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

Just disclose it

Don't get burned by thinking that a prosecutor's duty to disclose hinges on the information's materiality and admissibility. The Board of Disciplinary Appeals says that Texas ethics rules require prosecutors to disclose everything.

In *Schultz v. Commission for Lawyer Discipline of the State Bar of Texas*,[1] the Board of Disciplinary Appeals (BODA), appointed by the Texas Supreme Court, held that a prosecutor's *ethical* duty to disclose favorable[2] information and evidence to the defense—pursuant to Texas Disciplinary Rules of Professional Conduct 3.09(d) and 3.04(a)—is broader that the prosecutor's *legal*, constitutional duty of disclosure imposed by *Brady v. Maryland*[3] and its progeny.[4] That's because the ethical duty to disclose allows a prosecutor no discretion to withhold favorable information or evidence because he subjectively considers it either immaterial or inadmissible.[5] In reaching this conclusion, the BODA affirmed an evidentiary panel's decision that a Texas prosecutor violated ethics Rules 3.09(d) and 3.04(a) by failing to disclose favorable information required to be disclosed under those rules.[6]

By Melissa Hervey
Assistant District Attorney in Harris County

How did this happen?

The *Schultz* disciplinary case originated with the prosecution of Silvano Uriostegui for the aggravated assault with a deadly weapon of Maria Uriostegui, his estranged wife, by the Denton County District Attorney's Office.[7] In the underlying criminal case, Maria was attacked and stabbed in her apartment bedroom at night; the only light in the area was from a TV in another room.[8] Maria told the police that Silvano had attacked her and testified to it in a hearing for a protective order.[9]

In 2011, when Assistant District Attorney Bill Schultz became the chief of the family violence division of the Denton County District Attorney's Office, he took over the Uriostegui case from another prosecutor.[10] Silvano's defense attorney requested and received the State's initial production of discovery from the original prosecutor but asked for additional discovery, including all evidence favorable to Silvano, in June 2011.[11] Schultz and Silvano's defense counsel met several times before trial to discuss discovery.[12]

In January 2012, one month before Silvano's case was set for trial, Schultz and several other people from the Denton County District Attorney's Office met with Maria.[13] During that interview, Maria stated

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Welcome the new TDCAA training team!

I am happy to report that the revamped TDCAA training team has hit the ground running. **Brian Klas**, formerly of the Williamson County Attorney's Office, is our new Training Director. Brian has a wealth of experience from his office, as a TDCAA speaker, and as a TDCAA faculty advisor. Joining him as our Meeting Planners are **Patrick Kinghorn** and **LaToya Scott**. Of course you all know Patrick, as he has been working for TDCAA part-time to support our Border Prosecutor Unit training and other TDCAA events. LaToya (pictured below with Brian) comes to us from the world of hotel management and most recently as the meeting planner at the Texas Association for Home Care & Hospice. Please welcome them next time you see them at a TDCAA seminar!

By Rob Kepple
TDCAA Executive Director in Austin

LaToya Scott and Brian Klas having some fun at February's Investigator School.

Use-of-Force Summit report

In November, TDCAA hosted a summit for prosecutors on the investigation and prosecution of police use-of-force cases. Thanks to a supplemental grant from the Court of Criminal Appeals, we were able to gather 40 Texas prosecutors who specialize in such cases, as well as folks from the Department of Justice in Austin. The purpose was to examine the "state of the State" when it came to such cases and to discuss future training and activities that may be needed moving forward. You can read a copy of the Summit Report on our website; just look for this article in this issue of the journal.

One of the reasons we wanted to gather was to evaluate how we handle these cases in light of the national criticism that prosecutors treat these cases differently from other criminal cases. There was quick agreement by the participants on one thing: Police use-of-force cases are handled differently because they *are* different. Peace officers have an affirmative duty to get involved when they think that crime is afoot. Indeed, the general public hires them and expects them to do just that. Furthermore, officers have specific training on use of force, have "rules of engagement," are authorized to use force in certain circumstances, and are allowed to rely on the general rules of self-defense.

All that said, the summit participants agreed that the public has the right to expect a thorough, fair, and transparent process. This may be one of those areas in which prosecutors are advised to pay attention to how their actions are perceived, as the perception of injustice in the general public (whether that injustice actually exists) can injure our ability to seek justice on a day-to-day basis in the courthouse.

One of the themes that emerged was the need for advance preparation. First, a prosecutor's office will be in a better position to handle such a case if the office has a history of outreach and openness in the community. In addition, prosecutors and law enforcement need an advance plan as to who will investigate officer use-of-force cases. Some departments insist on investigating their own officers, but there was widespread agreement that the use of an outside agency is the best practice.

It was also clear that different offices handle these cases in different ways. There was plenty of good discussion on a number of questions: Do you bring in special counsel? Do you contact the family of the deceased? Do you go to the scene? If you go to the scene, what is your role?

Do you insist on an officer "walk-through" of the crime scene? What information do you release to the public? Do you release video if it is favorable to the officer? Should the officer be given a chance to view video of the event before making a statement? Should the prosecutor make a recommendation to the grand jury? If there is a no-bill, what do you release to the public? If you go to trial on one of these cases, what are the issues a prosecutor will face?

Summit participants discussed many ideas for moving forward, including a track at this year's Annual Criminal and Civil Law Update devoted to the investigation and prosecution of these cases. Be sure to stay tuned for future discussions and training on these tough cases, and if after reading the report you have additional perspectives you want to share, please contact me at Robert .Kepple@tdcaa.com.

TDCAA training hits new highs

We at TDCAA pride ourselves in serving Texas prosecutors by providing timely, relevant, and accessible training. And it seems each year the demand for training grows. The TDCAA Training Committee, Investigator Board, Key Personnel Board, and Victim Services Board do a great job of designing that training. The numbers for Fiscal Year 2015 training are in, and we have smashed all previous records for number of attendees and per-person hours of training delivered. In FY 2015, we had 8,713 attendees at TDCAA courses. (The previous record was 6,642 in 2013.) We delivered 59,066 hours of training, beating the previous record of 53,897, also set in 2013.

The difference-makers? Online *Brady* and ethics training, growing Prosecutor Trial Skills Courses, a huge Annual Update, and Border Prosecutor Unit training. Most importantly, the various committees and TDCAA staff have continued to bring quality training to you. To those committee members and staff, thanks for all you do.

The system's not broken

If you keep up with the various criminal law journals, news articles, and advocacy group missives, you are hearing a constant refrain: The criminal justice system is broken. It occurred to me as I watched the baby lawyers at our Prosecutor Trial Skills Course in January that someone new to prosecution could easily get confused by this consistent message. Here they are, swimming in a sea of cases without enough time or resources to deal with all of the crime on the dockets, yet they hear from the media and elsewhere that somehow the system is broken because we are putting people in jail (well, mostly putting people on probation). But sometimes when the crime is particularly heinous or the victim particularly vulnerable, juries will hit defendants with long (or even life) sentences—then people complain to the media that the State is putting people in prison for unreasonably long sentences. It sure seems like a disconnect between what is really happening in our courtrooms and what some de-incarceration advocates are claiming. As the prosecutor who just got a stiff prison sentence for a violent guy, you were thinking the system was working as the public wants it to. The jury—a group of citizens—had no trouble with such a long sentence for such a dangerous criminal.

Here is the thing: The system today is working exactly the way it was designed to work when the Penal Code and penitentiary system was overhauled in the mid 1990s. Some of us remember when it was really broken in the 1980s: County jails and a small state prison system were overrun with people awaiting trial and those who had been convicted. It was common that convicted felony prisoners would be paroled straight out of the county jail—"parole in absentia" they called it. Heck, often we could try a drug dealer who had never actually gone to the pen on his first two convictions as a habitual criminal. During those dark days of the '80s, our Legislature reacted to the overcrowding problem by quietly reducing the time served for violent offenders from one-third to one-quarter time. Not exactly a well-thought-out solution. And if you lived in Houston, you remember the night that the Harris County Jail was forced to open the sally port door to let hundreds of people out of an overcrowded jail to just run off into the night. Now *that* was a broken system.

So the Legislature got a grip on the problem, produced a Penal Code that led the nation in clarity and consistency, beefed up the prison system to house violent offenders, and created the state jail felony to deal with the rest. And significantly, the Legislature created a system whereby the state could track exactly who was going to the pen, why, and for how long. No more "legislation by anecdote."

For the last 20 years the system

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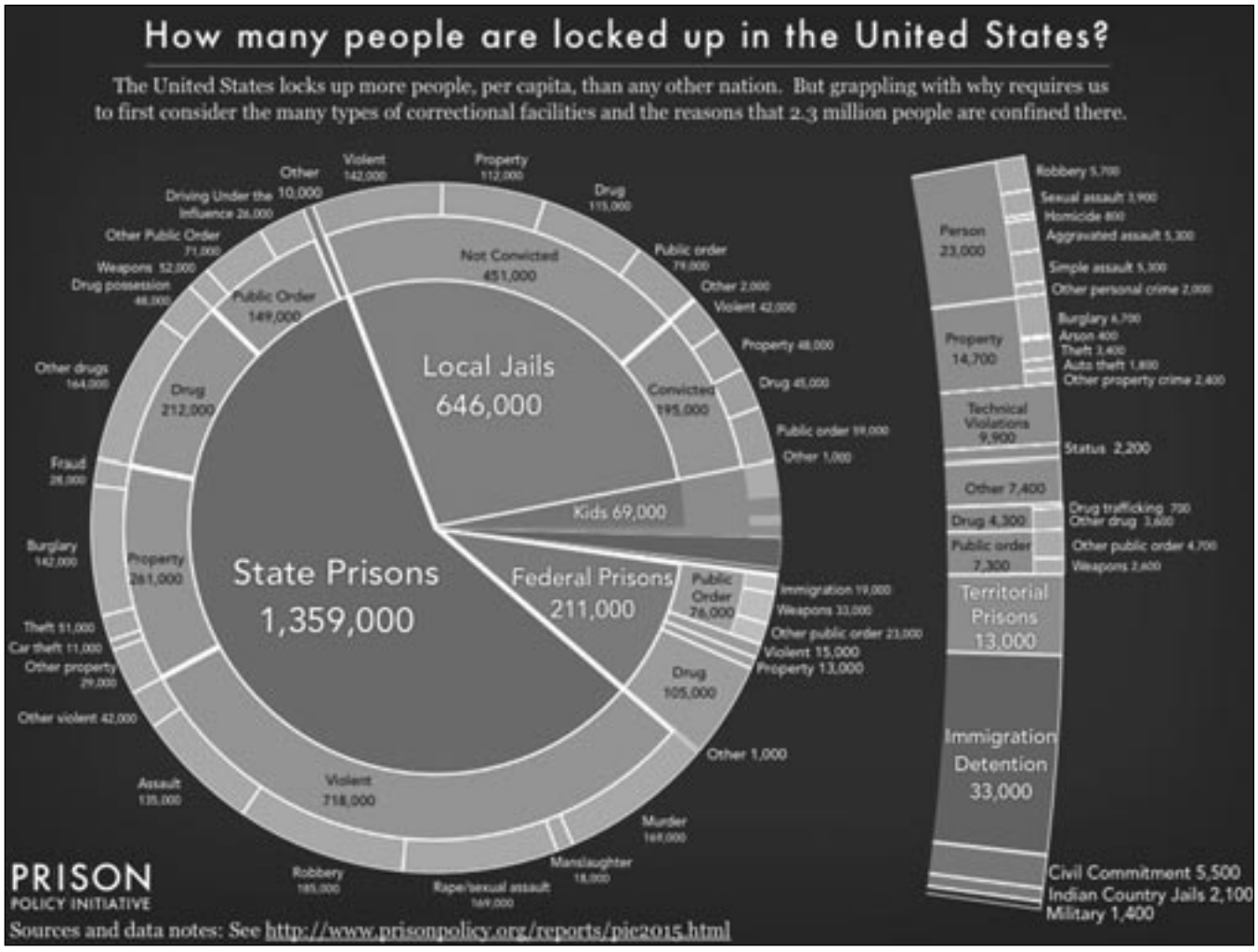
has pretty much worked as anticipated, with the Legislature keeping an eye on the whole thing and making adjustments along the way, such as beefing up resources for diversions and treatment and increasing penalties for violent sex offenders, human traffickers, and the like. Last time I checked, Texas juries have continued to use the punishment ranges afforded to them. Check out the two graphics, at right and below, illustrating who is incarcerated in the United States—to a large extent, penitentiary resources are devoted to the incarceration of violent individuals. (You can go to this link, www .prisonpolicy.org/reports/pie2015.ht



ml, to read more on these numbers.)

So … once more with feeling … The system is not broken! It is working as intended. De-incarceration advocates may believe that the policies adopted by the Legislature in the 1990s are no longer viable and need to be adjusted. They may believe that violent offenders, who take up the majority of beds in the pen, should no longer face long sentences. They may believe that lots of crimes should be outright abolished. They may want to make improvements and add new procedures to insure justice. Fair enough. Advocating for a change in policy is fine, and a debate on how the system could be adjusted is a healthy thing. Heck, there are many things prosecutors want to change as well, and those changes are usually *not* about more incarceration. But for all of you who go to court every day with the conceit that you are doing good work to protect the public, rest assured that you are not part of a broken system.

And one more thing. To the "Cut 50" folks who advocate that we cut the prison population in half (and do it quickly): Take a look again at that pie chart and tell the public more about your plans to drastically reduce the time violent offenders serve. You can't make a significant dent in the prison population without letting these criminals out on the street. At some point we'd sure like to hear a plan for reducing the prison population and keeping citizens safe at the same time. ❇

The President's Column

8-liners in Texas: still illegal

Recently, I had an interesting encounter with an elderly lady who accosted me at the local *tortilleria*—I was picking up tamales for my family's Christmas *tamalada*. This woman vented her frustrations about the way I was "going after" gambling rooms in our county; she considered them totally harmless, especially in an area where there was otherwise "nothing to do." I was taken aback by her very public expression of ire—all I wanted was tamales.

By Bernard Ammerman
County and District Attorney in Willacy County

I explained that I was just the prosecutor, not the police who raided her room. She reiterated that the casino was just clean entertainment. Then she told me of an old couple she knew who had frequented this particular game room; they had died after said establishment was raided and closed (temporarily) in 2013. She was blaming me, indirectly, for their deaths. I told her that my sister is a medical doctor and that I would ask her if the casino's closure and her friends' deaths could be related or even plausible.

Later that day, at my family's Christmas celebration, I dutifully asked my sister about the lady's insistence that her gambling buddies had died (of boredom?) after their casino was shut down. Her reply was that shutting down a casino couldn't cause death but that, yes, it could result in a loss of votes. I guess that comes with the territory and with the unwritten effects of the local DA's job description. I felt a bit relieved at my sister's answer, but my encounter at the meat market just goes to show how common these game rooms are and how hard they are to fight—even some of the citizenry is against us.

The struggles in my county

My jurisdiction, Willacy County, is located on the southernmost tip of Texas in the lower Rio Grande Valley. Willacy has a population of roughly 22,000 and is sometimes known, however unfortunately, as a county populated by prisons. A county jail, state jail, federal jail, and criminal alien requirement detention center are some of the landmarks. The county boasted a Walmart Supercenter up until a few weeks ago, when it all too suddenly closed its doors and took with it jobs and needed revenues. We do have an HEB grocery store of statewide cal-

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iber and a once-thriving oil and gas industry, as well as wind farms that dot the countryside with stately windmills.

Because Willacy County is greatly dependent on oil and gas, the recent decline in oil prices has dealt the county a serious economic blow. Added to that loss of income, Willacy County suffered a prison riot, and, as noted earlier, Walmart decided to shut its doors with little warning. All told, the aftermath of these unexpected downturns has resulted in a painful loss of jobs and income to the county and its people. A previous county budget of approximately $8 million was shaved to $6 million—a debilitating 25-percent cut.

Gambling thrives

While Willacy County revenue sources have been limping along and even disappearing, another kind of business enterprise has been booming: gambling rooms, and they are brimming with 8-liners. Commonly called *maquinitas* (Spanish for "little machines"), 8-liners are video slot machines, and they feed the gambling addictions of the poor. They operate in murky atmospheres and engage in perpetual cat-and-mouse games with the authorities. On the surface, operations are above-board and within their legal rights to own, operate, and play the machines; they even pay hefty fees to open and run their establishments. By law, they may not pay cash prizes to their clients, but many Rio Grande Valley 8-liner establishments blatantly break the law by paying out more than what's allowed (a prize of not more than 10 times the amount of the bet or $5, whichever is less). One example was when the Raymondville Police Department and Willacy County Sheriff's Office raided some 8-liners because the machines were still paying out more than $5 per play. To remedy that, operators quickly reprogrammed their *maquinitas* to pay lesser amounts that fell into compliance. How long before the machines were reprogrammed to their original payouts is anybody's guess.

They also skirt the law by awarding *indirect* cash payouts. For example, when casinos were busted for paying cash, they immediately moved to novelty .999 fine silver coins or flecks of silver—which is quickly converted to cash at the neighboring gold and silver exchange. A defense attorney tried to convince me that silver does not constitute cash because the government removed it as currency decades ago. I contend that the casinos and the gold exchanges are in cahoots.

Because of these cat-and-mouse shenanigans, some communities have few incentives to investigate gambling rooms. Their city officials have simply begun requiring 8-liners to pay for costly permits to set up shop in their towns. (Lyford is one of those cities.) Operators are well aware that Willacy County lacks the resources—and even the will—to prove whether or to what extent cash is exchanged in their operations, and they have flourished. Small wonder they have become so common even in Texas, a state that publicly and officially is keeping casinos out while quietly and unofficially allowing 8-liner game rooms to proliferate. The argument then follows that if the gambling rooms are paying for permits to operate, why should authorities hound them? And at a time when county revenues are but a fraction of other years, one cannot negate that the needy cities of Willacy County can use the revenues these game rooms provide.

As a result, 8-liners have become a constant headache to local law enforcement and to me as the county prosecutor. One morning I was awakened by my chief investigator with a report that a local 8-liner game room had been broken into. The stolen items included cash and silver. The law enforcement agency asked me to pay a confidential informant to help recover the stolen funds, so that once recovered, the assets could be returned to the gambling room. I was (and am) vexed, as would be any taxpaying citizen of Willacy County. I have a duty to seek justice for the citizenry, certainly—but does that obligation extend to using the resources of this office to go after a criminal with the ultimate goal of returning assets to yet another unsavory individual who may be breaking the law as well? I believe I spoke for the citizens of Willacy County when I said no. ❇

Online *Brady* training

Just a reminder to all new prosecutors: The law requires that you take a course on *Brady* and the duty to disclose exculpatory and impeaching evidence that is approved by the Court of Criminal Appeals within 180 days of beginning your job. It just so happens that you can find that course online and for free at http://tdcaa.litmos.com/ online-courses. We at TDCAA keep track of who has taken the course and report it to the proper authorities.

By Rob Kepple
TDCAA Executive Director in Austin

Thanks, Joe Shannon

I want to thank **Joe Shannon**, our former CDA in Tarrant County, for his recent generous donation to the Foundation. Joe did something much appreciated as he closed out his political accounts after his retirement: As authorized by law, he donated the unused funds to an educational foundation—in this case, TDCAF. Joe has always been a great supporter of prosecutor training and of the mission of TDCAA, and we thank you, Joe, for finding yet another way to show your support.

Annual Report available

The Foundation's Annual Report for 2015 is on its way to donors' mailboxes as this issue goes to press. (If you'd like one, email the editor at sarah.wolf@tdcaa.com to request a copy, or go online at www.tdcaa.com/publications, and look for this issue of the journal to find a PDF version of the report.) It explains how the Foundation has been supporting TDCAA's training efforts over the past year, thanks our donors and corporate sponsors, and goes into detail about what to expect in the year ahead.

Honoring achievement

Lots of great things happen to our friends at the courthouse and the office. They get great verdicts, help crime victims, and track down witnesses who are crucial to our cases. Remember that a great way to recognize someone is to give a contribution in their honor to the Foundation. It is a way to let someone know that he or she has stood out, and it gives back to the profession. For a list of recent gifts to the Foundation, see the box at left. ❇

*Recent gifts to the Foundation**

Richard Alpert
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* gifts received between December 4, 2015, and February 5, 2016

How Bexar County operates

A large part of my job as Director of Victim Services is to travel across Texas visiting prosecutor offices (on request) offering training, assistance, and education on victim services and how best to help crime victims who are encountering the criminal justice system. Training prosecutor staff personnel may involve an in-office group presentation or individual one-on-one training. Effective training on and knowledge of state laws regarding the rights of crime victims help prosecutors and victim assistance coordinators (VACs) overcome potential obstacles they may face down the road.

By Jalayne Robinson, LMSW
Victims Services Director at TDCAA

In January, Assistant Criminal District Attorney Bill Squires asked me to give a 1½-hour presentation to Bexar County's victim service specialists on victim assistance programming and time management tips, as well as an hour of training to prosecutors on how a victim assistance program can help them.

Before the training, Victim Services Director Cyndi Jahn took me on a tour of the office, and I learned more about how Bexar County runs its program. It's a very busy office, with about 15,000 felony and 50,000 misdemeanor cases filed every year. Cyndi told me that her staff of 38 advocates (plus an administrative supervisor, an office assistant, and Cyndi herself) met in-person with more than 9,400 victims, accompanied 3,400 victims to court, and made 22,000-plus phone calls to victims and witnesses in 2015 alone. Whew!

I found out that Bexar County assigns its victim advocates to a particular division of the office (juvenile, family violence, child abuse, protective orders, etc.) and to a single court so that they work with the same subject matter and with the

TOP PHOTO: Office Assistant Agnes Lopez (left) and Victims Services Director Cyndi Jahn (right). ABOVE (back row, from left to right): Amy Villarreal, Janet Rodriguez, Alexandra Bojorquez, Eloise Cortez, Monica Guillen, Lupe Lopez, Michelle Hilliker, Norma Alatorre, and ACDA Bill Squires. Front row, left to right: Dwayne Larimore, Jessica Munoz, Mae Arredondo, Amanda Infante, Rachel Guerra, and Vicky Lopez.

prosecutors assigned to that court. This arrangement allows victim assistants to see cases through from beginning to end, even if the prosecutors can't. "Because prosecutors can rotate through the different courts and divisions fairly frequently," Cyndi explained, "it is really important to the victims to maintain the consistency in knowing and trusting their advocate."

And while the 38 advocates do all of the usual tasks on behalf of victims (keeping them apprised of court dates or plea agreements, assisting with victim impact statements, accompanying them to court, making travel arrangements, etc.), one advocate, Monica Guillen, handles all of the applications and filings for Crime Victims Compensation (among other things). "So with just a quick phone transfer, the victim can receive help applying for benefits," Cyndi says.

I was so impressed with how victims are given such personal assistance in Bexar County—and that's possible because the VACs are a consistent, knowledgeable presence in each court. It's a wonderful way to serve such a large jurisdiction of almost two million citizens. Thank you, Bexar County, for allowing me to tour your program, bring training to your staff, and share with our members here at TDCAA what good work you are doing in your community.

Another in-office visit

My next stop was the Coleman County DA's office—I had received a request from District Attorney Heath Hemphill to spend some time with Shayla Carter, the newly hired victim assistance coordinator (she's pictured below). The Coleman County DA's office is like many other small prosecutor offices where staffers wear many hats. Shayla, too, has other job duties, and one is being the VAC. She has been in her current position since last August and is new to victim services, and she was very eager to learn. I shared ideas with her about how to comply with Chapter 56 of the Code of Criminal Procedure when affording crime victims their rights, and I put her in contact with the Texas Department of Criminal Justice's Victim Services Division so she can complete her Texas Victim Assistance Training (TVAT) online. We also covered the Attorney General's Crime Victims' Compensation Program, the Victim Impact Statement process, and the numerous organizations that offer free pamphlets and brochures for her to hand out to crime victims.


Shayla Carter

TDCAA's in-office victim services assistance is designed to help brand-new VACs (like Shayla) as well as those with years of experience (like the advocates and assistants in Bexar County). Please reach out to me, and I will develop either group or individualized training for your office too. Email me at Jalayne.Robinson@tdcaa.com for inquiries, support, or scheduling an in-office consultation.

National Crime Victims' Rights Week

National Crime Victims' Rights Week (NCVRW) will be recognized April 10–16. This year's theme is "Serving Victims. Building Trust. Restoring Hope," which focuses on the importance of early intervention and services in establishing trust with victims, thus beginning to restore their hope for healing and recovery.

Here is a link to an online resource guide provided by the Office for Victims of Crime (OVC) to help you promote NCVRW in your community: www.ovc.gov/awareness/about_ncvrw.html. Included are educational materials, artwork, and a theme video. You can also sign up for notifications from the OVC about National Crime Victims' Rights Week.

TDCAA would love to publish photos and success stories of your NCVRW events in the next edition of *The Texas Prosecutor* journal. E-mail event information and photos to me at Jalayne.Robinson@tdcaa.com. ❇

Lone Star Prosecutor award presented to 12

The investigators, support staff, and prosecutors who tried the capital murder case against Eric Williams, who killed three people in Kaufman County in 2013 (including two county prosecutors) and was sentenced to death, were honored at a ceremony in Dallas in January.

The Lone Star Prosecutor Award recognizes prosecutors and prosecutor office personnel whose tireless work "in the trenches" advances justice in their communities. In honoring the prosecution team in the case *State of Texas v. Eric Williams*, TDCAA lauded those who spent many months securing justice and ended a very dark time for Texas prosecutors and staffs.

"TDCAA's Board of Directors and our Nominations Committee were proud to recognize the efforts of the lead lawyers, Bill Wirskye and Toby Shook," says Rob Kepple, TDCAA Executive Director, "but at Bill and Toby's insistence, we recognized the entire team who worked on the capital murder case of Eric Williams. This year's award acknowledges that a successful prosecution is the work of three vital parts of a prosecutor office: the attorneys, investigators, and support staff. It took a team of 12 to secure justice for the murders of Mark Hasse, Mike McClelland, and Cynthia McClelland."

"It was just a massive undertaking," explains Wirskye, now a prosecutor in Collin County. "We had almost 25 terabytes of information collected during the investigation, and there's no way to house, digest, and get that out for discovery without a huge team behind you. That's why so many people stepped up and helped us, why so many people played such a valuable role. The whole case exemplified the best in Texas prosecution where everybody pitches in and we help one another."

Collaborating as a team is something Mr. Shook appreciates (and misses). Once a longtime felony prosecutor in Dallas County—and the only two-time winner of the Lone Star Prosecutor Award—he's been in private practice at Shook & Gunter for nearly a decade. "What I enjoyed about the Williams case was having the team effort in the prosecution," he says. "That's something I miss from the DA's office. When you're in private practice, the most collaboration you get is with one other attorney. But in this case it was a team effort, and working with a team of professionals is satisfying and a lot of fun."

Both Wirskye and Shook say they are especially grateful to receive this award because it comes from their peers, from people who know how much work goes into a death-penalty case and who recognize how important this particular trial was because a murderer was targeting those in the criminal justice system.

"I was surprised and humbled by it," Shook admits.

"It's meaningful coming from TDCAA," Wirskye says, "because TDCAA members know how hard this type of trial is, how hard it is being gone from our families, and how important it was to the profession that we get it right." ❊

Pictured at left are (back row, left to right) John Rolater, chief appellate prosecutor in Collin County; Rob Kepple, TDCAA's Executive Director; Danny Nutt, investigator in the Tarrant County DA's Office; Rhona Wedderien, trial art coordinator in Tarrant County; and Bill Wirskye, special prosecutor and current prosecutor in Collin County; (front row, left to right) Damita Sangermano, prosecutor in Rockwall County; Kenda Culpepper, criminal district attorney in Rockwall County, to whose jurisdiction the trial was moved because of publicity; Jerri Sims, assistant U.S. attorney in the Northern District of Texas and former prosecutor in Dallas County; Toby Shook, special prosecutor and former prosecutor in Dallas County; Erleigh Wiley, criminal district attorney in Kaufman County and award presenter; Tom D'Amore, former prosecutor in Dallas County; and Miles Brissette, former prosecutor in Tarrant County. Not pictured are Mark Porter, investigator in the Tarrant County DA's Office, and Lisa Smith, appellate prosecutor in Dallas County.

How does recusal work? Examination of this issue and others in *Buntion v. State*

By Jessica Akins
Assistant District Attorney in Harris County

The year was 1990. A motorcycle officer with the Houston Police Department, James Irby, was working patrol on June 27 and initiated a traffic stop of a vehicle driven by Johnny Killingsworth. Carl Wayne Buntion was his passenger.

Killingsworth stepped out of his car and walked to its rear to speak with Officer Irby. According to witnesses, their interaction appeared to be cordial, and nothing indicated any type of issue between them. At one point, Officer Irby walked to the driver's side window and said something to Buntion, then returned to Killingsworth. Buntion then got out of the car, and Officer Irby motioned for him to get back inside. Instead of complying, Buntion approached the officer, pointed a .357 magnum revolver at Officer Irby, and shot him in the head. He then shot him two more times in the back.

A Harris County grand jury indicted Buntion for capital murder on July 12, 1990. Later that year, the trial judge granted the defendant's motion for change of venue, the trial was re-located to Gillespie County (Fredericksburg), and it began in early 1991. Buntion was found guilty of capital murder, and after the jury answered "yes" to the special issues, he was sentenced to death.[1]

Buntion's direct appeal to the Court of Criminal Appeals was affirmed in 1995.[2] However, in 2009, the Court determined that Buntion merited a new punishment hearing due to the absence of a *Penry* instruction—one that provides the jury a proper vehicle to consider mitigating evidence in determining his sentence.[3] Harris County prosecuted Buntion again in 2012, and he was sentenced to death a second time. In affirming the case on direct appeal in 2016, the Court of Criminal Appeals set forth some helpful guidelines for criminal practitioners with regard to recusals, change of venue, and life without parole.[4]

Recusal

Buntion had filed a motion to recuse the Harris County District Attorney's Office, alleging the office was disqualified because the sitting District Attorney was previously employed as a Houston police officer, as was the victim of this crime. The Code of Criminal Procedure sets forth that a district attorney shall represent the State in all criminal cases except when a district attorney's employment prior to election would be adverse to the prosecution of a particular case.[5]

In reviewing Buntion's claim, the Court of Criminal Appeals noted that the trial court has limited authority to disqualify an elected district attorney and her staff from the prosecution of a criminal case. The office of a district attorney is constitutionally created and protected; thus, the district attorney's authority "cannot be abridged or taken away."[6] Further, it is the responsibility of the district attorney to recuse herself in a particular case to avoid conflicts of interest and the appearance of impropriety.[7]

The Court determined that the trial judge properly denied Buntion's motion to recuse, as Buntion had not alleged nor was there any evidence that an actual conflict existed. The Court also embraced the idea (previously articulated by Judge Womack) that a prosecutor need not be a neutral party in criminal litigation. "A prosecutor who zealously seeks a conviction is not inherently biased or partial," the decision reads. "A prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor."

Change of venue

Buntion also filed a motion for change of venue, requesting his trial to be moved to Travis County. In this motion, he claimed the Harris County District Attorney had issued a legally inaccurate statement to the *Houston Chronicle* newspaper regarding his case, which made it impossi-

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ble for him to receive a fair trial in Harris County. In discussing her decision to pursue death in several cases that had been returned on appeal, the District Attorney articulated a concern that these offenders could be released on mandatory parole if the jury came back with a life sentence, as opposed to the death penalty.

The trial court held a hearing on the motion where both sides presented several witnesses. Buntion presented evidence that the parole statement was incorrect, and two of the State's witnesses agreed that capital murderers are not eligible for any type of mandatory release. The defense concern was that the jury pool had been tainted with the "mistruth" that Buntion would be released on mandatory parole if given a life sentence, thereby assuring him a second verdict of death.

The Court of Criminal Appeals upheld the trial court's denial of the motion to change venue. The Court found that Buntion was not harmed by the misstatement because the consideration of parole law in his case was not appropriate during the jury's deliberation of punishment.[8] The Court also noted the jury was properly instructed not to consider any possible action by the Board of Pardons & Paroles Division of the Texas Department of Criminal Justice or how long Buntion would have to serve to satisfy a life sentence. The Court further reiterated that it is presumed the jury disregards parole when it is instructed to. Also of note: That the motion to change venue was granted in the first trial had no bearing on the Court's analysis of this issue in the second trial.

Life without parole

During his re-trial in 2012, Buntion requested that the trial court apply the sentencing scheme that was currently in effect, which then (and now) included life imprisonment without parole as a sentencing option, rather than the law that applied to capital offenses in 1990 when he committed the offense.[9] He reasoned that, because a defendant may knowingly and voluntarily waive most rights, he should be allowed to waive the right to be "punished under an antiquated system that is no longer in effect."

Under current law, the trial court shall instruct the jury that if jurors answer that a circumstance warrants that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment for life without parole *and* charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.[10]

But life without parole as a sentencing option for capital offenses did not exist at the time Buntion committed this crime.[11] Under Article 37.0711—Procedure in Capital Case for Offense Committed Before September 1, 1991—if a defendant is tried for a capital offense in which the State seeks the death penalty, upon a finding of guilt, the trial court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment.[12] Thus, the Court of Criminal Appeals found the trial court properly overruled Buntion's motion. The Court focused on the sentencing scheme on the date of the offense and embraced the historical notion that people who commit the same crime on the same day should be treated similarly.[13]

Also of interest

Also of note: the concurring opinions this particular issue generated. Judge Alcala wrote separately to address her concern about the inequity she perceives in life sentences based upon offense date.[14] She urged the legislature to provide a mechanism whereby a defendant could waive the right to the possibility of life with parole and instead be treated under the current punishment scheme. This is precisely what Buntion suggested: the opportunity to ask the jury to sentence him to life without the possibility of parole rather than death. Judge Hervey, who was joined by Judge Keasler and Judge Newell in her concurring opinion, responded that Judge Alcala's legislative suggestion raises serious *ex post facto* concerns.[15] Simply put: How can a defendant be sentenced to a punishment that did not exist at the time of the offense?

This is a lengthy opinion with lots of practical information for practitioners who anticipate trying a death penalty case in the near future. In addition to the issues noted here, the Court reviewed numerous denials of the defendant's challenges for cause, which could be useful in your next voir dire. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 37.071, §2(b).

2 *Buntion v. State*, No. AP-71,238 (Tex. Crim. App. May 31, 1995) (not designated for publication).

3 *Penry v. Johnson*, 532 U.S. 782 (2001); *Ex parte Buntion*, No. AP-76236, 2009 WL 3154909 (Tex. Crim. App. Sep. 30, 2009) (not designated for publication).

4 *Buntion v. State*, 2016 WL 320742 (Tex. Crim. App. Jan. 27, 2016).

5 Tex. Code Crim. Proc. art. 2.01.

6 *Buntion*, 2016 WL 320742 at *10; *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008).

7 *Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008).

8 *Buntion*, 2016 WL 320742 at *9-10.

9 Tex. Code Crim. Proc. art. 37.071, §2(a)(1) (if a defendant is tried for a capital offense in which the State seeks the death penalty, upon a finding of guilt, the trial court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole).

10 Tex. Code Crim. Proc. art. 37.071, §2(e)(2).

11 Tex. Penal Code §12.31(a).

12 Tex. Code Crim. Proc. art. 37.0711, §3(a)(1).

13 *Buntion*, 2016 WL 320742 at *35.

14 *Buntion v. State*, 2016 WL 320742 (Tex. Crim. App. Jan. 27, 2016) (Alcala, J., concurring).

15 *Buntion v. State*, 2016 WL 320742 (Tex. Crim. App. Jan. 27, 2016) (Hervey, J., concurring).

Award winners at our Investigator School

TOP: Frank Allenger, DA Investigator in Guadalupe County, was honored with the Chuck Dennis Award. He is pictured with the award (center) and a delegation from his office. MIDDLE: PCI winners Sherry Morris, David Hanes, and Monica Cervera received their awards at the conference; other winners (not pictured) include Robert Hinton, Gregory McNeese, and Michael G. Smith. BOTTOM: The Investigator Board, both outgoing 2015 members and those incoming for 2016.

Photos from Prosecutor Trial Skills Course

Photos from our Investigator School

A roundup of notable quotables

"Any mess-ups from now on, he's going to be over with us. He's going to see what the big-boy jail is like."

Terry Grisham, spokesman for the Tarrant County Sheriff's Office, about Ethan Couch, the now-18-year-old man who, at age 16, struck and killed four people while driving drunk and was sentenced to probation after defense attorneys argued that Couch suffered from "affluenza." While on probation, a video of Couch playing beer pong surfaced about the time he missed a check-in with his probation officer, and authorities had just extradited him from Mexico as of press time. (http://www.dallasnews.com/news/crime/headlines/20151216-authorities-want-affluenza-teen-ethan-couch-in-big-boy-jail-but-fear-he-s-fled-their-reach.ece)

"All they want to do is the drugs, make knives, and make alcohol. Then they say when they get out they will not come back. I tell them of course you will. You are doing the same thing that got you locked up. Of course they do not want to hear that. It is like speaking to a brick wall. Now I understand how people must have felt talking to me."

A letter from one-time NFL running back Lawrence Phillips to Ty Pagone, his former high-school football coach. A first-round draft pick in 1996, Phillips was serving a 31-year sentence for domestic violence and other crimes and was a suspect in the death of his cellmate when he was found dead in his cell of an apparent suicide. (http://ftw.usatoday.com/2015/06/ex-nfl-running-back-lawrence-phillips-sends-terrifying-letters-from-jail-this-place-is-a-jungle)

Have a quote to share? Email it to Sarah.Wolf@tdcaa.com. Everyone

"I've been drunk for three months."

a DWI suspect in Smith County, in response to a trooper's question of how much he'd had to drink that day. (Submitted by Taylor Heaton, prosecutor in Smith County)

"Sometimes we're a warrior, sometimes we're a guardian, sometimes we're a babysitter!"

Captain James Agee, a peace officer in St. Albans, West Virginia, after he and other officers rescued a 14-month-old child from a locked bathroom at a Kroger grocery store. In the hours before Child Protective Services could arrive to take the baby, the officers cared for her by purchasing baby food, diapers, and several small toys. (https:// gma.yahoo.com/west-virginia-cop-cares-baby-rescued-grocery-store-235103786—abc-news-topstories.html)

"The extent that the law goes through to protect the accused is pretty extraordinary. We have run that string in your case to the very end of the rope, but you create a little bit of dilemma about at what point do I quit trying to save you from yourself, and at what point do I make you responsible for what you've done?"

Judge Graham Quisenberry of Parker County, to Kassidy Randall Townsend, a 25-year-old "sovereign citizen" convicted of cocaine possession, before he sentenced Townsend to three years in prison. Before trial, Townsend repeatedly filed a counterclaim as a civil lawsuit against Judge Quisenberry, the district attorney, the district clerk, the law enforcement officers involved in the case, and even the wrecker service that towed his vehicle after he was found with cocaine. (http://www.weatherforddemocrat.com/news/jury-quickly-convicts-man-who-represented-self/article_ 786ec8ea-c49b-11e5-b9cb-e7a23d3bd07b.html) ❇

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Just disclose it all (cont'd)

that she thought that her attacker was Silvano based on his smell, the sole of his boot, and his stature as she saw him in the shadowy light, but she admitted, "I couldn't see his face."[14] Schultz did not disclose Maria's statements to Silvano's defense counsel, but at some point in his investigation, Schultz explored the whereabouts of Alvero Malagon—a man who had previously assaulted Maria—and confirmed that Malagon was incarcerated when Maria was attacked.[15]

In February 2012, Silvano pled guilty but had the jury assess punishment.[16] At sentencing, Maria testified that she did not see her assailant's face and that she did not know whether her attacker was Silvano; she explained that she had testified in the protective order hearing that she had assumed it had been Silvano, given his smell and his boot.[17] Maria also testified that she had previously told Schultz that she did not see her attacker's face.[18] Based on Maria's testimony and upon learning of Schultz's investigation of Malagon's whereabouts, Silvano's defense attorney moved for a mistrial, alleging that the prosecution had violated its disclosure obligation under *Brady*.[19]

In defense of his actions, Schultz explained to the trial court that Maria had told him that she had identified Silvano by his smell, boot, and stature, and that Schultz did not consider Maria's statement (that she did not actually see her attacker's face) to be exculpatory[20]—he believed it was a prior inconsistent statement at most.[21] The trial court disagreed, found that the undisclosed information was exculpatory, and granted the defense's motion for a mistrial on *Brady* grounds.[22]

Silvano's defense counsel then filed an application for a writ of habeas corpus, alleging that double jeopardy attached to the mistrial and that the State was barred from retrying him.[23] In the habeas proceeding, two prosecutors stipulated that the indirect manner by which Maria had identified Silvano was favorable to the defense and should have been disclosed.[24] Schultz also testified in the proceeding that, while he "had no doubts" that Maria told him that Silvano was her attacker (and so it did not occur to him that the information was *Brady* material), in hindsight, he should have disclosed to the defense how Maria arrived at the conclusion that Silvano had been her assailant.[25]

The trial court granted Silvano's application for a writ of habeas corpus and permitted Silvano to withdraw his guilty plea.[26] The trial court also held that double jeopardy attached to bar retrial because the State had purposefully withheld exculpatory information and intentionally goaded the defense into pleading and seeking a mistrial.[27]

Thereafter, the Denton County Criminal District Attorney sent a letter to the State Bar of Texas to report Schultz's conduct, though the District Attorney excused it as unintentional.[28] Silvano's defense attorney obtained a copy of that letter and then filed a grievance against Schultz with the State Bar, which resulted in a disciplinary proceeding before Evidentiary Panel 14-3 for the State Bar of Texas District 14 Grievance Committee.[29]

The evidentiary panel determined that Schultz's failure to disclose the information concerning Maria's indirect and limited identification of Silvano violated Texas Disciplinary Rules of Professional Conduct 3.09(d) and 3.04(a), and imposed a six-month, fully probated suspension of Schultz's bar license.[30] Schultz appealed the evidentiary panel's decision to the BODA to challenge the panel's findings of misconduct, though he completed the six-month probation prior to submitting his appeal.[31]

What do Rules 3.09(d) and 3.04(a) say again?

Texas Disciplinary Rule of Professional Conduct 3.09(d) states:

> The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[32]

Texas Disciplinary Rule of Professional Conduct 3.04(a) provides:

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> A lawyer shall not unlawfully obstruct another party's access to evidence; in anticipation of a dispute alter, destroy, or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.[33]

What did the BODA decide in *Schultz*?

There are several important takeaways from the BODA's decision in *Schultz*. For one thing, Rule 3.09(d) is broader than *Brady* in two significant ways. First, Rule 3.09(d) has no materiality requirement. In other words, Rule 3.09(d) requires the prosecution to disclose favorable information and evidence "without regard for the anticipated impact of the information on the outcome of a trial."[34] It will be no defense to a claimed violation of Rule 3.09(d) that the undisclosed information or evidence would not have affected the case's outcome in any manner or deprived the defendant of a fair trial in any way.

Second, Rule 3.09(d) has no admissibility requirement. That is, the prosecution must disclose favorable information and evidence without regard to whether the information and evidence would be admissible at trial. Again, this means that there is no defense to a claimed violation of Rule 3.09(d) that the undisclosed evidence would have been inadmissible.

Explaining why a prosecutor's ethical disclosure obligation under Rule 3.09(d) is broader than the prosecutor's legal disclosure obligation under *Brady*, the BODA noted that the goal of the rule is to "impose on a prosecutor a professional obligation to 'see that the defendant is accorded procedural justice, that the defendant's guilt is decided upon the basis of sufficient evidence, and that any sentence imposed is based on all unprivileged information known to the prosecutor'"—clearly extending past the requirements of *Brady* that the prosecution ensure that the defendant has due process of law by disclosing favorable, material, and admissible evidence to the defense.[35] The BODA also emphasized that the rule's ethical duty protects the public at large—as opposed to just safeguarding the fairness of trials—which requires that prosecutors be held accountable for timely and thorough disclosure of favorable information and evidence even when no trial or conviction is had.[36] And finally, the BODA further distinguished Rule 3.09(d) from *Brady* by observing that "Rule 3.09(d) is specifically intended to advise and prevent a prosecutor from making an incorrect judgment call" regarding the materiality or admissibility of favorable information and evidence.[37]

Rule 3.09(d) requires "timely" disclosure like *Brady* but requires disclosure before a defendant pleads guilty. The BODA explained disclosure must be made "as soon as reasonably practicable so that the defense can make meaningful use of it."[38] However, the BODA then asserted, "The ethical obligation's usefulness to the defense in plea bargaining is a key difference from the duty under *Brady*."[39] The prosecutor must disclose favorable information or evidence to the defense prior to a guilty plea so the defendant's lawyer may use it to find other evidence or to assist the defendant in plea negotiations.[40]

Unlike *Brady*, Rule 3.09(d) attaches only when the prosecutor has actual knowledge. The BODA acknowledged that: "Unlike *Brady*, Rule 3.09(d) limits the information to that actually known by the prosecutor."[41] However, the BODA cautioned that "under the disciplinary rules, actual knowledge may be inferred from circumstances."[42]

This distinction from *Brady* is logical, given that *Brady* is a constitutional due process doctrine meant to ensure the integrity of a trial's outcome by safeguarding the defendant's right to obtain information for defending himself. Under *Brady*'s constructive-knowledge doctrine, a defendant is entitled to relief when he can demonstrate that *someone* in law enforcement connected to the case's investigation and prosecution knew of favorable information or evidence and prevented the defense—in either good or bad faith—from having access to it, and that the information or evidence was material to the outcome of the defendant's case.[43] Thus, under *Brady*, even when a prosecutor is not personally aware of favorable information or evidence, the prosecutor is considered to have constructive knowledge of it if any other lawyer or employee in the prosecutor's office or any member of law enforcement connected to the investigation and prosecution knows of or possesses it.[44] The BODA in *Schultz* makes clear, however, that the constructive-knowledge doctrine of *Brady* does not carry over to Rule 3.09(d) and,

thus, that a prosecutor does not violate his *ethical* duty of disclosure if he did not personally know the favorable information or evidence existed.

But violating Rule 3.09(d) also violates Rule 3.04(a), even absent intent. Rejecting Schultz's arguments to the contrary, the BODA held that if a prosecutor has actual knowledge of favorable information or evidence and he or she does not timely disclose that information or evidence to the defense pursuant to Rule 3.09(d), the prosecutor violates not only Rule 3.09(d) in failing to disclose, but also Rule 3.04(a), regardless of whether the prosecutor's failure to disclose was unintentional, negligent, or in good faith.[45] Quoting one of the drafters of the Texas ethics rules, the BODA opinion asserts:

> "[A] lawyer need only be negligent to violate … Rule [3.04]. A lawyer need not have known of the evidentiary value of the materials or even [have] recklessly disregarded the possibility that they might have such value, if a competent lawyer would have recognized that fact. Thus, under this rule, a lawyer cannot 'escape liability … by closing his eyes to what he saw and could readily understand.'"[46]

Rule 3.09(d) imposes the same discovery obligation as Article 39.14(h). The BODA opined in *Schultz* that Article 39.14(h)[47] of the Texas Code of Criminal Procedure mandates the same standard for disclosure as Rule 3.09(d) and, like Rule 3.09(d), disclosure does not depend upon the prosecution's subjective determinations of materiality and admissibility.[48]

Rule 3.09(d) is identical to ABA Model Rule 3.8(d). When interpreting Rule 3.09(d) and determining that it does not simply codify the constitutional disclosure requirements imposed by *Brady* but rather expands upon those obligations, the BODA relied extensively upon the American Bar Association's (ABA) interpretation of Model Rule 3.8(d) of the ABA Model Rules of Professional Conduct, regarding "Special Responsibilities of a Prosecutor." It is identical in wording to Rule 3.09(d).

Given their matching texts, it is clear that Model Rule 3.8(d) is broader than the constitutional due process requirements of *Brady*.[49] Model Rule 3.8(d) also requires prosecutors to have actual knowledge of the favorable information or evidence before he is required to disclose it but similarly denies the prosecutor any discretion to withhold potentially favorable information or evidence based on materiality and admissibility considerations.[50]

Why does *Schultz* matter to you?

The BODA opinion in *Schultz* means that prosecutors must disclose favorable information or evidence to the defense—we have no discretion to withhold evidence based on our subjective evaluations of its exculpatory, impeachment, or mitigating value. Stated simply, whether an item of favorable information or evidence is material or admissible at trial should be of no concern to prosecutors during discovery, and "if there is any way a piece of information could be viewed as exculpatory, impeaching, or mitigating—err on the side of disclosure."[51]

While failure to comply with Rules 3.09(d) and 3.04(a) may not rise to the level of a constitutional due-process, *Brady* violation—given that materiality and admissibility remain viable considerations for that *legal* disclosure obligation—violation of the *ethical* disclosure obligations can result in dire professional consequences. *Schultz* demonstrates that the State Bar is more aggressively enforcing Rules 3.09(d) and 3.04(a) and will hold prosecutors' feet to the so-called disclosure-obligation fire. Don't get burned—if there is any conceivable way in which information or evidence could be considered favorable to the defense for exculpation, impeachment, or mitigation purposes, don't stop to wonder whether the information or evidence is material and admissible. Just disclose it. ❇

Editor's note: In the next issue of this journal, watch for analysis and commentary from experts about how prosecutors will practice law in light of this decision.

Endnotes

1 *Schultz v. The Board of Disciplinary Appeals*, No. 55649 (Tex. Dec. 17, 2015), http://www.txboda.org/sites/default/files/Schultz55649%20Opinion.pdf.

2 Remember, information or evidence is "favorable" for disclosure purposes when it is either exculpatory (i.e., tending to justify, excuse, or clear the defendant from guilt); useful for impeachment (i.e., anything offered to dispute, disparage, deny, or contradict); or mitigating (i.e., useful to the defense during punishment proceedings). See *Little v. State*, 991 S.W.2d 864, 866-67 (Tex. Crim. App. 1999); see also *Banks v. Dretke*, 540 U.S. 668, 702 (2004) (explaining that prosecutors are obligated to disclose mitigating punishment evidence, such as a State's witness's status as an informant).

3 *Brady v. Maryland*, 373 U.S. 83 (1963).

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4 Although the United States Supreme Court has issued numerous opinions clarifying and shaping the Court's original holding in *Brady*, for the sake of simplicity the line of such cases is referenced herein as just "*Brady*." See, e.g., *United States v. Bagley*, 473 U.S. 667, 676 (1985) (reiterating that the prosecution has a general, affirmative duty under the Due Process Clause of the Fourteenth Amendment to disclose to the defense any evidence favorable to the accused and that, "if disclosed and used effectively[,]…may make the difference between conviction and acquittal"); *Giglio v. United State*s, 405 U.S. 150, 154 (1972) (finding no exception to the prosecution's duty to disclose under *Brady* even when the prosecutor actually trying the case was unaware of the existence of favorable evidence and, thus, establishing that favorable information or evidence is constructively "attributed … to the Government" as a whole).

5 *Schultz*, No. 55649, at *2, 21 ("Based on the plain language of Rule 3.09(d) and significant differences between the purpose and application of the duty under the disciplinary rule and the constitutional duty under *Brady*, we hold that Rule 3.09(d) is broader than *Brady*").

6 *Id.* at *4, 21.

7 *Id.* at *4.

8 *Id.*

9 *Id.*

10 *Id.* at *5. When Schultz was assigned to prosecute the Uriostegui case, he had been licensed to practice law in Texas since 1995, and he had been a state and federal prosecutor for more than 16 years. *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 BODA took the opportunity to explain the significance of the prosecutors' investigation into this possible alternative suspect by including a footnote quoting the habeas judge's comments on it. See footnote 9, pages 15–16. The habeas judge believed that investigating an additional suspect after disclosure of the victim's original identification was a tacit admission by the prosecutors that the information about Malagon was indeed *Brady* information.

16 *Schultz* at *5.

17 *Id.* at *5-6.

18 *Id.* at *5.

19 *Id.* at *6.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Schultz*, No. 55649, at *6; see *Ex parte Masonheimer*, 220 S.W.3d 494, 507-08 (Tex. Crim. App. 2007) (explaining that double jeopardy may attach and bar retrial when a defendant's mistrial was "necessitated primarily by the State's 'intentional' failure to disclose exculpatory evidence").

24 *Schultz* at *6.

25 *Id.* at *6-7.

26 *Id.* at *7.

27 *Id.*

28 *Id.*

29 *Id.* at *1, 7.

30 *Id.* at *2.

31 *Id.* at *2, n.2.

32 Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d).

33 Tex. Disciplinary Rules Prof'l Conduct R. 3.04(a), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (Tex. State Bar Rules, art. X, §9, R. 3.04).

34 *Schultz*, No. 55649, at *10 (citing ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009)).

35 *Id.* at *10 (quoting Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) cmt. 1); ABA Formal Op. 09-454.

36 *Id.* at *12.

37 *Id.* at *11.

38 *Id.* at *10 (citing ABA Formal Op. 09-454).

39 *Id.* at *13.

40 *Id.* at *13-14.

41 *Id.* at *10.

42 *Id.* at *10 (citing Tex. Disciplinary Rules Prof'l Conduct Terminology); *Cohn v. Comm'n for Lawyer Discipline*, 979 S.W.2d 694, 699 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

43 See *Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011) (explaining that, pursuant to *Brady*, even when an individual prosecutor is not personally aware of favorable evidence, "the State is not relieved of its duty to disclose because 'the State' includes, in addition to the prosecutor, other lawyers and employees in his office and members of law enforcement connected to the investigation and prosecution of the case").

44 *Pena*, 353 S.W.3d at 810.

45 See *Schultz*, No. 55649, at *15-16, 19-21 (affirming that a prosecutor violates Rule 3.04(a) "where [the] prosecutor fail[s] to disclose information tending to negate the guilt of the accused as required by Rule 3.09(d) or other law, regardless of intent").

46 *Id.* at *19-20 (quoting 48A Robert P. Schuwerk and Lillian B. Hardwick at §8:4).

47 Article 39.14(h), enacted as part of the Michael Morton Act and effective January 2, 2014, provides: "Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." Tex. Code Crim. Proc. art. 39.14(h).

48 Compare Tex. Code Crim. Proc. Ann. art. 39.14(h) with Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d).

49 Compare Tex. Disciplinary Rules Prof'l Conduct R. 3.09(d) with Model Rules of Prof'l Conduct R. 3.8(d); *Schultz*, No. 55649, at *13.

50 See *Schultz*, No. 55649, at *13-14 (citing ABA Formal Op. 09-454) (emphasizing that "[Model Rule 3.8(d)] requires prosecutors to give the defense the opportunity to decide whether the evidence can be put to effective use"—as opposed to permitted the prosecutor to make the subjective determination of what information or evidence may be material and admissible).

51 *Id.* at *11.

I read the Texas Open Meetings Act so you don't have to

A primer on open vs. closed meetings, when the Act applies, posting notice, and what to do about violations

Two commissioners and a county judge walk into a bar. The judge says, "I'd sure like to get this road out front fixed." The two commissioners say, "That sounds like a good idea."

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

Though it sounds like the set-up to a joke, the above situation isn't funny to prosecutors familiar with the Texas Open Meetings Act (TOMA). That's because two county commissioners and a judge make a quorum, their conversation constitutes a "meeting," and now the local county attorney has a TOMA violation to deal with.

Long before we could tune into basic cable to keep up with the Kardashians' every move, the Legislature passed TOMA to insure that we could keep up with our government. Adopted in 1967, the act essentially gives the public near-complete access to the meetings of a governing body. The law is based on the principle that citizens have the right to be informed about and participate in their own governance, and reviewing courts conduct their analysis of TOMA issues with this principle in mind.

Today, reality TV and social media have led to the expectation that we are informed about everything from a favorite celebrity's baby name to an update (with photos!) of the salad that a random high-school classmate had for dinner. In this world, should we really be surprised that our citizens want to know the who, what, where, when, and why of their local government?

On the surface, that sounds pretty simple. However, anybody with a J.D. can tell you that things are rarely as simple as they seem. Violations of the Open Meetings Act happen. A lot. As my boss likes to say, "Lots of people are afraid that someone else is getting something that they aren't." We can count on those same people to let us know the second that an agenda item is not properly posted by the local school board and complain that no one is investigating members of the city council for having lunch together.

One of the worst things about TOMA violations is that their appearance can be so unpredictable. In a rural jurisdiction like mine, we might go years without dealing with a single one. Then, all of the sudden, our phones start blowing up with calls from helicopter moms who are out for blood after the school board did something they didn't like or Lois Lane-like reporters hoping to knock Lex Luthor off his perch on the local city council.

This article is an attempt to save prosecutors headaches and forays into TOMA to research answers to common questions. Here is a glimpse at some of the ins and outs of this important legislation.

To whom and when does TOMA apply?

Every regular, special, or called meeting of a governmental body must be open to the public.[1] "Governmental body" is defined in the Texas Government Code §551.002(3)(A)–(L). The list contains entities like the commissioners court and a school district board of trustees like you would probably expect, but it also includes a few that you might not necessarily think of as a governmental body, such as certain non-profit organizations and some property owners associations.[2]

TOMA comes into play when there is a meeting of the governmental body. A meeting is defined as a deliberation between a quorum of a governmental body or between a quorum of a governmental body and another person, during which business or public policy over which the governmental body has supervision

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or control is discussed or considered, or during which a governmental body takes action.[3] A meeting can also be a gathering that is 1) conducted by a governmental body or for which the governmental party is responsible 2) at which a quorum of members of the governmental body is present, 3) that has been called by the governmental body, and 4) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.[4]

Records of open meetings

It should come as no surprise that minutes must be kept or a recording made of every open meeting. These minutes must state the subject of each deliberation and indicate each vote, order, decision, or other action taken.[5] After the minutes are prepared, they are considered public records and must be made available for inspection and copying by the public if a request is made.[6] Any person in attendance may record an open meeting in part or in full.[7]

If you are in a large county or have a large municipality in your jurisdiction, watch out. HB 283 (84th Legislative Session) made some amendments to TOMA regarding Internet broadcasting of open meetings. Effective January 1, 2016, the following entities must make a video and audio recording of reasonable quality of each regularly scheduled open meeting that is not a work session or a special called meeting and make available an archived copy of the video and audio recording of certain meetings on the Internet:

- a transit authority or department subject to Chapter 451, 452, 453, or 460 of the Transportation Code,
- an elected school district board of trustees for a school district with a student enrollment of 10,000 or more,
- an elected governing body of a home-rule municipality with a population of 50,000 or more, and
- a county commissioners court for a county with a population of 125,000 or more.[8]

The types of meetings required to be recorded and broadcast are described in §551.128(1). Don't be caught unaware by this new requirement.[9]

Notice[10]

In my opinion, the notice requirements placed on governmental bodies are probably the single most involved aspect of the Texas Open Meetings Act. The law contains very specific guidelines concerning when notice must be given and what information that notice must contain. These requirements should not be taken lightly—strict compliance is often necessary.

A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by a governmental body.[11] The notice has to contain enough detail to let the public know what will be discussed at the meeting.[12] If a committee of a governmental body is meeting and that committee has the authority to act or will make recommendations that will be accepted without discussion by the governmental body, notice of that meeting should be posted.[13] A governmental body can't discuss or take action on any item that is not posted. However, if a topic comes up that was not included in the notice for the meeting, limited discussion of the subject can take place so long as discussion is limited to specific factual information or policies that already exist.[14]

The posting *must* be a physical one. A hard copy of the meeting notice should be placed at a "location convenient to the public" in the county courthouse.[15] The Internet may be used to maintain a concurrent posting on the governmental body's website but cannot be used in place of the required physical posting.[16] Depending on the size of the relevant population, a governmental body may be required to post the agenda for the meeting and the notice on its website.[17] If a governmental body is using only a physical posting for its notice, the physical posting must be readily accessible by the public at all times for a minimum of 72 continuous hours before the meeting's scheduled start time.[18] Nothing can be added to the agenda after the 72-hour deadline for posting the notice unless there is an emergency.[19]

It is very important to follow these notice guidelines strictly. The Texas Supreme Court has held that putting a physical notice on a bulletin board inside a locked courthouse was insufficient to meet the 72-hour requirement, for example.[20] Consequences for failing to follow the notice guidelines can be dire—in certain instances, the Supreme Court has gone so far as to void the actions of governmental bodies for

failing to comply with the notice require-ment.[21]

Notice in emergencies

The law does give governmental bodies a little leeway when there is an emergency or urgent public necessity. When there is an emergency, notice of the meeting may be posted as little as two hours before the meeting is scheduled to begin.[22] What is an emergency, you ask? An emergency or urgent public necessity exists "only if immediate action is required of a governmental body because of an imminent threat to public health and safety; or a reasonably unforeseeable situation." When one of these situations arises, the governmental body has to clearly identify the emergency or urgent public necessity in the notice. This section comes in handy when Mother Nature decides to hit a county with a few tornados or a blizzard. On the same day. Only a few hundred miles apart.[23]

Closed meetings

Believe it or not, there are some circumstances where it is permissible for a governmental body to have a closed meeting (that is, a meeting not open to the public). Subchapter D of the Texas Government Code lists the more than 20 exceptions to the requirement that meetings be open.[24]

Like everything else in the Open Meetings Act, these exceptions are very specific and narrowly tailored. Some of them are generally applicable to every type of governmental body while others apply specifically to just one agency. If you are going to counsel an entity on whether a closed meeting is permissible, be sure that the open meeting exception applies to that particular entity.

If a closed meeting is permissible, don't forget to give the proper notice. If a closed meeting is going to be held under Subchapter D, a governmental body must first have a quorum of its body convene in an open meeting (for which proper notice has been given under TOMA),[25] after which the presiding officer must publicly announce that a closed meeting will be held and identify the section(s) of Subchapter D that applies.[26]

Any action to be taken on a matter deliberated in a closed meeting must occur in an open meeting.[27] A certified agenda or a recording of each closed meeting must be kept unless the closed meeting is a consultation with an attorney under §551.071.[28] Requirements of the certified agenda include 1) a statement of the subject matter of each deliberation, 2) a record of any further action taken, and 3) an announcement by the presiding officer at the beginning and the end of the meeting indicating the date and time.[29] This certified agenda and recording must be preserved for two years.[30] If action involving the meeting is taken during that two-year period, the certified agenda and recording must be preserved as long as the action is pending.[31]

Enforcement, remedies, and criminal violations

So the local water board met in closed meeting when it should have met during an open meeting. While in the illegal closed meeting, the board decided to spend some money, and citizens of the county are upset. What can they do about it?

An interested person, including a member of the news media, can seek a writ of mandamus or an injunction to stop, prevent, or reverse a governmental body's violation or threatened violation of the Texas Open Meetings Act.[32] Whoever prevails may be awarded the costs of litigation and reasonable attorney's fees.[33] Whether the action was brought in good faith and whether the governmental body's actions had a reasonable basis in law are two factors the court will consider when determining whether to award these costs to the prevailing party.[34] If a court determines that a violation occurred, the action taken by the governmental body in violation of the Open Meetings Act is voidable.[35]

Let's say that the water board meeting goes beyond an innocent mistake with the Open Meetings Act. Let's say the board's members knowingly tried to circumvent this chapter by meeting in numbers less than a quorum for the purpose of circumventing the act and having secret deliberations. In such a situation, the offending parties can be subject to a fine between $100 and $500 and/or time in the county jail for one to six months.[36]

If a closed meeting is called and no closed meeting exception applies, the member(s) of the governmental body who call or aid in calling or organizing the meeting, close or aid in closing the meeting, or participate in the closed meeting can be punished under §551.144. For violations under this section, the legisla-

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ture provided an affirmative defense if the defendant acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record, the attorney general, or the attorney for the governmental body.[37] Because of that lovely little defense, don't be surprised to hear, "Can I get that in writing?" any time you advise a governmental body that it may have a closed meeting.

Failing to produce a certified agenda or recording of a properly called closed meeting can also result in a penalty. An offense under §551.145 is punishable as a class C misdemeanor if the members participate in a closed meeting knowing that a certified agenda of the meeting is not being kept or a recording is not being made.

The final offense under the Texas Open Meetings Act concerns the unauthorized disclosure of a certified agenda or recording of a meeting lawfully closed to the public. If a knowing disclosure is made, the offending party is liable to a person injured or damaged by the disclosure for 1) actual damages, 2) reasonable attorney's fees, court costs, and possibly 3) exemplary damages.[38] The offending party can also be charged with a Class B misdemeanor.[39]

Conclusion

The Texas Open Meetings Act embodies the most basic values of democracy. Its various requirements ensure that the citizens of Texas can stay informed about and participate in their local government. However, the consistent need for strict compliance with the act means that accidental violations and, heaven forbid, intentional violations are bound to occur.

With a little bit of luck and a lot of attention to detail by your local governmental bodies, you will never have to experience a TOMA violation-induced headache. But should you be the unlucky soul who finds a TOMA casefile dropped in your lap someday, I hope you find this article helpful. You might even consider dropping in on your local governmental leaders from time to time to offer a little open-meetings knowledge, especially if you ever see a quorum walk into a bar together. ❇

Endnotes

1 Tex. Gov't Code §551.002.

2 Tex. Gov't Code §551.0015.

3 Tex. Gov't Code §551.001(4)(A).

4 Tex. Gov't Code §551.001(4)(B)(i-iv); see also *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433 (2001) for a good discussion on the concept of quorums and when a "walking quorum" might exist.

5 Tex. Gov't Code §551.021.

6 Tex. Gov't Code §551.022.

7 Tex. Gov't Code §551.023. The governmental body is allowed to set some reasonable restrictions to maintain order at meetings, so don't be afraid to designate a specific area for cameras to be set up.

8 Tex. Gov't Code §551.128.

9 "That's awesome. Now I can sit at home in my bathrobe and watch every action of my commissioners court." —An anonymous member of the Rusk County & District Attorney's Office informed of the provision requiring Internet broadcasting for counties of 125,000 people or more.

10 If you are looking for a more specific guide as to what to put into a notice of an opening meeting, the Texas Association of Counties puts out a publication titled *Open Meetings Act: Basic Information for County Officers* that serves as a more comprehensive primer on the Texas Open Meetings Act.

11 Tex. Gov't Code §551.041.

12 *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991).

13 Tex. Att'y Gen. Op. No. GA-0999 (2013).

14 Tex. Gov't Code §551.042.

15 Tex. Gov't Code §551.049.

16 Tex. Gov't Code §551.056.

17 Tex. Gov't Code §551.056(c)(1)–(6).

18 Tex. Gov't Code §551.043.

19 Tex. Gov't Code §551.045.

20 *Smith County v. Thornton*, 726 S.W.2d 2 (Tex. 1986).

21 *Id.*

22 Tex. Gov't Code §551.045.

23 See www.usatoday.com/story/weather/2015/12/27/severe-weather-tornadoes-texas-south/77939562.

24 Subsection D begins with Tex. Gov't Code §551.071.

25 Tex. Gov't Code §551.101.

26 Tex. Gov't Code §551.101(1)–(2).

27 Tex. Gov't Code §551.102.

28 §551.071 applies to consultations with attorneys on matters of 1) pending or contemplated litigation, 2) a settlement offer, or 3) a matter in which the duty owed to the governmental body by the attorney is in conflict with the Texas Open Meetings Act.

29 Tex. Gov't Code §551.103.

30 Tex. Gov't Code §551.104.

31 *Id.*

32 Tex. Gov't Code §551.142(a).

33 Tex. Gov't Code §551.142(b).

The jury found him guilty! Now what?

A primer on basic issues relating to punishment evidence and some potential pitfalls for the unwary

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Prosecutors tend to define themselves and their trial strategies in terms of guilty verdicts. But oftentimes, the real battle in a criminal trial begins at the punishment stage. This is particularly true in the realm of serious felony offenses, where oftentimes the real bone of contention between the prosecution and defense is the punishment to be assessed rather than the defendant's guilt or innocence. With that in mind, this article is designed to present a primer on some basic issues relating to punishment evidence, from what items are admissible and inadmissible, to identifying potential pitfalls for the unwary.

What is admissible?

The general rule is that "evidence may be offered by the State and the defendant as to any matter the court deems relevant to sentencing."[1] As with most general rules, however, this general rule is replete with inclusions and exclusions.

Article 37.07 of the Code of Criminal Procedure specifically enumerates certain items that are admissible at the punishment phase. These include but are not limited to: 1) the defendant's prior criminal record; 2) reputation and opinion evidence about the defendant's character; 3) the circumstances of the underlying offense; 4) any extraneous bad acts which the State proves beyond a reasonable doubt to have been committed by the defendant, regardless of whether he was charged or convicted of them; and 5) an adjudication of juvenile delinquency based on a violation of the penal law that was a felony or a misdemeanor punishable by confinement in jail.[2]

What's out?

Article 37.07 of the Code of Criminal Procedure also specifically enumerates certain items of evidence that cannot be admitted.

1) The State may not offer evidence that the defendant's race or ethnicity makes it more likely that he will engage in future criminal conduct;

2) Neither party may introduce evidence that the defendant intends to undergo an orchiectomy (removal of the testicles); and

3) Neither party may introduce evidence of how the parole and

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34 *Id.*

35 Tex. Gov't Code §551.141.

36 This offense is titled Conspiracy to Circumvent and is punishable under Tex. Gov't Code §551.143.

37 Tex. Gov't Code §551.144(c).

38 Tex. Gov't Code §551.146(a).

39 Tex. Gov't Code §551.146(b).

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good conduct time laws will apply to the defendant.[3]

While the statute addressing punishment evidence gives some guidance as to what evidence is admissible and inadmissible at the punishment phase, caselaw has addressed a much wider variety of scenarios. Some of these are addressed below, with an eye towards assisting the practitioner in successfully introducing evidence and avoiding the potential mistakes of allowing inadmissible evidence to permeate his case.

Prior convictions

As one might imagine, prior convictions are the bread-and-butter for a prosecutor looking to either enhance a defendant's punishment or obtain the maximum punishment within the statutory range. As such, a great deal of caselaw has been developed addressing that type of evidence.

"To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that 1) a prior conviction exists, and 2) the defendant is linked to that conviction."[4] Prosecutors should make certain that they are relying on final convictions, so verify that the prior judgments at issue were not appealed; if they were appealed, confirm that the conviction has nonetheless become final. A conviction that has been appealed becomes final when the mandate issues from the appellate court.[5]

Once the prosecutor has established that he does in fact have a final conviction, he must then prove beyond a reasonable doubt that the defendant is the person who was convicted of that offense.[6] The courts have held that there is no mandated way to establish such proof,[7] which leaves open a wide variety of ways to connect the defendant to the prior conviction beyond the traditional judgment and sentence and pen packet combination, such as: 1) fingerprints,[8] 2) photographs,[9] 3) the defendant's handwriting,[10] 4) eyewitness testimony of a person who witnessed or was otherwise aware of the prior conviction,[11] and 5) certified copies of a defendant's driving record.[12]

Unadjudicated extraneous offenses

Although unadjudicated extraneous offenses are admissible by statute, the fact-finder may consider them only when they are proven beyond a reasonable doubt.[13] So if punishment is being tried to a jury, the prosecutor should request an instruction—or the trial court should give the jury an instruction *sua sponte*—that jurors may not consider extraneous offenses until such offenses have been proven to have been committed by the defendant beyond a reasonable doubt.[14] But even this general rule has limited exceptions. For example, a trial court may consider extraneous bad acts even where they are not proven beyond a reasonable doubt where they are referenced in a court-ordered pre-sentence investigation report.[15]

One might tend to think of extraneous-offense evidence as relating to criminal acts in particular, but the law does not limit the prosecution to admitting only criminal acts as evidence at punishment. For example, the State may introduce evidence that the defendant is a member of a criminal street gang, even though membership in the gang is not in itself illegal, if the State also presents evidence of the gang's violent and illegal activities.[16]

Traps for the unwary

The category of legitimate punishment evidence is broad and has relatively few limits in the governing statute. However, some limitations on what the State may introduce are found outside of the statutes, which can be traps for the unwary. For example, while victim impact testimony is generally admissible, victims' opinions about what punishment is appropriate are not admissible, and these opinions are evidence violative of Texas Rule of Evidence 403.[17] Further, the rules of evidence apply at the punishment phase, including the notice requirements as to extraneous bad-act evidence contained in Texas Rule of Evidence 404(b).[18] So failure to include such bad acts in your 404(b) responses can keep the jury from hearing it.

While there are potential pitfalls from the admission of certain evidence by the prosecution at trial, there are also potential pitfalls for the defense from failing to object to the admission of certain evidence. For example, while certain evidence about a victim may be admissible, there are many scenarios in which the defense has attempted to offer unflattering evidence about the victim, which has ultimately been held inadmissible.[19] These include evidence of the victim's homosexuality and evidence of a victim's status as a registered sex offender; these were held to be inadmissible because they were not relevant to the circum-

stances of the crime.[20] The prosecution would do well to prepare for such potential attacks with a knowledge of what the defense may not inquire about, so as to avoid both unfairly prejudicing the jury against the victim and causing unnecessary pain to the family.

Resources

There are several TDCAA resources that may prove helpful to prosecutors in preparation for trying the punishment phase of trial. The first of these is likely already on your desk: TDCAA's *Annotated Criminal Laws of Texas*, which contains a wonderful set of annotations regarding punishment evidence following Article 37.07 of the Texas Code of Criminal Procedure. Diane Burch Beckham's book, *Punishment and Probation*, also published by TDCAA, is another excellent resource for those seeking more in-depth treatment of this topic in that it includes charts laying out punishment options for various offenses and gives a detailed breakdown of the various potential probation conditions. TDCAA also publishes the *Prosecutor Trial Notebook*, which contains an extensive and useful section on the punishment phase on just a few laminated pages, filled with information and the requisite citations. (All publications are available for sale at www.tdcaa.com/publications.)

The punishment phase is a critical portion of trial and worth the prosecutor's best efforts. Oftentimes even more than the finding of guilt, a positive result in punishment can deter crime and provide closure for the victims of crime. ❇

Endnotes

1 Tex. Code Crim. Proc. art. 37.07 §3(a)(1).

2 Tex. Code Crim. Proc. art. 37.07 §§3(a)(1), 3(a)(1)(A), 3(a)(1)(B).

3 Tex. Code Crim. Proc. art. 37.07 §3(a)(2), (3)(h), (4)(d).

4 *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007).

5 *Beal v. State*, 91 S.W.3d 794, 796 (Tex. Crim. App. 2002).

6 *Flowers*, 220 S.W.3d at 921; *Ex parte Augusta*, 639 S.W.2d 481 (Tex. Crim. App. 1982).

7 *Flowers*, 220 S.W.3d at 922.

8 See *Cain v. State*, 468 S.W.2d 856 (Tex. Crim. App. 1971).

9 *Littles v. State*, 726 S.W.2d 26, 32 (Tex. Crim. App. 1984) (op. on reh'g); *Pachecano v. State*, 881 S.W.2d 537, 545 (Tex. App.—Fort Worth 1994, no pet.).

10 *Orsag v. State*, 312 S.W.3d 105, 118-19 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd); *Pachecano*, 881 S.W.2d at 545; see Tex. Code Crim. Proc. art. 38.27.

11 *Orsag*, 312 S.W.3d at 118; *Bautista v. State*, 642 S.W.2d 233, 236-37 (Tex.App.—Houston [14th Dist.] 1982, pet. ref'd).

12 *Flowers*, 220 S.W.3d at 924-25.

13 Tex. Code Crim. Proc. art. 37.07 §3(a)(1); *Huizar v. State*, 12 S.W.3d 479, 481 (Tex. Crim. App. 2000).

14 *Huizar*, 12 S.W.3d at 484.

15 *Smith v. State*, 227 S.W.3d 753, 762 (Tex. Crim. App. 2007).

16 *Davis v. State*, 329 S.W.3d 798, 805 (Tex. Crim. App. 2010).

17 *Simpson v. State*, 119 S.W.3d 262 (Tex. Crim. App. 2003); *Rogers v. State*, 991 S.W.2d 263, 266 (Tex. Crim. App. 1999).

18 Tex. Code Crim. Proc. art. 37.07 §3(g).

19 *Hayden v. State*, 296 S.W.3d 549, 552-53 (Tex. Crim. App. 2009) (listing scenarios in which "comparative worth" testimony inadmissible).

20 *Goff v. State*, 931 S.W.2d 537, 553-54 (Tex. Crim. App. 1996) (holding that trial court did not abuse its discretion in refusing to allow cross examination a witness about the victim's prior conviction for injury to a child and victim's homosexuality); *Hayden*, 296 S.W.3d at 553-54 (trial court did not abuse its discretion by excluding evidence of the victim's status as a registered sex offender because it was not relevant to the defendant's punishment).

NEWSWORTHY

Nominate a lawyer for distinguished service to kids

The State Bar Committee on Child Abuse and Neglect is now accepting nominations for the Fairy Davenport Rutland Award for distinguished service to children and families. Only practicing attorneys are eligible, and candidates must have made a substantial contribution to the field of advocacy for abused and neglected children. Submit a written nomination with specific reasons, the address and telephone number of the nominee, and whether you (as the nominator) permit publication os your name in print media, to Kanice Spears, State Bar of Texas, P.O. Box 12487, Austin, TX 78711-2487 or Kanice.Spears@texasbar.com. Nominations are due April 1, 2016, and the award will be given at the State Bar of Texas Advanced Family Law conference in 2016. ❇

Blazing a cold trail

If your office doesn't have a cold (or old) case unit (and very few do), how do you handle a writ of habeas corpus on a 20-year-old murder case?

1995 was 20 years ago. I'll say that again, just to let it sink in: 1995 was 20 years ago. It was the year of Braveheart, pogs, the O.J. Simpson trial, and "The Macarena." Cell phones were large— not in a cool way—and the Internet was so slow that it almost wasn't worth using. (There wasn't much to do on it anyway.)

By Justin Weiner
Assistant District Attorney in Henderson County

Needless to say, popular culture has changed a lot in 20 years—and so has the legal world. This significant span of time generates an unusual scenario for those prosecutors who might face a writ of habeas corpus on a case that has been dormant this long, as I recently was. My feeling of urgency was heightened because it involved a murder conviction. It certainly set the stage for an interesting and challenging journey for a prosecutor who didn't have a bar card back in 1995. Heck, that was the year I spent most days in Mrs. Brewer's fifth-grade class. Surviving math and making it to our daily pick-up basketball game at recess was what I fretted over the most—a far cry from battling to keep a murderer in prison.

Just to give readers some background on our county, Henderson: Its population is just over 78,000; our county seat, Athens, has less than 13,000 people. Our DA's office is pretty small. Eight attorneys handle every felony (from pre-indictment through appeal), plus protective orders, Department of Aging and Disability Services investigations, and Child Protective Services cases; we also assist law enforcement with drafting warrants and giving legal advice at crime scenes. The office almost always demands an "all hands on deck" mentality. Needless to say we don't have a unit that handles old (or cold) cases. When an older case rears its head after 20 years, it is up to one of the prosecutors to make heads or tails of the situation and seek justice—just as I had to do when Robert Blagburn's writ came to our office's attention.

Now that I've been through the process, I offer this article to help those prosecutors in smaller offices who must handle their own writs and cold cases. The Cliff's Notes version of my advice is to first figure out where the case has been, where it is now, and where you're going with it—answer these questions before trying to figure out how you're getting there. Doing things in this order is counterintuitive for us prosecutors, largely because there are so many competing interests that have been building up for decades. Rather than focusing first on how to prove something, it is even more important to truly understand why it hasn't been proven before. Though it is a significantly more cumbersome process and will undoubtedly consume more time and energy, slowing down to do things the correct way is a prerequisite of not only *being* right (seeking justice) but also *getting it* right (keeping justice secure).

Where the case had been

On November 20, 1995, Robert Blagburn pled guilty to murder in return for a 45-year sentence. The victim was Clyde Willis Wilkins, a 37-year-old pimp who was gunned down while trying to spare a prostitute from a beating. Blagburn, 19 at the time, had paid $20 to have unprotected sexual intercourse with Sheree Barker, 35. The scratches on her body and bizarre bite marks on her tongue were consistent with her story that Blagburn had roughed her up.

Blagburn had been under everyone's radar, biding his time in the Texas Department of Criminal Justice for nearly 20 years until he filed his very first writ of habeas corpus. Any prosecutor with even a small amount of felony experience knows that the writ can easily be abused—and often. (I can think of one inmate in particular who recently filed his ninth writ on nearly the same grounds as the previous eight.) So having a man who had pled to murder wait 20 years to file his first writ was fairly unusual.

His writ, once I read and digested it, made the pending litigation even more complex and troubling. Blagburn claimed that his defense attorney was ineffective even though he had pled guilty. But that's nothing out of the ordinary, right? Well, here is the kicker: The defense attorney has been dead for years and his law practice died with him. And the murder weapon—yes, you guessed it—is gone. It had been released to a family member shortly after the plea. Yikes.

To get a "Google maps"-style, bird's-eye view of the situation, I had to understand the rules that were in place back in the day. An older, wiser, and more experienced attorney once told me that we should always start with the law. Believe it or not, even an offense like murder has undergone some changes since 1995—pop culture wasn't the only thing different 20 years ago. Whether you seek out the controlling law via an old code book or by WestLaw or Nexus, go find it and read it. Defenses, affirmative defenses, and even culpable mental states may have changed over the decades. Ultimately, grabbing this bull by the horns will save some heartache down the road and insure that you are preparing appropriately for the task at hand. Just because something is the law now doesn't mean that it always has been the law. For example, currently the murder of a child 10 or younger constitutes a capital murder, but in 1995 the child had to be 6 or younger. The 1995 version also didn't have the subsection regarding retaliatory murders of judges and justices.

A secretary or legal assistant will love you when you ask them to pull an 18-year-old file out of the office's infamous storage building. Ours has flooded several times, has poor lighting, and though large, has the uncanny ability to make you feel claustrophobic. Regardless, it is important to see what you have and what you don't have as you triage the file's contents. Fortunately, Blagburn's file hadn't been damaged by a flood or fire, shredded, or misplaced over time, but nothing in it had been scanned so I had to completely rely on the paper file. (Newer files are scanned into a system so everything can be viewed electronically, which also safeguards them from being lost or destroyed over time.) As sidekicks to this endeavor, I suggest a fresh legal pad as well as a fresh pot of coffee; also, do your best to procure a banker's box, preferably one of the coveted ones with handles, as a safe place to put the contents of the file and your notes during the inevitable interruptions that will pop up while you're combing through all of the papers.

I personally find great benefit in organizing an entire file myself. We all think differently, of course, and one can actually learn a lot about a file by taking it apart and putting it back together. The first time I perused Blagburn's massive file, I treated it as if my boss had called on me to try the case the following week. It is vitally important to fully immerse yourself in its contents. Knowing bits and pieces is not enough—you must have a functional understanding of how everything went down. As painful as it may seem, this includes listening to all the interviews and reviewing all the previously filed motions in the case.

The biggest challenge with this one was finding a tape player—that's right, Blagburn's case predated digital recording devices. I had the darnedest time finding a cassette player! And though I probably could have sat in a coworker's car for hours to listen to those tapes, let's not make it any more awkward than the situation dictates. Fortunately, I was aware that our office has an old and rarely frequented filing cabinet. It is filled, and I mean *filled*, with archaic electronic equipment. Believe it or not, I found not one but two cassette players in our office's technology graveyard. Be prepared for when you finally find a boom-box that it will likely get the attention of your coworkers, and they will feel compelled to tell you about their first cassettes. (Mine was *Brand New Man* by Brooks and Dunn.)

Where the case is now

It's worth tracking down as many of the original players as you can. The prosecutors who had handled the case had left the office years ago, but Ray Nutt, who worked the Blagburn case as a Texas Ranger, is now the Henderson County Sheriff. (He was easy to find!) You never know why and for what reasons people may remember the case or the trial from the past. Someone may even remember the scene and the role that they played. Sheriff Nutt remembered the murder and the defendant, and he was able to give a nice narrative overview of his investigation. Having that resource made sifting through offense reports much easier.

If the case didn't have a large impact on the community, it may be

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hard to find people who remember it and can help. Blagburn's case involved a white man killing a black pimp over the rough treatment of a hooker. His file contained a letter from then-Govenor George W. Bush's office, which responded to the concerns from the victim's family about possible Ku Klux Klan involvement in the case. It was a baseless accusation but still made for some fascinating reading.

You can imagine that it was a bit alarming to discover that nearly all of the evidence that had been collected had been destroyed. Supplemental DNA testing would prove to be not only difficult but darn near impossible—you can't test what you don't have. Heck, the murder weapon, a shotgun, had been released to a family member shortly after the conviction was secured.

Unfortunately, the defense attorney had stopped practicing only a short time after Blagburn's plea and had died some time after that, and his practice died with him—nobody took it over after his death, and his old files were gone. The defense attorney appointed to Blagburn's writ, Brian Schmidt, had gone so far as to track down the previous attorney's former legal assistant and daughter, but no helpful information was found. It seemed as though trails had faded just as much as most people's memories. Regardless of how many stones you turn over, you can't find something that is no longer there. Outside of the original State file, there wasn't much information available to give us any additional insight.

I found nothing to prove Blagburn's defense attorney was ineffective. And the real conundrum for Blagburn was that with a dead attorney and no file, he would have to testify, and by testifying he would open himself up to cross-examination. Preparing a cross-examination for any defendant can be challenging; preparing one for an accused murderer even more so. But preparing cross for a defendant who committed a murder 20 years ago is a field of landmines that takes a significant amount of preparation to maneuver. However, if you have done your homework and put in the time in advance, then you will be ready for just about anything.

Where the case is going

I was raised to "hope for the best and prepare for the worst." My sleepless nights during a trial involve figuring out how I could possibly lose a case rather than how to win it. If justice calls for it, we prosecutors should hope that relief will be denied and that the judge will side with the State. And even more importantly, we should be prepared to have to try the case all over again. That's right, if all goes terribly wrong, we must figure out what to do in the impending hearing to bolster a future case if we have start all over again, even on a 20-year-old murder. I also had a back-up plan of using the equitable doctrine of laches, just in case. (Anyone else remember that from property class in law school? It's dubbed the "clean hands" doctrine because it penalizes those who sit on their rights.) I hoped I wouldn't have to use it, but I was prepared to.

As I expected he would, Blagburn took the stand. He told the court that his deceased attorney had given him bad information on which he had relied in deciding to plead guilty. Blagburn claimed that he was told that his "work time" and "good time" would allow his sentence to discharge before his parole eligibility date and that he would have to serve only 18 years. In all honesty, I really don't know how someone could come up with the idea that his sentence would discharge before he was paroled. That is the whole point of having a parole eligibility date; it is the first date that parole is even possible. Murder is a 3(g) offense, so Blagburn wouldn't even sniff parole until he had served 221/2 years on his 45-year sentence. The intriguing part of the story is that Blagburn had not acted on this advice until 18 years had passed and he wasn't released from custody—then he filed his writ. To me, it sounded like he had discussed his case with a jailhouse lawyer and rehearsed the story in his mind so many times that he had accepted it as the truth. Though I didn't believe it, it certainly sounded like HE believed it. Fortunately for prosecutors, that is not an applicable legal standard.

To my surprise, once Blagburn got on the stand, he was not as standoffish as defendants can typically be when they testify. That may have been partly because of the way I asked him questions. Though I wasn't a psychology major or anything, being a prosecutor has taught me a thing or two about how the human mind works. Blagburn believed he was a victim of a corrupt system and a crooked defense attorney. I earned his trust by treating him like a victim. "Let me take you back to that day—do you remember

it?" I started off. By easing my way into cross and asking softly worded and open-ended questions, Blagburn was quick to get comfortable. Believing he was the victim here, he was open about the evening of the murder. Eventually he freely confessed to the murder. He testified under oath that he shot Wilkins in the back from about 40 feet away—the victim was actually running from him. Blagburn used the shotgun he had kept on the floorboard of his vehicle. It was important to get this admission on the record because if anything had gone terribly wrong and he would have been granted relief, his confession would help the prosecution the second time around. Once he had confessed to the crime, it was time to start asking the hard questions in an increasingly more strategic and sophisticated way. I was letting Blagburn set himself up.

When we got to his attorney's alleged ineffective assistance, all of my preparation paid off. Blagburn acknowledged that his attorney had filed seven pretrial motions after he had been indicted. I went over each one with him on the stand to emphasize the time and work that his attorney had put into his defense. He also acknowledged his attorney's negotiation efforts for a plea bargain—he and the State had gone back and forth with four different offers, from life all the way down to the 45 years that he ultimately pled to. I walked Blagburn through the understanding that by taking a murder case to trial while he was on felony probation, he very well may have gotten 60 years or life in prison. (Most felony prosecutors know that 60 years is essentially a "life sentence" for most people.) By pleading to 45 years, a 15-year difference, he potentially moved up his parole eligibility 7½ years.

Regarding his misapplication of "work time" and "good time," I may never know how in the world he came up with the concept. It was such a grave deviation from rational thought that no one believed that the deceased attorney would have told him that before the plea.

The court's decision

District courts merely serve as the "eyes and ears" of the Court of Criminal Appeals on 11.07 writs. Ultimately, after reading the State's meticulously worded six-page Findings of Fact and Conclusions of Law, the court followed our recommendations, stating that the Doctrine of Laches barred consideration of the claims Blagburn made in his Art. 11.07 writ. The court also found that Blagburn had failed to demonstrate ineffective assistance of counsel before and during the plea bargain. It was important to get the district court to rule on this issue, though not legally necessary, just in case the Court of Criminal Appeals decided to ditch the district court's laches recommendation. Though it can take a lot of time that you probably don't have, NEVER pass up on an opportunity to draft Findings of Fact and Conclusions of Law for the court. Though the judge will have the final say, doing so gives the State the first crack at controlling the manner and means in which the facts and law is presented. (For a checklist on handling Art. 11.07 writs, see the July-August 2015 issue of this journal at www.tdcaa.com/journal.)

Today, Blagburn resides in the Michael Unit of TDCJ and will be eligible for parole in August 2017. He was on probation for two other felonies when he committed the murder, and though I am not a parole expert, I think it is reasonable to assume that he will not make parole the first time he is eligible.

Conclusion

We as prosecutors, when faced with an old case (or a cold case) must remember to first find out where you have been, where you are, and where you are going. Only then will it be clear how to get there. Always have a backup plan in case things go terribly wrong in court, and don't forget to enjoy the ride. How many people can say they get paid to do the right thing and seek justice every day?

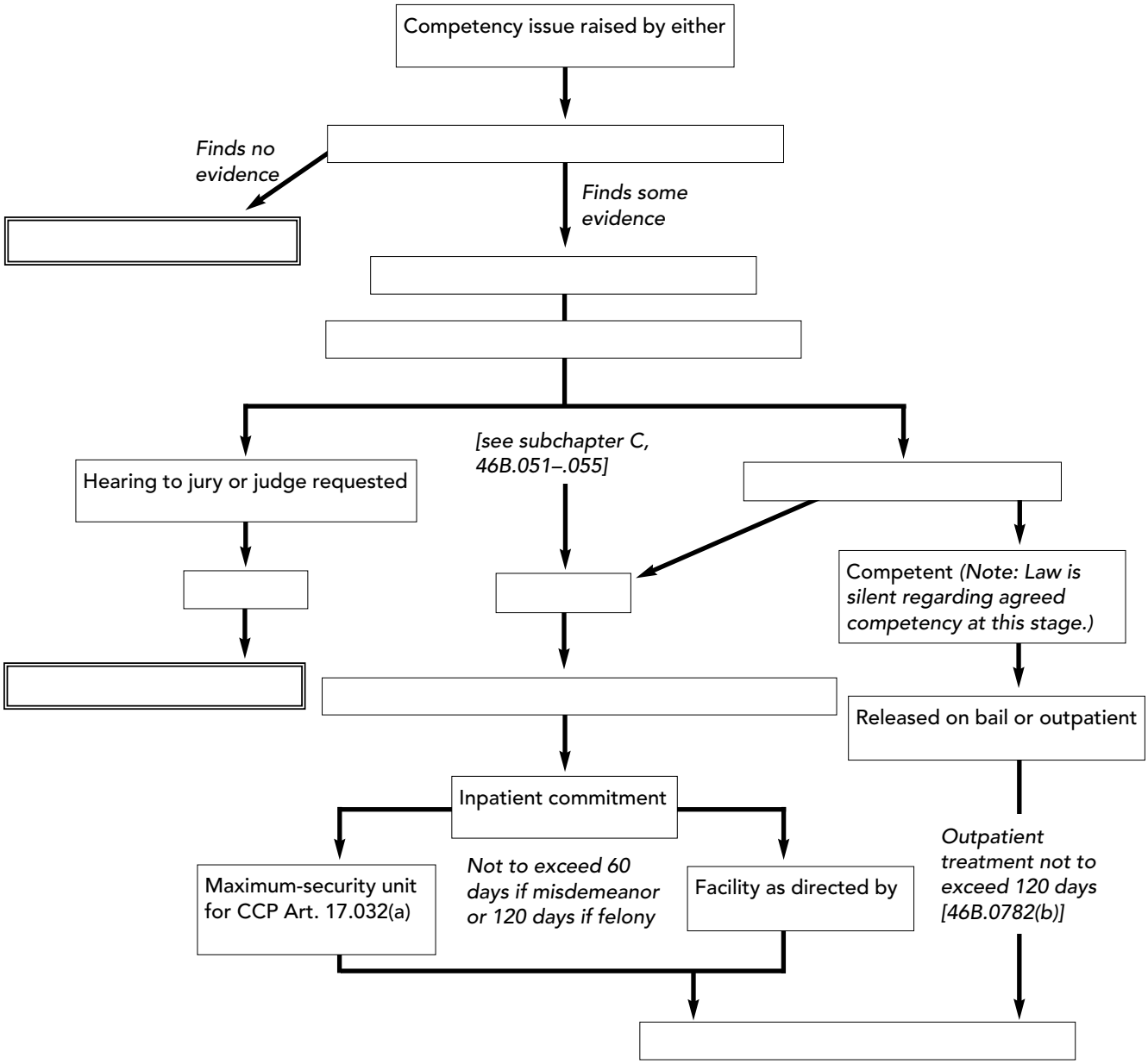
If you find yourself in a similar situation and need help, feel free to email me at jweiner@co.henderson.tx.us or call 903/675-6100. ❇

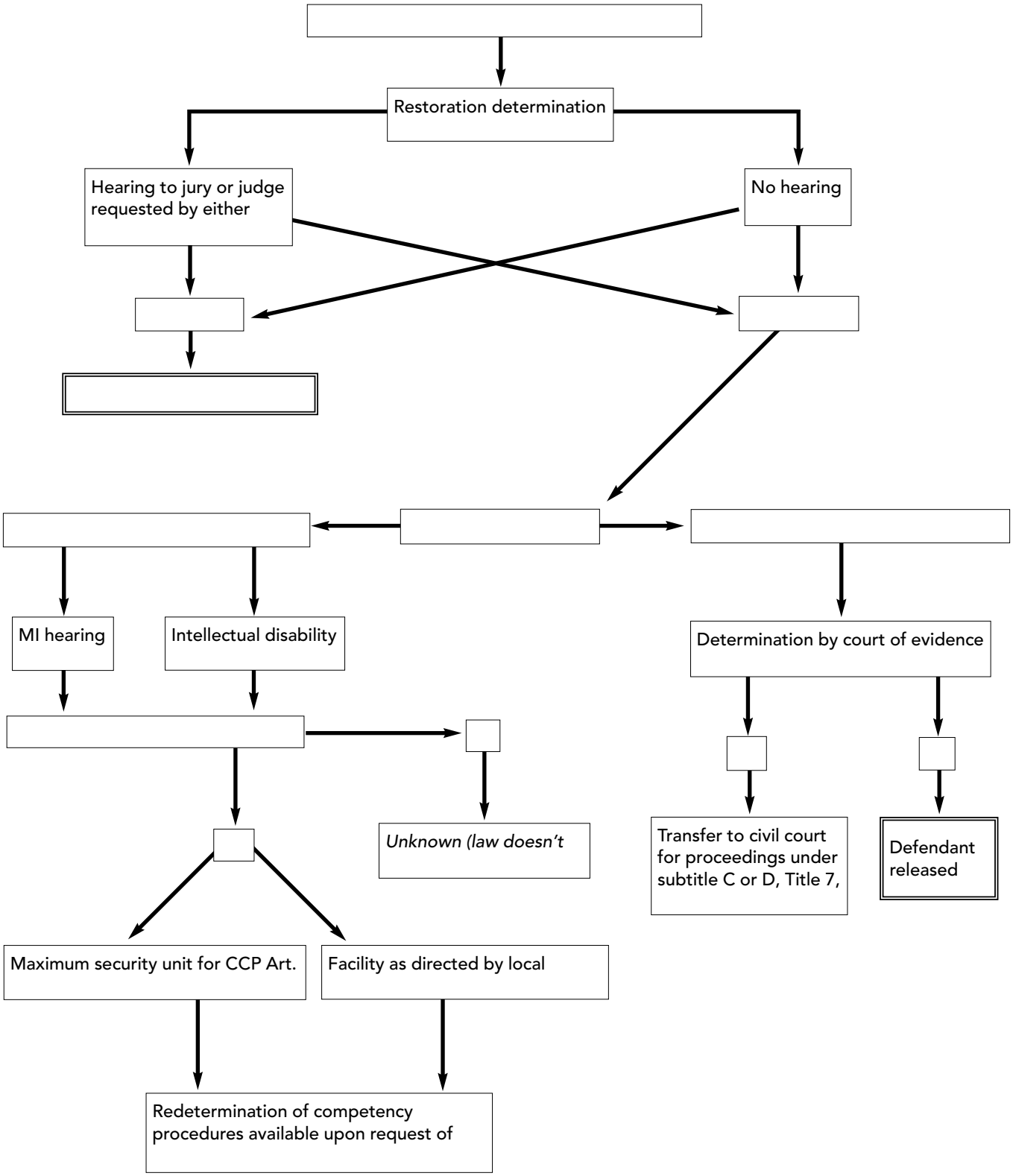
An updated flow chart on how incompetency works

Years ago, this journal published a chart (written by Shannon Edmonds, our Director of Government Relations) depicting how incompetency is litigated in criminal courts. As a service to our members, Ashley Martin, our Research Attorney, has updated it here.

Chapter 46B: Incompetency to Stand Trial

Please note: All statutory references are to Code of Criminal Procedure Chapter 46B.




Restoration determination
Hearing to jury or judge requested by either
No hearing
MI hearing
Intellectual disability
Determination by court of evidence
Unknown (law doesn't
Transfer to civil court for proceedings under subtitle C or D, Title 7,
Defendant released
Maximum security unit for CCP Art.
Facility as directed by local
Redetermination of competency procedures available upon request of

Charging capital murder in the SXSW tragedy

When Travis County prosecutors indicted a Killeen man for capital murder after he plowed his car through a crowd of pedestrians, injuring 24 of them and killing four, eyebrows across the country were raised. Here's how they arrived at that charge—and a guilty verdict.

By Marc Chavez and Amy Meredith
Assistant District Attorneys in Travis County

In the wake of one of the greatest tragedies to occur in Austin, it was reported on national news, "One minute of peril leaves two dead as a driver under pursuit crashes into a crowd of people at South By Southwest. People scattered in the street with serious injuries. Police rush to the scene performing CPR as ambulances were on their way."

The driver, Rashad Owens, 21, who was in Austin to watch fellow artists perform at South by Southwest (SXSW), the internationally acclaimed music and technology festival that floods the city every March, crashed through barricades and plowed through a crowd outside a nightclub injuring two dozen people and killing two at the scene. Two more people would die in the following days.

The pursuit began as a routine traffic stop on a vehicle traveling without headlights. That pursuit quickly escalated when Owens pulled into a gas station only to speed off down the wrong way of a one-way street, bypassing a barricade blocking vehicle traffic and accelerating to more than 50 mph down a road teeming with pedestrians. By the time his car broadsided a taxi (bringing his vehicle to a rest), the damage had already been done.

A year and half after this tragedy struck the city, it took a jury of 12 citizens just three hours to convict Rashad Owens of capital murder. He was charged and indicted for this offense, along with the offenses of felony murder (evading arrest or detention in a motor vehicle), aggravated assault, and intoxication assault. How we arrived at the capital murder charge (and lesser includeds) begins with the events of the early morning hours of March 14, 2014, after Owens had left the venue where his friends performed. Owens was on hand to pass out CDs.

Shortly after midnight, he left the club in a friend's car and was supposed to pick up his brother. Officer Lewis Traylor, assigned to the downtown DWI unit, saw that Owens' car was operating without its headlights, and he pulled beside Owens at a stoplight. When the light turned green, Owens—though in a straight-only lane—turned in front of the officer, and the officer initiated a traffic stop. Owens stopped at the next light and when that light turned green, he proceeded through the intersection and turned on his blinker to get in the far-right lane. Slowing his car and turning on his right blinker again, he approached a gas station, ostensibly to pull over for the officer. Instead, upon entering the gas station's parking lot, he accelerated between the gas pumps and turned onto 9th Street heading the wrong way (9th Street is a one-way, east-bound street). He approached the intersection of 9th and Red River Streets, where both north- and south-bound avenues of Red River were blocked off to cars with temporary barricades and ropes.

Red River is a very popular part of SXSW and has multiple venues for concerts. During the SXSW festival, the street is blocked to vehicle traffic so that pedestrians can have the run of the road. The crowd had grown in the previous hour because a popular performer, Tyler the Creator, who became well-known as the leader and co-founder of the alternative hip hop collective Odd Future, was about to take the stage at The Mohawk (a bar at 10th and Red River) and had tweeted that he was going to be letting some patrons in for free. And that's when Owens was fleeing from Officer Traylor. Rather than abiding by the barricades, he turned north onto Red River and accelerated up the street and through the crowd of people. Between 9th

and 10th Streets, he struck more than 20 pedestrians with his vehicle. He also struck a barricade at 10th and Red River, blocking that intersection. (See the image above for a bird's-eye view of the area.)

Even after all that damage and carnage, he continued to accelerate in an attempt to get away from the officer, who was following slowly and at a distance. As he approached 11th and Red River, he maneuvered around a vehicle in the left turning lane, veering into the right lane and striking a couple on a motorcycle and a bicyclist, propelling all three into the intersection. In that same intersection, Owens collided with a cab traveling west on 11th Street. That collision forced Owens' vehicle off the road, coming to rest against a parked car. Once stopped, he leapt out of the car and ran up 11th Street, pursued by the officer on foot. The officer caught up to Owens and tazed him to subdue and capture him.

The damage was massive: 24 people injured and four pedestrians killed (two of whom died instantly), not to mention dozens of others who witnessed the incident and have been emotionally and psychologically scarred by what they saw. Austin itself continued to reel from this carnage once news and videos of the horrific scene spread to media outlets around the world.

About five hours after the crime, Austin Police Chief Art Acevedo declared that his department would be filing capital murder charges (among others) against Owens (that the defendant intentionally or knowingly caused the death of more than one individual in the same criminal episode), a decision that was disseminated widely and scrutinized by those who thought the charges overreaching. Initially, we prosecutors were not committed to the charge of capital murder but instead kept an open mind of all possible charges that could apply until we had a better picture of what we were looking at, what evidence was collected and preserved, and what we could ultimately prove.

Why not intoxication manslaughter?

Traditionally in auto-pedestrian collisions, charges such as manslaughter, intoxication manslaughter, aggravated assault, or intoxication assault are common because the driver's acts are reckless. But this case was different. Though it is hard to fathom that someone would knowingly use a vehicle in this manner, it was even harder to ignore that Owens knew what he was doing that night. For starters, he intentionally fled from police. Granted, that doesn't establish that he meant to kill someone, but his intent to flee police was clear, and his driving facts were calculated. From the moment the officer encountered Owens on the I-35 frontage road, Owens' responses—that is, that he sped off and squeezed around a barricade—proved to us that he was cognizant of his surroundings and capable of maneuvering the vehicle in tight spaces. In various admissions after his arrest, he told officers that he ran because he was scared.

As far as an intoxication-related charge went, Owens did indeed show signs of intoxication, such as odor of alcohol on his breath, slurred speech, and a portable breath test registering the presence of alcohol. Results from a consensual blood draw and subsequent search warrant draw were .09 and .07, respectively. The blood test also showed marijuana in his system. But despite this evidence of intoxication, Owens' actions (displayed on video from the

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pursuing officer's dash camera) and his statements in the back of the patrol car (also recorded on-camera) demonstrated that he knew his actions were likely to cause the deaths of those he struck.

The patrol car's video showed that when the officer turned north onto Red River, the defendant was already plowing through a crowd of people. The officer, who was not right behind Owens but at a noticeable distance, carefully wove between those who had been hit. Also noticeable on the video is that the defendant never braked. Later, once he was in the patrol car, Owens acknowledged striking the pedestrians in different ways, and many times he expressed regret. He hoped no one had died, but it sounded less like sympathy for the victims and more like he couldn't bear to have that grief on his hands. At one point, he even stated that he should've just stopped the car.

To prove capital murder the way we alleged it, we had show that Owens intentionally or knowingly caused the death of more than one individual in the same episode. Our strategy was to disregard the "intentional" aspect of *mens rea* (it was clear that Owens did not target or seek out these individuals to kill them) and focus instead on Owens "knowingly" causing their deaths. More specifically, we had to prove that he knew death was likely to occur from his actions (of driving more than 50 mph down two city blocks open only to pedestrians). The question then became whether we could show through his actions that Owens knew he was causing the death of the pedestrians he hit. Even as he drove down Red River Street, he drove in a relatively straight line, as evidenced by the blood path down the street, and made little to no attempt to avoid hitting anyone. And not only did he never apply his brakes, but he also accelerated to speeds over 50 miles an hour. These facts added to our suspicions of his deliberate driving.

After evaluating all his driving facts and measuring them against any comments or excuses, we felt that going forward with capital murder charges was appropriate.

Trial for capital murder and felony murder

We decided that the best course of action was to try only the capital murder case (Count One of the indictment) and the felony murders (Counts Two through Five, one for each deceased victim). We felt confident pursuing the felony murder charges on the basis of Owens' evading in a vehicle as well as the element of "committing an act clearly dangerous to human life." That second element seemed pretty evident given that Owens had struck 28 pedestrians with his car. (Depending on the results, we would wait to dispose of the aggravated assault charges at a later time.)

The ultimate question for the jury was whether Owens knew his actions would cause the death of more than one person. With the way we indicted the capital murder charge—that Owens caused the death of more than one individual in the same criminal act—there would be no lesser-included charge that would apply to the facts. If jurors felt that he did not know his actions would cause that specific result (believing instead that his actions were reckless, not knowing), then they would simply vote "not guilty" and then consider the felony murder charges.

Our approach during trial was to put the jury in the pedestrians' (victims') vantage point that night. We wanted jurors to see exactly what the witnesses, officers, and even what Owens saw as best we could. Approximately 50 witnesses, some of whom were themselves victims, testified to what they witnessed that night—what they saw and most importantly what they heard. The sounds from the night in question—Owens' vehicle striking pedestrian after pedestrian as he made his way up the street—were seared in their memories. Witness testimony about these ugly sights and sounds was key to combat the defense theory that the street was dark and streetlights were not illuminated so Owens couldn't see what he was doing.

Witnesses—victims, festival workers, emergency personnel, and law enforcement—also detailed the aftermath and chaos of the scene as dozens lay wounded until paramedics could arrive. Their descriptions, such as the street looking like a war zone, like a bomb went off, and bodies lying everywhere, dominated the eyewitness testimony. Jurors viewed photographs of the aftermath that included bloodstains on the pavement, sand from the barricade that was demolished, and shoes and other clothing items tossed about the street. Eric Sagotosky, an aspiring filmmaker, had begun recording on his handheld camera just as Owens' vehicle had plowed through the crowd in front of The Mohawk.

Even though he was unable to record the vehicle actually striking the crowd, he did record (and the jury was able to view) the immediate chaos on the street and the final resting place of the victims after they were struck.

After eyewitnesses testified, we proceeded to disprove any possible defense regarding Owens' mental state. We called paramedics who testified that they checked him out that night and there were no signs of stroke or seizures. We called the DWI officer who pursued and arrested Owens; the two had an extensive conversation that evening, and he testified that the defendant was completely responsive to the entire thing. Also as part of that DWI officer's testimony, we played a portion of his in-car video where the defendant was in the backseat by himself saying things like, "I hope I didn't kill nobody" and "Sir, all I care about is me not killing nobody," as well as begging over and over that no one die. We felt that these statements needed to go before the jury so they could evaluate whether Owens knew that his actions could have caused the death of an individual. We even called the nurse and doctor who treated him at a local hospital to testify about their observations and evaluations of Owens, which assisted in determining his mental state. (He was sent there after his arrest to be treated for minor abrasions on his legs and hands.) Both professionals testified that he was lucid and conscious, even to the point of being selective about which questions he would answer.

Next we focused on the working condition of the car. We called mechanics to assess its state to make sure that the braking system was in working order and that this particular vehicle had no recalls associated with it. It was in fact in good working condition.

Accident reconstruction

At this point in trial, the jury had seen the video of the defendant driving his vehicle past a barricade into a large crowd of people thru the officer's dash-cam video. We had proven that he didn't suffer any medical problems and that his vehicle's braking system was in fine working condition. His own statements to police showed that he knew had hit a bunch of people. Our final way to put the jury in the defendant's car was through the Austin Police Department's accident reconstruction expert, Rich Harrington. Harrington extracted data from the car's Airbag Control Module (commonly called the "black box"), which yielded information for every half-second up to five seconds prior to impact with the motorcycle. This info included the car's speed, any braking, throttle position (how far the accelerator was depressed), and steering input (see the visual he constructed, below). Harrington determined how fast Owens was driving at the point of impact with the motorcycle and bicycle (hitting three victims at 53 mph) and when he struck the cab (47 mph). Harrington also testified that after Owens had hit more than 20 people and a barricade, the defendant's speed was still 41 mph. He then accelerated to 53 mph, with the throttle reaching 99 percent (the percentage of how far the gas pedal is pressed down—100

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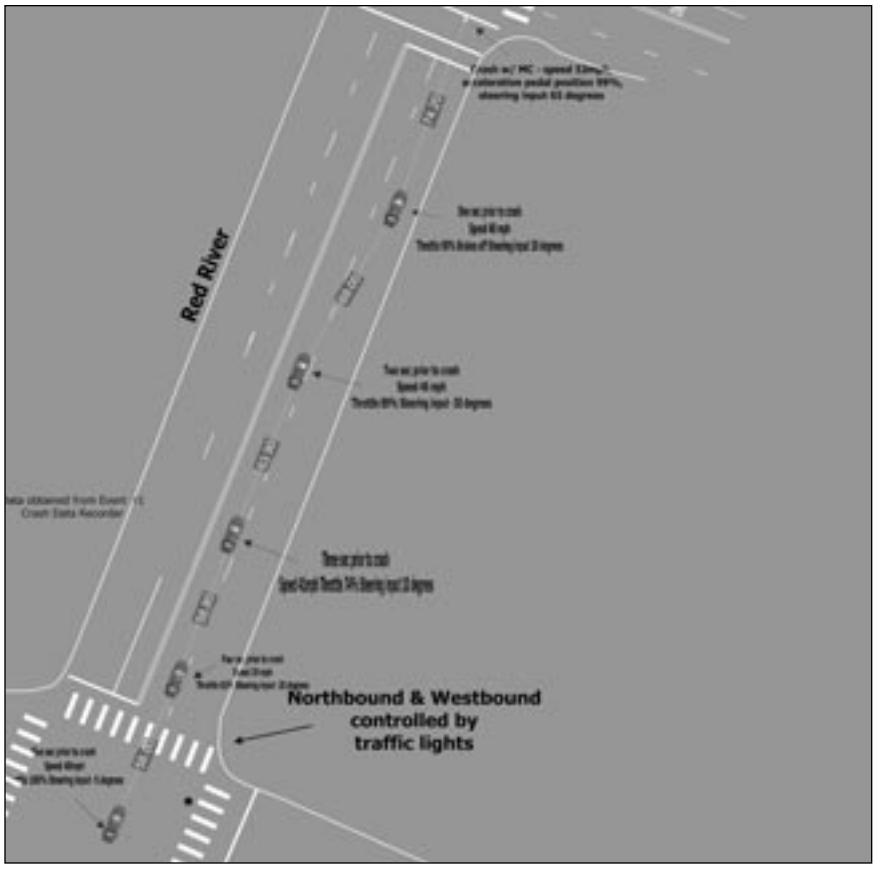

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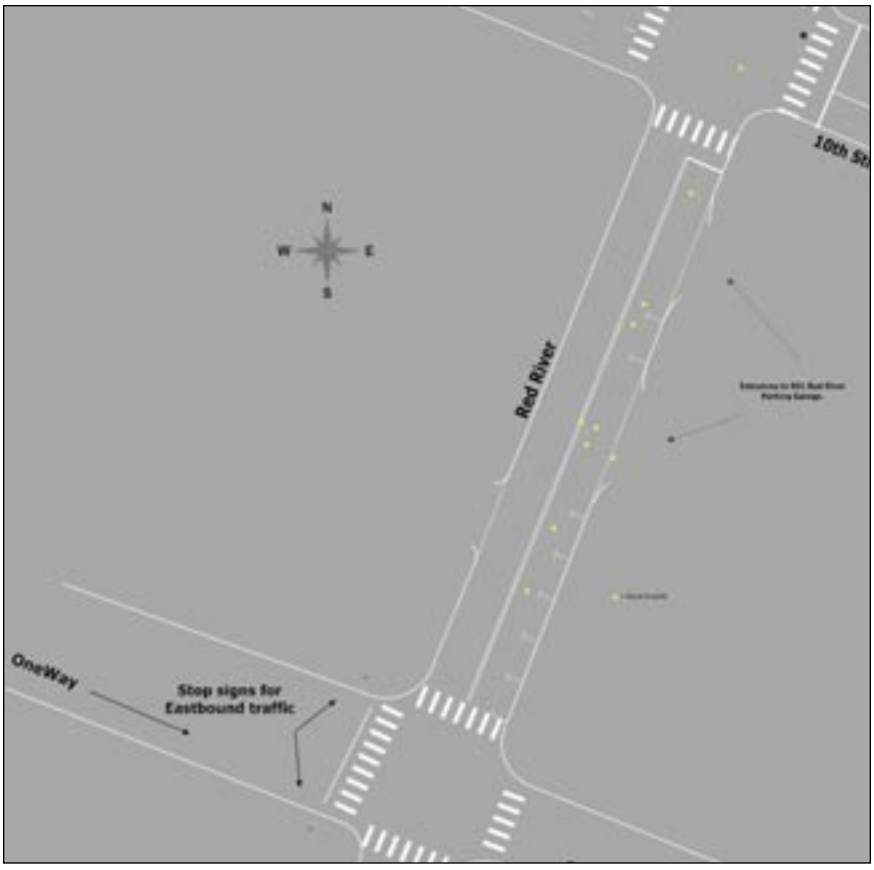
percent is "flooring it"). Steering data showed that Owens maneuvered the car out of the left lane and around another vehicle, striking the motorcyclist and his passenger as well as a bicyclist. The two people on the motorcycle died almost instantly.

With the help of surveillance video from a parking lot between 9th and 10th Streets on Red River, Harrington determined the vehicle's speed to be 55 mph before it ran into the big crowd in front of The Mohawk bar. He was also able to use blood drops on the street to plot points of evidence on a map (see it, below; blood drops are in yellow), an influential visual aid showing that Owens traveled in a straight line down the street, never attempting at any time to avoid pedestrians. Rather, he drove right through them. This wasn't a situation where the defendant hit only one group of people. He was striking person after person after person before he got to the large crowd in front of The Mohawk at Red River and 10th Street. He then struck the large crowd.

Closing arguments

To close, Amy began with a detailed list of acts the defendant committed throughout the evening. She outlined Owens' controlling his vehicle in a deliberate way to his direct responses to law enforcement and medical personnel, laying the groundwork to rebut any possible defense claim that he didn't know what he did, either because of his intoxication or other reasons. She also stressed the high speeds Owens had used throughout the destruction and noted that intoxication played a small role, if any, in this case. (As we all know, voluntary intoxication is not a defense to a crime, but the defense alluded to his intoxication and hinted that even though it's not a legal defense, the jury should consider it when determining his state of mind.) His direct responses, calculated driving, and even the manipulative way in which he answered law enforcement's and medical personnel's questions quashed any ideas that he was drunk and didn't know what he was doing. About the only way intoxication played a role was as his motivation to evade the police officer in the first place.



Marc gave the second half of closing and rebutted the defense argument that "this was just an accident." They also alluded to the fact that the street was poorly lit and the defendant did not have his headlights illuminated—therefore, he didn't know what he was hitting. Pounding on counsel's table to illustrate the sounds of bodies hitting the hood of Owens' car, Marc asked jurors to imagine that sound but much louder—that was what the defendant would've heard at least six times before he hurtled into the crowd in front of The Mohawk that night. Even after hearing that awful sound, the defendant didn't stop, slow down, or pull over—instead, he sped up. He played one of the defendant's statements for the jury ("I should've just stopped") to argue that the defendant knew exactly what he had done. At the end of closing, Chavez asked jurors not to do what was easy but to do what was right, to hold Owens accountable for causing the deaths of four victims.

After hearing all the evidence and argument of both counsels, the

jury took merely three hours to render a guilty verdict on both the capital murder as well as the felony murder charges. (The judge asked them to render verdicts on all counts; however, he did not read the verdicts of felony murder, nor did he assess punishment on those counts.) Owens was subsequently sentenced on the capital murder charge to life in prison without parole.

Reflection

Our decision to go forward with capital murder charges was criticized and critiqued by many. We realize that traditionally, automobile collisions involve lesser charges, often because we don't want to believe that a person would knowingly run over people with his car. But this was a very rare case with a defendant who was willing to do whatever it took to flee an arresting officer—even plowing through a crowd of people. He knew what he did, and more importantly he knew that he was likely people by his actions.

With a tragedy like this one, there are no winners. Lives were lost needlessly, and other lives were affected forever—but we felt justice was served when the jurors decided to hold Rashad Owens accountable for his complete disregard for others' lives when he did anything he could to escape law enforcement. The victims' families will never get their loved ones back, but they had their day in court, and we hope that with this verdict, they will have the closure they so richly deserve. ❇

Seeing dollar signs behind the bruises

How to spot, investigate, and prosecute cases of elder abuse with underlying financial crimes

Elder abuse[1] has not gotten a lot of attention in the law enforcement and prosecution arenas up to this point. Unfortunately, both groups will encounter such crimes more and more frequently as our population ages. Baby Boomers are entering the elderly category in droves while many of their parents are still alive.[2] In the year 2000, the elderly consisted of 13 percent of the population; by 2030, those over 65 will be an estimated 20 percent of the population. To put this startlingly into context, that means that by 2030 there will be more Americans over the age of 65 than under the age of 18.[3]

By Rebekah Bailey and Amy Croft
Assistant Criminal District Attorneys in Dallas County

It is also important to note that 70 percent of personal wealth in this country is held by senior citizens.[4] This wealth includes everything from homes and stocks, to Social Security benefits and pensions. Elder Texans have lots of financial resources, whether large or small. These resources, combined with their weakening physical, mental, and emotional conditions, make elderly people easy targets for a variety of abuses. Elder abuse crimes—financial and physical—affect all racial, social, economic, and geographic populations. The focus of this article will be the rise of physical abuse cases related to financial crime.

Dallas County

In Dallas, we have seen firsthand the devastation that financial exploitation and physical abuse can have on elderly victims. Since 2007, a designated prosecutor has handled such cases, and in 2014, our office became a part of the Elder Financial Safety Center (EFSC), a public safety project made possible by the W.W. Caruth, Jr. Foundation at the Communities Foundation of Texas.[5] The EFSC is a collaboration between the DA's Office, the Dallas County Probate Courts, and the Senior Source, which is a local non-profit. The EFSC addresses all aspects of the financial safety of older adults through prevention, protection, and prosecution. Through the funding of this collaboration, the Dallas County DA's Office created an Elder Abuse Unit to focus exclusively on cases involving financial exploitation of the elderly.

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When Criminal District Attorney Susan Hawk took office in January 2015, she added another prosecutor to our unit to handle cases involving physical abuse and neglect. By July 2015, our newly expanded unit was up and running, handling all theft, fraud, and exploitation cases as well as injury to elderly and disabled persons. The unit does not handle all general criminal activity against elderly individuals; rather, we focus on crimes where the perpetrator occupied and abused a position of trust.

Even in such a short time period, we have been able to identify a new trend: physical abuse of elders rooted in financial motivations. Our caseload has shown us that where an elder has been physically abused, it is likely that the same abuser has also financially exploited him. The purpose of this article is to illustrate how physical and financial crimes are co-occurring and to discuss the strategies we use to investigate and prosecute them. A financial motive might be as obvious as the takeover of a bank account, or it might be more subtle, like a free place to sleep. Regardless, such motivations exist, and developing them can dramatically strengthen the State's case against a thief and abuser.

Case study: Minnie

Minnie's story illustrates co-occurring physical and financial abuse crimes. This case came to us after the Dallas Police Department (DPD) filed an Injury to an Elderly Person[6] charge involving our victim, Minnie. At the time of this offense, Minnie was 86. She had been badly beaten by her granddaughter, Michele, who was 34. The defense attorney set the case for trial almost immediately, claiming there was no way that the State could prove its case. He rattled off all of the typical reasons we hear: The victim was bruised because she had thin skin, she might not be able to recall what happened, and she might not be physically able to testify. During preparation for trial, however, we learned that Minnie's physical injuries were only a portion of the abuse she suffered. Combined investigative efforts with Adult Protective Services (APS), local police, and our unit at the DA's office helped prove the case and bring additional charges.

When we met Minnie, she was widowed and living in the home she and her late husband bought years before. She worked hard all of her life in the dry cleaning industry and retired at age 65. Despite being on a fixed income, Minnie was on top of all of her bills. She was also a social lady and regularly attended her neighborhood church where she had been a member since 1974. In the recent past, Minnie's church recommended a home health-care company, which she hired to help her out a few times a week. Things had been going well for Minnie, at least until a year earlier, when her granddaughter Michele left her troubled past in another state and moved in with Minnie to "help out."

Friends from Minnie's church began to notice changes shortly after Michele arrived. Minnie stopped coming to church, and the home health-care workers were fired. Soon Michele began to turn away neighbors and friends who came to check on Minnie. At some point, APS was called. Michele took the same approach with the APS caseworker; at first she pretended not to be home, then refused to answer the door. Luckily for Minnie, the APS caseworker was vigilant. On the very day Michele assaulted Minnie (the assault underlying our later charge of Injury to an Elderly Individual), Michele refused to allow APS into the home. But the caseworker had a gut feeling that told her not to leave. Instead she called 911 and initiated a welfare check. Police and EMS responded and found a horrible scene. Minnie was filthy and covered in bruises from Michele's hits, punches, and slaps. Minnie was transported to the hospital, where doctors determined she had a broken tibia (leg bone). Despite her age and declining health, she had tried to defend herself, as evidenced by the bruises on her palms. Her treating physicians found she was of sound mind, and Minnie gave a vivid account of how Michele beat her and pushed her from her chair, breaking her leg. Minnie's injuries were consistent with her version of events.

We met with the APS caseworker soon after charges were filed and learned that she had seen some newly executed documents on the table in Minnie's home after police entered. The worker had specifically seen a power of attorney document naming Michele as POA and a will leaving Minnie's home to Michele; both were dated within the last month.

The new power of attorney and will alerted our unit to the possibility of bigger issues inside Minnie's home. Our investigator subpoenaed bank records and credit card statements, which revealed a drastic change in Minnie's accounts before and after Michele came on the scene. For years, Minnie paid everything by check, but a debit card was issued

after Michele moved in. Though Minnie had always paid her bills on time, utilities and essential bills went unpaid after Michele took over—the water at Minnie's home had even been turned off for two weeks prior to Michele's arrest. Minnie reported she had been walking to church to fill up milk jugs so she would have water to bathe. She also told us that she was using the bathroom outside.

Minnie knew Michele was using her Social Security check for booze and drugs, but she was afraid to tell anyone for fear of further physical abuse. Minnie was also afraid Michele would make good on her threat to send her to a nursing home—a reality that distressed Minnie greatly considering how independent she had been. Instead of paying bills, Michele used Minnie's monthly Social Security income for herself. Michele had the money routed to a debit card that she used for expenditures in and around known drug locations. These bank records led us to bring two more charges: Exploitation of an Elderly Person[7] and Theft of $1,500–$20,000.[8] While Michele did not steal a large amount of money, it was all Minnie had—and we could prove it. Minnie was eventually discharged from the hospital into a skilled nursing facility. She told us she never wanted to go back to that little house of hers. Even though it was all she had ever owned, she was worried about Michele's seedy friends returning and placing her in danger. Michele's greed financially devastated Minnie, led her to abuse her own grandmother, and ultimately made this kind woman feel unsafe in her own home.

In Minnie's case, the proof of Exploitation of an Elderly Person was clear-cut once bank records were obtained and reviewed. Prosecutors should not underestimate the power of this statute. The elements are broad and may be easier to prove than Theft because we do not have to prove the victim's lack of consent. The statute simply requires a showing that the defendant illegally or improperly used either an elderly person or an elderly person's resources for his own monetary or personal benefit, profit, or gain.[9] These actions can be proven by showing a mens rea of intentionally, knowingly, or recklessly. Additionally, the statute explicitly allows for co-charging under a different section, such as Theft. This case fit all of the elements of the offense: Minnie was well over the age limit for an elderly person, her Social Security income went in and out of her account without any of her bills being paid, and Michele was taking the money for her own personal use. Further discussion with Minnie also supported the Theft charge because she did not consent to Michele using her money the way she was.

The evidence of both physical and financial crime was so strong in Minnie's case that we never offered the defendant probation. The defense attorney changed his opinion on how to handle the case after viewing all of the additional evidence and charges, and Michele ended up pleading guilty to all three charges and went to the judge for punishment. Upon seeing the evidence and hearing from Minnie, the judge sentenced Michele to the maximum of 10 years in the Texas Department of Criminal Justice in each case. With Minnie, the physical abuse surfaced first, but her abuser's financial motivations helped us ensure that we could present the strongest possible case to the judge.

Case study: Dudley

Dudley's story illustrates a more subtle financial motivation that we often see: a defendant abusing an elder for a roof over his head or food to eat. Dudley retired from a multinational company having received the "Most Admired Man" award. He was never an executive but worked hard and did very well for himself, considering his education ended after high school. Compared to the rest of his Fair Park neighbors, Dudley was well off. He owned his home and had a monthly income stream consisting of his pension and Social Security benefits. While his mental faculties were intact, Dudley had life-long breathing issues and had been diagnosed with cancer in the last year.

Just weeks after surgery for his cancer, his neighbor's brother, Chuck, appeared at Dudley's door and pleaded his story. Chuck had lost his job, his family kicked him out, and he just needed a place to stay for one night. Being a compassionate person, Dudley reluctantly agreed to just *one* night on his couch. But one night turned into 11, and tension between the men grew. Chuck ate all of Dudley's food, left the usually well-kept house messy, and offended Dudley's visitors. One day, Dudley's pain from his surgery overwhelmed him, and he called his doctor for a prescription for pain medication. In a moment of desperation, Dudley asked Chuck to pick the prescription up for him—and

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Dudley was shrewd enough to call ahead and let the pharmacist know that Chuck was allowed to buy only the prescription on his debit card. When he came back, Chuck did not give the medicine to Dudley. Instead, he hid it, taunted Dudley, and punched him in the face when he stood up for himself and demanded to know where the medication was. At the time of the assault, Dudley was 77 and had dwindled to just over 100 pounds; Chuck was 30 years younger and in good shape. Although Chuck fled immediately following the assault, he was arrested when he returned to Dudley's house later that night.

As we investigated the case and prepared for trial, we continued to wonder why Chuck had assaulted Dudley. (Although we did not have to prove Chuck's motive, we wanted to find a grounding theory for the case.) During conversations with Dudley, he told us he intended to "put Chuck out" of his house soon, and he sensed Chuck knew that. It was subtle, but it gave us our theory: Chuck preemptively acted out against Dudley physically because his immediate financial well-being was in jeopardy.

Dudley's health continued to fail and it was uncertain whether he would be able to testify for trial or a deposition,[10] but Chuck had out-of-state felony convictions and saw the writing on the wall. He ended up pleading guilty and taking a trip to the Texas Department of Criminal Justice for two years. We hoped he might get a longer sentence from a jury, but Dudley was too sick to come to court to testify. Had Chuck not pled guilty to these charges, our plan was to pursue evidence that would support an Exploitation of Elderly charge as we did in Minnie's case. As discussed above, charges under the Exploitation of Elderly statute are a powerful tool. Strongly consider it where prosecutors have an Injury to Elderly case with weak evidence, a witness who cannot articulate what happened, or a witness who cannot physically testify.

Warning signs

Minnie and Dudley's cases illustrate the many factors at play in elder abuse. Our unit has come to realize the tell-tale signs of financial abuse often lurking in the background of physical abuse cases. The Abuse in Later Life Power and Control Wheel[11] is a useful tool to keep around for understanding the dynamics of any case with an elder victim. It identifies the specific tactics perpetrators use in committing elder abuse. They include psychological abuse, denying access to religious events, ridiculing a victim's values, threats, and isolation.

If the victim is able to speak with prosecutors, ask about the dynamics and relationships in his life. Most importantly, ask how those dynamics have changed since he came to know or be around the perpetrator. If the victim is unable to speak with prosecutors or investigators, see if APS has a case file on the victim. Elderly victims often still operate in a world outside of the Internet, so there are people in the community (outside of their family members) who know them. Consider speaking to a victim's doctor, postal carrier, pastor, hairdresser, or banker—these people often provide valuable information about how the victim's life changed since the perpetrator came along.

During the course of an investigation, some of the following things might jump out and indicate financial motivations underlying physical abuse: New legal documents such as powers of attorney and wills are often executed by perpetrators who coerce or mislead their victims. Once executed, the perpetrator will quickly use them to place herself on a victim's bank account or make herself a representative payee for Social Security benefits. Gaining access to money often leads to vast changes in spending habits. Bank records going back six to 12 months prior to a perpetrator gaining access to a victim's account will establish the baseline pattern for spending. Once an abuser gains access to an account, those habits will quickly change, often manifesting in large checks written to various individuals, significant cash withdrawals, and major purchases. With money going out for the perpetrator's own use, the victim's bills often go unpaid. Also keep in mind that payments to an insurance company, particularly life insurance, may also lead prosecutors to a recent change naming the perpetrator as the beneficiary. Another helpful place to look is the victim's credit report, which might show newly opened lines of credit or accounts that may not show up in the victim's existing bank accounts.

Lastly, seek out assistance from agencies that deal with elderly people and abuses against them, such as:

- Department of Family and Protective Services—Adult Protective Services;[12]
- Social Security Administrator—Office of the Inspector General;
- U.S. Department of Veterans

Affairs;
- Office of the Inspector General—Criminal Investigations Division;
- Department of Aging and Disability Services;
- Attorney General's Office—Medicaid Fraud Control Unit; and
- probate courts (when the victim is the subject of a guardianship or might need the protection of a guardianship).

These agencies have been working with elderly people for a long time and have not seen much prosecution of elder abuse crimes. Our unit's experience with these agencies proves they are very willing to work collaboratively to make convictions a reality.

Conclusion

As the Baby Boomers age, district and county attorney's offices across the state will see more and more elder abuse cases. While these cases present unique challenges, prosecutors should not doubt their strength. Do not be persuaded when a defense attorney says that "old people bruise easily"; "she wanted to give the defendant the house—just look at the will"; or "the defendant was really just helping" the victim out. A little bit of digging will often prove there is a lot more going on than meets the eye. Learning to spot the underlying financial motivations in physical abuse cases often yields fantastic evidence for added or strengthened criminal charges.

Our elder Texans have stories to tell, life to live, and assets to enjoy. While they might be easily victimized, strong prosecution of those who commit these crimes will send a message that these victims are not without protection. ❇

Endnotes

1 We define elder abuse as encompassing physical abuse and neglect, emotional and psychological abuse, as well as financial exploitation.

2 Tex. Penal Code §22.04(c)(2) defines an "elderly individual" as anyone over the age of 65.

3 Jennifer M. Ortman, Victoria A. Velkoff & Howard Hogan, U.S. Census Bureau, *An Aging Nation: The Older Population in the United States* (May 2014) available at https://www.census.gov/prod/2014pubs/p25-1140.pdf.

4 Elder Financial Abuse: A Growing Epidemic, *EverSafe* (Jan. 8, 2015, 11:26am), https://www.eversafe.com/elder-financial-abuse/overview.html.

5 The role of the Senior Source in the EFSC is to prevent seniors from falling victim to frauds and scams, as well as the problems associated with inadequate income and excessive debt by offering a unique set of services including financial counseling, benefits assistance, insurance counseling, debt management, among others. The probate courts provide protection for vulnerable older adults by ensuring that there is a court-authorized guardian of the person and/or estate and regular monitoring for every older adult determined by the court to be incapacitated. The DA's Office prosecutes cases involving the exploitation and abuse of older victims through the Elder Abuse Unit. Working together in a formal collaboration allows us to more effectively ensure the safety and security of some of our community's most vulnerable members.

6 Tex. Penal Code §22.04.

7 Tex. Penal Code §32.53.

8 Tex. Penal Code §31.03 (old value ladder).

9 The code section also covers the same criminal activity against elderly and disabled individuals. See Tex. Penal Code §32.53.

10 Tex. Code Crim. Pro. arts. 39.02, 39.025.

11 Nat'l Clearinghouse on Abuse in Later Life, Abuse in Later Life Power and Control Wheel (2006) available at http://www.ncall.us/content/abuse-later-life-power-control-wheel.

12 Law enforcement officials can call a dedicated APS hotline to report suspected abuse: 1-800-877-5300.

News Worthy

Prosecutor booklets available for members

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

Texas Investor Guide available online and on paper

Our friends over at the Texas State Securities Board (TSSB) passed along a link to its Texas Investor Guide, which is available at www.ssb.texas.gov/flash/TexasInvestorGuide/index.html. It includes information on budgeting, saving for retirement, and avoiding financial fraud. The flipbook cannot be printed, but print copies are available by emailing Robert Elder at relder@ssb.texas.gov with your mailing address, phone number, and how many copies you'd like to receive. Thanks to the TSSB for making this booklet available! ❇

Teaming up with the DA's office

How can assistant county attorneys get trial experience when the vast majority of misdemeanor cases never go to court? By partnering with the local DA's office, that's how. Here's how Ector County came up with a win-win-win situation for both offices and the county as a whole.

By Dusty Gallivan
County Attorney in Ector County

Prosecutors want to try cases—that's why we became prosecutors. There is no experience like being in trial! If we wanted to sit in our offices and push paper all day, we would be civil lawyers. But in an office that had only five jury trials last year, how can six attorneys go to court often enough to gain experience and hone their skills?

We in the Ector County Attorney's Office in Odessa file approximately 5,500 misdemeanor cases a year, but we had only five trials in 2015. That means that 99.9 percent of cases ended with a plea bargain, dismissal, or the defendant absconding.[1] There are several reasons for this low number of criminal trials. Many of our defendants are *pro se* and just want to resolve their cases. We make fair plea offers, which they often accept so there's no trial. And because our jail has been overcrowded, we make low jail offers for those defendants in custody, also reducing the number of trials. And affecting our number of trials specifically in 2015, a new county judge was appointed in October, so we were unable to have jury trials in his court the last three months of the year. In addition, the district courts have increased the number of felony trial weeks, which means that many of our county's defense attorneys are in felony court, whereas in past years they might've been in county court on misdemeanor cases instead.

As the elected county attorney, one of the things I miss most is trying cases. Sure, I could pick up any case I want and try it, but that would mean taking a case from one of my assistants—what would that do for morale? They want to try cases too. And when we try so few cases, we miss out on all that excitement from a jury trial.

By contrast, in our county's DA's office (headed by the elected District Attorney Bobby Bland), more than 3,000 felonies were filed last year, and more than 20 of them ended up in court. I wondered if the larger number of felony trials might be an opportunity for our assistant county attorneys to get trial experience. What if we in the County Attorney's Office helped the prosecutors in the District Attorney's Office with their felony trials? We could sit second chair with the first-chair ADAs and be another set of eyes and ears. I figured this partnership would accomplish two goals: give ACAs more trial experience and help the ADAs with their preparation and trials in the process. It turned out to supply those benefits—plus a few more unexpected ones.

Pitching the idea

I brought up the idea at one of our office meetings, asking the attorneys if they would be interested in assisting the DA's Office on felony cases. The response was an overwhelming yes. Although half of us have tried felonies in the past, we welcomed the opportunity to work on different types of cases from our usual. Normally, about 20 percent of our misdemeanors are DWIs, another 20 percent are possession of marijuana, 10 percent are theft, and 9 percent are family violence (FV), with miscellaneous other crimes making up the balance. We welcomed the idea of trying aggravated robbery, aggravated assault, felony DWI, and felony FV cases. Many of the elements are similar, so it seemed like a natural transition.

About this same time, in October 2015, the District Attorney's Office was authorized to hire two additional prosecutors due to the increase in felony cases. Although West Texas is a great place to live and work, it can be difficult to convince attorneys to move here from larger areas. Knowing this and knowing the DA's office could use a little assistance handling the extra caseload, I approached Bobby Bland with my

idea. I had worked as an assistant under him before I was appointed county attorney, and many years before, Bobby and I were both ADAs in that office. I asked him what he thought about me trying a case with one of his prosecutors because I missed trying cases. He laughed and said sure. Then I asked if all of our attorneys could help try felony cases. Bobby liked the idea and let his ADAs know that if they had a trial coming up and wanted any additional assistance, they could just call the County Attorney's Office. And within a couple of days, we got such a call.

Lisa Borden, an experienced felony prosecutor in the 244th District Court, called and asked Kortney Williams, an ACA, to assist her in an upcoming aggravated assault trial. Kortney quickly agreed to help. Kortney normally has a caseload of about 400 cases, all at different stages (intake, waiting to be set for trial, and her trial docket; Kortney also handles the juvenile caseload). We had envisioned that the experienced felony prosecutor would do the heavy lifting and we would just help out, but since Kortney is eager to learn and Lisa is a fantastic teacher, Lisa let her handle some witnesses and the closing. The case resulted in a conviction (after 11 minutes of deliberation). It was great for both attorneys.

"The stakes were higher, definitely," Kortney says of the experience, "but the court procedures were not any different. The defendant was facing 99 years or life, and the minimum was 25 years—we don't see anything like that in county court. I definitely learned some things I will use during my next misdemeanor trial." For example, she discovered that the preparation for a felony trial is very similar to that of a misdemeanor trial—there is just more evidence to prepare. And her stress level was higher because the stakes were higher. It was also a great confidence booster!

Other benefits

Gaining experience for my assistant prosecutors is a wonderful result of this partnership, but it's hardly the only one. Like many counties our size, we have a jail population problem. We just can't move cases through the system as fast as we would like for a variety of reasons. One step the district judges took was to add 10 jury weeks to the calendar, and while doing so will help move felony cases, it puts an extra burden on an already-taxed DA's Office and staff. Although the DA's Office has two attorneys assigned to each court plus a sexual assault prosecutor, prepping cases for trial and having three trial weeks a month is difficult without increasing manpower. Our partnership gave the DA additional resources to move jail cases and ultimately save taxpayers money.

Additionally, I am a firm believer that as the elected county attorney, it is my responsibility to train the staff not just to be competent at their current jobs but also to be prepared for their next jobs. Having come from private practice, I know how expensive it is to have employees who are untrained or—worse—employees who leave because they aren't being challenged. Zig Ziglar said it best: "The only thing worse than training employees and losing them is to not train them and keep them."

As electeds, it is our responsibility to provide the best possible prosecution of criminal cases in our jurisdictions. To do so, we need to provide our assistant prosecutors with time in the courtroom. Many misdemeanor prosecutors have little experience and take these jobs to gain the expertise they need to later become felony prosecutors. I consider our office as a training ground for new attorneys. Although we are fortunate to have over 75 years of experience, we do have a couple of newer attorneys, and most new hires are young lawyers. If we are able to train attorneys to be good prosecutors who can then move into felony work, it's a win-win for my office as well as Bobby's. Turnover is expensive, both for the office and for the county. If an attorney can transfer from our office to the DA's Office, not only have we done a service to the district attorney (he will be getting an experienced prosecutor who knows how the county operates), but we have also done a service to the community we represent (that attorney with expertise and talent has stayed in Ector County rather than moving elsewhere). Plus, instead of there being two open attorney positions (one in each office), we need to fill only one.

This program may not work for every county. For example, if you are in a Criminal District Attorney's Office, you already have the ability to train on both misdemeanor and felony cases. For those counties with separate offices for the county and district attorney, success will depend on the ability of the two elected prosecutors to work together for the benefit of their assistants. The biggest factor in the success of this program is the relationship between Bobby

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and myself. Because we can work together, we are able to accomplish so much more than in the past. We both see the benefits to our respective offices, as well as for the individuals we lead.

Conclusion

To serve our many different constituents, we need to think of creative programs. Just because we've never done something in a particular way doesn't mean we shouldn't give it a try. Sometimes we must break out of the status quo to make an office or situation work better. If we serve the individuals we lead, we will always move forward. ❇

Endnote

1 Editor's note: We checked with three other county attorney's offices of similar size to see how their number of trials measure up to those in Ector County. The Hood County Attorney's Office, for example, tried several more cases (17) in 2015, but both Burnet County (two) and Parker County (four) had fewer.