The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

New discovery rules for asset forfeitures

When it comes to asset forfeitures, planning is the key to success. It sounds simple enough, but with the new discovery rules (effective January 1, 2021) and a mere 30-day filing deadline, the challenge of successfully prosecuting forfeiture cases has grown.

By Jennifer Hebert
Assistant District Attorney in Brazos County

Prosecutors are already juggling chaotic schedules with packed dockets (and backed-up dockets due to COVID-19) and crazy trial schedules, and law enforcement agencies are overloaded with detectives who can hardly keep up with the workload. So with all of these challenges, the question is, how can you successfully manage a forfeiture docket?

While there isn't an answer that works for everyone, each prosecutor has to find an efficient strategy or system that works for the individual situation. What works in one office or for one prosecutor may not work for someone else. For me, it took some trial and error to figure it out. Even now, my process is not perfect, but it has greatly increased my asset forfeiture productivity and resulted in resolving cases at a much faster pace, most times without a trial, while still being conservative in my approach to what gets filed. In general, three things have been key:

1) knowledge of the civil rules,
2) education and training with law enforcement, and
3) having a plan and staying organized.

Knowing the rules

Let's start with the basics. What is asset forfeiture? Asset forfeiture is a means by which law enforcement can legally take contraband from criminals through a civil process. Contraband is defined by Texas law as property of any nature (including real, personal, tangible, or intangible) that is used or intended to be used in the commission of, proceeds gained from the commission of, acquired with the proceeds of, used to facilitate, or intended to be used to facilitate the commission of various enumerated felonies and certain misdemeanors.[1] Generally, we are talking about first- or second-degree felonies, any felony under the Health and Safety Code, or fraud types of crimes, but the list is extensive. In essence, the entire purpose of the asset forfeiture process is to deprive criminals of the profits of their crimes and take

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Prosecutors like a little challenge!

In the last edition of *The Texas Prosecutor* journal, I announced the Escamilla-Wortham Challenge.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

David Escamilla, former County Attorney in Travis County, and **Bob Wortham**, current Criminal District Attorney in Jefferson County, pledged a total of $15,000 of their own money in the form of a dollar-for-dollar challenge. To qualify for the matching challenge, donations had to come from contributors' own pockets, not asset forfeiture accounts. **Sarah Halverson**, the journal editor, had planned to publish a "thermometer" gauging our progress in each of the next three issues.

Well, we won't need no stinking thermometer! Texas prosecutors love a challenge, apparently, because as we go to press with this issue, we are just $400 short of the $15,000 needed to fully match David and Bob's donations! A lot of people jumped in (see the list below), but I must say that we were anchored by a generous $5,000 donation from **Rusty Hardin** that really got the momentum going. This kind of support that comes from our members is gratifying and humbling.

And the donations are vital. The Foundation has anchored our efforts to produce the Advanced Trial Advocacy and Train the Trainer Courses. When we needed it most, the Foundation came through with swift funding for our online training development. Thanks to David, Bob, the Foundation Board, and everyone who has donated. Let's finish this challenge strong! ❇

Donors to the Escamilla-Wortham Challenge*

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About *The Texas Prosecutor*

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TDCAA and the 87th Regular Session

The 87th Legislative Session ended on Memorial Day. You have surely read about all of the hot-button issues by now and the prospects for special sessions.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

TDCAA will turn our attention to the online Legislative Update coming in August, and trust me, there is a lot to discuss. We went into the session thinking that COVID would slow the process down, but by April it was apparent that this would be a normal session at the end—with dozens of new crimes, enhancements, and procedures to figure out.

I want to take a moment to thank our Legislative Committee and committee chairs **Jennifer Tharp**, CDA in Comal County, and **Staley Heatly**, 46th Judicial District Attorney. They were the TDCAA version of Maverick and Goose, hopping in at a moment's notice when the voice of a seasoned elected prosecutor was needed. And it was an absolute pleasure to watch **Lindy Borchardt**, ACDA in Tarrant County; **Tiana Sanford**, ADA in Montgomery County; and **Paige Williams**, ACDA in Dallas County, work on bills. They brought the kind of knowledge the legislature needed on a daily basis and made quite an expert team. In addition, we all owe a big thank-you to **Amy Befeld**, who works for the Texas Association of Counties as its liaison to Texas prosecutors. Amy had worked for **Senator Joan Huffman** last session and brought incredible insight, energy, and expertise to the team. I am proud of their work for y'all.

Finally, I want to take a moment to recognize the fine work of TDCAA's Governmental Affairs Director **Shannon Edmonds**. He was there for every single minute of every single committee hearing and floor session, and when the legislators were done, he was scouring the bills and amendments for problems—problems you won't have come September 1 because Shannon was able to advise legislators on how to fix the language before it became law. Using a chess analogy, I'll say that Shannon has a tremendous end game. Even on Memorial Day weekend as things were winding down, Shannon was hard at it finding problematic language that could still be tuned up. The state and our profession are well-served. Thanks, Shannon.

No longer down at the courthouse

On behalf of all prosecutors in Texas, I want to thank my good friend **Scott Durfee**, who after 30-plus years has retired from the Harris County District Attorney's Office. Scott served as general counsel for that office under a number of elected district attorneys and exemplified professionalism. He is a thoughtful voice of reason and he contributed much to Texas prosecutors in the area of professionalism, ethics, and office management.

In honor of Scott, I invite you to download from iTunes a song by the Harris County DA's Office former garage band, Death by Injection. It's called "Down at the Courthouse," and legend has it that it is named for Scott, who was hit by a bus in front of the courthouse. (He recovered just fine!) When you listen to the song, you will hear **David Mitcham**, First Assistant DA in Harris County, singing the lead. We are waiting for their reunion tour at some point.

In the meantime, it sounds like Scott will start writing for fun, specifically, a memoir about growing up in the '70s. The opening line is already written: "I remember the first time I ate at a Waffle House—it was all at once too much and not enough." We can't wait to hear the rest of it!

Annual Criminal and Civil Law Conference

Here at TDCAA World Headquarters, we are already getting excited about seeing everyone at the Annual Criminal and Civil Law Conference in Galveston in September. We have enjoyed developing our online training, but the live learning component is essential for any profession that seeks to improve its work on a daily basis. Watch your mailbox for a brochure in the coming weeks, and see our website (www.tdcaa.com/training/annual-criminal-civil-law-conference-2021) for hotel information. See you there!

Live training and distance learning

As we return to live training, we want you to know that we are not about to give up on producing quality online training as well. The popularity of our online training has demonstrated that we have a new ability to deliver timely, relevant, and accessible information and resources to our members, and we intend to build on that. It will take additional resources, no doubt, but we are up for the challenge of delivering the best to Texas prosecutors. The TDCAA Training Committee will be working to develop the plan as we move into the fall.

A celebration of life for Cathy Cochran

The pandemic has slowed us all down some, but as we get through it, we get to do some things we've been waiting for. I am happy to pass on the following invitation to a celebration of life for **Cathy Cochran**, a dear friend of our profession:

> Court of Criminal Appeals Judge Cathy Cochran passed away on February 7, 2021. Due to the COVID-19 pandemic at the time, no memorial was possible. Instead, a Celebration of Life gathering will be conducted for her on September 18, 2021, from 1:00 to 4:00 p.m. in the Auditorium at the Lady Bird Johnson Wildflower Center, 4801 La Crosse Avenue in Austin. Following Judge Cochran's instructions, she wants a happy gathering with family, friends, and colleagues that includes cookies, coffee, and good conversations. Dr. Tony Fabelo is working with Rusty Hardin and family to organize the event. Dr. Fabelo's wife, Dr. Dora Fabelo, is managing the invitation and logistics. Please RSVP to her at dmfabelo@aol.com.

The DALLAS Project

The Deason Criminal Justice Reform Center at Southern Methodist University's Dedman School of Law has partnered with the Dallas County Criminal District Attorney's Office on the DALLAS Project: District Attorney Learning and Leadership through Application of Science (DALLAS). The research performed in conjunction with Dallas County CDA **John Creuzot** and his office has led to the issuance of a series of studies on the enforcement of marijuana laws in Dallas County and provides some real food for thought on how those laws have been enforced and how they should be enforced moving forward. To read more about the project, follow this link: www.smu.edu/Law/Centers/Deason-Center/Issues/Prosecutorial-Discretion/Policing-Racial-Disparity. ❇

National Crime Victims' Rights Week events

During the week of April 18–24, 2021, communities across the United States observed National Crime Victims' Rights Week (NCVRW).

By Jalayne Robinson, LMSW
TDCAA Director of Victim Services

The 2021 theme—*"Support Victims. Build Trust. Engage Communities"*—emphasized the importance of leveraging community support to help victims of crime.

The Office for Victims of Crime offers a resource guide each year that includes everything needed to host an event in your community. Check out the website at https://ovc.ojp.gov/program/national-crime-victims-rights-week/overview for additional information. Sign up for the NCVRW subscription list at https://ovc.ncjrs.gov/ncvrw/subscribe to receive information in 2022 to plan your event.

Numerous communities across Texas observed NCVRW, and TDCAA would like to share photos and stories submitted by two of our members.

Dana Bettger
Victim-Witness Coordinator in the Bell County District Attorney's Office

The Bell County Crime Victims Coalition (VACs and advocates from law enforcement agencies) gathered by the Victim Memorial Tree outside the Bell County Courthouse on Monday, April 19, to pay tribute to crime victims and their families in recognition of National Crime Victims' Rights Week. We placed commemorative ribbons on the tree, which was planted and dedicated by the coalition 10 years ago (see the photos at right).

The Bell County Commissioners Court signed a proclamation declaring this week as Crime Victims' Rights Week in Bell County. District Attorney Henry Garza assisted with recognizing crime victims and hanging ribbons on the tree. Victims, their families, and friends are able to visit the tree anytime during this week.

Ebonie Daniels
Victim Assisstance Coordinator in the Wichita County Criminal District Attorney's Office

TOP PHOTO: The entire Wichita County District Attorney's Office at the Save Jane event at Patsy's House, the local Children's Advocacy Center. Save Jane was meant to honor victims of child abuse. MIDDLE PHOTO: John Gillespie, Criminal District Attorney in Wichita County (at right, speaking), and Staley Heatly, 46th Judicial District Attorney (at left), speaking at Save Jane. BOTTOM PHOTO: Ebonie Daniels, VAC in the Wichita County CDA's office, at Midwestern University's Take Back the Night Event April 9.

Victim Impact Statement Revision

In accordance with Code of Criminal Procedure Art. 56A.151, the Texas Crime Victims Clearinghouse will revise the Victim Impact Statement following the 87th Regular Session.

Please look for the new Victim Impact Statement forms available this fall at tdcj.texas.gov/publications/victim_impact_statement.html.

This summer I will serve on the TDCJ-Victim Services Division Victim Impact Statement Revision Committee. The committee will meet several times in Austin to review the format of the Victim Impact Statement form, Victim Impact Statement Quarterly Activity Report, "It's Your Voice" brochure, and Victim Impact Statement recommended processing procedures, and review any changes proposed by the committee members.

If you have wished for additional information or for revisions to these documents, I am open to suggestions and will share them with the committee. The VIS revision committee is interested in making these documents user-friendly for victims as well as criminal justice professionals. Please share your suggestions with me by email at Jalayne.Robinson@tdcaa.com.

Protective order registry

The Office of Court Administration launched the new Protective Order Registry in October 2020. The dedicated website for law enforcement and prosecution personnel is called the Protective Order Registry of Texas (PROTECT) and is located at https://protect.txcourts.gov. This portal launched in February 2021 and currently contains more than 34,000 entries.

For the first time, PROTECT allows criminal justice personnel in Texas to view more comprehensive protective order information online, including images of applications and signed orders,

Continued on page 9 in the yellow box

'This is the Way' lesser-included error must be preserved

By Britt Houston Lindsey
Chief Appellate Prosecutor, Criminal District Attorney's Office in Taylor County

The single best thing that came out of the dumpster fire that was 2020 is *The Mandalorian*, a fantastic, *Star Wars*-branded mash-up of Sergio Leone westerns, knight legends, and Ronin tales of feudal Japan.[1]

The titular character, Din Djarin the Mandalorian, adheres to both a moral compass that leads him to take in an adorable child (known popularly, if incorrectly, as Baby Yoda) and the strict warrior's code of his people, as reflected in their creed, "This is the Way." We cheer for the Mandalorian because he not only does the right thing, but because he does it the right way, which is a goal we all should strive for.

To do the right thing the right way, trial and appellate prosecutors alike must know when defendants are entitled to a requested lesser-included instruction, when they are not, and what defendants must do to preserve error on that point. The Court of Criminal Appeals provided some guidance in that regard in *Williams v. State*,[2] handed down May 26, 2021.

Background

The underlying case involved a charge of continuous trafficking of a minor.[3] Much like the continuous sexual abuse of a child statute you're no doubt familiar with, the Texas Penal Code criminalizes the act of engaging, two or more times over a period of 30 days or more, in conduct that constitutes an offense under the trafficking statute, §20A.02. The defendant, Issac Williams, met a 15-year-old girl, B.F., on social media and messaged her for several months before meeting her in person after she stated that her mother "kicked her out." Williams told the girl (age 16 by then) that he would take care of her, showed her the adult escort advertisements on Backpage, and explained the process of placing ads and finding customers. Williams introduced her to 20-year-old "Kandy," took them both to the store to buy "cute underwear," and took photos of them for ads.

At trial, over 3,000 pages of Backpage records were introduced as an exhibit, showing B.F. as "Amber," alongside Kandy; some of these pages advertised a "two-girl special." The ads ran from December 9, 2013, to August 14, 2014. Most of the ads were invoiced to Kandy, but some that ran from July 20 to August 5 were invoiced to the defendant. B.F. testified that Williams would drive her and Kandy to different cities to meet clients while he either waited in his Cadillac or in a different hotel room, and that she was never to tell clients that she had a pimp. She said that they worked every day except Sundays, when they would go to church to see Williams's father preach.

Department of Public Safety Special Agent Shawn Hallett and Sergeant John Elizarde with the Texas Attorney General's Child Exploitation Unit found the ads for Amber and Kandy while looking for juvenile victims of human trafficking. They were able to determine their real identities from Facebook and also learned that B.F. was a minor and a runaway. They arranged a "two-girl special" at a hotel in Killeen, where they conducted a sting operation that took Kandy into custody.

Hallett, Elizarde, and Sergeant Stormye Jackson found B.F. in the hotel room; B.F. was "surprised and overjoyed" that they had found her. The girl related the details of the trafficking scheme; multiple cellphones, a hotel receipt in Kandy's name, condoms, and personal lubricant were found in the room. B.F. "melted down" upon seeing Williams's Cadillac outside, and a search of that vehicle and his person revealed gift cards used for hotel rooms and Backpage ads. Cell phones were also found in the car; they had a history of use on Backpage, texts and calls to the phones found in the hotel room, and hotel bookings. There were also boxes of condoms of the same type found in the hotel room.

Williams's theory of the case at trial, developed through cross-examination and testimony, was that Kandy and B.F. acted alone and that he had no knowledge or suspicions that they were prostituting themselves. He testified that he had committed no crime, was only roommates with Kandy, never trafficked either of them, and that he had had blocked B.F. on Facebook because she was coming on to him. The gift cards in his wallet had been given to him by Kandy to hold onto, and the two of them had switched phones the day before. He stopped appearing for court after his jury setting because he felt sad and betrayed and because he was a nice person who didn't do anything wrong to anybody.[4]

At the close of evidence, Williams' trial counsel requested multiple lesser-included offense instructions on the record:

> **Defense counsel:** In this charge, we are asking that the lesser-includeds be placed in the charge. If we go through the definition of the charge, there are elements that we talked about in the informal charge conference: human trafficking, compelling prostitution, prostitution, and then, there was evidence of a simple assault. So we believe that there is sufficient evidence for the jury to look at any one of those theories and find a lesser-included, and we ask for those charges to be—the lesser-included—
>
> **The Court:** Is there—was there any evidence elicited—and refresh my memory—that if he's guilty of any offense, he's guilty of the lesser only and not the greater?
>
> **Defense counsel:** I believe there was in substance.

to improve enforcement, investigation, and safety planning for victims of family violence and other violent crimes. Texas courts have been entering applications, protective orders, and magistrate's orders of emergency protection into the registry since October 15, 2020. Courts are required to complete entry of the information into the registry within 24 hours of issuance.

Elected district attorneys, criminal district attorneys, and county attorneys may have already been added to the registry as restricted users, which gives access to view all applications and protective orders that have been entered into the registry. For other personnel within an office to also view these records, you must enter them into the registry as restricted users. Please go to https://protect.txcourts.gov for all the information on how to get started.

Please send any questions to OCA-Legal-Support@txcourts.gov. To inquire about training for yourself or your staff, please contact the domestic violence training attorney, Kimberly Piechowiak at kim.piechowiak@txcourts.gov. OCA is excited to offer this new tool to assist in enforcement and investigation of violent crimes in Texas.

Victim services consultations by Zoom

As TDCAA's Victim Services Director, my primary responsibility is to assist elected prosecutors of Texas, victim assistance coordinators (VACs), and other prosecutor office staff in providing support services for crime victims in their jurisdictions. I am available to provide victim services training and technical assistance to you via phone, email, or Zoom. The services are free of charge.

If you would like to schedule a victim services training, please email me at Jalayne .Robinson @tdcaa.com. Many VACs across Texas are taking advantage of this free victim services training—please let me know how I may be of assistance to you and your office. ❇

The Court: Do—

Defense counsel: OK. And then, the Court makes the ruling. It is what it is.

The Court: OK. That will be denied.

The jury found Williams guilty of continuous trafficking as charged and sentenced him to 50 years' confinement.

The court of appeals

First, let's recall a few important things to know about the law and jury charge error. Jury charges are one of the few areas in the law where failure to object does not necessarily waive error.[5] Rather, it affects the harm standard that the reviewing court uses to evaluate the error. Under *Almanza v. State*,[6] if there is error in the charge but the defendant did not object, reversal is not required unless the defendant suffered "egregious harm." If the defendant preserved error by objecting to the charge, the standard is only "some harm." Without getting too deep in the weeds, essentially "some harm" is a much lower standard and a good reason to pay very close attention to defense objections to the charge.

Jury charges are one of the few areas in the law where failure to object does not necessarily waive error.

There's an important exception to that rule, however: defensive instructions, such as an instruction on self-defense. Under *Posey v. State*,[7] the judge has no duty to *sua sponte* give the jury an unrequested defensive instruction; a defendant must request one or he has procedurally defaulted any complaint on appeal. This makes sense, because the decision of whether to request a defensive instruction depends on the defendant's trial strategy. If a defendant were allowed to both intentionally forgo a defensive instruction at trial and complain for the first time on appeal that he wasn't given one, he could "sandbag" the court by not requesting one and potentially get another bite at the apple on appeal for something that he strategically chose to waive.

Armored[8] with that knowledge, let's return to the appeal. Williams appealed to the Fourth Court of Appeals in San Antonio, arguing that he had preserved error by objecting to the exclusion of the lesser-included charge and that the "some harm" standard accordingly applied. The Fourth Court agreed that Williams had properly requested the lesser-included instruction and that because evidence existed to support the charge, the court erred by not including the instruction. The Court noted that the jury could rely on evidence showing that:

1) Kandy appeared on almost all the ads;

2) Williams's "roommate" was identified as Kandy; and

3) Kandy's phone (found in the hotel room) contained text messages between her and Agent Hallett.

The Fourth Court further found that the jury "could also believe Williams's testimony that the reason his phone, which police found in his car, had incriminating evidence on it was because he had 'merged' his phone with Kandy's phone only a few days before the arrest." The Fourth Court also pointed out the Backpage ads in Williams's name could allow a rational jury to conclude only that he only compelled B.F. to commit prostitution from July 20, 2014, to August 5, 2014, and that one of the text messages from Kandy to B.F. stated, "Make sure Issac doesn't see you," which defense counsel argued was evidence that Kandy and B.F. were doing something that they didn't want Williams to know about. Because the jury was faced with the choice of acquitting the defendant entirely or convicting him of the greater offense that it may have had a reasonable doubt that he committed, the Fourth Court further found that Williams had met the "some harm" standard and remanded back to the trial court for a new trial.

As the CCA saw it

In the State's petition for discretionary review,[9] Bexar County Assistant District Attorney Nathan Morey raised the very good point that the Court of Criminal Appeals had discussed in *Tolbert v. State,*[10] that the trial court does not have a duty to *sua sponte* instruct the jury on lesser-included charges. Rather, they are treated like defensive instructions under *Posey*: matters of trial strategy that the defendant must request or waive. One of the purposes of requiring the affirmative request under *Posey* is to prevent "sandbagging" the trial court judge. The State argued in its first ground that the defendant failed to preserve any error because he had not sufficiently explained to the trial court why he was entitled to a lesser-included, quoting the late Judge Cochran's concurrence in *Grey v. State* that "the defendant must point to specific evidence in the record that negates the greater offense and raises the lesser-included offense."[11] Williams argued that he did point out the specific evidence on appeal, and

that nothing required him to do so in the trial court.

The Court of Criminal Appeals agreed with the State on the error preservation issue. Judge Newell wrote the majority opinion and was joined by Presiding Judge Keller and Judges Hervey, Richardson, Keel, and Slaughter. Judge Newell pointed out that a defendant is entitled to a particular lesser-included instruction when it is shown to be a "valid rational alternative" to the greater crimes, e.g. when he details on the record the specific basis for rejecting the greater offense but supporting the lesser. Here, the defendant did not point to any affirmative evidence that would support the submission of any of the lesser-included offense instructions, and, specific to the charge of trafficking, did not at trial point to facts like those on which the Fourth Court relied. Judge Newell noted that the Court has ruled that general or insufficiently specific objections do not preserve error for appeal, and that a defendant who files or dictates a "laundry list" of objections to the charge must also specify the legal or factual reasons why he believes he is entitled to the special instructions.

Judge Newell was careful to point out that the result may have been different if the evidence supporting the lesser-included instruction were obvious (or "manifest") to the trial court, but here it was not—Williams's defensive theory was that he did not commit any crime. As Judge Newell put it, "Because the evidence supporting trafficking as a rational alternative to the charged offense was not obvious, and the appellant failed to point to it, the trial court, reversed on appeal, was classically 'sand-bagged.'"

Like in *Posey*, the rule Judge Newell establishes here makes sense because the same rationale applies. As *Posey* puts it, requiring an affirmative request for a defensive instruction "prevents the party from 'sandbagging' the trial judge by failing to apprise him, and the opposing party, of what defensive jury instructions the party wants and why he is entitled to them." If the rule were otherwise, a defendant could direct his theory of the case toward an outright acquittal, ask for a laundry list of lesser-included instructions, shrug his shoulders when the trial court asks why he was entitled to a lesser-included instruction, then gain a reversal by carefully combing through the appellate record at his leisure to find evidence supporting any one of the instructions after the fact.

Judge Yeary dissented, joined by Judges Walker and McClure. Judge Yeary stated that neither the majority nor the parties cite to any caselaw stating that it is the defendant's responsibility to inform the court of the specific evidence that showed him to be guilty only of the lesser-included offense, and that in his view, Texas Rule of Appellate Procedure 33.1(a)(1)(A) did not necessarily mandate that the defendant do so. Judge Yeary observed that some other jurisdictions did in fact make that demand of the trial court, noting that New Jersey had long held that "when a defendant requests a lesser-included-offense charge, the trial court is obligated, in view of the defendant's interest, to examine the record thoroughly to determine if the rational-basis standard has been satisfied." Judge Yeary also felt that defense counsel's statement, "I believe there was in substance," to be sufficient to apprise the court that there was evidence to support the lesser-included instruction, and he expressed his belief that it was incumbent on the trial court to make further inquiry if further clarification was needed.

The takeaway

So what's this mean to me, the hard-working, front-line prosecutor? I'm so glad you asked. There are lessons here for defense counsel, judges, and prosecutors alike.

First and foremost for our purposes is that the State has to listen very carefully to any requests or objections the defendant has regarding the jury charge and objectively assess whether he does or does not have a right to them.[12] Here, there arguably was evidence that could have supported the lesser-included charge, but Williams did not articulate that evidence when the charge was discussed on the record. It also was not obvious to the trial court, because the theory of the case that the defendant pursued throughout the trial was that he committed *no* crime, not a lesser crime. Had the defendant pointed to a scintilla of evidence from any source showing that if he were guilty that it was only of the lesser-included offense during the charge conference, or had the defense made obvious that the theory of the case was that the defendant was guilty only of the lesser-included and emphasized that evidence in trial, the outcome here might have been differ-

The Court has ruled that general or insufficiently specific objections do not preserve error for appeal, and that a defendant who files or dictates a "laundry list" of objections to the charge must also specify the legal or factual reasons why he believes he is entitled to the special instructions.

ent. If the evidence that supports a requested lesser-included offense isn't clear to prosecutors at the charge conference, ask to discuss it on the record. If the evidence supporting the lesser-included *is* clear, don't fight it.

Prosecutors must also be aware of what constitutes evidence that will support a lesser-included instruction and what will not, which is trickier than it seems. Although only a scintilla of evidence is needed, the Court of Criminal Appeals has stated repeatedly that there must be evidence "directly germane" to the lesser-included offense for the jury to consider to make it a "valid rational alternative to the greater offense." It is not enough that the jury may simply disbelieve crucial evidence pertaining to the greater offense.[13] If the offense is continuous sexual abuse of a child and the defendant's only argument at the charge conference is that the jury may not believe the victim's testimony about the number of assaults or the time period during which they happened, that standing alone won't justify a lesser-included instruction.[14] If the defendant actually adduces germane evidence that the time period was less than 30 days, or the defendant himself actually testifies that the sexual abuse happened on only one occasion, the lesser-included instruction is warranted. Analyzing which arguments do and don't support a requested lesser-included instruction in the charge isn't easy, but ... This is the Way. I have spoken! ❇

The State has to listen very carefully to any requests or objections the defendant has regarding the jury charge and objectively assess whether he does or does not have a right to them.

Endnotes

[1] See e.g., Lone Wolf and Cub, Kazuo Koike & Goseki Kojima, *Futabasha* (1970) (Japanese manga series depicting wandering rōnin protecting young child).

[2] No. PD-0477-19, 2021 Tex. Crim. App. LEXIS 558, 2021 WL 2127116, –- S.W.3d –- (Tex. Crim. App. 2021).

[3] See Tex. Penal Code §20A.03.

[4] Williams was arrested in the Dominican Republic and extradited back to the United States after being located there through an investigation by the U.S. Marshals Service and the Texas Department of Public Safety. "Man accused of using Backpage.com to prostitute Texas girl captured in Dominican Republic," https://foxsanantonio.com/news/local/man-accused-of-using-backpagecom-to-prostitute-texas-girl-extradited-to-bexar-county (retrieved June 2, 2021).

[5] This is because "[t]he trial judge has the duty to instruct the jury on the law applicable to the case even if defense counsel fails to object to inclusions or exclusions in the charge." See *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013).

[6] 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh'g).

[7] 966 S.W.2d 57 (Tex. Crim. App. 1998).

[8] Beskar, naturally.

[9] Nueces County Assistant District Attorney Douglas K. Norman also filed a brief as amicus curiae.

[10] 306 S.W.3d 776, 780 (Tex. Crim. App. 2010).

[11] 298 S.W.3d 644, 653 (Tex. Crim. App. 2009) (Cochran, J., concurring).

[12] It should be mentioned at least in passing that before beginning the analysis of whether the evidence supports a lesser-included instruction, the parties should look at the first prong: whether the lesser offense being offered actually is a lesser-included of the greater offense. Here there was no dispute, as it was agreed by all parties that trafficking was clearly a lesser-included under the continuous trafficking statute.

[13] *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997) cert. denied, 523 U.S. 1079 (1998); *Bignall v. State*, 887 S.W.2d 21, 24 (Tex. Crim. App. 1994); *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011).

[14] See e.g., *Martinez v. State*, No. 10-14-00035-CR, 2014 Tex. App. LEXIS 11230, at *8 (Tex. App.–Waco Oct. 9, 2014, pet. ref'd) (mem. op.); *McGinty v. State*, No. 08-13-00217-CR, 2015 Tex. App. LEXIS 2546, at *11 (Tex. App.–El Paso Mar. 18, 2015, pet. ref'd) (mem. op.).

Photos from our Elected Prosecutor Conference

New discovery rules for asset forfeitures (cont'd from the front cover)

away the instrumentalities of their crimes to eliminate their ability to continue to participate in criminal activities. Because asset forfeiture is a civil process, the Texas Rules of Civil Procedure apply.

Many prosecutors (and in my experience, most defense attorneys) don't know the Texas Rules of Civil Procedure. They may be a bit hesitant (maybe even a little afraid) to learn them because they are complicated and new. In this regard, I admit I have a bit of an advantage: I practiced as a commercial litigator for more than seven years before making a career change. But anyone can learn them, and if you are working forfeiture cases, you absolutely must.

Knowing the civil rules also requires knowing how to use them effectively. It's a different world from the criminal side. For example, did you know that the State can seek discovery from the respondent in an asset forfeiture case? You can.[2] Specifically, you can ask for any information and documentation[3] relevant to the issues in the case. You can even ask specific questions relating to the case that have to be answered under oath.[4] Do you want the respondent's bank account records? You can ask for them. Do you want to know where the respondent has worked for the last few years? You can ask, and if the respondent refuses to provide documents and information, there are consequences (i.e., motions to compel, sanctions, and even attorney's fees).[5] Knowing how to ask for these things and doing it correctly can make our job much easier and more efficient.

Did you know you can also depose the respondent[6] and even call the respondent as a witness at trial? Odd, right? Simply, the limitations of criminal cases don't apply in civil cases. If the respondent pleads the Fifth, you can actually use it as substantive evidence in the forfeiture case. And if he refuses to answer Requests for Admission,[7] they are *automatically* deemed admitted[8] and can be used as substantive evidence for trial and any pretrial motions such as a Motion for Summary Judgment.[9] Did you know that a prosecutor can ask the court to grant a judgment based on those admissions and the testimony of the investigating officer through an affidavit? You can.

For the record, I'm not saying we should seek to depose every respondent or seek every record potentially in the defendant's possession in civil asset forfeiture cases. But knowing that it is possible is important, and knowing when to do so is even more important. Also keep in mind, however, that the same rules apply for the defense. The respondent has the same opportunity to depose State's witnesses and seek discovery. So read the rules, know the rules, and use the process wisely.

Also important to note is that, as of January 1, 2021, the civil discovery rules have changed with regard to expedited actions (i.e., cases with less than $250,000 at issue).[10] For many of us, the vast majority (if not all) of our forfeiture cases will fall into the expedited actions category, so now we have one set of rules for cases filed before 2021 and a new set of rules for cases filed on or after January 1. These new rules, which the Texas Supreme Court approved based on the advice of an advisory committee and after a period for public comment, govern discovery deadlines and even change how initial disclosures are done. You will need to read them carefully,[11] but the biggest changes are set out below:

1 The discovery period starts 30 days after initial disclosures are due. While disclosures are mandatory in most cases and due 30 days after the filing of the first answer, forfeitures are excluded from mandatory disclosures under the new rules. Previously, prosecutors just had to send a request for disclosure to the respondent. Now, however, we have to ask for a court order to start the discovery period and get initial disclosures from the respondent. I recommend alerting the court staff before filing this motion for the first time because it will be something judges have likely never seen before. Also keep in mind that this exception for forfeitures serves an important purpose: It keeps the State from having to turn over information vital to the ongoing criminal investigation before that investigation is final. So be aware of the progress of the criminal investigation and wait to ask for disclosures until it is safe to do so.

2 The discovery period also ends 180 days *after the first initial disclosures are due*. This is a significant change from the prior rule, which set the deadline for discovery at 180 days after the first request for discovery of any kind is served on any party. Ultimately, this means prosecutors need to have discovery ready to go on the day the

disclosures are due so that we have time to get responses, send follow-up requests (if needed), and schedule depositions before time runs out.

3 Parties must also now automatically disclose additional information 30 days before trial, including the names and contact information for witnesses, an identification of all documents and exhibits, and summaries of other evidence which the party expects to offer and those that the party may need to offer "if the need arises."

Read the full text of Texas Rules of Civil Procedure 169, 190, 194, and 195 thoroughly as there are additional changes as well.

Teaching and training

Now that we are familiar with the civil rules, what else can we do to move these cases more quickly and make our lives easier? For me, I have found that training with the law enforcement agencies I work with on a regular basis makes our jobs much easier. It also fosters positive relationships and better communication. If they know what I want up front and understand why I ask for certain things, they are generally more than willing to take the extra steps to get me the information I need (not to say that they don't ever grumble about it). Ultimately, it saves them time and results in fewer court appearances.

As part of this training, I make sure they understand the timelines involved and what information I need before I can even consider filing the petition. Each of the agencies I regularly work with also have set forms they use so they don't miss any of the basic necessary information (i.e., the date and location of the seizure, the identity of the owner, any other party in possession or essential to the proceedings, any lien holders, and identification of the relevant criminal charges). I also give them guidelines on what I need to see in their affidavits (more on that below), most importantly that they connect the dots and clearly demonstrate that the funds or property seized are the instrumentalities of crime. Because most of our forfeiture cases are drug-related, there are certain factors the affidavits need to focus on:

- the proximity of the money to the drugs;
- the presence of drug paraphernalia consistent with drug sales (e.g., scales, baggies, and drug ledgers);
- when dealing with property, the proportionality of the volume and value of the drug to the value of the property seized;
- was there a canine alert on the currency (or other property such as gold, jewelry, etc.) indicating a connection between the drugs and currency?;
- any suspicious activity consistent with drug sales;
- any undercover buys or confidential informant (CI) tips;
- the amount of money and why that amount or the types of currency are relevant;
- alternative sources for the money or property;
- the storage method and location of the cash or property;
- bank records and records from other cash management accounts such as Venmo or CashApp (which can be a treasure trove of valuable information); and
- cell phone records, pictures, and text messages.[12]

I talk to them about why it is so important that their affidavits are done correctly and contain all of the information I need. I can admit (and the officers I work with regularly will tell you) that I am a stickler for proper formatting and grammar. As a former commercial litigator, the importance of not missing even a single improperly placed comma was drilled into me. Those lessons stuck because I have seen firsthand that how we present cases at the very first opportunity truly makes a difference in how our judges perceive us and our cases. Officer affidavits are the first (and sometimes only) substantive piece of information judges see about forfeiture cases. At least in Brazos County, the vast majority of our asset forfeiture cases are resolved without a trial, either through a default judgment or summary judgment, meaning judges do not hear testimony or see exhibits in these cases. As a result, the officer's affidavits must be done correctly so that they provide all of the information necessary to prove our case in its entirety from the beginning. This means making sure that they are not only sound factually, but also well-written and properly edited.

It may sound trivial, but ultimately, the more well-written and compelling the affidavits are, the more we show our judges that we take these cases seriously and ensure we are seizing funds only where appropriate. So after we talk about the why, we also talk about the how, and I give them the following basic guidelines:

At least in Brazos County, the vast majority of our asset forfeiture cases are resolved without a trial, either through a default judgment or summary judgment, meaning judges do not hear testimony or see exhibits in these cases. As a result, the officer's affidavits must be done correctly so they provide all of the information necessary to prove our case in its entirety from the beginning.

Affidavits should include what I call a "yay, me!" paragraph–in other words, a section that details the officer's expertise in the areas relevant to the case.

1 All affidavits should be written by the seizing officer in first person and based on direct knowledge. Sometimes we even need a second affidavit from another officer if the officers were involved in different vital parts of the seizure (e.g., one conducted the search and found the money and drugs, and one interviewed the defendant). This ensures that the affidavit is admissible in later proceedings such as a Motion for Summary Judgment and prevents having to get a new affidavit later in the case. Previously in Brazos County, a patrol officer might conduct a traffic stop that turned into a forfeiture. An investigator would then take over and write the forfeiture affidavit based on the patrol officer's report. While this works for criminal probable cause statements, it does not work in a forfeiture case because an affidavit written in this manner is entirely hearsay and inadmissible in summary judgment proceedings. We would then have to get a second affidavit if we wanted to file for summary judgment, requiring extra work months or even years down the line when memories are not as clear.

2 Affidavits should avoid hearsay unless subject to an exception such as excited utterances or statements against interest.

3 Affidavits should include what I call a "yay, me!" paragraph—in other words, a section that details the officer's expertise in the areas relevant to the case. For example, if it's a drug case, the officer should highlight his or her expertise in narcotics, including both training and experience. It is vital that judges know that the conclusions reached and opinions given by seizing officers are based on actual training and experience. This is the State's chance to prove it.

4 Keep it as simple as possible, and avoid acronyms and abbreviations that are not commonly known. I always use my husband as an example here. He works for NASA. Anyone who knows someone who works for NASA knows that employees speak in acronyms and codes. I literally have no idea what he is saying half the time when he talks about work. Our judges are the same way when officers use police terms. Sure, we prosecutors know what a CI is or the various ever-changing slang terms for drugs, but we cannot assume that judges know. We must be clear so there is no question about what is meant.

5 Remember it is all public record. Officers tend to forget that everything filed in an asset forfeiture case is open for the public to see, so we have to be very careful about disclosing information that we do not want public just yet. Given the quick time frames in forfeiture cases (a mere 30 days), many times our criminal cases have not been indicted and may still be in the active investigation stage. In these instances, we must be very careful not to disclose information that could harm the open investigation in any way.

6 Be sensitive about names and witnesses. Again, because everything is a matter of public record, we must be very careful about including informants' names or identifying information. In general, unless it is absolutely necessary, I ask officers not to include confidential informant information in forfeiture affidavits. The same is true for other civilian witnesses. We certainly do not want to put these witnesses in a dangerous situation.

7 Stick with facts and reasonable conclusions that relate to the case. Do not speculate and do not include unconfirmed rumors. This sounds like basic common sense, but it can be tricky.

8 Copy edit for grammar and punctuation.

9 Finally, submit the affidavit for review and approval no later than 15 days after the seizure. This deadline lets prosecutors work through any potential issues well before the filing deadline and prevents having to refuse a case at the last minute for reasons that could have been fixed if they'd been found earlier. It also allows prosecutors to calendar the filing deadline and monitor any possible conflicts, such as all-encompassing trials or vacation dates, so that we do not miss a deadline because I'm unavailable when the paperwork comes in at the last minute.

Potential defenses

Knowing what goes in the affidavit is absolutely important, but just as important is knowing what to look for that could lead to a legitimate defense to the forfeiture. For that reason, we also talk about defenses to forfeitures and what officers need to look for on the front end so we are not improperly seizing funds. Does the respondent have a legitimate job? Could the funds be from that job? The Texas Workforce Commission can be a great source of information in this regard, but we also should not disregard basic detective work (gasp, actually talking to witnesses such as alleged employers). Does the property belong to

someone else who may not know what his or her property is being used for? I work in a college town, and this can definitely be an issue with college students, but it can come up with adult children and other family members. Ultimately, we need this information up front to prevent unnecessary work from everyone involved.

Finally, I finish every training session answering questions and making sure officers have my contact information (email and phone numbers). If they have questions at the time of the seizure or any other time, they can call or email and ask. I would much rather they ask questions and make sure we are all on the same page from the beginning. We all know that it is much easier to work through a case and resolve potential issues with 25 days until the deadline than it is the day before the filing deadline.

Have a plan and stay organized

When it comes to managing asset forfeitures, consistency is important. But having a plan doesn't mean always sticking to a set routine when it comes to forfeitures. Every case is different, and some require a completely fresh approach. That said, having a general concept in mind for how cases should flow helps tremendously. My case flow generally looks something like this:

1) Review initial affidavit.
2) Make any necessary revisions and ask follow-up questions.
3) Approve final affidavit.
4) Once paperwork is received, file the case.
5) Make sure the respondent is served (this one can be tricky and time-consuming).
   5a) If no answer, file a default judgment.
   5b) If an answer is filed, send discovery.

6a) If discovery isn't answered, file a Motion for Summary Judgment based on the affidavit and deemed admissions.

6b) If discovery is answered, evaluate the case for settlement purposes or to see if summary judgment may still be appropriate.

7) If no settlement or summary judgment, ask for a trial.

Throughout this process, I keep track of everything in a spreadsheet and put all filing and discovery deadlines on my calendar. Calendaring of discovery deadlines will be even more important under the new discovery timelines so that prosecutors do not inadvertently miss deadlines and impede our ability to fully investigate and prove cases.

Conclusion

At the end of the day, prosecutors must see justice done. The same applies in asset forfeitures. Forfeiture funds can do a lot of good in our communities, but we cannot abuse the system. We must be conservative in our filings and use the forfeiture system for its intended purpose. We must remember that the process is available to take away the instrumentalities of crime to reduce crime in our communities and be careful not to allow forfeitures to become punitive in nature. ❇

Endnotes

[1] Tex. Code of Crim. Proc. Art. 59.01.

[2] Tex. Rules Civil Proc. 190–204.

[3] Requests for production, Tex. Rule Civ. Proc. 196.

[4] Interrogatories, Tex. Rule Civ. Proc. 197.

[5] Tex. Rule Civ. Proc. 215.

[6] Tex. Rule Civ. Proc. 199.

[7] Tex. Rule Civ. Proc. 198.

[8] Tex. Rule Civ. Proc. 198.2(c).

[9] Tex. Rule Civ. Proc. 166a.

[10] Tex. Rule Civ. Proc. 169.

[11] Tex. Rules Civ. Proc. 169, 190, 194, and 195.

[12] See, e.g., *Antrim v. State*, 868 S.W.2d 809 (Tex.App.–Austin 1993, no writ).

Knowing what goes in the affidavit is absolutely important, but just as important is knowing what to look for that could lead to a legitimate defense to the forfeiture.

Will the real outcry witness please stand up?

During my 3L evidence class at Baylor Law under the great Professor Gerald Powell, he made one thing perfectly clear: No student could pass his class without reciting the business records exception to the hearsay rule, from memory, on command.

By Brandy Robinson
First Assistant District Attorney in Austin County

He considered the business records exception just about the most powerful hearsay exception that a lawyer could use in trial. He was largely right: Since graduation, I've used it countless times.

However, in child abuse prosecutions, a different hearsay exception steals the spotlight and merits the highest level of respect: the outcry witness exception. This exception provides that a child's first statement to an adult over 18 describing an alleged offense of physical or sexual abuse is admissible in the State's prosecution for the abuse.[1] This exception is particularly powerful because the outcry witness's statement may be offered as substantive evidence of the abuse, and the defense is not entitled to any standard hearsay instruction limiting its use.[2] In cases that often rise and fall on the word of few witnesses, outcry testimony is indispensable.

Despite its long-standing usefulness, many judges and attorneys still struggle with the law and its application. Who really counts as the "first" adult? Can the State use only one outcry witness per trial? What hoops does the State have to jump through to secure admission? Much like the business records exception, trial attorneys should commit to learning the basics of how to use and apply this exception, by memory, on command.

Notice required

Outcry statements are useless if the prosecutor fails to properly notify the defense. The State must give the defense the name of the outcry witness and a written summary of what the child told the witness more than 14 days before trial.[3] However, our duty doesn't stop there. Even if the defense decides not to object to the outcry testimony, a hearing still must be conducted outside the presence of the jury to determine the admissibility of the statement, and the court must find that the outcry testimony is reliable based on the time, content, and circumstances of the statement before it can be admitted.[4]

Who should be included in the notice to defense? It can be tempting to pick one outcry witness early in the process, send out notice, and forget about it completely until trial. Unfortunately, all too often the person whom you believe qualifies as an outcry witness during intake can change drastically during trial preparation. The safest bet is to provide notice to the defense for every person you can identify, adult or not, whom the child has told about the abuse.

Several people may appear, at first glance, not to qualify at all. For example, if a child only generally describes the sexual abuse to an adult, that adult does not qualify as the proper outcry witness at trial.[5] Instead, the proper outcry witness is the first person to whom the child described the details of the offense in a discernible manner.[6] However, it would be a mistake to omit a

witness on the notice simply because the child's statement seems vague. During trial prep, how many times have witnesses told us new details that they never told an investigator before? If we fail to provide timely notice of a possible outcry witness, the testimony will be inadmissible, even if that person turns out to be the only proper outcry witness.

If we notify the defense about every person that the child told, even those we think may not qualify, then we have accounted for the normal changes in details and witness availability that happen in trial prep. To avoid any defense claims that the State is attempting to mislead the defense about the outcry witness, I title my document as a notice of *potential* outcry witnesses and include a small disclaimer at the end: "By providing this notice, the State does not guarantee that all above witnesses will be placed under subpoena or present for trial."[7] I also advise the defense in the notice that the law requires an outcry hearing and that all victim statements that the State possesses are available to the defense for inspection and copying in the State's file.

The hearing

What should the hearing look like? Outcry hearings are limited to the very specific purpose of determining the reliability and admissibility of the outcry statement itself, not the credibility of the child or the outcry witness.[8] Some defense attorneys may view the outcry hearing as their shot at a mini-trial before the trial, but the Court of Criminal Appeals has explicitly disapproved of that idea. The Court has held that the time, content, and circumstances of the statement are the only relevant issues at the hearing, so the defense should not use it to attack the outcry witness's potential bias, ability to remember, or credibility at the hearing.[9] Briefing the judge on this case before the hearing may prevent him or her from requiring prosecutors to call a vulnerable child victim to the stand during the outcry hearing, because the hearing should revolve around the outcry witness's testimony alone.

There can be only one? No.

If you ask attorneys vaguely familiar with the outcry rule to describe it, they may tell you it means that the first adult whom the child tells about the abuse gets to testify about it at trial. Many still don't realize that the State can admit several outcry witnesses in the same trial, depending on the charge and the evidence. Multiple outcry witnesses may testify, so long as each witness describes a distinct event of sexual abuse.[10] The two most common ways this comes up are when the State alleges either multiple abusive acts or multiple victims in the indictment.

Multiple acts. If a victim told one person about one incident of abuse first and later told a different person about another incident, the State may properly offer a different outcry witness for each act of abuse charged in the indictment.

For example, Victim 1, an 11-year-old girl, tells Mom that the defendant exposed his penis to her on a camping trip. Victim 1 tells the Children's Advocacy Center (CAC) interviewer that the defendant exposed his penis at home and made Victim 1 touch it. Later, Victim 1 tells Grandma that the defendant made her touch and lick his penis, and that this happened from second through fourth grades.

In this case, prosecutors need to provide an outcry notice to the defense that describes Victim 1's outcry to Mom for Indecency by Exposure; Victim 1's outcry to the CAC interviewer for Indecency by Exposure and Indecency by Contact; and Victim 1's outcry to Grandma for Indecency by Exposure, Aggravated Sexual Assault, and Continuous Sexual Abuse.

Before the outcry hearing, it is crucial to interview all witnesses to pin down exactly to which statements and events of abuse they can testify. Based on those pretrial interviews, select the first person over 18 whom the complainant told about each event, then offer only those outcry witnesses at pretrial and trial. Just be careful to meticulously avoid duplicative testimony, as outcry witnesses cannot repeat an outcry about the same event.[11]

Multiple victims. Since the creation of the Continuous Sexual Abuse statute, presenting multiple victims in the same trial has become much more common. To support a conviction for Continuous Sexual Abuse of a Young Child under Penal Code §21.02, the State need not prove the exact dates of the abuse, only that there were two or more acts of sexual abuse that occurred during a period that was 30 or more days in duration, against one or more children.[12] This allows the State to make its case by alleging multiple victims with multiple acts of abuse, where appropriate, in a single indictment.

If a victim told one person about one incident of abuse first and later told a different person about another incident, the State may properly offer a different outcry witness for each act of abuse charged in the indictment.

The determination of a proper outcry witness is event-specific rather than person-specific; therefore, one outcry witness could testify for one victim and event at trial, while a different outcry witness may be proper for a different victim and event.[13] That means that if prosecutors indict on a Continuous Sexual Abuse case alleging multiple acts against more than one victim, then they can provide testimony from multiple witnesses, where appropriate, about each outcry statement that each child has given about each separate event or act charged.

For example, as part of the investigation on Victim 1, the CAC interviewer questions the child's best friend, Victim 2, who tells the interviewer that the defendant also showed her his penis, had her touch it, and had her lick it several times. Victim 2 also said that when she was younger, she told her cousin that the defendant touched Victim 2's genitals, and she thinks her cousin was 17 when she told him.

The determination of a proper outcry witness is event-specific rather than person-specific; therefore, one outcry witness could testify for one victim and event at trial, while a different outcry witness may be proper for a different victim and event.

Here, prosecutors would provide outcry notice to the defense that describes Victim 2's outcry to the interviewer for Indecency by Exposure, Indecency by Contact, and Aggravated Sexual Assault. It would also be useful to provide notice for an outcry of Continuous Sexual Abuse because the victim describes several acts that may have occurred more than 30 days apart (as long as there is some indication the defendant had contact with Victim 2 more than twice in a period of more than 30 days). Even though Victim 2's cousin was supposedly under 18 when she told him, it would be prudent to provide an outcry notice that describes Victim 2's outcry to her cousin, just in case Victim 2 told the cousin anything about the abuse after the cousin turned 18.

In a Continuous Sexual Abuse example with two victims and multiple abusive events, the prosecution could conceivably call Mother, Grandma, and the CAC interviewer as outcry witnesses for Victim 1, plus the CAC interviewer to testify as an outcry witness for Victim 2. If Mother testifies at trial to a very specific incident involving one Indecency with a Child by Exposure, then the CAC interviewer *cannot* testify to that same event, as that would be duplicative. However, the CAC interviewer *can* testify to any other Indecency by Exposure event—for example, another exposure at a different location and time.

Two caveats to keep in mind: First, remember that the best practice is to provide notice to the defense about all possible outcries, even if they seem redundant or you believe they will ultimately be inadmissible. Next, make sure you offer an outcry witness at trial to testify only to the offenses you have actually charged. If the indictment alleges only one count of Indecency with a Child by Exposure, then it would not be proper to offer an outcry witness to testify about Indecency with a Child by Contact, as that would be an extraneous offense. Likewise, if you have indicted the defendant for Aggravated Sexual Assault with one victim, you may not prove up extraneous acts with a different victim using outcry testimony. The outcry witness exception applies only to the crime charged in the indictment.[14] So, even though you may be able to present evidence of the defendant's extraneous, uncharged acts of abuse in guilt/innocence under CCP Art. 38.37, you should not use an outcry witness to help prove those extraneous acts.

The uncooperative witness

While Continuous Sexual Abuse cases can present the State with the dilemma of choosing proper outcry witnesses from a plethora of possibilities, a comparatively simple one-count Indecency or Aggravated Sexual Assault case often poses the opposite problem: It can be hard to identify any outcry witness at all.

Anyone who tries child abuse cases either already has, or likely will, run into one inevitable and panic-inducing problem: The star outcry witness either cannot or will not testify to the outcry at trial. So, what do you do when a child insists that she told one witness first, but that witness either refuses to testify about the child's statement or doesn't remember it? Can you still use an outcry statement?

Yes, you can. But you might have to do some digging to find the next person in line whom the child told. Texas appellate courts have found that the proper outcry witness under CCP Art. 38.072 is the first adult who can both *remember* what the victim said and also *relate* it at trial.[15] Under the appellate courts' reasoning, if one potential outcry witness is unwilling or unable to testify to the child's statement at trial, the proper outcry witness would be the next adult whom the child told about the offense who is able to both remember and relate the details.

If a judge is hesitant to get on board with that law, it may be helpful to brief him or her before

the outcry hearing on the facts in *Carty* and *Foreman*, as well as addressing the legislative intent behind the outcry statute. In *Carty*, a victim's mother initially appeared to be the proper outcry witness, but she was under indictment for failure to report the abuse. In *Foreman*, the victim stated she had told her mother and father about the abuse, but both the mother and father stated they had no memory of it. In both cases, the courts found that the outcry exception to hearsay would be rendered toothless unless it allowed the first witness who could actually *remember* what the child said and *relate* it at trial to testify.

The *Carty* court found the legislative intent to curb child sexual abuse was particularly persuasive.[16] If the statute required the State to offer the very first adult told, without regard to whether that adult would actually testify to the outcry, then the legislative goal of curbing child abuse would be unmet, particularly in cases where a victim's first confidants are unprotective.

In our example, imagine that Victim 1's Mother has started dating the defendant again before trial, and Mother now claims Victim 1 never told her about the abuse. Victim 1's Grandma has dementia and cannot remember what Victim 1 told her. In this example, the CAC interviewer would stand alone as the sole witness who could testify to an outcry statement that Victim 1 made about abuse.

You can see how easily an outcry witness can slip through our fingers and how useful it is to notify the defense about everyone whom a child may have talked to about the abuse, regardless of how much the child disclosed or when. If you lose the star outcry witness before trial, you can pursue appropriate alternatives, as long as you have given timely notice to the defense.

The unavailable witness

What if a witness would have been a perfect outcry witness, had he not been deported? A physically unavailable witness poses a novel problem not expressly addressed by Texas courts yet, but the general reasoning of the appellate courts should apply in the same way. Cases such as *Carty* and *Foreman* do not define what constitutes an inability to relate testimony at trial, as their facts address only witnesses who would be excluded due to the content of their testimony rather than physical absence. However, because both cases contemplate witnesses who could have been subpoenaed, they clearly do not require the State to prove total witness unavailability, such as the high standard required by the hearsay exception in Texas Rule of Evidence (TRE) 804.

The stringent hearsay exception in TRE 804 requires the State to prove unavailability by showing that a witness could not appear despite the State's subpoena and the State's good faith efforts to obtain the witness. In both *Carty* and *Foreman*, the outcry witnesses could have been compelled by subpoena but either refused to cooperate or failed to remember at trial.[17] This implies that the State is not required to prove total unavailability as contemplated elsewhere in the Rules of Evidence. Nevertheless, if you're facing a deported (or perhaps even deceased) witness, the safest tactic would be to prove up the highest standard of unavailability possible.

Proving a witness has died would likely be as simple as offering a certified copy of a death certificate; however, in the case of a deported foreign citizen, the matter can become complicated. The State cannot compel subpoena process under CCP Art. 24.28 because a deported witness does not reside within U.S. borders or the District of Columbia anymore. Further, the State could not compel process under 28 U.S. Code §1783 because that subpoena power applies only to U.S. citizens or nationals in a foreign country and cannot be used to compel foreign nationals in a foreign country.

Moreover, even if you have good contact information for the witness and the witness wishes to appear, the State cannot request a deported defendant to voluntarily enter the United States without compulsory process because the State cannot (and should not) induce a witness to break federal immigration law. It is a federal misdemeanor to enter the United States illegally, and it is a felony in many instances to reenter, or attempt to reenter, the United States after being removed or deported.[18]

If the trial court is concerned that the State may not have tried hard enough to secure the outcry witness's testimony, *Loun v. State* has useful language addressing unavailability. The *Loun* court held that the State "is not required to engage in clearly futile activities before a trial court can, in its discretion, determine that the State made good-faith efforts to produce a witness at trial."[19]

Back to our example. Before trial, you learn that the cousin was actually 18, not 17, when Vic-

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tim 2 told him the details of abuse. However, the cousin has since been deported to Mexico. Can you call the CAC interviewer to testify to offenses that Victim 2 told the cousin about first?

Yes, you likely can. Under *Foreman* and *Carty*, the State can show the trial court that a witness cannot appear to relate the victim's statement at trial. However, be cautious in trying to over-extend this concept. If an outcry witness is merely in another state, he could be compelled to testify via the Interstate Compact, or if he could voluntarily appear, then the prosecution may be required to call him. The same may be true if an outcry witness is a United States citizen in a foreign country who could voluntarily appear or feasibly be compelled to testify under federal law.

Remember that when it comes to outcry law, the "first" adult does not always mean first, and it certainly does not mean "only."

Finally, to avoid the problem entirely, if a case heavily relies on an outcry witness whose citizenship is questionable, consider whether a U-visa application would be appropriate to ensure that the witness remains in the country and available to testify.

Conclusion

Remember that when it comes to outcry law, the "first" adult does not always mean first, and it certainly does not mean "only." Although you may not be able to recite every applicable case from memory, there are a few key lessons that all child abuse prosecutors should know by heart:

1) Notify the defense of every potential outcry witness's statement more than 14 days before trial, and secure admission through a pretrial hearing.

2) A proper outcry witness must be able to describe the offense in a discernible manner, rather than making a general allusion to abuse.

3) The State can call multiple outcry witnesses, as long as each witness testifies to a separate criminal act charged in the indictment.

4) If the primary outcry witness can no longer remember and relate the victim's statement at trial, prosecutors may call the next adult who can.

Remembering the basics of the outcry witness law not only provides us with a great hearsay exception, but it also gives us confident command of one of the strongest tools against child abuse in a prosecutor's arsenal. In cases where every word counts, make sure you have exhausted every possibility to allow the victims' words to be heard. ❇

Endnotes

[1] Tex. Crim. Proc. Art. 38.07 §2(a)(1), (2); *Bargas v. State*, 252 S.W.3d 876, 894 (Tex. App.–Houston [14th Dist.] 2008, no pet.).

[2] *Buentello v. State*, 512 S.W.3d 508, 518 (Tex. App.–Houston [1st Dist.] 2016, pet. ref'd.); *Duran v. State*, 163 S.W.3d 253, 257 (Tex. App.–Fort Worth 2005, no pet.).

[3] Tex. Code Crim. Proc. Art. 38.072.

[4] Tex. Code Crim. Proc. 38.072 §2(b).

[5] *Garcia v. State*, 792 S.W.2d 88, 91-92 (Tex. Crim. App. 1990); *Hayden v. State*, 928 S.W.2d 229, 231 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd); *Rodgers v. State*, 442 S.W.3d 547, 552 (Tex. App.–Dallas 2014, pet. ref'd); *Brown v. State*, 381 S.W.3d 565, 571–72 (Tex. App.–Eastland 2012, no pet.).

[6] *Garcia v. State*, 792 S.W.2d 88, 91-92 (Tex. Crim. App. 1990).

[7] See *Bargas v. State*, 252 S.W.3d 876, 895 (Tex. App.–Houston [14th Dist.] pet. ref'd.)

[8] *Sanchez v. State*, 354 SW3d 476, 486-489 (Tex. Crim. App. 2011).

[9] *Id*.

[10] *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011); *Cervantes v. State*, 594 S.W.3d 667, 673-674 (Tex. App.–Waco 2019, no pet.); *Rosales v. State*, 548 S.W.3d 796, 806-808 (Tex. App.–Houston [14th Dist.] 2018, pet. ref'd., cert. den'd.); *Robinette v. State*, 383 S.W.3d 758 (Tex. App.–Amarillo 2012, no pet.); *West v. State*, 121 S.W.3d 95, 104 (Tex. App.–Fort Worth 2003, pet. ref'd); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.–Texarkana 2000, pet. ref'd).

[11] See *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011); *Cervantes v. State*, 594 S.W.3d 667, 673-674 (Tex. App.–Waco 2019, no pet.; *Polk v. State*, 367 S.W.3d 449, 453 (Tex. App.–Houston [14th Dist.] 2012, pet. ref'd); *Broderick v. State*, 35 S.W.3d 67, 73 (Tex. App.–Texarkana 2000, pet. ref'd).

[12] *Buxton v. State*, 526 S.W.3d 666, (Tex. App.–Houston [1st Dist.] 2017 pet. ref'd.).

[13] See *Lopez v. State*, 343 S.W.3d 137, 140 (Tex. Crim. App. 2011); *Hines v. State*, 551 S.W.3d 771, 780-781 (Tex. App.–Fort Worth 2017, no pet.).

[14] *Beckley v. State*, 827 S.W.2d 74, 78 (Tex. App.–Fort Worth, 1992 no pet.); *Chapman v. State*, 150 S.W.3d 809, 816-817 (Tex. App.–Houston [14th Dist.] 2004, pet. ref'd.).

[15] *Carty v. State*, 178 S.W.3d 297, 306 (Tex. App.–Houston [1st Dist.] 2005, pet. ref'd.); *Foreman v. State*, 995 S.W.2d 854, 858 (Tex. App.–Austin 1999, pet. ref'd).

[16] *Carty*, at 306; citing *Garcia v. State*, 792 S.W.2d 88, 91 (Tex. Crim. App. 1990).

[17] *Carty*, at 306; *Foreman*, at 858.

[18] 8 U.S.C. §1325; 8 U.S.C. §1326.

[19] *Loun v. State*, 273 S.W.3d 406, 420 (Tex. App.–Texarkana 2008, no pet.); *Ledbetter v. State*, 49 S.W.3d 588, 594 (Tex. App.–Amarillo 2001, pet. ref'd).

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Investigating officer-involved shootings

Prosecutors do not get to decide when and where officer-involved shootings occur. We can only decide how we respond to them.



By Gavin Ellis (left) & Michael Harrison (middle),
Assistant District Attorneys, and
Tony Rose (right)
District Attorney Investigator, in Harris County

As prosecutors, we often have the final say in the way these cases are reviewed, presented to grand juries, and, at times, charged and prosecuted. With such great responsibility, the onus is on us to be familiar with shooting incidents and how they are investigated.

The *Washington Post* newspaper maintains a database of officer-involved shootings (OISes) occurring nationally.[1] This database indicates that, from 2015 to 2020, Texas accounted for 526 of the 5,950 officer-involved shootings across the country, which is a population-commensurate 8.84-percent of all OIS incidents. The majority do not result in criminal charges against police. These shootings are not, however, immune to the understandable scrutiny and criticism that often accompanies grief and frustration. By default, as prosecutors and investigators, we are not exempt from the scrutiny or the responsibility of navigating these legal minefields with professional poise and ethical grace. The police we work alongside may look at us with skepticism, advocates may question our pace and motivation, and our fellow prosecutors may even question our discretion. Our greatest allies in handling these complex investigations come from the guiding hands of an objective approach, an open code book (from our friends at TDCAA), and an evidence-based review and presentation of the facts.

The investigations related to the killings of Laquan McDonald, Daniel Shaver, Breonna Taylor, and numerous others have shed even more light on the importance of conducting complete and objective investigations of police shootings. These complete and objective investigations must begin on the scene, immediately after the incident occurs.

Interacting with police

One of the most difficult tightropes to walk during these investigations comes from navigating the balance of *being* law enforcement while also *investigating* law enforcement. This balance becomes particularly difficult when approached with the Venn diagram of two separate but related investigations that arise from the same incident and share much of the same evidentiary content. When at all possible, it is prudent to have different attorneys handle the officer-involved shooting investigation and the investigation into any separate criminal suspects (when applicable). Having the same attorney simultaneously investigate a potential suspect who was shot *and* the police officer who shot him can invite questions about impartiality and bias. It is not uncommon for police to ask on-scene ADAs to draft search warrants or accept charges against civilian suspects while investigating OIS scenes, but doing so can create complicated dilemmas for on-scene prosecutors. One prosecutor accepting charges against a suspect on-scene while simultaneously investigating an officer may create unintentional implications regarding a prosecutor's opinions of the legality of the officer involved shooting, the immediate necessity of force, or the prosecutor's ability to judge the actions of either party impartially. Further, these decisions are sometimes made before body cameras have been reviewed and the OIS investigation has been completed.

Consider the awkward possibility at trial of trying a case *against* an officer and sponsoring the testimony of the victim you, personally, charged with a felony while on the scene. Maintaining a cordial and respectful relationship with the parties on scene, being conscious of the laws related to these incidents, and gathering enough

information to kick off an investigation can be a laborious set of tasks. Having different attorneys handle separate arenas of the investigation allows prosecutors to narrow their legal focus and analysis, while also avoiding certain questions of prejudice and self-service.

It bears noting that we are not naïve to the realities of working in a resource-strapped, personnel-limited profession. We recognize that making every scene and having separate attorneys handle distinct arenas is not always a practical possibility for every office, especially some of the smaller offices in the state. This does not mean, however, that prosecutors are relieved of their responsibility to be consciously and logistically prepared for these situations when the necessity arises.

Walkthroughs

The on-scene investigation will likely involve a "walkthrough" with the shooting officer(s). Walkthroughs involve the officers providing a spoken explanation of the events that led up to the shooting, how and where the shooting occurred, and why the officer discharged his weapon. In most cases, walkthroughs are unsworn. Assistant DAs, DA investigators, homicide detectives, Internal Affairs officers, and tactics officers are often present to observe the walkthrough, but the group will vary from scene to scene and agency to agency. More on walkthroughs in a bit.

Determining whether the walkthough will be recorded is usually up to the officer and his attorney, as well as the practices of the investigating agency. Some DA's offices may have agreements by which they conduct parallel investigations separate from the investigating police agency, while others will review the investigation conducted by the police agency, then supplement the investigation where necessary.

Officer statements

Voluntary sworn statements are generally conducted after the on-scene investigation. Much like a walkthrough, these statements are voluntary and provide detail and explanation of the shooting incident. A voluntary statement can generally be used as an evidentiary basis for prosecution. In contrast to the on-scene walkthrough, these statements are most commonly *written* and *sworn*. A 48-hour rule may be in effect in your county. Such rules allow officers to review evidence and wait 48 hours before providing a statement.

If an officer provides a statement that is involuntary and as a condition of the officer's employment, it will be considered a *Garrity* statement and therefore inadmissible as evidence.[2] Understanding *Garrity v. New Jersey* plays a very important role in avoiding prosecutorial pitfalls with officer statements. The impact of *Garrity* goes beyond preventing the admission of the evidence. *Kastigar v. U.S.* states that prosecutors cannot rely upon *Garrity* material as a basis of the case they are bringing,[3] nor can the State make "derivative use" of the material. The intention of the *Kastigar* opinion is to leave prosecutors in the same position as they would have been without the statement.

Be sure to review your office policy on handling *Garrity* material, and reach out to fellow prosecutors to make sure it is handled or excluded properly in your cases.

Reporting to office leadership

Communication with your superiors and office leaders after making the scene of a shooting is imperative. Officer-involved shooting incidents often garner a high level of media and public attention. Your elected DA or immediate supervisor may need to respond to questions about the incident and the investigation. Providing them with a synopsis of the current state of the investigation and what happened on scene can help them provide answers to their constituents and the media. This can be done personally or by email. These synopses can also help with refreshing your own recollection of the case while reviewing the investigation or before presenting the case to a grand jury. In these communications, it is important to not make or convey conclusions about the legality of a shooting before the full investigation has been completed. Like most other aspects of prosecution, accurate documentation, effective communication, and complete, evidence-based review prove invaluable through the span of an investigation.

The DA investigator's perspective

DA investigators can play a crucial role in the review and investigation of officer-involved shootings. Like many investigators within police agencies, investigators in our office's Civil Rights Division rotate as primary on-call for one week and on-call as secondary (back-up) for an additional week. There have been times when there

Kastigar v. U.S. *states that prosecutors cannot rely upon* Garrity *material as a basis of the case they are bringing, nor can the State make "derivative use" of the material. The intention of the* Kastigar *opinion is to leave prosecutors in the same position as they would have been without the statement.*

were two separate officer-involved shootings at the same time but at different locations in Harris County, requiring two teams of attorneys and investigators.

DA investigators are tasked with responding to the scene and assisting the ADA and local law enforcement agency with investigating and reviewing the shooting. When the phone rings at 2 a.m. from the scene of an officer-involved shooting, where do you, as the DA investigator, begin?

When the phone rings at 2 a.m. from the scene of an officer-involved shooting, where do you, as the DA investigator, begin?

Upon arrival at the scene, make contact with the ADA and lead investigator for the LE agency, and begin gathering preliminary information: what happened, who was involved, and case numbers. Obtain the names of all officers involved, their attorneys, and the injured or deceased person who was shot. Did the involved officer(s) have body worn cameras (BWCs) that recorded the incident? Are the BWCs available for viewing at the scene? Contact the Crime Scene Unit (CSU) and advise that you will need to be present for the charting of weapons. While you and the ADA wait for the agency to finish speaking with witnesses and collecting evidence, take photographs of the scene.

A walkthrough of the incident by the shooting officer is an important step in the investigation and assists with locating additional evidence, such as spent cartridge casings, bullet trajectories, distance, and surveillance videos. At the start of the walkthrough, everyone participating should introduce themselves. This is a good opportunity to ascertain if the officer has been involved in any other OISes, how long he has been an officer, and what assignment he had during the shooting (patrol, undercover, off-duty, etc.). Take notes on what the officer describes during the walkthrough. Keep in mind that only criminal investigators should be asking questions during the walkthrough, usually the lead investigator and the DA investigator; generally speaking, Internal Affairs investigators should not ask questions at this time. Given that Internal Affairs are administrative investigators on policies and procedures as it pertains to employment, any answers to questions these officers ask could be viewed as *Garrity* statements. If an on-scene prosecutor has questions or needs clarification, such questions can be asked through the DA investigator.

Upon completion of the walkthrough, the officer's weapon(s) should be charted at the scene, as should any weapons used by the injured or deceased suspect. Weapon charting is the process of cataloging the firearms used, along with the remaining ammunition. Prior to charting, obtain photographs of the officer as he presented at the time of the shooting; this is to show how the officer appeared during the incident (whether he's in uniform, in tactical or raid gear, wearing civilian clothes, etc.). CSU will usually chart the weapons as investigators observe while taking notes and photos. While no two scenes are identical, the general procedure is as follows: Photograph the officer's weapon on all sides and obtain the serial number. Make note of any attachments or modifications to the firearm. As CSU ejects the seated magazine and any chambered cartridges, note the chambered cartridge's make and caliber. As the cartridges are removed from the magazine, it is important to note the make and caliber of each cartridge in the order it was removed. Note the magazine capacity, and take photographs along the way. Do the same for each additional magazine and any backup weapons the officer possessed during the shooting.

Additionally, ensure CSU obtains DNA swabs of the suspect's weapon and chart it using the same technique as the officers. The weapon charting is compared to the spent cartridge casings at the scene. Ensure the caliber and number of spent cartridges align with the weapon charting. In a shooting incident where multiple officers discharge, the spent cartridge casings and recovered projectiles can be compared to the weapons to determine who fired which shot. Photograph all sides of the officers and any injuries they may have sustained. If there was a struggle for an officer's weapon, make sure it is swabbed for DNA prior to charting.

Determine whether the person who was shot is at the hospital or deceased on the scene. If injured and at the hospital, have the lead investigator provide the Medical Reference Number (MRN) from the hospital, which will be a big help in obtaining a grand jury subpoena for medical records. If this person is deceased on the scene, wait for the medical examiner and obtain her information and medical case number.

After the investigating agency has completed its investigation, obtain a complete copy of the case file, and review it in its entirety to prepare an internal report for the ADA to review. Ensure that the videos, evidence, and witness statements match the officer's walkthrough and statement.

Presenting to grand juries

Many jurisdictions are moving toward requiring that all officer-involved shootings be presented to grand juries. As officer-involved shooting cases become a growing concern for the public, the need for transparency and community involvement has also grown. Grand juries are meant to represent the will of the community. As such, presenting these cases to grand juries can instill a greater degree of trust in the process than having a single prosecutor close a case by memo based solely upon his own perspective.

Supplementing the agency's investigation

An officer-involved shooting investigation will likely have been reviewed by several police investigators by the time it makes its way to the prosecutor's desk in preparation for grand jury presentation. However, it is very important for the ADA to thoroughly review the whole investigation for a few reasons. First, investigators are primarily concerned with fact-gathering. Prior to a prosecutor's review, the facts of the case have likely not been viewed critically through a legal lens. Legal context separates important facts from inconsequential details. The investigating agency, as well as the DA investigator, may reach a conclusion in the investigation, but the investigator's conclusion alone is not a sufficient substitute for the attorney's legal evaluation. It is the attorney's duty to comb through the investigation and apply the law to the facts.

Furthermore, it is not unusual for a police investigator's description of use-of-force to be slightly slanted in favor of the fellow officer's conduct. For instance, an investigator's report may describe what he sees in a video of the incident thusly: "The officer guided the belligerent, handcuffed suspect to a resting position on the ground," when in reality, the BWC video shows a handcuffed man being shoved face-first into the concrete after mouthing off to the officer—hence the broken nose. So while an investigator's point of view is certainly valuable, it does not replace the attorney's independent review of the investigation.

The second reason is closely related to the first: After conducting a legal analysis of the facts, it may be determined that additional investigation is needed. For example, a prosecutor may listen to a recorded witness statement and find that a key question was not asked or a detail was left out that changes his legal analysis. These are situations that all prosecutors are accustomed to when evaluating cases. A key distinction, however, is that the investigations reviewed by most prosecutors have already resulted in charges and probable cause, whereas in most officer-involved shooting investigations, the question of probable cause is generally left to a grand jury, which requires all of the relevant facts to reach its decision.

Third, a prosecutor's familiarity with grand juries will very often result in tracking down additional information. We have all been there: A grand juror asks whether anyone has checked if the high rises across the street from the crime scene (that can be seen in crime scene photos) had surveillance cameras. You pause while thinking of a graceful way to say "no." Looking at an investigation with a future grand jury presentation in mind will almost always help identify potentially important questions for which you do not currently have an answer. Anticipating grand jury inquiries and arming yourself with the details goes a long way in establishing the credibility of the prosecutor and the investigation. Also, I don't think any attorney likes *not* having the right answer locked and loaded, if for no other reason than to save face with grand jurors.

Communicating with family members

Communicating with the family of a decedent in an officer-involved shooting case can sometimes be a sensitive subject. Depending on the particular facts of a case, the decedent may have been committing a crime at the time of the shooting. Furthermore, some families may have already retained counsel. Pair these factors with the potential media fallout from a mishandled conversation with a family member, and it can prove crucial to consult your office leadership regarding how and when to reach out or respond to family members. Follow your office's policy on communicating with crime victims and their kin, including enlisting the help of your office's victim services division.

A few words of advice: First, lead with compassion. Regardless of the circumstances, this family is dealing with the loss of a loved one. It is possible to be compassionate toward a person's suffering and still remain realistic and unequivocal regarding the state of affairs. Second, navigate with wisdom. Steer clear of promises, comments, or commitments that could poten-

We have all been there: A grand juror asks whether anyone has checked if the high rises across the street from the crime scene (that can be seen in crime scene photos) had surveillance cameras. You pause while thinking of a graceful way to say "no."

tially be taken out of context. While it is generally fine to explain the process of the investigation, there is no shame in letting a family member know that you need to consult with your office prior to answering more specific questions.

What is the State's position?

If officer-involved shooting cases are truly to be decided by the community, prosecutors must ensure that the grand jury is well-informed and that the State remains impartial. While "run-away" grand juries can be a reality, grand juries that are presented with all of the facts and a *complete and comprehensive* explanation of the governing law usually come to the right conclusion.

While "run-away" grand juries can be a reality, grand juries that are presented with all of the facts and a complete and comprehensive presentation of the governing law usually come to the right conclusion.

Moreover, when dealing with officer-involved shootings, answering the question of reasonableness as it relates to an officer's use of force is a question reserved for a group of reasonable people—the very purpose of a grand jury. While the notion that a prosecutor can "indict a ham sandwich" is a gross mischaracterization of the grand jury process, it is based in an element of truth. We as prosecutors—and more broadly, as human beings—naturally bring our beliefs and biases into any room that we enter. Grand juries often yield to our experience, training, and status as attorneys when deciding what to think about a case. However, it is vital to check our personal position on the matter at the door, present all perspectives equally, and devote energy to ensuring that the grand jury understands how to appropriately apply the law. The advocacy that happens in the grand jury is advocacy on behalf of the law. This will certainly require that prosecutors challenge incorrect applications of the law and educate the grand jury regarding the scope of its legal analysis. Remaining neutral may be unnerving as it requires giving up a degree of control over the process—but that's the entire point. ❇

Endnotes

[1] https://www.washingtonpost.com/graphics/investigations/police-shootings-database.

[2] *Garrity v. New Jersey*, 385 U.S. 493 (1967).

[3] *Kastigar v. U.S.*, 406 U.S. 441 (1972).

Dallas County's Expunction Expo

Since 2017, the Dallas County Expunction Expo ("Expo"), an annual community outreach project sponsored by the Dallas County District Attorney's Office and District Clerk's Office, has helped almost 1,000 people legally clear their criminal records.

By Annissa Obasi (left) and Karen Wise
Assistant Criminal District Attorneys in Dallas County

As we prepare for our fifth Expo, we are excited about the local collaborations and national partnerships that have developed from this event, as well as the synergy that has extended to similar events through our conversations with prosecutor offices and stakeholders in Collin, Harris, Kaufman, Tarrant, and Travis Counties.

The purpose of our Expo is to help people with eligible Dallas County criminal offenses legally clear their records. As part of this event, we match these individuals with attorneys who volunteer to assist them with preparing and filing the legal documents required to seek an expunction, often at no cost to the Expo participant. In addition to helping people get a fresh start, this event has provided an opportunity to partner with many entities, including local law schools, criminal justice-focused nonprofits, the Dallas County Public Defender's Office, the City of Dallas City Attorney's Office and Community Courts, area attorneys, and local and national law firms and corporations.

"We are very pleased to host this annual event," says Dallas County Criminal District Attorney John Creuzot, "because we know that having a criminal record is often an impediment that prevents people from getting a good job, quality housing, or advanced education. It is our hope that the people we help during the Expo are able to put their past behind them and go on to lead happy, healthy, productive lives."

The Expo also serves as a platform to educate the community about our state's oft-misunderstood expunction law—many people who attended our first Expo believed an expunction was like an exoneration! Per Texas statute, individuals who have offenses on their criminal record may qualify for an expunction if the statute of limitations to prosecute the offense has expired (subject to a few exceptions) *and*:

1) they were arrested but a charge was never filed or was no-billed by the grand jury;

2) they have a criminal charge that was dismissed without any type of community supervision or probation prior to dismissal, except for Class C offenses;

3) they were acquitted on the charge by a judge or jury (usually by a finding of not guilty), or appellate court; or

4) they were convicted of a crime but later pardoned by the Governor of Texas or the President of the United States.

An offense is not eligible for an expunction if:

1) the case is still pending;

2) the individual was convicted in the case s/he wants expunged, even if s/he just paid a fine (convictions on other cases do not prevent expunction, unless they are from the same arrest);

3) the individual was placed on probation, community supervision, or deferred adjudication for any felony or Class A or B misdemeanor s/he wants expunged, even if the case was later dismissed (Class C deferred adjudication is the only exception); or

4) the individual was convicted or received any kind of probation on another felony offense arising from the same arrest.

Three parts

The Dallas County Expunction Expo consists of three parts: the pre-screening period, pre-qualification clinic, and graduation ceremony.

To help as many people as possible during the Expo, our Expunction Division approves any offense eligible for expunction in which the statute of limitations for the offense will run by December 31 of the following year.

During the pre-screening period, individuals seeking an expunction are sent to a page on the District Clerk's website containing information about expunctions and the Expo. People who believe they qualify for an expunction can provide information about their criminal history via a Participant Information Form (PIF) accessible by a link on the page. (Prior to the pandemic, paper forms were available at various locations throughout Dallas County.) These forms are delivered to attorneys in our office's Expunction Division, who review them.

To help as many people as possible during the Expo, our Expunction Division approves any offense eligible for expunction in which the statute of limitations for the offense will run by December 31 of the following year. On average, our Expunction Division has identified eligible offenses on approximately 50 percent of the PIFs they review; generally, half of those who submit PIFs have offenses that do not qualify for expunction. Last year, nearly 80 percent of those who submitted a PIF were members of communities traditionally over-represented in the criminal justice system, including black, indigenous, and other people of color.

Based on anecdotal observations of these requests, we believe a significant number of those offenses that are ineligible for expunction may qualify for non-disclosure; however, our event does not currently include non-disclosure assistance. In response to this and in keeping with his criminal justice system reform efforts, DA Creuzot formed a Non-Disclosure Division in our office in August 2020. This division, which functions like the Expunction Division, now channels non-disclosure filings to a group of attorneys with subject-matter expertise in this area. Future plans for this new division include either partnering with the Expunction Expo to include non-disclosures or hosting a separate, dedicated event to assist those with offenses potentially eligible for non-disclosure.

If a person's case appears to merit expunction based on the pre-screening procedure, he or she is invited to participate in the next part of the Expo: the pre-qualification clinic (PQC). Those who attend are assigned a volunteer attorney who meets with them to review their record. If the attorney determines a client's offense qualifies for an expunction, the attorney completes and files expunction pleadings.

Because prosecutors from our office are unable to serve as volunteer attorneys (see Texas Code of Criminal Procedure Art. 2.08), we initially reached out to criminal justice clinic contacts at local law schools, criminal defense attorney associations, and the private bar in planning the Expo. To ensure that Expo participants receive the best possible representation, the event's schedule includes continuing legal education (CLE) training conducted by Expunction Division Chief Karen Wise, one of the co-authors of this article. Over the years, the CLE training, which occurs about a month before the PQC and is customized for our volunteer attorneys, has helped us recruit more civil attorneys, many of whom do not regularly file expunctions or are completely unfamiliar with this area of law but who are searching for *pro bono* opportunities. In fact, many of our volunteers are civil attorneys who have never filed an expunction prior to the Expo. The training not only covers current expunction law but also includes tips about the practical aspects of filing expunction petitions, such as how to correctly complete the forms and how to find public records that provide the information required for the filings.

Participation from the criminal defense bar has also grown. In 2019, the Dallas County Public Defender's Office, under the leadership of Chief Public Defender Lynn Pride Richardson, became an Expo partner, and 20 assistant public defenders volunteered to represent Expo clients. Many of these assistant PDs have shared how gratifying it is to help clients who generously express appreciation for their legal assistance.

In 2020, the Expunction Division established a dedicated telephone line, affectionately known as the Bat Phone, as additional support for the volunteer attorneys. Volunteers are invited to call anytime they have questions. This phone is monitored every workday from the previous training through the filing of PIFs and up until Expo Graduation Day. (More on graduation in a bit.)

The PQC was held in person the first three years. Year four found us in the midst of the pandemic. Fortunately, the increased access and use of Zoom and Microsoft Teams allowed us to continue with the Expo while keeping everyone safe. An unexpected benefit was that attorneys from other parts of the country whose firms had Dallas offices volunteered for the virtual pre-qualification clinic and were able to attend the virtual graduation ceremony.

Another silver lining of the COVID cloud was the experience we gained in transitioning the Expo from an in-person to a virtual event. We were able and happy to share that experience with members of the legal community in neighboring Tarrant County, where an in-person expunction and non-disclosure clinic has been held for over 15 years.

The Expo culminates in a graduation-style ceremony where the people whose expunctions are being granted are acknowledged, if they wish, and celebrated. The graduation ceremony also provides an opportunity to thank the many people and organizations that help make the Expo a success. For year five of our Expo, we are planning a virtual PQC and an in-person graduation ceremony.

Lots of participation

As an Expo co-facilitator, the Dallas County District Clerk's Office plays an essential role. District Clerk Felicia Pitre and her staff prioritize Expo expunction petitions. Absent this expediting, it would be impossible to conduct the Expo within the designated timeframe. Additionally, Ms. Pitre has provided pivotal guidance regarding the use of Affidavits of Inability to Pay Costs, specifically Rules 145 and 202 of the Texas Rules of Civil Procedure. Armed with this information, we may effectively assist people who would otherwise be unable to pay the filing fees and court costs for an expunction.

Through this event, we have developed partnerships with Legal Aid of Northwest Texas (LANWT), the University of North Texas (UNT) Dallas School of Law, and the Southern Methodist University (SMU) Dedman College of Law, which have third-year law students assist Expo clients during the PQC under the supervision of a licensed attorney. In addition to attorneys from the Dallas County Public Defender's Office, who graciously volunteer for the Expo, the Dallas Bar Association, J.L. Turner Legal Association, and Christian Legal Society are among the organizations whose members assist people pro bono with clearing their criminal records. Our law firm partners include Akin Gump, Jones Day, Katten Muchin, Locke Lord, Perkins Coie, and the Cochran Firm. Corporate partners include general counsel from American Airlines and Toyota. Last year, we were delighted to have over 100 attorneys and law students participate in the Expo.

The Dallas City Attorney's Office and Community Courts have partnered with the Expo since its beginning to assist citizens with clearing city violations, as well as identifying participants with Class C offenses that may be eligible for expunction.

Our Expo partners also include the Texas Offender Reentry Initiative (TORI) and Unlocking Doors, two Dallas-area criminal justice-focused nonprofit organizations.

For smaller counties

Admittedly, most district and county attorney offices do not have the volume of expunction filings, nor the personnel or community resources of Dallas County. However, we believe a record-clearing event is feasible in a county of any size. Smaller counties might try conducting a simple expunction law community education campaign, hosting an expunction-law CLE for local attorneys, creating some type of pre-screening event or online process, or even partnering with the local bar or law school clinic as an attorney referral source for those seeking expunctions. We know firsthand that whatever efforts are made to help people legally clear their criminal records will result in an abundance of goodwill for all involved.

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