Think about what you want to accomplish with your answer. If you have time before the interview, write out a few "talking points" or sound bites about the case. For example, in a child sexual assault case, you might want to note, "Our office vigorously prosecutes crimes committed against the most vulnerable victims in our society—the children." And finally, don't smile! I had to learn this one the hard way. Although an initial reaction when one sees a reporter smiling at them is to smile back—don't. You do not want to be shown on camera with a smile on your face as a gruesome murder is discussed. As you leave a courtroom or a grand jury room, remember that a poker-face is best.

It would take another few thousand words to discuss the ethical considerations in dealing with the media, but remember to always stick with the public record. Generally, something becomes public record when it is said in open court. A prosecutor has a duty to present information in a manner that will not influence a future court proceeding. The ethical rules prohibit prosecutors from discussing a defendant's criminal history or any statements or confessions he or she may have made. Invariably, a mistake will be made during filming. Whether a name is mispronounced, an offense misstated, or the prosecutor accidentally swaps the police officer's name with that of the defendant (oops!), these

things happen. So how do you correct it? Be nice to the reporter. Reporters will often allow you two or more "takes" to get the information presented in an intelligent manner. Remember that they are looking for an interesting, well-presented story too. If you look good, it will reflect favorably upon them.

Some of the best advice shared with me is to remember that today's headline is tomorrow's birdcage liner. What appears to be a significant negative story is generally forgotten when a new scandal emerges. Just relax and give it some time. One major online news story discussed a 42-year-old Houston woman who flew to Canada to engage in sexual relations with a 16-year-old boy she'd met online. Because a boy of 16 years is considered an adult in Canada, the woman could not be charged with a crime there, but a quick-thinking prosecutor charged her with online solicitation of a minor in Houston. Unfortunately, the flamboyant reporter made a small error in the story by swapping my name with hers. At one point he mentioned that "Ms. Hawkins" flew to Canada, had sex with a 16-year-old boy, and was arrested when she arrived home to Houston. He may have also called "Ms. Hawkins" the Texas Cougar. Although I was embarrassed when the story came out (my attention was drawn to it by the parents of the young man involved), I learned that having a sense of humor was probably the best way to deal with such faux pas. (Just do not Google my name, OK?)

So what else can be done to improve relationships with reporters and media representatives? On hot summer days, we offer the reporter and cameraperson cold bottles of water. You would be surprised just how far that simple gesture can go. As they are leaving our offices, we also show them to the "facilities," as many are on the road much of the day and appreciate the refresher.

Finally, I just want to thank all of you for the work you are doing to prevent crime and protect our citizens. Being a prosecutor is the most rewarding job in the world. You serve as the voice of victims. For that, you should hold your heads up high and be proud as you face the cameras. Break a leg! ❇

News Worthy

We need your help updating our directory

We're updating our records for the 2013 *Directory of Texas Prosecutors & Staff*. But we're publishing the directory a little differently this year. Say goodbye to the old CDs and spiral-bound paper copies that we published every two years. Instead, from now on we will be publishing the directory electronically in PDF format and updating it every six months. A password will be emailed to all paid TDCAA members with each new edition to access the PDF directory through a password-protected area on the TDCAA website.

If you have updates to your office personnel or questions about the new electronic publication of the directory, feel free to contact Lara Brumen Skidmore at lara.skidmore@tdcaa.com. ❇

TDCAA e-books are available!

TDCAA announces the launch of two e-books, now available for purchase from Apple, Kindle, and Barnes & Noble. Because of fewer space limitations in electronic publishing, these two codes include both strikethrough-underline text to show the 2011 changes and annotations. Note, however, that these books contain single codes—just the Penal Code (2011–13; $10) and Code of Criminal Procedure (2011–13; $25)—rather than all codes included in the print version of TDCAA's code books. Also note that the e-books can be purchased only from the retailers. TDCAA is not directly selling e-book files.

New editions of these e-books will be available after the 2013 leg-

Cruel and unusual punishment

In Dallas, a 10-year-old boy died of dehydration when his stepmother restricted his water intake as punishment for wetting the bed. How prosecutors secured justice for this boy.

By Marci Curry and Carmen White
Assistant Criminal District Attorneys in Dallas County

According to medical experts, it took three to five days for 10-year-old Jonathan James to die from lack of water. He had been ordered to stand on an X that had been duct-taped to the kitchen floor and to stare at an X taped on the window of his father and stepmother's non-air-conditioned house. It was July 25, 2011, Day 19 of what would eventually be 70 straight days of temperatures over 100.

During the summer of 2011, while news stations were warning people of the high temperatures, encouraging people to reduce their physical activities outside and to stay hydrated, Tina Marie Albertson was punishing her stepson Jonathan. For at least three days, Tina made him stand on his tiptoes while reaching for a tack, hold a 5-pound bag of potatoes over his head, and sleep in a bedroom without air-conditioning, and she prevented him from drinking water. He eventually collapsed and was rushed to the hospital.

The emergency room doctor knew as soon as Jonathan arrived by ambulance that he was the victim of a heat-related illness. What the doctor did not know was if anyone was responsible for his condition. Jonathan arrived at the hospital with no heartbeat, chapped and bleeding lips, and a completely empty bladder. After working for over 45 minutes to save Jonathan's life, the doctor pronounced him dead. Standing by his bedside were his mother, his twin brother, and his maternal grandmother, who was on staff at the same hospital. As the family said their goodbyes, police began their investigation.

It is the policy of the Dallas Police Department to investigate all child deaths in the city if the child is not under medical care. Originally, police believed that the death was an unfortunate event that often occurs in the Texas summer. They treated the case much like they would treat a football player who died after practicing outside in the summer heat. However, what the police eventually learned shocked them and the entire community.

The investigation

The police began their investigation by speaking with the people who were at the house when Jonathan collapsed. They began their conversation with the adults. Michael James, Jonathan's father, and Tina Alberson, his stepmother, told police their version of events on that day. Jonathan had been with them for his summer visit. He was having a normal summer playing video games and watching television. They reported that Jonathan was just fine until he collapsed. The parents reported that their central air-conditioning had gone out and that they only had window units in some of the rooms of the house. The parents stated that in their opinion, Jonathan got too hot because of the lack of central air and that his death was a horrible result of the Texas heat. In fact, the parent's stories were so compelling, a Good Samaritan who heard the story on the news donated money to have the air-conditioning repaired.

While the parents were telling one story, Joseph James, Jonathan's twin brother, was telling a different one. Joseph told the police that Jonathan was being punished when he died.

The homicide detectives of Dallas Police Department notified the Child Abuse Division. The homicide detectives went to the offense location while the child abuse detectives set up a forensic interview. The detectives decided that a non-leading forensic interview conducted by a trained interviewer would be the best way to get information from Joseph.

The following morning, Joseph was interviewed at the Dallas Children's Advocacy Center. The picture that Joseph painted of he and Jonathan's court-mandated visitation

with their dad revealed forms of punishment that sounded unbelievable. Joseph told the interviewer that Jonathan was punished from Friday until the Monday that he died. He told her that Tina told him he couldn't have water if he didn't eat. He told her that Tina made Jonathan sleep in the hot bedroom after the air-conditioning went out. Joseph finally told the interviewer that even after Jonathan was trying to sneak water from the bathroom sink, Tina would not let him have it. Joseph's story was so detailed and disturbing that even the police had a difficult time believing that a caretaker would do this to a child.


Jonathan James

Once the interview with Joseph was complete, police knew they had no other choice but to interview Michael, Tina, and Tina's biological son B.J. Police determined that Michael and Tina would be asked to come voluntarily to headquarters and B.J. would be interviewed at the Dallas Children's Advocacy Center. To everyone's surprise, B.J., Michael, and even Tina confirmed the different forms of punishment.

During Tina's first interview, she stated that it was dangerously hot outside and inside her home. She stated that she was making sure that all of the children were drinking water. In fact, she went as far as to say that Jonathan was drinking four to five glasses of water every hour. The detectives challenged Tina regarding how much water Jonathan was actually drinking. Once challenged, Tina admitted that she did restrict Jonathan's water. However, she told police that she only restricted his water for a limited number of appropriate reasons. She told police that she restricted his water for 1) wetting the bed, 2) failing to eat, 3) drinking after his father, 4) taking food and water into his bedroom, and 5) receiving a timeout. Though Tina admitted to restricting Jonathan's water, she maintained that Jonathan drank four to five glasses every hour. Further, Tina denied that she ever saw Jonathan in any distress.

During Michael's interview, he substantiated Tina's story. However, B.J. was telling a different tale. Although he did not tell as much information as Jonathan, he confirmed the different forms of punishment.

While Tina and Michael were being interviewed, the Dallas County Chief Medical Examiner, Dr. Jeffrey Barnard, was in the early stages of conducting the autopsy. Because the medical examiner had not ruled on a cause of manner of death, Tina and Michael were released. While waiting on the medical examiner's report, police consulted Dr. Matthew Cox, a child abuse expert, to review the lab work and discuss the symptoms of dehydration.

It took nearly a month for the medical examiner to complete his autopsy. The nature of the death was so unique that the medical examiner took every precaution to rule out any form of natural death. Once all tissue samples and lab results were complete, the medical examiner ruled Jonathan's death a homicide. The medical examiner determined that Jonathan's death was a result of prolonged dehydration which resulted from his water restriction. One month to the day of Jonathan's death, Tina Marie Alberson and Michael James were arrested on a first-degree felony charge of serious bodily injury to a child.

After the arrest, police conducted custodial interviews of both Michael and Tina. Michael finally admitted that he knew Tina was depriving Jonathan of water. He even told police that he and Tina argued about her not letting Jonathan have water. He stated that at one point he instructed Jonathan to sneak water in the bathroom. When confronted as to why he didn't do something to help his son, Michael blamed the fact that he is blind in one eye, wheelchair-bound, and unable to care for himself as an excuse as to why he lied to the police during his first interview. Michael maintained that he never saw any signs of illness in Jonathan.

Once the police had statements from the children and Michael, they finally conducted a custodial interview of Tina. It was only then that Tina admitted that she restricted Jonathan's water as form of "discipline." She stated that she had restricted water before as a form of discipline and it had not caused illness in the past. She maintained throughout her entire interview that she did not mean to kill Jonathan. Both Tina and Michael told police that Jonathan went to a party on the Saturday preceding his death and that he drank soda and ate cake. She claimed that Jonathan never showed any signs of distress.

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Charging decision

Once the police had the statements from the witnesses, defendants and all medical personnel, police filed the cases with the District Attorney's Office.

We first had to decide what to charge. Though Jonathan was dead, we thought that a murder indictment was not appropriate. Everyone, including the detective, agreed that the defendants did not deprive Jonathan water with the intention to cause his death. However, we believed that the defendants knew that depriving Jonathan of water in the record-setting heat without air-conditioning was reasonably certain to cause him serious bodily injury. Therefore, we decided to charge the defendants with injury to a child by intentionally and knowingly causing serious bodily injury to Jonathan James by not providing adequate hydration and failing to seek medical attention.

Challenges

On the surface, this case read like a one-hour episode of "Law & Order"—an open and shut case. However, this case was anything but. It was riddled with challenges. The first challenge was proving intent in the indictment and proving failing to seek medical treatment. The second challenge was handling child witnesses. The final challenge was explaining why Jonathan, a 10-year-old boy, did not defy Tina and get water.

After a thorough review of the evidence and interviews with the doctors and witnesses, we decided to strike intent and failure to seek medical attention out of the indictment. We felt that narrowing the jury's attention to Tina's knowledge of the action she took would make the trial cleaner.

We handled the second challenge by spending several hours interviewing the children. We spent time with B.J. just letting him know that he could tell the truth and that he would not be responsible for putting his mother in jail. He was a very sad, 14-year-old stuck in the middle between his loyalty to his mother and the truth. Joseph was a separate challenge. Throughout the course of the case, Joseph had shown signs of attention-seeking. It became clear early in the case that although Joseph was telling the truth about the details of the offense, he liked the attention from the media and authorities that the case was giving him. We spent a tremendous amount of time explaining to Joseph the importance of telling the truth and not treating this like a TV show.

Though the first two challenges were easy to handle, the third challenge came with a price. We knew that to convince a jury that Jonathan would obey Tina even to his detriment, we had to show them that Jonathan was terrified of Tina. Although Joseph and B.J. told stories of discipline, we did not have any witnesses to speak about how mean Tina was to Jonathan, and we did not know how we were going to prove it. But about a week before trial, our question was answered. Michael's attorney contacted us and told us that Michael wanted to talk. He wanted to testify against Tina. We decided that we would meet with him, but we would not offer him any deals in exchange for his testimony. To our surprise, Michael agreed to testify without a deal. Michael told us in his interview that Tina was restricting water more than he originally said and that Jonathan was sick a few days prior to his death. He described Jonathan as lethargic and very thirsty. This was consistent with the dehydration symptoms the child-abuse expert described to the police. He also told us that Tina was bi-polar and that all her anger the week that Jonathan died was directed at the child. With that information, we had our final piece of the puzzle.

The trial

The first jury we attempted to pick was released. A majority of the venire panel had read the media coverage of the case and formulated an opinion before they appeared for voir dire. We were able to seat a jury the second day. We spent the majority of jury selection discussing mens rea. We knew from the beginning that the only issue would be Tina's state of mind when she committed this crime.

We started our case by putting on emergency room doctor. This doctor testified about Jonathan's condition when he arrived at the hospital and the lab results from the hospital. The most telling thing the doctor stated was that Jonathan's bladder was completely dry.

Jonathan's mother was our second witness. She described Jonathan's character as a sweet, loving boy who loved to play outside. This was a stark contradiction to the description Tina gave in her inter-

views, that Jonathan was a lethargic child who would rather watch television than play outside. Tina would also say that he was a constant troublemaker and there was no rhyme or reason for him being bad; he was just bad to be bad. Next, we called the police officer who went to the house on the night of the child's death. The most important thing that this officer testified to was that the house was stifling at 3 a.m. when the police arrived to take pictures and investigate the crime scene. He described that it was "so hot that it was hard to breathe." The first day of the trial ended with one of the most important witnesses: the lead detective. The lead detective testified to Tina's demeanor during her custodial and non-custodial statements. She showed no remorse in her actions and she would occasionally laugh when recalling how the boy aggravated her during the days leading up to his death. We then entered the videos of Tina's statements. The jury was able to see the stark contrast between Tina's first two statements and her subsequent admissions to the detective. They were also able to see how her statements contradicted the proven medical evidence. We thought it was important to end the day with Tina's statement because we wanted the jurors to know on Day One that it was Tina who restricted the water. We knew that once we convinced them of that, all we had to focus on the next few days was what she knew when she was taking these actions.

As the trial continued, we introduced periodicals to show the extreme temperatures during the days that Tina was depriving Jonathan of water. We also called her husband, Michael, to the witness stand. He told the jury that Tina "had it out" for Jonathan. He stated that Tina would be there to stop Jonathan when he tried to get water. He also told the jury that Jonathan was sick and he and Tina discussed Jonathan's illness. Finally, he confessed that he and Tina argued over Tina depriving Jonathan of water.

Ten-year-old Joseph testified on the third day of trial. Joseph was a wonderful witness. He was polite and charming with the jury. The jury laughed along with him when Joseph admitted that he, not Jonathan, was the real troublemaker in the family. He told the jury how Tina was punishing Jonathan and restricting his water. He also told the jury that Jonathan did not wet the bed and that Tina was just being mean to Jonathan. He testified that the night prior to Jonathan's death, Jonathan and Tina stayed up all night and when Jonathan died, he hadn't slept in over 24 hours. He did not know what punishments Jonathan endured during that time. Joseph, whom we believed would be one of our biggest challenges, ended up being a great witness.

We ended the State's case with the medical evidence. Dr. Barnard testified that in all of his 40 years of practice, Jonathan's sodium level was as high as he had ever seen. He also commented on how a completely dry bladder was a very unique finding. Dr. Barnard testified that Jonathan's death was due to kidney failure and cardiac arrest, which were direct results of dehydration. Dr. Cox testified that the sodium level was extreme. According to Dr. Cox, Jonathan's lab work indicated that he had suffered prolonged dehydration. He also testified to the effects of dehydration and how a dehydrated child would act. He stated that Jonathan would have been dehydrated and at some point his body would have craved water to the point that he would sneak water or do whatever he could to get water. He said that near the end of his life, Jonathan would have become delirious. Dr. Cox's testimony confirmed the witnesses' statements of Jonathan's behavior prior to his death.

The defense's case

Then the defense began its case by calling Tina's son B.J. to the stand. We were prepared for this. We choose not to call B.J. because we thought it likely he could not tell the truth and harm his mother. Shaking and with tears streaming down his face, B.J. claimed that Jonathan was not in trouble during that period. He stated that Jonathan had as much water as he wanted. His testimony was very sad. Although we knew that we could impeach him with his previous statements to us, we choose not to. Instead, we asked B.J. about his current family situation. He was currently in foster care as both his mom and step dad were in jail. We pointed out through B.J.'s testimony that this little boy wanted to be back with his mother and that he was refusing adoption from a family in hopes that his Mom would come back home. We felt like it was clear to the jury that B.J. was just trying to save his mother.

Throughout preparation and trial, we believed that Tina would

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not testify. She had a previous prison trip for committing aggravated assault with a deadly weapon by running over a man with her car. She also had a prior family violence assault conviction against her first husband. We were sure that this information would keep her from testifying. However, to our surprise, the defense made a motion to allow the defendant to testify free of impeachment of her convictions. The defense argued that 10 years had elapsed since she was sentenced and that the probative value of admitting the aggravated assault conviction did not substantially outweigh the prejudicial effect. Although the State argued that it had not been 10 years since her actual sentence, the judge agreed with the defense that when calculating the defendant's back-time credit at the time of her plea, her 10 years had expired the day we selected the jury. The judge found that the statute's the time limit is applicable when the defendant takes the stand, not when the trial starts, so she was allowed to testify free of impeachment.

Tina spent the first hour of her direct examination explaining what a dedicated mother she was. She described herself as the mother who never let her children out of her sight and the mother that kept Joseph from failing school. She maintained that she never saw any signs of distress with Jonathan and if she had, she would have taken him to the doctor. She told the jury that she did minimally restrict Jonathan's water, but that he drank several glasses of water everyday. We confronted Tina by pointing out that her statements were medically impossible. She stated that the doctors were wrong. At the end of her cross-examination, she admitted that she knew that depriving anyone of water in those conditions of that summer would with reasonable certainty cause that person serious bodily injury, such as heat stroke or heat exhaustion.

During closing argument, we felt it was important to remind the jury of several key issues. We emphasized that we did not have to prove that Tina intended to kill Jonathan. We reminded them that Tina did not have to know that Jonathan would die or that he would die from dehydration. We told them that Tina did not have to see any signs of distress in Jonathan. Finally, we argued that Tina knew that her deprivation of water was causing Jonathan's illness because right before he collapsed, Tina gave him the one thing that she had been denying him: water. She gave him several glasses of water and put him in a bathtub filled with it.

The defense argued that Tina did not know her actions were causing serious bodily injury because she didn't see any signs that he was sick.

After more than three hours of deliberations, the jury returned a verdict of guilty on the lesser-included offense of reckless serious bodily injury to a child. This offense carries a punish range of 2 to 20 years in prison. However, with the enhancement paragraph, the punishment range was increased to five to life.

Punishment

We began the punishment phase with Tina's criminal records. After evaluating the underlying offenses, we chose to put on the certified copies of the judgments rather than the witnesses. We also called Jonathan's maternal grandmother, Sue Shelton. She gave a powerful and heartbreaking testimony of who Jonathan was and how his death impacted their family. With the jury listening as tears ran down their faces, Jonathan's grandmother expressed guilt for not keeping Jonathan away from his dad's house. She testified that Jonathan begged her that he not have to go, but she felt she had no choice. She left the witness stand after asking the jury for a lengthy prison sentence.

The defense called Tina's father to the stand. He had only been in Tina's life for the five years preceding the trial. He stated that his daughter was a good person and that she was sorry for what happened to Jonathan. He asked the jury for the minimum sentence.

Tina also took the stand in the punishment phase of the trial. She testified that the prior assaults were not her fault but that she was responsible for Jonathan's death. She testified on cross-examination that when people make her angry, she feels justified in hurting them.

At the close of the case, the State asked for a life sentence and the defense asked for the minimum sentence of five. After approximately 20 minutes of deliberations, the jury returned a verdict of 85 years. (Michael James's case is currently pending and set for trial later this summer.)

Lessons learned

The media coverage played a major role in the trial. The news cameras were present every day, and reporters were in the courtroom watching and

writing about every word. The jury and the witnesses were well aware of the media. The judge would not allow cameras in the courtroom, but they could film through a window in the door, the same door witnesses had to pass through to take the witness stand. Several witnesses said it made them uncomfortable. In the future, we would keep the cameras out of view of the witnesses as much as possible. Jurors also sent a note to the judge stating they did not want to be filmed or interviewed. We passed this along to the media and at the end of the trial they were escorted out of the back of the courtroom.

Witness preparation was key to this trial. I met with Joseph several times, though we did not talk about the facts of the case every time we met. In fact, during most of our meetings, we discussed the importance of telling the truth, being calm, and not acting out in trial. It was these meetings that made Joseph a good witness. In fact, Joseph testified in trial that I told him to keep his conduct in court on the "down low." Although I did not use that phrase, he had understood my point. The jury complimented the doctors and felt that they were a very important component to the case.

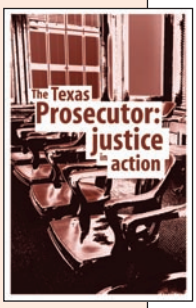
Conclusion

This successful prosecution is a direct result of the hard work of the professionals in this case. The multidisciplinary team made up of the Dallas Police Department, Child Protective Services, Dallas Children's Advocacy Center, Children's Medical Center, Charlton Methodist Hospital, the Medical Examiner's Office, and the District Attorney's Office, worked hand-in-hand to expose the cruelty Jonathan suffered all in the name of punishment. On January 22, 2013, Jonathan received his justice. ❇

Prosecutor booklets available for members

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

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



A loud party with lots of weed—and police come a-knockin'

How *Kentucky v. King* offers guidance during hearings to suppress the marihuana seized during a search based on exigent circumstances

By Brian Foley
Assistant County Attorney in Brazos County

Puff, puff, give.[1] Apparently everyone who smokes marihuana[2] does it with friends. It reeks to high heaven, and the odor makes peace officers want to search everything from cars to baby dolls. I have smelled it in apartment complexes and coming from the car in front of me at a red light. The automobile exception to the warrant requirement allows the police to search a motor vehicle when the officer smells marihuana coming from the car.[3] That is easy enough.

But when the potheads get together and start annoying the people in the apartments or houses around them, police are often called to the scene because of loud music or the odor of marihuana. This article is designed to help a prosecutor preparing for a suppression hearing in this scenario. The article gives a sample set of facts in police report style, then discusses likely suppression issues. I hope it will arm you with what you need to see that justice is done at these hearings.

The police report

"I, Officer Rock T. Ag, was on duty wearing my outstanding and fashionable standard police uniform and was dispatched to 123 Random Apartment after receiving a noise and odor of marihuana complaint. Upon arrival I smelled the odor of marihuana emanating from the apartment. I knocked on the door and announced myself as the police. I then heard shuffling inside the house and know that illegal drugs may be easily destroyed. I became suspicious of the noises and entered the apartment.

"Once inside, the odor of marihuana became suffocating to the point that I began to cough and get an acute case of the munchies. I noticed three people sitting around a table in plain view with a baggie of a green leafy substance that I recognized as marihuana based on my training and experience. Also on the table were a gas-mask bong; a 3-foot-tall, Chinese-style dragon; and a Teddy Ruxpin doll. The dragon and teddy bear were later discovered to be bongs as well.

"I did a protective sweep of the residence to ensure that no other subjects were present. Once the apartment was secured, I told everyone to sit on the couch. The defendants were Bob Marley, Snoop Dogg, and Willie Nelson. I asked them who owned the apartment. Bob said it was his apartment and the other two were just visiting. Snoop requested a lawyer, and Willie said he was smoking earlier tonight but that the weed belonged to Bob. Bob said he didn't know who owned the weed. I arrested all three of them and placed them in handcuffs double-locked."

At the front door

The first issue defense counsel may try to argue is that the police had no right to contact the subjects in the first place. In a dispatching for loud music and marihuana, police have the right to show up and knock on the door.

The police received an anonymous tip. Normally police officers have to corroborate an anonymous tip with the officer's own observations,[4] but police may approach a house or any area open to the public in the same way any other individual may.[5] However, if officers want to search a house, they need a reason to enter. The Fourth Amendment analysis starts when the police move past the front door.

Fourth Amendment

Searches and seizures inside a home without a warrant are "presumptively unreasonable."[6] However, sometimes "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless

search is objectively reasonable. …"[7] So, you always need a warrant—unless you don't. Thanks for being so clear, Supreme Court.

Here is what an officer really needs to search a home without a warrant: probable cause and exigent circumstances.[8] The smell of marihuana is probable cause, and there are three types of exigent circumstances:

- emergency aid: assisting someone inside the home whom he believes to be in danger;[9]
- hot pursuit: chasing a fleeing suspect who runs into a home;[10]
- preventing destruction of evidence: stopping suspects from flushing drugs down the toilet.[11]

This article focuses on preventing the destruction of evidence. Defense lawyers argue that the police shouldn't be able to enter a home just because they smelled marihuana and heard the defendant trying to destroy it. They argue that police themselves create the exigent circumstances and therefore shouldn't be allowed to enter. As a prosecutor, this makes sense, right? Because obviously people are going to destroy evidence once the police arrive. After all, they're on drugs. The police should be allowed to break down the door only if they accidentally catch someone burning bodies in the fireplace. In 2011, the Supreme Court decided *Kentucky v. King* and flushed these arguments down the proverbial toilet.

Kentucky v. King

Kentucky v. King held that police may enter a home without a warrant when defendants attempt to destroy evidence so long as up to that point the police had not violated or threatened to violate the Fourth Amendment.[12] Made simpler, who cares if the police created the circumstances? They hadn't done anything wrong up to that point, and we're not going to let defendants flush all their drugs away.

In *King*, Kentucky police officers set up a controlled buy of crack cocaine outside an apartment complex. A suspect purchased crack from the officers. That suspect began to run, and police chased him to an area with two apartments, one on the left and one on the right. The suspect went into the apartment on the right. The police smelled marihuana coming from the apartment on the left. They knocked on the left apartment door and announced themselves as the police. The officers heard noises that sounded like the destruction of evidence and entered the apartment on the left without a warrant.

Inside that apartment, they found three people including Mr. King. Justice Alito's majority opinion proclaims, "Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue."[13] I couldn't have said it better myself.

The basic principle

Kentucky v. King adopts a common sense approach. "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak."[14]

"In [*Kentucky v. King*, the defendant] claim[ed] that the officers 'explained to the occupants that the officers were going to make entry inside the apartment,' but the record is clear that the officers did not make this statement until after the exigency arose." The court decided in favor of the State because the officers acted pretty reasonably. They didn't issue an ultimatum or threaten to break down the door. Footnote No. 4 of the opinion explains how the case may have turned out differently had the officers acted less professionally. "There is a strong argument to be made that … the exigent circumstances rule should not apply where the police, without a warrant … threaten that they will enter without permission unless admitted."[15]

"Rustling around" and exigent circumstances

Kentucky v. King did not decide that exigent circumstances in fact existed. The court assumed the veracity of the facts about the officer hearing a rustling inside the room and his belief that the destruction of evidence was imminent. So don't hold up this case in court and say the high court has ruled that rustling automatically equals exigent circumstances—the Supreme Court actually noted that that question was better left to the Kentucky Supreme Court, presumably because these issues are very fact-specific and the high court doesn't want to get into the business of drawing those kind of lines.

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The best strategy to get past this hurdle is to speak with an officer candidly and go into detail about his observations on the record. The more precise prosecutors can be and the more we can tie his observations to his experience and training, the more likely we are to win the hearing. For example, if the officer could hear a toilet flush or knew someone was running out the back door, then that is pretty good evidence that destruction of evidence was imminent. But if all he heard was someone turn the music down and lock the door, then that doesn't sound like destruction of evidence. Warrantless entry must be based on genuine exigency.[16]

Kentucky v. King was decided in part because there was a split in the circuits about police-created exigency. Five different tests were being used in the United States Courts of Appeals prior to this decision.[17] These tests were the result of defense arguments that we have all heard some version of before. Here is a list of the defense arguments that were specifically identified and rejected by the *Kentucky v. King* opinion.

- **Bad faith:** If the officer was creating exigent circumstances on purpose to enter without a warrant, that violates the Fourth Amendment. This argument was rejected because "our cases have repeatedly rejected a subjective approach, asking only whether 'the circumstances, viewed objectively, justify the action.'"[18]
- **Reasonable foreseeability:** If it is reasonably foreseeable that knocking would cause the defendant to flush the drugs, then police shouldn't knock. This claim was rejected because police may seize an item even though the officers may be "interested in an item of evidence and fully expect to find it in the course of [a protective sweep or other search]."[19]
- **Probable cause and time to secure a warrant:** The court should penalize officers who had probable cause and didn't get a warrant but rather tried to obtain consent to search. This argument was rejected because the police have every right to attempt a simpler, faster, and less burdensome route to obtaining evidence than applying for a warrant.[20]
- **Standard or good investigative tactics:** The officer didn't do what the standard officer in that area would do. This claim was rejected because that test would not create clear guidance for officers, and it invades upon the authority of law enforcement agencies.[21]
- **Entry is imminent and inevitable:** It is illegal for officers to make an occupant feel like they are coming in no matter what. This argument was rejected because it relies on subtleties such as tone of voice or the forcefulness of the knocks, creating an unworkable standard where officers would not know how loud was too loud.[22]

The officer is legally inside—now what?

Recalling the police report and *Kentucky v. King* analysis above, we can see that the officer has validly entered the home based on the exigent circumstances relating to destruction of evidence.

So is it legal to detain the suspects all in one room? Their freedom of movement is restricted, and they are certainly not free to leave—does that make their statements inadmissible? What about the guy who asked for a lawyer? How do you know whose apartment this is or who smoked the weed tonight?

Detaining suspects in one room and Miranda

Detaining the toking trio isn't an issue unless prosecutors are trying to enter their statements into evidence at trial. Defense counsel may argue that their statements are inadmissible because the defendants were in custody and the officer has violated their *Miranda* rights, but in our situation prosecutors should argue that *Miranda* does not apply because the defendants' statements were non-custodial.

A person is in custody when his freedom of movement is restrained to the extent usually associated with formal arrest.[23] The test is *not* simply whether he is free to leave. Although it is true that a person can be in custody without being under formal arrest, the Court of Criminal Appeals applies multiple factors to determine whether a person is in custody.[24] In a call responding to loud music and marihuana, huddling the individuals together should be considered an investigative detention. It's similar to a DWI detention where police conduct a field sobriety test and ask questions about how much a suspect has been drinking. When an officer questions a suspect during an investigative detention, it's generally not considered custodial interrogation.[25] How else are police officers able to determine the answers to the appropriate questions? Do the defendants in this situ-

ation believe they are free to leave? No. But neither does a defendant who is pulled over for DWI. This doesn't automatically make all statements inadmissible.[26] Just because the officer has observed contraband and the defendants are the focus of a criminal investigation does not mean they are in custody.[27]

Again, "an individual is 'in custody' for purposes of *Miranda* 'when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.'"[28] Nobody is happy about being told to sit down and stay in the living room to be asked questions about marihuana. But an innocent person would not feel like he is under arrest at that point.[29] The reasonable person standard presupposes an *innocent* person.

There are countless cases where only one or two of the individuals are close enough to the marihuana to be the likely owners of it. In that type of case, everyone will be sat down but only a few will be arrested. The courts recognize that every situation is different and hold that "a determination of custody must be made on an ad hoc basis, in consideration of all of the objective circumstances of the detention."[30]

The questions are part of an investigative detention. "An investigative detention involves detaining a person reasonably suspected of criminal activity in order to determine his identity or to momentarily maintain the status quo in order to garner more information."[31] That is exactly what is happening in our situation. All of this caselaw can be used to argue against the State as well, but we should still be able to rely on it.[32]

Fifth (not Sixth) Amendment right to counsel

Remember Snoop Dogg asking for a lawyer? When someone asks for a lawyer, either the Fifth or Sixth Amendment right to counsel may be an issue. The Sixth Amendment gives the right to counsel after the initiation of adversarial proceedings and does not apply in our fact pattern.[33] The Fifth Amendment right to counsel doesn't apply in our situation either because the suspect is not in custody. So just as there is no right to consult a lawyer before deciding to refuse a breath test, there is no right for Snoop to speak with his lawyer before he is asked questions about the marihuana.

However, the best practice here is to simply not ask him any questions. I would advise my officers to respect any person's request for counsel. Police must scrupulously honor the right of an accused held in custody to cut off questioning.[34] Snoop was very clear that he wanted to invoke his right. If he were not so clear, then there would be no need to stop questioning.[35] "Maybe I should talk to a lawyer" doesn't cut it.[36]

Plain view

Officer Rock T. Ag is going to confiscate all three bongs and the marihuana. If an officer 1) sees an item in plain view from somewhere he has the right to be and 2) immediately recognizes the item as evidence, he may seize the item.[37] In our fact pattern the marihuana is clearly evidence. The dragon is probably evidence as well because the officer may have seen these kinds of bongs before. Teddy Ruxpin on the other hand was probably not "immediately" recognized as evidence in a marihuana case.

Protective sweeps

Rock T. Ag also made a protective sweep. A protective sweep is a quick search based on officer safety.[38] Searching a home is "generally not reasonable without a warrant issued on probable cause."[39] But if Rock reasonably believed that the rest of the apartment may have people hiding in it, he can look for them.[40] He can't search inside drawers, open the fridge, or look anywhere a person couldn't fit.

In our police report Rock didn't do a very good job saying he believed there may be a dangerous situation other than simply saying there were drugs and people in the house. We must have an "articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene."[41] However, the Fifth Circuit has held that a protective sweep may be reasonable during drug arrests because weapons are commonly found with drugs.[42]

Conclusion

I haven't answered every conceivable question, but I hope prosecutors are able to use this article as a starting point or reference the next time this comes up at docket. In summary, 1) *Kentucky v. King* held that police may enter a home without a warrant when defendants attempt to destroy evidence, so long as up to that point the police had not violated or threat-

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ened to violate the Fourth Amendment,[43] 2) custody is determined ad hoc and asks if a reasonable innocent person would have felt they were under arrest,[44] and 3) all the defense tactics in the world can't beat a reasonable police officer and prosecutor working together for justice.[45] ❇

Endnotes

1 From the Urban Dictionary: The mandatory smoking rotation of a group of people, especially for weed blunts or joints. "Puff puff" means you take two short hits (usually the required limit), and "give" means you hand the smoking device to the person next to you in the rotation. This phrase was made popular by Chris Tucker's character Smokey in the 1995 movie *Friday*.

2 The spelling of "marihuana" with an "h" comes straight from Texas Health and Safety Code §481.002(26) There are other ways spell it, including with a "j."

3 *California v. Carney,* 471 U.S. 386, 390 (1985); *State v. Guzman*, 959 S.W.2d 631 (Tex. Crim. App. 1998).

4 *Alabama v. White*, 496 U.S. 325, 330-331 (1990).

5 *Porter v. State*, 93 S.W.3d 342 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd); *Rodriguez v. State*, 106 S.W.3d 224 (Tex. App.—Houston [1st Dist] 2000, pet. ref'd) (*Porter* and *Rodriguez* held that the police could freely approach the front door to conduct dog sniffs.); *Horton v. California*, 496 U.S. 128 (1990) (plain view).

6 *Kentucky v. King*, 563 U.S. ___, 131 S. Ct. 1849, 1856 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Gallups v. State*, 151 S.W.3d 196, 201 (Tex. Crim. App. 2004); see *Cooke v. State*, 735 S.W.2d 928, 929 (Tex. App.—Houston [14th Dist.] 1987, pet. ref.).

7 *Kentucky v. King*, 563 U.S. ___, 131 S. Ct. 1849, (2011).

8 *McNairy v. State*, 835 S.W.2d 101, 107 (Tex. Crim. App. 1991) (methamphetamine case).

9 *King* at 1856; *Fearance v. State*, 771 S.W.2d 486, 510 (Tex. Crim. App. 1988).

10 *King* at 1856.

11 *Id.*

12 *King*, 563 U.S. ___, 131 S. Ct. 1849, 1856 (2011).

13 *King* at 1862.

14 *Id.*

15 *King* at 1858 n4.

16 *Brigham City*, 547 U.S. 398, 406 (2006).

17 *King* at 1857.

18 *Id.* at 1859.

19 *Id.*

20 *Id.* at 1860.

21 *Id.* at 1861.

22 *Id.*

23 *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984); *California v. Beheler*, 463 U.S. 1121, 1125 (1983); *McCrory v. State*, 643 S.W.2d 725, 734 (Tex. Crim. App. 1982).

24 *Melton v. State*, 790 S.W.2d 322, 325 (Tex. Crim. App. 1990); *Meek v. State*, 790 S.W.2d 618, 621 (Tex. Crim. App. 1990); see *Ramirez v. State*, 105 S.W.3d 730, 739 (Tex. App.—Austin 2003 no pet.).

25 *Anderson v. State*, 787 S.W.2d 221, 228 (Tex. App.— Fort Worth 1990 no pet.).

26 *Berkemer v. McCarty*, 468 U.S. 420, 437-438 (1984) (holding normal questions incident to traffic stops are not custodial interrogation).

27 *Beckwith v. United States*, 425 U.S. 341 (1976); *Meek v. State*, 790 S.W.2d 618, 621 (Tex. Crim. App. 1990).

28 *United States v. Stevens*, 487 F.3d 232 (5th Cir. 2007) (citing *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988) (en banc)).

29 *Ramirez v. State*, 105 S.W.3d 730, 738 (Tex. App.—Austin 2003 no pet.); *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

30 *Ramirez*, 105 S.W.3d at 738 (citing *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) and *Shiflet v. State*, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)).

31 *Ramirez*, 105 S.W.3d at 739 (citing *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968)).

32 *Ramirez v. State* identifies some situations that might constitute custody. "1) when the suspect is physically deprived of his freedom of action in any significant way, 2) when a law-enforcement officer tells the subject he cannot leave, 3) when law-enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, or 4) when there is probable cause to arrest and law-enforcement officers do not tell the suspect he is free to leave. *Shiflet v. State*, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985). Our facts arguably meet all four of those criteria but so would any DWI stop. The hallmark of this area of law lies in the third prong. Would a reasonable person think he was restricted similar to formal arrest? I think the answer to that question is no. At least not yet.

33 *United States v. Shaw*, 701 F.2d 367, 380 (5th Cir. [Miss.] 1983), *cert. denied*, 465 U.S. 1067 (1984).

34 *Hearne v. State*, 534 S.W.2d 703, 707 (Tex. Crim. App. 1976).

35 Unless the defendant clearly invokes a right the officer can continue questioning or ask to clarify. See *Davis v. United States*, 512 U.S. 452 (1994).

36 *Dinkins v. State*, 894 S.W.2d 330, 350 (Tex. Crim. App. 1995).

37 *Martinez v. State*, 17 S.W.3d 677, 685 (Tex. Crim. App. 2000); *Ramos v. State*, 934 S.W.2d 358, 365 (Tex. Crim. App. 1996).

38 *Maryland v. Buie*, 494 U.S. 325, 328 (1990).

39 *Id.* at 331.

40 *Id.*

41 *Id.* at 336.

42 See *United States v. Maldonado*, 472 F.3d 388, 394 (5th Cir. 2006).

43 *King*, 563 U.S. ___, 131 S. Ct. 1849, 1856 (2011).

44 *Ramirez*, 105 S.W.3d at 738 (citing *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) and *Shiflet v. State*, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)); *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

45 My own two cents. And special thanks to my wife for helping me write this article.

Not so squirrely after all

Harris County appellate prosecutors recently won an appeal where defense attorneys (loudly) claimed actual innocence. Here's how the State saw that justice was done in an almost completely circumstantial murder case.

One of my favorite movies is *Up*, the Pixar film in which an elderly man and a boy travel to South America in a house carried along by countless helium balloons. I know, I know: an unlikely scenario. But it is an animated movie, and anything can happen in an animated movie.

By Alan Curry
Assistant District Attorney in Harris County

When the man and the boy reach their destination, they are confronted by an evil genius who has trained several dogs to be his servants. These well-trained dogs can speak through a device on their collars so that humans can understand them, but they are still dogs, with the same instincts and desires of regular dogs. They are especially distracted by squirrels, even when the bushy-tailed critters are nowhere to be seen. The dogs will be talking about something, then suddenly stop and yell, "Squirrel!" with all the attention and earnest of a trained hunting dog.

As prosecutors, we oftentimes hear defense counsel alert us to their clients' actual innocence or an unknown person's guilt. If you're a prosecutor for any amount of time, you will hear it quite often and with increasing frequency. You will tire of the claims, as you hear them repeatedly, and find out that there is very little substance to most of them, which are nothing more than phantom squirrels.

But unlike cartoon dogs in a movie, defense counsel making such claims cannot be ignored. For every phantom squirrel in our practice, there is always the possibility of a Michael Morton or an Anthony Graves, and we have to ensure that an actually innocent person has not in fact been wrongly convicted. This special attention is never more important than in circumstantial evidence cases. And that brings me to the David Temple case.

Circumstantial case

I have prosecuted a couple of thousand cases on appeal, but the David Temple case—where he murdered his wife, who was several months pregnant—proved to be one of the most circumstantial cases that I have ever handled. From the very beginning, the defendant and his various attorneys have proclaimed Temple's innocence, and, from the very beginning, they have pointed to the guilt of a teenage neighbor. As prosecutors, we should be prepared to respond to claims of actual innocence and third-party guilt at whatever stage these claims occur. We should not summarily reject them, but they should be closely examined because we have a duty to see that justice is done.

On January 11, 1999, Belinda Temple, who was seven months pregnant with her second child, was found murdered in her upstairs master bedroom closet at her home in Katy. She had been shot in the back of the head with a 12-gauge shotgun some time in the afternoon. There were signs of forced entry to the residence, and no murder weapon was ever recovered. After Belinda had arrived home that afternoon, her husband, David Temple, left the house with their young son and traveled to various locations throughout the city. He and his son returned to the residence later in the afternoon, and he then alerted neighbors to an apparent burglary and called the police soon thereafter.

The defense would have us believe that a burglar wielding a shotgun had shot and killed Belinda while David and his son were away. They believe that a teenage boy, Riley Joe Sanders, who lived next door, had committed the crime with a shotgun that perhaps belonged to his family. And the boy in fact had skipped school on that particular day with some of his friends, and the police knew that these boys were suspected of committing burglaries and smoking marijuana. Sanders may have even had a motive: He disliked Belinda Temple for being a strict disciplinarian at school, where she was a teacher, and at home, where she com-

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plained about the boys leaving beer bottles lying around. Sanders was investigated by the police, and he repeatedly failed polygraph exams.

But the facts of the case are not quite that simple. Police almost immediately realized the burglary had been staged. Glass had been broken at the apparent point of entry at the back door, but the glass was strewn about on the floor as if it had been broken after the door had already been opened. Drawers were opened in various locations in the residence, but nothing was disturbed. A television had been moved from a table to the floor, but it was still plugged into the wall. Jewelry was left out in the open in the bedroom where Belinda was killed, and jewelry was left on Belinda's body. Nothing appeared to have been stolen from the residence.

Perhaps the most important factor was the Temples' dog. This dog was notorious for violently barking when strangers drew near the Temples' backyard. Because of the dog, David's neighbor was prevented from following David into the house to investigate the apparent burglary. Similarly, responding officers were prevented from entering the backyard and the residence until David moved the dog into the garage. Even in the garage, the dog continued to bark ferociously. But throughout the entire afternoon of the offense, no one in the neighborhood heard the Temples' dog barking, even though people were walking and moving along the street throughout the entire afternoon, returning from work and school. No stranger could have reasonably gotten past the dog to commit a burglary of the Temples' residence.

And David Temple had motive for killing his pregnant wife. He had entered into a romantic relationship with a fellow teacher at his school, where he was a coach. On New Years Eve, he spent the entire holiday with this other woman, even though he told everyone else, including his pregnant wife, that he was going hunting. On January 5, 1999, the other woman talked about ending her romantic relationship with David, but three days later David informed the woman that he was in love with her. She stated that she felt the same way. Immediately after Belinda was murdered, David was unusually calm. He later showed a great deal of interest in how all of these tragic events were affecting the other woman. David and this other woman eventually renewed their relationship, and they were married.

The high-profile trial

After much investigation and after the case had been closed and then reopened, Kelly Siegler, a long-time assistant district attorney with the Harris County District Attorney's Office, took over the case. She had handled many high-profile cases for the office in the past, and she had gone up against David Temple's attorney, Dick DeGuerin, as well. (Mr. DeGuerin was himself no stranger to high-profile cases.)

Both sides presented all of the facts detailed above during a very lengthy, hotly contested trial. Kelly Siegler and her co-counsel, Craig Goodhart, carefully put all of the many pieces together to show that David Temple must have been the person who murdered Belinda Temple. He had the motive and the opportunity. Riley Joe Sanders testified as the State's last witness, and he was vigorously cross-examined by Mr. DeGuerin. Presented with all of this evidence and the competing theories, the jury found David Temple guilty of murder in November 2007, and he was sentenced to life in prison.

The appeals process

Of course, the defense appealed David Temple's conviction, and that is where I came in. Stanley Schneider joined Dick DeGuerin on the appeal, and I responded to the 70-page brief that raised 80 points of error. The brief challenged the sufficiency of the evidence, but it also challenged Kelly Siegler's actions and inactions throughout the entire proceedings. As it had at trial, the defense made claims that Kelly had committed *Brady* violations concerning Riley Joe Sanders. But the defense had more than enough to suggest that this teenage boy was the person who actually committed the murder of Belinda Temple. It took me about six months to respond to all of the allegations in the very lengthy brief, but the appellate courts proved to be primarily concerned about only one thing—the sufficiency of the evidence to support David Temple's murder conviction. On December 21, 2010, the Fourteenth Court of Appeals upheld that conviction, but the justices were badly split over what standard of review should be applied.[1] The Court of Criminal Appeals granted David Temple's petition for discretionary review on January 11, 2012, seeking to review only the sufficiency of the evidence.

Temple murder timeline

Sometime in 1998 David Temple told Belinda Temple that he was going on a hunting trip with some friends during the New Year's weekend, but he instead used that opportunity to spend time with Heather Scott.
December 31, 1998 David Temple spent the holiday weekend with Heather Scott, and they continued their romantic relationship and engaged in sexual intercourse during that time.
January 5, 1999 Heather Scott talked with David Temple about ending their romantic relationship.
January 8, 1999 David Temple told Heather Scott that he had fallen in love with her, and she stated that she felt the same way.
January 11, 1999 The date of the offense
11:40 a.m. Deborah Berger takes a phone call from daycare center, where her young son, Evan, is sick. Deborah tells Belinda Temple about the call.
11:55 a.m. Belinda's cell phone calls Alief School where David Temple works (the call lasts 32 seconds).
12:03 p.m. Belinda's cell phone again calls Alief School (4:14 minutes).
12:08 p.m. Belinda's cell phone once again calls Alief School (1:04 minutes).
12:09 p.m. Belinda's cell phone yet again calls Alief School (59 seconds).
12:11 p.m. Belinda's cell phone again calls Alief School (34 seconds).
About Noon Belinda picks up Evan at the daycare center. About the same time, Belinda called David Temple from home regarding Evan and needing relief.
12:30–12:40 p.m. David Temple arrives home.
1:00 p.m. Belinda returns to school.
3:00 p.m. Nothing unusual at the Temple home.
3:30 p.m. Belinda finishes meeting at school.
3:32 p.m. Belinda calls David Temple at their house to say that she is on her way home. After leaving school, Belinda went to her in-laws' home to pick up some soup, and she left their residence at about 3:45 p.m. Belinda Temple is never heard from again.
3:40 p.m. Nothing unusual in the neighborhood.
3:45 p.m. Belinda gets home, and David Temple says that she is tired and wants to rest. "While she was resting, I took my son to the park, near my subdivision, and then to the grocery store and Home Depot." The trip to the Brookshire Brothers grocery store and Home Depot are verified, but the trip to the park is not. David Temple and Evan leave their home, but it appears that Evan rode in David Temple's pickup with no car seat.
4:00 p.m. Nothing unusual in the neighborhood.
4:20 p.m. Nothing unusual in the neighborhood. The Temples' dog was not barking.
4:25 p.m. The Parkers' dog was barking and running up and down along the fence line. The Temples' dog was not barking.
4:30 p.m. Nothing unusual at the Temple home; the Temples' dog was not barking. A four-door, light-colored sedan with two young men drove quickly out of the neighborhood.
4:32 p.m. David Temple and Evan enter Brookshire Brothers on the other side of the Katy Freeway.
4:38 p.m. David Temple and Evan leave Brookshire Brothers and walk toward parking lot.
4:38 p.m. Brenda Lucas makes telephone call to Belinda Temple, but Belinda does not answer.
4:40 p.m. Temple answering machine records Brenda Lucas' call to Belinda. Some young children in the neighborhood claimed to have heard a loud boom that sounded like a gunshot. No one else in the neighborhood reports hearing such a gunshot.
4:50–5:00 p.m. Buck Bindeman sees David Temple at Katy Hockley Cut-Off and Morton Ranch Road intersection facing southbound, coming from an area north of the Brookshire Brothers, but after David Temple and Evan had already left Brookshire Brothers and coming from the area where David Temple's parents lived and where he had often hunted.
5:10 p.m. Nothing unusual in the neighborhood. David Temple's dog was not barking.
5:10 p.m. Temple answering machine records Kenneth Temple's call asking about his grandson, "little man."
5:14 p.m. David Temple and Evan enter Home Depot.
5:25 p.m. Angela Vielma sees the Temples' blue pickup and David Temple as garage door closes at Temple home. David Temple's dog was not inside the garage, and it was not barking.
5:30 p.m. Kenneth Temple called the Temple home again, received no answer, and left no further message.
5:40 p.m. Maureen Temple called the Temple home, received no answer, and left no message. David Temple knocked on the Ruggieros' door.
5:36 p.m.* Mrs. Ruggiero's call to 911.
5:38 p.m. David Temple's call to 911.
5:41 p.m. Mr. Ruggiero could not make it into David Temple's home because of aggressive and barking dog in the backyard.
5:42 p.m. Mrs. Ruggiero called David Temple on the telephone but received no answer.
5:45 p.m. Mr. Ruggiero called David Temple on the telephone but received no answer.
5:49 p.m. Sergeant Gonsoulin and Deputy Johnson arrive at the Temple home.
5:54 p.m. Sergeant Gonsoulin and Deputy Johnson could not enter Temple home because of barking and aggressive dog.

** Note: The discrepency between when Mrs. Ruggiero called 911 and when David Temple knocked on her door (that is, Temple would've had to knock on her door before*

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Once again, our briefs before the Court of Criminal Appeals were very lengthy, even though they focused only on the sufficiency of the evidence to support the murder conviction. The oral argument before the court was held on June 20, 2012, and it was very lively. However, based upon the questioning from the court, it did not appear that the court was ready to overturn a jury verdict unless there was a very good reason. What I did not know at that time was that the defense was working on another way to bring relief to their client, even while the direct appeal was still pending.

It seems that in May, a young man contacted Mr. DeGuerin and allegedly presented an alternate version of the facts that would implicate Riley Joe Sanders and perhaps some of his friends in the murder of Belinda Temple. I did not learn about this individual until after the oral arguments had been completed. Even though I doubted the credibility of this individual's claim, especially because he had come forward for the first time more than 13 years after the murder, I believed (and still do believe) that the claim needed to be investigated. And it was: Our office hired a special prosecutor, Brad Beers, to investigate, and the Harris County Sheriff's Office conducted its own investigation.

While Mr. Beers was still conducting his investigation, the sheriff's office was pursuing its own investigation, and the direct appeal before the Court of Criminal Appeals was still pending, the defense decided to file a new claim for relief before the trial court. On September 10, the defense filed an "Out-of-Time Motion for New Trial or Alternative Application for a Writ of Habeas Corpus." The defense wanted to have a full evidentiary hearing on the claims of the young man who had come forward 13 years after the murder, and they wanted to explore alleged *Brady* violations by Kelly Siegler.

If you have prosecuted cases on appeal for any length of time or if you have handled post-conviction writs of habeas corpus, you know that a defendant cannot file an out-of-time motion for new trial after the time for the filing of a motion for new trial has expired. And a defendant cannot file an application for a writ of habeas corpus while the direct appeal is still pending. As earnest as the defense might have been in claiming David Temple's innocence, they did not have a legal leg to stand on. Although a prosecutor's office should always be willing to see an innocent man exonerated, I would never feel comfortable hiding behind a procedural rule to keep relief from being granted to such a man. We are now all too familiar with cases like Morton and Graves—but the Temple case is not that type of case.

The various investigations quickly revealed that there was very little substance to the story told by the individual who came forward some 13 years after Belinda Temple's murder, and the *Brady* claims raised by the defense had all largely been addressed both at trial and on direct appeal. So I filed a reply to Schneider's and DeGuerin's request for a hearing on a motion for new trial or a writ of habeas corpus, pointing out that the trial court did not have jurisdiction to rule on either claim for relief, and that both claims should be dismissed for that reason. But I did not want to leave the public with the impression that the defense had uncovered a valid actual innocence or *Brady* claim. I wanted to respond on the merits to the defense's claims as well.

As they have done from the very beginning, the defense has continued to place a great deal of emphasis on the tight timeframe in which David Temple would have had to murder his wife and travel to various locations throughout the city of Katy (not necessarily in that order). That narrow window has always been an issue in the case, and it was presented to the jury. But even though the defense has tried from the very beginning to place the blame for Belinda Temple's murder upon one or more teenage boys, the defense has still yet to present anything that explains how one or more teenage boys were able to commit the murder of Belinda Temple within that same tight timeframe—all while not be seen by anyone and successfully interacting with the Temples' very aggressive dog. So once again, my reply to the defense's latest motions included the lengthy facts of this case to show that David Temple was still the person who had committed this horrible crime. (See the timeline on the previous page for more details on what happened the afternoon Belinda was killed.)

My reply also included an affidavit from the lead trial prosecutor, Kelly Siegler. She was understandably upset by all of the allegations that the defense had once again leveled against her. Kelly reviewed the

entire file all over again, just as she had done numerous times so many years before. She then prepared a very detailed affidavit in which she refuted each and every one of the defense's allegations and in which she challenged the credibility of the new evidence that the defense was presenting. Almost from the very beginning, Kelly has been attacked mercilessly by the defense. To be sure, she tries a hard case, and she is quite aggressive, but keep in mind that Kelly Siegler is the same prosecutor who was appointed to look into the Anthony Graves case and recommended his exoneration.

I myself have been an appellate prosecutor for over 24 years, and I would be the first person to suggest relief for David Temple if I thought he deserved it. I have gotten to know Belinda Temple's family, and I have gotten to know her a little from reading and hearing about her. She was a beautiful young woman who was carrying her second child, and she did not deserve to be brutally murdered in her own home. I want to make sure that the person who committed this heinous crime spends the rest of his life in prison. I believe that person is David Temple, but I will always keep my eyes open, as all prosecutors should.

The trial judge agreed with the State that he did not have jurisdiction to address to the defendant's out-of-time motion for new trial or the application for a writ of habeas corpus, and he dismissed the defense's motions. The defense attempted to get a court of appeals to force the trial judge to hold a hearing by way of a petition for a writ of mandamus, but the court of appeals refused. The defense attempted to file a writ of habeas corpus with the Court of Criminal Appeals while the direct appeal was still pending, but that was also rejected. The Court of Criminal Appeals upheld David Temple's murder conviction on January 16, 2013. There were no dissents. One would assume that the defense will now be filing a proper application for a post-conviction writ of habeas corpus, and this office will be prepared to respond when it comes.

Advice for prosecutors

Especially when you are working on appeal, I would strongly urge you to do something in your work as a prosecutor: Consider the victim and her family. Communicate with them, even if you are working on appeal. The appellate process is remarkably time-consuming, and it is very difficult for the average citizen to understand why the process takes so incredibly long. To be frank, it is hard for ME to understand on occasion, and I have been doing this for a long time. Consider how the victim's family is feeling. How do you think Belinda Temple's family felt when the Court of Criminal Appeals granted the defendant's petition for discretionary review on January 11, 2012, the anniversary of Belinda's murder? So many years had passed, and a great deal of time had gone by since the court of appeals had upheld the conviction—but it was still not over. How do you think that they felt when they heard that our office and the sheriff's office were investigating whether the same teenage neighbor boy had committed Belinda's murder, when a jury had rejected that same claim so many years before? They were angry and upset, and I frankly could not blame them. But that does not mean that I do not take their phone calls, and it does not mean that I chide them for their feelings while I am so busy. I always tried to explain as best I could what was happening. I was glad to do that in this case. Belinda Temple's family is wonderful, and it has always been my honor to seek justice on Belinda's behalf.

Prosecutors always have a duty to see that justice is done. And that often and usually means that we should diligently seek to prove beyond a reasonable doubt that a man is guilty of a criminal offense. We have to know our facts well, even if the facts are as incredibly complex as they are in David Temple's case. We have to put all of the pieces together for the jury, trial judge, and appellate courts. If the defense attempts unusual tactics, as they have in the David Temple case, we should be prepared to respond, and if necessary, try to stop them. We should not get distracted from our duty to see that justice is done.

But do not ignore claims of actual innocence or *Brady* violations out of hand. They can be tiring, especially when we see them again and again, but examine them carefully nonetheless. If they deserve to be heard, then let them be heard.

If you ever need assistance on claims like these, please feel to contact me. I would be glad to help. ❇

Endnote

1 See *Temple v. State*, 342 S.W.3d 572 (Tex. App.—Houston [14th Dist.] 2010, pet. granted).

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Nominations needed for Outstanding Government Lawyer Award

For the past two years, the Government Law Section of the State Bar of Texas has presented the Outstanding Government Lawyer Award in recognition of an outstanding government lawyer who has provided exemplary service to the profession and the public. The award honors a practicing lawyer employed by the government or involved in a government-law-related business or employment who has made an outstanding contribution to government service. There have been two recipients of the award: Charles Zech in 2011 and Scott N. Houston in 2012.

Please take a moment to nominate someone that you know who deserves this award. It will be presented at the State Bar of Texas Suing and Defending Governmental Entities Course, Government Law Boot Camp, on July 17, 2013, at the Doubletree hotel in Austin.

The nominee should exemplify the ideals of dedication, professionalism, and ethics in service that have benefited the public or a governmental entity. The nominee should also have made outstanding contributions in providing legal services in the public interest. All nominees must be a member of the Government Law Section of the State Bar of Texas in good standing.

Nomination for 2013 Outstanding Government Lawyer Award

1. Name of nominee, plus his or her title, address, phone number, and email address.
2. Nominee's government agency or government-law-related business or employment.
3. Number of years nominee has practiced law.
4. Attach a current resume of the nominee, if possible.
5. Describe in detail the contributions made by the nominee that exemplify the ideals of dedication, professionalism, and ethics in service that have benefited the public or a governmental entity. Describe in detail the contributions made by the nominee in providing legal services to the public. Please attach supporting information to assist the committee in its selection.
6. Names of person/organization submitting this nomination, plus his or her address, telephone number, and email address.

Completed nomination forms must be submitted by April 5 to Penny Wilkov by e-mail at Penny.Wilkov @soah.state.tx.us; by fax at 512/475-4996; or by mail to her attention at 300 West 15th Street, Austin, TX 78711-3025. ❇