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The Texas Prosecutor

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

A prosecutor's immigration toolkit

Whenever I speak on the intersection of immigration and criminal law at CLEs, I play a video from one of my favorite TV shows, *Supernatural*.

By Lauren Sepulveda
Assistant Criminal District Attorney in Hidalgo County

Dean Winchester, one of the lead characters, is asked how he and his sidekick brother[1] know about a rare supernatural being, and he retorts, "Well, we know a little about a lot of things—just enough to make us dangerous."[2]

I play this clip because my goal in teaching about "crimmigration" (criminal law + immigration) is essentially that—to teach the average prosecutor a little about a large, confusing, and ever-evolving subsection of the law. The field of crimmigration can be so complex and nuanced that it would be inefficient for every prosecutor in Texas to take a deep dive into the subject. However, because immigration issues have increasingly woven themselves into the disposition of our criminal cases, it is essential that prosecutors have a basic understanding of how these two areas of the law intersect and can affect our victims, witnesses, and the defendants we are prosecuting. That is the purpose of this article—to give prosecutors a basic toolkit of immigration knowledge that will aid us in seeing that justice is done.

The term "crimmigration" was coined by legal scholar Juliet Stumpf in 2006 and refers to the complex intersection of immigration policies and criminal laws that began to emerge in the United States during the 1980s.[3] The intersection began with the passage of the Anti-Drug Abuse Acts of 1986 and 1988 during the Reagan administration and has steadily continued since then under both Republican and Democratic presidents.[4] These new legislative acts addressed both crime and immigration, which led to an overlap of the roles of law enforcement agencies and immigration agencies and to greater coordination between the two.[5] This legislation also created a broad category of criminal activity called "aggravated felonies," which can lead to deportation for aliens.[6]

Differing definitions

One of the hardest concepts to grasp when learning crimmigration is that both fields use some of the same terms, but in each field those terms can have completely different meanings. To understand how a disposition of a criminal case

Continued on page 19

Online *Brady* training for law enforcement

TDCAA's online *Brady* training by all accounts has been a great success.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

It is a cutting-edge interactive video, and the participation of Michael Morton in the project really has made this training something special. Thanks to the Foundation and support from the Court of Criminal Appeals, we can continue to offer the training for free.

There's a great new development with this webinar. Law enforcement agencies have seen it and are taking an interest in making sure their officers take the course. We have just worked out a deal with the Austin Police Department (APD) to share the training on its online training platform. APD is going to require all of its officers to complete the course and will even get TCOLE credit for it (something that logistically we just couldn't do). If you think your law enforcement agencies would be interested in doing the same, give me a call. APD has been a good partner in this effort, and I think they are eager to share their experience if it works well! Me, I see it as enlightened self-interest—the whole state benefits greatly if prosecutors and law enforcement are on the same page when it comes to *Brady* and the Michael Morton Act.

Victim Assistance Coordinator video

I am happy to announce another exciting project funded by the Foundation. You all know that **Jalayne Robinson** is TDCAA's Victim Services Director, and with the support of the Foundation, she has continued to crisscross the state bringing valuable training to our victim assistance coordinators (VACs). One of the challenges, though, is to educate prosecutors, especially new ones, on just how valuable VACs are as a resource. Victim assistants are truly a critical member of the team, and prosecutors need to know how to make full use of their skills.

With that in mind, the Foundation is paying for a training video designed to educate prosecutors on the VAC's role and how VACs can contribute to successful outcomes in court and for crime victims. It will be a great training tool that we will post on the TDCAA website, use at seminars and events, and that YOU can use any time you wish. Thanks to Jalayne and to **Diane Beckham**, TDCAA Senior Staff Counsel, for spearheading this project! ❇

About *The Texas Prosecutor*
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Table of Contents

The homelessness crisis, part two

In the September–October 2019 issue of this journal, I wrote about criminal justice and the homelessness crisis,

By Rob Kepple
TDCAA Executive Director in Austin

that no longer are county jails the default housing option for homeless people with mental health or drug addiction problems. That is good public policy, but the consequence has been to lay this problem squarely at the feet of everyone—literally and figuratively. I wondered how the public would respond.

The response has come swiftly. As the public demands action and cities such as Austin struggle to find solutions, Governor Greg Abbott weighed in to clean up homeless encampments on highway rights-of-way and to invest resources by developing a large homeless camp operated by the state. (Here's an article about it: www.texasobserver.org/austin-homeless-greg-abbott-mega-tent/.) The camp will remain open until a coalition of businesses, churches, and nonprofits can raise an estimated $14 million for a homeless shelter to be opened in 2020 (https://cbsaustin.com/news/local/state-proposes-5-acre-site-for-temporary-homeless-camp-in-se-austin). In addition, the City of Austin is buying and renovating an old Rodeway Inn to serve as a temporary shelter (www.statesman.com/news/20191114/council-approves-purchase-of-motel-for-homeless). Those are great starts to make sure people are safe and off the streets, but I am hoping that we don't just take the "out of sight, out of mind" approach. Here's to hoping that our leaders continue to invest resources in mental health services and addiction recovery.

As for Seattle, the focus of the "Seattle is Dying" YouTube video, leaders have re-instituted a role for criminal law enforcement, at least when it comes to what they have dubbed "prolific offenders." The new initiative will include a new treatment center with case management and behavioral health services, including jail release services for inmates who need to be connected with support (www.seattletimes.com/seattle-news/homeless/looking-to-quell-downtown-disorder-seattle-and-king-county-announce-plan-for-repeat-offenders). All in all, it is gratifying to see the public spotlight on problems that for so long only the criminal justice system seemed to grapple with!

Mental health resources at your fingertips

Texas judges have been pretty active this year developing new strategies to handle people at the intersection of mental health and the criminal justice system. First, the Court of Criminal Appeals published the *Texas Mental Health Resource Guide*, a comprehensive listing of state and county mental health services and resources. The guide, cross-indexed by resource type, region, county, and individual practitioner by city, is a terrific help to courts and practitioners looking to identify resources near them. You can find it at www.txcourts.gov/media/1444700/texas-mental-health-resource-guide-email-corrected-09092019.pdf.

In addition, the Texas Judicial Commission on Mental Health has published the *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book*. This is a law and practice guide organized around "intercept" points in the criminal justice system for people with mental health issues or intellectual or developmental disabilities. In addition, the bench book comes complete with a robust forms bank. Access the bench book at http://texasjcmh.gov.

Finally, thanks to a grant from the Court of Criminal Appeals, Texas prosecutors will receive a new TDCAA publication on mental health issues in prosecution. The book, authored by Texas prosecutors who are experts in the field, will cover every aspect of prosecutors' duties when it comes to defendants with mental health issues, from pretrial onward. Keep an eye out for it this summer!

Report from the multi-state human-trafficking summit

In the middle of November, a Texas delegation traveled to Lake Charles, Louisiana, for a multi-state summit on sex trafficking. Comal County CDA **Jennifer Tharp**, Rockwall County CDA **Kenda Culpepper**, Brazos County DA **Jarvis Parsons**, Galveston County CDA **Jack Roady**, and I represented Texas and met with delegations from Louisiana and Mississippi. The Texas delegation was led by **Andrea Sparks**, the Director of the Governor's Child Sex Trafficking Team, and former district judge and retired Congressman **Ted Poe** (there's a photo of us, below). It was a great opportunity to share information about the investigation and prosecution of human trafficking cases in the region. Hot topics of discussion included how human trafficking advocates may assist victims and increase cooperation with the prosecution, and how prosecution might use forfeiture by wrongdoing in these cases.

Perhaps the most interesting session was over lunch, where McLennan County Sheriff Deputy **Joe Scaramucci** demonstrated just how the "demand side" of the equation worked. Joe, using his laptop at the lunch table, advertised the prostitution services of a 16-year-old girl on a local website. Within an hour a man had responded to the ad and was on his way to meet the "girl" at our summit. Fortunately, the Lake Charles district attorney was at lunch and quickly alerted local police to await the predator's arrival. Turns out he was also a felon illegally in possession of a firearm, and he was taken into custody without incident.

We will be bringing you a lot more training and information on resources to address trafficking in the next year. Thanks to the governor's office and Judge Poe for leading the team to bayou country!

Welcome, Mark Penley

The Office of the Attorney General recently announced the appointment of a new Assistant Deputy Attorney General for Criminal Justice, **Mark Penley**. I had the pleasure of visiting with Mark recently, and I am very happy he is at the criminal justice helm at the AG's Office. Mark, an Air Force Academy graduate, civil practitioner, and former Assistant U.S. Attorney in Dallas, knows what it takes to run a prosecutor shop and work with others as a team. He has committed to the mission of assisting prosecutors when needed and working side by side with local prosecutors on tough cases like human trafficking. Welcome to the team, Mark!

Thanks to Leslie Dippel

Congratulations to Assistant Travis County Attorney **Leslie Dippel**, who was recognized in the State Bar Director Spotlight segment of the November 2019 issue of the *Texas Bar Journal*. Leslie is the director of civil litigation at the Travis County Attorney's Office and the current Chair of TDCAA's Civil Committee. She is an accomplished writer and trial attorney, as well as a speaker at many of our TDCAA conferences. As the bar director for Region 9, she is certainly a great ambassador for our profession. In the article she offers insight about being in our profession and what it has meant to her, especially when she discussed the three pillars of effective leadership: skills, issues, and relationships. Thanks for being part of the TDCAA family!

RIP to Kit Bramblett, progressive prosecutor

I want to take a moment to honor a figure in Texas prosecution, **C. R. "Kit" Bramblett**, who recently passed away. A cursory Internet search will reveal his story as a fascinating West Texas rancher and Hudspeth County Attorney who displayed hospitality toward would-be gold miners and who once donated water rights on his ranch to the Texas Water Trust.

What you may not know is that Kit was an early progressive prosecutor in Texas. His policies on the prosecution of marijuana came to light in 2011 when he refused to prosecute **Willie Nelson** for possession after a search of his tour bus at the border patrol checkpoint in Sierra Blanca turned up some pot. Kit famously reduced the case to a Class C misdemeanor because, as he

Continued in the green box on page 7

Within an hour a man had responded to the "ad" for sex with a 16-year-old girl and was on his way to meet the "girl" at our summit. Fortunately, the Lake Charles district attorney was at lunch and quickly alerted local police to await the predator's arrival. Turns out he was also a felon illegally in possession of a firearm, and he was taken into custody without incident.

Collaboration is key in 2020

I am excited to take the torch from Jarvis Parsons, Jennifer Tharp, Randall Sims, and those before me in becoming the 82nd President of the Texas District and County Attorneys Association.

By Kenda Culpepper
TDCAA President & Criminal District Attorney in Rockwall County

I follow in the footsteps of greatness (yes, I said "greatness") and fully understand the responsibility I have to continue the accomplishments of my predecessors and the TDCAA staff. And while such great work has been done already, I look forward to making my mark on the traditions of this remarkable organization.

I recently participated in TDCAA's Fundamentals of Management Course with many of my supervisors at the Rockwall County Criminal District Attorney's Office. I plan to talk more about the course in a later article, but if you haven't had an opportunity to take the course yet, you really should. Before the class starts, all participants take two personality tests. And while I'll spare you the opportunity to psychoanalyze me too much, I will share one finding. On the conflict management portion, I scored really high in collaboration and really low in compromise. At first I was confused—aren't those two the same things? Slowly, I realized they weren't. "Compromise" means working together to achieve a goal where everyone gives up something for the whole to be successful. (That's a "Kenda definition," by the way, and may explain why I scored low in this category.) "Collaboration" means working together toward a goal where everybody wins. Anyone who knows me understands why I would have scored higher on collaboration than compromise. And while I'm not quite sure that lopsided score is technically a strength, I am making plans to embrace who I am and collaborate.

Here are a handful of ways I can see Texas prosecutors and staff collaborating with each other and the allied professionals around us in the next year.

Regional meetings

One of my favorite things to do during a conference is to get into a room and just talk and share ideas. I learn so much about how I want to run my office by listening to others, and I love learning about creative projects and trial strategies. I'd like to expand this idea by encouraging all TDCAA regional directors to plan a luncheon or event with the elected prosecutors in their regions. This type of outreach used to be a more commonplace occurrence, and we are formally reinvigorating the idea. To that end, Cherokee County District Attorney Elmer Beckworth led a successful regional meeting in Region 6 a couple of months ago.

Every region has a distinct personality, and area prosecutors often share common issues and constituencies. These meetings will be a wonderful opportunity to allow neighboring prosecutors to network and get better acquainted so they can rely on each other in the future. Electeds can then take ideas, solutions, and collaborations back to their offices to determine what works best for their own particular jurisdictions. I have personally experienced the benefits of being able to reach out to my neighbors on common cases and defendants, local partnerships, special prosecutions, political issues, and administrative quagmires. I have also seen the prosecutors and staff in my office capitalize on these collaborations to become more productive, streamlined, and forward-thinking.

An added benefit is that these meetings will be coming to your area. I know that some prosecutors and staff have difficulty traveling to the larger conferences, especially when they are one- and two-person offices. These meetings will be specifically for you and about you. I look forward to personally attending many of them, and I want to collaborate with as many of you as I can. A TDCAA staffer may be able to participate as well to answer questions that affect all offices, such as questions on salaries, longevity pay, administrative fund issues, and the like.

I would also like to include a networking opportunity with local legislators at some point during these regional meetings. Now is the time to be creating and cementing these relationships, rather than waiting until the frenetic lunacy of the session. We learned in the last legislative term that prosecutors are a force to be reckoned with when we band together with a unified voice. We also learned that legislators listen, especially to the elected and specialized prosecutors within their own districts. I want to leverage this impressive force as we move toward the next session.

The legislature

I have recently spoken to a number of legislators who are looking forward to meeting with us during the interim. Again, it's important to create these collaborative relationships now—because it is a two-way street. Local prosecutors should be a vocal resource when legislators have questions about criminal justice issues. They should be able to pick up the phone and get answers from us, just as we hope they will pick up the phone when we need support from them.

We should be collaborating as an organization as well, though. Whether we are looking at new legislation to make justice more accessible or being proactively defensive on issues that will make our jobs harder, we should be talking amongst ourselves now during the interim between sessions. TDCAA has an incredible ability to communicate with our members. We need to focus that resource to continue successful conversations from the last session and to prepare for that unified voice in the future. We also need to collaborate with our partners to find common ground so that everyone can be successful.

Partnerships

TDCAA already enjoys collaborating with many statewide and national partners, including law enforcement, the Texas Council on Family Violence, the Children's Advocacy Centers of Texas, the Texas Forensic Science Commission, the Texas Association of Counties, the National District Attorneys Association, and so on. This past

explained, "I ain't gonna be mean to Willie Nelson." He also publicly hoped that Willie would sing "Blue Eyes Crying in the Rain" in the courtroom, which didn't happen.

But he wasn't just giving a beloved singer-songwriter a break. Kit was interviewed following the case (read the article at www.texasnorml.org/the-raw-story-willie-nelsons-prosecutor-wants-to-see-marijuana-decriminalized) and made it clear that he typically reduced such cases to Class Cs and supported marijuana decriminalization. Who knew that when the governor announced his support for reducing possession of small amounts of marijuana to a Class C, he was following Kit's lead?! ❇

Recent gifts to the Foundation*

Richard Alpert
Diane Beckham
Elmer Beckworth, Jr.
Bobby Bland
Joe Edd Boaz
Alan Curry
Michael Guarino II *in memory of Larry Gist*
Lynn Hardaway
Lee Hon
John Hubert
Rob Kepple *in memory of Larry Gist*
Rob Kepple *in memory of Kit Bramblett*
Bud Kirkendall *in memory of Larry Gist*
Doug Lowe
Cheryll Mabray
Sonny McAfee
Lyn McClellan *in honor of Calvin Hartman*
Jana McCown
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Greg Miller
Sunni Mitchell
Kim Ogg
Jacob Putman
Julie Renken
Ross Rommel Jr.
William Shettle, III
Elizabeth Toben
Robert Vititow
Justin Wood

* gifts received between October 4 and December 6, 2019

We learned in the last legislative term that prosecutors are a force to be reckoned with when we band together with a unified voice. We also learned that legislators listen, especially to the elected and specialized prosecutors within their own districts.

summer, we even embarked on a new and successful collaboration with judges regarding pay-raise issues.

TDCAA leadership also diligently looks for opportunities to strengthen collaborative relationships. Several weeks ago, I had a great conversation with one of the regional directors at the Texas Department of Public Safety, and we have agreed to bring key members of our organizations together to have a frank conversation about what we can do to improve the criminal justice system. Additionally, in response to last legislative session's dust-up over jurisdictional issues, we have begun productive and open dialogues with key decision-makers at the Office of the Attorney General, including the new Deputy Attorney General for Criminal Justice, Mark Penley, to start collaborating on issues such as human trafficking. Prosecutors, law enforcement, and key advocates across the state know that our strength is magnified when we can present a united front. At the end of the day, everyone wants what is best for criminal justice—we just need to make sure that we are effectively communicating and collaborating.

State Bar of Texas (SBOT)

For the first time in a while, prosecutors are getting a lot of attention from the State Bar. This development is nurtured by the fact that prosecutors are more involved: Six of us sit on the Criminal Justice Section Board of Directors, which has become more influential in recent years; Travis County ACA Leslie Dippel is a Director on the SBOT Board of Directors; prosecutors have recently taken an active role on a number of key SBOT Committees; and the incoming President of the State Bar of Texas, Larry McDougal, is a former Texas prosecutor.

This attention creates another opportunity to collaborate for the benefit of TDCAA members. At TDCAA Executive Director Rob Kepple's invitation, SBOT President Randy Sorrels, Incoming President Larry McDougal, Executive Director Trey Apffel, and Board Chair Jerry Alexander came to the TDCAA Annual Criminal & Civil Law Update in September, and McDougal and Alexander presented again at the Elected Prosecutor Conference in December. They enthusiastically spoke about their desire to work together with Texas prosecutors.

I would like to capitalize on this opportunity by encouraging the State Bar to appoint more prosecutors to State Bar Disciplinary Committees. While I'm sure civil lawyers do a fine job on these disciplinary committees, everyone would benefit from having members with criminal law experience hearing issues against criminal law practitioners. At December's Elected Conference, I invited those present to let us know if they were interested in serving on a regional disciplinary committee, and I was overwhelmed by the response. Incoming President Larry McDougal and I have already started collaborating on these potential appointments, and he has agreed to be personally involved.

If you are interested in getting more active in any aspect of the State Bar of Texas, let us know. There are plenty of opportunities, and your involvement helps prosecutors across the state.

TDCAA staff and Board directors

Lastly, I look forward to continuing a productive collaboration with TDCAA staff. There is no question that the men and women who work for TDCAA provide stellar services for prosecutors, investigators, VACs, and key personnel. Whether it is producing nationally recognized training, helping with victim assistance services and appellate issues, writing and disseminating professional publications, producing one of the top prosecutor journals in the country, or navigating through the labyrinthine halls and issues of the Texas Legislature, our staffers are second to none. In addition, the dedicated Directors of the TDCAA Board and Texas District and County Attorneys Foundation Board are great groups who work well together and respect one another in their quest for a common goal: to represent and protect the interests of prosecutor offices across Texas.

TDCAA's goal is to help every prosecutor office work toward success. That success takes labor, ethics, professionalism, passion—and, yes, collaboration—on our part, and TDCAA is here to train and support. I am proud to be a member of TDCAA and excited to take a leading role in this organization. I hope you will join me in our quest to keep Texas at the leading edge—and always on the right side—of criminal justice. ❇

Law & Order Award winners

TOP PHOTO: Lieutenant Governor Dan Patrick (R-Houston) (right) appeared at our 2019 Elected Prosecutor Conference in Lakeway to accept TDCAA's Law & Order Award and give a brief yet gracious address to the attendees. Governor Patrick accepted the award in recognition of his support of Texas prosecutors on DWI legislation and various other criminal justice issues last session. He is pictured here with TDCAA Board representatives Jennifer Tharp (left), CDA in Comal County, and Kenda Culpepper (center), CDA in Rockwall County.

BOTTOM PHOTO: State Representative Andrew Murr (R-Junction) (center) was also honored with TDCAA's Law & Order Award at the 2019 Elected Prosecutor Conference in Lakeway. He is pictured with TDCAA Board representatives Jennifer Tharp (left), CDA in Comal County, and Kenda Culpepper (right), CDA in Rockwall County. Representative Murr accepted the award in recognition of his work last session on the House Criminal Jurisprudence and Juvenile Justice Committees and his successful passage of House Bill 3582 authorizing deferred adjudication for certain eligible DWI offenders.

Helping those who have lost loved ones to crime

As victim assistance coordinators (VACs), assisting surviving kin of deceased victims is one of our most difficult and emotional job duties.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

In this article, I hope to provide information on how we can be of service to those who have recently lost someone they loved to crime.

Who are close relatives?

Art. 56.01 of the Texas Code of Criminal Procedure defines a "close relative of a deceased victim" as a spouse, parent, brother, sister, or child of the deceased victim. As such, there may be numerous survivors who are considered "close relatives" of a deceased victim, and all of them are entitled to victim services through the prosecutor office.

Offering compassion

Providing support and assisting survivors of deceased victims involves satisfying our statutory duties (which I discuss later in this column) but most importantly should include emotional support and active listening. Compassion, understanding, and "putting yourself in their shoes" for sometimes months or years until the criminal case has been disposed is all part of our job as VACs. I realize how challenging it can be.

VACs are not usually professional counselors so becoming familiar with the range of emotions can help you understand what someone may be going through. Not everyone processes losing a loved one in the same way, and survivors could exhibit a range of emotions: anger or rage, fear or terror, frustration, confusion, guilt and self-blame, shame and humiliation, and grief or sorrow. Many times, most of our interaction with crime victims is by telephone, and I know it is hard to determine which emotional reaction someone is having over the phone. My advice is to do as much listening as you can without talking, take notes during the conversation, and later analyze which emotion the survivor might be exhibiting. Understanding where they are in the coping and healing process will help you guide them through the criminal justice system.

I am here to tell you I know this is hard. So many times when I was a VAC, survivors came across as very demanding, mad, or frustrated during our very first conversation. Please, please have patience and empathy during these interactions. Try to understand what they are going through and what message they are trying to deliver, and remember that their emotions are not directed at you. Those emotions are a result of the situation, a situation they have not asked for. Also keep in mind that you are one of many people they are having to interact with because of this crime. They could be talking with law enforcement, the funeral home, and possibly the media; they could have had to arrange for cleanup at the crime scene or dealt with property destruction, and all of it is exhausting. Sometimes it is very hard for a survivor to move forward until the criminal case is finalized.

Difficult questions

Survivors usually have many requests, such as:

- "I would like to see the crime scene photos."
- "I want to know more about how the crime happened."
- "I want the property returned the police took as evidence."
- "I want to meet with the prosecutor right away."
- "Is there is financial assistance for help with funeral expenses?"

A survivor may also have lots of "Why?" questions that you are not prepared (nor able) to answer.

Please tell them you realize they have many questions. Answer those questions that you can, and take notes as they talk so you can relay additional questions to the prosecution team or try and track down answers for those harder questions. Don't feel like you have to answer everything right then and there—none of us has all the answers! Treat the survivors with respect by admitting you don't know but saying you will do your best to find out. Don't promise them an answer by a certain date or time, though, because in our busy offices, sometimes it may take several days to get back to someone. You don't want to make promises you can't keep.

Sample language

The language you use when talking with a survivor is very important. I know it is difficult to find the right words when speaking to someone who has lost a loved one. Allow them to talk about that person, cry about him or her, and maybe even laugh at a good memory of that person. If the survivor is reminiscing, don't be afraid to use the victim's name in your conversation. Believe it or not, survivors want to hear their loved one's names. It reassures the survivor that you realize the deceased was a real person, not just a name in an offense report or on an indictment, and that he or she was very important person to them.

Here are a few examples I suggest:

- "I want to introduce myself as the Victim Assistance Coordinator assigned to this case, and I will do my best to keep you up to date on upcoming events."
- "I appreciate you talking with me today."
- "I am so sorry for your loss."
- "I cannot imagine your grief."
- "It is not your fault."
- "I will do my best to help you through the process. I realize it is complicated, and I will try and help you understand."

No two crimes are exactly alike, and the dynamics of surviving families are all different. I have seen families become divided after a crime, and I have seen families become closer. I have seen families move away and get divorced. I have seen families go straight to the media (including social media) in a crime's aftermath, and I've also dealt with families who are appalled by the media and want no contact at all with reporters. My best advice is to get to know the survivors while offering victim services—the earlier, the better.

Statutory duties

VACs' statutory duties to close relatives of deceased victim include:

- a cover letter stating:
  * cause number and court to which the case is assigned;
  * name, address and phone number of the VAC assigned their case; and
  * a request for current contact information; plus
- Crime Victim's Rights Brochure;
- explanation of the Crime Victims' Compensation (CVC) program offered through the Office of the Attorney General and an offer of assistance and information on how to apply. (A CVC quick reference guide is available at www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/CVC_QuickReferenceGuide.pdf.)

Providing victim impact statement (VIS) forms, an explanation, and an offer of assistance in completing the VIS is also part of our jobs. Close relatives, parents, or guardians of deceased victims can submit this statement, as can others (as outlined in CCP Art. 56.01). The most current version of the VIS is available at www.tdcj.texas.gov/publications/victim_impact_statement.html#vis

Prepping for trial

Many prosecutors allow VACs to be present during pretrial interviews or family meetings, which are excellent opportunities for VACs to determine the survivors' needs and emotions. With large families, prosecutors sometimes ask them to designate a single spokesperson as the contact for correspondence from the prosecutor office. Of course, every family is different; once you know some of the family dynamics, you can determine if a spokesperson is a possible way to successfully interact.

Preparing a survivor for trial and preparing ourselves as VACs to assist them is very important. Ideally, a VAC who is involved in trial preparation with the prosecutors and knows what to expect in the courtroom will be able to assist sur-

Compassion, understanding, and "putting yourself in their shoes" for sometimes months or years until the criminal case has been disposed is all part of our job as VACs. I realize how challenging it can be.

The language you use when talking with a survivor is very important. I know it is difficult to find the right words when speaking to someone who has lost a loved one. Allow them to talk about that person, cry about him or her, and maybe even laugh at a good memory of that person.

vivors when it is time for trial. We should not be caught off-guard during the presentation of the criminal case and emotionally fall apart in the courtroom because we didn't know what to expect. Educate yourself beforehand, and ask questions of the prosecution team, a trusted investigator, or me (I'm at Jalayne.Robinson @tdcaa.com). I would also recommend a publication called *Murder: This Could Never Happen to Me* from the Texas Department of Criminal Justice's Victim Services Division available at www.tdcj.texas.gov/documents/Murder_Never_Happen_to_Me.pdf. It is a handbook for families of murder victims and those who assist them.

I hope this information is helpful for VACs who assist surviving relatives who have lost someone they love to violent crime.

TDCAA Key Personnel/Victim Services Board Elections

At the Key Personnel & Victim Assistance Coordinator Seminar in November, board elections were held for the South Central Area (Regions 4 and 8) and East Area (Regions 5 and 6 of the Key Personnel–Victim Services (KP–VS) Board, which prepares and develops operational procedures, standards, training, and educational programs.

Katie Etringer Quinney, who works in the 81st Judicial District Attorney's Office in Floresville, will be the South Central representative, and Mona Jimerson, who works in the Gregg County Criminal District Attorney's Office in Longview, will represent the East Area. Katie and Mona were elected to serve on the KP–VS Board beginning January 1, 2020, for a term of two years. Welcome to them both! Additionally, Stephanie Lawrence of the Burleson County DA's Office was elected Chairperson.

If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. Elections are held each November at our TDCAA Key Personnel & Victim Assistance Coordinator Seminar. To be eligible, each candidate must have the permission of the elected prosecutor, attend the elections at the annual seminar or be appointed, and have paid membership dues. If you have any questions, please email me at Jalayne.Robinson@tdcaa.com.

KP&VAC Seminar

The Embassy Suites Hotel & Conference Center in San Marcos was the venue for a very successful seminar for key personnel and victim assistance coordinators from across Texas. More than 200 attendees gathered for the training.

This seminar is held annually and provides key personnel and VACs from prosecutor's offices across Texas a chance to network and get new ideas from others who do similar jobs in other counties. It is a very worthwhile experience for all. Mark your calendar for next year's seminar to be held November 11–13 at the Sheraton Hotel & Conference Center in Georgetown.

Award winners

Suzanne McDaniel Award. Veronica Brunner, VAC in the Denton County Criminal District Attorney's Office, was honored with the 2019 Suzanne McDaniel Award for her work on behalf of crime victims and her service to prosecution and to TDCAA. Veronica is the Chief VAC in the Denton County CDA's Office and has spent the past 20 years helping crime victims in Denton County.

During her career, she has assisted prosecutorial staff on some of Denton County's toughest, most violent, and emotionally draining cases. She works tirelessly in her daily duties as a VAC and makes additional time to organize donations to needy families, including the office's annual Angel Tree program. She is also great at coordinating, preparing, and facilitating the county's Crime Victims Rights Week program each year, and she has also served as secretary/treasurer and a regional representative on the KP–VS Board.

Veronica exemplifies the qualities that were so evident in Suzanne McDaniel herself: advocacy, empathy, and a constant recognition of the rights of crime victims.

Congratulations, Veronica!

Veronica Brunner

Oscar Sherrell Award. The Oscar Sherrell Award for service to the association, which is awarded each year by each section of TDCAA, is given to recognize those enthusiastic folks who excel in TDCAA work. This award may recognize a specific activity that has benefited or improved TDCAA or may recognize a body of work that has improved the service that TDCAA provides to the profession.

This year's recipient is Windy Swearingen, an administrative assistant in the Brazos County DA's Office. She also currently serves on TDCAA's KP–VS Board as a designated KP Representative and has served on the KP Board in the past as well. Congratulations, Windy, and thank you for your service to TDCAA!

PVACs. This year's recipients of Professional Victim Assistance Coordinator recognition are Jane Lowery and Juanita Blanchard. Jane has worked as a VAC in the Montgomery County District Attorney's Office for four years. She wears many hats in that office, including handling their courthouse facility dog, managing felony and misdemeanor caseloads for victim services, and collaborating with community agencies.

Juanita is a VAC in the Williamson County Attorney's Office, where she provides support to applicants for protective orders and has helped crime victims for over five years. Juanita is also bilingual and provides calm and comforting support while treating all victims with dignity and respect.

Congratulations Jane and Juanita!

Jane Lowery

Juanita Blanchard

PVAC deadline coming up

Recognition as a Professional Victim Assistance Coordinator (PVAC) is a voluntary program for Texas prosecutor offices designed to recognize professionalism in prosecutor-based victim assistance and acknowledge a minimum standard of training in the field. Applicants must provide victim assistance through a prosecutor's office and be or become a member of TDCAA.

To apply, applicants must either have three years' experience providing direct victim services for a prosecutor's office or five years' experience in the victim services field, one of which has to be providing prosecutor-based victim assistance. There is also a training requirement of 45 hours in victims services; training recognized for CLE, TCOLE, social work, and/or licensed professional counselor educational credits are accepted under this program. Training must include at least one workshop on the following topics:

- prosecutor victim assistance coordinator duties under Chapter 56 of the Code of Criminal Procedure;
- the rules and application process for Crime Victims' Compensation;
- the impact of crime on victims and survivors; and
- crisis intervention and support counseling.

For those VACs with extensive experience and whose training documentation is no longer readily available, there is a waiver. An applicant with 10 years' experience in direct victim services (five of which must be in a prosecutor's office) may sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts.

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

The deadline to apply is January 31. Detailed requirements and the Professional Victim Assistance Coordinator (PVAC) application may be found at www.tdcaa.com/wp-content/uploads/Victim_Services/Duties_Victims/Professional-Victim-Assistance-Cerftification-Application.pdf.

National Crime Victims' Rights Week

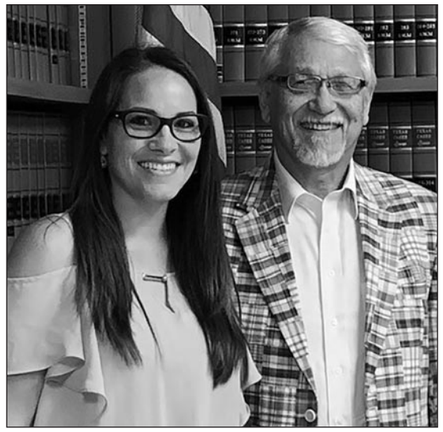
Each April communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 19–25, 2020, and this year's theme is: "Seek Justice; Ensure Victims' Rights; Inspire Hope." Check out the Office for Victims of Crime (OVC) website at https://ovc.ncjrs.gov/ncvrw/ for additional information.

If your community hosts an event, we would love to publish photos and information about it in an upcoming issue of this journal Please email me at Jalayne.Robinson@tdcaa.com to notify us with photos and a description of your event.

In-office VAC visits

TDCAA's Victim Services Project is available to offer in-office support to victim services programs in prosecutor offices. We at TDCAA realize the majority of VACs in Texas prosecutor offices are the only people responsible for developing victim services programs and compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support, which is where we come in. This project is especially helpful to new VACs.

If you are a new VAC and would like to schedule an in-office, one-one-one visit, please email me at Jalayne.Robinson@tdcaa.com. I am available for inquiries, support, in-office consultations, or group presentations. ❇



TOP PHOTO: Meagan Vinson, VAC in the Nolan County DA's Office.

MIDDLE PHOTO: In the Matagorda County DA's Office (left to right): Aleigha Galvan, VAC, and Steven Reis, District Attorney.

BOTTOM PHOTO: At the Harris County DA's Office Victim Services Group Training (left to right): Jalayne Robinson, TDCAA Victim Services Director; Kathy Rios, VAC; Brenda Velasquez, Administrative Assistant; Celeste Byrom, ADA and Director of the Victim Services Division; Quitney Guillory VAC; Bianca Wooten, VAC; Verna Johnson, VAC; Liliana Mendoza, VAC; Alessy Marlin, VAC; Alyssa Rodriguez, intern; and Yahaira Rios, VAC.

TOP PHOTO: In the Gregg County CDA's Office (left to right): Mona Jimerson, VAC; Stephanie Stephens, VAC; April Sikes, First Assistant District Attorney; Angie Herritage, Assault Family Violence Legal Secretary; and Jalayne Robinson, TDCAA Victim Services Director.

MIDDLE PHOTO: In the Rains County & District Attorney's Office (left to right): Jalayne Robinson, TDCAA Victim Services Director; Amanda Dollison, Investigator and Legal Assistant; Amy Wallace, Chief Legal Assistant and VAC; and Robert Vititow, County & District Attorney.

BOTTOM PHOTO: In the Wood County Criminal DA's Office (left to right): Joey Fenlaw, Assistant Criminal District Attorney; Georgia Cameron, Administrative Assistant and Felony Case Coordinator; Amber Taylor, Secretary and Misdemeanor Case Coordinator; Aimee Cook, Secretary and VAC; Gae Bergman, Secretary and Intake and Grand Jury Coordinator; Rebecca Monk, Secretary; Brandon Baade, First Assistant Criminal District Attorney; and Angela Albers, Criminal District Attorney (seated).

Photos from our Key Personnel & Victim Assistance Coordinator Seminar

Photos from our Elected Conference

Photos from our Prosecutor Management Institute: Elected Edition

A prosecutor's immigration toolkit (cont'd from the front cover)

could affect immigration, prosecutors must learn what commonly used terms mean in the immigration system and how they differ from how those same terms are used in criminal law.

For example, in the criminal justice system, when someone is "convicted" of a crime, we understand that guilt has been adjudicated for that offense. However, "conviction" has a totally different meaning in the Immigration & Nationality Act (INA).[7] There, a conviction means "a formal judgment of guilt entered by a court, *or*, if adjudication of guilt is withheld, where 1) a judge or jury has found the alien guilty, or the alien has entered a plea of guilty or *nolo contendere*, or [the alien] has admitted sufficient facts to warrant a finding of guilt, and 2) the judge has ordered some form of punishment, penalty, or restraint to [the] alien's liberty to be imposed."[8]

The expansive meaning of "conviction" in the INA allows most criminal dispositions to be considered as a conviction for immigration purposes, and recently, alternative dispute resolutions (such as restorative justice programs and offers of dismissals for pleas to lesser traffic offenses and higher fines) and pre-trial diversion programs began triggering unintended immigration consequences for their participants. For example, in Hidalgo County, we traditionally place individuals on pre-trial diversion or into diversion courts by having them admit guilt on the record and in written documents submitted to the court. The judge will then withhold the finding of guilt, and they are admitted into the pre-trial diversion program or court. Under immigration law, a plea of this kind could trigger immigration consequences because: 1) there is an admission of sufficient facts on the record to warrant a finding of guilt, *and* 2) the alien's liberty is restrained by the diversionary program or court.

To combat these consequences, some offices have sought out ways of placing alien defendants on pre-trial diversion programs that do not trigger immigration consequences. One solution used by the Nueces County District Attorney's Office is having the alien defendant admit guilt in writing before being placed on the pre-trial diversion program. Neither this non-judicial confession, nor the conditions of the program, are ever tendered to the court or put on the record. Because there has never been a formal admission of guilt to the court or a restriction of liberty recognized by the court, this form is unlikely to trigger immigration consequences for the participant. These policies are applied to both alien and citizen defendants alike. Why adopt such a policy? First Assistant Matt Manning of the Nueces County District Attorney's Office believes it helps his prosecutors better seek justice. "Seeking justice is our sole, unassailable duty," Manning said. "Accordingly, anything that constitutes 'double punishment' or an inequitable, Draconian collateral consequence upsets the balance of justice and denies fairness to those affected."

"Imprisonment" also has a different meaning within the immigration system. A term of imprisonment in the immigration system is "deemed to include the period of incarceration or confinement ordered by a court of law, *regardless of any suspension of the imposition or execution of that imprisonment in whole or in part.*"[9] Due to this language, any straight probation in Texas will qualify as a "term of imprisonment."[10]

What could this difference mean for an alien defendant? Let's say a hypothetical alien defendant is charged with second-degree felony Evading with a Motor Vehicle and has been released from custody on bond two days after being booked into the county jail. The alien defendant does not wish to return to jail. The line prosecutor has offered the defense attorney two plea options: 1) a state jail felony reduced to a misdemeanor under Penal Code §12.44(a) and a 30-day sentence with credit for two days served, or 2) two years state jail suspended and probated for three years on the charged offense. Were we to remove the fact that this is an alien defendant, most defense attorneys would agree the more attractive plea option for their client is to plead to probation and keep him from returning to jail. However, because the defendant is an alien, a probated sentence will be considered a conviction under the INA, and the term of confinement on Option 1 would be 30 days and on Option 2 two years. That distinction becomes important because aliens can become inadmissible to the United States or deportable depending not only on the crime they are convicted of, but also on the length of the term of imprisonment. Generally, in

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immigration, the shorter the term of "imprisonment" the better, so the first option would be the more desirable one for the alien defendant to avoid triggering immigration consequences.

The crime

As previously mentioned, what crime the alien defendant pleads to matters as well. In immigration, we are concerned about a broad category of offenses called "aggravated felonies." When any alien is convicted of an aggravated felony, he or she is ineligible for U.S. citizenship, ineligible to receive a visa, and ineligible to be admitted to the United States if the term of imprisonment was completed within the last 15 years.[11]

Somewhat similar to the way the term is used in criminal law, "aggravated felonies" in immigration refer to particularly serious crimes. However, unlike our "3g" offenses, what is considered an aggravated felony under immigration law includes a broader list of crimes.[12] The expansive list can encompass several Texas misdemeanors.

In immigration law, a "crime of violence" with a term of imprisonment of at least one year also qualifies as an aggravated felony. A "crime of violence" is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.[13] In a recent Fifth Circuit decision, *United States v. Gracia-Cantu*, Texas's Assault Family Violence (AFV) statute was found to be an aggravated felony under immigration law if the term of imprisonment was at least one year.[14] That means a guilty plea on an AFV case with a sentence of one year in county jail suspended for two years would be a plea to an aggravated felony, and that conviction would make the immigrant or alien ineligible for admission for the next 15 years and keep him or her from ever becoming a United States citizen. The finding in *Gracia-Cantu* was so expansive, the Court found that even the use of unintentional force could be a crime of violence.[15]

Another term of art to look out for in immigration law is "crimes involving moral turpitude" (CIMT). Although there is no statutory definition of what a CIMT is, it usually refers to conduct that is inherently base, vile, or depraved and contrary to the accepted rules of morality and the duties owed between persons or society in general. The courts have held that even reckless conduct can be considered a CIMT. Whether a crime is a CIMT is decided on a statute-by-statute basis; for a full list of offenses that qualify as CIMT, please see 8 U.S.C. §1251(a)(2)(A)(i).[16]

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Inadmissibility and deportability

It is important to know the difference between inadmissibility and deportability when determining if a case disposition will trigger immigration consequences. The grounds to make an immigrant inadmissible are found in §212(a) of the INA. If a person is inadmissible, he will not be allowed to enter the U.S. or be granted a visa.[17] If a person were already in the United States on a previous visa and has since become inadmissible, her visa will not be renewed and the person will be sent to removal proceedings.[18] In some rare cases, this can even keep green-card holders from returning to the U.S. after foreign travel.[19]

Grounds for deportability are found in §237 of the INA. These will make a person with legal status—whether the holder of an LPR (lawful permanent resident card, or "green card"), immigrant visa, or nonimmigrant visa—eligible for deportation.[20] This section specifically states that any non-immigrant who is in this country illegally shall be deported—which is why aliens who are here illegally will likely be deported even after having their cases dismissed or no-billed.

A quick summation of some of the common issues in the INA a prosecutor will run into concerning an alien's inadmissibility or deportability is below. Both inadmissibility and deportability can trigger an alien defendant to be placed in removal proceedings.

Inadmissibility

1) any alien convicted or who admits having committed, or who admits committing acts which constitute the essential elements of a) a CIMT or attempt or conspiracy to commit a CIMT *or* b) a violation of a controlled substance.[21]
2) any alien convicted of two or more offenses with aggregate sentences of confinement of five years or more, regardless of whether they are CIMT.[22]
3) any alien who is a drug abuser or an addict.[23]

Deportability

1) any alien convicted of a CIMT within five years of admission *and* convicted of a crime for which a sentence of one year *may* be imposed.[24]
2) any alien who any time after admission is convicted of two or more CIMTs not arising out of the same transaction, regardless of confinement.[25]
3) any alien who is convicted of an aggravated felony at any time after admission.[26]
4) any alien who any time after admission is convicted of a controlled substance charge other than a single offense of possession of marijuana of 30 grams or less.[27]

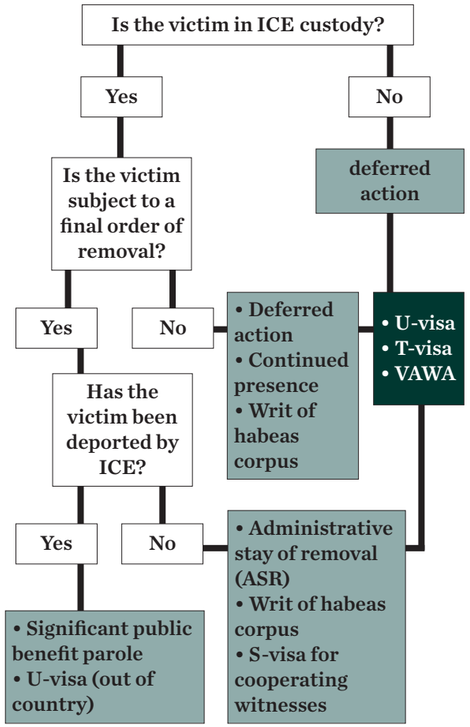
Victims and witnesses

Immigration issues during criminal proceedings are not exclusive to alien defendants. With increased immigration enforcement in the last several years, alien victims and witnesses now have credible concerns about immigration authorities showing up to court, and many prosecutors genuinely fear alien witnesses and victims being deported before their criminal cases are closed. Two years ago, I wrote an article on the types of immigration relief available for alien witnesses and victims.[28] It provides prosecutors with immigration tools that prevent removal (that is, that do not adjust a person's immigration status) and those that give legal status to the alien victim or witness. For a brief summation of the types of tools that exist to retain alien witnesses and victims, plus a flow chart to determine which tool to use, see below:

Types of Immigration Relief Available

Tools that do not adjust status
Deferred action
Continued presence
Administrative stay of removal
Writ of habeas corpus
Significant public benefit parole

Tools that adjust status
U-Visa
T-Visa
S-Visa
VAWA self-petition



Since we wrote the previous article, some things have changed regarding visas, specifically, that if a visa application is rejected by U.S. Citizenship and Immigration Services (USCIS), then the alien is given a Notice to Appear and will likely enter removal proceedings.[29] Another change is that due to a backlog of applications and a legislative cap on the number of U-Visas issued per year, the common wait time for a U-Visa application to be granted (if applied for in 2019) is seven to eight years.[30] Yes, you read that right.

Conclusion

You may be asking yourself, "Why does any of this matter?" No matter how far you are from the border, most prosecutors have had a defense attorney say (after offering a plea bargain), "This will get my client deported," or "That will hurt my client's immigration status." This small glimpse into the world of crimmigration is intended to give prosecutors the tools to verify whether or not such statements are true. Seeing justice done in a case may or may not mean we need to affect an alien defendant's immigration status. Knowing if our disposition does so is a large part of the

Quick reference resources

ICE's Toolkit for Prosecutors: www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

Immigration Consequences of Selected Texas Offenses Quick Reference Chart: projectcitizenship.org/wp-content/uploads/2017/04/Texas-Crimes-Chart.pdf (Note that this chart was compiled before the decision in *U.S. v. Gracia-Cantu*.)

Foreign Affairs Manual—CIMTs (does not consider individual Texas statutes): fam.state.gov/FAM/09FAM/09FAM030203.html.

Texas-Specific CIMTs: www.versustexas.com/criminal/crimes-of-moral-turpitude-texas/.

Aggravated Felonies (does not consider individual Texas statutes; starts on page 11 of 480): govinfo.gov/content/pkg/USCODE-2011-title8/pdf/USCODE-2011-title8-chap12.pdf.

battle and helps us in the administration of our dockets.

Having some knowledge of the intersection of criminal and immigration law will also help us assure the integrity of our convictions. In the last few years, our county has seen an explosion in Art. 11.07 and 11.072 writs, as have many other counties. Knowing the immigration consequences before a plea is given will make sure that alien defendants are being properly advised pursuant to *Padilla v. Kentucky* by their counsel and the court as to what their plea means for their immigration status. [31]

While this can be a complex area of law, I hope this basic crimmigration toolkit—a little bit about a lot of things—makes you more effective in the courtroom. If you have any questions about crimmigration, the resources below are always a great help. If you can't find the answer there, please consult an immigration attorney. ❇

Endnotes

[1] Sam Winchester is a sidekick. I said what I said.

[2] Supernatural: Crossroad Blues, (CW television broadcast November 16, 2006).

[3] Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 *Am. U. L. Rev.* 367 (2006).

[4] Tanvi Misra, "The Rise of 'Crimmigration,'" City Lab, Sept. 16, 2016, www.citylab.com/equity/2016/09/the-rise-of-crimmigation/499712/.

[5] *Id*.

[6] For purposes of this article, the term "alien" refers to any person who is not a citizen or national of the United States.

[7] Available at www.uscis.gov/legal-resources/immigration-and-nationality-act.

[8] INA §101(a)(48)(A); emphasis added.

[9] INA §101(a)(48)(B); emphasis added.

[10] While deferred probations do not count as terms of imprisonment, they do qualify as convictions under the INA.

[11] 8 U.S.C. §1101(a)(43).

[12] See 8 U.S.C. §1101(a)(43) for a list of applicable crimes.

[13] 18 U.S.C. §16.

[14] 920 F.3d 252 (5th Cir. 2019).

[15] *Id*.

[16] For a Texas specific list of CIMTs, please see: Benson Varghese, What Are Crimes of Moral Turpitude in Texas?, available at www.versustexas.com/criminal/crimes-of-moral-turpitude-texas/.

[17] I.N.A. §212(a), 8 U.S.C. §1182.

[18] *Id*.

[19] Id. For a real-life example of this happening to one of our Veterans Treatment Court Program participants, see: Molly Smith, Family of veteran detained by ICE pleads for his release, *The McAllen Monitor*, Feb. 26, 2019, https://www.themonitor.com/2019/02/26/family-veteran-detained-ice-pleads-release/.

[20] I.N.A. §237.

[21] I.N.A. §212(a)(2)(A)(i). Some petty and juvenile offense exceptions exist here.

[22] I.N.A. §212(a)(2)(B).

[23] I.N.A. §212(a)(1)(iv).

[24] I.N.A. §237(a)(2)(A)(i).

[25] I.N.A. §237(a)(2)(A)(ii).

[26] I.N.A. §237(a)(2)(A)(iii).

[27] I.N.A. §237(a)(2)(B)(i).

[28] Sepulveda, Lauren, and Morris, Michael, A New ICE Age, Vol. 47, No. 4, The Texas Prosecutor (July-August 2017), page 1. You can find that article at www.tdcaa.com/journal/a-new-ice-age.

[29] See USCIS Policy Memorandum PM-602-005.1.

[30] See www.womenslaw.org/laws/federal/immigration/u-visa-crime-victims/basic-info-and-definitions/how-long-does-it-take-get-u.

[31] 559 U.S. 356 (2010).

Faith in action

As the summer of 2005 came to an end, thousands in New Orleans were displaced due to the floods of Hurricane Katrina.

By Brittany Dunn
Assistant Criminal District Attorney in Dallas County

Men, women, and children poured into nearby cities for refuge after their lives were turned upside down. Some were seeking shelter, some were seeking loved ones, but most were seeking hope.

Among those at the Baton Rouge River Center, in his "Disaster Relief" shirt, stood Dr. Edward Smith. As he made his way through the crowd, a woman looked over and asked, "Are you here to sell me something?" "No," he replied. She fired back: "Are you staying in one of those fancy hotels?" "No," he replied again. Then another question: "Are you getting paid to be here?" Again, "No."

After studying him with a skeptical eye, she finally asked, "Then why *are* you here?" His answer was two-fold: "To care for you as a fellow human being and to provide spiritual and emotional care as a chaplain."

As the woman slowly let her guard down, she and Dr. Smith began to get to know each other. The even read the Bible together while ministering to others close by. When he offered a parting word of prayer, something remarkable happened: hundreds throughout the complex stood and bowed their heads—joining hands, joining hearts.

This is the environment where Chaplain Edward Smith is most comfortable—a space where hope and compassion are truly needed. He has been bringing that care, both spiritual and emotional, to the Dallas County Criminal District Attorney's Office for almost four years.

Working at the DA's Office

Chaplain Smith doesn't just follow disaster, although he's trained for it. A certified trauma specialist, he studied under H. Norman Wright, one of the leading authors in crisis response. He's provided care to others during mass shootings, plant explosions, and loss of loved ones—trauma both expected and unexpected and of course during natural disasters. These days however, he is often found walking the halls of the Dallas County Criminal District Attorney's Office talking with prosecutors, investigators, and staff.

It started as a chance meeting with our office's Chief Investigator, Robert Miller, back in 2016, which led to discussions on the importance of chaplaincy in law enforcement. Although Dr. Smith is not a licensed peace officer, due to his crisis training, he knows the job (and the burdens that go along with it) well. With the support of the then-District Attorney, counseling sessions between Dr. Smith and investigators began, and soon enough the entire office staff joined in.

Chief Investigator Robert Miller (left) and Chaplain Ed Smith

While he has doctorates of both Divinity and Ministry, Smith is quick to point out that his work is not necessarily what you might think. It is not religious (although it could be). It is not motivational speaking (although it could be). It is not Christian counseling (although it could be). His interactions are whatever staffers want it to be. He has conducted one-on-one sessions, he's worked with small groups, and he has even brought comfort to all 508 of us at once when our office faced an unexpected tragedy this year. No group is too small or too large for him. In fact, there are times when he brings back-up in the form of therapy dogs, my personal favorite.

The services he offers, the resources he provides, and his very presence in our hallways are about so much more than religion. His visits with

Chaplain Smith, who is certified in Critical Incident Stress Management (CISM), is particularly attuned to the emotional challenges those in law enforcement experience in their work.

DA staff are based on relationships and compassion. "My concern is always for the person I'm talking to, not what he or she represents or believes," he says.

Smith, who is certified in Critical Incident Stress Management (CISM), is particularly attuned to the emotional challenges those in law enforcement experience in their work. Prosecutors, peace officers, and first responders in particular are exposed to some of the most gruesome and heart-wrenching circumstances involving child and elder abuse, family violence, sexual assault, and senseless deaths. Day in and day out, we study crime scenes, pour over offense and autopsy reports, and conduct witness interviews with victims or their families. Every day, we see the effects of addiction and mental illness and we are faced with the anger, tears, and heartbreak of our community, but we do it each day, over and over, to preserve safety, order, and justice. It can come at a price, however.


Chaplain Ed Smith

Time and time again, we see people at their very worst, both defendants and victims; and while we'd love to leave our work at the office, the reality is that it stays with us, follows us home, and impacts our thoughts and relationships. Yes, that emotional investment contributes to our passion for justice and compassion for victims of crime. However, that same emotional investment has the potential to destroy our mental well-being and even be counterproductive to our criminal justice efforts.

Listening to investigators and prosecutors unload their thoughts, feelings, and concerns is a spiritual burden in and of itself, and it's not his only job. Dr. Smith currently serves as the District Chaplain Director for the Dallas Community College System. Additionally, he still deploys as a Disaster Response Chaplain for numerous organizations while serving as an Adjunct Professor at Cedar Valley College. With all of his many obligations, one wonders why Smith feels responsible to help, especially at no cost to the county or DA staff. "I do what I do because we are called to love our neighbors," he explains. "I call this my faith in action. I'm simply here to help, and like the prosecutors and investigators I work with, I'm here until the job is done." ❇

To combat the professional and emotional burnout that often accompanies this job, Chaplain Smith provides emotional support to staff, regardless of religious beliefs. "I'm here to provide emotional care," he explains. "If someone wants to talk about his or her religious beliefs, that is great—we can do that. If not, that's great—we don't have to. We can just talk about something else. Prosecutors and police give so much of themselves to their community, their victims, and their agencies. I am not here to give advice or push a particular religion. I have no other agenda than to listen, provide encouragement, and provide resources to those who are exposed to so much negativity."

Smith is well-versed on legalities and is aware of potential conflicts when talking to DA staff. The fact of the matter, however, is that the District Attorney's Office is called upon to see that justice is done above all else; doing so involves many things, including maintaining the health of the organization and those it employs.

Objections at every phase of trial

Learning when and how to object can be difficult for new prosecutors.

By Brian Foley
Assistant District Attorney in Harris County

Until someone has been in trial, one can't fully understand how mentally draining it can be. You're worried about the jury, the judge, defense objections, and finding the evidence you have already marked. Meanwhile, an officer, who has never testified before and who came to court from the graveyard shift, is staring blankly at you. With all that to consider, who has time to come up with an objection when it's the defense's turn to question a witness?

This article's purpose is to identify the most common tactics and arm prosecutors with the proper legal ground for objecting to those tactics so that you can confidently stand and say, "I object!" when the situation warrants.

As a brief preamble, I would note that the best advice I can give about objections is that just because we *can* do something doesn't mean we *should* do something. Not objecting can be as powerful a strategy as objecting. We must listen to the defense's question and listen to the witness's answer. It seems obvious that we should be listening in court, but in the middle of the "fog of trial,"[1] it's easy to totally miss very important questions and answers. The best way to listen carefully to the proceedings is to prepare as thoroughly as possible ahead of time, thus freeing up mental capacities for what is happening in the courtroom. If you are at counsel table wondering where the State's next exhibit is, you won't be paying attention to cross. Being intentional with every action in trial gives us the freedom to think about and anticipate objections during defense questioning.

Motions in limine

Our first opportunity to stop defense counsel from misleading the jury happens before jurors even come into the room. File a motion in limine to anticipate defense tactics specific to a given case. For example, ask that defense approach to seek a final ruling in front of the judge before mentioning that a victim or witness has a prior criminal history. You can also object to the defense offering a victim's statements because they are not admissions of a party opponent.[2]

Objecting during voir dire

The most common objections for prosecutors to make in voir dire are:

1) misstatement of law,
2) improper commitment questions, and
3) "Uh oh, he's about to bust the panel."

Misstatements of law. I don't like having to object in voir dire, but if defense counsel misstates the law, then I have to stand up and object. It normally occurs regarding the burden of proof, when defense counsel tries to take it beyond a reasonable doubt. Defense attorneys will say it's beyond all doubt or "beyond any single reasonable doubt." The latter phrasing is a little more artful, but it still misstates the law. They might also try to change the burden by analogy: "You have to make the State go the whole 100 yards of the football field" or "If you have a doubt, then you have to acquit." If they say any of these things, I generally object.

In a DWI case, we may encounter a defense attorney telling jurors that the State has to prove his client's normal mental or physical faculties to prove the case. This is also a misstatement of law.[3] In *Hernandez v. State*, defense counsel said in voir dire, "When we're looking to see is the person normal or not, we look—we need to find out is it normal for that particular person?" The State objected, arguing that the standard of comparison for not having the normal use of faculties is a normal, non-intoxicated person. The trial court sustained the objection, and the appellate court

upheld the trial court's ruling that this improperly applied a subjective rather than an objective standard.

In an assault case, we may hear the defense say that jurors have to think about self-defense by considering what the defendant would have done from his own standpoint. The actual standard is a *reasonable* belief that force was justified as viewed from the defendant's standpoint. Any phrasing that fails to include the "reasonable belief" language may be a misstatement of law that allows the jury to consider a defendant's unreasonable feelings or beliefs.[4]

If jurors don't have to follow the law stated in the question, then the question is improper. If jurors can follow the law without accepting all of the facts offered, then the question is also improper. Prosecutors should object to both.

Improper commitment questions. A commitment question asks prospective jurors to decide an issue in a particular way after being offered a set of facts. It is proper to ask a commitment question if it relates to an area of the law that the juror would be required to follow during the course of the trial.[5]

A commitment question that leads to a challenge for cause is proper so long as it does not include more facts than necessary to determine if the juror would follow the law. For example, it is OK to ask, "Can you consider probation for a felony case?" However, it is improper to ask, "Can you consider probation for a felony case involving violence?" The difference here is that the second question includes more facts than necessary to determine if the juror can follow the law.

A commitment question that seeks to commit the jurors to a particular set of facts is improper.[6] An improper commitment question asks jurors to follow a rule that the jury isn't absolutely required to follow. For example, "Would you presume someone guilty if he refused a breath test on his refusal alone?" This question is improper because the jury can absolutely convict on refusal alone.

In summary, if jurors don't have to follow the law stated in the question, then the question is improper. If jurors can follow the law without accepting all of the facts offered, then the question is also improper. Prosecutors should object to both.

"Uh oh, he's about to bust the panel." I'm referring to that moment at the counsel table when you realize the defense attorney might get all these jurors to say that they would require the defendant to take the stand and provide video of his innocence before they find him not guilty. You'll know it when it is starting to happen. You'll think to yourself, "I feel like this is about to turn south but I don't know what the objection is."

And no, we can't actually object and say, "Judge, defense counsel is about to bust the panel if we keep going down this road." But we do need to think of something because this moment is hard to come back from, and the more the defense attorney talks, the worse it's going to get. I recommend objecting and asking to approach before listing the specific objection. Generally, the State can object to improper commitment questions based on too many facts and then suggest a proper version of the question. Alternatively, you may choose not to approach the bench and object under Rule 403 that this question is "confusing the issues [or] misleading the jury." A good objection here can save a panel.

Objecting during opening statement

In law school mock trial, it is taboo to object during opening statement or closing argument. In the real world, though, it happens in almost every trial. But I am slower on the trigger here than in other phases of the trial.

The most common objections for prosecutors in opening statement are:

1) misstatement of the law and
2) counsel is arguing.

Because the defense attorney gets to say things like, "I expect the evidence to show ...," he can get away with injecting facts that may not be proven later. There isn't much to be done about that except to point out in closing argument that none of those alleged facts were ever proved in trial. Defense attorneys may misstate the law to increase the prosecution's burden or incorrectly state that certain evidence is required, such as a blood sample or blood search warrant. If the defense is misstating the law at any point, it is a proper and likely necessary objection.

Objecting during cross

A defense attorney on cross examination typically gets a lot of leeway from a judge. Counsel's standard response to an objection is, "Judge, this is cross." But even during cross, defense attorneys are not exempt from following the rules. It is difficult, though, because the defense is allowed to ask leading questions, and sometimes the attorney will say the objectionable information as he is asking the question. You may not have enough time to object before the jury hears it.[7]

For help objecting during cross, I will focus on three types of witnesses: peace officers, crime victims, and experts.

Peace officers. When a police officer is cross examined, the most likely objections are:

1) relevance,
2) hearsay,
3) outside of the expertise, and
4) question calls for a legal conclusion.[8]

Relevance is a very low standard. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[9] However, the defense will sometimes try to elicit evidence from cases, instances of officer misconduct, drug use by third parties, or other information that is not really relevant or would be overly prejudicial under Rule 403. In a DWI case, it may not really make a fact of consequence more or less probable if the officer drinks alcohol socially or if he would have two drinks and drive home. What an officer did days or weeks prior to the night in question is probably not relevant.

Regarding hearsay, defense attorneys who are cross-examining an officer will often try to rely on outside information in medical journals, heat tolerances for blood vials, or some other document or book that they find reliable but is generally not admissible. If the defense attorney's question is related to some other document or statement, then it very well may call for a hearsay objection. This includes the defendant's own statements. Questions that start with, "Didn't my client tell you ..." are almost always objectionable. It may not matter if you have already offered a videotape of the objectionable hearsay statement, but it can manifest itself in other ways. For example, a defense attorney may ask a witness, "Did you know that my client told his wife he loved her, not that he wanted to burn her house down?" Throwing the words "did you know" in front of a blatant hearsay statement doesn't make it automatically admissible. When the defense starts offering evidence of other events or statements, I object with relevance and hearsay and a little indignation.

Remember, though, that sometimes we want hearsay information in the record. If you don't object to it, then it comes in for its truth. The rules specifically state as much in TRE 802: "Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay." So the Rules of Evidence specifically permit prosecutors to allow hearsay in through defense questioning or our own questioning if we do not object.

We should be asking questions that establish an officer as an expert in police investigation and any areas relevant to her role in the investigation. Most street officers will be experts in collection and tagging of evidence and maybe in intoxication and standardized field sobriety tests, including the horizontal gaze nystagmus. However, defense counsel may try to ask them questions that fall outside their expertise. An officer may not realize it at first and dig a hole by answering questions about the heat tolerances of blood vials and their effect on alcohol concentration. The defense will do so because a blood analyst will know how to combat the argument of heat tolerances while an officer or nurse may not. The same holds true for lay witnesses or officers in other types of cases. They may get asked questions about DNA or fingerprints, and they don't know the answers but may be afraid to say so. It will be the prosecutor's job to object that the State's own witness does not have the requisite expertise and try to force the defense to ask the correct expert from the lab about these questions.

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Officers will also get crossed on whether the defendant was in custody, if certain facts amount to probable cause or reasonable suspicion, or that if one fact is true then the case can't be proven beyond a reasonable doubt. So while it is true that "an opinion is not objectionable just because it embraces an ultimate issue," it is still inappropriate to ask for a pure legal conclusion from any witness.[10] If the defense is asking an officer if he put the defendant in handcuffs, that's fine. If he asks, "You put him in handcuffs, and at that point you didn't have probable cause?" then he is asking for a legal conclusion and the officer's subjective belief is not relevant to the question. Only the objective facts known to the officer at the time are relevant.[11]

Crime victims. When a victim is on the stand, the defense attorney may try to offer inadmissible character evidence, badger the witness, and ask cumulative questions that have already been answered. A prosecutor's best shield is a good motion in limine. The motion should include objections to the victim's prior bad acts and prior convictions if they are not admissible under Rule

There is no rule of evidence against "badgering the witness" or "asked and answered." However, I'd say that in 90 percent of courtrooms, a good "badgering" or "asked and answered" objection will be sustained. The real legal authority invoked is under Rules 611 and 403.

609.[12] If the victim does have a felony or theft conviction in the last 10 years, then you should go over it on direct examination and thereby mitigate the sting of its impact when the defense brings it up.[13]

Defense attorneys may try to blurt out the damaging information in an attempt to force an objection in front of the jury and both highlight the information and make it look like you want it hidden. I try to avoid this by asking to approach outside the presence of the jury before the victim takes the stand; there, I ask for clarification on the previously ruled motion in limine. I may approach again after I pass the witness if defense counsel has been pushing the envelope.

There is no rule of evidence against "badgering the witness" or "asked and answered." However, I'd say that in 90 percent of courtrooms, a good "badgering" or "asked and answered" objection will be sustained. The real legal authority invoked is under Rules 611 and 403. TRE 611 gives the court the responsibility of "exercis[ing] reasonable control over the mode and order of examining witnesses and presenting evidence so as to: 1) make those procedures effective for determining the truth; 2) avoid wasting time; and 3) protect witnesses from harassment or undue embarrassment." TRE 403 doesn't merely state that relevant evidence may be excluded for "unfair prejudice." The rule also allows for the exclusion of relevant evidence on the grounds that it is "confusing the issues, misleading the jury, [causing] undue delay, or needlessly presenting cumulative evidence." "Asked and answered" falls under the undue delay or needlessly presenting cumulative evidence part.

State's experts. When the defense attorney is cross examining a State's expert, the prosecutor's strategy will depend largely on how much you trust the witness. Has she testified countless times and seen every trick in the book? Many blood analysts will fall into this category. Or has he testified only once before and bombed? Unfortunately, some blood analysts will fall into this category.

If an expert is really polished, she can probably handle the defense attorney and unreasonable questions on her own. When asked for an opinion outside her expertise or that improperly assumes a fact not in evidence, a good expert will say, "That is outside of the appropriate field of scientific study involved in my analysis" or "I did not have any reason to believe X fact was true at the time of my analysis."

Every now and then, a good defense attorney will get a rookie expert talking about all the possibilities in the world that are outside of his expertise or based on fact scenarios so crazy that nobody would consider them reasonable. This new expert may be intellectually stimulated by the profundities of these possibilities, and he may start nodding along and engaging with the defense counsel when he says that by the State's logic, it is possible his client would have had to drink 57 beers to reach a certain BAC. "It's possible ..." replies the expert. In cases like this, I will object and try to make defense clarify that he is asking a hypothetical question, and I'll object to the question being based on facts that are not in evidence.[14] It is true that we may ask an expert witness hypothetical questions, but I feel like it is better for the jury to know that defense is about to engage in an experiment rather than just laying out the probative facts of science in the case.[15] These things happen quickly, and prosecutors have an opportunity to frame the way the jury receives the evidence, not only during direct examination but also in our reaction to defense questioning.

Objecting during defense direct

The most frequently used objections when defense is on direct examination of a defense witness are:

1) leading,
2) relevance, and
3) hearsay.

Leading. Learning how to ask non-leading questions and present evidence through direct examination of a witness is difficult. It is an art that takes practice. Sometimes, a defense attorney's direct examination can look a lot like friendly cross examinations, where he leads like crazy.

Most leading is totally harmless and just makes a prosecutor look silly if he objects. But if the defendant is on the stand and his attorney is asking him stuff like, "And when she came at you, did you raise your left hand to defend yourself?" then you are losing valuable testimony from the defendant. I would object to leading when defense counsel is providing the mental state or description of facts for the defendant. Make the defendant provide the information himself. If his attorney continues to do it, then you'll at least have signaled to the jury that the defendant is being coached. This is also a topic you can visit on cross.

Relevance. The defendant and defense witnesses may attempt to offer mountains of evidence of the victim's bad character or the defendant's various achievements that are irrelevant. A motion in limine is the best remedy for attacks on the victim's bad character.

The defendant's achievements are a little different matter. Rule 404(a) provides that, "In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." So the relevant limitation is that character evidence includes only a pertinent character trait. During the guilt-innocence phase, defense counsel shouldn't be getting into how the defendant works at a soup kitchen for the homeless if the pertinent character trait is his sobriety. The proper objection is relevance and character evidence of a non-pertinent character trait.

On the other hand, if you have cross examination material on a relevant bad character trait, you should be allowed to offer that evidence. A trial strategy to employ here is to ask to approach the bench and object something like this: "Judge, I object to this improper character evidence. I mean, if he is going to get into this topic, then the State should be allowed under Rule 404 to rebut it. So I object, but if he wants to go down this road, it is going to open the door to other bad acts." Even if you don't win this objection and the defense gets to go into the topic, it may make them pull back or move on more quickly, and the judge will be primed to listen to appeals for bad character evidence's admission in rebuttal.

Hearsay. Hearsay law and how it is practically applied are very different. You might think the definition of hearsay is "an out-of-court statement offered to prove the truth of the matter asserted." That is what you were taught, but it is technically wrong. The rule actually provides, "Hearsay means a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement."[16] It's obvious from a cursory plain language reading that a defendant's own statement to police on the day of the robbery is a statement that he "[did] not make while testifying at the current trial." I will say that most judges seem to know this if you are objecting to the defense admitting a DVD of his own self-serving interview in an aggravated robbery case, but our objections will more likely fall on deaf ears when the defendant tries to tell the jury everything he said to his neighbor the week prior to his domestic violence case. A defendant's statement is excluded from the definition of hearsay by TRE 801(e)(2) only when "the statement is offered against an opposing party." So the State gets to tell the jury what the defendant said, but the defendant doesn't. He may argue that it isn't offered for the truth of the matter asserted but for the effect on the listener, or he may argue a more explicit exception such as excited utterance, but you'll never know if he can meet the exception if you don't object to its admission.[17]

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Objecting during closing argument

By closing argument, objections should be reserved for egregious violations or areas where we think the jury might simply get confused about an important point. A few places where defense attorneys may push the limits in closing argument are:

1) arguing facts not in evidence, or its cousin
2) misstatement of evidence,
3) improper argument and jury nullification, and finally
4) "placing the jury in the shoes of the defendant."

Because closing argument allows lawyers to make inferences from the evidence, almost anything the defense says about what happened that day is fair game.

Facts not in evidence. Defense counsel might try to slip in the victim's bad acts that prosecutors had successfully kept out of the trial up to this point under a motion in limine. If he does, then all you have in your tool belt is a deflating "facts not in evidence" objection. Of course, if you object to a victim's bad act as a "fact" not in evidence, you likely have lost the battle already. How about this instead? "Objection, Judge. Defense counsel is violating your order on the motion in limine."

You have another tool, too: You get to respond to defense arguments in your own final close. We can argue that "defense violated the court's order and attempted to talk to you about

unsubstantiated allegations. That's what happens when the evidence against a defendant is so strong—you try to put someone else on trial. So let's go over that evidence against him again."

Misstatement of evidence. Say the defense attorney claims it took 12 seconds for police to arrive at the crime scene, but the video shows it took three minutes—you could object to a misstatement of evidence. But if you do, the judge will likely respond, "The jury will remember the evidence, and statements of the attorneys are not evidence." Objecting to this type of misstatement doesn't get you anywhere.

If the misstatement is easily proved wrong, just wait until your final close. If it's a minor but confusing point, a simple objection could be enough to show jurors you disagree with that part of the defense's closing argument. I've had jurors shoot me a look when defense was arguing something that was clearly wrong, almost urging me out of my chair to object. On one occasion, defense counsel said that his client was wearing "high heel stilts" in the DWI video and that she couldn't balance. A female juror who was wearing wedges—these are women's shoes with a flat bottom and a raised heel—must have noticed that the defendant was actually wearing wedges in the video, and this juror shot me a look to get my attention, looked at her own wedge-heel shoes, and then looked back at me. I stood up and objected to the misstatement of evidence and got the standard response from the judge—but that the juror nodded her head in approval. I'd have to say that was probably the most effective objection I've ever made.

Any time the defense tries to ask jurors, "What would you have done if you were the defendant?," it is called a "Golden Rule" argument, and it is generally improper.

Improper argument and jury nullification. The other objection that comes up in closing argument is improper argument, and it generally means that the defense is asking for jury nullification. An argument by defense counsel that asks the jurors not to participate in jury deliberations is improper.[18] Some defense attorneys will approach the line of what's proper but not cross it; they might ask jurors to "make up their own mind and don't let someone tell you you're wrong" or say to them, "You're not one jury; you're 12 individual juries, and you have to reach your own personal verdict." I'm of the opinion that objecting and letting them know it's an improper argument is fine, but it may not be necessary. As is always the case, prosecutors have to be intentional and think about how the entire trial has gone up to this point. If you've done a good job so far, then the defense's closing argument might not matter much.

Placing the jury in the defendant's shoes. Any time the defense tries to ask jurors, "What would you have done if you were the defendant?," it is called a "Golden Rule" argument, and it is generally improper. There is a long-standing legal tradition that neither party in any lawsuit or prosecution may engage in this type of argument,[19] which can also appear in the form of "How would you feel if you were the defendant?" and "If they can do this to him, they can do it to you."

When not to object

You have to know when to hold 'em and know when to fold 'em. So how do you know? That's the real trick.

Based on your preparation for a case, you will know a few issues that will likely come up. Object on those issues until the judge sustains your objections or until your continuing to object starts to look like you don't respect the court. The jury normally believes that the judge is the smartest person in the room and whichever lawyer appears to be in more agreement with the judge is probably right. If you think having an objection on a victim's prior drug problem sustained was critical and you lose that battle, it's time to start evaluating what else you want to let in and what objections you're going to let slide.

I suggest that we object only if we know the judge will sustain the objection or we don't care if it's sustained. This is similar to the cross-examination rule where you don't ask a question you don't already know the answer to—unless you don't care what the answer is. If defense counsel's question is "almost speculation," don't object just because you can. If the point of your objection is to let the jury know that the defense's statement isn't true, regardless of whether your objection is sustained, then go ahead and object.

If the defense attorney is digging himself a hole with a witness and that witness doesn't need protecting, you may not want to object just because he didn't lay the proper predicate for the 911 audio. If you want the jury to hear the 911 audio, then let it come in. Also don't object if your case is going really well. Objecting to technicalities is important only when you think the truth would be obscured by admitting the evidence.

Lastly, don't object because you're mad at defense counsel. Some prosecutors can come off as angry and wound-up. If defense attorneys know that you get riled up and angry when they violate minor rules, they just might do it just to get the reaction. Remember that there are a hundred ways to win a case, and objections are just tools to help control the presentation of evidence. We object so that our theory of the case and our presentation of the truth fills the courtroom and shapes how the jury experiences the trial. Maybe we do so by excluding certain inadmissible evidence, or maybe it is by letting the jury know that the State disagrees with the particular evidence offered. If your trial strategy depends on the jury believing you are merely presenting the uncontested facts, then there is no room for being upset over petty procedural issues. On the other hand, if your strategy depends on the jury seeing you as someone who will fight for every inch on behalf of the victim and the people in the community, then maybe they would expect you to object often.

We should be intentional with every decision, word, and movement we make in a trial. We are building the world view of the jurors from the moment they walk into the courtroom for voir dire to the moment they leave after the verdict.

Conclusion

I hope this article gives you an idea of when, how, and why to object. If you have any additional questions or suggestions, please feel free to email me at foley_brian@dao.hctx.net. ❇

Endnotes

[1] The "fog of trial" is similar to the "fog of war" coined by Carl von Clausewitz in his 1832 book, *On War*, where he writes, "War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty. A sensitive and discriminating judgment is called for; a skilled intelligence to scent out the truth."

[2] *Logan v. State*, 71 S.W.2d 865, 869 (Tex. App.–Fort Worth 2002, pet. ref'd) (holding that in a criminal case a statement by a victim or complainant is not admissible under Rule 801(e)(2) as an admission by a party opponent).

[3] The trial court correctly overruled Hernandez's objection to the State's use of the objective standard and sustained the State's objection to Hernandez's use of the subjective standard. *Hernandez v. State*, 107 S.W.3d 41, 52 (Tex. App.–San Antonio 2003, pet ref'd).

We object so that our theory of the case and our presentation of the truth fills the courtroom and shapes how the jury experiences the trial.

[4] "The appellant is entitled to a charge stating that he need have only a reasonable belief that he is under unjustifiable attack viewed from his standpoint at the time he acted." *Kolliner v. State*, 516 S.W.2d 671, 674 (Tex. Crim. App. 1974) (holding that defendants are entitled to have the jury consider the reasonableness from the defendant's standpoint). Of course, it still has to have been objectively reasonable or there would be no point to self-defense instructions.

[5] *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001).

[6] *Atkins v. State*, 951 S.W.2d 787 (Tex. Crim. App. 1997).

[7] Sometimes a judge will want to hear the entire question before entertaining an objection. If you don't want the jury to hear the question at all, then ask to approach before stating the objection and have defense counsel proffer the rest of the question at the bench and outside the jury's hearing. This is helpful when the question to a victim is, "Isn't it true you're a convicted murderer?" We should approach on that one and make sure the felony conviction is within the last 10 years and relevant under TRE 609.

[8] A witness may not testify to his opinion on a pure question of law. *Baxter v. State*, 66 S.W.3d 494, 504 (Tex.App.–Austin 2001, pet ref'd) (citing *Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 554 (Tex.App.–Houston [1st Dist.] 1994, writ denied)); *Anderson v. State*, 193 S.W.3d 34, 38 (Tex. App.–Houston [1st Dist.] 2006, pet ref'd).

[9] TRE 401.

[10] TRE 704 and *Baxter v. State*, 66 S.W.3d 494, 504 (Tex.App.–Austin 2001, pet ref'd).

[11] "Moreover, the subjective intent of law enforcement officials to arrest is irrelevant unless that intent is somehow communicated or otherwise manifested to the suspect." *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996).

[12] There are some nuances to Rule 609, but generally any witness may be impeached with prior convictions for theft or a felony in the last 10 years. Again, there is more to it than that, but the quick answer is object any time defense counsel isn't going after one of these.

[13] An example of a non-traditional moral turpitude crime is assault by a man on a woman. "We hold, therefore, that a conviction for misdemeanor assault, as defined by Penal Code § 22.01, by a man against a woman is a crime involving moral turpitude and therefore is admissible as impeaching evidence under rule 609 of the Texas Rules of Criminal Evidence." *Hardeman v. State*, 868 S.W.2d 404, 407 (Tex. App.–Austin 1993), *pet. dism'd*, 891 S.W.2d 960 (Tex. Crim. App. 1995).

[14] It is improper to cross-examine a witness with a question that assumes a fact not in evidence. *Ramirez v. State*, 815 S.W.2d 636, 652 (Tex. Crim. App. 1991); see *Duncan v. State*, 95 S.W.3d 669, 673 (Tex. App.–Houston [1st Dist.] 2002, pet. ref'd).

[15] "An expert can offer an opinion based solely on hypothetical questions posed at trial." *Tillman v. State*, 354 S.W.3d 425, 439 (Tex. Crim. App. 2011).

[16] TRE 801(d).

[17] Statements may be "admissible as evidence of their effect on the listener, rather than of the truth of the matter asserted." *Young v. State*, 10 S.W.3d 705, 712 (Tex. App. 1999). See also Statements "would not constitute hearsay if offered for their effect on the listener rather than for the truth of the matter asserted." *In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 189 (Tex. 2007). Excited utterance is specifically listed under TRE 803(3) exceptions to the rule against hearsay–regardless of whether the declarant is available as a witness.

[18] "Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict or conviction can be set aside by the court as being against law." *Mouton v. State*, 923 S.W.2d 219, 221–22 (Tex. App.–Houston [14th Dist.] 1996, no pet.).

[19] One example of this comes from *Beckett v. State*, an unpublished opinion, but take it for what it's worth. Defense argued, "If [Beckett] believed what he did was wrong, then why was he so ready to tell the officer? Because you have to look at that at that time. Look at the photographs. If you had done that and you had known that you had done that, would you have been sitting in the room? ..." The trial court sustained the State's objection that the argument "[put] the jury in the shoes of the defendant." Courts have held as improper argument that asks the jury to stand in the shoes of a party. See e.g. *Fambrough v. Wagley*, 140 Tex. 577, 169 S.W.2d 478, 481–82 (Tex.1943); *World Wide Tire Co. v. Brown*, 644 S.W.2d 144, 145–46 (Tex.App.–Houston [14th Dist.] 1982, writ ref'd n.r.e.). This is so because the jurors are being asked to consider the case from an improper viewpoint, *Fambrough*, 169 S.W.2d at 482, that is, from the perspective of an interested party as opposed to a neutral fact-finder. See *Brandley v. State*, 691 S.W.2d 699, 712 (Tex.Crim.App.1985) (asking jurors to imagine how they would feel if they had lost a daughter improper argument because it was essentially a plea for abandonment of objectivity). "We conclude the trial court did not abuse its discretion in sustaining the State's objection to the jury argument asking the jury whether they would have been sitting in the interview room if they had inflicted the injuries shown on the autopsy photographs of Christopher." *Beckett v. State*, No. 05-10-00331-CR, 2012 WL 955358, at *6 (Tex. App. –Dallas Mar. 22, 2012, pet. ref'd, untimely filed).

Proactive crime prevention

Statistics show that close to 90 percent of Americans with a substance abuse problem started drinking, smoking, vaping, or using other drugs before the age of 18.

By Laura Wheeler
Assistant Criminal District Attorney, and
J. Brett Smith
Criminal District Attorney, in Grayson County

Closer to home, our county has seen a large increase in children and teenagers falling victim to sexual predators through phone apps, social media, gaming systems, and other grooming tactics. With these problems in mind, the seed was planted for law enforcement and our office to host community awareness presentations.

Brett Smith, the Criminal District Attorney in Grayson County (and a co-author of this article), had worked in law enforcement prior to becoming an attorney. He and our local Texas Ranger, Brad Oliver, discussed being more proactive in preventing crime. Oftentimes, prosecutors' work is mostly reactive—that is, a crime occurs, the police investigate, and we prosecute. All of our work occurs after the crime. Why not educate those in our community about the dangers we see every day to perhaps prevent future crimes?

Our office currently has two programs to educate parents, grandparents, educators, and community members about the dangers that our children and teens face in today's society. The Sexual Predator Awareness (SPA) and Drug Abuse Awareness (DAA) seminars are held on various school or community college campuses in our county, usually in the evenings for about two hours, the last 30 minutes of which is a question-and-answer session. Our SPA seminars draw the largest crowds, about 150 citizens each time! That seminar focuses on how predators use social media and various electronic applications to find victims. The DAA seminar, on the other hand, educates people on current drug, alcohol, and vaping trends, signs of substance abuse, and resources for treatment or assistance.

The SPA seminar is in conjunction with the United States Attorney's Office for the Eastern District of Texas. U.S. Attorney Joe Brown (formerly the elected Criminal District Attorney of our office) encourages interagency cooperation between state and federal partners in this project. This collaboration allows us to bring in Assistant U.S. Attorney Marissa Miller, a child exploitation prosecutor, and the highly dedicated Federal Bureau of Investigation Special Agent Jen Sparks, who is assigned to the Bureau's CARD (Child Abduction Rapid Deployment) team. These two bring invaluable experience to the presentation.

In this past year, we have presented three SPA and two DAA seminars, with more on the calendar. The audience is limited to adults over age 18 because of the content, and our primary goal is spreading this information to educators, parents, and community leaders. Crowd response has been incredible—attendees' feedback is that they are shocked these problems exist in our community. These seminars generally draw many questions from parents on how they can protect their children from predators and drug abuse. At the end, we often have to remind the audience our time is up and we all have to be at work early because the questions just keep coming, and we refer them to links on our office Facebook page for more information.

We have tremendous cooperation from our law enforcement agencies, the Sherman and Denison Police Departments and Grayson County Sheriff's Office, which have dedicated officers and resources to this project. Lt. Jeremy Cox of the Sherman PD has been an instrumental

TOP: U.S. Attorney Joe Brown (at left) and Grayson County CDA Brett Smith. MIDDLE: CDA Brett Smith (at left) and Ranger Brad Oliver. BOTTOM: The audience at a recent event.

member of the team developing these projects. ADA Laura Wheeler, the other co-author of this article, has prepared outlines, scheduled meetings, and coordinated the events and the publicity for them. She also arranged with the Grayson County Department of Juvenile Services to have the father of a drug-involved teenager speak about his real-life experiences and struggles as the parent of a young addict. We even brought in our local Substance Abuse Counsel for input on such issues.

In the beginning, we did not know if anyone from the community would show up—we wondered, "If we build it, will they come?" It is hard to gauge the fruits of our labor, but all involved have a passion for protecting our community and believe that our time and energy is well-spent. As Edmund Burke once said, "The only thing necessary for the triumph of evil is for good men (and women) to do nothing." To encourage attendance, we spread the word by running newspaper ads, issuing press releases, doing media interviews, and appearing on television community forums. Our local school districts publish seminar posters on their websites and in their newsletters and push them out via social media. We also post on our office Facebook page and, of course, spread the news by word of mouth. These programs have been well-received, and we continue to get calls for more programs on different topics. We have been asked by many parents to create a "PG" version of the SPA seminar to roll out to their children, so that may be our next project.

To strengthen the relationships within our communities, we strongly advocate that other prosecutor offices and law enforcement agencies consider putting on these types of programs. We have found that our community welcomes the conversation and is grateful for the time and information. We are fortunate to have a platform from which to promote community awareness of these and other serious issues, and our office considers it a privilege to provide information and guidance to anyone interested. You may contact us at smithb@co.grayson.tx.us, wheelerl@co.grayson.tx,us, or 903/813-4361 with any questions. ❇

Ten commandments for second-chair counsel

Through a complicated and circuitous set of circumstances we won't take time to discuss here, we have recently discovered a cuneiform tablet from the ancient Sumerian city of Uruk.[1]

By Mike Holley
First Assistant District Attorney in Montgomery County

This tablet, incredibly enough, contains the "Ten Commandments for Second-Chair Counsel."[2] We now offer these ancient bits of wisdom with brief commentary for your consideration.

Commandment I: Thou shalt always remember that you are the Second Chair and not the First.

There is a wide spectrum of how prosecutors participate with others at trial. On one end is an attorney who is told to sit beside lead counsel simply to keep a seat warm. ("Good morning! So what's your case about again? Intox manslaughter? Got it. Interested to see what happens.")

On the other end—with many permutations between—is the "co-First Chair," an increasingly popular option for a number of reasons, including optimizing trial stats for each.

But the ancients, who neither knew nor cared about trial stats, seemed to believe that ultimately one person must be in charge and not two.[3] This is for good reason. Almost every trial has a critical moment (or moments) in which a difficult decision must be made quickly and with confidence. Decision by vote or consensus simply will not do. The decision *must* be made, and it must be made by the First Chair. If the Second Chair usurps this authority, if there is confusion about this authority, or if there is unnecessary delay in the exercise of this authority, dire results are likely, if not inevitable.[4]

Additionally, trials are an individualized creative process—a highly intentional weighing and weaving of emotions, issues, and facts into what might be best described as a unique work of both art and science. The creator (First Chair) has a vision for what she's doing, and she's likely the only one who knows every facet. Or, if you like, the First is essentially crafting a very particular stew according to a special recipe in her own mind. We know from our own stew-making experiences and modern lore that a second cook (or third or fourth) can often make something that ought to be delicious into something completely unpalatable.

Finally, if our own great body of wisdom—namely movies—have taught us anything, it's that in the end, "there can be only one."[5]

Commandment II: Thou shalt know all of your assigned and particular duties and perform them diligently.

Asking "Should I take this next witness or do you want to?" in the middle of trial is sub-professional practice. Trial is stressful enough (even when done correctly) and contains many unexpected turns and twists. Assigning roles as clearly and early as possible increases the probability of success of any particular task. Let co-counsel know—now—if you want her to open in the trial next week so that she (and her subconscious) can begin work on that task. Just as importantly, by letting a colleague know what her tasks are, you can close a mental loop in your own head and focus on other things.

Common questions you must answer before trial: Which witnesses do you wish me to take, if

Professionals keep checklists; amateurs wing it. And checklists don't keep themselves. Keeping lists is a perfect assignment for a Second Chair–it requires careful attention but not creativity. (Leave the creativity for the First.)

any? What types of anticipated defense witnesses should I prepare to cross? Who will prepare the charge? Who will read the indictment to the jury? We all know these tasks must be done, but the assignments still need to occur, and they need to occur as clearly and as early as possible. And, for the Second Chair's part, when assigned to a trial as a Second, she must be prepared to fulfill it in such a way as to fully accomplish the intent of the First for this particular trial. (And to that end, the more the Second knows about the trial and the First's intent for it, the better.)

Commandment III: Thou shalt not talk to the First while the First is listening to another, nor shalt thy write to the First while the First is reading something else.

There is an "ear" gate and an "eye" gate into the mind. Two streams of information can enter the mind through these gates, but not through the same gate at the same time. That is to say: One can watch (the "eye" gate) a video on a screen while listening (the "ear" gate) to co-counsel. Similarly, one can listen (ear) to a 911 recording while looking (eye) at a photo, and one can hear what a juror says while looking at seating chart, or one can listen to a juror while watching his body language.

What one *cannot* do is listen to a witness while co-counsel whispers into his ear what the next question should be. One cannot watch a witness draw on a diagram while reading a case to support an upcoming objection. That's because each gate can receive only one stream of information at a time. One stream, one gate. Don't cross the streams.

When acting as the Second, then, I should be mindful of this reality. I can slide a note with a suggested question across the table to the First during his questioning of a witness. Or, if he is watching a demonstration, I can quietly tell him that our key witness has arrived and is in the waiting room. One stream, one gate. Now that you know the rule, you can vow to abide by it.

Commandment IV: Thou shalt provide food and water to the First as needed.

Trial is a taxing, arduous experience. The mind can produce only what the body supports, and the body can provide support only to the extent it is properly cared for and nourished. The Second can greatly help by providing the basics—food and water and coffee—for the First. These are the types of things the First should not have to worry about so he can focus on the trial.

Commandment V: Thou shalt keep the lists of exhibits, elements, and witnesses and guard them diligently.

Professionals keep checklists; amateurs wing it. And checklists don't keep themselves. Keeping lists is a perfect assignment for a Second Chair—it requires careful attention but not creativity. (Leave the creativity for the First.) And part of keeping a checklist is not losing that checklist amongst all the other papers. (Pro tip: The ancient Sumerian bar apparently used a different colored clay tablet for the exhibit checklist so that it stood out amongst all the other tablets on counsel table and could be located quickly. Not a bad idea for us to borrow.)

Commandment VI: Thou shalt oversee exhibits, witnesses, mints, instructions, kerchiefs, sticky notes, the stylus, and the clay.

There are a lot of moving parts in a trial, and many of those moving parts are little things—but important things. Documents. Highlighters. A safety pin for a rip in a blouse or trousers. A binder clip for a list of exhibits. A disk with a video. A good Second has those things at hand and under control.

Along those same lines, the diligent Second ensures that the exhibits that actually go into the holy of holies—the sacred deliberation room—are what they ought to be, and no more nor no less. Other moving parts of a trial are, of course, the people, and the good Second is a witness wrangler "par excellence."

Commandment VII: Thou shalt take notes with utmost care, especially when the First speaks to jurors.

As soon as testimony is uttered, it dissipates. A witness says four things, and the prosecutor hears three, remembers two, and repeats one. Notes make all the difference: "The faintest ink is more powerful than the strongest memory," as the ancient Chinese philosopher Confucius probably didn't say. But notes really do matter, and they matter a great deal. The Second is ideally situated to take notes when she doesn't have to focus on formulating the next question or objection. This is particularly and uniquely true in voir dire where the First can ideally focus on speaking to, listening to, and carefully watching jurors, which he cannot do if he is frantically writing down the (often complicated) comments of a juror who has taken to heart the urging of counsel to "freely speak your mind." The same is true of witness testimony.

Simply put: A Second who takes good, clear notes in such a way as to make information later accessible in trial is worth her weight in goats.[6]

Commandment VIII: Thou shalt not distract the First nor impede his efforts in any way.

The First must be singularly focused—all the burden of the battle rests ultimately on his shoulders. There are many, many distractions in trial, but the Second cannot be one of them. Questions, suggestions, and comments should be reserved unless and until they assist the cause. The best Second is present when needed and invisible when not. The Second also should not be easily offended by the direct nature of the First under fire. (Thick skin is essential equipment for a trial lawyer. Remember that. A trial is often a knife fight, not a high-school debate.) The Second should bring no additional drama to the table as drama is already present in abundance.

Commandment IX: Thou shalt freely offer encouragement, hope, and humor but shall avoid negative comments at all costs.

Trials are inherently emotional experiences performed by emotional actors in an emotional setting. The roller coaster nature of trial inherently possesses many difficult and diverse challenges to the prosecutor's mental fortitude.[7] The Second should be there to bolster, not burden, the First. A joke at the appropriate time (but *not* an inappropriate time) does wonders. Encouragement from the Second is like "apples of gold in a setting of silver."[8] Advice, especially when requested, can make all the difference in an outcome and will be forever remembered and cherished. The one thing the Second cannot do—even if she feels it deeply herself—is to say or do anything that would discourage the First. Plenty of others are willing and able to take up that task already.

Commandment X: Thou shalt show but one face toward the adversaries and all observers.

There is an aspect of warfare in trial work. Adversaries (and jurors) intently study counsel at the table, and they may value the observations they make themselves over the evidence fed to them.[9] So, for example, a Second who is texting away, oblivious to testimony, or clearly bored with the proceedings, sends a powerful message to jurors—and it's not a good one! When a Second appears shocked by devastating and damaging testimony from a defense witness, the jurors notice—and the damaging effect is amplified.

More significantly, any obvious disagreement between the First and the Second invites aggression and agitation from opposing counsel and sows doubt and distrust in the hearts of the jurors. Therefore, the First and Second must always, always maintain a unified front between them even if strong disagreements occur behind closed doors. And they might.

Conclusion

And there you have it—ancient wisdom for modern times. Whether or not these commandments are unreasonably ideal or always appropriate for every office or trial will be up to you to decide! ❇

The First and Second must always, always maintain a unified front between them even if strong disagreements occur behind closed doors.

Endnotes

[1] Uruk was one of the most important cities in ancient Mesopotamia. It was founded by King Enmerkar around 4500 B.C. https://www.ancient.eu/uruk/.

[2] This is not true. I made this up.

[3] "A multitude of rulers is not a good thing. Let there be one ruler, one king." Homer, *The Iliad*, circa 750 BC.

[4] There is, of course, an exception for a supervisor who must prevent a disaster.

[5] Unless we are talking about *Highlander II: The Quickening*, which is a terrible, terrible movie. So let's not talk about it.

[6] Goats were very, very valuable in ancient Sumer. Probably.

[7] The typical pattern is this: I cannot lose this trial. I cannot win this trial. Throw up. Repeat.

[8] Ancient Hebrew, circa 700 B.C.

[9] Some of these observations occur in the hallway or the parking lot.

How incompetency works in Texas

Years ago, this journal published a chart depicting how incompetency is litigated in criminal courts. That process has changed somewhat over the years, so we present an updated flow chart of the incompetency process.

By Monica Mendoza
TDCAA Research Attorney in Austin

Chapter 46B: Incompetency to Stand Trial

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

Found in Subchapter A: General Provisions

Competency issue is raised by either party or court. 46B.004(a)

Court conducts informal inquiry. 46B.004–.005

Finds no evidence

Criminal proceedings resume.

Finds some evidence to support a finding of incompetency [46B.005(a)]

Found in Subchapter B: Examination

Court orders evaluation. 46B.021–027

Report by expert(s) due within 30 days. 46B.026(a)

contested

uncontested

Found in Subchapter C: Incompetency Trial

Hearing to jury or judge requested by either party or the court.

Competent.

Criminal proceedings resume. 46B.053

Competent. *(Note: Law is silent regarding agreed competency at this stage.)*

No hearing requested. 46B.054

Incompetent. 46B.055 **(See opposite page for next steps.)**

Chapter 46B: Incompetency to Stand Trial (cont'd)

Incompetent.

Initial restoration "tracks." 46B.071–.086

Offense is a Class A misdemeanor or any felony.

1) Release on bail for outpatient restoration treatment if the defendant is not a danger to others, if he may be safely treated on an outpatient basis with specific objectives, and if appropriate outpatient competency is available. Not to exceed 120 days. (46B.072)
or
2) Commitment to jail-based competency restoration program or mental health or residential care facility.

Offense is a Class B misdemeanor.

1) Release on bail for outpatient restoration treatment if:
a) defendant is not a danger to others,
b) defendant may be safely treated on an outpatient basis, and
c) comprehensive outpatient competency restoration treatment program offered by an identified treatment provider is available. Not to exceed 60 days. (46B.0711)
or
2) Commitment to jail-based competency restoration program,
or
3) Commitment to mental health or residential care facility *only if* Option 2 is not available or not appropriate. 46B.071(a)(1)

Offense is a Class C misdemeanor.

No restoration process for a Class C. 46B.002

Defendant returned to court. 46B.081

Court's decision contested

Court's decision uncontested

Hearing to jury or judge requested by either party or the court. 46B.084(b)

No hearing requested.

Competent. 46B.084(d)(1)

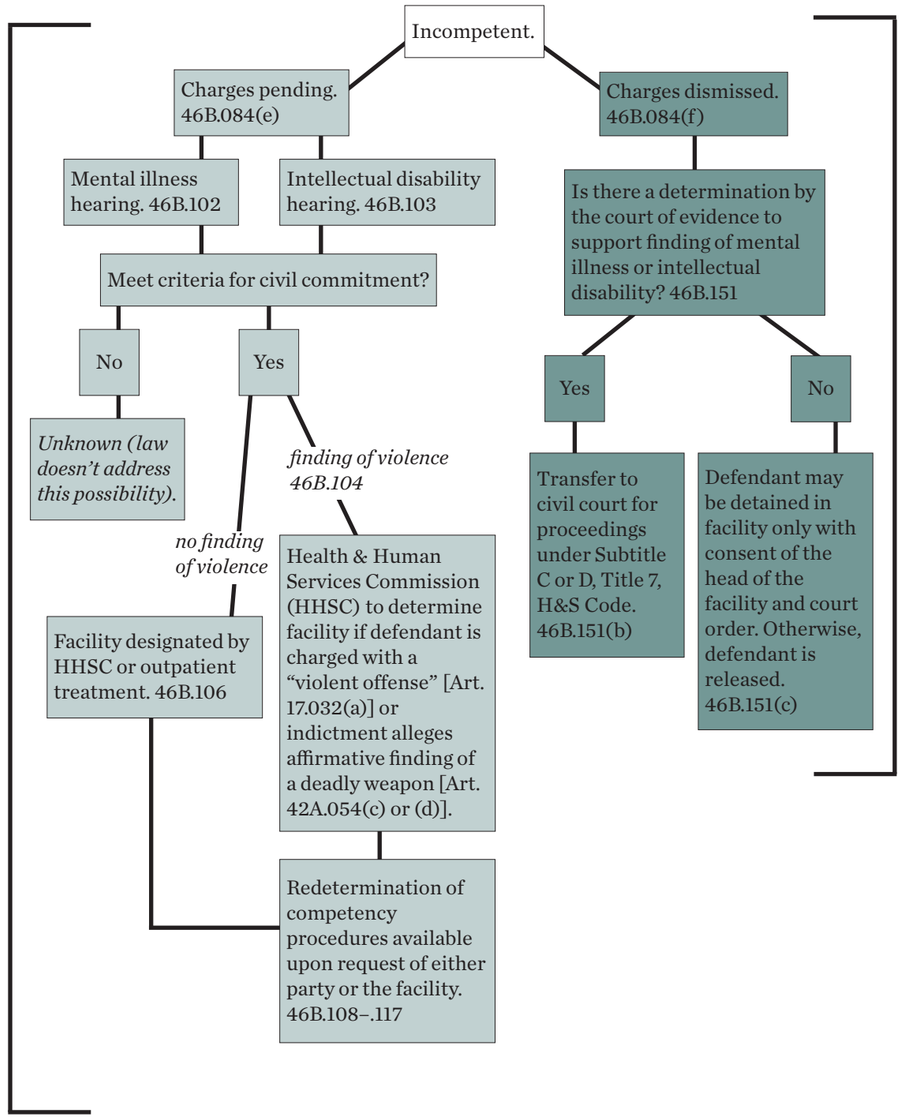
Incompetent. **See page 40 for how the process continues.**

Criminal proceedings resume. 46B.053

Found in Subchapter D: Procedures after Determination of Incompetency

Chapter 46B: Incompetency to Stand Trial (cont'd)

Found in Subchapter E: Civil Commitment Charges Pending



Found in Subchapter F: Civil Commitment Charges Dismissed

The rest of the story

"Pics or it didn't happen" has been a popular online catchphrase for some time now.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

Usually, it's a demand that someone provide photographic evidence to support a claim or boast that seems outlandish. Such a catchphrase would have been ridiculous 20 or 25 years ago, but the proliferation of smartphones, affordable cloud-based home security cameras, and traffic control cameras has in many ways created an expectation, however unreasonable it may be, that much of our day-to-day life be intentionally or incidentally recorded.

Law enforcement, to at least a small extent, has recognized this cultural phenomenon, and the presence of dash cameras and body cameras is now so ubiquitous that even the smallest law enforcement agencies have equipped their officers with recording equipment. These cameras have been a game-changer for the people investigating crimes and prosecuting criminal offenses, and the presence of these devices at crime scenes has led jurors to ask—not "What did the defendant say?" or "What did the officer say?"—but "What does the video show?"

But anybody who's been prosecuting for more than a few months knows that these videos don't always tell the whole story—there's a world of activity going on beyond the body-worn camera's limited field of view. Our office was reminded of how important it is to go beyond the video by a recent case where a rookie officer's body camera footage told one story about an alleged crime, while one of our citizens claimed something very different.

A day of heavy drinking

On May 6, 2018, Jane Doe (obviously not her real name) spent the day drinking. She was 60 years old and had been a heavy drinker since the mid-'90s. She resided in an apartment complex in Tatum for many years and her drinking was both well-known and greatly annoying to the other tenants.

By 10 that evening, Jane had consumed two-thirds of a bottle of vodka and taken a variety of prescribed medications including clonazepam, temazepam, and methocarbomal to treat insomnia and muscle and joint pain. As a favor, Jane decided to take a plate of fried fish, which she'd made for dinner, to her friend Annie Sneed, who managed the apartment complex. When Jane arrived at Annie's apartment, she thought Annie looked ill and needed medical attention.

Jane walked back to her apartment and called 911. An ambulance was dispatched to the complex, and pursuant to Tatum Police Department policy, the sole patrol officer on duty that night was sent to the scene as well. Officer Terry Dillon Lofties was just 26, he had recently been hired, and he had graduated from the East Texas Police Academy just two months prior.

Officer Lofties arrived on scene and made contact with Annie Sneed, who was livid that Jane had called 911 on her behalf. She insisted that she was perfectly fine, that she was only tired and didn't need any sort of medical attention. Jane, though, had been drinking all day and she was really the one who needed checking on. Officer Lofties was wearing a department-issued body camera, so this interaction was recorded. The lens was obscured somewhat by grease or humidity, but the audio recorded without issue.

Together, Annie and Officer Lofties went to Jane's apartment, and Annie used her master key to open the door. Jane was in her nightgown watching television. The pair spoke with her, and after a few moments, Officer Lofties told Ms. Sneed to return to her apartment so she could tell the paramedics that she would be refusing medical treatment. The officer then questioned Jane about her day and why she decided to call an ambulance for her friend. He counseled her to remain in her apartment, sober up, and leave Annie

alone. Jane promised that she would and asked that Officer Lofties stop by her apartment before he left to tell her if Annie actually refused treatment. Officer Lofties said he would, and he went to check in with Ms. Sneed again before moving his patrol vehicle to provide easier egress for the ambulance. He sat in his vehicle for a few minutes, presumably making notes for his report, before the body camera and dash camera went off.

The allegation

The next afternoon, Jane Doe called Tatum Chief of Police April Rains and reported that she had been sexually assaulted by a Tatum police officer. Chief Rains immediately reached out to the Rusk County Criminal Investigations Lieutenant Dale Summer and Investigator Russell Smith; Lt. Summer, in turn, contacted Texas Ranger Chris Baggett to assist.

When Investigator Smith arrived at Jane's apartment, she was preparing to go to Henderson for a SANE exam. Jane had already been to a general practice doctor in Tatum for an exam but was told that she would need to see a SANE instead. This delay turned out to be a stroke of good fortune for Investigator Smith as it let him get a first-hand account of what happened before he went about collecting evidence.

At this point, there was a lot of skepticism around Jane's allegation. The hardest piece of evidence available to us was Officer Lofties's body camera and dash camera footage. It hadn't captured the events Jane described.

Jane told investigators that after she called the ambulance for her friend Annie, a short, heavy-set officer with a dark complexion pushed his way into her apartment. Jane said that the officer kissed her and pushed her towards her bedroom. Once back in the bedroom, the officer pulled her panties down and pushed her nightgown up so that she was nude from the waist down. The officer then took his utility belt and gun off his waist and dropped his own pants. He then penetrated her sexual organ and ejaculated inside her. She described the feeling of his ejaculate on her private parts and on the inside of her thigh. When the officer was finished, Jane said she pushed him out of her apartment. She noted that she always slept alone so her bedroom should be tidy but, at that moment, the bed was in a state of disarray.

Sgt. Smith then left Jane to photograph the bedroom, where he noticed that the bed appeared to be quite neat, with the blankets folded over as if someone who'd been sleeping in the bed had folded them off of her before getting up. He took canvassing shots of the bedroom and hallway before photographing and collecting all of the bedding as evidence, including a fitted sheet, cover sheet, pillowcase, heated blanket, and comforter.

Jane was driven to Henderson for the SANE exam, where she was examined by Susan Camazine, who performs virtually all of the sexual assault nurse examinations in Rusk County. Jane gave a patient history consistent with what she had already told Sgt. Smith and what she would later tell Ranger Baggett. In her report, Ms. Camazine noted bruising on Jane's arm and what appeared to be a recent injury on the labia minora that was consistent with a nonconsensual sexual encounter. Before concluding the exam, Ms. Camazine took a number of swabs from across Jane's body, including from the interior of her vagina and inner part of her thigh.

Meanwhile, Ranger Baggett was interviewing witnesses and began with Annie Sneed. Ms. Sneed told the Ranger that she had used a master key to enter Jane's apartment the night before because Jane didn't answer the door. It was Annie's hope at the time that Officer Lofties would arrest Jane for public intoxication. When they opened the door, Jane was sitting in a chair drinking an alcoholic beverage. Jane was a drunk, Ms. Sneed explained, and would drink until she fell down. On the day of the incident, Annie noted that Jane had fallen down and was left with several bruises and a bloody nose. Ms. Sneed told Ranger Baggett she didn't stay in Jane's apartment long before returning to her own place, and Officer Lofties wasn't in Jane's apartment for more than five minutes longer because Annie watched him leave while she was still waiting to sign the ambulance's refusal of transport.

Ranger Baggett next interviewed Stasia Scott, whom Jane had called the day after the assault. Jane told her she had been raped and described the ordeal in much the same way she would later describe it to Investigator Smith. Ms. Scott informed Ranger Baggett that she had to convince Jane to notify law enforcement. Ms. Scott then took Jane to the local doctor for a sexual assault exam, and while there, Jane began asking the doctor to prescribe "nerve medication." The doctor refused because Jane appeared intoxicated. She had also been in the same doctor's office the day before in an attempt to get a prescription for a shoulder complaint. Jane became angry with Ms. Scott because Jane believed she had told the doctor about her drinking that day. After this argument, Ms. Scott dropped Jane off at her apartment and refused to take her to the emergency room for the SANE exam.

After these interviews, Ranger Baggett talked to Officer Lofties at the Tatum Police Department. By this time, Officer Lofties had been informed of the allegations and had signed an acknowledgement that he was on administrative leave while the investigation was pending. Officer Lofties completely denied any wrongdoing and described the events of that evening consistently with what was depicted on his body camera. He never got within 3 feet of Jane that night, he said, and he denied having any physical contact with her, let alone any sexual contact.

He said that after he checked in with Ms. Sneed, he spent 10 to 15 minutes talking to a fellow officer on the phone before returning to the office. This other officer, Cody Rodriguez, was a longtime friend, and it was not uncommon, according to Lofties, for the two of them to call each other and debrief after their various callouts.

Hard to believe

At this point, there was a lot of skepticism around Jane's allegation. The hardest piece of evidence available to us was Officer Lofties's body camera and dash camera footage. It hadn't captured the events Jane described. Rather, the video backed up what Officer Lofties had said about the night in question, and Annie Sneed's own observations also seemed to support his account.

Moreover, Officer Lofties did not match the description of the assailant Jane had offered. She had described the man as short and stocky with a dark complexion, and while Officer Lofties was somewhat stocky, he was of average height and had an unmistakably pale complexion. Jane's request for "nerve medicine" the day after the sexual assault, coupled with the doctor denying her request the day before, raised suspicions that she was fabricating the assault allegation to obtain additional prescriptions.

Even setting aside these evidentiary concerns, the allegations against Officer Lofties seemed far-fetched. He was 26 years old, and Jane was 60. He had a wife and small children at home. He had graduated from the police academy only a few weeks earlier and had just begun his law enforcement career. He had too much going for him to throw it all away by committing such a heinous crime.

At this early stage in the investigation, we were falling into the same trap that so many people do when hearing the details of a sexual assault. We were trying to make sense of a senseless act. This inability to appreciate that a member of our own law enforcement community could do something so hideous had us ready to believe that any inconsistency in Jane's account amounted to a reasonable doubt. Every mental impression we had about the case was being viewed through the body camera's narrow field of view. Our understanding of the case would quickly change, however, when some forensic testing finally allowed us to stop looking at the body camera footage and start listening to Jane.

The turning point

Despite our concerns with the case, the swabs taken from Jane as part of the SANE exam were submitted to the DPS Crime Lab in Garland for examination. Two factors proved very fortunate to Jane's cause. First, Ranger Baggett impressed upon the lab how important it was for the testing to be completed quickly. The Tatum Police Department is an incredibly small agency. There is never more than a single officer on duty, and it was going to be impossible for the department to hire another officer while it was paying Lofties to be on administrative leave. Second, the Garland lab was beginning a pilot program to reduce the turnaround time on SANE kit testing. When this case's swabs were submitted, the forensic scientists immediately went to work. The pilot program's goal was to see how quickly a single case could be completed if the forensic scientist worked on that one case exclusively and without interruption. The lab did not change the tests, nor were there any changes to the science— it was truly a matter of putting themselves up against a stopwatch to see how fast everything could be done.

The speed with which these lab tests were competed remains astonishing to me. Just 11 days after the sexual assault was committed, the Garland lab confirmed the presence of male DNA on the swabs from the vagina, external genitalia, perianal area, lip, and thigh. It gave the case a new spark. Ranger Baggett obtained a warrant for a sample of Officer Lofties's DNA so that a comparison could be made.

Meanwhile, Ranger Baggett interviewed another of Jane's friends, Martha Sue Pepper. She had been at Jane's apartment the night of the assault, and she stated that after Officer Lofties moved his vehicle out of the ambulance's way, he sat in it for a few minutes before returning it to a parking place in front of Jane's apartment.

Even setting aside the evidentiary concerns, the allegations against Officer Lofties seemed far-fetched. He had too much going for him to throw it all away by committing such a heinous crime.

We first considered the possibility that the defendant would enter a guilty plea and throw himself on the mercy of the jury. We wouldn't normally give an idea like this too much thought, but with the DNA evidence connecting Lofties to Jane, we thought this decision would be the most direct path to minimal punishment.

A few days later, the Garland lab completed the DNA comparison, and both the interior vaginal swab and the thigh swab (the only two that were analyzed) came back with exceptionally high numbers. The DNA mixture from the vaginal swab was 2.7 octillion times more likely to come from Jane and Officer Lofties than Jane and another unknown, unrelated individual. The DNA mixture from the thigh swab was 1.95 octillion times more likely to come from Jane and Officer Lofties than Jane and another unknown, unrelated individual. Whole sperm cells were also obtained from the thigh swab, and they were 1.48 octillion times more likely to come from Officer Lofties than from another unknown, unrelated individual. With these DNA results in hand, Officer Lofties was indicted for sexual assault by a Rusk County grand jury in June 2018.

Tying off a loose end

Ranger Baggett was convinced that Cody Rodriguez, the friend and fellow law enforcement officer who spoke with Lofties the night of the sexual assault, might be a source of material information. He arranged for Texas Ranger Nicholas Castle to interview Mr. Rodriguez, who had taken a job at a nearby county's sheriff's office, about two months after the assault.

Despite the delay in getting his statement, Mr. Rodriguez recalled his conversation with Lofties quite well. Lofties called him to recount a service call on May 6, 2018, involving an intoxicated woman who had bragged to Lofties that she "used to mess around with troopers" but had "never been with a city cop" before. Because he was married, Lofties informed Mr. Rodriguez that he "squashed it right there."

Lofties's sexualized depiction of Jane to his friend was significant to our view of the case. The body camera footage recorded nothing even remotely similar to this statement during Lofties's interaction with Jane. This statement seemed tantamount to an admission that Lofties had returned to Jane's apartment with his body camera turned off.

Pre-trial preparations

Virtually no plea negotiation took place between indictment and the trial in September 2019. As the trial approached and we began preparing our witnesses, we started to contemplate possible defensive strategies. We first considered the possibility that the defendant would enter a guilty plea and throw himself on the mercy of the jury. We wouldn't normally give an idea like this too much thought, but with the DNA evidence connecting Lofties to Jane, we thought this decision would be the most direct path to minimal punishment.

Next, we mused over the idea that Lofties would reverse course and admit to the sexual contact but claim it was consensual. This strategy worried me most of all. If the defense went this route, the defendant himself would have to take the stand, where we could confront him with the earlier opportunities he had, with Ranger Baggett and with his friend Cody Rodriguez, to come clean and admit to the sexual contact if it truly was consensual. On the other hand, I thought that an explanation along the lines of "I'm sorry I lied to the Texas Ranger, but I had committed adultery and wasn't able to admit it at the time" might resonant with members of the jury, especially if any of them had committed adultery themselves. The combination of such an excuse and Jane's alcohol- and medication-addled recollection might have been a winning combination with the right jury.

Ultimately, the defense settled on the third possible theory we discussed internally at the office. The result of the DNA testing was our obvious "smoking gun" that tied the whole case together, and without those results, this case likely would not have made it out of grand jury. In clear recognition of this fact, the defendant centered his attack on undermining the results of the DNA testing.

The defense strategy in action

I'll be the first to admit that I greatly underestimated the strategy of attacking the DNA evidence. It wasn't that I underestimated defense counsel. The defense attorney's reputation for being a cunning, persuasive attorney well preceded her. I knew going into the trial that if anybody could make this strategy work, it was this defense attorney. My mistake was in assuming that the reputation that DNA had developed in its depiction in pop culture and on the news would make it next to impossible to take down effectively.

The main thrust of the defense's attack on the DNA results happened during cross-examination of the forensic scientist. The defense attorney spent about two hours on cross. She never got overtly hostile with the forensic scientist, and if she was ever agitated by a response to her questioning, she didn't let it show. The cross-examination was divided into two parts. The first was essentially a discussion of the history of DNA testing and how it has improved over time. The defense attorney drew on her many years of working with forensic scientists as a prosecutor and her experience presenting forensic DNA evidence at trial to walk the forensic scientist and the jury through the earliest days of DNA testing all the way to today's modern polymerase chain reaction testing. The second part was a discussion on the change in how DNA results are reported. The defense attorney repeatedly emphasized that DNA testing is not able to say definitively that any specific person was the source of any particular DNA but, instead, uses a likelihood ratio that stops short of a definitive assertion about the source of any DNA.

The defense attorney never attempted to create a "Perry Mason moment" for herself on cross-examination. Both the defense attorney and the forensic scientist were too smart and too good at their jobs for something like that to happen. Instead, her approach was clearly designed to result in death by a thousand cuts.

In closing argument, defense counsel attempted to strike her lethal blow by implying that the scientific methods used to test the DNA in this case will ultimately be replaced by better, more accurate methods, and that those new methods would illuminate why "this crime just doesn't make sense." She told the jurors that she wasn't going to stand before them and be so foolhardy as to suggest that the DNA testing in every criminal case is bad or wrong. Rather, she focused on the uncontroverted events from the body camera footage and the witness statements that corroborated it. She noted the inaccuracies and inconsistencies in Jane's testimony. When viewed in light of everything else we knew about the case, she argued, the DNA results simply had to be wrong—an error in the testing was the only thing that made sense.

The verdict

The jury deliberated for five hours before requesting to break for the evening. They returned the next morning and deliberated for another two hours before returning a guilty verdict.

Jane felt like she had said everything she needed to during the guilt-innocence phase of trial, and the defendant had no prior criminal history, so the State's punishment case consisted solely of closing argument. The defense called two witnesses, the defendant's wife and his father.

Lofties's wife's testimony was as expected. She talked about how important the defendant was to her family. She spoke at length about how he had become the father to her two children from a previous marriage and how great a dad he was to the child they shared together. She also emphasized his importance as a breadwinner and the struggles that her family would face without him.

The defendant's father is a retired former law enforcement officer. Despite his son's wrongdoing, he, like his daughter-in-law, stood by his son in the wake of the criminal case. When confronted with the fact that his son would now be a registered sex offender for the rest of his life, the man became very emotional. It was a completely genuine moment that seemed to register on the faces of many of the jurors.

The State's argument at punishment centered on the defendant's gross misuse of power that had been entrusted to him as a member of the law enforcement community. Our office argued that the facts of the case required a prison sentence to uphold the legitimacy of the criminal justice system in Rusk County. Ultimately, though, the emotional displays of the defendant's family, coupled with Jane's relative lack of emotion, resulted in the jury assessing punishment at 10 years' confinement with a recommendation of community supervision.

I'll be the first to admit that I greatly underestimated the strategy of attacking the DNA evidence.

Lessons learned

I am a firm believer that every single trial should teach the prosecutors a few lessons. We should come out of trial a little bit better and a little bit wiser than when we went in. We can improve ourselves through simple internal reflection and by debriefing with colleagues, witnesses, and jurors. I make a point after every trial to sit and write down the lessons I need to carry with me into my next one. This case was no different.

First, this case really impressed upon our office and the investigators the importance of sticking with a case to the bitter end, even when the early investigation is not promising. Before the DNA results came in, plenty of people doubted Jane's allegations against Officer Lofties. Don't get me wrong: No member of the DA's Office, Sheriff's Office, or Texas Rangers ever gave up on this case. There was, however, a little bit of a lull in the investigation while DPS was preparing the DNA analysis. This time could have been used to interview Martha Sue Pepper and Cody Rodriguez. By waiting until the DNA testing was

complete before we conducted these interviews, we put more time between the sexual assault and the interviews and created the opportunity for the defense attorney to cast doubt on the witnesses' recollections of events.

I also believe that we were not aggressive enough in the charging conference. Our office typically prepares the charge for the district judge. We collaborate with defense counsel in its construction and try to work out any disagreements about its contents as collegially as possible. Because a conviction can be reversed if an erroneous portion of the charge is objected to and any harm is suffered by the defendant as a result, our office typically errs on the side of giving the defense attorney what he or she wants.[1]

In this case, the charge of the court as originally drafted contained three different definitions of nonconsensual sex as described in Texas Penal Code §22.011(b):

- by the use of force,
- by the victim being physically unable to resist, and
- nonconsensual sex resulting from a public servant actor who coerces the other person to participate.[2]

At the charging conference, the defense attorney objected to the inclusion of everything but the "use of force" definition. At that point in the trial, we felt confident in the evidence that we had presented as far as use of force was concerned, and rather than run the risk of an appellate court interpreting its inclusion as error in some way, we agreed to remove the "physically unable to resist" method from the charge. After trial, we spoke with some of the jurors and learned that despite both parties' heavy focus on the DNA, the jury spent the majority of its time deliberating on consent. Despite not having an instruction to that effect, the jurors decided Jane was simply too intoxicated from the combination of alcohol and prescription medications to physically resist the defendant's advances. Had we included this instruction in the charge and discussed it during closing argument, we could have significantly reduced the deliberation time and possibly received a punishment verdict more in line with our request.

Our final lesson stems from the punishment phase. It goes without saying that our office did not ask that the jury recommend community supervision. While we certainly respect the jury's decision, I feel like we could have done a better job impressing upon them the seriousness of sexual assault in general and the egregious nature of this sexual assault in particular. We took the diverse life experiences of our jurors for granted and wrongly believed that, like us, the jurors would be shaken to their very core by a law enforcement officer sexually assaulting a citizen while on duty. We should have spent time talking with members of our own law enforcement community and with the East Texas Police Academy graduates from the defendant's class. Had we done something as simple as call one of the police academy instructors to discuss the law enforcement ethics training the defendant received or introduced a copy of the Texas Police Association's *Law Enforcement Code of Ethics*, it might have diffused some of the sympathy that the defendant's wife and father generated for him with their testimony, and it may have resulted in a punishment verdict more in line with the 20 years' confinement that we deemed appropriate.

With the benefit of hindsight, we would certainly do some things differently—though that's not to say the trial had no positives. In fact, if you asked our victim, she would tell you that she was satisfied with how it turned out. Like us, she believed prison time would have been appropriate, but thanks to the incredible work of our victim assistance coordinator Salenea Turner, Jane was informed about every decision we made when we made it, as well as the logic behind it. She knew when she made the report that a lot of people doubted her story and, in some ways, she had expected us to do the same. However, the efforts of the investigative team and our office throughout the whole process instilled an appreciation in Jane that the verdict could not shake. Jane had been telling the truth the whole time—and we uncovered it, even when the body-cam footage made that task harder. ❊

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Endnotes

[1] An error in the charge to which defense counsel does not object requires egregious harm.

[2] Tex. Pen. Code §22.011(b)(1), (b)(3), and (b)(8).

A roundup of notable quotables

"He would no doubt still be adding to his staggering tally had he not been caught."

— Ian Rushton, a deputy chief crown prosecutor for the northwest of England, in a statement about Reynhard Sinaga, who was sentenced in early January to life in prison for nearly 200 sexual assaults over a 2½-year period. Detectives are still trying to identify 70 victims who are depicted on Sinaga's cell phone, which he used to record the assaults. Prosecutors called him "the most prolific rapist ever tried in a British court." https://www.nytimes.com/2020/01/06/world/europe/reynhard-sinaga-rape.html

"Someone asked earlier, who's responsible for what's happening at Parchman [prison]? The inmates. The inmates are the ones that take each other's lives. The inmates are the ones that fashion weapons out of metal."

—Phil Bryant, outgoing governor of Mississippi, commenting on a prison uprising that left at least five inmates dead. Mississippi prisons have long been underfunded and understaffed, and a veteran Department of Corrections employee, Christopher Epps, warned legislators in 2012 that trouble would come if more money was not appropriated to hire additional guards. Epps himself went to prison for collecting more than $1 million in bribes. https://www.easttexasmatters.com/news/national/foretold-uprising-hits-cash-starved-mississippi-prisons/

"I had seen him. I had visited with him. I had given him food."

—Britt Farmer, senior minister at West Freeway Church of Christ in Fort Worth, speaking of the gunman who opened fire during a late December service, killing two congregants before being shot and killed himself. Though the motive for the murders is still unknown, the shooter had demanded money from the church in the past and had become enraged when told no. https://www.cnn.com/2019/12/30/us/texas-church-shooting-monday/index.html

"That's the baby in my house."

—The unnamed ex-boyfriend of Magen Fieramusca upon seeing a flyer with Margo Carey's picture. Margo was weeks old when she and her mother, Heidi Broussard, were kidnapped by Fieramusca, and Fieramusca passed off the child as her own while living with the ex-boyfriend. Broussard's body was later found in a car parked in Fieramusca's driveway, and baby Margo was recovered and reunited with her family. Fieramusca was arrested and is in the Travis County Jail. https://www .easttexasmatters.com/crime/woman-charged-with-kidnapping-austin-mom-and-baby-pretended-child-was-her-own/

Have a quote to share? Email it to the editor at Sarah.Halverson@tdcaa.com. Everyone who contributes a quote will get a free TDCAA ball cap!

"Fixating solely on whether bail is affordable for the defendant is unacceptable. Such a myopic analysis leaves out an important part of the story; it critically undermines the victims of crime and could easily put the community at risk of further violence."

—U.S. Attorney Erin Nealy Cox of the Northern District of Texas, in an editorial in the *Dallas Morning News*. Cox cites several examples of Dallas County defendants granted bail only to be re-arrested days or weeks later for new offenses. https://www.dallasnews.com/opinion/commentary/2020/01/05/bail-is-a-revolving-door-for-violent-criminals-to-quickly-leave-jail-and-hurt-more-people/

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