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

Wichita Falls horror story

Officers and prosecutors alike said this crime scene haunted them. How Wichita County prosecutors sought justice for a disabled woman exploited by her own mother.

"I felt like I had stepped into a horror movie," said one of the investigators who'd been called out to a house on the northwest side of Wichita Falls. Law enforcement officers were serving an arrest warrant for a subject at 3106 Northeast Drive, and they had no idea what they would find when they entered the nondescript house.

By John Gillespie and Stephen Rancourt
Assistant Criminal District Attorneys in Wichita County

"It was easily the worst thing I have seen in 25 years of law enforcement." Officer after officer who responded to the scene later testified in a similar way.

The first thing officers noticed was the overwhelming smell of human feces emanating from the residence. "The house smelled like a dirty outhouse at a deer camp," one investigator said. In looking for the suspect with the warrant, officers had obtained permission to enter the house. In a dimly lit, cluttered front room, they found what appeared to be a cage. "It scared me—I thought it was a monster in a cage," one veteran officer said, remembering when he first entered the room and saw the naked, caged creature making guttural noises. "It looked like a caged animal."

In fact, officers had discovered 25-year-old Allison (not her real name), the daughter of Robin Payne. The cage was a dilapidated adult medical crib. The apparent rust on the cage's bars turned out to be dried fecal matter. Allison was naked in the crib with no bedding or pillows. She was covered in dried feces, which made a pattern like a tattoo on one leg. Her fingernails and toenails were also caked in her own excrement.

As a baby, Allison had suffered a stroke and had severe brain damage. Other than guttural sounds, she could not communicate, and she was legally blind. When officers discovered her, she was in a clear state of distress. Her brother, Brandon Terrell, who had felony drug convictions, was the only relative at the house. (The warrant was for Mickey Stuart, a friend of Brandon's who was not at the house.)

After being transported to the hospital, Allison was showered. It took four nurses over 30 minutes to clean her thoroughly. The fecal matter was so dried and embedded in her pelvic and anal regions that nurses had to pick it out in a laborious piece-by-piece process. "When she realized she was getting a shower, she got this big smile on her face," one of her nurses said. Even after the shower, Allison still reeked of feces.

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Our first winner in the Article 42.12 rewrite contest

In the July-August edition of *The Texas Prosecutor* I announced a contest: Find a substantive change in the Code of Criminal Procedure's Article 42.12 re-write and win the TDCAA book of your choice.

By Rob Kepple
TDCAA Executive Director in Austin

I think our first responder is a winner. **Judge Larry Gist** from Beaumont wrote to point out a rather obvious change: The very first section of CCP Art. 42.12, whose title was "Purpose," was deleted in the re-codified CCP chapter 42A. But is that a *substantive* change? Does it change the meaning of the words?

I agree with Judge Gist that it does, and here is why. The stated purpose of Article 42.12 is "to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision and the supervision of defendants placed on community supervision. …" But that is not what Art. 42.12 does. Indeed, the article has evolved into the home for *limitations* on a judge's authority when it comes to his discretion to impose community supervision and conditions of supervision. What was once a simple section that said essentially, "Judges, just go do justice," is now, "Here is a big, long list of things you can't do."

And I agree that this was intentional. Many of you may recall efforts in the late 1990s to legislatively delete Art. 42.12 and revert to a simple "use your judicial discretion and do a good job" approach. A lot of judges and lawyers liked the idea. But there was one problem: No legislator would file such a bill. Finally, a state senator explained the problem to us: Legislators *liked* Art. 42.12 as it was because that is where legislators could tell judges what to do. Why would a legislator want to change that?

So Judge Gist, I think you are indeed right. The purpose of Art. 42.12 has changed, and the new Chapter 42A will carry that change forward. A TDCAA book of your choice is on its way!

Who will rebuild trust?

It has been a tough summer for Dallas and indeed, the whole country, in the wake of police shootings and ambushes in cities across the nation. It feels like Black Lives Matter and Blue Lives Matter have squared off in many respects. How does this work out?

A recent poll by the *Texas Tribune* revealed that 73 percent of readers believed that it will be community groups and other local leaders who find the right path—not the legislature, state leaders, police groups, or others. Could it be that district and county attorneys are in a unique position to lead the way? I think maybe so. After all, these shootings and use of force cases land on your desk—ultimately all of the parties intersect in your office.

Many of your colleagues agree. In August the TDCAA Diversity, Recruitment, and Retention Committee met to discuss the issues facing our profession and communities, including what prosecutors can and should do in these uncertain times. The discussion went beyond the intricacies of investigating and prosecuting use-of-force cases and included the role of Texas prosecutors in restoring a sense of balance to our communities. So stay tuned: There will be more to follow. If you want to get involved in the discussion and the work of the committee, just give me a call.

Prosecutors leading on conviction integrity

In the July–August edition of this journal, I talked about how prosecutors are the key to reform in criminal justice and that they have taken the lead in DNA, discovery, and other critical reform efforts. So it was satisfying to see the cover of the July 10, 2016, *New York Times Magazine*: It featured a letter from the Harris County District Attorney's Office to a one-time criminal defendant informing her that there had been a flawed drug test and that she had been prosecuted in error. The article behind the cover image raised a lot of issues about pre-trial detention,

police use of preliminary drug test kits, plea bargaining, and the role of the defense attorney.

I know we tend to cringe when we see that the *New York Times* has written something about Texas prosecutors, but by putting that letter on the front cover, the *Times* tacitly acknowledged that Texas prosecutors are dedicated to getting it right. Indeed, the article credits Harris County Assistant DA **Inger Chandler** with exposing the problem with convictions based on the field tests, DA **Devon Anderson** with devoting resources to the problem and committing to exonerating innocent individuals, and former Assistant DA **Marie Munier** (who wrote the letter on the front of the magazine) with getting the job done. You can read the article here: www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html.

Finally, Inger recently published an article in the Summer 2016 issue of the American Bar Association's Criminal Justice Section journal titled, "Conviction Integrity Review Units: Owning the Past, Changing the Future." In the article she discusses the development of conviction integrity units in Texas and how prosecutors have engaged in a collaborative approach to reviewing cases, which has reaped benefits. I'm afraid that there is no access to the article if you are not an ABA member, but if the ABA keeps this up, prosecutors might have the incentive to join!

The Honorable Gerald Goodwin

I am saddened to report the passing of a well-respected and beloved former DA and jurist, **Judge Gerald Goodwin**. Gerald was a towering figure in the East Texas legal community, having started prosecution in 1971 in Houston before moving home to Lufkin in 1974 to begin a storied career as a prosecutor and then a judge. Indeed, until very recently Gerald was sitting on the bench overseeing Angelina County's "rocket docket." I got to know Judge Goodwin when I came to the association. He was a big supporter of the Foundation and obviously loved our profession—he'd regularly miss judicial conferences to come to our Annual Update in September. We will miss you, Judge.

Welcome new—but not green—prosecutors

Welcome to a folks who have taken the reins in county attorney offices. First, **Rodolfo Gutierrez** is our new Jim Hogg County Attorney. But he is not new to prosecution—Rudy began his career as an assistant DA in Jim Hogg County way back in 1977, which might make him the longest-serving assistant in the state.

And hello once again to **Ed Walton**, who is now the Loving County Attorney pro tem. Y'all might remember that Ed was the CDA in Kaufman County from 2003 to 2006. He still lives there, but through happenstance now spends some time in Loving County as its county attorney. Loving is one of our least-populated counties, as it's home to only 86 Texans but 452 oil wells. If just one more lawyer moves there, the legal profession will boom!

Limestone County Justice League

It is always great when legal firepower gathers in one place. Recently folks in Mexia honored retiring attorney **Holloway Martin** after a 56-year legal career. The ceremony offered a chance for the photo below: Pictured from the left are Holloway Martin, Limestone County District and County Attorney from 1961 to 1969; **Judge Patrick Simmons**, District and County Attorney from 1981 to 1985; and **Roy DeFriend**, the District and County Attorney from 2001 to the present. Thirty years of announcing "ready" for the State over five decades! An impressive trio.

Thanks to Bobby Bell

Congratulations to **Bobby Bell**, who had served as the Jackson County Criminal District Attorney for 32 years until his appointment in August to the 267th Judicial District Court bench. Bobby's reputation and legacy is that of a strong advocate for the right of victims. Knowing Bobby, I'm sure that adjusting to the more passive role of district court judge will take a week or two, but he will be a great judge. Thanks, Bobby, for your service!

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Automated vehicle update

About a year ago I went to a conference with folks from the Texas A&M Transportation Institute. The purpose was to meet with prosecutors and law enforcement to explore the issues involving traffic law enforcement when it comes to automated vehicles. Officers in the room quickly identified some basic issues: If there is a wreck, how does the officer move and/or turn off the automated vehicle (abbreviated as AV)? If the AV commits a traffic violation, how does the officer pull it over? Who gets the ticket? What if the AV hits someone and fails to stop and render aid? What if the AV is pulled over and a drug dog hits on it because it is being used as an automated drug courier? Fully automated vehicles will be hitting the roads soon, and these questions will need answers.

Texas A&M is working on them and has recently issued a report on the challenges of moving into an AV world. Check it out at: http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/PRC-15-46-F.pdf. Or go to our online Journal Archive at www.tdcaa.com/journal, look for this column, and download the PDF from there.

Speaking of vehicles …

It was the end of an era when we at TDCAA said goodbye to our trusty white Suburban ("the 'burban" for short—it's pictured in the top photo at right), which had carried our training team all over this great state for more than 10 years. Truth be told, we can be pretty tough on vehicles (the 'burban had its fair share of windshield cracks and bumper scrapes), and it was high time to get a new one to tote us—and all of our gear—to Galveston for our Annual conference in September.

Enter **Frank the Tank**. That's a photo of him, below. He is our new TDCAA van/truck/tank, and he is a shiny black Nissan beast designed to haul lots of people (which we have) and lots of stuff (which we also have). A world of thanks to **Shannon Edmonds**, our trusty Governmental Relations Director, who researched, shopped for, and test drove vans and SUVs in search of the exact right vehicle for our needs. He earned a debt of gratitude from all of us—as well as naming rights for the beast. Some of you may remember that Frank the Tank was Will Ferrell's nickname in the movie *Old School* (it's a TDCAA staff fave and is consistently quoted around these parts), always up for a party—and maybe a little streaking. We're not exactly sure why Shannon went with that nickname, but we're going to keep a close eye on both him and our new ride for the near future, just to be safe.

The 'burban

Frank the Tank

The first lawsuit over guns in the courthouse

In the last six months, different counties have gotten letters from the Attorney General's Office notifying county officials that various county buildings had improperly posted signs prohibiting concealed firearms on the premise. The AG had the unenviable task of managing the complaints around those signs made by open-carry and constitutional-carry advocates, and that office has been doing a great job of working out these problems all over the state.

Well, one of our prosecutors decided enough was enough and "cut out the middle man," so to speak. Recently **Elton Mathis**, our Waller County CDA, filed a declaratory judgment action naming **Terry Holcomb**, the Executive Director of Texas Carry, as the defendant. The lawsuit's goal is simple: to secure a legal ruling that §46.03(a)(3) of the Penal Code means exactly what it says, that guns are not allowed in a courthouse. Period. To read the lawsuit, go to our website at www.tdcaa.com/journal, and find this column in this issue.

Just before this issue went to press, Attorney General Ken Paxton filed suit against Waller County on this very issue, so stay tuned to see how it all plays out.

Welcome, August James Martin!

We are thrilled to report that **Ashley Martin**, our most excellent Research Attorney, has a son! August James Martin was born on July 6 at a healthy 8 pounds, 2 ounces. Everyone is doing great, and we're proud

to add another soul to the TDCAA family.

The Seeds of Injustice

I enjoy reading a good crime drama, and it is even more fun when it is written by one of our own. The most recent novel by a TDCAA member is *The Seeds of Injustice* by Rusk County and District Attorney **Micheal Jimerson**. It is a good read and a lot of fun as it is a bit of a "period piece" set in post Civil-War East Texas. Here's the back cover description: "Caleb Philips returns from the carnage of the Civil War to find his wife dead, his teenage son rebelling, and his native East Texas in turmoil. Before he can begin to rebuild, another returned veteran, ex-Confederate general-turned-judge Matthew Ector deputizes him to hunt down the cold-blooded killers of several newly freed slaves. In the meantime, Ector himself must deliver justice in a courtroom for an Indian chief and former rebel general under the hostile gaze of the Union occupying authorities. In a rip-roaring tale stretching from the Piney Woods of East Texas to the barren desert of the Comancheria in New Mexico, author Micheal Jimerson weaves a powerful tale of love, loss, vengeance, and forgiveness."

You can find it on Amazon at www.amazon.com/Seeds-Injustice-Micheal-Jimerson/dp/1936497328. ❇

PRESIDENT'S COLUMN

An opportunity—and duty—to lead

By Bernard Ammerman
District Attorney in Willacy County

Like all of you, I was horrified when five officers in Dallas who were providing security at a peaceful demonstration for the Black Lives Matter movement were shot and killed by a sniper. Following the tragedy in Dallas, three Baton Rouge officers were ambushed, and one San Diego officer was killed during a traffic stop. Preliminary data by the National Law Enforcement Officers Memorial Fund shows that 2016 has seen an epidemic of officers who have been shot to death in the line of duty. At this date the number is 32, compared to 18 for the entire year of 2015. That is an increase of nearly 78 percent. What is as alarming is that 14 of these officers were murdered by ambush.

As prosecutors, we work every day with our police officers. To learn to appreciate the challenges of their job, I have done numerous ride-alongs with officers. I wanted to experience what police officers experience every minute on their jobs. How else could I paint an adequate picture to a jury? And I did not stay in the comfort of the air-conditioned patrol unit and watch by long-distance. I got out and stood near the officers to listen first-hand to their interactions with citizens. It's a job fraught with uncertainty: What are you walking into? Is the driver behind the wheel armed? What or who is in the back seat, behind the fence, or on the other side of this door? What I offer to you is that policing is not a job for the weak-kneed. I highly recommend that prosecutors do a ride-along with your local officers to experience what they do to keep our families and us safe.

In Texas, Governor Greg Abbott announced a proposed bill called the Police Protection Act after the murder of the Dallas police officers. The bill would extend hate-crime protection to law enforcement officers and change the offense of assaulting a public servant from a third-degree felony to a second-degree. I think that is a good message of support for law enforcement. Abbott also proposes a campaign to educate Texas youth on the value of the service of law enforcement officers. Education may be a vital tool to bring our hurting people together.

So where do we go from here? How do we work to support and protect our officers? I suggest that we go back to the beginning of this current tumult over police use of force and the reactionary ambush of officers—all the way to Ferguson, Missouri.

Questions have been raised about how police officers are trained

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when it comes to use of force, as well as when and how they use that force. As far as I can tell, those questions aren't going away. As ministers of justice who prosecute (or *don't* prosecute) use-of-force cases, we are squarely in the middle of this issue. This is our opportunity to lead the conversation in our communities, and we all win if we can begin a conversation that restores and enhances trust in our law enforcement community.

I'd like to remind everyone what was happening on that tragic night in Dallas: Citizens were marching in peaceful protest while being protected—not opposed—by the police. I don't have a laundry list of things we need to talk about or what needs to change, but it seems to me that people are on the right track in Dallas. ❇

Upcoming TDCAA seminars

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

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

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

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

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

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

Key Personnel & Victim Assistance Coordinator Seminar, November 2–4, at the Embassy Suites Hotel & Conference Center, 1001 E. McCarty Lane, in San Marcos. Rates are $119 plus tax for a single or double room; this rate is good until October 11 or until sold out. To make reservations, call 512/392-6450 and identify yourself with TDCAA.

Elected Prosecutor Conference, November 30–December 2, at La Toretta Lake Resort & Spa, 600 La Toretta Blvd., in Montgomery. Rooms are $139 plus tax per night. See our website, www.tdcaa.com/training, for information on making reservations.

Registration for all TDCAA seminars is online only at www.tdcaa.com/training. ❇

Advanced training for prosecutors

The Foundation exists to support the mission of TDCAA to train and support today's Texas prosecutors. We know that grant funding can go a long way, but we want Texas prosecutors to be the best in the nation, so we continue to strive to find the resources to do the job.

I am proud that the Foundation is able to support the recently completed Advanced Trial Advocacy Course at the Baylor College of Law. (See a group photo of the attendees, faculty advisors, and a few speakers, below.) This is one of our best courses, and it draws major support from the Foundation. We all know that the job of a prosecutor has gotten more complicated. We no longer just try our cases and move to the next. We pay attention and devote resources to all sorts of issues in our criminal justice system, from pre-trial services to diversions to sex offender civil commitment to victim services. Our offices have become pivot points for reform of the criminal justice system.

By Rob Kepple
TDCAA Executive Director in Austin

And that is good and right. But there is one constant to this job: When it is time to stand and announce, "The State is ready, Your Honor," we have to be the best. We have to truly be in command of the courtroom and have the skills needed to fight for justice. This course is designed with that in mind. This year we again had students from all over the state, from Pecos to Beaumont and everywhere in between, and faculty from all over the country. These prosecutors learn from the best to be the best. We couldn't do it without the Foundation and your support.

Thanks to **Dean Brad Toben** at Baylor for allowing us to use the school's wonderful facilities. It is a world-class environment for trial advocacy skills, and the dean's continued enthusiasm for our program is very gratifying! ❇

*Recent gifts to the Foundation**

Richard Alpert
Don Clemmer
Justin Tony Cunningham
David Escamilla
Gerald Fohn
Dan Hagood
Luke Inman
Micheal Jimerson
Justin Jones
Rob Kepple in honor of John B. Holmes, Jr., Lyn McClellan, and Kelly Siegler
Rob Kepple in memory of Gerald Goodwin
Tom Krampitz in memory of Gerald Goodwin
Doug Lowe
Lyn McClellan in honor of Bert Graham
Lyn McClellan in honor of John B. Holmes, Jr.**
Kim Ogg
Keith Orsburn
J. Kevin Sutton

* gifts received between June 3 and August 5, 2016

** Editor's note: In the last issue of this journal, Lyn McClellan's gift was mistakenly noted to be in *memory* of John B. Holmes, Jr. It should have been in *honor* of Mr. Holmes, as he is very much alive. We regret that error! We're glad to correct it in this issue. We're also glad he's got a great sense of humor about being erroneously reported as deceased. ❇

Notice of a rate increase for CVC

Just recently, the Office of the Attorney General announced new rate increases to the Texas Crime Victims' Compensation (CVC) program. This is the first increase to some claim limits since the 1990s. From January 1, 1980 to June 30, 2016, the program paid out $1.45 billion involving 225,698 victim applications.

By Jalayne Robinson, LMSW
Victims Services Director at TDCAA

The increased limits will take effect for violent offenses committed on or after July 15, 2016. Here are some of the changes:

- Funeral and burial limits have been increased from $4,500 to $6,500.
- The loss of earnings and loss of support benefits go from a maximum of $500 per week to $700.
- Reimbursing child care expenses increased from $100 per child per week to $300.
- The crime scene clean-up limit went from $750 to $2,250.
- Reimbursement for a sexual assault exam went from $700 to $1,000.
- Reimbursement for property seized at a crime scene increased from $750 to $1,000.

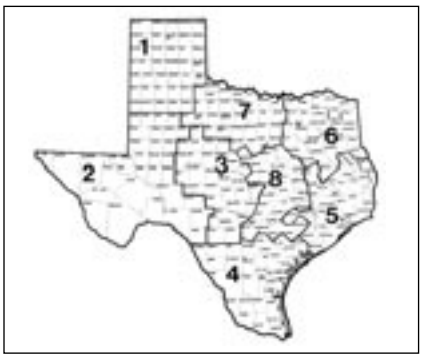
For a detailed list of the new Texas CVC program claim limits go to www.texasattorneygeneral.gov/cvs/crime-victims-compensation-reimbursable-expenses. And for more information about the Texas CVC program, including eligibility requirements, go to www.texasattorneygeneral.gov/cvs/crime-victims-compensation.

Upcoming training

TDCAA's Key Personnel & Victim Assistance Coordinator Seminar will be November 2–4 at the Embassy Suites in San Marcos. Don't miss this opportunity to learn from the best speakers in Texas and to network with prosecutor's staff from across the state. A bonus: The hotel is within a few minutes' shuttle ride to two major outlet malls! Visit www.tdcaa.com/training/key-personnel-victim-assistance-coordinator-seminar for registration and hotel information. We would love to see you there!

Key Personnel and Victim Services Board Elections

Elections for the 2017 Key Personnel and Victim Services Boards (Regions 1, 3, 5, and 7) will be on November 3 at 1:15 p.m. at the KP/VAC Seminar in San Marcos. (See the map, below, to find out what region you're in.)



Both boards assist in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region. To be eligible, each candidate must have the permission of her elected prosecutor, attend the elections at the annual seminar, and must have paid membership dues prior to the meeting. The bylaws for the Victim Services board and FAQs about running for the boards are posted at www.tdcaa.com/victim-services.

Professional Victim Assistance Coordinator recognition

Certification as a Professional Victim Assistance Coordinator (PVAC) is designed to recognize professionalism in prosecutor-based victim assistance and to acknowledge a minimum standard of training in the field. Applicants must provide victim assistance through a prosecutor's office and be or become a member of the Texas District and County Attorneys Association in the Key Personnel category to be eligible for this recognition.

Other requirements include:

- either three years' experience providing direct victim services for a prosecutor's office or five years' experience in the victim services field, one of which has to be providing prosecutor-based victim assistance;
- training recognized for CLE, TCOLE, social work, and/or licensed professional counselor educational credits;
- at least one workshop on the following topics:
  - * prosecutor victim assistance coordinator duties under Chapter 56 of the Code of Criminal Procedure;
  - * the rules and application process for Crime Victims' Compensation;

* the impact of crime on victims and survivors; or

* crisis intervention and support counseling.

• applicants must show that they have already received 45 total hours of training in victim services (which is equivalent to the number of hours in the National Victim Assistance Academy program created by the U.S. Department of Justice's Office for Victims of Crime). Please note that training documentation may no longer be readily available for coordinators with extensive experience, especially in the case of basic training on CCP Chapter 56. An applicant who has 10 years' experience in direct victim services (five of which must be in a prosecutor's office) may sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts.

• five professional references from individuals not related to the applicant. One must be from the elected prosecutor in the jurisdiction where the applicant has been employed and at least one of the letters must be from a representative from a local victim services agency in the community who has worked with the applicant for one year or longer. The remaining three letters can be from other victim services agencies, crime victims, law enforcement representatives, assistant prosecutors, or other criminal justice professionals who have knowledge of the applicant's skills and abilities in the field of victim services.

The next deadline for submitting PVAC applications is January 31, 2017. Applications can be found (as a PDF download) at www.tdcaa.com/victim-services, or look on our website in the Journal Archive in this issue.

ABOVE: In Montgomery County, I met with the Victim Assistance Division in the morning, then trained prosecutors in the afternoon on how VACs can help them. Pictured from left to right are Jason Larman, Jarrod Smith, Philip Harris, Brent Chapell, Taylor Stoehner, Philip Teissier, Sara Corradi, Echo Coleman, Ilda Rupert, Nancy Hebert, Amber Dana, Joel Daniels, Bradlee Thornton, Jane Viada, Donna Berkey, Jocellyn Camarillo, Chaco (a service dog), Vince Santini, Tamara Holland, Kyle Crowl, Pam Traylor, Ranger (another service dog), Tiana Sanford, and me on the far right. BELOW: In Harris County, I met with the Victim Services staff. From left to right are VACs Cindy Contreras, Vania Delgado, Jennifer Gosko, Monica Neal, Martha Cazarez, Alex Guajardo, and Maria Guerrero. Seated is Michelle Permenter, Director of the Victim/Witness Division; Colleen Jordan is part of the division but is not in the picture.

In-office visits

Thank you to each of the offices that invited me to come out for victim services assistance. Traveling across

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Texas and visiting each of your offices is so exciting to me! It is such an honor to be able to help victim assistance coordinators (VACs) and prosecutors recognize the services and resources available for crime victims and to share ideas on how VACs may assist the prosecutors with whom they work.

Please reach out to me at Jalayne.Robinson@tdcaa.com, and I will develop either group or individualized victim services training for your office. ❇

In the Washington and Burleson County District Attorney's Office, I met with Julie Renken, the DA (on the far left) and Amanda Schumann, VAC (in the center). That's me on the far right.

Defense of a third party and the meaning of 'immediately necessary'

Self-defense claims show up regularly in prosecution, and their brother, defense of a third party, only slightly less often. Both claims require that force be "immediately necessary" before they apply, but neither statute nor any other part of the law defines what "immediately necessary" means. In *Henley v. State*,[1] the Court of Criminals Appeals looked at that meaning and what is required for self-defense or defense of a third party to apply.

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

The facts

Gregory Henley and his ex-wife, Brandy, were going through a custody dispute. At the time of trial, Gregory had sole custody of their two sons, and Brandy had supervised visitation. The visitation was supervised due to claims that Brandy's new husband, Douglas, had strangled the boys and Douglas's 11-year-old former stepson had sexually abused them.[2]

On the day of the offense, Brandy and her mother (who supervised the visitations) arrived at Henley's house to pick up the boys. Brandy refused to speak to Henley other than to tell him to bring the boys to the car. When he refused, she called 911 to report that Henley was violating the court order allowing her visitation. Henley brought the boys to the car and put them in the backseat. Brandy was sitting in the driver's seat waiting for the police to arrive when Henley broke off her door handle, pulled Brandy out of the car by her hair, hit her in the face with his fists, and knocked her head against the concrete. When Brandy's mother tried to intervene, he shoved her back, and she broke her arm in the fall. Henley then got in his car—without his sons—and drove away.

At his assault trial, Henley claimed defense of a third party, that his assault of Brandy was justified to protect his sons from potential abuse by Douglas or his stepson. He wanted to present evidence about the allegations against Douglas and his stepson and evidence that Brandy had lied to the family court about living with Douglas, showing that he had a reasonable belief that Brandy might violate the court order about not allowing Douglas to be around the boys during her visits. The abuse allegations were first made in August 2011; this offense was in May 2012. Henley testified in a hearing that he became aware of additional allegations a week before the offense, but

he did not contact CPS or the police or make any attempt to modify the custody orders in that time. After several hearings outside the jury's presence at different points of the trial, the trial court ruled that the evidence was irrelevant and thus inadmissible.

"Immediately necessary"

Both self-defense and defense of a third party share the requirement that the actor believe his use of force is "immediately necessary" to protect himself or a third party. The term "immediately necessary" is not defined in either statute or elsewhere in the Penal Code. Although the Court has not considered the immediacy requirement in the defense of a third person context, it drew the analogy to a similar justification defense: necessity. The necessity defense justifies conduct if the actor believes the conduct is "immediately necessary to avoid imminent harm."[3] Imminent harm means harm that is ready to take place; therefore, for conduct that is immediately necessary to avoid imminent harm, "that conduct is needed right now."[4] For force to be "immediately necessary" to protect another, it must be force that is needed *at that moment*, "when a split-second decision is required."[5]

A defendant has the right to present evidence relevant only to a *valid* justification defense.[6] Otherwise the evidence is irrelevant and inadmissible. Thus, *Henley* turns on whether the evidence showed a valid defense of a third party justification to the assault charge. If not, the evidence was inadmissible. The Court concluded that even if all of Henley's evidence was true—giving reasons why he did not trust Brandy to watch the boys and why he was angry at her ignoring his concerns—it still did not do anything to justify assaulting her because there was no split-second decision that it was necessary to assault her to protect his children. Neither Douglas nor his former stepson were present at the time, and there was no evidence that there was any imminent danger of them coming into contact with the boys. Henley's evidence focused only on his fears based on information that was, at best, a week old. Any potential harm he feared was "neither immediately present nor certain to occur in the immediate future."[7]

In considering whether the threat was imminent, the Court noted the number of other alternatives Henley could have taken to address his concerns if he was afraid the boys were in danger.[8] He could have sought out a temporary restraining order to prevent Brandy's visit, filed for a change in the custody arrangement with the family court, or notified CPS or the police. Indeed, because Brandy had already called 911 and was waiting on the police to arrive when Henley started assaulting her, he could have just waited for the police and explained his concern. The Court also pointed out that Henley created the danger by first putting his sons in Brandy's car and *then* assaulting her. He also left his sons behind (and possibly in danger) when he drove away after the assault. In all, the Court decided that Henley's evidence helped make his anger more understandable, but it did not provide a valid defense.[9]

In short, the Court concluded that to be justified to use force to protect a third person, the person had to have been in immediate danger, not danger from an "imagined future scenario."[10] Because Henley's evidence did not show that Douglas or his former stepson were present or that Brandy or her mother were about to endanger the boys, his evidence did not support defense of a third party.

Going forward

What does *Henley* mean for practitioners? Importantly, the Court's decision was not unanimous, spawning three dissenting opinions and one concurring opinion. Two of the dissents argued that Henley was entitled to present evidence on the issue even if a jury might not have found reasonable his belief that force was immediately necessary.[11] This highlights how dangerous a road a prosecutor faces when trying to exclude requested jury charges. *Any* evidence raising a defense—no matter how weak, impeached, or contradicted—requires it to be included in the jury charge upon request.[12] Here, the majority opinion relied on the conclusion that even if Henley's evidence was fully believed, it still did not raise the defense and thus the evidence was irrelevant. It is important for prosecutors to remember that the question is not whether the evidence is *believable* but simply whether it *exists*.

Presiding Judge Keller's dissent raised a different issue. She believed that the majority ruling added an extra imminency requirement to the statute. The statute requires that force only be immediately necessary, not that it be immediately necessary

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Prosecutor booklets available for members

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

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to protect against imminent use of force. This, Keller believes, is to prevent a "point of no return" event from returning, where it may be the last opportunity to use force even though the danger itself is in the future.[13] However, even this danger was not present in *Henley*, as there was no indication that dragging Brandy out of the car while she waited for the police to arrive was the "point of no return" after which Henley's sons would inevitably find themselves facing danger. But in another case where the *danger* may not be immediate but the need to act is—perhaps if Brandy had been threatening to take the boys away to hide with her and Douglas and Henley had no other opportunity to stop her—a court may find that such circumstances do satisfy the immediacy requirement. The important factor to keep in mind is thus not whether the danger is about to happen, but whether the defendant's actions were necessary *at that moment* to prevent the danger.

In light of the concerns raised by the dissents, it is important not to get carried away with this victory for the State. Small changes in Henley's facts could have resulted in a very different opinion. But in cases where the defendant is claiming to have been acting under self-defense or defense of a third party based on purely an "imagined future scenario" instead of a danger actually close at hand, this case is an important weapon in the prosecutor's arsenal. A defendant cannot simply use his imagination to think of a possible danger in the future to justify an assault in the present. The danger must be in some way near at hand or immediate, or the assault is just an assault. ❇

Endnotes

1 *Henley v. State*, No. PD-0257-15, 2016 WL 3564247 (Tex. Crim. App. June 29, 2016).

2 The strangling allegation was later found not true, and the sexual assault allegation was found to be true.

3 Tex. Penal Code §9.22.

4 *Henley*, slip op. at 19.

5 *Id.* at 20.

6 *Id.* at 5.

7 *Id.* at 21-22.

8 *Id.* at 22.

9 *Id.*

10 *Id.* at 25.

11 *Id.*, Hervey, J., and Newell, J., dissenting.

12 *Beltran v. State*, 472 S.W.3d 283, 290 (Tex. Crim. App. 2015).

13 *Henley*, slip op. at 2 (Keller, P.J., dissenting).

Photos from our Prosecutor Trial Skills Course

Photos from our Advanced Trial Skills Course

A roundup of notable quotables

"Yeah, if you are speeding through McLennan County, you just might get pulled over by The Dude."

—actor Jeff Bridges, well-known for playing The Dude in *The Big Lebowski*, at the premiere of *Hell or High Water*, a new movie in which he plays a West Texas sheriff. He based his performance on McLennan County Sheriff Parnell McNamara, and the two men hit it off so well that Sheriff McNamara made Bridges an honorary deputy. An audience member at the premiere asked Bridges about being deputized, and he proudly whipped out his ID card so everyone could see it. (hwww.wacotrib.com/news/mclennan_county/sheriff-mcnamara-the-inspiration-for-jeff-bridges-new-movie-role/article_c3c1b95b-e27b-5ec5-afbd-344941f6f606.html)

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

"We just want people to hire us, either as lawyers or for their bar mitzvah."

—Waco defense attorney Will Hutson, who, along with law partner Chris Harris, wrote and recorded "Don't Eat Your Weed," a song they uploaded to YouTube (www.youtube.com/watch?v=nQZRA7wft1I). It's been viewed more than 331,000 as of press time. (http://www.texarkanagazette.com/news/texas/story/2016/jul/12/singing-lawyers-send-message-dont-eat-your-weed/631143/)

"Every societal failure, we put it off on the cops to solve. Not enough mental health funding—let the cop handle it. Not enough drug addiction funding—let's give it to the cops. Here in Dallas we got a loose dog problem. Let's have the cops chase loose dogs. Schools fail—give it to the cops. Seventy percent of the African-American community is being raised by single women. Let's give it to the cops to solve that as well. Policing was never meant to solve all those problems."

—Dallas Police Chief David O. Brown, at a press conference after five Dallas peace officers were killed at a protest. (www.nytimes.com/2016/07/12/us/dallas-police-chief-brown-protests.html)

"'Pokemon Go' is not a valid defense for violating a no-contact order."

—@lawyerthoughts on Twitter

"They tell me before she became hooked on heroin, she was a very loving and attentive parent."

—James Bogen, court-appointed attorney for April Corcoran, 32, of Ohio. Corcoran was sentenced to 51 years to life in prison for loaning her 11-year-old daughter to her drug dealer in exchange for heroin. Judge Leslie Ghiz, who sentenced Corcoran, told her from the bench that this was by far the worst crime that had come before her in her 3½ years as a judge. (https://www.washingtonpost.com/news/morning-mix/wp/2016/07/20/the-worst-thing-that-has-come-before-this-court-ohio-mom-financed-her-addiction-by-letting-drug-dealer-rape-her-child/)

"As reflected by many public speeches that he gave to various organizations and graduation ceremonies, he was eternally grateful for the opportunity that America gives to those who work hard, particularly to a young barefoot boy who herded goats and later graduated from law school."

—Obituary for the late Honorable Gerald Goodwin, onetime district attorney and district judge in Angelina County (and a member of our Foundation's Texas Prosecutors Society), who died in August after a battle with lung cancer. (http://www.legacy.com/obituaries/lufkindailynews/obituary.aspx?page=lifestory&pid=180947871)

Continued from the front cover

Wichita Falls horror story (cont'd)

Assessing the crime scene

Back at the house, officers executed the search warrant, cataloging the shocking state of Allison's room. "Her room looked like a hoarder's house," one investigator said. One of us, John, also responded to the call and witnessed it first hand. In my 15 years as a prosecutor, I've seen some awful crime scenes, but none has haunted me like that house. Clothes and various junk cluttered the entire area, with barely any space to walk to or from the crib. A bottle of curdled chocolate milk rested on a table a few feet from where Allison slept. The floor was littered with discarded Chef Boyardee-type food tins.

Not five feet from the crib, a dead mouse laid in a trap on the floor. The floor was also sprinkled with rodent droppings. The wall next to the crib was smeared with dried fecal matter. The mattress in the crib had a hole in it, and an indentation indicated Allison had been lying in one spot. Duct tape held the old crib together. When investigators pulled the crib back from the wall, they found a huge pile of human feces on the floor against the wall. In the crime scene photos, it almost looked like large scoops of chocolate ice cream.

In the kitchen, the refrigerator was dead and overgrown with mold. Other than some ice coolers with lunch meat, investigators could locate no edible food in the room. One cooler did contain several cold beers, and the cabinets above the stove were filled with empty cigarette boxes. The living room with the TV and the other bedrooms were much cleaner than Allison's room.

While investigators were on scene, Robin Payne arrived home with a bottle of chocolate milk. Ms. Payne identified herself as Allison's mother and said she had been at a community college and left Allison with her son, Brandon.

Ms. Payne said she was "awfully ashamed" for Allison's condition and that she "had no excuse for it." Ms. Payne told the detective that she knew she had failed her daughter and that she should be doing better for her.

In that interview, Ms. Payne also said she had not taken Allison to a doctor in two years and that she had not seen a dentist in five. The unemployed Ms. Payne said she had been meaning to call for a doctor for Allison, but "there just aren't enough hours in the day." Finally, Ms. Payne said she was receiving $710 a month in Social Security disability for her daughter.

Finding the right charge

Law enforcement sent the case over as a grand jury referral for injury to a disabled person. While the medical records indicated that Allison may have been dehydrated and malnourished, she had no significant injuries. Also, because she was unable to communicate, Allison could not tell us whether her condition caused her physical pain.

In scouring the Penal Code for the best charge, we located exploitation. In 15 years as a prosecutor, I (John) had never reviewed or charged an exploitation offense. Section 32.53 of the Penal Code defines exploitation, a third-degree felony, as the "illegal or improper use of a child, elderly individual, or disabled individual or [of their resources] for monetary or personal benefit, profit, or gain." Additionally, exploitation can be intentional, knowing, or reckless.

Exploitation neatly fit our set of facts. First, the charge did not require that we prove bodily injury. Second, it was broad enough that in proving that Allison's resources were used for Robin Payne's monetary or personal benefit, we could focus on the Social Security money that Ms. Payne took for her daughter's provision coupled with the substandard care that she provided, including the lack of medical or dental care, filthy conditions of the room and crib, and lack of hygiene. Additionally, the Adult Protective Services investigation, which started the day Allison was found and concluded four months later, expressly determined that Robin Payne exploited her daughter and found significant medical and physical neglect, so we had an expert report to support the charge. Based on this information, the grand jury returned an indictment for exploitation.

The bench trial

On the eve of trial, defense counsel said her client wanted to plead guilty and go open to the judge at a bench

trial on punishment. We consented.

Our trial strategy was to call almost every law enforcement officer who responded to the scene to explain it was one of the most horrific crime scenes each had seen in his law enforcement career. In total, we had eight officers testify that they had been in numerous messy houses and seen many disturbing things, but that this house and the conditions that Robin Payne had subjected Allison to were some of the very worst things these veteran officers had seen. Months later, these officers were still visibly shaken from what they had witnessed in Allison's room.

We also called several of Ms. Payne's neighbors. Two said they thought Allison had been committed to a facility because they never saw her in the neighborhood after the young woman had stopped going to Dayhab, a daycare-like facility for the disabled, five years before. Ms. Payne's next door neighbor, who was a bit like the nosy neighbor Gladys Kravitz on the old '60s TV show *Bewitched*, said she became so concerned about never seeing Allison that she point-blank asked Ms. Payne why Allison never left the house. Ms. Payne claimed that Allison was "allergic to the sun" so she could not bring her outside. Allison's pediatrician, however, testified that she had no such condition. We believed this testimony was important to show that Allison had been willfully confined inside the house.

The neighbors testified that while they often saw Ms. Payne walking her dogs in the neighborhood, they never saw her taking Allison out to get some sun and fresh air. Ms. Payne's lie about the sun allergy also helped demonstrate her consciousness of guilt.

Dr. Kenneth Sultemeier, a pediatrician who had treated Allison since she was baby, was also a key witness. He explained that Allison had hydrocephalus and shunts in her brain. She had complications with these shunts, and the doctor said they needed to be checked regularly by a physician. Additionally, Allison had a seizure disorder for which she needed regular medical care.

Dr. Sultemeier said Ms. Payne knew of these critical medical conditions but that she had not brought Allison to see him in five years, and Ms. Payne admitted on the stand that Dr. Sultemeier was the last doctor to have seen Allison. Thus, the doctor's testimony established that Robin Payne had lied regarding Allison's last doctor's visit. While Ms. Payne repeatedly claimed it had been only two years, actually five years had elapsed since a doctor had examined Allison.

To establish motive for the exploitation, we called the care facility administrator at the first facility where Allison had lived after her removal from the Payne house. The administrator confirmed that while Medicaid would help pay for care for a patient like Allison, her mother would have to assign over her disability payments to the facility. The administrator also testified that patients like Allison received regular perineum care, which demonstrated the type of intimate cleaning a patient like Allison needed and would receive in an inpatient facility.

This evidence showed the motive: Ms. Payne was denying her daughter inpatient care that she desperately needed because she would have to relinquish the monthly disability payments. Thus, the old adage of "follow the money" applied to our case.

The State's case ended with Nikki Ross, a veteran Adult Protective Services investigator. We designated Ms. Ross as an expert witness in the investigation of exploitation and neglect. Ms. Ross detailed her thorough investigation and her conclusions that Ms. Payne had medically and physically neglected Allison and that she had exploited her daughter's resources.

Significantly, Ms. Ross detailed all of the social services that were available for a disabled individual, such as adaptive medical equipment, medical treatment, and home health nurses through Medicaid. Yet the only social services that Ms. Payne had taken advantage of were food stamps and disability payments, which directly benefitted herself. Ms. Ross also testified that it was clear from looking at Allison that "Ms. Payne wasn't spending much money on her."

Emergency room records indicated Allison was malnourished, but the defense questioned Dr. Sultemeier about Allison's lab numbers, and the doctor replied that they were all normal and not indicative of malnourishment. We wound up not emphasizing that at trial. Allison had a voracious appetite when she was placed in care and gained 10 pounds—but disabled people in her condition will eat and eat and eat, we were told, so it is hard to say if her appetite was because of malnourishment or because of her disabilities.

Finally, Ms. Ross testified that in

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approximately 2,500 cases of adult abuse and neglect that she had investigated, this was the single worst case of a child's exploitation and neglect by a parent.

The defense case

Rather than accept responsibility and claim that the defendant was just overwhelmed and had let the situation get out of control (which is what Robin Payne had told the detective the first time she spoke with him), the defense decided to deny that Ms. Payne had exploited Allison and instead blamed law enforcement for her daughter's condition. (That's right: Ms. Payne pled guilty but then tried to shift the blame for Allison's condition elsewhere. We were befuddled as to that trial strategy.)

Ms. Payne and several other witnesses testified that on that morning when Robin left for class, Allison was clothed and clean, that there was no fecal matter smeared on her crib or bedroom walls, and that there was no dead mouse on the floor. Rather, they claimed that when law enforcement arrived, Allison had just escaped her clothes and had a bowel movement. Allison had "fast-drying" fecal matter, they said, and she often "pooped balls and balls and balls—massive amounts—of poop." Thus, they claimed law enforcement was responsible for Allison's situation, which the defense claimed had deteriorated rapidly only after the officers arrived and intervened.

This absurd testimony was rebutted by two first responders who cared for Allison. Both testified that they had encountered many situations where people had lost control of their bowels and then not been discovered for up to 24 hours, but Allison's situation was worse than those. Rather, they said it was clearly something that took days if not weeks to deteriorate to that point.

While Ms. Payne testified that her son Brandon was an appropriate babysitter, Brandon himself testified, "I'm not a babysitter. I'm not a role model. I'm not a daycare provider. I don't change diapers."

Sadly, trial testimony also revealed that Ms. Payne rarely went to see Allison after her placement in a residential care facility.

The perjury

During her direct testimony, Ms. Payne went through her alleged expenditures for Allison. She claimed to have spent close to $700 a month on her and claimed not to be able to account for only $20. This directly contradicted the information she had given to the APS investigator, when she had trouble accounting for much more of Allison's money.

When defense counsel asked if she ever spent Allison's money on herself, Ms. Payne said that she had not. We were surprised that Ms. Payne had just denied the offense for which she pleaded guilty. Importantly, she had previously signed a judicial confession where she swore she had exploited Allison.

On cross-examination, John asked her if she was familiar with the legal definition of exploitation. She said that she was and that her attorney had explained it to her. Then I asked her if under the legal definition of exploitation in Texas, did she ever exploit her daughter? "No, I did not exploit her," she replied.

Later that week, the grand jury indicted Ms. Payne for aggravated perjury because she had sworn to two directly contradictory statements under oath, both of which could not be true.

The sentence

"The true measure of any society can be found in how it treats its most vulnerable members," Gandhi once said, and John used this quote at closing. If this is a true standard for society, then isn't it also a true way to measure *crimes* against the most vulnerable? For a mother to exploit her daughter who was so completely vulnerable, so completely dependent, so completely unable to speak up for herself was a special kind of evil.

Judge Bob Brotherton sentenced Ms. Payne to six years in prison and said that he was especially offended at the terrible conditions she left Allison in compared to the rest of the house. He said it was clear that Ms. Payne was providing a better standard of living for herself and the other adults in the house than for her disabled daughter. Following the judge's prison sentence, we permitted Ms. Payne to plead to misdemeanor perjury, whose sentence will run concurrently with the exploitation sentence.

Allison is now placed in a new residential care facility in Wichita Falls. When we went by to see her, she was in a clean bed with fresh clothes and a bow in her hair. She often watches the Disney Channel, and she is happy. ❇

"Does the defendant have to register?"

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

Editor's note: This article ran in the last issue of this journal, and due to editing errors (not those of the author), several mistakes were included in it. We regret those errors and reprint the article here in its entirety so that the correct information is readily available and apparent.

By Hilary Wright
Assistant Criminal District Attorney in Dallas County

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

Where to start

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

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

When does the registration expire?

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

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

Charges *not* requiring registration

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

- §20A.03 Continuous Traffick-

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Convictions and adjudications that require sex-offender registration

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

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

ing of Persons (even though 20A.02(3), (4), (7), and (8) Trafficking of Persons offenses have a lifetime registration requirement),

- §21.12 Improper Relationship between Educator and Student (even if the student is a child),
- §39.04 Improper Sexual Activity with Person in Custody (even if the person in custody is a juvenile),
- §21.15 Improper Photography or Visual Recording (even if the complainant is a child),
- §43.03 Promotion of Prostitution (even involving a person under 18 engaging in prostitution),
- §43.04 Aggravated Promotion of Prostitution (even when using as a

prostitute one or more persons younger than 18 years of age), and

- §43.23(h) Obscenity, when the obscene material depicts or describes activities engaged in by a child under 18, a person indistinguishable from a child under 18, or an image depicting an identifiable child (see the note above about obscenity).

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

Charging strategies

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

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

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

Admonishment

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

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

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Conclusion

Whether it is for plea-bargain negotiations, indictment strategy, or showing off at cocktail parties, knowing your way around the sex offender registration laws is a big help to prosecutors and criminal defense lawyers alike. If it is difficult for an attorney to comprehend, you can imagine how hard it might seem to a defendant. My hope is that this article and the accompanying chart will guide you past the minefields on a safe path through this treacherous ground. ❇

Endnotes

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

[2] Tex. Penal Code §43.23(h).

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

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

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

Evaluating defendants for competency and sanity

How experts examine defendants for competency to stand trial and for sanity at the time of the offense

By Matthew D. Faubion, M.D.
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Erin M. Foley, Ph.D.
Forensic Director of the Department of State Health Services in Austin

Edward Smith is a (hypothetical) defendant facing charges for aggravated assault with a deadly weapon after hitting his mother with a baseball bat during an argument about going to see a psychiatrist. He has been unable to live on his own for some time and currently lives with his mother at her house. Mr. Smith is unemployed and relies on his Social Security income. He has previously been diagnosed with a severe mental illness and has been intermittently adherent to psychiatric care over the years.

In this example, would you as a prosecutor consider raising the issue of competency when Mr. Smith's file lands on your desk? If so, what factors suggest that the issue should be raised? If not, what additional information might lead you to raise the issue of competency? While a prosecutor may not have a specific legal duty to always bring a defendant's mental health issues to a court's attention, it is a prosecutor's primary duty "not to convict, but to see that justice is done."[1] This overarching directive makes our questions above particularly relevant for today's prosecutor.

Evaluating a defendant for either competency to stand trial or sanity requires knowledge of both the criminal justice and mental health systems, as well as an understanding of the psychological and legal factors unique to a defendant's particular case. In general, competency evaluations examine current functioning as it relates to legal proceedings while insanity evaluations consider one's functioning at the time an offense occurred. For most individuals, including those with severe and persistent mental illness, competence to stand trial is not an issue. Nationally, competency evaluations occur at a rate of 50,000–60,000 per year, with only 20 percent of those evaluated deemed incompetent to stand trial.[2] Claims of insanity are even less common, with data sug-

gesting they occur in only 1 percent of felony cases and are successful roughly 25 percent of the time.

While the question of competency is not an issue for most individuals facing trial, it is helpful to understand when and how the question of competency should—or could—be raised. Furthermore, it is important to know when an insanity evaluation might follow a competency evaluation and how both sanity and competency are addressed within the mental health arena. Texas Code of Criminal Procedure Chapters 46B and 46C outline the many details associated with competency to stand trial and the question of sanity. Using Edward Smith as an example, we will explore some of these elements, beginning with the issue of competency.

Competency evaluations

Competency evaluations are here-and-now assessments. They examine the defendant's understanding of the charges, his understanding of potential consequences of the criminal proceedings, and his ability to consult with an attorney. Competency evaluations are guided by CCP Chapter 46B, which establishes specific criteria that must be addressed, as well as the qualifications of the examiner necessary to perform the evaluation. A qualified expert is either a state-licensed psychiatrist or psychologist who has the specialized forensic certification, training, or experience outlined in the statute.[3]

Issues of competency may be raised by the defense attorney, prosecutor, or trial court.[4] When competency is called into question, the individual raising the issue submits a brief to the court detailing probable cause for an evaluation. In the case of Mr. Smith, several key pieces of information might raise the issue of competency: his history as it relates to psychiatric care, his reliance on his own Social Security income, his inability to live on his own, and the context in which the assault allegedly occurred. We should also look beyond the limited information provided in our case example to any behaviors that might significantly interfere with his work with counsel or his ability to participate in courtroom proceedings.

If the issue of competency is raised, the court determines through informal inquiry whether there is evidence from any source (e.g., observations of the defendant's behavior or information from a credible source that the defendant may be incompetent) to support a finding of incompetency. Should there be a determination that evidence exists to support a finding of incompetency, the court will order a formal competency evaluation.

If the court orders a competency evaluation, a qualified expert will be appointed to examine the defendant. Competency evaluations consider information specific to the individual being assessed; therefore, the information requested by an expert evaluator may vary from one case to another. At a minimum, the evaluator will likely request the incident or police report associated with the offense, jail records detailing any psychiatric or medical care received, and any records of the defendant's behavior while in the jail. This information focuses on current functioning and is consistent with the notion that a competency evaluation is not necessarily a deep review of someone's history.

Competency evaluations often occur in jail settings and generally take several hours to complete. In our case example, evaluating Mr. Smith should, at a minimum, take into account each of the factors identified in statute:

- his capacity to rationally understand the charge brought against him and the potential consequences of the pending criminal proceedings;
- his ability to disclose relevant facts, events, and states of mind to his attorney;
- his ability to engage in reasoned decision-making regarding legal strategies;
- his understanding of the adversarial nature of criminal proceedings;
- his ability to behave appropriately in the courtroom; and
- his ability to testify.

In addition, Mr. Smith's evaluation should include an assessment of whether he has a mental illness or intellectual disability and, if so, whether the identified condition has lasted or is expected to last for at least one year.[5]

When evaluating Mr. Smith, the qualified expert would assess the level of impairment resulting from any identified mental illness or intellectual disability as well as the specific impact this illness or disability has on his capacity to reasonably and rationally consult with his attorney. It was mentioned previously that Mr. Smith has received psychiatric care—if he is currently taking psychoactive or other medications, the evaluator should also examine whether the medication is necessary for Mr. Smith to main-

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tain competency and what effect, if any, the medication has on his appearance, demeanor, or capacity to participate in court proceedings.[6]

Once an assessment is complete, the information is compiled into a report and presented to the court for consideration. Proceedings from that point on are governed by Subchapters A (General Provisions) and C (Incompetency Trial) of CCP Chapter 46B.

It is important to note that mental illness is dynamic and may be subject to periods of exacerbation when under stress (such as that experienced while in a jail setting), so individuals who are deemed competent at one point in time may need to be reassessed immediately before trial to address potential shifts in functioning. Defendants should be reexamined by the forensic evaluator if there has been any suggestion of change in mental status. Counsel should have a low threshold for requesting that the expert briefly evaluate the defendant immediately before trial to ensure that there has been no deterioration of his competency for trial.

A finding of incompetence

Mr. Smith was charged with aggravated assault with a deadly weapon. If found incompetent to stand trial, he would be committed to treatment to restore his competency to proceed to trial. In Texas, there are several options for restoring a person's competency.[7] Individuals may be committed to an inpatient or residential care facility (e.g., a state-supported living center) or released on bail and restored to competency in an outpatient setting. The setting is determined by the presiding judge and takes into consideration factors such as risk of unauthorized departure, safety to the community, and clinical need. Mr. Smith's offense (aggravated assault with a deadly weapon) is among those requiring commitment to a Maximum Security Unit (MSU) designated by the Department of State Health Services (DSHS). Currently, two state-operated psychiatric hospitals have designated MSUs, North Texas State Hospital in Vernon and Rusk State Hospital, so Mr. Smith would receive treatment and competency restoration services in one of these facilities. His initial commitment would be for 120 days. Had he been committed for an offense other than one requiring MSU admission, he would have been ordered to a non-maximum security facility (i.e., a state-operated psychiatric hospital, contracted facility, or state-supported living center) or outpatient competency restoration program.

National statistics reveal high rates of competency restoration, with approximately 75–90 percent of individuals restored to competency within the first 180 days of admission to services.[8] In Texas, initial competency restoration commitments are mandated not to exceed 60 days for a misdemeanor or 120 days for a felony. The head of the treatment facility may request one 60-day extension of the initial commitment period if it is believed that the individual can attain competency during that additional 60-day timeframe.[9] Importantly, individuals may not be committed to a hospital or other facility or program for a cumulative period that exceeds the maximum sentence of the offense for which he was to be tried (in Mr. Smith's case, 20 years).[10]

Mr. Smith would remain in the MSU until restored to competency or until he passes the state Dangerous Review Board (DRB). The DRB is a statutorily defined multidisciplinary group that evaluates whether a person presents as manifestly dangerous (i.e., a danger to others and in need of placement in an MSU to continue treatment and protect the public).[11] If reviewed by the DRB and found not manifestly dangerous, Mr. Smith could transition to another state facility for continued competency restoration in a less restrictive setting. If found dangerous, Mr. Smith would remain in the MSU for continued treatment and would be presented again to the DRB if he improved or every six months irrespective of clinical status. As treatment progresses, additional competency evaluations would be conducted by forensic evaluators, and reports would be prepared for the court's consideration in accordance with requirements laid out in CCP Chapter 46B.

Sanity evaluations

In our example, Mr. Smith was found incompetent to stand trial and ordered into inpatient care. If, however, Mr. Smith had been found competent to stand trial, there is a possibility that a separate report regarding sanity could be obtained. Of course, it is important to note that the insanity defense is rarely utilized.

Sanity evaluations are governed by Subchapter C (Court-Ordered Examination and Report) of CCP

Chapter 46C. In those instances when insanity is a potential consideration, competency and sanity reports are often ordered together. A qualified expert can give an opinion regarding sanity, but only if the individual is first deemed competent to stand trial. In these instances, the expert will prepare two separate reports (i.e., one competency report and, if competent, a second sanity report). Information presented in a competency hearing is much more limited in nature than information included in a sanity report and is statutorily excluded from introduction in the case-in-chief.

Unlike competency evaluations, which focus on current functioning, sanity evaluations are retrospective assessments. They evaluate one's ability to differentiate right from wrong at the time of an alleged offense (which often occurred months, if not years, in the past).[12] As such, this type of assessment typically requires a greater amount of information to best ascertain the defendant's mental state at the time of the alleged offense. The evaluator may request:

- police reports;
- witness statements (particularly those describing others' accounts of the defendant's actions and demeanor);
- mental health records to establish the nature of the defendant's mental illness;
- collateral information from those who had contact with the defendant;
- medical records, including drug or toxicology screens following arrest; and
- an interview with the defendant.

In addition, other records may be necessary depending on the nature of the offense (e.g., an autopsy report, assessment of the victim's injuries, or school records). In any case, the retrospective nature of the sanity assessment generally requires more information and more of the evaluator's time to prepare the necessary report.

Not Guilty by Reason of Insanity (NGRI)

Assume that Mr. Smith's insanity defense was raised successfully. Further, imagine that following his acquittal, Mr. Smith was committed to inpatient care in accordance with procedures outlined in CCP Chapter 46C. This order of commitment would expire on the 181st day following the date it was issued, and the court would determine annually whether to renew Mr. Smith's commitment order. Similar to what was described for competency restoration commitments, the total commitment period for any person found not guilty by reason of insanity (NGRI) cannot exceed the maximum sentence had he been convicted of the crime. This total commitment period may include time in an inpatient or residential setting as well as time in an outpatient setting. Typically, individuals on an NGRI commitment stay in care for longer than those on a commitment for competency restoration. Looking at only the inpatient hospital stays for Texans deemed NGRI, as compared to those found incompetent to stand trial (IST), we find that the average length of stay in 2015 was 615 days for the NGRI population and 177 days for the IST population.[13]

Treatment for persons deemed NGRI is targeted toward those symptoms of mental illness associated with dangerousness. Additionally, treatment focuses on vocational rehabilitation and building skills necessary for one to live safely and productively in the community. For individuals committed to inpatient care, release from a psychiatric hospital takes into consideration factors related to ongoing treatment needs, potential dangerousness, and community safety. Prior to transitioning out of an inpatient hospital setting, individuals found NGRI will have a treatment team recommendation that they are suitable for community release; a forensic consultation detailing their community treatment needs and violence risk; and, potentially, testimony from treatment providers in case of a contested release. Defendants are released only with the permission of the court.

As a general rule, persons deemed NGRI stay in the hospital until their treatment needs can be met in a community setting and they are no longer dangerous. Texas does not have conditional release for persons found NGRI, and there are limited transitional care options for those leaving inpatient settings. Most often, NGRI acquittees are released on outpatient commitments that must be renewed annually. If an individual's outpatient commitment is not renewed, then he is no longer subject to the court. Those released on an outpatient commitment may be discharged to a boarding home under the court's supervision with psychiatric care rendered by the local mental health authority or other mental health service providers in the community. These mental health providers periodically report to the

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court on the individual's condition, although the mechanism for this reporting varies widely across the state. If an individual currently under an outpatient commitment deteriorates and presents as a danger to others—or otherwise meets civil commitment criteria—he can be converted from an outpatient to an inpatient commitment for continued treatment in a more structured setting.

Conclusion

A defendant's experience of mental illness can significantly impact his interactions with the legal system. Forensic mental health evaluators can assist in legal proceedings by helping the parties involved navigate complex issues that may arise surrounding questions of competency and sanity. If you have any questions, please feel free to contact us at Erin.Foley@dshs.state.tx.us (or 512/206-5237) and Matthew.Faubion@dshs.state.tx.us (or 830/258-5287). ❇

Endnotes

1 Tex. Code Crim. Proc. Art. 2.01.

2 Mossman D., Predicting restorability of incompetent criminal defendants. *Journal of the American Academy of Psychiatry and the Law*, 35: 34-43, 2007.

3 Tex. Code Crim. Proc. Art. 46B.022.

4 Tex. Code Crim. Proc. Art. 46B.004.

5 Tex. Code Crim. Proc. Art. 46B.024.

6 *Id.*

7 Tex. Code Crim. Proc. Ch. 46B, Subchapter D (Procedures after Determination of Incompetency).

8 Morris DR and DeYoung NJ. Long-term competence restoration. *Journal of the American Academy of Psychiatry and the Law,* 42:81-90, 2014.

9 Procedures for extended commitments outlined in Tex. Code Crim. Proc. Ch. 46B incorporate the civil commitment standards set forth in the Health & Safety Code; see Subchapters D–F for details.

10 Tex. Code Crim. Proc. Art. 46B.0095; see that article and Art. 46B.010 for procedures applicable after the maximum commitment period has run.

11 Tex. Code Crim. Proc. Art. 46B.105.

12 Tex. Penal Code §8.01.

13 Department of State Health Services, Division of Mental Health and Substance Abuse Services, Office of Decision Support, June 2016.

Free at last?

An examination of the timelines with which the State must comply to avoid mandatory release of a defendant in custody because the State was not ready for trial

You've just been given your first really ugly case to present to the grand jury for an indictment. There are hundreds of exhibits to organize, dozens of witnesses to talk to, and endless forensic tests that need to be run for DNA, fingerprints, and the like, which will take who knows how long. Luckily, you have plenty of time to get all of that ready, right?

By Zachary Robichaux
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If the defendant is in jail and you want him to stay there pending trial, the answer is a resounding "nope." Texas has a statute governing how long the State has to be ready for trial before the defendant must be released from custody on his own recognizance or given a bond low enough for him to secure release on bond. That statute and how it operates in practice is the topic of this article.

What's the rule?

The Code of Criminal Procedure mandates that a defendant who is in jail pending trial must be released either on personal bond or by reducing the amount of bail required if the State is not ready for trial of the criminal action for which he is being detained within:

- 90 days from the commencement of his detention if he is accused of a felony;
- 30 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment in jail for more than 180 days;
- 15 days from the commencement of his detention if he is accused of a misdemeanor punishable by a sentence of imprisonment for 180 days or less; or
- five days from the commencement of his detention if he is accused of a misdemeanor punishable by a fine only.[1]

However, those rules do not apply to a defendant who is:

- currently serving a sentence of imprisonment for another offense;
- being detained pending trial of another accusation for which the applicable period has not yet elapsed;
- incompetent to stand trial, during the period of the defendant's incompetence; or
- being detained for a violation of the conditions of a previous release related to the safety of a victim of the alleged offense or to the safety of the community.[2]

What exactly does "ready for trial" mean?

The prosecutor's knee-jerk reaction to this statute may well be to say, "That can't really mean I have to be ready to go to trial on my case within those deadlines, does it?" The short answer is, yes.

The State does not have to formally, and without prompting, announce that it is ready for trial within the timelines in Article 17.151.[3] However, once a defendant raises the issue of the State's readiness for trial under Article 17.151 (usually by way of pre-trial writ of habeas corpus), the State must then make a *prima facie* showing that it is ready for trial.[4] In this vein, the Court of Criminal Appeals has held that "all a prosecutor has to do to prevent release of an accused who has been unable to make bail is to announce ready in a timely fashion, even if trial is thereafter delayed for other reasons."[5] Remember that the State's announcement of ready for trial must be that the State was ready for trial within the timeline in Article 17.151—announcing ready at some hearing on a later date will do no good.[6]

While the State's announcement of "ready for trial," is sufficient to make a *prima facie* showing that the State is ready for trial, the defense can then rebut that *prima facie* showing, including by questioning the

prosecutors at a hearing.[7] The courts have examined the State's readiness for trial in somewhat painstaking detail and have come to sometimes obvious and sometimes counterintuitive conclusions as to whether the State was actually ready for trial. Most importantly, these decisions have gone into deep consideration of the underlying facts the State would have to prove and the witnesses the State would need to present in considering whether the State would have been ready for trial within the timeline.

For example, the State's announcement of ready for trial will not be sufficient where there is no indictment.[8] However, the Fort Worth Court of Appeals held that the State "may be prepared for trial even though the indictment that forms the basis for the prosecution of the offense is so defective as to be void."[9] In *Jones*, the Court of Criminal Appeals held that the State was not ready for trial within the timeline because a necessary witness was not "present or readily available to testify at any time during the 90 days following [the] appellant's arrest."[10] By contrast, the absence of certain items of evidence was found insufficient to rebut the State's announcement of ready for trial where the prosecutor stated that the State was prepared to go forward without that evidence.[11]

What if I can't be ready, but it's not my fault?

Too bad. The statute includes no provision for extending the timelines due to a delay that is beyond the prosecutor's control.[12] But there is still some hope. If the defendant is in jail on multiple counts and any one of the other counts (felony or misdemeanor) has not yet reached its time limit under the statute, then a court may deny habeas relief to the defendant.[13]

When does the clock start?

The statute mandates that the clock begins to run from the date of the "commencement of detention."[14] However, what constitutes the commencement of detention is open to some interpretation. For example, the Fort Worth Court of Appeals has held that detention did not start until the defendant was arrested in another county at the request of the county where the crime occurred.[15] The Waco Court of Appeals has held that the defendant's detention did not begin until the defendant was in the custody of the county in which he would face prosecution.[16]

What about the safety of the community?

The Court of Criminal Appeals has held that Article 17.151 does not allow a trial judge to consider victim or community safety in determining whether to release a defendant due to the State's inability to be ready for trial.[17] However, the Court of Criminal Appeals did note that:

> [n]othing in the mandatory language of Article 17.151 precludes a judge from imposing a broad range of reasonable (and even creative) conditions of release designed to ensure victim and community safety like non-contact orders, house arrest, electronic monitoring, or daily reporting. Article 17.40 acknowledges that a judge need not turn a blind eye to potential safety concerns.[18]

Conclusion

In short, the prosecutor must be ready for trial rapidly should he desire to keep a defendant who cannot make bond in jail pending trial. However, where this is not possible, as the Court of Criminal Appeals has pointed out, there are many potential bond conditions that can be placed on a defendant when he is released to help ensure the safety of the victim or the community. Please feel free to contact us if we can be of any assistance. ❇

Endnotes

1 Tex. Code Crim. Proc. Art. 17.151 §1.

2 Tex. Code Crim. Proc. Art. 17.151 §2.

3 See *Jones v. State*, 803 S.W.2d 712, 717 (Tex. Crim. App. 1991).

4 *Id; Ex parte Ragston*, 422 S.W.3d 904, 906 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

5 *Id.* at 716.

6 See *id* at 717. (State made *prima facie* showing it was ready within the 90-day time limit when the prosecutor said the State "has been ready" for trial).

7 *Applewhite v. State*, 872 S.W.2d 32, 34 (Tex. App.—Houston [1st Dist.] 1994, no pet.).

8 *Ex parte Smith*, 486 S.W.3d 62, 66 (Tex. App.—Texarkana 2016, no pet.).

9 *Ex parte Brosky*, 863 S.W.2d 775, 778 (Tex. App.—Fort Worth 1993, no writ), citing *Behrend v. State*, 729 S.W.2d 717, 720 (Tex. Crim. App. 1987).

10 *Jones*, 803 S.W.2d at 719.

11 *Ex parte Watson*, 940 S.W.2d 733, 736 (Tex. App.—Texarkana 1997, no writ); *Ex parte Sherrill*, No. 12-10-00183-CR, 2011 WL 2638530 (Tex. App.—Tyler Jun. 30, 2011, no pet.) (not designated for publication).

12 See Tex. Code Crim. Proc. Art. 17.151; *Rowe v. State*, 853 S.W.2d 581, 582 (Tex. Crim. App. 1993).

13 *Ex parte Jagneaux*, 315 S.W.3d 155, 157 (Tex. App.—Beaumont 2010, no pet.).

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[14] Tex. Code Crim. Proc. Art. 17.151.

[15] *Balawajder v. State*, 759 S.W.2d 504, 506 (Tex. App.—Fort Worth 1988, pet. ref'd).

[16] *Ex parte Smith*, 10-13-00243-CR, 2014 WL 702812, at *1 (Tex. App.—Waco Feb. 20, 2014, no pet.) (not designated for publication).

[17] *Ex parte Gill*, 413 S.W.3d 425, 431 (Tex. Crim. App. 2013).

[18] *Id.*

Keeping the government's actions in the clear

Those in prosecutor's offices have many duties under the Texas Public Information Act, and it's imperative that we know what they are and that we fulfill them.

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

I recently bought a new charcoal grill. When I opened the lid to use it for the first time, I laughed when I noticed the warning inside: "For Outdoor Use Only." I thought to myself, *Who would possibly think it safe to light a charcoal grill indoors?* Obviously, somebody somewhere didn't have the good sense to keep his grill on the patio where it belongs, he incinerated his living room, and now Weber is putting everyone on notice to keep their grills outside.

Absurd warnings like this one are everywhere. (My wife bought a hair dryer that advised her not to use it while sleeping.) As lawyers, we all know that ridiculous warnings like these exist only because somebody devoid of common sense misused a product, got hurt, and sued the manufacturer for damages. And now those manufacturers are obliged to warn everyone else who is similarly situated.

Some of our society's laws have similar origins. The Texas Public Information Act, for instance, was born from the ridiculous actions of those up to no good. In January 1971, attorneys for the Securities and Exchange Commission filed a federal lawsuit in Dallas alleging stock fraud against a number of Texas legislators.[1] With a scheme that would make Bernie Madoff proud, several state lawmakers got rich with quick-turnaround stock sales that were financed by the Sharpstown State Bank in exchange for banking legislation.[2] After this scandal came to light, it would be called the Sharpstown Scandal. The resulting lawsuit and several successful criminal prosecutions of those involved resulted in a big loss of conservative Democrats in the 1972 election.[3]

The newly elected, less conservative Democrats and Republicans went into the 1973 legislative session with reform on their agendas,[4] and the Open Records Act [now known as the Public Information Act (PIA)] was one of the many laws passed that session. The Act is rooted in the ideal that a successful democratic government requires an informed citizenry. As it exists today, the Act places a substantial number of obligations on county and district attorney's offices. Knowledge of these obligations and how to correctly perform them is an essential part of our duties as attorneys and government employees.

At the heart of the Texas Public Information Act (which is codified

in Chapter 552 of the Texas Government Code) stands the principle that government exists to serve the people and not vice versa. The Act expressly states that it is the policy of the State of Texas that each person is entitled to complete information about government affairs and official acts of public officers and employees. Under the Act, public servants are expressly denied the right to decide what information is and is not good for the public at large to know. It is expressly stated that the provisions of the Texas Public Information Act will be construed liberally to implement this principle and in favor of granting public requests for information.[5]

What is public information?

The definition of public information within the Act is predictably broad. It includes "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" of a governmental body, for the governmental body, or by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.[6]

For offices like ours, "public information" includes mundane things like personnel files and employee salaries, but it also encompasses much more sensitive information: our case files, the contents of our emails, and our written correspondence with victims. But don't panic! There are some very, very limited exceptions (which we will get to later) that protect some of this information. A non-exclusive list of examples of public information can be found within the Act.[7]

Requests for disclosure of information

There are a significant number of scenarios in which the public may request disclosure of records maintained by a prosecutor's office. If we are lucky, the requestor will have a clear objective for the information she's requesting. Intrepid reporters will make the majority of public information requests—they'll want to get the scoop on a recent criminal offense. But not every public information request will be media-related. Civil attorneys will want to see what information in a DWI case is going to help them win in civil suits. Concerned taxpayers will want to see how money in the office is spent. There is really no end to the variety of public information requests to which an office will end up responding.

Sometimes, the requestor's end game won't be so obvious. An attorney from New York once requested the start and end dates of every employee in our office back to a specific date in 1992. It was a puzzling request that we simply had to deal with because we are prohibited from asking the requestor why he is requesting the public information.[8]

If your office has not already done so, it should designate someone as the "public information officer" (PIO) and have that person respond to requests under the Act. Having a public information officer is not required under the Public Information Act, but it is helpful in a lot of different ways. First and foremost, directing public information requests to one person (or one group of people) encourages those people to familiarize themselves with all of the particulars of the Act itself. Secondly, it gives the community a public face to identify when their need for public information from within your office arises. It's not necessary that the PIO be a licensed attorney, so don't be afraid to designate an investigator or clerk as the public information officer if an attorney is not available.

If you are in a smaller office like mine, it might not be practical for a single person to be solely responsible for responding to PIA requests, so make sure that anybody who might respond to these requests is trained on your office's responsibilities in doing so. I would also strongly advise having a formal, written policy on the Public Information Act. It will help those people tasked with responding to requests.

The only requirements for validity under the Act are that the request 1) is in writing (though there isn't any particular form that the request must take) and 2) reasonably identifies the information that is being sought. Many requests, especially those coming from out of state, might come into your office under the guise of a "Freedom of Information Act Request" under the federal code. Requests made in this name, even though applicable to federal agencies only, should be treated as requests made under the Texas Public Information Act.

If the information the requestor seeks isn't clear, the governmental agency is required to contact the

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requestor for clarification.[9] Subpoenas *duces tecum* and requests for discovery are not considered requests under the Texas Public Information Act.[10]

Responding to the request

Most of what the public information officer needs to know about producing the requested public information is found in §552.221. An office's public information officer must produce the public information requested for inspection and/or duplication "promptly." Our friends in the legislature define promptly as "as soon as possible under the circumstances, within a reasonable time, and without delay."[11] We can also comply with the request by sending copies of the documents via first-class mail or directing the requestor to an agency's website if the requested information is readily identifiable online.[12]

Sometimes the governmental body will be actively using the information or the information will be in storage. If this is the case, the requestor must be given a date and time when the information will be available.[13] If there is going to be a delay of more than 10 business days before the information can be produced for inspection or duplication, the governmental body must set a date within a reasonable time when the requested information will be available.[14]

The public information officer has to comply with requests only for records that exist at the time the request is made.[15] There is no obligation to advise the requestor if additional information comes into existence later or if it may come into existence later. There is no obligation to do legal research on behalf of the requestor or organize the requested information for the requestor. The only caveat is that when information is available in electronic format, the public information officer must provide information in that format if it can.[16] If a requestor repeatedly makes requests for the same information that you have already provided, the PIO may certify that the information has already been provided rather than complying with the request again.[17]

Redaction

Any prosecutor who has ever handled a crime against a person knows that we sometimes have loads of confidential information in one of our case files. The drafters of the Act were not so unreasonable as to require us to hand this confidential information over. In specific instances, the Act allows governmental bodies to redact information; those instances are detailed in Subchapter C. The Act handles redactions in two different ways: For certain redactions, such as Social Security numbers,[18] there is no recourse for requestors. For others, the requestor can seek a decision from the Attorney General about the matter.[19] When you are redacting information, I suggest you consult the provision of Subchapter C authorizing the redaction to determine whether the requestor can subsequently seek action from the Attorney General.

Reasonable charges

Often, public information will be in a variety of formats. If the information is electronic (such as footage from body or dashboard cameras), you may provide that to the requestor in a similar electronic format.[20] But as any county commissioner will tell you, writable DVDs and CDs, paper, and copy toner don't come cheap. The Act recognizes this too and allows government agencies to reasonably charge the requestor for the costs associated with responding to his request. Definitely consult Subchapter F[21] if you plan to assess any sort of charge for the production of the public information.

Exceptions and the Attorney General

If a well-meaning piece of legislation like the Public Information Act is going to be successful, it must have some exceptions. The Act has plenty of narrowly drawn exceptions, some of which prosecutors utilize with regularity. The procedure for doing so is pretty specific, so take care when deciding not to disclose information.

The exceptions to disclosure are in Subchapter C of Texas Government Code Chapter 552. Not all of these exceptions are going to be applicable to a county or district attorney's office, but if your office frequently counsels other county officials, consult Subchapter C before you advise an official on whether an exception applies.

The public information exception of most interest to a prosecutor's office is in §552.108. I strongly suggest that every public information officer have a hard copy of the entirety of this section on hand. That section allows information to be

withheld if the release would interfere with the detection, investigation, or prosecution of a crime.[22] Mental impressions and legal reasoning of prosecutors are also exempt under this section.[23]

Texas Government Code §552.1085 is also helpful for prosecutors: It covers the release of sensitive crime scene images. However, a handful of individuals are allowed to view these images in spite of the exception, including next of kin, a defendant or the defendant's attorney, and researchers with institutions of higher education.[24]

If you receive a request for public information or are advising a county official on whether he must disclose information, and you conclude that a public information exception applies to the requested information, consult Subchapter G. It details the process for requesting an Attorney General opinion on whether the requested information falls under one of the exceptions in Subchapter C.

The basics of requesting an AG opinion on public information requests is similar to requesting an opinion on any other point of law. Within 10 business days of receiving the public information request, you must state for the Attorney General what public information is being sought and what exception(s) you believe apply.[25] Once you have sent this request to the AG's office, provide the requestor a written statement (within 10 business days of receiving the request) that your office wishes to withhold the requested information and that your office has asked for a decision from the Attorney General about whether the information falls within an exception to public disclosure.[26] You must also send a copy of the written communication to the Attorney General asking for the decision or, if the written communication to the AG discloses the requested information, a redacted copy of that written communication.[27]

Within 15 days of receiving the request for information, you must send the AG written comments stating the reasons why you believe the exceptions apply, a copy of the written request for information, a signed statement as to the date on which the written request for information was received by the governmental body (or evidence sufficient to establish that date), and a copy of the specific information requested (if a voluminous amount of info was requested, you can submit representative samples of it). Label the copy of the specific information or of the representative samples to indicate which exceptions apply to which parts of the info.[28]

A governmental body that submits written comments to the Attorney General shall send a copy of those comments to the person who requested the information not later than the 15th business day after receiving the written request.[29] As before, these comments can be redacted.[30]

Be very diligent with public information requests where you believe an exception applies. The sooner you send off the request to the AG, the better. If you fail to make this request to the AG's office on time, the information is presumed public.[31] Don't put yourself in the position of having to explain to your elected DA, law enforcement agency, or a crime victim why sensitive information was released and your chances for a successful prosecution were comprised.

Criminal penalty

Criminal penalties for violation of the Public Information Act are found in Subchapter I. There are three potential violations contained within the Act;[32] all three are misdemeanors punishable by fine and/or jail time.

Why are these violations important? On one hand, we are all prosecutors and could very well find ourselves in a situation where we could be the attorneys in charge of prosecuting one of these violations. These prosecutions are not common by any stretch of the imagination, but take the time to familiarize yourself with the basic framework of PIA violations. It's never fun to have a well-informed citizen or an upset criminal investigator in your office explaining the law to you.

On the other (probably more important) hand, these offenses are capable of being committed within a prosecutor's office. Think about some of the people we deal with on a day-to-day basis who would relentlessly pursue a member of a county or district attorney's office for committing one of these violations. I encourage you all to deny them the pleasure and train everyone in the office on the basics of the Texas Public Information Act. There isn't a prosecutor, investigator, or supporting staffer who doesn't need a primer on the Act and a copy of the office's record retention policy. Even though I wasn't able to find any cases where a

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prosecutor's office violated the PIA, I'm sure you won't want to be the first. And there are a few examples where other governmental agencies got themselves mixed up in a suit with the AG's office. Let them be a warning to all of us.

Conclusion

The Public Information Act is an unfamiliar law for a lot of prosecutors—but it shouldn't be. Take time to familiarize yourself with this legislation, bring staff up to speed on its content, and keep them updated on the periodic changes from the legislature. Don't let a lack of training on this law burn you or a member of your staff. ❇

Endnotes

1 www.texastribune.org/tribpedia/sharpstown-stock-scandal/about/, accessed July 31, 2016.

2 https://tshaonline.org/handbook/online/articles/mqs01, accessed July 31, 2016.

3 *Id.*

4 *Id.*

5 Texas Gov't Code §552.001(a). (All subsequent statutory citations will refer to the Texas Government Code.)

6 §552.002.

7 §552.022.

8 §552.222(a). While the governmental agency can't inquire as to the reason for the requested information, if the request is voluminous the agency can confer with the requestor to see how the request might be more tailored, as provided by §552.222(b).

9 §552.222.

10 §552.0055.

11 §552.221(a).

12 §552.221(b)–(b-1).

13 §552.221(c).

14 §552.221(d).

15 §552.002.

16 §552.228(b).

17 §552.232.

18 §552.147.

19 For example, see §552.138(d).

20 §552.228(b).

21 §552.262–275.

22 §552.108(a)(1).

23 §552.108(a)(4).

24 §552.1085(d)(1-8); be sure to see this section for an exhaustive list.

25 §522.301(a)–(b).

26 §522.301(d)(1).

27 §522.301(d)(2).

28 §522.301(e).

29 §522.301(e-1).

30 *Id.*

31 §522.302.

32 §522.351-353.