The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

September–October 2024 • Volume 54, Number 5

"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

Investigative Genetic Genealogy (IGG): a guide for prosecutors

Forensic investigative genetic genealogy (abbreviated FIGG, IGG, or FGG) is a groundbreaking tool in the field of criminal investigations.[1]

By Leighton D'Antoni
Assistant Criminal District Attorney in Dallas County

It is revolutionizing the way DNA evidence is utilized while giving law enforcement the confidence to solve previously unsolvable violent crimes. Reflecting this confidence and enthusiasm, one investigator remarked: "I truly believe that this is the new fingerprint."[2] It has resulted in identifying suspects in tricky cases that could not be solved any other way. A seasoned genetic genealogist explained, "In case after case, the comment is, 'That person was never on our radar.'"[3]

While IGG represents a game-changing advancement for law enforcement, it must be employed with responsibility and ethical consideration. Legal and privacy concerns should always be paramount. When used ethically, IGG stands as the most effective investigative method in modern criminal investigations.

What is IGG?

IGG is an innovative investigative approach that combines traditional genealogy with advanced DNA analysis to solve

[1] The author's opinions do not reflect and are not endorsed by the Department of Justice (BJA), the Sexual Assault Kit Initiative (SAKI), or the Dallas County Criminal District Attorney.

[2] Dowdeswell T., Forensic Genetic Genealogy Project Dataset, August 2023, v.3, Mendeley Data, 2023, available at https://data.mendeley.com/datasets/82969bsmw4/3/files/3fd011e4-9844-4504-8929-f0a42b2ef21d.

[3] Guerrini, C.J., Bash Brooks, W., Robinson, J.O., Fullerton, S.M., Zoorob, E., and McGuire, A.L., "IGG in the trenches: Results of an in-depth interview study on the practice, politics, and future of investigative genetic genealogy." Forensic Sci Int., March 2024, available at ncbi.nlm.nih.gov/pmc/articles/PMC10984250.

Continued on page 14

"*Noblesse oblige*, Bubba"

Many years ago I attended a State Bar committee meeting.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

The committee was dedicated to exploring how to deliver legal services to indigent criminal defendants, and it was made up mostly of well-heeled defense attorneys and a few prosecutors. **Tom Krampitz**, my dear friend, mentor, and former executive director of our association, and I were part of the lively discussion.

At one point the conversation devolved into a bitch session by one of the defense attorneys, who griped mightily about just how expensive it was to run his law practice—how could he possibly afford to work on the cheap for indigent defendants? After what seemed like an hour of complaints, Tom dead-panned a classic retort to the rant that quieted the room:

"*Noblesse oblige*, Bubba." The obligation of nobility, delivered in French with a Texas spin.

A deep chortle ran through the room as people tried not to laugh out loud.

I am thrilled that so many people sought to join the Texas Prosecutors Society in 2024—16 folks and counting, and the final list will be announced soon. The Society works to build an endowment for the future. We indeed work in an honored profession, and we must aspire to lead and grow the profession however we can. I want to thank all of you who continue to make the growth of this profession a priority, especially our outstanding Foundation Board of Trustees. And thanks, Tom, for delivering a classic line at the perfect moment. ❇

Recent gifts to the Foundation*

Kristin Burns
Celeste Byrom
Jack Choate *in honor of Laurie English*
Jessica Escue
Glen Fitzmartin
John Fleming
Ariane Flores
Christopher Gatewood
Bert Graham *in memory of Chuck Rosenthal*
Roger Haseman
Rob Kepple *in memory of Bill Pool*
Rob Kepple *in memory of Stan Anderson*
Natalie Koehler
Landon Lambert
Dewey Mitchell
Mindy Montford
Kevin Petroff
Chandler Raine
Will Ramsay
Shanna Redwine
Brandy Robinson
Joseph Shrivanek III
Beth Toben
Martha Warner
Andrea Westerfeld

* gifts received between June 8 and August 2, 2024

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

About *The Texas Prosecutor*

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

Table of Contents

2024–'25 Code of Criminal Procedure

As you have seen over the last few years, the Texas Legislative Council has been busy updating and rewriting many of Texas's antiquated codes, including the Code of Criminal Procedure.

By Rob Kepple
TDCAA Executive Director in Austin

The project has a noble purpose, as we can all agree that much like our garages, reorganization can really help find useful stuff. The only rule: Don't throw anything out, meaning, in the end, there should be no substantive changes. The reorganization does lead to *some* changes, such as the venerable term "3g" now being referred to as Article 42A.054, but it's for the greater good, right?

In 2023 the legislature went all-in on numerous reorganizations of the Code of Criminal Procedure. Chapters 2, 13, 31, 45, and 55 were all rewritten, and they re-emerge on January 1, 2025, as chapters 2A, 2B, 13A, 31A, 45A, and 55A. A major complicating factor: The goal of making "non-substantive" changes did *not* stop the legislature from making numerous *substantive* changes to the original chapters, and those differences must be given their due consideration when applying the law. And on top of all that, the many special sessions in 2023 led to some substantive changes that took effect in 2024, rather than in 2023 as would normally happen.

So how on earth can one ever figure all this out? Who could possibly help? Enter **Diane Beckham**, TDCAA's Publications Director and Queen of the Codebook. Given the huge number of changes, she produced and published a version of the Code of Criminal Procedure that contains the changes effective in 2024 and 2025. (It is available now for purchase at TDCAA.com.) Indeed, the book is so valuable that the Court of Criminal Appeals has allowed us to send one copy to every prosecutor office in the state—meaning, someone in your office already has it on his desk! If you want your very own, you can order it by visiting our website.

National Association of Prosecutor Coordinators

The National Association of Prosecutor Coordinators (NAPC) is the national group of people who do what TDCAA does: serve state prosecutors. (That's a photo, below, of several of us who attended the most recent meeting.) Naturally, there are 50 members, one for each state, and we gather twice a year to discuss training, national trends, and the challenges that face state prosecutors. Another very important part of what we do is helping each other's members when they are having trouble. For instance, our friends in Washington recently needed help with an Article IV prosecution; that is where a Mexican citizen will be tried in Mexico for a crime committed in the United States, all based on documentation provided by U.S. prosecutors (in this case, from Washington). The Washingtonians called TDCAA, and I was able to hook them up with prosecutors in El Paso, who are skilled at Article IV prosecutions.

But it works the other way too. Do you need jail records or pen packets from another state but are having a hard time with the out-of-state

clerks? Do you need to interview a witness in Ohio? Are you looking for a witness in New York? We can make the connections for you. Just call us here at TDCAA. And I can tell you our counterparts are more than happy to help out. And heck, if we need to go to Hawaii for you, we will be more than happy to go above and beyond that way!

Is student loan forgiveness back?

Student loan forgiveness has been a real roller-coaster in the last couple decades. In the early 2000s, the John R. Justice Act promised a strong national response to the student debt problems that faced state prosecutors, but funding evaporated and Texas abandoned the program. Later, the federal Public Service Loan Forgiveness program seemed like a great deal, but many folks struggled with the paperwork hurdles.

We may be on the upswing here, and if you have loans it may be worth looking into. The current presidential administration has just announced another round of loan forgiveness, including $1.2 billion in public service loans. You can check it out at www.cbsnews.com/news/biden-administration-student-loan-forgiveness-1-2-billion-who-qualifies. In addition, I have been hearing that the Public Service Loan Forgiveness program has again ramped up, and some prosecutors are seeing their loans forgiven after 10 years of service. That may be worth checking out at www.laurelroad.com/public-service-loan-forgiveness/what-is-public-service-loan-forgiveness-program.

"Chris Spendlove's rookie year"

The June 2024 edition of the *Texas Bar Journal* featured an article about a newly minted assistant prosecutor in McLennan County titled, "**Chris Spendlove**'s Rookie Year." The journal spent quite some time following Chris, a recent Baylor Law School graduate, as he got his feet wet at the office, in the courtroom, and at a TDCAA conference. When you read the article, much of it will resonate with you, whether you have been a prosecutor one year or 30. But what comes through is the passion to serve his community and be a positive force. "I want to inspire my kids with what I do," he tells the reporter in the story. "A big part of the reason why I took the job is to show them that you can have a career as a public servant and do a lot of good."

Good for you, Chris—and all the new prosecutors you represent!

Texas Crime Lab Records Connect

In 2023 the legislature funded an ambitious project at the Department of Public Safety (DPS) Crime Lab to make forensic crime lab records accessible to both the prosecution and defense online. The purpose was to streamline discovery for all parties involved. The lab is working diligently to get the program up and running, with no firm start date yet; however, they did share their first newsletter in July—search the TDCAA website for it ("Texas Crime Lab Records Connect newsletter"). They do make one suggestion, and that is how to pronounce their acronym, TCLRC. They prefer "Texas Clear Connect." I say we have our own contest on how to say it. I like "Tickle Wreck." Your thoughts?

A longtime prosecutor retires

Kerye Ashmore, the longtime first assistant CDA in Grayson County, hung up his hat in July. He started his career in prosecution in 1983 as an ADA in Lamar County, eventually being elected DA of that county for a term before taking on the first assistant job in Grayson County. He had served in that capacity under two administrations, **Joe Brown** and current DA **J. Brett Smith**, since 2004. In all, he worked in prosecution just over 40 years. Amazing!

His boss, Brett Smith, shared that Kerye tried more than 350 felony jury trials to verdict, including seven death sentences, more than 75 life sentences, and 70-plus sentences over 40 years. Brett remembered his own experience working with Kerye as incredibly rewarding and life-changing. In his first murder trial in 2008, where the two of them had certified a very troubled juvenile offender as an adult, "Kerye Ashmore 'held my hand' during the entire process, walking me through investigation, legal theories, filing, and of course, he sat second chair during the trial," Brett tells us. They secured a guilty verdict, and the jury handed the offender 99 years.

"I will never forget coming into the work the following Monday thinking I was the cat's meow," Brett says. "I walked into Kerye's office, where he promptly congratulated me on the victory and then handed me a large stack of files, including another murder case, and told me to get back to work. Frankly, I was a bit set back and shocked. It took me a long time to understand his paternal

The current presidential administration has just announced another round of loan forgiveness, including $1.2 billion in public service loans.

motivation, but to this day I never forgot the lessons learned: 1) You are only as good as your next endeavor, 2) you cannot rest on your laurels, and 3) success can inflate an ego.

"Those of us who had the honor of working with Kerye are forever impacted by his tutelage, and those lessons will continue on in the prosecutors who shall follow in his footsteps." We couldn't have said it better. Good wishes in retirement, Kerye!

Welcome to Christina Sanchez

Welcome to our newest county attorney in El Paso, **Christina Sanchez**. Christina was appointed to succeed **Jo Anne Bernal**, who was a force in government service in her county, the state, and here at TDCAA. Christina, an experienced former assistant in the El Paso office, brings a lot of firepower to the job. Welcome, Christina!

When you play a Texas prosecutor, you gotta go big!

Who plays you in the movie?

I was looking at my Neflix offerings this summer and came across one that sent me in the way-back machine: *Hitman*. It is the story of a mild-mannered fellow who serves as a fake hitman to foil a murder-for-hire plot. Co-producer and director **Richard Linklater** freely acknowledges taking liberties with the truth, but the movie is based on the life and career of a former Harris County DA investigator, **Gary Johnson**. I had the privilege of knowing Gary back in the '80s. He was a tall, lanky, quiet, ponytailed man who often played the role of a hitman for hire to obtain sufficient evidence of solicitation of capital murder.

The movie is fun, but what I loved was who played Gary: **Glen Powell**, an Austin native and the latest Hollywood action hero and heartthrob. Which got me to thinking: Who would play *you* in a movie? Gary got pretty lucky with Glen Powell. Panola County CDA **Danny Buck Davidson** also did well when **Matthew McConaughey** played him in the movie *Bernie*. **Guy James Gray**, former Jasper County CDA, was played by **Ron White** in the movie *Jasper, Texas*. One thing is for sure: When you play a Texas prosecutor, you gotta go big!

AI and Draft One

Prosecutors have been struggling to keep up with the quick advancement of artificial intelligence (AI) applications in criminal law. We have seen some missteps, such as AI-generated briefs that contain fabricated legal citations, but make no mistake, AI soon will be permeating everything we do. Many of you are already employing AI for data processing, transcript production, and the like.

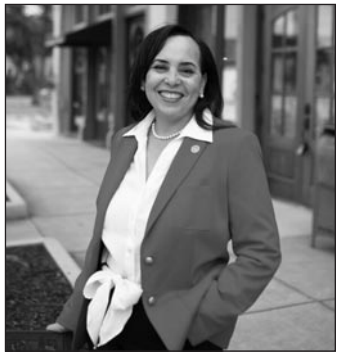
One of our first challenges may be to keep on top of how law enforcement is using AI. Many of us shuddered when we heard that Axon, a popular law enforcement technology company, launched Draft One. You can learn about it at www.axon.com/products/draft-one.

I know what you are thinking: A computer program that turns body camera footage into an offense report, which the officer then signs off on? What could possibly go wrong? I am still trying to wrap my head around the potential cross-examination of the officer about who—or what—actually wrote the report. Was it the officer or a machine?

My point is this: I have talked to the folks at Axon and expressed my concerns. Their response was straightforward and unapologetic: This technology is coming, whether it has potential problems or not. Rather than ignore it at our peril, it is time to get involved and make sure guardrails are in place. We will be talking a lot more about this as we move forward, but what if we could indeed use AI to make our jobs easier? What would that look like? ❇

Introducing our next Executive Director, Shannon Edmonds

In a prior article, I discussed plans for selecting the next executive director at TDCAA.



By Erleigh Wiley
TDCAA President & Criminal District Attorney in Kaufman County

We learned last September at the Annual Conference that Rob Kepple was retiring in December 2024. After Rob's announcement, a selection committee for a new executive director was formed to search far and wide for his replacement. In the end, this decision was not a selection committee or Board decision; it was a decision by TDCAA's service group of Texas prosecutors and staff.

As you read this column today, I am happy to report that the selection committee's work is complete and that the TDCAA Board selected Shannon Edmonds as TDCAA's next Executive Director. Rob and Shannon will continue to serve the TDCAA membership through the end of this year as they cooperate on a smooth transition, which will include a search for a new Director of Governmental Relations to fill Shannon's current role (that job is now posted on tdcaa.com/jobbank).

A careful process

The process of hiring a new executive director was not easy and took about six months. Initially, a selection committee was formed. Committee members were chosen from across the state, and the group consisted of current elected prosecutors, former prosecutors, assistant prosecutors, members of the Texas District & County Attorneys Foundation, and TDCAA Board members to make sure there was a well-rounded representation from our organization.

The committee met numerous times, both in person and over Zoom. We began by deciding on the qualifications for the position, and we then posted the job opening to various websites focused on executive directors. Simultaneously, we created a survey to get feedback from you, TDCAA's service group. The survey's purpose was to gather current opinions of our organization and the future needs of TDCAA. Again, thank you for the time you took to answer the survey. It was great feedback!

The survey questions were short and to the point. They asked how the executive director should spend his or her time, what attributes make a successful director, what challenges an executive director might face, and how best our executive director can serve the membership and staff. The survey responses were reviewed, and we actually incorporated them into the questions we asked during in-person interviews of the candidates.

After receiving applications for the position, we narrowed the applications to three outstanding finalists. We requested references from them, and we contacted those references; those comments were then reviewed by the committee. The three finalists were finally interviewed at a neutral site.


Shannon Edmonds

They were all outstanding, and I believe you would have been proud for any of the finalists to represent TDCAA, but in the end the selection committee made its recommendation to the Board, which in turn offered the position to Shannon. Though it was a tough choice, it was great to know that our association is so well-respected that the caliber of our finalists made this decision difficult for the selection committee.

A little more about Shannon: He is currently TDCAA's Director of Government Relations. He is a graduate of the University of Texas and UT's School of Law and a longtime public servant. He worked in both the County Attorney's Office and the District Attorney's Office in Travis County, the Office of the Governor under the Honorable

I am so proud to have been a part of this important process for our organization as Board President of TDCAA.

George W. Bush, and the Office of the Lieutenant Governor under the Honorable Bill Ratliff. Since 2002, he has worked at TDCAA primarily as a liaison between state prosecutors and the Texas Legislature.

Rob, who is retiring at the end of the year, will be so missed by me personally and I believe also by association members and staff. He has done so much as executive director for the last 22 years, and TDCAA has grown under his leadership. As Shannon put it, "Under the stewardship of Rob Kepple, TDCAA has become one of the premier prosecutor associations in the country. I am grateful that our leadership has chosen me to help them build upon that legacy, and I look forward to what the future holds for our organization."

I am so proud to have been a part of this important process for our organization as Board President of TDCAA. It is the largest association of local prosecutors in the nation with more than 6,500 members, and it serves Texas prosecutors and staff with continuing legal education through live conferences and online courses, technical assistance, legislative assistance, and legal publications.

Please join me in welcoming Shannon as TDCAA's next Executive Director. He brings a wealth of knowledge and experience, and I am confident that his leadership will be instrumental in advancing TDCAA's goals and furthering our impact in the legal community. ❇

Please consider running for TDCAA's Key Personnel–Victim Services Board

Elections for the Key Personnel-Victim Services (KP–VS) Board (Regions 1, 2, 3, and 7) will be held at TDCAA's Key Personnel & Victim Assistance Coordinator Conference on November 14 at 1:15 p.m. The conference will take place at the Marriott Sugar Land Hotel, 16090 City Walk, in Sugar Land.

The KP–VS Board assists in preparing and developing operational procedures, standards, training, and educational programs. Area representatives serve as a point of contact for their regions. Board members will attend the KP–VAC Conference each November, where a Board meeting will be held. An additional Board meeting will take place each spring to plan training for the upcoming fall conferences.

To be eligible to run for the Board, each candidate must have permission of the elected prosecutor, attend the elections in-person at the conference, and have paid membership dues prior to the meeting. To register for the conference, visit www.tdcaa.com/training.

If you have any questions, please email Jalayne.Robinson@tdcaa.com. Hope to see you in Sugar Land! ❇

Smith v. Arizona requires experts to testify for themselves, not for other experts

Confrontation Clause cases are both exciting and boring. They're exciting because we're getting to watch a sped-up version of common-law development.

By Clinton Morgan
Assistant District Attorney in Harris County

After the Supreme Court of the United States reset this area of caselaw in 2004's *Crawford v. Washington*,[1] the vast advances of the forensic sciences have created a never-ending supply of novel scenarios. In the states and federal circuits, we've seen a century's worth of doctrinal development in just the last 20 years.

Confrontation Clause cases from the Supreme Court are boring, though, because that court takes its job seriously and gives us only the smallest answers possible for each case it decides. If a criminal lawyer has 10 questions in mind about the Confrontation Clause, the typical Supreme Court case will answer one and create two more.

Last term's Supreme Court case on the subject, *Smith v. Arizona*,[2] fits the pattern of gradual and predictable doctrinal development. It was so predictable, in fact, that the Court of Criminal Appeals saw it coming a decade ago.

The "substitute expert"

The legal issue in *Smith* is interesting, but the facts are not: Officers found a bunch of drugs in Jason Smith's shed.[3] Forensic testing conducted by an analyst named Elizabeth Rast revealed the drugs were drugs. Smith went to trial on a variety of drug charges.

By the time of trial, Rast no longer worked for the lab, so the prosecution changed its witness list to include a "substitute expert" named Greggory Longoni. Longoni testified that he was aware of the lab's standard procedures, but he knew nothing about Rast's testing beyond what Rast put in her records. Longoni testified about what procedure Rast wrote that she followed. Longoni testified that Rast's testing adhered to "general principles of chemistry." Then Longoni testified that based on what Rast wrote, it was his independent expert opinion that the substances found in Smith's shed were the illegal substances Smith was charged with possessing.

On appeal, Smith argued this procedure violated his rights under the Sixth Amendment's Confrontation Clause. That amendment gives criminal defendants the right "to be confronted with the witnesses against him."[4] While Smith could confront Longoni, he contested that Longoni's testimony about Rast's notes made Rast a witness against him; thus, that testimony was inadmissible because Smith could not confront Rast.

Melendez-Diaz, Bullcoming, and *Williams*

Since *Crawford*, the U.S. Supreme Court has explained that the Confrontation Clause generally bars the admission of "testimonial hearsay." That phrase has two parts: "Hearsay" is an out-of-court statement offered for the truth of the matter asserted. And hearsay is "testimonial" if it was made in "circumstances which would lead an objective witness reasonably to believe that the

[1] 541 U.S. 36 (2004).

[2] 144 S.Ct. 1785 (2024).

[3] *State v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269 (Ariz. Ct. App. July 14, 2022).

[4] U.S. Const. amend. VI.

statement would be available for use at a later trial."[5]

Before *Smith*, the Supreme Court had three times addressed whether evidence made by a non-testifying forensic analyst was testimonial hearsay. In *Melendez-Diaz v. Massachusetts*, the Court held that it violated the Confrontation Clause to admit an affidavit created by a non-testifying analyst stating that a substance was drugs. In *Bullcoming v. New Mexico*,[6] the Court held it violated the Confrontation Clause to use an analyst who had no involvement with the case to sponsor a lab report written by a non-testifying analyst.

The third pre-*Smith* case was *Williams v. Illinois*.[7] That case raised the question of whether an expert witness could form an opinion based on a lab report created by a non-testifying witness and then testify to some facts contained in that lab report. That sounds pretty on-point for *Smith*, except the Court did not have a majority opinion. A four-justice plurality concluded the testimony was not hearsay because it was not "offered for the truth of the matter asserted"; rather, it was offered only to support the expert's opinion. A four-justice dissent argued it was inadmissible testimonial hearsay, and a concurring justice concluded it was admissible because it was not "testimonial."

Before Smith*, the Supreme Court had three times addressed whether evidence made by a non-testifying forensic analyst was testimonial hearsay.*

Looking at these three cases, the Arizona Court of Appeals rejected Smith's complaint, holding that both *Melendez-Diaz* and *Bullcoming* were distinguishable because they involved the admission of the actual document created by the non-testifying analyst. In contrast, Rast's documents were not admitted at Smith's trial. Longoni testified as an expert witness, and the Arizona Rules of Evidence allow an expert to base an opinion on inadmissible evidence and then testify to the basis for his opinion.[8] The Arizona court noted its opinion was consistent with the plurality opinion in *Williams*, and adverse language in the *Williams* dissent wasn't binding.

Flipping the result of *Williams*

The Supreme Court granted review of *Smith* and reversed. Justice Kagan, who had written the *Williams* dissent, wrote the opinion of the Court, joined by Justices Sotomayor, Kavanagh, Barrett, and Jackson; in relevant part it was also joined by Justices Gorsuch and Thomas, though they concurred and rejected one part of the opinion that was unnecessary for the resolution. It's worth noting that none of the five justices who had been on the Court at the time of *Williams* changed his or her mind in *Smith*. Instead, the different result resulted from different personnel.

Each Confrontation Clause case from the Supreme Court has been narrowly focused, so it's important to identify the exact issue decided. In the second paragraph of the opinion, Justice Kagan described the issue in *Smith* as "the application of [Confrontation Clause] principles to a case in which an expert witness restates an absent lab analyst's factual assertion to support his own opinion testimony."

The narrow question at the core of the opinion is whether in that scenario the non-testifying analyst's factual assertions are being offered "for the truth of the matter asserted." Justice Kagan faulted the Arizona court for relying on its rules of evidence to characterize the purpose of the evidence. While Arizona's rules stated the non-testifying analyst's statements were admissible to "help the jury evaluate the opinion," state rules do not control on a constitutional question. Rather than allow the state rules to determine the purpose of evidence, a court addressing a constitutional challenge should "conduct an independent analysis of whether an out-of-court statement as admitted for its truth."

That independent analysis was fairly simple and straightforward: "If an expert ... conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." Justice Kagan illustrated this principle by quoting a few questions and answers from Longoni's testimony. He testified that

---

[5] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

[6] 564 U.S. 647 (2011).

[7] 567 U.S. 50 (2012).

[8] Arizona Rule of Evidence 703 allows the expert to disclose the inadmissible bases for his opinion "only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." In Texas, the law is similar though without the word "substantially." Tex. R. Evid. 705(d).

according to Rast's writings, Rast had performed appropriate scientific analysis of the drugs, and based on her analysis, Longoni believed the drugs were drugs. Rast's out-of-court statements support Longoni's opinion only if they are true. Thus the prosecution's case depended on the truth of out-of-court statements. That, according to the Court, is hearsay.

Justice Kagan explained that the lower court's approach was an "end run" around the Confrontation Clause. Under the lower court's ruling, any expert could serve as the sponsor of a non-testifying analyst's work, so long as he or she phrased it as an "independent opinion." That procedure denies a defendant's ability to ask questions about whether the actual tests were performed correctly.

Part III of Justice Kagan's opinion offers some advisory thoughts on other issues, particularly as to whether Rast's writings were "testimonial" for purposes of the Confrontation Clause. She noted that the record did not show what, exactly, it was that Longoni testified from. Was it informal notes Rast kept for herself, or was it a formal report? Because whether a statement is "testimonial" relates to the purpose for which the statement was made, that would be an important question for the lower courts on remand.

Concurrences

Justice Thomas wrote a concurring opinion. He joined the opinion of the Court as it related to whether the statement was hearsay, but he did not join the dicta discussion in Part III. He continued to adhere to his belief—stated in many cases over the years—that anything less formal than an affidavit is not testimonial.

Justice Gorsuch also concurred and joined the Court's opinion except Part III. He expressed skepticism of the "primary purpose" test for determining whether a statement is testimonial, and he noted the Court's opinion has conflicting statements about whether this was a subjective test (i.e., what did the declarant intend when he said it?) or an objective test (i.e., would a reasonable person believe the statement would be used in court?).

Finally, Justice Alito wrote a concurrence that is, on the relevant point, a dissent. He was joined by Chief Justice Roberts. Aside from its legal arguments, this opinion has an informative discussion on the history of expert testimony. Justice Alito argued, as he did as author of the *Williams* plurality, that if the out-of-court statement was offered to support an expert's testimony, then a limiting instruction from the judge informing the jury they could not consider it for the truth of the matter asserted would cure any Confrontation Clause problems. He points out—correctly—that limiting instructions are used all the time when evidence creates both permissible and impermissible inferences. Justice Kagan's opinion offered no response to this fairly solid point. Justice Alito's opinion is a concurrence because he believed that some of Longoni's statements were hearsay, just not the ones Justice Kagan believed were.

Takeaways

The effect of this opinion should be limited in Texas. In 2013's *Burch v. State*[9] and 2015's *Paredes v. State*,[10] the Court of Criminal Appeals synthesized *Melendez-Diaz* and *Bullcoming* into rules consistent with *Smith*. *Burch* held the State could not use a reviewing analyst to admit a report written by a non-testifying analyst if the reviewing analyst had not participated in the analysis. *Paredes* held that an analyst who reviewed raw data created by others could testify to his own independent analysis of the data so long as he did not act as a "surrogate" for an out-of-court analyst's opinion. Unlike the Arizona courts, *Paredes* paid heed to some of the language in Justice Kagan's *Williams* dissent, so Texas law is better prepared for *Smith* than some other states. I don't see anything in *Smith* that undermines *Paredes*.

Paredes emphasized that when an analyst looks at raw data created by a machine, his opinion of that data isn't hearsay because there's no human declarant. So long as testifying analysts are looking at original outputs, *Paredes* is still good law.

Smith leaves prosecutors the ability in future cases to argue whether certain out-of-court statements are "testimonial." That could prove fruitful for certain notes that lab techs might make that are intended for internal purposes. Such notes would still have to be admissible under state hearsay rules, but those have many more exceptions than the Confrontation Clause. Justices Thomas and Gorsuch didn't appreciate Justice Kagan's dicta about determining whether a statement is testimonial, but it still got five votes and should be taken seriously going forward. ❇

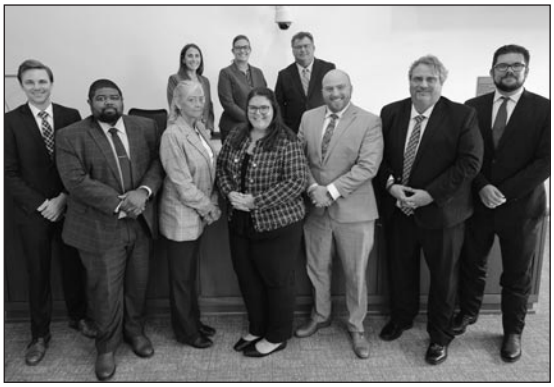
Unlike the Arizona courts, Paredes *paid heed to some of the language in Justice Kagan's* Williams *dissent, so Texas law is better prepared for* Smith *than some other states.*

---

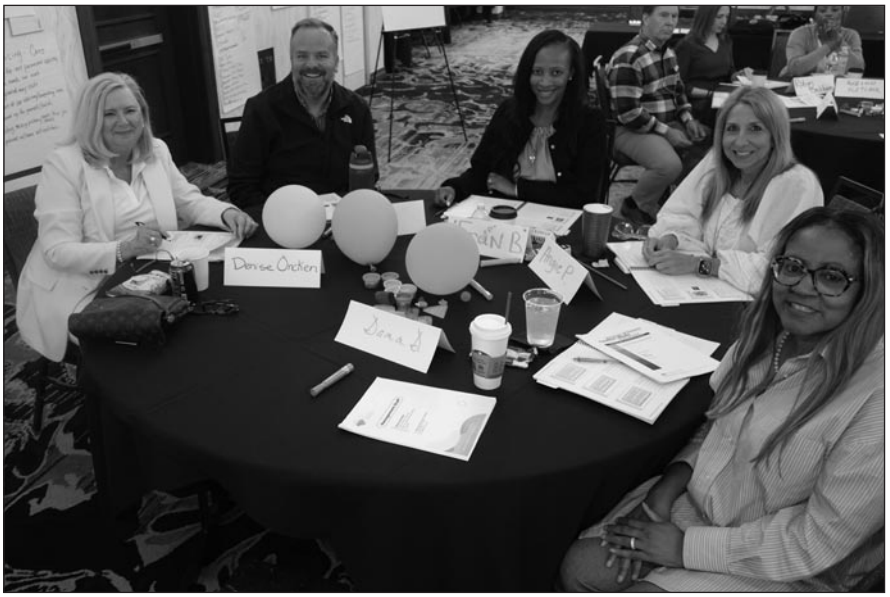
[9] 401 S.W.3d 634, 638 (Tex. Crim. App. 2013).

[10] 462 S.W.3d 510, 517 (Tex. Crim. App. 2015).

Photos from our Advanced Trial Advocacy Course



Photos from our Fundamentals of Management Course in Austin



Investigative Genetic Genealogy (IGG): a guide for prosecutors (cont'd from the front cover)

crimes. The technique is primarily used on cold cases, but the future of many criminal investigations that are not initially solved may be based in the world of IGG. This article will give an introductory overview of how IGG is used in criminal investigations and prosecutions.

Golden State Killer

Even after five years, it is impossible to discuss IGG without mentioning the Golden State Killer (GSK), a prolific serial killer in California during the 1970s and 1980s who was responsible for at least 13 murders and 51 home invasion rapes. This high-profile cold case was solved using IGG.

The GSK case was the spark that ignited a transformational investigative phenomenon that is just starting to scratch the surface of its full potential. Since GSK's arrest in 2018, IGG has helped to clear over 1,000 cases,[4] many of which involve serial offenders. At the same time, this number excludes cases in which IGG has not been confirmed by any public agency, as well as any that were not disclosed upon clearance and did not appear in the researchers' search results.[5] The actual number of cases cleared using IGG is likely larger.

In 2015, I started prosecuting cold cases for the Dallas County Criminal District Attorney's Office in conjunction with the Department of Justice's first-ever SAKI (Sexual Assault Kit Initiative) grantee class. The SAKI grant helped our office put together a full team of prosecutors, investigators, and victim advocates to focus on unsolved sexual assaults and sexual assault homicides. Ten years later, SAKI now funds grantees to investigate and prosecute any violent unsolved cold cases. SAKI, with its close relationships between its grantees and the Department of Justice (DOJ) and FBI, really are the world leaders in the IGG revolution.

In March 2018, I read the book *I'll Be Gone in the Dark: One Woman's Obsessive Search for the Golden State Killer*, Michelle McNamara's award-winning account of the GSK's crimes and her quest to identify him. At the time of the book's release, the GSK case was unsolved, and my familiarity with the case grew into an obsession. I delved into the world of crowd-sourced amateur investigations, and then unexpectedly, in April 2018, GSK was identified and arrested.

As a cold case prosecutor, I was eager to learn how.

By 2017, investigators had exhausted traditional methods for tracking GSK. There were no fingerprints, and GSK's DNA did not match any profiles in law enforcement databases (CODIS). Cash rewards proved ineffective. Paul Holes, a retired cold case investigator, turned to a novel approach: a genealogy website. Holes used a DNA sample from a 1980 double murder scene attributed to GSK and ran it through GEDmatch, a public genetic database. This search led to GSK's great-great-great grandparents. Over four months, investigators constructed a family tree, ultimately leading them to GSK, a 72-year-old grandfather, former police officer, and retired grocery store warehouse worker. He was arrested on April 24, 2018, and in August, he was charged with eight counts of first-degree murder and 13 counts of kidnapping. (Many of his earlier crimes, including several rapes, could not be charged because of California's statute of limitations.) He pled guilty to 13 counts each of murder and kidnapping in 2020 as part of a plea bargain and admitted to numerous crimes with which he had not been formally charged. He was sentenced to life in prison (12 consecutive times over) without parole.

The revelation that a new forensic technique combining DNA technology and genetic genealogy solved the GSK case compelled me to learn everything about IGG. I soon discovered there was widespread misinformation about it and its usage in law enforcement. Concerns about privacy and the rights of third-party individuals were potentially implicated in IGG investigations.

---

[4] A comprehensive analysis of cases in the dataset through December 31, 2020, is presented in: Dowdeswell, T., "Forensic genetic genealogy: a profile of cases solved," Forensic Sci. Int. Genet. 58 (2022) 102679. The dataset continues to be updated and currently includes cases through August 2023.

[5] Dowdeswell, T., "Forensic Genetic Genealogy Coding Book & Annotated Bibliography," June 2023 v.2.1, Mendeley Data, 2023, available at https://data.mendeley.com/datasets/82969bsmw4/3/files/33b456ad-9fe3-42be-9a86-9c3330278457.

DOJ's Interim Policy for Forensic Genetic Genealogy

Before proceeding with the type of forensic testing required for IGG—SNP (Single Nucleotide Polymorphisms, pronounced "snip") testing—I should stress that law enforcement should follow the Department of Justice's Interim Policy for Forensic Genetic Genealogical DNA Analysis and Searching.[6] It is critical for all agencies involved in an IGG investigation and prosecution to communicate with each other to ensure they are not risking federal grant funds by violating the policy, as federal law enforcement agencies and those receiving federal funding for IGG must follow the policy. Plus, its protections and procedures are in place to balance the interests and privacy rights of the public.

The policy is clear that IGG is an investigative lead technique that should be used for identifying suspects only in "violent crimes" (murder, attempted murder, and sexual assaults) as well for identifying unknown human remains. The policy requires law enforcement to get *prosecutor concurrence* before using IGG. There is an exception to the "violent crimes" requirement when it concerns a matter of national security or there is an ongoing threat to public safety; these exceptions, too, require prosecutor approval.

In the policy, "prosecutor" refers to an Assistant Attorney General, United States Attorney, state or local prosecuting attorney, or state attorney general (or his or her designee), with jurisdiction of either the crime under investigation or the location where the unidentified human remains were discovered (if those are different). This is true also when the Department of Justice and one or more state or local prosecuting authorities have concurrent jurisdiction of the crime(s) under investigation.[7]

The DOJ Interim Policy requires that all traditional investigative methods have been exhausted and not yielded any identifiable lead or results. It requires an already uploaded STR (Short Tandem Repeat) DNA profile into CODIS that does not have a hit or match to a known offender.

Privacy and ethical considerations are a vital component of this policy. The need to respect the privacy of individuals whose genetic data is used should always be at the forefront of law enforcement, prosecutors, defense attorneys, judges, the media, and all players in the criminal justice system. Law enforcement must use only public genetic genealogy databases that clearly state in their terms of service that law enforcement and the public at large may access their data. *Informed consent* from individuals who submit their DNA profiles into IGG databases is paramount to protect the important privacy rights and ethical concerns of millions of innocent third-party citizens. All uploaded personal genetic profiles and service account information shall be treated as *confidential government information*. Finally, law enforcement is also required to get informed consent from third parties before collecting any reference samples used for IGG.

This policy also stipulates that IGG results serve as *investigative leads only*. Suspects cannot be arrested based on IGG results alone; a direct STR DNA profile comparison is necessary. Additionally, cases investigated using IGG should be entered into the FBI's ViCAP (Violent Criminal Apprehension Program).[8]

IGG case requirements

The IGG process starts with the collection of crime scene evidence that either has biological material (e.g., a victim's clothing) or is biological material (e.g., a vaginal swab taken from a victim during autopsy). DNA extracted from biological material can provide a genetic profile. Bodily fluids such as blood, semen, sperm, and saliva are the most common examples of bodily fluids that yield a strong STR DNA profile. Epithelial cells (from the outermost layer of skin) are also biological material from which DNA can be extracted. STR DNA is the most common type of DNA used in criminal investigations. It refers to specific sequences of DNA that consist of short segments of repeated nucleotides. STRs are highly variable among individuals, making them

It is critical for all agencies involved in an IGG investigation and prosecution to communicate with each other to ensure they are not risking federal grant funds by violating the policy, as federal law enforcement agencies and those receiving federal funding for IGG must follow the policy. Plus, its protections and procedures are in place to balance the interests and privacy rights of the public.

---

[6] United States Department of Justice's Interim Policy Forensic Genetic Genealogical DNA Analysis and Searching (2019), www.justice.gov/olp/page/file/1204386/dl. And yes, the "interim" policy is the most current one, even though it's five years old.

[7] *Id*. at Endnote 20.

[8] www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/freedom-of-information-privacy-act/department-of-justice-fbi-privacy-impact-assessments/vicap.

ideal for both genetic profiling and forensic identification (DNA fingerprinting). STR DNA has been the gold standard in court identification in criminal trials since it was first introduced in an American courtroom in 1986. Up until a few years ago, if you were talking about DNA in a criminal case, you were most likely talking about STR DNA.

Some types of evidence may first undergo serological testing. Many times, this is dependent on the specific process of the lab testing the evidence. For our purposes, we skip ahead to the extracted DNA going through the typical STR DNA analysis flow chart of:

Quantification > Amplification > Separation > Analysis > Interpretation[9]

An unknown STR DNA profile that doesn't match any known profiles can be uploaded into CODIS. If no match is found, law enforcement may consider IGG as an investigative technique.

If there are no DNA profiles identified in the tested evidence, you are done. If the evidence contains sufficient DNA from one, two, or even more people, forensic experts can often produce a clear STR DNA profile of the person or people who left it. That STR DNA profile, sometimes called a genetic fingerprint, can provide a solid lead in a criminal investigation.[10]

Modern STR DNA testing can identify multiple DNA profiles from a single sample, crucial in intimate samples such as those from sexual assault exams. An unknown STR DNA profile that doesn't match any known profiles can be uploaded into CODIS. If no match is found, law enforcement may consider IGG as an investigative technique.

What is SNP testing?

Conventional DNA testing methods may not yield results when DNA is highly degraded. For example, in the World Trade Center terrorist attack, DNA of the victims was subjected to such extended periods of extreme temperature that conventional testing could not be used to identify the remains.[11] SNPs are the most common type of genetic markers found in humans. On average, every thousand bases in human DNA will contain a nucleotide site that can differ between individuals. Bases refer to the fundamental building blocks of DNA, and DNA is composed of four different types of nucleotides. Nucleotides are basic units of DNA, consisting of nitrogen, a sugar molecule, and a phosphate group. Just as DNA STRs were developed so that smaller and more degraded samples could be tested than with restriction fragment length polymorphism (RFLP), SNPs can be used to obtain results from even smaller and more degraded DNA samples than with STRs.

IGG can examine more than half a million SNPs, which replace the STR DNA markers analyzed in traditional forensic DNA typing. These SNPs span the entirety of the human genome, allowing scientists to identify shared blocks of DNA between a forensic sample and the sample donor's potential relatives. Recombination or reshuffling of the genome is expected as DNA from each generation is passed down, resulting in larger shared blocks of identical DNA between closer relatives and shorter blocks between more distant relatives. Due to predicted levels of recombination between generations, it is possible to analyze these blocks of genetic information and make inferences regarding potential familial relationships.[12]

The measurement used for genetic relationships in SNP profiles is called centimorgans (cM). The closer the relationship, the more or higher the cM number will be. The human genome has about 6,800 cM. A parent-child relationship will share 50 percent of their DNA, or ~3,400 cM. If you want to learn more about shared cM and relationship levels, search online for "The Shared cM Project." You'll find a chart[13] that anyone doing IGG work uses all the time. It was instrumental in my training on how to build family trees and identify familial suspect pools.

Time to SNP

Once preliminary work is completed, law enforcement and prosecutors identify STR DNA evidence for submission to a SNP lab. Currently,

---

[9] National Institute of Justice (NIJ).

[10] Press, R., "DNA Mixtures: A Forensic Science Explainer," National Institute of Standards and Technology, U.S. Department of Commerce, April 3, 2019, nist.gov.

[11] Principles of Forensic DNA for Officers of the Court, National Institute of Justice, June 21, 2023.

[12] United States Department of Justice's "Interim Policy Forensic Genetic Genealogical DNA Analysis and Searching," (2019).

[13] Here is one example of the chart: https://dnapainter.com/tools/sharedcmv4.

only a few labs in the United States can perform SNP testing, and most of them are private. The very first public crime lab to offer any type of SNP testing in the United States was right here in Texas, the Center for Human Identification at The University of North Texas Health Science Center at Fort Worth.[14]

The crime lab that performs the original STR DNA testing will determine whether a DNA extract exists. If it does, the lab will need to quantify ("quant") the sample to ensure there is enough DNA for the SNP lab. It may be that another DNA extraction from the original STR DNA sample or evidence is needed. In those cases, it is always best to have the original STR DNA lab perform the extract before sending it to the SNP lab. This is especially true if that lab is CODIS accredited. When the SNP lab receives the evidence, it will analyze the collected DNA to create a detailed genetic SNP profile of the unknown suspect. As previously mentioned, the profile is much more comprehensive than those used in traditional forensic DNA databases.

One more thought on SNP testing and the labs that perform it: Not all SNP testing labs use the same testing technique, and each technique tests a different number of SNP markers. Currently, the three most common types of SNP testing methods are Whole Genome Sequencing, Microarray, and Kintelligence. Whole Genome Sequencing is best for low-level and degraded DNA. The commercial kit companies (23andMe and MyHeritage) all use Microarray. Kintelligence targets the lowest level in its SNP profiles of the three (10,230 SNP markers) but it is said to be explicitly curated for forensic kinship use with the ForenSeq Kintelligence Kit. Kintelligence also claims to be the only sequencing-based assay designed for IGG.[15] If you are involved in an IGG investigation, you should at least be aware of what method may be or was used for your case. Certain evidence may benefit from the higher marker level of testing that comes with using Whole Genome Sequencing and Microarray.

Upload and tree build

Once a SNP profile is created, that profile is sent to the law enforcement agency investigating the case to be uploaded into a public, searchable genetic database. GEDmatch is by far the most widely used; it is marketed as offering "comprehensive solutions for genetic genealogy and family tree search," and it allows users to compare their DNA test results with those of other people across the globe. It also lets users "opt in" to the Genetic Witness Program, where law enforcement can upload unknown DNA data to GEDmatch to find relatives of the unknown donor.[16] Such databases contain the DNA of millions of individuals, almost all of whom have *voluntarily* submitted their genetic information in the hope of tracing their ancestry or finding biological relatives, and law enforcement never has access to users' raw DNA data.

Law enforcement or genetic genealogists then evaluate the shared genetic variations in the suspect's SNP profile to start building a family tree. The number of SNP variations shared between individuals can help approximate the genetic distance between them. This data is used to determine the degree of relation and placement within the family tree.

Rarely will law enforcement be able to identify a suspect based on the initial upload of a SNP profile into a public database, but it does happen. In June 2020, I vividly remember being at my son's baseball game on a Saturday morning when I got a call from FBI Special Agent Randy White. Randy leads the FBI's IGG Team in Dallas, and I started working with him on IGG cases in late 2019. Up until that Saturday, we had not identified a suspect using IGG for a Dallas County case. We had submitted evidence on some cases for SNP testing and FBI had been building trees, but no concrete results pointing to a specific suspect in those cases. I knew that the Friday before, Randy and his team had gotten the SNP results back from a case we had just submitted, but I wasn't expecting to hear anything back from the tree building and online research for months, if not longer.

That Saturday morning, Randy called to say he and his team had identified a suspect in one of

Rarely will law enforcement be able to identify a suspect based on the initial upload of a SNP profile into a public database, but it does happen.

[14] www.unthsc.edu/school-of-biomedical-sciences/chi-becomes-nations-first-public-lab-to-earn-accreditation-to-perform-forensic-genetic-genealogy/.

[15] https://verogen.com/products/forenseq-kintelligence-kit/.

[16] www.gedmatch.com/join-the-genetic-witness-program.

the biggest unsolved serial rapist cases in Dallas history: David Thomas Hawkins. Not only that, but the suspect was still alive and lived in North Texas. My heart raced with excitement. This was the first time in Dallas County history a criminal case had been solved using IGG.[17] We got lucky on Hawkins: A direct family member had uploaded a genetic DNA profile to a public open-source database.

That is not the norm. IGG investigative work requires great patience. For example, the very first case Randy and I collaborated on was a capital murder from 1983 that took us three years to solve using IGG. But the takeaway is that we solved it. If a case qualifies for IGG, it can be solved. Some cases you will have to grind out more than others.

IGG really does not work without traditional genealogical research, which involves tracing both close and distant relatives, extensively researching public records, scouring social media, and looking into other sources to establish relationships and potential ancestral links to the suspect. Some cases will require hundreds of hours of research that can take years. Determination and patience are vital.

IGG really does not work without traditional genealogical research, which involves tracing both close and distant relatives, extensively researching public records, scouring social media, and looking into other sources to establish relationships and potential ancestral links to the suspect.

Investigators will examine publicly available historical records. They will connect biological family members to verify and grow the family tree. By combining the information provided by the public genetic database with traditional genealogical research, law enforcement can unravel previously unknown branches of the family tree, validate existing relationships, and gain a more comprehensive understanding of suspect's biological lineage. In Dallas, all sorts of folks are doing the genealogical research. It started with the FBI using tree builders under independent contract. Now the FBI has its own people in-house building trees. Some local law enforcement agencies and even prosecutor offices use their own people, and those results are mixed. I try to use only the FBI, as they are truly the world leaders.

There are pitfalls. Investigators should not assume anything. IGG investigations often reveal that someone who was previously thought to be a biological child to a known parent is not at all blood-related to that parent. And then there is the previously unknown high rate of incest in the United States that has been discovered with genetic genealogy and the inception of IGG in criminal investigations.[18] IGG brings secrets into the light.

Initial tree

Once law enforcement has built a family tree to a satisfactory initial level, they can start trying to identify potential suspects based on characteristics such as age, height, race, and criminal records. They eliminate unlikely suspects and focus on those fitting the suspect profile.

In cases with multiple suspects in the pool, criminal records can be helpful. In cases involving murder and sexual offenses, there's a decent chance the suspect has a history of other crimes such as domestic violence, aggravated assault, and of course prior sexual crimes. For IGG suspects, the criminal records for serious felonies will almost always be arrests only, charges that were reduced for pleas, or convictions that occurred prior to laws requiring DNA samples for felony convictions. Remember, the suspect is not in CODIS. Investigators really need to look beyond convictions to identify the suspect or suspects who fit the profile. There is no concern that someone may be wrongfully arrested based on their past because law enforcement does not arrest anyone until there's a direct STR DNA match to the suspect. The investigative lead must be followed up with traditional police work and the gold standard of forensic identification evidence, STR DNA.

"We're gonna need a bigger tree"

In the realm of IGG work, there sometimes comes a point when the family tree constructed by investigators reaches an impasse and requires further expansion. The most effective method to grow the tree is by incorporating more familial SNP profiles through reference testing, which involves the consensual collection of a DNA sample from a third-party individual. Identifying candidates for reference testing occurs during the initial stages of tree construction. Reference tests introduce new branches to the family tree by re-

[17] Hawkins was later convicted on three counts of aggravated rape and one count of Aggravated Sexual Assault. He was sentenced to four terms of life in prison. Hawkins confessed to more than 30 violent home invasion rapes using a firearm.

[18] Zhang, S., "DNA tests are uncovering the true prevalence of incest," The Atlantic, March 18, 2024.

vealing additional genetic relatives, which can also aid in pruning non-relevant branches and verifying existing connections.

Law enforcement should never reference-test anyone who may possibly be the suspect or have a relationship close enough to the suspect(s) it could jeopardize the investigation. People talk, especially family. The last thing we want is a suspect to get wind of the investigation—that creates a public safety risk to victims and any family members the suspect may think are cooperating with law enforcement. When it comes to reference testing, proceed with caution!

The DOJ's Interim Policy requires informed consent from all third parties before collecting a reference sample. There is an exception to this requirement when the collection of such a sample would compromise the investigation, and law enforcement needs prosecutorial approval to use this exception.

For reference testing, law enforcement should utilize consumer SNP profile DNA kits; AncestryDNA is one brand (available at ancestry.com). These kits ensure that the tested individuals retain ownership and control over their genetic data. Law enforcement can access these results only with the individual's explicit permission, thereby protecting privacy rights and maintaining a safeguard between citizens and law enforcement.

Suspect(s) identified

In IGG cases, law enforcement often narrows down the suspect pool to a small group of blood-related individuals, typically siblings or first cousins. Investigators then meticulously examine each suspect until they obtain a direct STR DNA confirmation necessary for an arrest. The initial focus should be on the suspect most likely to have committed the crime based on available evidence. However, the most apparent suspect is not always the perpetrator.

Multiple cases have required law enforcement to collect surreptitious DNA samples from various suspects before identifying the correct match to the crime scene evidence. This meticulous approach underscores the value of IGG, which minimizes the risk of misidentification, as DNA evidence is irrefutable. Although time-consuming and potentially costly, it is imperative to await STR DNA confirmation before making any arrests to guard against wrongful arrests.

The DOJ Interim Policy is clear: "A suspect shall not be arrested based solely on a genetic association generated by a GG [genetic genealogy] service. If a suspect is identified after a genetic association has occurred, STR DNA typing must be performed, and the suspect's STR DNA profile must be directly compared to the forensic profile previously uploaded to CODIS. This comparison is necessary to confirm that the forensic sample could have originated from the suspect."[19]

In most scenarios, law enforcement will obtain a suspect's STR DNA profile using a surreptitious collection method; the most common of these is the "trash pull." It is critical that law enforcement follow all local, state, and federal laws when doing a trash pull. The DOJ Interim Policy also requires prosecutor concurrence to plan and execute a trash pull for IGG; failure to follow the law at this point can jeopardize the STR DNA testing. Law enforcement will need probable cause (PC) to make an arrest, and IGG should never be used as PC for an arrest or search. It should be treated akin to an anonymous tip in legal terms—guiding investigations but not serving as the basis for PC. A quick refresher on anonymous tips from *Davis v. State*:[20] An anonymous tip can initiate a police investigation but typically does not establish the requisite suspicion for investigative detention or PC for arrest without additional reliable facts. Similarly, IGG "tips" must be corroborated, and the subsequent investigation must yield additional case facts to establish probable cause, including a direct STR DNA comparison.[21]

In most scenarios, law enforcement will obtain a suspect's STR DNA profile using a surreptitious collection method; the most common of these is the "trash pull."

---

[19] United States Department of Justice's "Interim Policy Forensic Genetic Genealogical DNA Analysis and Searching" (2019).

[20] 989 S.W.2d 859 (Tex.App.–Austin 1999, pet. ref'd).

[21] See *Clemons v. State*, 605 S.W.2d 567, 570 (Tex.Crim.App.1980); *Mann v. State*, 525 S.W.2d 174, 176 (Tex.Crim.App.1975); *State v. Simmang*, 945 S.W.2d 219, 223 (Tex. App.–San Antonio 1997, no pet). However, an anonymous tip or telephone call alone rarely will establish the requisite level of suspicion necessary to justify an investigative detention. See *White*, 496 U.S. at 329, 110 S.Ct. 2412;5 *Reynolds v. State*, 962 S.W.2d 307, 311 (Tex.App.–Amarillo 1998, pet. ref'd); *Parish v. State*, 939 S.W.2d 201, 203 (Tex.App.–Austin 1997, no pet.). Normally, there must be some further indicia of reliability–additional facts from which a police officer may reasonably conclude

Once law enforcement matches a direct STR DNA profile to the STR DNA profile of the suspect, they have the proper PC to make an arrest and execute a buccal confirmation search warrant.

IGG at trial

At trial, nothing changes. *The prosecutor should not present IGG investigative evidence at trial.* The evidence the prosecution will use to identify the defendant will be the buccal swab STR DNA confirmation testing that was taken subject to a search warrant or consent at the time of the defendant's arrest. Prosecutors should introduce testimony from the witness who gathered the evidence at the crime scene, including sexual assault exams and autopsies. The prosecutor will then put on the witness, most likely a law enforcement officer, who took the defendant's buccal swab. Finally, the prosecutor will call the STR DNA analyst to admit the DNA report and testify to its findings. Nothing changes.

At trial, nothing changes. The prosecutor should not present IGG investigative evidence at trial. The evidence the prosecution will use to identify the defendant will be the buccal swab STR DNA confirmation testing that was taken subject to a search warrant or consent at the time of the defendant's arrest.

It is important to note, that just because IGG evidence does not need to be admitted at trial, *IGG evidence must be turned over in discovery.* There may be situations where pre-trial hearings on IGG evidence and IGG discovery are warranted. Law enforcement must preserve all relevant communications, notes, tree building records, relevant matches, and SNP testing results and maintain regular communication with prosecutors about the IGG evidence.

The future

The future of IGG and DNA technology in general continues to have great potential for meaningful impact solving violent crimes. Ten years ago, we all thought that the future of forensic DNA was Rapid DNA. Rapid DNA refers to the technology and processes that allow for the quick analysis and profiling of DNA samples. Rapid DNA used on evidence is currently not admissible in any jurisdiction for criminal trials in the United States. It was expected to revolutionize criminal investigations, but its implementation has been slow. On the other hand, IGG has experienced swift adoption in recent years, becoming a common tool in criminal cases nationwide. Might there be a day in the not-so-distant future where these two emerging DNA technologies intersect? One can hope.

During a conversation with nationally recognized DNA expert Dr. Robert Benjamin,[22] I discussed the potential of a SNP testing database to replace the current CODIS STR system for identifying suspects in violent crimes. According to scientific evidence, SNP testing offers a higher chance of identifying suspects compared to STR testing. Additionally, unlike CODIS, which includes only convicted felons, a SNP database could encompass *everyone*. That's right, as you read this article today, you are related to someone who has uploaded his or her genetic DNA profile to a public database. It might be a very distant, low-centimorgan relationship, but it is there. Dr. Benjamin believed that from a scientific standpoint, there is no reason why SNP testing couldn't be implemented similarly to CODIS.

I also spoke with the former custodian of the National DNA Database at the FBI about the future of SNP testing and IGG. He mentioned two significant issues hindering the transition from a STR CODIS system to a SNP database: First, there is currently no standardized set of SNPs for comparison. Second, it would require retyping more than 20 million offender profiles and more than a million forensic profiles. However, he acknowledged the potential for SNPs to become a viable option for forensic databases in the future.

The future of IGG will also be a big player in the world of wrongful convictions and exonerations. This incredible new ability to better identify suspects in pending criminal cases translates perfectly to helping identify wrongful conviction cases and exonerating those who have been wrongfully convicted. This is forensic science technology that will benefit us all.

Indeed, SNP testing and IGG have the potential to greatly benefit not only law enforcement but also defense attorneys and innocence projects across the country. The availability of scien-

---

that the tip is reliable and a detention is justified, *much less probable cause for an arrest.* See *White*, 496 U.S. at 329, 110 S.Ct. 2412; *Davis*, 794 S.W.2d at 125.

[22] Conversation between author and Dr. Robert Benjamin outside the courtroom before his testimony in *State v. Talyle Meaderds* jury trial on August 10, 2022, in Dallas.

Continued on page 23 in the blue box

The curious case of Cordarius

A case recently handled by our office took turn after turn that no one could have predicted, reaching a conclusion we never expected.

By Timothy Flathers
First Assistant District Attorney in Midland County

This isn't a tale about a great courtroom triumph or feats of legal wizardry, but rather a particularly memorable example of those human dramas that we witness in this profession time and time again.

Inside the city of Midland, in the heart of the oil patch, behind the houses on most residential blocks, there is a secondary network of largely unpaved alleyways running parallel to the streets in town. It was in one of these alleys, on a cool Sunday afternoon in January 2023, that the mysterious situation of Cordarius Pegues first presented itself. A resident of Fannin Terrace neighborhood had reported a child roaming in the alley, walking with his pants down, and pushing a toy car. When an officer with the Midland Police Department arrived to investigate, she found someone who looked by all appearances to be a young teen, or possibly even a child, and who was utterly unable to tell the officer anything about who he was or where he belonged.

The boy was checked by paramedics. It was unknown how long he had been roaming the streets or what he might have been through before being discovered. Though dirty and disheveled, he appeared in relatively good health and didn't need medical attention. Short and slightly built, the boy's childish face seemed even younger under the pink bicycle helmet, complete with cat ears, nose, and eyes, perched atop his head. He was turned over to Child Protective Services (CPS) while Midland police tried to locate whoever was responsible for him. Still unable to communicate verbally with him, officers were finally able to get a name that they could read when he scrawled "Cordarius" on a piece of paper.

A social media post and news release seeking possible leads to Cordarius's identity turned up nothing. Fingerprints and buccal swab DNA samples were collected. Checks with the National Center for Missing and Exploited Children (NCMEC) and the National Missing and Unidentified Persons System (NamUS) were conducted but uncovered no new information.

Cordarius was an absolute mystery, as if he had somehow dropped out of the sky into that central Midland neighborhood. The news about him had gone viral, seemingly gaining national attention. And yet there was not a single clue to point in the direction of family or a guardian.

It was clear that Cordarius had many needs and developmental deficits. In addition to being nonverbal, he was also not well bathroom-trained and he was in need of significant help with basic activities. Someone had clearly been caring for him, yet there was no indication that any living soul knew Cordarius or even knew *of* him.

Days turned to weeks and weeks to months without any new light shed on the mystery of Cordarius. Due to the level of help he needed, it had been necessary for CPS to move him out of the area to a suitable foster home. Midland authorities continued hoping for any new information that might answer everyone's questions, but nothing came. It seemed as if the frustrating puzzle of this young man's existence might go unsolved.

Prosecutors are committed to serving their communities by providing fair and equal justice for all and allowing defendants the opportunity to accept responsibility, with the advice of their counsel and the oversight of a neutral judge who is integral to an effective and just system.

The break in the case

Finally, on August 9, 2023, the break everyone had been hoping for arrived: A woman from out of state claiming to be Cordarius's grandmother called the Midland Police Department. She informed them that her grandson was supposed to be living in Midland with her daughter, Charlotte Pegues. Alerted by a friend who had seen Cordarius's picture in the news, the grandmother had contacted her daughter, who assured her that Cordarius was with her and was fine. Unsatisfied with that answer, Cordarius's grandmother called Midland authorities.

Before that conversation had even finished, investigators were notified that another woman was trying to call them. Officers talked to her on the phone initially, as she claimed she wasn't ready to meet in person. Her name was Charlotte Pegues, and she said she was Cordarius's mother. She also revealed a surprising piece of information during that call: Cordarius, despite his youthful appearance, was born in January 1999. He was not a child or even a teen. He had been found, it turned out, just weeks after his 24th birthday.

Investigators arranged a meeting with Charlotte Pegues the following day at the police department. She appeared voluntarily and agreed to talk. Her home, where Cordarius had lived with her until earlier in the year, turned out to be fewer than three blocks from where her son had been found.

Charlotte and her son had lived in Midland for two years at the time he was found in that alleyway. After years in Tennessee and Oklahoma, Charlotte had come to Midland to work for a company that owned fast food franchises in town. Her job on the corporate side of the business paid decently and she seemed to be well-liked within the company. No one in their quiet, middle-class neighborhood knew Charlotte, and they definitely never remembered knowing or even seeing Cordarius. The tidy, nondescript ranch-style house they lived in was owned by the franchise business and was provided to her as part of the job.

According to Charlotte, Cordarius had somehow gotten out of the house earlier in the day on January 29. She had searched for him for a couple of days and then given up. She stated she looked for Cordarius on missing persons websites. Implausibly, she claimed that she was only now finding out that Cordarius had been found. While his story had been an online sensation all over the country, she stated she did not watch the news and had never seen anything about him until hearing from her mother shortly before calling the police herself.

Charlotte's story was that she had not reported her son's disappearance out of a combination of shame she had lost him, mistrust of law enforcement due to experiences in her past, and fear that she would be in trouble if something bad had happened to her son. Her explanation was obviously met with skepticism by investigators. It seemed much more likely that, upon learning that Cordarius had been found wandering the neighborhood, Charlotte waited for the inevitable knock at that door that would return him to her as his caretaker. When that knock did not come immediately, she kept waiting. When more and more time passed without any hint that Cordarius had been traced back to her, and with media reporting that he was safely in state custody, she probably began to hope that the burden of caring for her son, which she had borne for years, would now be taken on by someone else. Maybe she could, against all hope, get on with living her life. Now that her discovery had become inevitable, she was desperately trying to get out in front of things.

Shortly after that initial meeting at the police department, Charlotte consented to a search of her house. The house's furnishings were spartan, with a few exceptions. Charlotte's own bedroom was stocked with all the furniture and entertainment options of modern living. Another room, which Charlotte said had been Cordarius's, was nearly empty except for an old, dismantled bed. She said she had cleaned it out after he didn't come back. A third room was smaller and more disturbing. It was packed with trash to the point where it was difficult to open the door. The top layer of garbage was strewn with junk food packages and wrappers. It reeked, even over the deodorizers that had been applied to mask the smell. Clearly, Charlotte hadn't yet undertaken cleaning up that mess. Investigators shuddered to think how much time Cordarius might have spent closed in that room.

What could the law do?

As the story continued to unfold, the whole city remained heartbroken by the circumstances of this vulnerable young man, unclaimed and seemingly alone in the world. There was no mistaking the attitude vocalized in the community toward Charlotte Pegues: She needed to be locked up,

and it didn't really matter how or what for. The thought of a mother turning her back on a vulnerable child, even one Cordarius's age, was tough to stomach.

Our office's initial consultations with investigators about the case had to put aside the easy emotional reaction and focus on what evidence there was and what crime, if any, had been committed. It was not an easy task. When everyone was under the initial impression that Cordarius was a child, the assumption was once his parents or legal guardians were found, there were obvious criminal charges to consider. That Cordarius had been an adult since long before coming to Midland upended that assumption.

First, it did not appear that Cordarius had suffered any bodily injury. It was impossible to say if his diminutive size could be due to historic malnutrition or if it was just his natural condition. By all measures he was relatively healthy when he was found, except for some poor dental hygiene. He would need dental work, but nothing that we felt would give rise to an Injury to a Disabled Person charge, either by act or by omission.

Further, a charge of Abandoning or Endangering a Child had initially been a strong possibility that evaporated upon learning Cordarius's true age. As most are aware, Penal Code §22.041 is today titled "Abandoning or Endangering a Child, Elderly Individual, or Disabled Individual." The "elderly individual or disabled individual" language, however, was added by the 88th Legislature and didn't take effect until September 1, 2023. The new elements added by that change, protecting disabled adults in the same way we had long protected children, came about seven months too late to apply to our situation.

The mystery of Cordarius had become a cooperative multi-agency effort consisting of law enforcement, prosecution, and CPS and Adult Protective Services (APS) personnel both in West and South Texas. That investigation made one interesting discovery that proved critical to our case. Many years earlier, while Cordarius was a young special needs student in Tennessee, Charlotte Pegues had secured disability benefits on his behalf. She had been collecting those benefits ever since. To state it more accurately, Charlotte's mother, due to a past conviction on Charlotte's record, had been receiving those benefits for Charlotte and then providing them on a debit card, along with monthly care packages for her grandson. For months, Charlotte had been falsely assuring her mother back home that Cordarius

tific technology that can provide more accurate information is invaluable in determining the truth. It is important to use this technology responsibly and ethically. When used in this manner, there are no limits to the power and capability of IGG in achieving justice, which is ultimately the goal for which we all strive. The exploration of SNP testing and IGG opens up new possibilities for the legal system to ensure fairness and accuracy in criminal investigations and court proceedings.

Conclusion

In summary, law enforcement should follow the DOJ Interim Policy for Forensic Genetic Genealogy, ensuring a CODIS-eligible DNA profile is uploaded and exhausting all traditional investigative methods. Investigators must build the family tree, conduct reference testing as needed, and perform surreptitious sample collections until an STR DNA match to the crime scene evidence is confirmed. An arrest should be made only after obtaining an STR DNA match, with a search warrant ready for a buccal swab confirmation at the time of arrest. All IGG investigative work must be preserved for case filings, and prosecutors should follow standard procedures for presenting DNA evidence at trial, ensuring the integrity and reliability of the investigation and prosecution process. As one investigator proclaimed, IGG "is the most powerful tool that I've seen come along in the [decades] that I've been in law enforcement."[23] The excitement surrounding IGG for law enforcement and prosecutors is palpable. This innovative method is set to revolutionize investigations by leveraging genetic information to uncover vital leads and identify suspects in ways never thought possible. As long as it is being used responsibility and ethically, IGG empowers investigators to make connections that can bring justice to victims and closure to families. Once you experience the incredible power and life changing justice, healing, and closure IGG brings to your community, you will become captivated by its power and effectiveness . ❇

---

[23] De Groot, N.F., Van Beers, B.C., and Meynen, G., "Commercial DNA tests and police investigations: a broad bioethical perspective," J. Med. Ethics 47 (2021) 788–795.

was with her and fine, and she continued to receive what they both called "Cord's packages."

According to Charlotte's bank records, from the time of Cordarius's discovery in January until August, when she had not provided for him in any way, she had collected nearly $7,000 in benefits on behalf of her son. There were no lavish trips to Vegas, but there was plenty of evidence of a veritable parade of Uber Eats deliveries and spending sprees at Ulta Beauty in the Midland Park Mall.

Wiser heads in my office and with Midland PD recognized this to be a violation of Penal Code §32.53, Exploitation of a Child, Elderly Individual, or Disabled Individual, a third-degree felony. The statute, in the code's fraud chapter, criminalizes improperly using the resources of a disabled individual for personal monetary gain. It wasn't the direction anyone expected the case to go, but it seemed squarely on point with Charlotte's conduct and gave us an opportunity to address with strong consequences a situation that everyone knew was unjust, even before we knew exactly why it was so.

Uncomfortable as it may be to contemplate, I cannot help but believe that both Cordarius and his mother are better off now than they were before.

After securing an indictment, it was then time to decide what kind of punishment to seek. We had to consider multiple factors. First, it was clear that Cordarius could never articulate how his mother treated him over the years, let alone ever testify about it. We were keenly aware that exploitation was likely the lone criminal charge possible in the case. This was in no way analogous to taking down Al Capone's criminal empire with tax evasion charges, and it wouldn't have been justice to treat it as such. Also, we knew the challenges that a trial would bring. Any competent defense counsel would not have to work hard to paint Charlotte Pegues as a woman beaten down by years of grueling care for her son and facing years more. When presented with an escape and the possibility that someone else would care for him without facing the indignity of having to ask for that help, she took the out. We knew that the online keyboard warriors calling for her head would not be the same people on our jury.

Taking all of that into consideration, we decided to offer the maximum sentence of 10 years in prison but probated for five years and with the condition that she repay Cordarius the benefits that she had falsely received over the months he was gone. Somewhat to our surprise, she jumped at the chance. The guilty plea went smoothly and the case was resolved.

The rest of Cordarius's story

Cordarius was initially placed with a gracious and loving foster family far from Midland who did saintly work tending to his many needs for as long as they were able. Once it was discovered that Cordarius was nearly 25 and came under the authority of APS, it was necessary to move him into a group home in the Rio Grande Valley that could handle his special circumstances. Today, he is healthy, and he participates in speech, physical, and occupational therapy. He loves to swim and play basketball. He has been able to go to church and his caregivers describe him as "joyful." Thanks to the work of many caring professionals both here and in South Texas, he is in a better place. Uncomfortable as it may be to contemplate, I cannot help but believe that both Cordarius *and* his mother are better off now than they were before.

Conclusion

Dealing with human tragedy is a daily affair in our business. Sometimes, we are confronted with real evil. In a way those situations are easier to process, precisely because they are so extraordinary. Most of what we deal with, though, amounts to nothing more than humans behaving in predictable human ways to one another, but often with horrifying results. It's stories like Cordarius's, the tragic human drama of a mother–son relationship that is simply beyond the comprehension of most, that illustrate so well those situations that are often the hardest to make sense of: not evil, just human. ❇

Workers' compensation fraud

Workers' compensation fraud prosecution is not universally viewed as the sexiest area of practice, so I was both honored and surprised to be asked to contribute this article to *The Texas Prosecutor* about a recent high-profile case disposition.

By Jessica Bergeman
Special Prosecutor, Embedded Fraud Unit in the District Attorney's Office in Travis County

I appreciate the opportunity to discuss the importance and complexity of my work as Special Prosecutor for the Texas Department of Insurance's (TDI) Division of Workers' Compensation (DWC). I'd also like to shine a light on some common misconceptions about it.

About the case

In May 2024, Frances A. Hall pled no contest to one count of second-degree Securing Execution of Document by Deception in the 147th District Court of Travis County. Ms. Hall was co-owner (through marriage) and a workers' compensation insurance policy contact for Bill Hall Jr. Trucking during Texas Mutual Insurance Company (TMIC) coverage years of 2009–2016. Part of Ms. Hall's policy contact responsibilities was providing accurate payroll reports to the insurance carrier to calculate premiums based on the carrier's exposure.

Ms. Hall became the sole owner of the Bill Hall Jr. family of trucking companies upon the death of Bill Hall Jr., which is the basis for how my workers' compensation insurance fraud prosecution gained media attention. Frances Hall was convicted of causing the death of her husband while attempting to assault his mistress in October 2013, and the story became highly sensationalized in national media coverage when she received a sentence of two years in prison, perhaps based on the jury's acceptance of the defense's mitigation theory of sudden passion. Before her trial and incarceration, Ms. Hall had exclusive responsibility for Bill Hall Jr. Trucking group for purposes of insurance policy coverage and auditing responsibilities from October 2014 through February 2016, when TMIC canceled the coverage for the suspected fraud. During her control of the companies, the information she reported to TMIC increasingly aligned with TMIC's actual exposure. However, over the entire seven years of coverage, the trucking companies and their owners avoided paying approximately $9 million in premium fees by underreporting their workforce payroll. While that seems like an astronomical amount, it's correlated to the number of employees, the total payroll, and the risk associated with the kind of business being conducted by the policyholder and the employees.

About workers' compensation

Workers' compensation—affectionately shortened to "comp"—is a boutique area of practice. It is different from regular insurance practice because it is limited to a single type of insurance coverage regulated by DWC pursuant to the Texas Labor Code and adopted rules. Workers' comp fraud cases often overlap with other kinds of crimes, such as wage theft or worker misclassification. I'm always happy to be a resource for others if they identify a comp issue in their prosecutions, and the DWC Fraud Unit can also be consulted for their expertise.

As Texas continues to increase in population and construction projects, labor-based crimes

are prevalent across the state. My hope is this article will assist other prosecutors in spotting comp issues in their own caseload and know that help is available to them.

Workers' compensation is not mandatory in the State of Texas, but participating in the system provides protections for both workers and employers in the event of an on-the-job injury. The injured worker gets no-cost access to health care to treat the injury so s/he can return to work, and the employer is protected from civil liability. The premiums paid by participating employers provide the basis for funding the comp system through a maintenance tax on the premiums. Employers who do not wish to participate in the system can declare themselves "nonsubscribers" with the Division of Workers' Compensation, but they leave themselves vulnerable to the entire range of civil liability if an employee is injured at work.

Claimant cases are what most people probably think of when they hear "workers' comp fraud," but they represent only a small fraction of the actual fraud being committed in the comp system, according to national experts. The Coalition Against Insurance Fraud launched a task force in 2021 to review fraud in workers' compensation systems across the country. The report estimates that of the $34 billion in comp fraud discovered, $9 billion is in bogus claims filed by employees, while $25 billion is premium fraud.[1]

I think it's essential to note that workers' comp fraud is *not* a victimless crime. The Texas workers' compensation system is funded by a maintenance tax on insurance carriers, not through general revenue. If comp carriers are defrauded, it has the potential to raise premium costs for businesses in Texas, as well as undermine the ongoing viability of this critical protection for Texas workers.

As Special Prosecutor for DWC, I work in the Travis County DA's Office with the authority of an Assistant District Attorney pursuant to House Bill 2053, which took effect in 2017. It authorized DWC to embed a prosecution unit in Travis County to handle cases referred by the DWC Fraud Unit subject to a memorandum of understanding (MOU) between DWC and the Travis County DA's Office. My unit is unique, as we are DWC Fraud's only prosecution team, while TDI has prosecutors embedded in several DA offices across the state, including Travis, Harris, Dallas, and Bexar Counties. Travis County has jurisdiction over all comp cases because all comp carriers, who are usually the victims in our cases, are mandated by the legislature to have a registered agent in Travis County. Therefore, all my prosecutions are conducted in Travis County.

I have a small team of one investigator and one legal assistant, and we handle *only* cases referred by the DWC Fraud Unit. DWC is mandated to investigate allegations of workers' compensation fraud across the State of Texas, which is a big ask for a team of five investigators, three data analysts, and a director. It is advantageous that many insurance carriers have Special Investigation Divisions that compile much of the evidence needed for DWC's Fraud Unit so that they can then review, investigate, and refer cases appropriate for criminal prosecution.

My cases are extremely document-heavy, with thousands of pages of insurance policies, hospital records, bank account information, certified public accounting (CPA) records, Secretary of State and Texas Workforce Commission records, email communications, cell phone records, etc. These documents help us form the basis of the crime itself and provide an excellent starting point for witness interviews so we can understand the behind-the-scenes activities of companies. From there, we can ascertain who the decision makers are on insurance issues, their motives, and who has provable culpability in these complex, often multi-year fraud schemes.

For example, in the Hall case, we conducted interviews of multiple witnesses with insight into the daily activities of the Bill Hall Jr. Trucking family of companies to understand how much authority Frances Hall had as a decision maker or whether it was Bill Hall Jr. who exercised control over the businesses. While I can't disclose the specific details obtained in the course of our investigation, the information we received directly informed my decisions on how to approach the prosecution and was instrumental in negotiating a fair disposition of the case.

The referrals we receive from DWC Fraud are varied. Many are premium fraud cases—like the Hall case—but we also prosecute billing fraud in the comp system by doctors and lawyers, as well as claimant fraud cases. Claimant cases usually

I think it's essential to note that workers' comp fraud is not *a victimless crime. The Texas workers' compensation system is funded by a maintenance tax on insurance carriers, not through general revenue. If comp carriers are defrauded, it has the potential to raise premium costs for businesses in Texas, as well as undermine the ongoing viability of this critical protection for Texas workers.*

[1] See Workers' Compensation Fraud Report 2022, Coalition Against Insurance Fraud https://insurancefraud.org/wp-content/uploads/2023-Workers-Comp-report.pdf.

fall into a category called "double dipping," where an employee claims to be unable to work, thereby receiving benefits at the maximum level authorized by the Labor Code, but then works at another job without disclosing that income to the insurance carrier. It's a common misconception that injured employees are *prohibited* from earning wages from a different job if they are receiving comp benefits, but that is not true. What is true is that the employee is responsible for advising the insurance carrier of that income so that their benefits can be adjusted to conform to the requirements instituted by the Legislature.[2]

About me

I've been DWC's Special Prosecutor since 2019, but this is not my first rodeo, if you will. I spent almost 10 years in the Cook County (IL) State's Attorney's Office prosecuting crime as an Assistant State's Attorney. I like to say that I did my hard time in street crime in Chicagoland, where I prosecuted public safety violations, property and violent crimes from misdemeanors to felonies, including DUIs, domestic violence, child sex crimes, assaults and batteries, and weapons violations. I gave up my career in prosecution—or so I thought—to move to Texas. I worked as the Director of the Client Attorney Assistance Program at the State Bar for several years, where I was able to effectively restore communication in thousands of lawyer-client relationships, avoiding the necessity of clients filing a grievance against their attorneys to get their attention.

But being a prosecutor is part of my identity. The trick for me became finding a role in prosecution that didn't have the damaging psychological impact of violent crime prosecution. My current role fits the bill perfectly—I can use the trial skills I honed in Chicago, as well as my natural love of mysteries and problem-solving, to deep-dive into my caseload and see justice done for my victims in the protection of an important safety net for Texas workers.

It's a common misconception that injured employees are prohibited from earning wages from a different job if they are receiving comp benefits, but that is not true. What is true is that the employee is responsible for advising the insurance carrier of that income so that their benefits can be adjusted to conform to the requirements instituted by the Legislature.

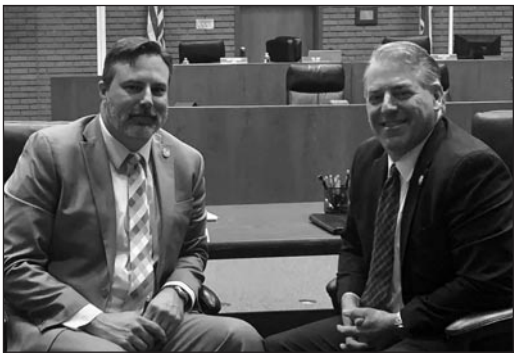
Conclusion

By virtue of the deception involved, comp fraud can take a long time to discover, investigate, and prosecute. Circumstances that may have existed during the timeframe of the criminal activity—or "crimeline," as I call it—may have changed by the time a case is referred and prepped for indictment, trial, and disposition. The Hall case is a great example of this. While the crime was being committed, there were multiple companies and individuals involved who could have been adjudicated as culpable, but by the time we were able to indict the case and dispose of it, only one viable defendant remained. All the businesses were bankrupt and defunct, the primary target was deceased, and the secondary target was only recently released from prison. These truths dramatically impacted the amount of restitution possible to recover for the victim insurance carrier. Ultimately, Ms. Hall was sentenced in July on her no-contest plea and paid $50,000 upfront to Texas Mutual in restitution but will pay the company $100,000 over the next 10 years of her probationary period for her part in the multi-year scheme. ❇

[2] See Tex. Labor Code §408.041 et seq; 28 Tex. Admin. Code 129.4.

Murder with an international extradition charging dilemma

Taking over the reins of the Walker County District Attorney's Office in 2019, our administration inherited several murder cases, but none with more interesting and challenging issues than that of *State of Texas v. Neriah Roberts*.



By Phillip Faseler (left)
Assistant Criminal District Attorney, and
Will Durham
Criminal District Attorney, both in Walker County

Being a rural county on the freeway north of Houston, Walker County over the years has seen its fair share of dead bodies dumped in the piney woods under the watchful eyes of our big Sam Houston statue. In this case, it was alleged that Neriah Roberts strangled Tierra Adams, threw her in the trunk of his car, drove to Huntsville, and buried her in a shallow grave on January 28, 2008. Tierra was nine months pregnant and ready to give birth at the time she was murdered. Roberts, who held dual citizenship in Dominica (not to be confused with the Dominican Republic), fled the United States to Venezuela before Tierra's body was even discovered.

Although we knew all this, the challenge was proving it beyond a reasonable doubt almost 15 years later.

The defendant's flight and extradition

After Tierra Adams went missing on January 28, 2008, Houston police officers from the missing persons division sprang into action trying to locate this 25-year-old woman ready to deliver her baby. Detectives discovered that Roberts picked up Tierra from a state jail facility three days before she went missing; she was pregnant before she began serving an eight-month sentence for drug possession. Roberts was the last person to see her alive.

Tierra was reported missing by her mother when she failed to return home after spending several days with Roberts. Detectives spoke to him on several occasions in an attempt to locate Tierra. He told police that they were in a romantic relationship, and he claimed that he kicked her out of his car in the middle of the night after an argument, never seeing her again. HPD detectives later conducted a more formal recorded interview with Roberts on February 7. After that interview, Neriah Roberts bought a plane ticket to Caracas, Venezuela, and fled the United States on February 13. He had purchased this ticket with cash and boarded the international flight to Venezuela two hours later.

Tierra's body and that of her unborn baby girl were ultimately discovered in a shallow grave on March 26, 2008. An eyewitness recalled helping Neriah Roberts near the scene of the grave less than two months earlier—this witness helped pull Roberts's vehicle from the mud and even noticed a shovel at the scene. That witness later picked Roberts out of a photo lineup.

Once Tierra's body was discovered and positively identified, an arrest warrant for Neriah Roberts was issued for Tierra's murder. The next step was locating and extraditing him. Houston police reached out to their FBI liaison, who began this process. Then-District Attorney David Weeks formally requested FBI assistance and stated his office would extradite. The U.S. Attorney's Office subsequently filed a charge of Unlawful Flight to Avoid Prosecution (UFAP) in federal district court. With the prosecutor's agreement to extradite, an Interpol Red Notice was issued, which required any Interpol member country to notify the FBI should Roberts be located or ar-

rested. The FBI utilized some contacts in Venezuela and Dominica to locate Roberts—to no avail, as so many years passed by. In 2008, diplomatic relations between the United States and Venezuela were deteriorating, and by 2014 relations were close to nonexistent. By the time this case went to trial in 2022, Venezuela was in the same diplomatic category as North Korea, where the United States has no diplomatic relations at all.

The Department of Justice's (DOJ) Office of International Affairs worked with prosecutors to prepare a provisional arrest warrant to seek extradition. DOJ advised that it would be best for Walker County to indict the defendant so that the charge and range of punishment would be known to the extraditing country. (We learned later why this was so important.) Roberts was indicted by a grand jury for Tierra Adams's murder (but not her unborn child) on March 28, 2012, so the punishment range was five to 99 years or life. To the surprise of FBI special agents with the fugitive task force, Venezuelan authorities contacted the United States in 2014 when Roberts was taken into custody on Margarita Island for unrelated charges. Venezuela ultimately extradited Roberts to face a murder charge for the death of Tierra Adams, and this is where the case stood as DA administrations changed.

The nurse practitioner confirmed that Tierra's pregnancy had no complications and that her baby was healthy and ready to be born as of her last medical visit, which was only a few days before her death.

Investigation and proof of the baby's life

When our new administration took over the case in 2019, we knew that the victim in that shallow grave had been pregnant and that the baby deserved justice too. Therefore, we first decided to investigate evidence regarding the baby's health and her mother's pregnancy care during the nine-month period before her death. We were interested in learning if there was adequate proof that the fetus was healthy and ready to be delivered at the time of the murder to possibly pursue a charge for the baby's death too.

Prenatal medical records and sonogram records were reviewed in detail. We learned that both the mother and her baby girl were healthy and had received routine medical care throughout her pregnancy. After making numerous phone calls and emails to almost every nurse, doctor, or medical care provider listed in these records from over 14 years ago, we eventually located the actual nurse practitioner who treated Tierra and her baby. Throughout her pregnancy while in state jail custody, Tierra received excellent pre-natal care from the University of Texas Medical Branch (UTMB) at medical clinics within the Texas Department of Criminal Justice–managed healthcare system. We met with the nurse practitioner, Aimee Jackson, DNP, at the Houston Medical Center, where she explained all the records to us. She confirmed that Tierra's pregnancy had no complications and that her baby was healthy and ready to be born as of her last medical visit, which was only a few days before her death.

After this meeting, we knew emphatically that the evidence required to present a case for the death of Tierra's unborn baby girl was available. But would there be other impediments to prevent that from happening?

Charging decision

The fact that this defendant had fled the United States from Houston to Caracas, Venezuela, within two weeks of the discovery of his pregnant girlfriend's disappearance presented charging and proof issues that our office did not anticipate upon our first review of the case. After the initial review, our trial team agreed that we should do everything we could to see justice done for not only the mother, but also the unborn child. We knew that Texas law allowed for the life of an unborn fetus to be brought as an "individual" for purposes of prosecuting a murder or capital murder, so without fully realizing the implications of doing so, we filed a superseding indictment for capital murder of both Tierra Adams and the unborn child, which the grand jury approved. Things were humming along nicely as we prepared to try the capital murder for the death of two individuals in the same criminal transaction—up until about a month before trial when we got a crash course in international law.

The decision to drop capital murder

As we were making final preparations for trial, the defense attorney emailed to say the extradition treaty with Venezuela did not allow for a punishment of death or life imprisonment, and further that there was a 30-year cap on punishment (which would have been nice to know about sooner). Obviously, this news sent us into a bit of

a tailspin. We read the treaty,[1] which does say that Venezuela reserves the right to decline extradition for crimes punishable by death and life imprisonment. It also states that Venezuela has the power to grant extraditions upon receipt of assurances that prosecutors would not seek the death penalty or life imprisonment.

We then started contacting the FBI, DOJ, and State Department to see what could be done. All were extremely helpful. We were told that it is not uncommon for this limitation to be in extradition treaties, especially in Latin American countries, and typically the feds will agree to 30 years upfront before the extradition proceeds. When our contacts looked into this particular case, however, they could find no assurances given regarding punishment, and it was clear that Venezuela had extradited fully aware that the charge was murder and the punishment range was up to life imprisonment. DOJ felt confident that as far as punishment was concerned, life was in play. However, pursuing the capital murder charge to include the baby's death for life without parole was a different story.

The Rule of Specialty

The Rule of Specialty is a long-standing international principle that says an extradited defendant may not be prosecuted for any offense other than that for which the surrendering country agreed to extradite. Once the defendant is extradited, specialty bars the receiving country from bringing additional charges.[2] We now had to decide how to move forward. Basically, if we proceeded with a capital murder charge and included the baby, then there would likely be federal litigation because we would have exceeded the scope of the extradition agreement entered into back in 2014 and violated the Rule of Specialty. As this reality sunk in, our initial reaction was something like, "Forget Venezuela—our country doesn't even talk to them anymore!"

But after our frustration wore off, we decided against starting an international incident or dealing with unending federal litigation, so we pursued only the murder of Tierra Adams. We did learn that for countries with which the United States has diplomatic relations, it is not uncommon to ask to waive the Rule of Specialty, and most of the time the other country will. However, most European and Latin American nations will not waive the Rule of Specialty unless the death penalty is waived, and the majority will not waive if punishment includes life without parole. Unfortunately, because diplomatic relations did not exist with Venezuela at the time, there was no avenue available for our office to even request a waiver of the extradition agreement to pursue capital murder or life without parole. We knew our answer and what we had to do—pursuing a murder charge for Tierra alone was our only option. (After the trial, we asked a State Department official hypothetically what would have happened if we had thumbed our nose at Venezuela. He responded that no one has done that as far as he knew, but it would get "very messy.")

Basically, if we proceeded with a capital murder charge and included the baby, then there would likely be federal litigation because we would have exceeded the scope of the extradition agreement entered into back in 2014 and violated the Rule of Specialty.

Testimony about the unborn baby at punishment

Our office knew that we had compelling testimony for the jury to hear from the nurse practitioner who provided the medical care for Tierra Adams and her baby during the pregnancy. But how could we best utilize her testimony now? Because capital murder could not be pursued, we decided to move this medical witness from the guilt–innocence phase to being a punishment witness. Our office let the nurse practitioner know that her testimony would be needed only if we got a guilty verdict for Tierra's murder, which we ultimately did. Moving her testimony to punishment allowed our case to comply with the terms of the extradition agreement and the Rule of Specialty, while also allowing the jury to consider the baby's death in punishment deliberations.

As expected, the nurse practitioner from UTMB was a strong witness at punishment. She explained all the medical records and exams showing the health and strength of the mother and the baby, including that the baby was already in the cephalic position (head down) and ready to be born at the time of Tierra's last medical visit a few days before her murder. Dr. Jackson's med-

Continued on page 33 in the blue box

[1] See Treaty of Extradition, Jan. 19-21, 1922, U.S.-Venez., Art IV, 43 Stat. 1698, T.S. No. 675.

[2] See 18 U.S.C. §§ 3181, 3184; *United States v. Rauscher*, 119 U.S. 407 (1886); Caitlan M. Sussman, Not My Cup of Special Tea: An Extradited Defendant's Standing to Challenge American Prosecution Under The Specialty Doctrine, 2022 U. Chi. L. Rev. Online 1 (2022).

Hearsay statements of child abuse victims

In all the years I've been handling CPS cases, I have put only two children on the stand.

By Deanna Belknap
Assistant Criminal District Attorney in Tarrant County

It was during a contested adversarial hearing where their mother was challenging the removal. The children were 14- and 16-year-old sisters; the older was the biological child of the mother and her sister was one of three adopted children. I needed their testimony because their Snapchat videos proved my case, and they were the only witnesses who could authenticate these recordings. Fortunately, the girls wanted to testify about the abuse occurring in their home. In fact, they pretty much begged their attorney ad litem to make it happen. It was not my preference, but at least they were older children who felt empowered by their testimony.

But this is the exception. I haven't met a child protection prosecutor yet who actually wants to put children on the stand to testify against their parents. We are always looking for ways to prove our cases without bringing children into the courtroom.

Why children shouldn't testify

We are prosecutors, not child therapists, but I think it's safe to assume we all understand that it's traumatic for most children to testify, especially against their parents. If you handle Child Protective Services (CPS) cases, you are familiar with the emotional struggles children experience after removal. Many of these children have conflicting feelings toward their parents: They miss them even though the parents were the inflictors of their abuse, and they feel guilty for feeling safe or happy in the care of another adult. In most cases, the status of the parent-child relationship at removal is categorically unhealthy, and the child often feels responsible for the parents' well-being instead of the other way around. I have heard from child abuse experts and child therapists that recalling the abuse in a court setting, especially in front of their abusers, can substantially set a child's healing back, which of course is the last thing we want for children in care.

And because of these conflicting feelings, or because of being a trauma victim, there is a risk the child may not make the statement of abuse again on the stand. The child may forget what he or she had said, may have blocked out the abuse, or may not want to incriminate the parent. If this happens, the child's credibility gets attacked, and we lose a critical piece of evidence against the abusers.

We can protect our children and our cases and still get this evidence in by knowing how to make §104.006 of the Family Code work for us.

> **§104.006. Hearsay Statement of Child Abuse Victim.** In a suit affecting the parent-child relationship, a statement made by a child 12 years of age or younger that describes alleged abuse against the child, without regard to whether the statement is otherwise inadmissible as hearsay, is admissible as evidence if, in a hearing conducted outside the presence of the jury, the court finds that the time, content, and circumstances of the statement provide sufficient indications of the statement's reliability and:
>
> (1) the child testifies or is available to testify at the proceeding in court or in any other manner provided for by law; or
>
> (2) the court determines that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.

Age. If a child is 12 or younger, this statute applies. If a child is 13 or older, you cannot use the statement—right? Not necessarily. The wording of the statute says it applies at the time the orig-

inal statement of abuse is made. In *K.L.*, a 2002 appellate case out of Fort Worth, the court held that the "statute conditions the age of the child on when the statements were made, not on when the trial court later determines the admissibility of the child's statements at trial."[1]

So if you are preparing for final trial with a child who is 14, don't automatically think, "Darn it! I've lost my outcry." Do the math to figure out how old the victim was at the time of the statement of abuse—remember, some of these cases go on for a long time, so don't assume the outcry statement is lost because the child is over 12 at the time of trial.

Alleged abuse. When looking at the outcry statement, you may question if it describes abuse contemplated by §104.006. If a child says, "I saw Daddy point a gun at Mommy," or "Mama left me alone and I didn't have any food," are these statements of abuse?

Abuse is defined in Family Code §261.001(1), which lists 13 types of abuse. A few of the more commonly used definitions are:

- mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
- physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;
- sexual conduct harmful to a child's mental, emotional, or physical welfare, including conduct that constitutes the offense of continuous sexual abuse of young child or disabled individual under §21.02 of the Penal Code, indecency with a child under §21.11, sexual assault under §22.011, or aggravated sexual assault under §22.021; and
- the current use by a person of a controlled substance as defined by Chapter 481 of the Health and Safety Code, in a manner or to the extent that the use results in physical, mental, or emotional injury to a child.

[1] *In re K.L.*, 91 S.W.3d 1, 15 (Tex. App.–Fort Worth 2002, no pet.).

ical testimony also included topics involving what happened to the baby in utero after the mother was killed. She stated that Tierra's baby likely suffered for 10–15 minutes before dying from suffocation. During this time, the baby's fetal heartbeat initially increased as oxygen deprivation began, and then decreased and stopped as oxygen from her mother ran out. Without oxygen, the baby struggled and went into distress, eventually suffering brain damage and death.

It is our belief that the nurse practitioner's testimony regarding the baby led to the jury imposing a longer prison sentence while at the same time allowing our case to comply with international law and the extradition agreement with Venezuela. Overall, our office is pleased with the guilty verdict and 55-year prison sentence as we proceed with the appeals, knowing that the minefield of international extradition issues should not be a problem.

Epilogue

We would be remiss if we didn't point out another big challenge with trying a 14-year-old case: finding the witnesses. Almost every witness had since retired, changed positions, or changed professions. Two were deceased. The investigators with our office worked tirelessly to locate and arrange the witnesses' testimony. We want to thank all these professionals who traveled in from all over the country (North Carolina, Florida, Idaho, and California) and across Texas to make sure that Tierra and her baby received justice. The response we received from everyone we contacted was, "When do you need me—I will be there!" Thanks to the dedicated men and women of the Walker County Sheriff's Department, Houston Police Department, Texas Rangers, DPS Forensics, and the FBI, along with other medical expert witnesses. Justice for Tierra and her unborn baby couldn't have happened without them.

Another note to add: After the trial, a Motion for New Trial was filed. The original trial judge recused himself and a visiting judge was appointed to decide the motion for new trial, which was granted (to our surprise). The State appealed, oral arguments were heard, and we were successful when the 10th Court of Appeals reversed the new trial order on July 11, 2024, and reinstated the defendant's murder conviction and 55-year sentence. That saga itself could merit another article, but suffice to say we are pleased with the outcome. ❇

In *M.R.*, a 2007 case from Fort Worth, even though the father did not raise this issue on appeal, the appellate court nevertheless considered whether the child's hearsay statements rose to the level of abuse to satisfy §104.006 of the Family Code. The child's foster mom testified that the child told her about her mother's use of a drug pipe and how she smoked it, how other people smoked with her mother in the home, how she had to care for her younger siblings when people would come over and go into a room to use drugs, how her family found food in dumpsters, how they drove around in the middle of the night trying to find a place to sleep, and how the children received spankings from belts. The court looked directly to §261.001(1) for the definition of abuse and determined that the child's statements met that definition. The court did not scrutinize the effect the parent's behaviors had on the child but simply concluded, "M.R.'s testimony falls within the Family Code's definition of abuse for purposes of §104.006."[2]

If you are preparing for final trial with a child who is 14, don't automatically think, "Darn it! I've lost my outcry." Do the math to figure out how old the victim was at the time of the statement of abuse.

In *E.M.*, a 2015 case from Waco, the intermediate court considered the definition of abuse in §261.001(1) to be a "non-exhaustive list of definitions of abuse," but used it "as a guide" when considering whether a child's statements about her parents' continuous fighting, drug use, lack of providing food, and spanking and slapping the child, rose to abuse. Unlike in *M.R.*, the opinion in this case did discuss the effect the parents' behaviors had on the child. The court found that based on the child's therapist's opinion that the child suffered significant emotional difficulty due to her parents' behaviors, the statements described abuse as contemplated by §261.001.[3]

The takeaway here is this: Protect the case on appeal by putting on evidence of the connection between what the child describes and the harm that behavior caused the child. First look to the hearsay statement witness to see if s/he can articulate this. For example, a foster parent may very well be able to testify about a child's nightmares or recurring aggressive behaviors relating back to the child's experiences with the parent. If this witness can't cover it, talk with the child's therapist, who will likely be able to make this connection for you.

Outside presence of jury. Section 104.006 of the Family Code requires the judge to hold a hearing outside the presence of a jury when seeking to enter statements under this hearsay exception. Almost all my cases are tried to the bench, and because a final trial to the bench is a hearing conducted outside the presence of the jury, I rarely need to seek a special hearing on this issue. I just go straight into a set of authentication questions with my witness during trial, deal with any objections, then have the witness testify to what the child told them. Just be mindful that if you have a jury trial, you need to request this hearing pretrial.

Sufficient indications of reliability. Section 104.006 also requires the court to find that the time, content, and circumstances of the hearsay statement provide sufficient indications of the statement's reliability. In *M.R.*, the court declared Family Code §104.006 as the "civil analogue" of Art. 38.072 of the Code of Criminal Procedure and determined that civil courts should use the same analysis used for Art. 38.072 when determining whether a child's statement of abuse is reliable enough to qualify as a hearsay exception.

M.R. relied on a line of criminal cases that articulate 11 indicia of reliability based on time, content, and circumstances. This list includes, for example, "whether the child understands the need to tell the truth and has the ability to observe, recollect, and narrate"; "whether other evidence corroborates the statement"; and "whether the child made the statement spontaneously in his own terminology or whether evidence exists of prior prompting or manipulation by adults."[4]

E.M. also looked to how criminal courts interpret reliability under Art. 38.072. In *Broderick*,[5] a 2002 criminal case from Houston, the appellate court noted that the focus for admissibility should be on the statement, not on the abuse, and held that a child's outcry statement may be found to be reliable "even when it contains vague or inconsistent statements about the actual details of the sexual abuse." Relying on *Broderick*, *E.M.* held the same to be true for a child's statement of abuse under §104.006 of the Family Code.

---

[2] *In re M.R.*, 243 S.W.3d 807, 812 (Tex. App.–Fort Worth 2007, no pet.).

[3] *In Int. of E.M.*, 494 S.W.3d 209 (Tex. App.–Waco 2015, no pet.).

[4] See *Torres v. State*, 424 S.W.3d 245, 257 (Tex. App.–Houston [14th Dist.] 2014, pet. ref'd).

[5] *Broderick v. State*, 89 S.W.3d 696 (Tex. App.–Houston [14th Dist.] 2002, no pet.).

If you need ideas on how to prove reliability using time, content, and circumstances, you will find quite a bit of caselaw on this prong of §104.006. The most common indicator of reliability in these child protection cases is children describing things they shouldn't have any knowledge of at their age. Five-year-old children shouldn't be able to describe how to put bullets in a gun, how to load a meth pipe, or what mommy's face looks like after daddy beats her up. And when they do describe it—with their 5-year-old vocabulary—reliability is pretty easy to show.

Available to testify or necessary to protect the welfare of the child. Section 104.006 of the Family Code requires that the child be available to testify or that the hearsay statements are necessary in lieu of the child's testimony to protect the child's welfare. We need only one of these! So go with the one that's easiest to prove for your case.

In *S.B.*, a 2006 case from Fort Worth, the appellate court found that the record reflected that:

1) the trial court heard and considered arguments from both parties regarding the admissibility of the child's statements under §104.006;

2) no party indicated that the child was unavailable to testify; and

3) the trial court could have concluded that the child was available to testify.

Having made these findings, the appellate court held that the trial court was not required to make a finding that the hearsay statement in lieu of the child's testimony was necessary to protect the child's welfare.[6]

In *R.H.W., III*, a 2018 case out of Houston, the appellate court found that the record did not reflect the children were unavailable to testify; the case was tried to the court; and the trial court impliedly found that the children were available to testify by admitting the statements as a hearsay exception under §104.006. Therefore, additional evidence was not required to prove the hearsay statements were necessary in lieu of the child's testimony to protect the welfare of the child.[7]

Interestingly, in both *S.B.* and *R.H.W., III*, there was no express testimony that the child was available to testify; however, the courts found availability based on the parties' failure to indicate otherwise. Regardless, and if you want cover all your bases, it's not hard to put on testimony through the hearsay witness or caseworker that the child is available to testify. For example, ask the question: "If the court were to require John-John Johnson to be here today to testify, could the Department make him available to the Court?" Answer: "Yes."

Of course, make sure this is true, so prep the witness for this question and know where the child is before you ask.

What if the child is not available to testify? Then argue the hearsay statement is needed in lieu of the child's testimony because it's necessary to protect the welfare of the child. See "Why children shouldn't testify" above.

I object

Most of the objections to this evidence are from attorneys who also practice criminal law. Their objections might be appropriate challenges to Art. 38.072 of the Code of Criminal Procedure but not to §104.006 of the Family Code. Be ready to distinguish these two statutes for the judge because you will inevitably get this objection if you offer this hearsay evidence frequently enough.

The most common objection I hear is that my witness is not the first witness to whom the child made outcry, which is a requirement of Art. 38.072 but not §104.006. Article 38.072 also requires the State to provide the defense with at least 14 days' notice of its intent to use the outcry, the name of the outcry witness, and a written summary of the statement. None of this is required by §104.006 of the Family Code.

I've also gotten a few Confrontation Clause objections.[8] I admit that the first time I got this objection it threw me for a second; I had been a criminal prosecutor before and had to remember which courthouse I was in! Don't be a deer in the headlights on this one: Remember, the confrontation clause *applies only to criminal cases.*

The most common indicator of reliability in these child protection cases is children describing things they shouldn't have any knowledge of at their age. Five-year-old children shouldn't be able to describe how to put bullets in a gun, how to load a meth pipe, or what mommy's face looks like after daddy beats her up.

[6] *In re S.B.*, 207 S.W.3d 877, 883 (Tex. App.–Fort Worth 2006, no pet.).

[7] *In Int. of R.H.W. III*, 542 S.W.3d 724, 740 (Tex. App.–Houston [14th Dist.] 2018, no pet.).

[8] If you're not familiar with the Confrontation Clause, the Sixth Amendment of the U.S. Constitution says that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him. …" The 14th Amendment makes this right applicable to the states.

Other tips

The witness to a child's statement of abuse can be anybody. I've used investigators with Child Protective Investigations (CPI), forensic interviewers, conservatorship workers, teachers, counselors, police officers, and foster parents. At times I have used two witnesses to get in one statement of abuse. For example, a police officer may not be able to articulate why it would be emotionally harmful for the child to testify or whether the child is available to testify, but the caseworker can, so have the caseworker cover the authentication questions first, and the police officer can testify to the actual statement of abuse.

Of course, we don't always need to rely on §104.006 of the Family Code to enter a child's statements of abuse. Sometimes they are admissible as excited utterances or statements made for the purposes of medical diagnoses or treatment. When assessing evidence, run through all the possibilities for admission. And remember, if the statement of abuse is deemed inadmissible, make an offer of proof as to what the hearsay witness would have said during his or her testimony to properly preserve the issue for appeal.

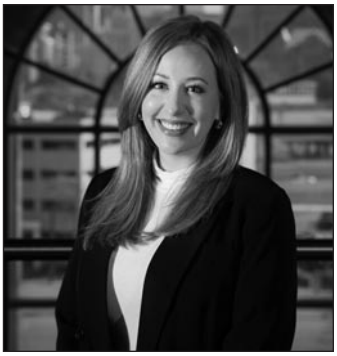
Conclusion

Children's words are so powerful in court. When you are preparing for trial, don't forget about this helpful little statute in the Family Code that allows us to get in some of the most damning evidence available without putting the child on the stand. I recently had a foster father testify to sibling outcries of abuse by their mother. I had already put mom on the stand, who presented herself in a positive light and made a plea for the court not to terminate her parental rights. Foster dad was my last witness; he testified that the 7-year-old told him she had seen her dad put a gun to her mom's head, and the 4-year-old told him that he wanted the foster parents to hurt him because that's what parents are supposed to do. The atmosphere fell silent as the power of the words of these two abused children settled on everyone in the courtroom. Fortunately, and thanks to §104.006, this critical perspective was presented without having to further traumatize the children by bringing them into the courtroom. ❇

What if the child is not available to testify? Then argue the hearsay statement is needed in lieu of the child's testimony because it's necessary to protect the welfare of the child.

Special prosecutors answer the call

One step into the courtroom, and it was clear—they weren't in Dallas anymore.



By Claire Crouch
Media & Community Relations Manager in Dallas County

The McLennan County Courthouse, complete with a dedicated rack for cowboy hats, is a far cry from the twinkling skyline of DFW.

"Even though it was 90 miles away, I immediately said yes," recalls Dallas County Criminal District Attorney John Creuzot, reflecting on the decision to take on one of the most high-profile murder cases in the McLennan County community in decades as a special prosecutor. The pressure of handling such a case as outsiders brought an added layer of anxiety. "We definitely had concerns. Going from a community of 2.6 million to 260,000, we worried they would think, 'Here come the slick guys from Dallas.'"

Seven years prior, in 2017, McLennan County was shaken by a brutal crime. Thirty-two-year-old Christopher Weiss shot and killed Valarie Martinez and their 13-month-old daughter Azariah. The gravity of this crime reverberated throughout the community and law enforcement circles. The original judge in the case went to work for the DA's Office, as did the defendant's divorce lawyer. That meant that in January 2023, the office was recused, and by April, the case still had no prosecutor assigned. That is, until the Dallas County office got the call.

Dallas County prosecutor Scott Wells was assigned the case as a special prosecutor in May 2023, and his first instinct was to earn the trust of the local community. "I wanted to show them we weren't just passing through, that we understood the importance of getting this right for their community," he says.

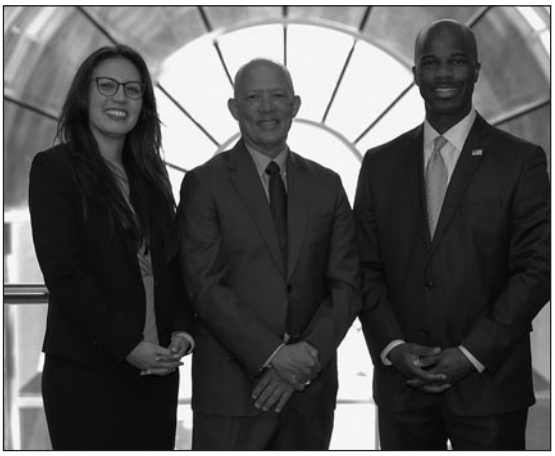
This commitment set off a routine for Scott, which involved a two-hour drive from Dallas to Waco. "Right away, I made the trip to meet with the lead detective, the DA's Office, and the sheriff's office," he explains. "I reviewed all the discovery and began to get a handle on where we stood."

In the beginning, Scott continued to visit the City of Waco to meet law enforcement officers and witnesses and view the crime scene. It soon became clear any anxieties of not being welcomed by the McLennan County community were unnecessary. "They welcomed us with open arms," Scott remembers. "The DA's Office gave us office space when we needed it, shared contacts, and provided printers or supplies we didn't have. Ms. Marcia Herring was especially helpful."

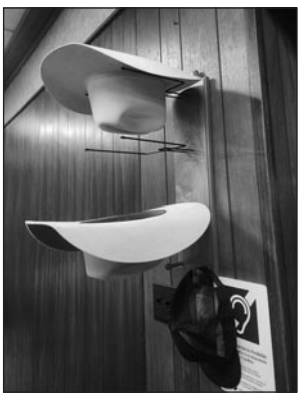
From May 2023 through February 2024, Judge Thomas West conducted several pre-trial hearings via Zoom—a welcome adjustment that eased the logistical burden on the Dallas team. Despite managing a substantial workload back in Dallas, Scott prioritized the McLennan County case, weaving it seamlessly into his schedule.

As the trial date approached, the full team relocated to McLennan County: Lead Prosecutor Scott Wells, ACDA Priscilla Pelli, Investigator Anthony Winn, Paralegal Maria Cantrell, and most notably, Criminal District Attorney John Creuzot. "Going down there with them was important to me," Mr. Creuzot emphasizes. "It showed the office and the community that this case was a priority—it wasn't just two lawyers, it was the elected DA."

For Creuzot, the case was personal—not only because of the gravity of the crime but also to demonstrate the importance of assisting one an-



BELOW: A rack for hats in the McLennan County courtroom. BELOW LEFT: The trial team (left to right): Priscilla Pelli, John Creuzot, and Scott Wells.



other when called upon. "We can and should help each other prosecute these cases," he explains.

The Sunday before the trial, the team settled into the Springhill Suites in Waco where they stayed for seven days. What initially seemed like a disadvantage—not being able to return home to their own beds—soon became a welcome escape. The tranquil hotel environment allowed the team to focus entirely on the task at hand, free from distractions. "When going to a smaller city, some may immediately think of the movie *My Cousin Vinny* and trying to sleep in an old motel as a train barrels through town," Scott says. "This team, however, had a very different experience in the beautiful city of Waco."

This immersion in the local atmosphere continued to prove beneficial helping them get a taste of the local flavor in more ways than one. "There were wonderful places to eat," Creuzot notes. "We always took a nice lunch break, which also allowed us to see people in the community."

Assistant prosecutor Priscilla Pelli adds, "That hotel became our home for the week—from the moment we walked in, the hospitality staff were nothing but accommodating. They told us about a few local characters around town but most importantly, great local spots to grab a bite. Waco folks are truly the friendliest around!"

Inside the courtroom, adjustments were necessary. The Frank Crowley Courts Building in Dallas, built in the 1980s, is starkly different from the century-old courthouse in McLennan County. "This was a totally different environment for me," Mr. Creuzot says. "Most of the cases I've tried have been in Dallas County, where the courtrooms are bigger. In McLennan County, I felt a little pinned in and definitely had to make some mental adjustments."

Judge West gave a brief statement during jury selection about why the Dallas team was brought in, and beyond that, it was business as usual.

Long-lasting impression

The team's hard work culminated in a swift guilty verdict for capital murder, resulting in a life sentence without the possibility of parole. No doubt serving as special prosecutors in McLennan County left an indelible mark on the Dallas team.

"This will likely be the case I remember most in my career," Scott says. "I commend DA Creuzot for taking this case. He went down there, tried it himself, and put his reputation on the line for a family who waited seven years for justice. He set the standard for other counties to follow. It's more than just paperwork; it's about people's lives, and I'm grateful to have been a part of it."

Reflecting on the experience, Scott and Priscilla emphasized the importance of early collaboration with the local DA's office and detectives. Meeting with them early on, reviewing their files, and understanding their perspective on the case proved crucial in setting up the Dallas team for success.

"My advice to any prosecutor stepping into a case like this is to review it immediately and thoroughly," they say. "Trying a case is like cooking Thanksgiving dinner—everyone has their own way of preparing a great meal," Scott adds. "Similarly, everyone has their own approach to building a strong case, but those opinions can vary greatly. It's vital for a prosecutor to ensure everything meets their standards."

The McLennan County staff also set an example for how local offices can support special prosecutors. "Their office was a great host from the start," Priscilla says. "From local law enforcement to the court staff, these were people we didn't know, but they did everything they could to support us. We showed them we were really invested, and that made them more open with us. Their actions showed how much they appreciated our willingness to take on the case."

Scott adds, "We worked extremely hard to prepare the case for trial and listened carefully to the advice of those who regularly practice in Waco. By doing so, we avoided missteps that could have irritated the Court or its staff and quickly connected with the jurors who would ultimately decide the case."

The lessons learned from the McLennan County experience serve as a blueprint for future special prosecutor situations. Approaching each case with diligence, humility, and a willingness to adapt to unique challenges is essential. By collaborating across jurisdictions and upholding the highest standards of professionalism and integrity, we can ensure that justice is accessible to all. ❇

The McLennan County staff also set an example for how local offices can support special prosecutors. "Their office was a great host from the start," says Dallas ACDA Priscilla Pelli. "From local law enforcement to the court staff, these were people we didn't know, but they did everything they could to support us."

A county-wide collaboration in victim services

The role of a victim service professional is a crucial component of our justice system.

By Allison Attles Bowen
Director of Victim Services in Tarrant County

Often, we are considered a shoulder to cry on or a hand to hold. While these things may occur, they are not our purpose—it's just what happens. Our true purpose is to stand with victims, guide them through the complex journey toward justice, and ensure their rights are protected.

The Texas Code of Criminal Procedure mandates in Arts. 56A.201 and 56A.203 that every law enforcement agency and criminal prosecutor's office appoint a designated victim service professional. In local police departments, that person is known as a crime victim liaison (CVL), while at prosecutor offices, they are victim assistance coordinators (VAC). The unique contributions of both roles are vital in ensuring victims are afforded their rights.

CVLs, as the front line of victim services, respond to crime scenes with officers to provide immediate support to victims, assessing urgent needs, safety planning, arranging shelter, accompanying victims to emergency rooms, and, most importantly, ensuring victims are aware of their rights. CVLs build initial trust in the criminal justice system and prepare victims for what comes next. They lay the groundwork for ongoing victim cooperation. CVLs share valuable information with VACs, such as family dynamics. They let us know all sorts of important information: who is the point of contact, whether there is a family conflict, if the parents have a good relationship, whether the victim and family members understand their rights, whether a crime victims compensation application started, whether other services are needed, if there an ongoing relationship with the defendant, if the victim likely to cooperate, and much more.

Conversely, VACs step in once officers conclude their investigations and transfer the cases to the prosecutor office. VACs are ready to illuminate the criminal justice process to victims, address safety concerns, collaborate with prosecutors, accompany victims to court, advocate for victim participation, and coordinate with the Texas Department of Criminal Justice and the Office of the Attorney General. VACs act as intermediaries between prosecutors and victims. They play a unique role in ensuring that the voices of the victims are heard whether during meetings before a grand jury or trial, by helping victims write impact statements, or by assisting them in delivering a statement in court. VACs have a unique understanding of the criminal justice system, enabling them to support and advocate for victims differently from CVLs or other community advocates. At the same time, VACs can communicate and explain unfavorable outcomes to victims effectively. Prosecutors and investigators trust VACs as reliable sources of information.

In accordance with Art. 56A.204 of the Code of Criminal Procedure, CVLs and VACs are required to work together. Specifically, CVLs are mandated to seek guidance from VACs to perform the duties imposed upon them. Fostering relationships with the different entities involved fulfills a legal requirement and builds trust with victims, ensuring ongoing support throughout their journey to justice. It is also important to recognize that the roles of CVLs and VACs extend beyond victim support. They play a significant part in augmenting the efforts of officers, investigators, and prosecutors. Their roles underscore the collaborative nature of their work and highlight the shared responsibility in supporting victims.

County collaboration

In Tarrant County, I am proud to share the collaborative efforts of VACs and CVLs. Our collaboration, appropriately titled Tarrant County Victim Service Professionals (TCVSP), is a testament to the strength of our community and its commitment to victim support. It began in 2021 and has flourished under the direction of Criminal District Attorney Phil Sorrells.

In past years, those of us in victim services observed a lack of communication between CVLs and VACs in Tarrant County, leading to duplicate services or referrals and the potential for re-victimizing individuals when assessing their needs. To address this issue, we looked for an efficient way to improve communication. Tarrant County, with over two million residents and 43 law enforcement agencies (LEAs), is one of the largest jurisdictions in Texas, so we knew this wouldn't be an easy task. We used an internal database of email addresses for LEAs to send email invitations to CVLs for a "meet and greet." The response was positive, and several attended. At the meeting, we discussed some of our concerns, and we agreed to meet quarterly.

Since working together, we have seen a significant improvement in services. We now feel more comfortable contacting each other to discuss case outcomes, pending cases, or questions about operating procedures. Now, every quarter, 20–25 TCVSPs come together to discuss challenges, share community resources, and learn from prosecutors and other experts in the victim services field. The agenda for each meeting is influenced by suggestions from our members and any pressing issues affecting victims in the community. Throughout the years, we have delved into topics such as:

- explaining protective orders and bond conditions to victims
- working with victims who have intellectual and developmental disabilities
- sexual assaults on children, the elderly, and the disabled
- victims' rights post-conviction and during the appeals process
- legislative changes that impact crime victims' rights
- advanced training for CVLs

Most, if not all, of our previous problems have been resolved since we started meeting and working together. We are more at ease reaching out to each other to discuss case outcomes, talk about pending cases, or ask questions about operating procedures. In fact, the success of our partnership led to the formation of a committee for National Crime Victims' Rights Week. This committee includes TCVSPs from across Tarrant County to plan an event that honors victims and raises awareness about victim rights.

We've also seen our collaboration lead to greater support of each other. For instance, VACs have access to prosecutors and can gain insights into case outcomes. However, this is not always true for CVLs, especially in larger counties, but of course CVLs are often interested in how a case resolves, both to support their professional well-being and satisfy their own curiosity. Without this information, CVLs may wonder whether they could have done more to encourage victim cooperation. Answering these questions can help expand CVLs' professional knowledge in the justice system, which can then be shared with victims.

We've also seen our collaboration led to greater support of each other. For instance, VACs have access to prosecutors and can gain insights into case outcomes. However, this is not always true for CVLs, especially in larger counties, but of course CVLs are often interested in how a case resolves, both to support their professional well-being and satisfy their own curiosity.

Hosting your own victim services meetings

Creating a platform for open communication around shared goals is essential to building successful partnerships, particularly related to victim support. Platforms can take various forms, such as meet-ups at conferences, workshops, luncheons, and both in-person and virtual meetings.

When planning in-person meetings, consider the location and time. Our county is quite large, and some people must drive 30–40 minutes to attend, so we chose the DA's office as our designated meeting spot as it is centrally located.

Serving breakfast, lunch, or snacks can be an added incentive to increase participation. At our meeting, the Chief of Staff, Jason Peters, wheels in a popcorn machine and makes hot popcorn with various toppings, providing an added incentive to attend. My favorite is the ranch topping (if you have yet to try ranch-favored popcorn, I recommend you do). The aroma of fresh popcorn is enough to attract anyone.

Regardless of the format, victim service professionals will use their platform to find solutions, share ideas and community resources, and support each other. Collectively they make a significant difference in the lives of victims.

If you would like more information, wish to discuss partnering with victim services professionals in your county, or want recommendations for other popcorn toppings, please don't hesitate to contact me at abowen@tarrantcountytx.gov. ❇

Standards of review—aren't those the appellate division's problem?

Standards of review are often thought of by trial prosecutors, if at all, as mere afterthoughts, or as solely the purview of appellate attorneys.

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

However, understanding how different standards of review will apply to issues at trial when they make it to appeal can help a trial prosecutor prioritize issues and clearly lay out for the judge how his rulings will be reviewed. A thorough knowledge of standards of review can help a trial prosecutor understand what issues need to be hotly contested because they will be difficult to reverse on appeal. Further, such an understanding can help a trial prosecutor evaluate what issues may be amenable to a State's appeal or cross appeal and can convince a trial judge to rule in the State's favor by assuring the judge that her rulings will be granted deference on appeal.

What is a standard of review?

Standards of review at the appellate level are analogous to the burdens of proof at the trial level. "An appellate standard of review is the gauge by which an appellate court determines whether a trial court has erred in making a legal ruling or a fact finder has made an erroneous finding."[1] Standards of review are important at trial and on appeal to "frame the issues, define the depth of review, assign power among judicial actors, and declare the proper materials to review."[2]

The two standards of review which apply most often in criminal appeals in Texas are:

1) abuse of discretion and
2) *de novo* review.[3]

These will oftentimes appear in the resolution of the same issue in that the decision of certain facts will often be reviewed for an abuse of discretion, while the application of the law to those facts will be reviewed *de novo*, as in the suppression hearing context.[4]

Abuse of discretion

The abuse of discretion standard has been defined in numerous ways, but it is often referred to as where "the trial court's ruling was at least

---

[1] *Ervin v. State*, 331 S.W.3d 49, 57 at fn. 1 (Tex. App.–Houston [1st Dist.] 2010, pet. ref'd) (Jennings, concurring).

[2] *Id.*, quoting Steven A. Childress, A 1995 Primer on Standards of Review in Federal Civil Appeals, 161 F.R.D. 123, 126 (1995) (internal citation omitted).

[3] There are other standards of review in Texas jurisprudence, and mixed standards of review, but this article is limited to the two most common standards for purposes of brevity and clarity. For an in-depth discussion of standards of review, see Dix & Schmolensky, *Texas Practice Series: Criminal Practice and Procedure*, Vol. 43B §§56:123–56:135 (Nov. 2023 Update).

[4] *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010) (holding that a trial court's determination of historical facts will be granted "almost total deference" while the application of the law to the facts would be reviewed *de novo*).

within the zone of reasonable disagreement, [so that] the appellate court will not intercede."[5]

The abuse of discretion standard of review applies in numerous scenarios that appear in the course of a criminal trial. For example, the trial court's decision to admit or exclude evidence,[6] to grant or deny a mistrial,[7] and to grant or deny a motion for a new trial[8] are all reviewed for an abuse of discretion.

Of all the various standards of review, the abuse of discretion standard grants the greatest deference to the trial court's rulings. This usually plays in the State's favor because it is the State which is most often the proponent of affirmative evidence in a criminal trial, and if that evidence is admitted, the defendant will find himself with a high burden to overturn the trial court's ruling. The prosecutor can also reassure a wavering judge that a ruling in the State's favor will be entitled to significant deference on appeal.

Where the parties stipulate to the facts and the only determination for the trial court is a question of how to apply the law to those facts, the standard of review on appeal will be de novo.

The abuse of discretion standard can also be a detriment to the State where the State receives an unfavorable ruling, for example where evidence is suppressed on factual grounds, because the State faces a high burden to overturn the trial court's ruling on a State's appeal. This is in contrast to *de novo* review (covered below), wherein the State will have better odds of reversing a trial court's ruling—for example, where the trial court suppresses evidence on legal grounds rather than on factual ones.

An example of a scenario where a trial court suppressed the State's evidence on factual grounds can be found in *State v. Ross*.[9] In *Ross*, the defendant filed a motion to suppress evidence which alleged that there was no probable cause for his arrest.[10] The trial court granted the motion, finding that the arresting officer's testimony was not credible.[11] Because the trial court's ruling was based on a finding of fact, which itself was dependent on the trial judge's evaluation of credibility and demeanor, the appellate courts refused to overrule the trial court judge's decision and affirmed the suppression of evidence.[12] This is the kind of factual finding which, because it is dependent on the trial court's evaluation of credibility and demeanor, is extremely difficult (if not impossible) to overturn on appeal. By contrast, where the parties stipulate to the facts and the only determination for the trial court is a question of how to apply the law to those facts, the standard of review on appeal will be *de novo*.[13]

De novo standard

De novo "means that an appellate court affords no deference to the lower court's determination and the appellate court considers the matter as if it was the court of first instance."[14] An appellate court will apply *de novo* review to a determination of any issue in which the trial court is not in an appreciably better position to make the determination than the appellate court.[15]

Generally, questions of law are reviewed *de novo*. This again is a standard of review that applies to many scenarios often arising in criminal trials. For example, the *de novo* standard of review applies to a trial court's decision to quash an indictment,[16] to the application of the law to the facts in a suppression hearing,[17] to a determina-

---

[5] *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g).

[6] *Tillman v. State*, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011).

[7] *Coble v. State*, 330 S.W.3d 253, 292 (Tex. Crim. App. 2010).

[8] *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007).

[9] *State v. Ross*, 32 S.W.3d 853 (Tex. Crim. App. 2000).

[10] *Id*. at 854.

[11] *Id*. at 857 (concluding based on review of the record that although the trial court did not enter findings of fact and conclusions of law, the only logical basis for its ruling was a finding that the arresting officer was not credible).

[12] *Id*.

[13] See, e.g., *Maxcey v. State*, 990 S.W.2d 900, 903 (Tex. App.–Houston [14th Dist.] no pet.) (applying de novo standard of review on appeal to appeal of trial court's denial of motion to suppress on stipulated facts).

[14] *Tucker v. State*, 369 S.W.3d 179, 187 (Tex. Crim. App. 2012) (Alcala, J., concurring), citing Black's Law Dictionary 864 (2004).

[15] *Villarreal v. State*, 935 S.W.2d 134, 139 (Tex. Crim. App. 1996) (en banc) (McCormick, P.J., concurring).

[16] *Smith v. State*, 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010).

tion of the constitutionality of a statute,[18] and to questions of statutory construction.[19]

For the trial prosecutor, an awareness of when *de novo* review applies to a trial court's decision can be helpful in determining whether an adverse ruling is amenable to a State's appeal or cross appeal. In the suppression context, being aware that an adverse ruling will be more amenable to an appeal if it is a ruling based on a legal conclusion rather than a factual finding is helpful to the trial prosecutor: If he can get the trial judge to state on the record that his ruling is based on a legal conclusion rather than a factual finding, that adverse ruling will be more amenable to a State's appeal. This knowledge can also help a prosecutor craft findings of fact and conclusions of law in relation to a trial court's ruling on a suppression hearing to place the ruling in a light more favorable to either defense or attack on appeal.

State v. Norris is an example where the appellate court engaged in a *de novo* review and ultimately found in the State's favor on what might have looked, at first glance, like a factual issue.[20] In *Norris*, the trial court suppressed the defendant's confession on the grounds that he had unambiguously asserted his right to counsel and police had not honored that invocation.[21] Because the facts were not in question (the trial court had nothing more at its disposal to review than the appellate court did), the appellate court engaged in its own evaluation of whether the defendant's statements constituted an unambiguous invocation of his right to counsel by examining the defendant's videotaped confession and its transcript.[22] After engaging in this independent review, the appellate court reversed the trial court's ruling and admitted the defendant's confession.[23] Because the appellate court reviewed how to apply the law to the facts in *Norris*, the State secured a reversal of the trial court's suppression ruling.

By contrast, had the trial court's suppression ruling in *Norris* been based on an evaluation of credibility and demeanor, such as a swearing match between the defendant and the police, and the trial court found the police to be not credible, the State would have had a very difficult time securing a reversal because the trial court's ruling would be subject to the highest level of deference from the appellate court.

Error preservation issues

Trial prosecutors should keep in mind that while a knowledge of standards of review is helpful in determining what rulings by the trial court may be amenable to a State's appeal, error preservation rules, at least in the context of most cross appeals, apply to the State as well as the defense.[24] Considering that the question of whether an argument has been waived is the first thing on the mind of any appellate practitioner, trial prosecutors would do well to keep the issue of error preservation in the back of their minds. While it is true that many scenarios which prosecutors may face adverse rulings in do not require such specific objections as are often required of the defense, it is nonetheless advisable to make clear and specific objections to any adverse ruling to protect the appellate record.[25]

For the trial prosecutor, an awareness of when de novo *review applies to a trial court's decision can be helpful in determining whether an adverse ruling is amenable to a State's appeal or cross appeal.*

---

[17] *Valtierra*, 310 S.W.3d at 447.

[18] See *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007), *cert. denied*, 553 U.S. 1007 (2008) (applying *de novo* standard of review to a motion to quash an indictment based on a claim that the underlying statute criminalizing the conduct was unconstitutional).

[19] *Boston v. State*, 410 S.W.3d 321, 325 (Tex. Crim. App. 2013).

[20] *State v. Norris*, 541 S.W.3d 862 (Tex. App.–Houston [14th Dist.] 2017, pet. ref'd).

[21] *Id*. at 864-66.

[22] *Id*. at 866-67.

[23] *Id*. at 867.

[24] See Tex. R. App. P. 33.1; *State v. Garrett*, 798 S.W.2d 311, 313 (Tex. App.–Houston [1st Dist.] 1990, *aff'd* 824 S.W.2d 181 (Tex. Crim. App. 1992); see also *State v. Salinas*, 975 S.W.2d 717, 719 (Tex. App.–Corpus Christi 1998, no pet.) Yanez, J., concurring (for an appellate judge's potential reaction to the State's failure to specifically preserve error); but see Tex. Code Crim. Proc. Art. 44.01 (specifically allowing State's appeals in several enumerated scenarios without a specific preservation requirement).

[25] See *Garrett*, 798 S.W.2d at 313 (State's failure to object specifically to quashing of indictment did not bar appeal because Texas Code of Criminal Procedure Article 44.01 allows such an appeal).

For example, in *State v. Jaquez*, the trial court found several punishment enhancements to which the defendant pled "true" to be "not true."[26] The State did not object at the punishment hearing, nor when sentence was pronounced.[27] The State argued that it should still be able to raise this issue on appeal because the trial court's finding that the punishment enhancements were "not true" when the defendant had pled "true," resulted in an illegal sentence.[28] The Austin Court of Appeals rejected the State's argument, holding that because the trial court's sentence was within the range of punishment (though that range of punishment was based on a finding of "not true" as to the punishment enhancements to which the defendant had pled "true"), the sentence was not illegal. Therefore, the State would have had to object to preserve any complaint about this issue.[29]

Pre-trial writs of habeas corpus challenging the constitutionality of statutes, interlocutory appeals of pre-trial suppression rulings, and appeals and habeas writs stemming from final convictions can take on lives of their own that far outlive the trial proceedings.

Likewise, when the State is the losing party at the trial level, the State can find itself precluded from raising a particular legal theory if it did not raise that theory at trial.[30] For example, in *State v. Steelman*, the defendant moved to suppress the results of the search of his home, relying on state statutory and constitutional grounds.[31] At the trial level, the State argued only that the initial warrantless search was lawful but did not argue that a subsequently obtained warrant attenuated any taint from the potential illegality of the initial warrantless search. On appeal, the State attempted to argue for the first time that the warrant attenuated any taint from the initial warrantless search, and the Court of Criminal Appeals held that the State could not advance this theory for the first time on appeal.[32]

Conclusion

Trials and pre-trial hearings on the admissibility of evidence are hard-fought battles. But, if I may borrow a line from Winston Churchill, they are not the end, they are not even the beginning of the end, but they are, perhaps, the end of the beginning. Pre-trial writs of habeas corpus challenging the constitutionality of statutes, interlocutory appeals of pre-trial suppression rulings, and appeals and habeas writs stemming from final convictions can take on lives of their own that far outlive the trial proceedings. Understanding how standards of review on appeal will impact the odds of your evidentiary rulings or jury verdicts surviving appellate review will help the diligent prosecutor craft the presentation of evidence and protect the record.

Further, understanding those standards of review can be helpful in your relationships with judges if you can explain how their decisions will be reviewed on appeal. Let's hope such explanations will encourage them to rule in the State's favor when the standards support that ruling. So give standards of review their due consideration—crime victims, judges, and your appellate division will thank you. Please feel free to contact me if I can be of any assistance. ❇

---

[26] *State v. Jaquez*, No. 03-19-00087-CR, 2021 WL 476336 at *2 (Tex. App.–Austin Feb. 10, 2021, pet. ref'd) (mem. op., not designated for publication).

[27] *Id*. at *3.

[28] *Id*.

[29] *Id*. at *4.

[30] See, e.g., *State v. Steelman*, 93 S.W.3d 102, 107 (Tex. Crim. App. 2002) (State was not allowed, as losing party, to present alternative legal theories on appeal which it had not advanced at the trial level).

[31] *Id*. at 106.

[32] *Id*. at 107.

Will the real State please stand up?

Billy Moore was convicted of DWI and sentenced to 100 days in the Travis County Jail.[1]

By Jon English
Assistant Criminal District Attorney in Hays County

But he wasn't going quietly. He appealed his conviction in a motion for new trial, and he had a novel theory as to why his conviction should be overturned.

Unbeknownst to the prosecutors in the case, the officer who made the arrest was under investigation for possession and distribution of child porn by the Attorney General's Office.[2] Not only did the Travis County Attorney's Office not know this, but neither did the Austin Police Department. Nevertheless, Moore argued that not only was this information impeachment evidence through which he could undermine the credibility of an essential witness against him, but also that the knowledge of an investigation being performed in one law enforcement agency was essentially imputed to another—in this case, the prosecutor's office.

The Third Court of Appeals in Austin didn't buy it. Judges there applied a longstanding *Brady* analysis that focused on the concept of the "prosecution team."[3] This analysis has existed since at least 1979[4] and relies on the idea that knowledge of facts in a case are imputable only to those actively working together on the prosecution of that specific case. In other words, the Attorney General's investigation and the Travis County Attorney's Office weren't teammates on Moore's DWI case or on the child porn case against the investigating officer, so it wasn't a *Brady* violation to not disclose the child porn investigation to the defense.

But didn't the prosecution have a duty to seek out *Brady* information and disclose it to the defense as held in *Kyles v. Whitley*?[5] No, not on these facts, because the Attorney General wasn't acting on behalf of the "prosecution team." That is, the Attorney General was not "the State" for discovery purposes.

Would it have come out differently if Travis County law enforcement had known about the Attorney General's investigation? Maybe. It's hard to answer that question 17 years later because our concept of prosecutorial duties vis-à-vis discovery have evolved so much since then.

In fact, at the beginning of this very summer, we received a signal from the Court of Criminal Appeals that we may no longer be able to simply look to the line of "prosecution team" cases for guidance in answering this one ubiquitous and confounding question: Just who is the State when it comes to discovery responsibilities?

Who does *Heath* say the State is?

It's been about 11 years now since the legislature passed the Michael Morton Act (MMA), which is less than half of the time that Morton himself served in prison for a crime he did not commit. As you know by now, the Michael Morton Act was a complete overhaul of Article 39.14 of the Code of Criminal Procedure, otherwise known as the discovery statute. It has taken this long for various appeals concerning the revamped discovery law to work their way up to the Court of Criminal

---

[1] *State v. Moore*, 240 S.W.3d 324, 326 (Tex. App.–Austin 2007, pet. ref'd).

[2] *Id.* at 327.

[3] *Id.* at 328.

[4] *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979).

[5] "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995).

Appeals, but they're starting to arrive now, and as a result prosecutors have two landmark decisions interpreting the act.

The first, *Watkins v. State*, was written by Judge David Newell, and it was issued in March 2021.[6] The discussion in *Watkins* revolved around trying to pin down what "materiality" meant in a post-MMA world. The Court had issued many opinions over the years defining materiality in terms of previous U.S. Supreme Court definitions under *Brady* and its progeny, harmonizing those cases with then-existing versions of Texas discovery statutes.

But the CCA made a significant observation in *Watkins*, clearly recognizing that the prosecutor's duty regarding discovery was broadened by the Michael Morton Act beyond the requirements of the previous statutes, as well as broadened beyond the baseline constitutional due-process considerations formerly imposed.[7]

Then, in June of this year, with Judge Newell as the author again, the court handed down *State v. Heath*.[8] In *Heath*, the court took on the question, "Who is the State for purposes of Article 39.14?," and the answer is not very satisfying. "Article 39.14's use of the word 'State'," the Court concluded, "means exactly what one would think it means—the 'State of Texas.'"[9] The court also explains in several passages that the word "State" most naturally means a party to the litigation.[10] Keep that in mind. It will come in handy later.

Heath tells us we can be confident that the banner of "the State of Texas" will cover law enforcement and third-party contractors such as crime labs. The rationale is because *Watkins* held that the duty to disclose is broadened, not narrowed, beyond the due-process constitutional duties under *Brady*. And even under *Brady*, it had been determined for decades that exculpatory, mitigating, or impeachment evidence in the possession of law enforcement on the prosecution team was subject to disclosure. Ergo, references to "the State" in the MMA for sure include law enforcement, third-party contractors such as crime labs, and presumably other state agencies that have not previously been included in an analysis of discovery obligations.

Of course, this is hardly breaking news. As mentioned above, it was already more or less settled law that if the police agency that handled the arrest in a case had *Brady* information in its file and didn't turn it over to the prosecutor office, it was a discovery violation. At the same time, *Heath* is one of the first steps in setting down a test for who will be considered "the State" moving forward as Article 39.14 is further interpreted in the coming years.

Heath *tells us we can be confident that the banner of "the State of Texas" will cover law enforcement and third-party contractors such as crime labs. The rationale is because* Watkins *held that the duty to disclose is broadened, not narrowed, beyond the due-process constitutional duties under* Brady.

Expanding *Brady*'s definition of "the State"

While the Court didn't give us a bright-line test to determine who is and who isn't a state actor in a given scenario, it's at least going to include any agency or organization that had been found to be a state actor under a *Brady* analysis. But remember that the Court has said plain as day that the duty to disclose is wider under the MMA than it was under *Brady*, and this leads to the conclusion that the actors and agencies required to disclose information is likewise going to be broadened.

This means that the "prosecution team" analysis is still likely a good starting point to determine if a document or other piece of evidence in the possession of some actor besides a prosecutor office will need to be disclosed. In other words, if they would have been part of the prosecution team before *Heath*, assume they still are. But because the definition of "who is the State" is being broadened, not narrowed, by the CCA in interpreting Article 39.14, you can no longer end your analysis with a "prosecution team" determination.

For the last 30 years, Texas courts have frequently turned to *Kyles* for a definition of who is part of the prosecution team, holding those who act on "the government's behalf in the case" to be part of the team.[11] That doesn't sound so much different from "a party to the litigation." Cer-

---

[6] *Watkins v. State*, 619 S.W.3d 265 (Tex. Crim. App. 2021).

[7] "On the whole, the statutory changes broaden criminal discovery for defendants, making disclosure the rule and nondisclosure the exception. Significantly, Article 39.14(h) places upon the State a free-standing duty to disclose all 'exculpatory, impeaching, and mitigating' evidence to the defense that tends to negate guilt or reduce punishment. Our Legislature did not limit the applicability of Article 39.14(h) to 'material' evidence, so this duty to disclose is much broader than the prosecutor's duty to disclose as a matter of due process under *Brady vs. Maryland*." *Id*. at 277 (Tex. Crim. App. 2021).

[8] *State v. Heath*, No. PD-0156-22, 2024 WL 2952387 (Tex. Crim. App. June 12, 2024), as corrected (June 14, 2024).

[9] *Id*. at 10.

[10] *Id*. at 13.

[11] *Kyles* at 437.

tainly, pre-*Heath*, an actor who took an affirmative role in contributing to the case would have been considered a state actor, and anything in that actor's possession would be subject to discovery. That hasn't changed. But what about state agencies that are not involved in the case, yet have documents in their possession that might be helpful to a defensive theory? Are they a party to the case by virtue of being an agency of the State of Texas?

For example, in *Shanks v. State*, an inmate was convicted of assaulting a correctional officer (CO) at his prison.[12] His defense was that the CO used excessive force against him. As it happens, that CO's lieutenant had himself been disciplined in the past for excessive force, and Shanks argued that this was indicative of a culture where you could still be promoted despite wrongdoing, making his defense theory (that he was actually the victim) more credible.

No one contended that the prosecutor knew about the lieutenant's disciplinary record, but Shanks argued that the Texas Department of Criminal Justice (TDCJ) was part of the prosecution team, and therefore knowledge of that disciplinary record should have been imputed to the prosecutor.[13] The Texarkana Court of Appeals held that TDCJ was not part of the prosecution team under these facts, so even if there was *Brady* information in that disciplinary record, the prosecutor was under no obligation to discover and disclose it.[14]

This is a good place to stop and mention another relevant holding in *Heath*, that the prosecutor is always on the hook for exculpatory, mitigating, or impeachment evidence or information in the possession of the State, whether the prosecutor knows that evidence is there or not. Under *Heath*, "the State has an obligation to exercise reasonable diligence to ascertain what discoverable evidence is at its disposal."[15] This "reasonable diligence" standard sort of meshes with the "party to the litigation" standard and makes it even more clear that the number of rocks prosecutors must turn over to adequately perform our discovery duties has increased, perhaps significantly.

If *Shanks* were decided today, would there be a different ruling? There'd at least be a different analysis. For starters, the Court of Criminal Appeals held in 1951 that a prosecuting witness was a party to the case.[16] Does this pre-MMA decision mean that as a quasi-party to the case, the victim can be considered "the State?" Also in *Shanks*, the assault happened between a TDCJ employee and a TDCJ inmate on TDCJ property while the inmate was under the supervision of TDCJ. Does reasonable diligence require the State to obtain and disclose the disciplinary records of everyone involved in the incident plus everyone up the relevant chain of command?

The key word here is "reasonable." It seems like a tall task for a prosecutor to telepathically know what is in the files of every employee up the chain of command at TDCJ. Perhaps such intuitive mandates will not be the standard to which prosecutors are held in the future, and the pivot point of "reasonableness" gives courts broad discretion in making these rulings.

A more common situation will most likely arise with Child Protection Services (CPS) records, given the frequency with which prosecutors deal with them. In *Harm v. State*, decided by an *en banc* Court of Criminal Appeals, the appellant was convicted of indecency with a child and sentenced to 12 years in prison.[17] She argued on appeal, however, that there were exculpatory CPS records that showed that the victim had made unfounded allegations of sexual assault in the past and that the victim had also engaged in inappropriate sexual behavior.[18] These records were not known to the prosecutor and had not been shared with the defense.

The prosecution was aware of CPS involvement with the victim. In fact, prosecutors called a CPS caseworker to the stand in the trial.[19] But the prosecution did not know of the separate investigation into the victim's prior allegations or her previous behavior.

The court held that, although CPS workers can sometimes be actors of the State and therefore could fall under the big tent of *Brady*, in this case, they simply weren't. The investigation into the victim was a separate one from the case being tried, and the investigation was not a criminal

For the last 30 years, Texas courts have frequently turned to Kyles *for a definition of who is part of the prosecution team, holding those who act on "the government's behalf in the case" to be part of the team.*

---

[12] *Shanks v. State*, 13 S.W.3d 83 (Tex. App.–Texarkana 2000, no pet.).

[13] *Id*. at 85.

[14] *Id*. at 86.

[15] *Heath* at 16.

[16] *Devine v. State*, 156 Tex. Crim. 530, 533, 244 S.W.2d 232, 234 (1951).

[17] *Harm v. State*, 183 S.W.3d 403, 405 (Tex. Crim. App. 2006).

[18] *Id*.

[19] *Id*. at 406.

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

one.[20] Therefore, CPS was not part of the "prosecution team."

Compare that result with the analysis that would be applied under *Heath*. The relevant question, at least *a* relevant question, now appears to be predominately whether the actor in question could be considered a party to the litigation. Is there any doubt under these facts that CPS was a party to the suit? A CPS caseworker was literally a material witness who had engaged in an investigation into the victim in the case. The next relevant question appears to be whether reasonable diligence on the part of the prosecutor could have ascertained those records and made them available to the defense before trial? That also seems likely.

These are just two examples of the way the game has now changed regarding the analysis of prosecutors' discovery obligations. Don't think of them as *Brady* obligations. That's going to keep you narrowly focused on your constitutional obligations and will therefore prevent you from seeing the bigger picture. The duty now arguably extends outside of the "prosecution team" and to anyone who is a party to the lawsuit. That will certainly still include anyone acting on behalf of the government but may also include others you don't make a habit of checking with.

Back to Billy Moore

And finally, let's reconsider the case of Billy Moore. We know that at the time the case was decided, the law was that if you weren't part of the prosecution team, your knowledge was not to be imputed to the prosecutor in the case. In a post-*Heath* world, could a trial judge find a discovery violation occurred when the State failed to learn, and therefore did not disclose, that a necessary witness was under investigation for a serious criminal act by a statewide law enforcement agency (i.e., the Attorney General's Office)?

The *Heath* analysis indicates that the answer is "no." There isn't a compelling argument that the Attorney General was a party to the *Moore* case no matter how you look at it. And it definitely sounds unreasonable to expect a prosecutor to know, with no prompting, that another unconnected agency had opened an undisclosed investigation into a witness. Will that line of reasoning save the day for prosecutors? Only time, and the next set of opinions interpreting the Michael Morton Act, will tell.

Conclusion

If you're afraid that the likes of *Watkins* and *Heath* are going to cause an existential crisis in the world of criminal discovery for prosecutors, you can take at one big step back from the edge. There are still boundaries in place that protect you, your case, and your law license from the consequences of a discovery violation.

But the tectonic plates of discovery law are definitely shifting. And that means the State must be ready to change as well. You know—just as soon as we figure out who the State is. ❇

---

[20] *Id*. at 407-408.