The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

Using surveillance, cell towers, and social media to track down a killer

Howe is a small town in southern Grayson County with a population of a little over 3,300.

By Nathan Young (at left),
Assistant Criminal District Attorney,
Kerye Ashmore (middle)
First Assistant Criminal District Attorney, &
Karla Baugh (at right)
Assistant Criminal District Attorney, Grayson County

It doesn't see a lot of violent crime, let alone murders—the local paper is more accustomed to covering Founders Day and events about the local school district.

But that changed on August 24, 2017, when law enforcement responded to a shooting on the Highway 69/75 corridor within the Howe city limits. Tahbari Collins sustained two gunshot wounds to his chest and died on the scene. The Howe Police Department contacted local Texas Ranger Brad Oliver to request his assistance, and he and fellow Ranger Reuben Mankin, who became lead investigator, arrived to assist Howe Police Sgt. Keith Milks.

Mr. Collins was not from Howe or Grayson County; he was simply one of hundreds of travelers passing through that day on the highway. He had been sitting in the front passenger seat of his own car when he was shot. Two others were in the car at the time: Jesika Spencer, who was in the back seat, and De Marcus Griffin, who was driving. The three friends had been traveling from Houston to Atoka, Oklahoma, and back again as part of a fundraiser. They told police that as they travelled south on U.S. Highway 69/75, a major artery out of Dallas—75 goes north to Topeka, Kansas, and 69 eventually intersects Interstates 44 and 49 to Kansas City, Missouri—a black car pulled up beside them and opened fire. Neither witness could identify the shooter, make or model of the car, or license plate, nor could they provide a reason why someone would shoot at them.

As investigators searched the victim's vehicle, they discovered five bullets had struck it, with three entering the passenger compartment. Two had hit Mr. Collins, and one

Continued on page 15

Apply for the Mike Hinton Memorial Scholarship

In honor of the legendary Harris County prosecutor, defense attorney, and longtime Foundation supporter who passed in 2020,

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

the TDCAF Board is proud to announce a scholarship program named in his honor. The program is intended to assist any Texas prosecutor to attend our Annual Criminal and Civil Law Conference this September. If you want to attend the conference but don't have the resources, you may apply for a full scholarship to pay the $350 registration and association fee. Find the application on our website (search for "Mike Hinton memorial scholarship"), which are due April 30. ❇

We honored the 2020 and 2021 classes of the Texas Prosecutors Society (TPS) at the Wednesday night reception at the Elected Prosecutor Conference in December. Congrats to the Class of 2020 (top photo, L to R): Leslie Standerfer, Brian Baker, Jon English, Tiana Sanford, Beth Toben, Jerry Varney, and Landon Lambert. Not pictured: Chilo Alaniz, Art Bauereiss, Casey Garrett, Dan Gattis, Donna Hawkins, Natalie Koehler, Jo Ann Linzer, Laura Nodolf, John Rolater, April Sikes, Kebharu Smith, Kerry Spears, Brad Toben, Hardy Wilkerson, and Patrick Wilson. Also congratulations to the Class of 2021 (bottom photo, L to R): W. Clay Abbott, Joe Brown, Katrina Daniels, Stephanie Greger, Roy DeFriend, Zack Wavrusa, and Stephanie Stroud. Not pictured: Rocky Jones, Mia Magness, Dewey Mitchell, Sherine Thomas, John Wakefield, John Warren, and Andrea Westerfeld.

Texas District and County Attorneys Association

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About *The Texas Prosecutor*

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Thanks for your work!

I want to thank the Board members who completed their service at the end of the year.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

This has been a challenging year for TDCAA leadership. We began in the middle of the pandemic shutdown, and the Board carefully navigated difficult waters to get the association back to live training while preserving a commitment to online offerings. Their thoughtful and careful stewardship of your organization has made a real difference!

Thanks to our departing board members: **Julie Renken**, DA in Washington County; **Tiana Sanford**, ADA in Montgomery County; **Ricky Thompson**, DA in Fisher, Mitchell, and Nolan Counties; **Bob Wortham**, CDA in Jefferson County, and **Natalie Koehler**, CA in Bosque County.

Pictured above are outgoing Board members and those taking on new duties (left to right): Greg Willis, CDA in Collin County; Tiana Sanford, ADA in Montgomery County; Natalie Koehler, CA in Bosque County; Kenda Culpepper, CDA in Rockwall County; Ricky Thompson, DA in Fisher, Mitchell, and Nolan Counties; and Julie Renken, DA in Washington County.

I want to give a special shout-out to the outgoing Chair of the Board, **Kenda Culpepper**, CDA in Rockwall County. Kenda took on the presidency of our association in challenging times. Like everyone, it seemed as if we were making new decisions about how to deliver services to our members every day. Kenda did a great job keeping us focused on what is important—what you, Texas prosecutors and staff, needed from your association. Thanks, Kenda, for your leadership and friendship!

A new board

I want to welcome some new faces to the Board and thank some folks for continuing their service in a new capacity. Welcome to **Sunni Mitchell**, ADA in Fort Bend County; **Andrew Heap**, CA in Kimble County; **Steve Reis**, DA in Matagorda County; **Will Ramsay**, DA in Delta, Franklin, and Hopkin Counties; and **David Holmes**, CA in Hill County. Congratulations to: Region 6 Director **Greg Willis**, CDA in Collin County, who was elected as the association's Secretary/Treasurer; **Bill Helwig**, DA in Yoakum County and Secretary/Treasurer, who was elected to the President-Elect Position; and **Chilo Alaniz**, DA in Webb and Zapata Counties and Finance Committee member, who was elected to the DA-at-Large position. We have a great team for 2022!

Plans for the new year

Our newly formed Board will have plenty to do. In 2016, TDCAA completed its most recent in a series of five-year plans. In the last plan, we addressed some governance issues, and—this was prescient in 2011 when we wrote it—launched a

distance learning initiative (meaning, online training). In 2022 the Board's new President, **Jack Roady**, CDA in Galveston County, will appoint a Long-Range Planning Committee to map out our course for the next five years. The saying might go, "Any direction is OK if you don't know where you are going," but your leadership has done a great job of plotting a deliberate course as we thoughtfully meet the needs of our members.

One major initiative we will be working to develop: continued and robust online training. Reviews from our membership strongly encourage us to continue to offer online courses along with our traditional live conferences. To that end, we sought additional resources from our grantor agency, the Court of Criminal Appeals, to staff that effort. Thanks to the Court, and in particular Judge Barbara Hervey, for helping us develop this continued effort.

Welcome to our new Assistant Training Director

The first step in continuing our online training was to hire a new Assistant Training Director, whose job it is to live and breathe TDCAA online courses. I am pleased to announce that we have hired **Gregg Cox**, a former ADA in Travis County (among other things). There is not much Gregg hasn't done in his 30-year career as a line prosecutor, and he also brings some skills when it comes to the production of online content. He has hit the ground running—welcome, Gregg! ❇

Legislative Lone Star Award winner

State Senator Joan Huffman (R-Houston) was recently recognized as the sole state senator to receive TDCAA's 87th Legislature Lone Star Award in recognition of her outstanding work this past session. Senator Huffman put her experience as a former prosecutor and district court judge to good use as chairwoman of the Senate Jurisprudence Committee, vice-chairwoman of the Senate Criminal Justice Committee, and a leading member of the Senate Finance Committee. She also passed numerous bills on important topics such as bail reform, fentanyl punishments, harassment, street racing, and opioid abatement, and she and her hard-working staff helped to make sure prosecutors who wanted to provide input on those and other issues were granted that opportunity.

Presenting the award to Sen. Huffman (center, holding award) in her Capitol office were (from left to right) Shannon Edmonds (TDCAA Director of Governmental Relations), Comal County Criminal DA Jennifer Tharp (TDCAA Legislative Committee Co-Chair), Uvalde County Attorney John Dodson (TDCAA Board Chair), and Galveston County Criminal DA Jack Roady (TDCAA President).

KP–VAC Conference in Kerrville

In November, the Inn of the Hills Hotel & Conference Center in Kerrville was the venue for a very successful conference held for key personnel and victim assistance coordinators (VACs) from across Texas.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

More than 230 members gathered to hear speakers on all sorts of topics—many, many thanks to our very informative speakers! We appreciate your time and valuable assistance to our members.

This conference is held annually and provides attendees a chance to network and get new ideas from others who do similar jobs in other counties and is a very worthwhile training experience for all. Mark your calendar for next year's conference, which will be November 2–4, in San Antonio. We hope to see you there!

Suzanne McDaniel Award

Lisa Mehrhoff, VAC in the County Attorney's Office in Parker County, was honored with the Suzanne McDaniel Award for her work on behalf of crime victims. Lisa has worked in her office for 12 years; she and her dog, East (pictured at left) comfort and help victims navigate the judicial process. Lisa has been a mentor to other VACs and is an organizer for many victim-focused programs and events, such as the Tree of Angels and a school art contest in conjunction with National Crime Victims' Rights Week.

The Suzanne McDaniel Award is given each year to a person employed by a prosecutor office and whose job duties involve working directly with victims. The person must demonstrate impeccable service to TDCAA, victim services, and prosecution. It is named after Suzanne McDaniel, a pioneer in Texas victim services who served as TDCAA's Victim Services Director until her death in 2010. Her entire career was devoted to serving victims of crime.

PVAC recipients

This year, 11 people received their Professional Victim Assistance Coordinator (PVAC) certificates. They were recognized at TDCAA's Key Personnel & Victim Assistance Coordinator Conference in Kerrville in November and are in the group photo on the opposite page (left to right):

Liliana Mendez, a VAC in the Cameron County DA's Office. Liliana has 13 years' experience in the DA's office and is a supervisor to other VACs. She is very active in her community, and the support letters attached to her PVAC application all state how dedicated and compassionate she is to crime victims.

Gloria Reyes, a VAC in the Fort Bend County DA's Office. Gloria has been a Protective Order Coordinator in the office for 19 years and works closely with domestic violence victims. She also volunteers her time for the many domestic violence events her county hosts. Her DA, Brian Middleton, so graciously wrote, "Gloria truly is the face of our office for domestic violence victims in Fort Bend County."

Maria Guerrero, a VAC in the Harris County DA's Office. Maria has worked in this office for eight years. She is fluent in Spanish and is a team leader tasked with supervising other VACs. Maria comes highly recommended by her references, and many express how she effectively handles crime victims with care and compassion no matter how difficult the case.

Alex Guajardo, a VAC in the Harris County DA's Office. Alex has worked in the office for five years and had 12 years' prior experience in the judicial system. Alex is a team leader and has the responsibility of supervising and training other VACs in the office. He provides direct victim services assistance to felony-level cases.

Max Ayala, a VAC in the Harris County DA's Office. Max has worked in this office for five years and is a team leader. He has numerous years of prior experience in the judicial system before coming to the DA's office, one of which was with the Harris County Juvenile Probation Department. Max is fluent in Spanish both written and spoken.

PVAC recipients unable to attend the conference are pictured at far right (top to bottom):

Joanna Feliz-Carvallo, a VAC in the Harris County DA's Office. Joanna has worked for the office for four years. She is currently assigned to working with victims of misdemeanor and felony crimes.

Le'Shae Haynes, a VAC in the Fort Bend County DA's Office. LaShae has worked at the office for six years and began as an intern while attending Sam Houston State University, the only university in the state that offers an undergraduate and graduate degree in the field of Criminal Justice—Victim Studies.

Amanda Horak, a VAC in the Washington County DA's office. Amanda has worked in the office for seven years. She holds a Bachelor of Arts in psychology with a minor in sociology from Texas A&M University. Amanda has a passion for helping others and is an integral employee for the office.

Marlene Landaverde, a VAC in the Harris County DA's Office. Marlene has worked for this office for four years. Marlene is bilingual and assists Spanish-speaking victims of violent felony crimes.

Monica Neal, a VAC in the Harris County DA's Office. Monica has worked for this office for eight years assisting victims of domestic violence. Prior to becoming a VAC, Monica worked for the Houston Area Women's Center.

Ilda Rupert, a VAC in the Montgomery County DA's Office. Ilda has worked for the office for nine years and is assigned to victim services in the Crimes Against Children Special Unit at Children's Safe Harbor. She is an advanced advocate for child victims of crime.

PVAC application deadline

Professional Victim Assistance Coordinator (PVAC) recognition 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 the Texas District & County Attorneys Association (key personnel category).

Other requirements for PVAC recognition include:

- either three years' experience providing direct victim services for a prosecutor's office or five years' experience in the victim services field, one of which must be providing prosecutor-based victim assistance;
- proof of 45 hours of training. An applicant with 10 years' experience in direct victim services (five of which must be in a prosecutor office) may


Joanna Feliz-Carvallo


Le'Shae Haynes


Amanda Horak


Marlene Landaverde


Monica Neal


Ilda Rupert

sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts; and

- five professional letters of recommendation.

The next deadline to submit a PVAC application is January 31, 2022; the application is at www.tdcaa.com/resources/victim-services.

Board elections

At the Key Personnel & Victim Assistance Coordinator Conference in November, elections were held for the South-Central Area (Regions 4 & 8) and East Area (Regions 5 & 6) for board representatives. Sara Bill, who works in the County & District Attorney's Office in Aransas County, was elected as the South-Central Area representative. Teri Rose, a VAC in the County Attorney's Office in Chambers County, was elected as the East Area representative. Both Sara and Teri's terms began January 1 and will be for two years. Katie Etringer Quinney, a VAC in the 81st Judicial DA's Office in Floresville, was elected as the 2022 Chairperson and will serve one year. Welcome to you three!

If you are interested in training and want to give input on speakers and topics at TDCAA conferences for key personnel and VACs, consider running for the Board.

Outgoing members of the Board include Windy Swearingen of the DA's Office in Brazos County; Tracy Viladevall of the CDA's Office in McLennan County; and Amber Dunn of the CDA's Office in Denton County. Many thanks to all of you for your time and dedication in serving on the Board!

The Key Personnel–Victim Services Board prepares and develops operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region. To be eligible, each candidate must have the permission of the elected prosecutor, attend the elections at TDCAA's Annual Conference or be appointed, and pay TDCAA membership dues. If you are interested in training and want to give input on speakers and topics at TDCAA conferences for key personnel and VACs, consider running for the Board. Elections are held each November at our TDCAA Key Personnel & Victim Assistance Coordinator Conference. If you have any questions, please email me at Jalayne.Robinson@tdcaa.com.

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. In 2022, NCVRW will be observed April 24–30, and the theme is "Rights, access, equity for all victims." Check out the Office for Victims of Crime (OVC) website at https://ovc.ojp.gov/news/announcement/2022-national-crime-victims-rights-week-theme for additional information.

If your community hosts an event, we would like to publish photos and information about it in *The Texas Prosecutor* journal. Please email me at Jalayne.Robinson@tdcaa.com to notify us about your event.

Victim services consultations

Are you a new VAC who works in a prosecutor's office? Would your office benefit from a group victim services training? Do you or your office need a victim services refresher? I am available to provide such training and technical assistance to you and your office in individual or group presentations. The services are free of charge.

If you would like to schedule a victim services consultation, please email me at Jalayne.Robinson@tdcaa.com. ❇

For self-defense, it matters what the defendant actually believed

Lozano v. State is the most important self-defense case the Court of Criminal Appeals has released in years.

By Clinton Morgan
Assistant District Attorney in Harris County

It's a case about harmless error on appeal, so the instinct is to believe it's just for appellate lawyers. To be sure, it's a very helpful case for appellate prosecutors, but it's much more than that.

Lozano[1] is the clearest statement we have about what evidence is needed to raise a self-defense claim. It shows that without evidence of the defendant's subjective mental state—i.e., what the defendant was actually thinking—a defendant is not entitled to a self-defense instruction. For any prosecutors out there with a purported self-defense case with a non-testifying defendant, *Lozano* is a must-read.

Another shooting in a bar parking lot

Like so many marginal self-defense cases, *Lozano* starts in a bar parking lot. Mr. Lozano was in his truck with the windows down, staring at a group of six people. One of the men in the crowd, Jorge, took exception to how Lozano was staring at his girlfriend, so he threw a full beer can through the open passenger window into the truck. The beer "exploded" and spilled "everywhere."

Lozano reached into the backseat and retrieved a gun. He pointed the gun at the passenger window, but Jorge did not see the gun because Jorge was running around the truck to the driver's side. Jorge punched Lozano through the open driver's window, and Lozano shot him three times, killing him.

Lozano did not testify at trial. The jury was instructed on self-defense but found him guilty and sentenced him to 25 years.

The erroneous duty-to-retreat instruction

On appeal, Lozano complained about jury charge error he had not objected to in the trial court.[2] The charge included the duty to retreat, telling the jury to reject self-defense if it believed a reasonable person in the defendant's situation would have retreated rather than use deadly force. But that has not been the law since 2007, when Texas became a stand-your-ground state.

The State did not dispute that the instruction was wrong. Instead, it argued the error was not egregiously harmful, which is the standard for reversal for unobjected-to charge error. The State argued that because there was no evidence of Lozano's subjective mental state at the time of the shooting, any error in the charge was harmless because he was not entitled to *any* self-defense instruction.

The Eighth Court rejected this argument. It held that because of the statutory presumption of reasonableness in Penal Code §9.32(b), the evidence showed Lozano's belief was objectively reasonable. Yet the Eighth Court did not point to any evidence that Lozano subjectively believed that his use of force was immediately necessary. The Eighth Court found the error egregiously harmful and reversed because the error went to the central issue of Lozano's defense.

Objective and subjective parts of self-defense

The Court of Criminal Appeals granted review and, in an opinion by Judge Hervey, unanimously reversed. The Court recognized that self-defense

That an ordinary, prudent person in the defendant's situation might have reasonably believed the use of force was immediately necessary to prevent the victim's use of unlawful force does not give rise to an inference of self-defense unless there is evidence the defendant actually had such a belief.

contains "both subjective and objective components": The defendant must subjectively believe that the use of force is immediately necessary, and that belief must be objectively reasonable.[3] That an ordinary, prudent person in the defendant's situation might have reasonably believed the use of force was immediately necessary to prevent the victim's use of unlawful force does not give rise to an inference of self-defense unless there is evidence the defendant *actually* had such a belief. The "ordinary and prudent person standard ... prevents a jury from acquitting a defendant based on self-defense when the defendant did not believe that he acted in self-defense."[4]

The court recognized that evidence of the defendant's state of mind can be inferred from evidence other than the defendant's testimony. The classic examples of this are *Smith v. State*[5] and *VanBrackle v. State*,[6] where the defendants did not testify but witnesses testified to what the defendants said around the time of the crimes that demonstrated their states of mind.

But there was no evidence of Lozano saying or doing anything that demonstrated a defensive state of mind. The evidence showed Lozano being attacked, and it showed him responding to the attack. But it was silent on *why* he responded as he did. Maybe he was afraid for his life, or maybe he was mad someone threw a beer into his truck. The Court pointed out that the fact he shot Jorge three times further complicated the problem: "He might have shot Jorge once in self-defense, then continued shooting even though he knew Jorge was no longer a threat."[7]

Because there was no evidence of Lozano's subjective mental state, the Court held he was not entitled to a self-defense instruction. But what about the erroneous instruction he got? The Court held it was not egregiously harmful. Indeed, it concluded the instruction "benefitted" Lozano: He "was provided with the windfall of a possible acquittal on [self-defense, and] the self-defense charge increased the State's burden of proof. ..."[8] As a result, the Court reversed the Eighth Court and reinstated the conviction.

Takeaways

There are two sets of takeaways from this case, one for appellate practice and one for trial practice.

Lozano should be a go-to case for appellate prosecutors faced with claims of charge error. Although the holding *could* have been limited to simply stating the error was not "egregiously harmful," the Court went further, noting the error "benefitted" the defendant. What this should mean—and I have already argued as much in another brief—is that this case supports the proposition that if a defendant is not entitled to a defensive instruction, any error in the wording of that instruction is harmless under any standard. This holding seems logical—if there's no evidence of self-defense (or whatever defensive issue is involved), how would a jury ever side with the defendant under a correctly worded instruction? But before *Lozano* there was surprisingly little support for it in the caselaw.[9]

For trial practice, this case shows that even if there is evidence of a violent act against the defendant that *could* justify self-defense, a defendant is not entitled to a self-defense instruction if the evidence does not show he believed he was actually acting in self-defense. Prosecutors should, of course, be cautious in opposing self-defense instructions when that's the defendant's only defense. But defensive instructions that aren't supported by the evidence confuse jurors and cause unjust acquittals, and in marginal self-defense cases, they cause unjust acquittals for terrible crimes. If the evidence doesn't show the defendant's subjective belief for why he used force against the complainant, *Lozano* is good precedent for excluding self-defense and keeping the jury charge limited to the issues raised by the evidence. ❇

Endnotes

[1] *Lozano v. State*, ___ S.W.3d ___, No PD-1319-19, 2021 WL 4695809 (Tex. Crim. App., Oct. 6, 2021).

[2] *Lozano v. State*, No. 08-17-00251-CR, 2019 WL 5616975, at *4 (Tex. App.–El Paso Oct. 31, 2019) (not designated for publication).

[3] *Lozano*, 2021 WL 4695809, at *5.

[4] *Id*. at *6.

[5] 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).

[6] 179 S.W.3d 708, 714 (Tex. App.–Austin 2005, no pet.).

[7] *Lozano*, 2021 WL 4695809, at *7.

[8] *Id.*, at *8.

[9] In a 2016 unpublished opinion, the Eighth Court invoked "the long-standing rule that if a defendant is not entitled to an instruction, but the trial court nevertheless gives the instruction, any error in the instruction is harmless." *Torres v. State*, No. 08-13-00027-CR, 2016 WL 5404773, at *3 (Tex. App.–El Paso Sept. 28, 2016, pet. ref'd) (not designated for publication). But the only citations it included for this "long-standing rule" were to a death-penalty case from 1994 and a case from 1899. *Ibid*. (citing *Hughes v. State*, 897 S.W.2d 285, 301 (Tex. Crim. App. 1994) and *Burks v. State*, 49 S.W. 389, 391 (Tex. Crim. App. 1899)). On the strength of these citations, a colleague recently persuaded the Fourteenth Court to hold that an erroneous Art. 38.23 instruction was harmless because the defendant was not entitled to the instruction. *Ramirez v. State*, 611 S.W.3d 645, 654 (Tex. App.–Houston [14th Dist.] 2020, pet. ref'd). Before *Lozano*, those two cases were the best support for this very logical proposition.

In my first appellate loss, *Rodriguez v. State*, 456 S.W.3d 271, 288 (Tex. App.–Houston [1st Dist.] 2014, pet. ref'd), I argued an error in the form of a self-defense instruction was harmless because the defendant was not entitled to the self-defense instruction. The First Court made the novel and, as best I can tell, never repeated holding that the State was "estopped" from making this harm argument because it had gone along with the defense at trial in treating the case as a self-defense case. The *Lozano* court did not look at the behavior of the State, and indeed it seems the State did not object to the self-defense instruction.

Recent gifts to the Foundation*

Ryan Calvert
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Sherine Thomas
Brad Toben
Beth Toben

* gifts received between October 2 and December 4, 2021

Photos from our KP–VAC Conference

Photos from the PMI: Elected Edition Course

Photos from our Elected Prosecutor Conference

Using surveillance, cell towers, and social media to track down a killer (cont'd from the front cover)

was lodged in the back of the seat where he had been sitting. The other two bullets were never found. The next day investigators attended the autopsy where the two bullets from the victim's body were recovered.

Faced with a case with no suspects, no history explaining why the offense occurred, and no immediate leads, investigators began a search for the armed driver—a needle in the vast haystack that is Texas. It would take 18 months of determined investigation; dozens of search warrants for cell tower information, tollway records, and Facebook; analysis by the U.S. Marshals and DPS of these records; facial recognition efforts; acquisition of video and media; photo enhancement; in-state and out-of-state cooperative efforts by law enforcement; and a bit of luck before the full story would be revealed.

Working the case

The first lead came the day after the murder when Kelvin Collins, the father of the victim, told Ranger Mankin that Tahbari and his friends had taken marijuana from some people at a gas station in Tushka, Oklahoma, without paying for it. The elder Mr. Collins believed that this was the motive for the murder.

Ranger Mankin began methodically checking the gas stations in Atoka and Tushka for footage of the victim's car, a silver Hyundai Velostar. Mr. Collins's Velostar was seen at several gas stations, but no drug exchange appeared to have occurred.

Finally, at the Tushka Truck Stop, surveillance footage of the store and parking lot showed a black Toyota Camry turn into the station. The front passenger door opened, and the passenger appeared to vomit onto the pavement. The driver exited and appeared to be recording the passenger as he continued to vomit. Both the sick passenger and the driver were clearly visible and could be readily identified in the store video by their appearance and clothing.

Shortly after the driver and passenger entered the store, the driver exited. About this time, Mr. Collins and his friends pulled into the truck stop near the gas pumps and the black Camry. It then appeared that the driver of the black Camry leaned in to speak with the occupants of Collins's car. The Camry driver went back to his car, opened the back door, grabbed something, and returned to Collins's car, where he leaned in—all actions consistent with a parking lot drug deal. Collins's vehicle pulled up to the front of the truck stop and parked momentarily. It then backed up and sped onto the highway.

The Camry driver started toward Collins's vehicle, then stopped as it drove away. The driver entered the truck stop and exited a few minutes later with his passenger, the one who had been sick. They both got into the black Camry, and they too turned and sped southbound on Highway 69/75.

In almost 39 years of prosecution and a hundred or so murder cases, Kerye Ashmore (one of the co-authors of this article) had never had a case where the perpetrator was on film—so we knew exactly what he looked like—but we had no idea where he came from, where he went, whom he was with, or any type of identifiers. There was no special connection with the victims, either. The perpetrator wasn't a family member, girlfriend, someone from the victim's past, or a person with any type of relationship. The task of finding the perpetrator seemed to be very, very daunting. We were discouraged.

However, investigators kept at it. Ranger Mankin pulled still photographs of the driver and passenger from the truck stop video and sent them to Texas and Oklahoma law enforcement. While waiting to see if anyone recognized the driver, he went to the scene of the shooting in Howe and canvassed nearby businesses to see if any security cameras caught the vehicles involved in the crime. That's when he found a glimmer of the elusive "needle" in the haystack. Surveillance video from a used car dealership near the shooting showed a car closely resembling the black Camry from the Oklahoma truck stop drive by at the time of the shooting. The Camry was speeding southbound on Highway 69/75, just south of the crime scene.

On August 30, 2017, Ranger Mankin and Sergeant Milks traveled to Leon County, a convenient place for us (from Sherman) to meet the two witnesses from Tahbari Collins's car (both from Houston), and the elder Mr. Collins (from Huntsville). The DA's Office there kindly provided facilities for interviews of Kelvin Collins and Mr. Griffin and Ms. Spencer. Griffin and Spencer confirmed that Tahbari Collins had in-

deed taken a small amount of weed from a black man at the truck stop in Tushka and had left without paying for it. Griffin maintained that he did not know the black Camry had followed them into Texas until he looked in the rearview mirror and saw the car speeding and weaving through traffic before the shooting began. Spencer told officers that the last time she remembered seeing the driver of the black Camry, he was standing in the truck stop parking lot looking stunned as they drove off. Video at the Tushka Truck Stop showed that the shooter left about 4½ minutes after the victim's car did. So, in the next 60 miles from Tushka, Oklahoma to Howe, Texas, the Camry had closed the gap. Video from the Calera, Oklahoma, Police Department, which had a camera filming U.S. Highway 69/75, also showed that in a distance of 30 miles, the defendant was only 2 minutes and 15 seconds behind the victim's car.

Both maintained they did not know the person beforehand and that this was a purely chance meeting: They simply approached this person and wanted a little weed to smoke. The amount involved: one to two grams of marijuana. The agreed price: $10.

Naming the suspects

With solid suspects and a motive for the shooting, investigators now had to find names to go with the faces in the surveillance video. Still images were submitted the Texas Department of Public Safety (DPS) to complete an Image Verification System Workup, but no matches were found. Investigators requested by warrant the cell tower records for all the major carriers near the Oklahoma truck stop and the Texas crime scene, and DPS and the U.S. Marshal's Service reviewed those records, but no immediate leads came from any of them. Multiple search warrants were also served on the North Texas Tollway Authority looking for a black Camry with certain features believed to be involved in the shooting; it might have been travelling south on the North Dallas Tollway or west on Highway 121 (another tollway)—but no leads developed. The acquisition, review, and analysis of these records took months.

Detective Aaron Benzick with the Plano Police Department had been assisting Ranger Mankin with the execution of several warrants, including for data from a tower serviced by T-Mobile. And that was when officers caught a break. Knowing from the video footage that the driver of the black Camry had appeared to use a cell phone at the Tushka Truck Stop and knowing at what time the phone was used, Detective Benzick found an outgoing call to a number in Missouri associated with Montrae Austin—he had received a call on his cell phone. A Facebook search led to Montrae Austin's account, and one of the photographs on that Facebook account showed Austin sitting on the hood of a black Toyota Camry.

From there, the case fell into place. Further photographs of the Toyota Camry from Austin's Facebook page matched the make, model, year, and trim details of the suspect vehicle in the truck stop surveillance videos and were consistent with the car dealership surveillance video from Howe. The license plate on the vehicle came back to Montrae Austin.

Austin's Facebook account also contained the images of two people closely resembling the suspects captured on the surveillance footage from the Tushka truck stop. These men were identified as Sekou Finley and Kelvon Gray. Deep dives into the public information on these men's Facebook accounts, together with phone records and cell tower information on all three, confirmed that the men had traveled from Kansas City, Missouri, to Dallas down the 75/69 corridor on the day of the murder. Comparison of Facebook photos of Kelvon Gray and photos from the truck stop also clearly showed he was the same person as the man driving the black Camry in the truck stop footage.

Arresting the suspects

On June 9, 2019, Ranger Mankin and Sergeant Milks traveled to Kansas City seeking Finley, Austin, and Gray. With tireless cooperation and help from the Kansas City, Missouri, police, Finley was located, and he agreed to be interviewed. He told investigators that he, Montrae Austin, and Kelvon Gray had left Kansas City on the morning of August 24 and headed to Dallas to party for the weekend. On the way, he and Austin had become highly intoxicated, so Kelvon Gray had assumed driving duties. They stopped in Tushka, and Finley (the sick passenger from the surveillance video) insisted he had slept through the shooting and was too drunk to remember anything. Eventually, though, after he talked to his mother, Finley admitted that his companions

Both witnesses maintained they did not know the person beforehand and that this was a purely chance meeting: They simply approached this person and wanted a little weed to smoke. The amount involved: one to two grams of marijuana. The agreed price: $10.

had told him about the shooting, that it was over a small amount of weed that was not paid for, and that Kelvon Gray was the shooter, Gray having admitted as much to Finley.

Montrae Austin was also located and interviewed. He too claimed that he had been drunk and asleep at the truck stop and unaware of anything that happened there. He ultimately admitted that he had been asleep but awakened to the sound of gunfire as Kelvon Gray fired into a vehicle next to their car. Austin would also admit that once in Dallas, Gray related what had happened at the truck stop and that the shooting was in retaliation for the victims stealing marijuana.

A few days later, while Ranger Mankin and Sgt. Milks waited in Kansas City, prosecutor Kerye Ashmore presented the case to a Grayson County grand jury with the newest information available. The grand jury returned an indictment for murder for Kelvon Gray, and a capias warrant immediately issued and was transmitted to Kansas City. Based on that warrant and a search warrant obtained in Kansas City for Gray's residence, Gray was arrested at his home and a search performed. A 9-mm handgun was seized; it was transferred to the DPS Crime Lab in Garland where ballistics testing and analysis confirmed that Gray's gun had fired the lethal rounds at Mr. Collins and the bullet found in the seat of the victim's vehicle.

Feeling that it was essential to establish face-to-face contact and interviews with the police officers and other witnesses in Kansas City, Grayson County Criminal District Attorney Brett Smith agreed that we should travel there in preparation for trial. In September 2021, DA Investigator Mike Ditto and prosecutor Kerye Ashmore went to Kansas City to interview the numerous KCPD officers involved in the searches and other aspects of the case; we also attended the out-of-state-witness subpoena hearing for Finley and Austin. We interviewed these men, too, and insured their stories remained accurate and consistent. The help of the DA's Office in Kansas City was invaluable in this effort.

The trial

As trial neared, we prosecutors (Kerye Ashmore and Nathan Young) decided that Kerye would handle the eyewitnesses and the witnesses from Kansas City, and Nathan would handle the morass of search warrants, phone records, and Facebook records together with the DPS analyst explaining all it. We had tried four murder cases since COVID-19 restrictions were temporarily lifted in November 2020, reinstated, and lifted again in 2021, and Nathan had become masterful at understanding and presenting these types of records.

On October 18, the murder trial against Kelvon Gray began. Bit by bit the jury heard how the perpetrator of this senseless murder—over $10 worth of stolen marijuana—was identified and arrested. After a weeklong trial, the day of justice arrived. Gray, who had no previous criminal record, was found guilty and sentenced to 60 years in prison.

Conclusion

Ultimately a combination of investigative persistence, cooperation among law enforcement agencies and prosecutor offices, old-fashioned legwork, witness interviews, cell tower dumps, deep dives on social media, and expert testimony found the needle in the haystack in this case. We were proud to present this case to a jury after a long, difficult, and excellent investigation by law enforcement, and we were determined to do our best at trial to reflect that investigation and seek justice for Tahbari Collins. The jury's verdict did just that. ❇

Detective Aaron Benzick with the Plano Police Department had been assisting Ranger Mankin with the execution of several warrants, including for data from a tower serviced by T-Mobile. And that was when officers caught a break.

Law for the dog

Police dogs, also known as K-9 officers, are an essential component of the modern law enforcement agency, filling an irreplaceable role in the fight against crime.

By Nathan Alsbrooks & Millicent Lierman
Assistant District Attorneys in Montgomery County

With their penetrating sense of smell, they aid in the search for missing or wanted persons and assist investigations, finding their way into our case files. There are three foundational cases that establish law for the dog in a traffic stop, all decided by the United States Supreme Court: *United States v. Place* from in 1983, *Illinois v. Caballes* decided in 2005, and *Rodriguez v. United States* handed down in 2015.

In *United States v. Place*, the United States Supreme Court gave police dogs a special place in our jurisprudence that they have retained to this day.[1] The Court reasoned that the sniff of a dog is *sui generis*—intended to disclose only the presence or absence of narcotics. In doing so, the Court created a special exception from the broader category of searches for which a warrant is generally required. The Court reasoned that a person cannot have a legitimate expectation of privacy when it comes to possession of contraband because it is, by definition, illegal to possess contraband. By not invading a reasonable expectation of privacy, the dog sniff was not a search under the Fourth Amendment.

The United States Supreme Court reinforced this unique classification in *Illinois v. Caballes*,[2] where the Court held that the use of a drug-sniffing dog prior to the completion of law enforcement's routine duties involved in a traffic stop does not violate the Fourth Amendment. In *Caballes*, the Court reasoned that a dog sniff was less invasive than the thermal imaging cameras addressed in *Kyllo v. United States*.[3] Whereas the thermal imaging probed the"intimate details of the home," the dog sniff was relegated only to identifying the presence of narcotics.

The most recent canine case, though, *Rodriguez v. United States*, might be the most nationally relevant item to come out of Nebraska since Tom Osborne, Eric Crouch, and the triple option. In *Rodriguez*, the United States Supreme Court held that, absent reasonable suspicion, officers may not extend the length of a traffic stop to conduct a dog sniff.[4] Even though *Rodriguez* has been generally viewed as an advantageous opinion for defendants, the case is often misunderstood and misapplied. Most prosecutors in the trenches have had at least one conversation or email begin with: "I think you have a *Rodriguez* issue on this one." Perfect understanding of the *Rodriguez* decision, however uncommon, is not a panacea, because law for the dog does not begin or end with its holding.

Because most law enforcement officers do not travel with a canine, they are forced to call upon another unit in the event that they wish to deploy a dog sniff. It could take mere minutes, or in unfortunate instances, many minutes. This practical reality creates delay and longer roadside detentions. Accordingly, prosecutors should understand how Texas courts have treated the *Rodriguez* decision since its publication.

Understanding *Rodriguez*

A police officer stopped Rodriguez for driving on the shoulder of a highway, a violation of Nebraska traffic law. The officer completed his traffic stop and issued a warning, then asked permission from Rodriguez to walk his K-9 officer around the car to perform a free air sniff. Rodriguez refused; the officer then called for backup. Once backup arrived, the original officer walked the canine around the car despite Rodriguez's refusal to consent. The police dog alerted, signaling the pres-

ence of narcotics inside the vehicle. The officer conducted a probable cause search and uncovered methamphetamine, resulting in Rodriguez's arrest.

At trial, Rodriguez moved to suppress the drug evidence, arguing that it was obtained as a result of an improperly prolonged detention. The district court denied his motion, and the Eighth Circuit Court of Appeals affirmed the district court's decision, finding that the almost eight-minute delay between issuance of the warning and the dog sniff was *de minimus* and could be offset by the government's interest in preventing the flow of illegal drugs. But the U.S. Supreme Court granted certiorari and ultimately vacated and remanded the case.

The Supreme Court noted that officers enjoy general discretion to carry out ordinary inquiries during a traffic stop. Beyond determining whether to issue a traffic ticket, officers commonly verify whether a driver's license is valid, ensure that no active warrants exist against the present parties, and check the validity of an automobile's registration and proof of insurance. Along with the underlying reason for a traffic stop, these routine checks ensure vehicles on the road are operated safely and responsibly. A dog sniff, on the other hand, is no ordinary inquiry. Thus, the Court held that, absent reasonable suspicion, police extension of a traffic stop to conduct a dog sniff violates the Constitution's shield against unreasonable seizures.[5]

Notable Texas cases

The Texas Court of Criminal Appeals addressed the *Rodriguez* decision in *Lerma v. State*.[6] A Corpus Christi peace officer stopped a vehicle for improper use of a turn signal and failure to stop at a designated point before a stoplight. The officer approached the driver's side, seeing four people in the car. Lerma was in the front passenger seat. In the backseat, a woman held an unrestrained baby in her arms. The officer observed Lerma frequently reaching into his pockets, moving his hands between the vehicle seats, and making furtive movements with his feet. While the driver searched for his identifying information, the officer instinctively moved to the passenger side of the vehicle, nearer Lerma, to ensure Lerma did not retrieve a weapon. As Lerma did not have any identifying information himself, the officer asked him to exit the vehicle. Lerma stated there was a pocketknife on his person, and during a routine pat-down, the officer reported that he felt what he believed was a box of cigars and a bag with a "soft substance" inside.

At this point, the officer believed Lerma was concealing narcotics in his pocket. Alone and outnumbered, the officer did not confront him. Four minutes later, another officer arrived as backup. Lerma then provided the fake name of "Bobby Diaz" to the primary officer, along with a fake date of birth. Minutes later, the officers uncovered the deceit by use of a state database. The officers confronted Lerma, who admitted to smoking synthetic marijuana earlier in the day and having synthetic marijuana on his person. The officer searched Lerma's pockets and found the synthetic marijuana, prompting Lerma to flee from the scene on foot. A pursuit ensued, and Lerma was captured roughly 15 minutes later; an additional 17 crack cocaine rocks were found on his person, and he also admitted that he was a habitual felon. In total, nine minutes passed between the initial traffic stop and when Lerma ran.

After the trial court denied Lerma's motion to suppress the cocaine, he pleaded guilty and appealed the denial of his motion to suppress. The court of appeals reversed, holding that the officer's frisk of Lerma was made during an unjustifiably prolonged traffic stop and was not supported by reasonable suspicion.

The Court of Criminal Appeals reversed the court of appeals, holding that the stop was not unduly prolonged. Due to Lerma's furtive movements and lack of identifying information, it was reasonable for the officer to question him outside the car. The Court incorporated and applied basic precepts from *Rodriguez* but distinguished *Lerma* based upon the recorded facts.

The Court maintained that a stop made for the purpose of investigating a traffic violation must be reasonably related to that purpose and may not be prolonged beyond the time to complete the tasks associated with the stop. An officer is also permitted to ask drivers and passengers about matters unrelated to the purpose of the stop, so long as the questioning does not measurably extend the duration of the stop. If an officer develops reasonable suspicion that a driver or occupant of a vehicle is involved in criminal activity, as in Lerma, the officer may continue questioning the individual regardless of whether the official tasks of a traffic stop have ended.

If an officer develops reasonable suspicion that a driver or occupant of a vehicle is involved in criminal activity, as in Lerma, *the officer may continue questioning the individual regardless of whether the official tasks of a traffic stop have ended.*

There may come a day when the Supreme Court revisits dog law, but for now, the decisions in Place, Caballes, *and* Rodriguez *are touchstone pillars. Prosecutors should understand and utilize these cases to differentiate between lawful and unlawful detentions in seeing justice done.*

Just as in *Lerma*, the deciding court in *Davis v. State* differentiated its analysis from the *Rodriguez* decision based upon articulated facts supporting reasonable suspicion.[7] In *Davis*, the defendant was reported to be overtly nervous throughout the traffic stop and repeatedly grabbed his groin, and law enforcement received a tip the defendant recently purchased methamphetamine.

It is important to note that there are no *per se* time limitations on roadside detentions. In *State v. Martinez*, the court upheld a detention wherein a law enforcement officer waited 38 minutes for a canine to arrive. The *Martinez* decision underscores that reasonableness depends on whether a law enforcement officer pursued "a means of investigation efficient and appropriate and did not unreasonably or unduly delay or prolong the traffic stop."[8] In *Fisher v. State*, the deciding court asserted a similar position when it stated there was no "constitutional stopwatch on traffic stops."[9] In *Villarreal v. State*, the deciding court noted that reasonable suspicion must be viewed in light of the entire array of facts.[10] The court recognized that some circumstances, by themselves appearing innocent, may give rise to reasonable suspicion when combined with additional facts and a law enforcement officer's "keen eye and experience."[11]

The future of dog law

Prosecutors must effectively differentiate between unjust detentions and those instances when detention for the dog sniff is supported by individualized suspicion. We must also train law enforcement officers on the importance of articulating their observations and impressions at these roadside encounters. Officers frequently observe or perceive acute details that are never documented in an arrest record or offense report and are never elicited via testimony at a suppression hearing or during trial. The bottom line is this: the scope of the detention must be carefully tailored to its underlying justification.

The court in *Neuwirth v. State* aptly summarized what our examination should entail when analyzing prolonged detentions: "The evidence in the record shows that [the officer] pointed to specific facts that allowed the trial court to conclude that an objectively reasonable officer could have suspected criminal activity, that the investigation occurred in a reasonably short period of time, and that [the officer] investigated his suspicion in a manner reasonably designed to quickly resolve his suspicions."[12]

In the aftermath of *Rodriguez*, prosecutors must issue a clarion call to our law enforcement partners: Have a clear and compelling reason before prolonging a detention to carry out a dog sniff. There may come a day when excess leads to pushback.

The seeds for curtailing dog usage are already planted. On November 4, 2021, the *Houston Chronicle* newspaper published an article titled, "Texas police search thousands of drivers and find nothing. Here's where that happens the most."[13] The article highlights that some local police agencies carry out searches on more than one-third of vehicles they stop.

Also notable are two dissents authored in the *Caballes* decision. In one, Justice Souter called for revisiting the premise underpinning the *sui generis* classification for police dogs. He argued that a dog sniff was not infallible, nor are their human handlers. Souter pointed to studies highlighting false-positive alerts from canines, and he argued this error led to unlawful searches.

In another, Justice Ginsburg argued that the traffic stop was akin to a *Terry* stop and thus is not circumscribed merely by duration—she claimed that the manner in which the stop is carried out must also be carefully controlled. Ginsburg wanted the Court to scrutinize what government actors were searching for, in addition to the length of their detention. The *sui generis* designation of dog sniffs would be dispositive in cases such as *Caballes* only if the sole determinant of what is "reasonable" is the length of said traffic stop. She wrote, "Under today's decision [in *Caballes*], every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law-abiding population. ... Today's decision clears the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. ... Motorists [would not] have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green."

There may come a day when the Supreme Court revisits dog law, but for now, the decisions in *Place, Caballes*, and *Rodriguez* are touchstone pillars. Prosecutors should understand and utilize these cases to differentiate between lawful and unlawful detentions in seeing justice done.

We should also encourage law enforcement partners to consider whether they can clearly explain their reasonable suspicion to deploy a dog sniff before extending a detention, and to then carefully articulate the basis for detentions in their arrest records, offense reports, and live testimony. ❇

Endnotes

[1] 462 U.S. 696 (1983).

[2] 543 U.S. 405 (2005).

[3] 533 U.S. 27 (2001).

[4] 575 U.S. 348 (2015). Also note that in *Florida v. Jardines*, 569 U.S. 1 (2013), the final dog case of note, the U.S. Supreme Court held that bringing a drug dog within the curtilage of a home implicates privacy interests and the Fourth Amendment. Because this article discusses only traffic stops and dog sniffs, *Jardines* is not discussed here.

[5] Importantly, the *Rodriguez* decision does not apply to situations where the traffic stop investigation has not been completed, see *Adams v. State*, 11-17-00247-CR, 2019 WL 5078577 (Tex. App.–Eastland Oct. 10, 2019, pet. ref'd) (mem. op., not designated for publication); where the dog sniff was consented to prior to the completion of the traffic stop, see *Lewis v. State*, 10-19-00370-CR, 2021 WL 4198482 (Tex. App.–Waco Sept. 15, 2021, no pet. h.) (mem. op., not designated for publication); or where the dog sniff is incident to arrest, see *Briseno v. State*, 04-15-00566-CR, 2016 WL 3181544 (Tex. App.–San Antonio June 8, 2016, no pet.) (mem. op., not designated for publication).

[6] 543 S.W.3d 184 (2018).

[7] 03-19-00120-CR, 2020 WL 3481154 (Tex. App.–Austin June 26, 2020, pet. ref'd) (mem. op., not designated for publication).

[8] 11-20-00144-CR, 2021 WL 3919778, at *1 (Tex. App.–Eastland Sept. 2, 2021, no pet. h.) (not designated for publication).

[9] 481 S.W.3d 403, 408 (Tex. App.–Texarkana 2015, pet. ref'd) (internal quotations omitted).

[10] 14-18-00406-CR, –- SW.3d –-, 2020 WL 1880998, at *1 (Tex. App.–Houston [14th Dist.] Apr. 16, 2020, no pet.).

[11] See also *Freeman v. State*, 05-18-00910-CR, 2019 WL 2611011 (Tex. App.–Dallas June 26, 2019, pet. ref'd) (mem. op., not designated for publication); *Cuttrell v. State*, 09-15-00155-CR, 2016 WL 1468633 (Tex. App.–Beaumont Apr. 13, 2016, no pet.) (mem. op., not designated for publication).

[12] *Neuwirth v. State*, 09-18-00248-CR, 2019 WL 3937997, at *7 (Tex. App.–Beaumont Aug. 21, 2019, no pet.) (mem. op., not designated for publication).

[13] www.houstonchronicle.com/politics/texas/article/Texas-police-search-thousands-of-drivers-and-find-16589982.php.

5 questions you've been meaning to ask about interstate extraditions

Prosecutor offices are busy places. It doesn't matter whether you work in a county of 50,000 people or 5 million, the prosecutor's office will be bustling with people preparing for jury trials, talking to victims, meeting with law enforcement, or counseling local government officials.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

It's a great place to work, but the hectic nature of the business means key office personnel, especially those working in the legal field for the first time, may be hesitant to stop a lawyer, investigator, or other staff member and ask for help when needed. Don't fret! Texas is full of prosecutor's offices that want you to succeed just as much as you do. Whether you are new to the office or just new to the job responsibilities, here are some answers to common questions about extraditions you might be hesitant to ask.

What is an interstate extradition anyway?

Pop culture might have you believe that extraditions are merely the products of international treaties. You could be forgiven for assuming that they are a concern only for people looking to flee the United States after committing the kind of crime that puts you on an international most-wanted list. International extraditions of this sort are most definitely a thing, but they are not the only type of extraditions. This article isn't going to touch on international extraditions, but if you need some guidance check out Kim Bryant's article from this very journal from 2015 (it's online at www.tdcaa.com/journal). You may also want to give Governor Greg Abbott's office a call, as some staff there are tasked with assisting international extraditions.

Interstate extraditions are much more common. An interstate extradition is a legal proceeding that allows one state (called the demanding state) to retrieve a fugitive from justice from another state for the purpose of standing trial. Let's say a defendant commits a series of crimes as the leader of a criminal street gang in Philadelphia. Before he can be tried there, he flees the state of Pennsylvania with the hopes of starting anew in Texas. If Pennsylvania authorities get wind of his presence in Texas and want to return him to Philadelphia to stand trial, the legal process they would use is an interstate extradition.

What crimes qualify for extraditions?

The process of extraditing someone from one state to another is governed by three key pieces of law: the United States Constitution, the United States Code,[1] and the Uniform Criminal Extradition Act.[2] These laws permit extradition for "treason, felonies, or other crimes."[3] Extraditions are appropriate even when the defendant was not within the territory of a state when he committed his crime, as is the case with many cybercrimes so prevalent today.

Practically speaking, extraditions for misde-

meanors rarely happen. That's because extraditing someone from one state to another takes time and costs money, and not every jurisdiction is willing to spend the resources necessary to reclaim a fugitive from justice. Not even all felony-level fugitives will be extradited. Every extradition requires a local law enforcement agency to spend money on employee wages (plus likely overtime), fuel, vehicle maintenance, and, in the case of more far-flung locations, airfare and hotel costs. The reality is that sometimes these costs can deter a county from extraditing a person who otherwise qualifies for extradition.

Some counties may not be dissuaded by the costs of extraditing a low-level drug or property crime offender if the trip is only a couple hundred miles. That same county may opt out of retrieving a defendant charged with that same offense if the trip is longer. Similarly, a county may be willing to foot the bill to retrieve someone from anywhere within the United States if that person is charged with a serious, violent crime. Ultimately, the decision to extradite or not is a policy decision that will vary from county to county.

Seems like a lot of crimes qualify—why don't we see extradition hearings more often?

As discussed earlier, cost is certainly a reason we don't see as many extradition hearings as we could. However, the biggest reason is that most defendants elect to waive extradition and voluntarily return to whatever state is demanding their return. The motivation for waiving extradition will vary from person to person: Some may simply want to get on with the inevitable. Others may believe it is in their own self-interest not to make things harder on the attorneys prosecuting their cases.

What do I need to do to facilitate a waiver of extradition?

Whatever the motivation, a defendant's decision to waive extradition dispenses with the need for a contested hearing and creates the need for paperwork. Specifically, it will require some variation of the following:

- a defendant's request to waive extradition,
- the actual waiver of extradition, and
- the court's order approving the defendant's waiver of extradition and return, which is to be filled out by whomever the demanding agent sent to reclaim the defendant.

Some of you may work in counties where this type of paperwork is generated by the clerk's office or personnel within the court's office. If this is you, congratulations—you are living the dream. The rest of us are saddled with the responsibility of preparing this paperwork for the court. Someone in your office should already have these forms. Don't worry about these forms being complicated—they should be simple "fill in the blank" forms because the issues that a court can look into during an extradition hearing are very limited. On the off-chance your office doesn't already have forms generated, don't hesitate to reach out to the clerk's office for examples of the documents that have been previously filed in your county. If that doesn't pan out, call on a neighboring county, or find sample forms at tdcaa.com (look for this article in the Journal section).

If you are tasked with preparing the forms, the key information you will need is the defendant's name (and aliases if any are known), the demanding state, and the crime the defendant is accused of committing there. The method of getting this information will vary from county to county and, perhaps, from extradition to extradition. In Rusk County, it is not unheard of for us to assemble waiver of extradition paperwork based on information gleaned from TCIC/NCIC, out-of-state arrest warrants, and requests that were provided to the jail by the demanding state. With time, you will become adept at zeroing in on the relevant information.

What can I share with partner agencies and victims that could ease their concerns about a defendant slated for extradition?

First and foremost, remember that extradition is a two-way street. We can go out and demand the return of a Texas fugitive from any other state just as easily as those other states can from us. The law requires other states' law enforcement officers to assist Texas by "delivering up" fugitives from justice in exactly the same way we are required to assist other states. If a victim or law enforcement agency is worried that a defendant will escape justice by leaving the state, remind them that we have the extradition tool at our disposal.

Also remind them that while the process is pretty straightforward, it is not automatic. Some

The biggest reason we don't see more extraditions is that most defendants elect to waive extradition and voluntarily return to whatever state is demanding their return.

affirmative steps need to be taken for a fugitive to waive extradition. In cases where extradition is not waived, an attorney will have to offer up proof that the defendant is, in fact, a fugitive from justice. However, this proof is simply a certified copy of the indictment or a sworn affidavit. There won't be a need to call a bunch of witnesses either. While there are due process protections in place for the defendant and he has the right to an attorney, the court hearing the extradition is prohibited from getting into the issue of the defendant's guilt or innocence. The circumstances of the arrest are the only subject into which the court can inquire.

You may want to prepare crime victims for the possibility that a defendant will be granted bail prior to being turned over to the demanding state or picked up by Texas law enforcement in another state.

You may want to prepare crime victims for the possibility that a defendant will be granted bail prior to being turned over to the demanding state or picked up by Texas law enforcement in another state. The court is not required to give bail in an extradition case, and it is prohibited from giving bail in cases where the defendant is accused of committing a crime punishable by death or life imprisonment in the demanding state. If the defendant fails to appear as required after posting bail, the court has the same powers to forfeit the bail and issue an arrest warrant as it would in an ordinary criminal case.

If a defendant has committed crimes in Texas *and* the demanding state, Texas does not forfeit or otherwise concede its authority to prosecute someone for crimes committed in Texas by delivering the person up to the demanding State.

If you have more questions, just ask

If you take away anything from this column, it is this: All your coworkers, regardless of their title, want to see you succeed. If you have questions that a lawyer, investigator, or other seasoned staff member can answer, please ask. The law can be challenging, especially in uncommon proceedings like extraditions. ❇

Endnotes

[1] 18 USCS §3182.

[2] Tex. Code Crim. Proc. Ch. 51 (Fugitives from Justice).

[3] Tex. Code Crim. Proc. Art. 51.13.

The curious case of juvenile DWIs

Officer Lester Daniels of the San Antonio Police Department wasn't particularly surprised by the small white Toyota he saw speeding on an access road, failing to signal during a lane change, and nearly colliding with another vehicle.

By Joshua Luke Sandoval & Kathleen Takamine
Assistant Criminal District Attorneys in Bexar County

He was, after all, working the early morning hours of a Saturday, a very busy time for police officers.

He flipped on his patrol car's lights, and the scream of the siren pierced the cold January morning as he pulled the Toyota over. Officer Daniels called in his location and ran the vehicle plates, annoyed that the driver decided to stop at a small, poorly lit service station parking lot. As he stepped out of his patrol car and approached the Toyota, he noticed that the diminutive driver, M.H, was alone in the vehicle and talking on her cell phone. He asked for her driver's license and noticed that a strong odor of alcohol was coming from her breath, she had red, bloodshot eyes, and her words were slurred. When he asked for her date of birth, his straightforward DWI case took an unexpected turn: The driver was a juvenile.

Although this scenario is hypothetical, it has tremendous illustrative value. Juvenile intoxication stops have a lot of variables, and because they don't always track their adult counterparts, it is important to know how to handle those differences. Here in Bexar County, we have observed an increase in these cases over the past year, and as such we have gathered some additional insight into how to handle them. This article will detail juvenile DWI cases, how they are prosecuted, and some of the important distinctions with adult DWIs.

DWI and DUI

First and foremost, juveniles can be prosecuted for DWI. Let us put to rest any lingering thoughts to the contrary.[1] Secondly, let's distinguish DWIs from Driving Under the Influence (DUI) cases. This distinction is important because although they are often treated interchangeably in the everyday lexicon, the two charges are distinct. In Texas, DUIs are Class C misdemeanors[2] in which a minor (anyone under age 21)[3] operates a motor vehicle in a public place while having any detectable amount of alcohol in his or her system.[4] These cases are handled in the local municipal or justice of the peace (JP) court and do not include confinement as punishment.

In contrast, DWI elements make no restriction on the age of the vehicle operator but do require that the individual be legally intoxicated.[5] Juveniles charged with DWI face possible removal from their homes and placement in a secured juvenile facility.

At the point we left off in our hypothetical, we cannot say with certainty that the stop has matured into a DWI investigation. Why? We don't have enough evidence at our disposal to prove that the vehicle's operator was legally intoxicated. On the other hand, with the driving facts, the odor of alcohol from M.H.'s breath, and her slurred speech, the hypothetical has already demonstrated sufficient evidence for a DUI. If Officer Daniels could conclude that the juvenile was intoxicated, as it is defined in Chapter 49 of the Texas Penal Code, then it would become a DWI investigation of a juvenile.

Investigating the juvenile DWI

Fortunately, developing reasonable suspicion to stop a juvenile and probable cause to take a juvenile into custody for DWI are fairly straightforward. For the most part, neither statute nor caselaw creates a distinction between what con-

stitutes DWI reasonable suspicion and probable cause for juveniles versus adults. In Bexar County, the various situations that give rise to DWI investigations have included vehicle collisions, drivers who violate traffic laws, drivers asleep in their vehicles in dangerous locations, and so on.

After identifying the driver as a juvenile, Officer Daniels notes some of the classic indications of intoxication: an odor of intoxicants, red bloodshot eyes, an admission to consuming alcohol, and slurred speech. At this point the investigation will track the procedures and law that govern adult DWI cases, including Standardized Field Sobriety Tests (SFSTs), because the officer is conducting an investigatory detention and has not placed the juvenile in custody. Therefore, the juvenile may consent to the SFSTs and answer the officer's questions. Furthermore, juveniles are also subject to implied consent as covered in §724.011 of the Transportation Code, which defines arrest as including taking a child (as defined by the Family Code) into custody.

This process of the investigation does not rise to a custodial detention for purposes of juvenile law (the significance of which will become apparent soon), although courts will certainly consider the "reasonable person" standard from a juvenile's perspective.

An important point to keep in mind is that even though the juvenile is taken into custody, she is not yet formally charged with a criminal offense. This point will impact a requirement of Officer Daniels: to notify M.H.'s parent, guardian, or custodian of her arrest and charges.

Taking the juvenile into custody

After conducting the field sobriety tests, Officer Daniels determined that M.H. was intoxicated. He takes her into custody and places her in the back of his patrol vehicle. Now what?

This is when Title 3 of the Texas Family Code takes over the procedures, and it is where most of the differences between the juvenile and adult criminal justice systems arise. The first important note about the juvenile system is the terminology. As a juvenile offender, M.H. is *considered a respondent*, not a defendant. She was not arrested but was *taken into custody*. She would not be convicted of a criminal offense but *adjudicated* in having engaged in *delinquent conduct*, the delinquent conduct being DWI.[6] The different terms reflect the legislature's overall purpose in creating the Juvenile Justice Code. Family Code §51.01 specifically states it was enacted to ensure a juvenile is not given the "criminal" label and to ensure that the system does everything to promote the juvenile's treatment and rehabilitation.[7]

Once Officer Daniels takes M.H. into custody, he has to decide what to do with her and where to take her. The Family Code is strict regarding what can be done to juvenile offenders who are taken into custody. Under §52.02, he could take her to a Juvenile Processing Office (JPO)[8], do one of the enumerated acts listed in the code section,[9] or take her to an adult processing office for specific and limited purposes.[10] An important point to keep in mind is that even though she is taken into custody, she is not yet formally charged with a criminal offense. This point will impact a requirement of Officer Daniels: to notify M.H.'s parent, guardian, or custodian of her arrest and charges. We will discuss this requirement later.

Right now, let's briefly talk about the enumerated acts under §52.02, which apply in all juvenile cases. Once Officer Daniels takes M.H. into custody, if he doesn't take her to a juvenile processing office, he must do one of the acts outlined in this section:

1) release her to her parent, guardian, or custodian, [11]

2) take her before the office or official designated by the juvenile board,

3) take her to a secure detention facility or facility designated by the juvenile board,

4) take her to a medical facility if she requires medical attention, or

5) take her to the school in which she is enrolled if the school administrators accept her.

If he takes her to the JPO, it is for reasons listed in Texas Family Code §52.025, such as keeping the juvenile there while waiting for a parent to pick her up, completing any forms or records, photographing and fingerprinting her, or taking her statement. This section specifically states that a juvenile cannot be held in the JPO for longer than six hours.[12]

At this point, let's focus on taking a juvenile to a location in which adult offenders are processed for the purpose of requesting and obtaining a breath sample. This is unusual because the Family Code is strict in preventing juvenile offenders from coming into contact with adult offenders or being present in areas normally occupied by adults. There are very few exceptions to this general rule. This particular exception is due to the fact that it is generally impractical for police departments to have a separate facility that holds the Intoxilyzer machines specifically for juve-

niles.[13] Once the juvenile is processed in this manner, officers are then required to follow §52.02.

In our hypothetical, Officer Daniels took M.H. into custody for suspicion of DWI and brought her to the adult processing office to request and obtain a sample of her breath.[14] He first requested a breath sample by reading the Peace Officer DWI Statutory Warning (DIC-24 form) to her as he would to an adult offender. With regard to requesting a breath sample, because she is a juvenile, §52.02(d)[15] requires that M.H. be video-recorded while she either agrees or refuses to give a breath sample. This specific section also requires the police department to maintain the video recording until the case is final and to make it available to the juvenile's attorney.

An interesting question that has come up is whether the juvenile is required to be recorded on video in the adult processing office. Would it be sufficient for the officer to use his body-worn camera or the camera on the patrol vehicle to record the process? Even though §52.02(c) allows the juvenile to be taken to the adult processing office to be videotaped, §52.02(c)(2) requires only that the agreement to or refusal of the breath sample simply be video recorded. It does not mention where this recording should take place. The plain language of the statute appears to allow the various cameras outside the adult processing office to record this process. Officers just need to make sure that the recordings are preserved and made available to the juvenile's attorney.

Breath specimen

Another interesting factor of this section is that it allows the juvenile to decide whether to give a breath sample without the concurrence of an attorney. It is normal for the Family Code to give juveniles more protection from police and prosecutorial action than adults. However, §51.09 outlines the juvenile's ability to waive a right guaranteed by the U.S. Constitution, the Texas Constitution, and the Juvenile Justice Code. Under this section, an attorney must agree to waive a right afforded the juvenile unless a "contrary intent" clearly appears in the Juvenile Justice Code;[16] Family Code §52.02(d) has this contrary intent because it specifically indicates that the juvenile may be asked to give a breath sample without having her attorney present. Therefore, M.H. can agree or refuse to give a breath sample without consulting an attorney or having one present.

Blood specimen

Let's move on to blood specimens and add an interesting twist. What if M.H. says that she is unwilling to give a breath sample but is willing to give blood? Could Officer Daniels accept a blood sample if she gives it voluntarily or even requests it? The best route is to obtain a search warrant for a blood sample once the juvenile refuses to give a breath sample. The reason for this is due to §52.02(d) discussed in the preceding paragraph. This section allows a juvenile to agree to a breath test, but it does not mention a blood test. Therefore, the plain language of the section indicates that the juvenile will need the concurrence of an attorney before she can agree to a blood sample.

Regarding mandatory blood draws under Transportation Code §724.012(a-1), again, the best practice is for the officer to obtain a search warrant for a blood sample. Courts have leaned toward drawing blood as a more invasive search that requires more than a need for exigency due to possible loss of evidence.[17]

What if M.H. says that she is unwilling to give a breath sample but is willing to give blood? Could Officer Daniels accept a blood sample if she gives it voluntarily or even requests it? The best route is to obtain a search warrant for a blood sample once the juvenile refuses to give a breath sample.

Charging the juvenile

After going through the procedures for the breath or blood sample, Officer Daniels must decide whether to formally charge M.H. with DWI. Up to this point, he has been investigating her under the suspicion of committing the crime. He could file this case as a DUI or a DWI. Should he file a DUI, he would still have to follow the mandates of §52.02 and then make the appropriate referrals with regard to Class C misdemeanors.

If he decides to formally charge her with DWI, he can take her to the JPO at the police department or he can do, "without unnecessary delay,"[18] one of the enumerated acts in Family Code §52.02. These include taking the juvenile to a secure juvenile detention facility or releasing her to a parent and filing the case as a non-arrest charge. The decision to charge M.H. with a DWI is no different from deciding to charge an adult with DWI. Officer Daniels would use everything he observed while investigating this case, from witnessing the driving facts to his interaction with her during the investigation. If she agreed to a breath sample, the results would be another factor he considers.

To assist him in his decision, Officer Daniels contacts the magistrate's office where there is a prosecutor on duty 24 hours a day. Lucky for him, a prosecutor assigned to the Juvenile Section is there. He asks for advice. What would you tell him? What are some of the factors to consider when you advise him? Remember that a DUI case just requires proof that the minor (and M.H. definitely qualifies) has *any* detectable amount of alcohol in her system while operating a motor vehicle. DWI cases require proving that the individual was legally intoxicated. It is also important to keep in mind that as prosecutors, we walk a fine line between keeping to the goal of Family Code §51.01 (emphasizing the promotion of a juvenile's treatment and rehabilitation) and our duty to the laws of Texas and to the safety and wellbeing of the community.

To assist him in his decision, Officer Daniels contacts the magistrate's office where there is a prosecutor on duty 24 hours a day. Lucky for him, a prosecutor assigned to the Juvenile Section is there. He asks for advice. What would you tell him?

To assist Officer Daniels, you would want to know the facts of the case. Specifically, how many signs of intoxication did the juvenile display? Would it be too difficult to prove that she was intoxicated? Was she involved in a collision with property damage or injuries?

If the goal is to rehabilitate the juvenile and if the evidence does not rise to the level of what the DWI statute requires, then the case could be best served in municipal or justice of the peace (JP) court. The juvenile will still be required to undertake any alcohol-related programs under §106.071 of the Alcohol and Beverage Code. If the juvenile should have two prior convictions (for Class C misdemeanors in these courts, the juvenile will have convictions) of any alcohol-related offense, §51.08(b)(1) of the Family Code allows the municipal or JP court to waive its jurisdiction and transfer the case to a juvenile district court. Keep in mind that these convictions cannot be used to enhance a DWI to a DWI 2nd or a felony-level DWI. Penal Code §49.09 states that enhancements can be done only with convictions of operating a motor vehicle while intoxicated. The language does not include operating while under the influence.

Another important matter to keep in mind, if the facts indicate that it is a felony case (i.e., DWI with Child Passenger, Intoxication Assault, Intoxication Manslaughter, etc.), is that the case should not be filed in municipal or JP court. This is especially true if the case involves someone being taken to the hospital or the case involves a death. It is here where we need to become sensitive to the victim and the community, to give an actual voice to the victim in the case. Once the case comes to the district or county attorney's office, prosecutors can make a better assessment on how to proceed after a thorough investigation is done.

If any injuries are considered serious bodily injury[19] or if the collision caused someone's death, then the juvenile faces the possibility of being certified as an adult (depending on her age) or have the case filed as a determinate sentence case. These specific filing processes would involve a whole new discussion that could take up many pages. Suffice it to say that they would enable the cases to go beyond the juvenile's 18th or 19th birthdays, the dates the juvenile normally ages out of the juvenile court's jurisdiction.[20]

Finally, it is good practice to inquire into the juvenile's criminal and driving history. If she is showing a pattern of bad behavior, the case may be more suitable for the juvenile district court as there is a possibility of being placed into detention, taken out of the home, or placed in a secured facility. This would also apply to cases involving a wreck, which often involve victims. Because we are weighing the interest of the community in our considerations, it is better to deal with these types of cases in district court.

In situations where the facts could go either way, it is best to advise the officer to file the case as a DWI. There are more opportunities to work with the juvenile with greater consequences should she fail to comply with any conditions set by the court. Due to the limited time we have with juveniles (as they age out at 18), the quicker we work with them, the better they are in the long run.

After charging

In our hypothetical, Officer Daniels ultimately charges M.H. with DWI and takes her to the JPO located in his police department. Once at the JPO, he notifies her parents by directly calling them and telling them that she had been taken into custody for DWI, as required by §52.02(b). The plain language of this section requires that it is Officer Daniel's responsibility to notify M.H.'s parent. Though the statute requires the notification to be done in a prompt manner, there is no clear definition as to what "prompt" means. This is where it is important for officers to document all their interactions with juveniles. Courts will

look at the procedure as a whole in determining whether an officer's actions were appropriate. To determine whether the officer acted promptly, courts will consider the length of time between custody and notification, whether the juvenile made any statement in between those times, any difficulties the officers had in contacting the parents, and the officer's activities prior to notifying the parents.[21]

Similar to the notification statute, Family Code §61.103 gives parents the right to access the juvenile while she is in the JPO. However, even if the officer were not to abide by this section, that cannot be used as grounds to exclude evidence against the juvenile, nor can the officer be held liable for violating this section.[22]

So, in the final steps of the process of taking M.H. into custody and formally charging her with DWI, Officer Daniels took her to the JPO where he notified her parents and finished his report. He then transported her to the County Juvenile Detention Center, where she was formally processed into the center.

Here there is another quirk of the Family Code. Under §53.01, when a juvenile is taken to the detention center, an intake officer will determine if the person in custody is a child within the meaning of the Family Code and will determine if there is probable cause to believe the person in custody has engaged in delinquent conduct. The intake officer may be a probation officer or anyone authorized by the Juvenile Board. In other words, the Family Code is giving someone, who may not be an attorney, the power to determine probable cause in a criminal case. If this officer finds that the person is a child and that there is probable cause, then the child is processed and the case is accepted. The case is taken before the juvenile court judge for an initial hearing and another determination of probable cause. At this point, the officer's role as a main protagonist is essentially done unless he is called into court for any subsequent hearings or trial.

If the intake officer finds no probable cause, the child is released and the officer will have to make arrangements for her to be picked up by a parent. Then the officer is, once again, tasked with the decision to file the case in municipal or JP court or investigate the case further and resubmit the case as a non-arrest or at-large case.

Obviously, it takes practice and knowledge of the court systems in your county to be able to adequately advise any officer about filing decisions. Make time to learn about the various programs available to juveniles in all the courts, municipal, JP, and district. And don't be afraid to ask for help. So long as you can back up your advice with sound reasoning and a solid basis in the law, you will do fine.

Juvenile DWIs in Bexar County

One of the more interesting aspects of prosecution in Texas is the amazing diversity among jurisdictions in how offenses are handled. A great deal can be learned via shared dialogue and discussion on how offenses are trending and how various offices handle them. In Bexar County, we have seen a discernable spike in juvenile DWI referrals over the past year. This increase comes after several years of stagnant numbers.

Our office doesn't have a specific policy or manner of handling such cases, in part because our office is large enough to dedicate a section of prosecutors to only juvenile cases. Thus, each juvenile DWI is handled by a prosecutor who is quite familiar with the special requirements that come with these cases.

Some time back we were discussing this very issue with a prosecutor from another jurisdiction when we were asked if we had encountered the problem of law enforcement issuing citations for DUI as opposed to making an arrest for DWI (in situations where intoxication could have presumably been proven by law enforcement). Why is doing so pernicious? Well, issuing a citation for DUI (which is a Class C misdemeanor) in situations where a DWI arrest is warranted surrenders leverage in plea negotiations. Furthermore, given that the former is a Class C and the latter a Class B at minimum, these decisions by law enforcement drastically decrease the services a respondent could receive from juvenile probation. These services include drug and alcohol awareness courses, specialty dockets for substance abuse, counseling, and even drug and alcohol testing. Thus, at the end of the day, such decisions rob the respondent of services and potentially an increased opportunity at rehabilitation.

Although we have not experienced this problem, it might very well be an issue for some of you reading this article. If so, consider discussing the issue with direct supervisors and having meaningful conversations with law enforcement. Having served as supervisors throughout our careers,

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we can both attest that receiving feedback on issues from colleagues is important. In fact, it is sometimes the most efficacious means of identifying problems and addressing them. It could be the first step to positive change in your jurisdiction if you see this issue as a problem.

Whenever we have encountered instances where juvenile issues were not handled in the best manner, we made ourselves more available to officers. Strive to make law enforcement comfortable approaching you with questions.

Plus, there have been many instances where police departments have contacted our office to present and discuss various juvenile issues with the detectives and patrol officers. A lot of law enforcement officers don't handle juvenile cases with great frequency. However, officers must possess knowledge of different policies, procedures, and statutory guidelines that apply only to juvenile cases. Whenever we have encountered instances where juvenile issues were not handled in the best manner, we made ourselves more available to officers. Strive to make law enforcement comfortable approaching you with questions. Sometimes queries on juvenile issues may come at less than opportune times, but making an effort to reach out when officers have questions can foster goodwill between the prosecutor office and the police department. We have even spoken to law enforcement agencies on various aspects of juvenile law and how it applies to search and seizure or detention and arrest. Discussion groups like this can go a long way not only in increasing awareness about some of the specifics of juvenile law but also fostering a good relationship with various agencies.

Concluding thoughts

Juvenile law, like other areas of the law, has its own unique requirements when it comes to statutes or procedures. It is important, however, to not be intimidated by these distinctions. Juvenile DWI referrals can require special attention to detail, especially if you do not work with them frequently, but they need not be burdensome. Knowledge of the law, communicating with colleagues, and maintaining good working relationships with law enforcement will guide you as you navigate even the most troublesome of juvenile DWI referrals. ❇

Endnotes

[1] *Findlay v. State*, 9 S.W.3d 397, 401 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

[2] Tex. Alco. Bev. Code §106.041(c) (a DUI will not be classified as a Class C misdemeanor if 'it is shown at the trial of the defendant that the defendant is a minor who is not a child and who has been previously convicted at least twice of an offense' under the DUI statute).

[3] Tex. Alco. Bev. Code §106.01.

[4] Tex. Alco. Bev. Code §106.041(a); we can't resist pointing out that even someone who, criminally speaking, is an adult can still be charged with DUI under §106.01 and §106.041 of the Alcohol Beverage Code. Interestingly, "minor" and "child" are two different terms. A minor is anyone under 21. A child is anyone under 17 (the code references Family Code §51.02, which defines "child").

[5] Tex. Pen. Code §49.04(a).

[6] See Tex. Fam. Code §54.03 and Tex. Pen. Code §49.09. This is the reason why a DWI can never be enhanced against a juvenile. Texas Penal Code §49.09 requires that to enhance a DWI to a DWI 2nd or a felony DWI, there needs to be prior DWI convictions. Because a juvenile is adjudicated instead of convicted, these cannot be used to enhance any subsequent DWIs.

[7] See Tex. Fam. Code §51.01; see also Robert O. Dawson, *Texas Juvenile Law*, pp 8-9 (Texas Juvenile Probation Commission, 9th ed., 2008).

[8] Dawson, *Texas Juvenile Law*, p. 111. A JPO is a room or office designated by the county juvenile board in which the police department is located. The room is specifically inspected by the juvenile board and is approved for the temporary detention of any juveniles taken into custody.

[9] Tex. Fam. Code §52.02(a); see also *Roquemore v State*, 60 S.W.3d 862 (Tex.Crim.App. 2011).

[10] Tex. Fam. Code §52.02(c).

[11] From this point on, for the sake of brevity, we will refer to parent, guardian, or custodian as parent, but we mean all three unless we specifically state otherwise.

[12] Tex. Fam. Code §52.025(d).

[13] Dawson, *Texas Juvenile Law* at 483.

[14] Referencing Chris Hubner and Sharon Pruitt in *Juveniles* (TDCAA © 2005/2007 ed). It is interesting to note that when you read this section, it specifically allows the juvenile to be taken to an adult processing office if the officer believes that the juvenile was operating a motor vehicle while under the influence of alcohol. A motor vehicle is narrowly defined under the Penal Code, which would exclude watercrafts and aircrafts. So it appears that, had M.H. been caught operating a boat while intoxicated or under the influence, Officer Daniels would not have been able to take her to get a breath or blood sample.

[15] §52.02(d) reads: "Notwithstanding §51.09(a), a child taken into custody as provided by Subsection (c) may submit to the taking of a breath specimen or refuse to submit to the taking of a breath specimen without the concurrence of an attorney, but only if the request made of the child to give the specimen and the child's response to that request is videotaped. A videotape made under this subsection must be maintained until the disposition of any proceeding against the child relating to the arrest is final and be made available to an attorney representing the child during that period."

[16] §51.09 reads in full: "Unless a contrary intent clearly appears elsewhere in this title, any right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if: 1) the waiver is made by the child and the attorney for the child; 2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it; 3) the waiver is voluntary; and 4) the waiver is made in writing or in court proceedings that are recorded."

[17] See *Missouri v. McNeely*, 133 S.Ct. 1152 (2013).

[18] Tex. Fam. Code 52.02(a); *Contreras v. State*, 67 S.W.3d 181, 185 (Tex.Crim.App. 2001); by its terms, this section "contemplates that a 'necessary delay' is permissible."

[19] Tex. Penal Code §1.07 (46).

[20] Sarah Bruchmiller & Hans Nielsen, "Determinate Sentencing for Juveniles," *The Texas Prosecutor* (July-August 2017); see Bruchmiller & Nielsen, "Juvenile Certifications," *The Texas Prosecutor* (May-June 2017).

[21] See *Ray v. State*, 176 S.W.3d 544, 548–49 (Tex. App.–Houston [1st Dist.] 2004, pet. ref'd) (citing *Vann v. State*, 93 S.W.3d at 185 (citing *Gonzales v. State*, 67 S.W.3d 910, 911 (Tex.Crim.App.2002); *Hampton v. State*, 36 S.W.3d 921, 924 (Tex.App.–El Paso 2001), *rev'd*, *Hampton v. State*, 86 S.W.3d 603 (Tex.Crim.App.2002); *Hill v. State*, 78 S.W.3d 374, 382–84 (Tex.App.–Tyler 2001, pet. ref'd); *In re C.R.*, 995 S.W.2d 778, 783 (Tex.App.–Austin 1999, pet. denied)); *cf. J.B.J.*, 86 S.W.3d at 815 (applying "totality of the circumstances" approach to determine whether parental notification was promptly given).

[22] Tex. Fam. Code §61.106 & §61.107.

‘See you in church on Sunday!’

We’ve all heard of Bernie Madoff, who famously bilked investors out of millions of dollars in a massive Ponzi scheme, but did you know he was an “affinity con”?

By Lori L. Varnell
Assistant Criminal District Attorney in Tarrant County

Affinity con-artists use their affiliations and affinities with others—groups with religion, race, age, or marital status in common—to target and exploit them. These cons are very successful: The victims trust them because of their own shared interests with the con artist.

Religious con-artists are particularly good at marshaling the “will of God” to benefit themselves. What Madoff did to those of the Jewish faith, William Neil “Doc” Gallagher did to Christians in the Dallas-Fort Worth area. Gallagher spent hundreds of thousands of dollars to buy “bantering” spots with well-known and beloved Christian radio hosts to publicize his investment scheme, and they always ended with him saying, “See you in church on Sunday!” He appeared on the radio as many as three or four mornings a week, so many that the number of solicitation offenses would be impossible to calculate.

The stories of Gallagher’s desperation to keep his scheme going are heartbreaking. Some victims had to retire later than they planned because of his lies, and others recruited their children and friends to invest because of their good experience with Gallagher and his caring notes, cards, and gifts on birthdays. The victims referred friends to him saying, “He prayed with me over this decision.” The stories included descriptions of Gallagher placing a reassuring hand on his unsuspecting victim’s shoulder and saying glorious words. All the while, he was puffing up with the power he had in controlling of the futures of so many.

What is a Ponzi scheme?

Ponzi schemes have a long history in the United States. They tend to promise guaranteed returns on investment with little or no risk, unlike the vilified stock market, which is fraught with risk. The underlying investment scheme is varied: appreciation of stamps, currency, notes, bonds, oil interests, and specially selected stocks. The common hallmark is that the scheme must bring in new investors; the fraudster then uses the new investor’s money to pay existing investors so they don’t suspect that the scheme is a farce.

Gallagher’s scheme

The journey began at the Texas Department of Insurance (TDI) where an intrepid investigator, Sgt. Steve Richardson, was researching a forgery accusation against Gallagher. Gallagher was a licensed insurance agent (since his broker license had been previously revoked) and the forgery’s effect was to withdraw an annuity, which falls under TDI’s jurisdiction as insurance fraud. The victim was afflicted with dementia, which is a common complication in financial crimes against elderly people. The complaint was made by her grandson, who had power of attorney, and he had met with Gallagher to make him aware that the dementia was in effect and that his grandmother was not competent to make decisions about her own property. He further informed Gallagher that he had the power of attorney and would be making all the decisions. Shortly thereafter, the withdrawal form was forged.

Once Sgt. Richardson began looking into the bank records for the Gallagher Financial Group (abbreviated GFG), Mr. Gallagher’s investment advisor entity, he uncovered a huge Ponzi scheme that had been going for almost a decade.

The forgery TDI uncovered was the tip of a huge iceberg: 192 victims, $38 million in reported

loss, and $29 million in verifiable loss. Sadly, because of the length of this scheme, bank records are no longer available to verify losses prior to 2013, so it was likely even larger. It was indicative of a Ponzi scheme spiraling into desperation, with its creator grubbing at every target to get more money to feed the beast.

Unrelated to the TDI investigation, which began with a forgery, Tarrant County's prosecution of Doc Gallagher through its Elder Fraud Unit began with a text. I was driving into work on a Wednesday morning in April 2019 when I got a message from Detective Jim Hobbs of the Hurst Police Department (HPD). I was used to receiving abbreviated communications from him, but this one was a puzzle. It simply read, "What are we gonna do about Gallagher?" It sounded as if it were part of an ongoing text thread, but it was the beginning of a conversation that would last for years.

Hurst PD gets involved

In September 2018, a couple drove to the Hurst PD from Oklahoma. They met with Detective Hobbs and told him about hearing Gallagher on Christian radio. They contacted Gallagher to express interest in investing money with him, and Gallagher had traveled to their home in Oklahoma to meet with them personally, promising them a safe investment where they would never lose their principal. He said they could take out $5,000 per month because of the fabulous return and never dip into the principal. They ended up investing $752,000 with him.

In exchange for this substantial outlay, they received a statement showing that their money was put into five different types of investments: Treasuries, Investor Business Daily Formula, Fixed Index, Life Settlements (another fraud-laden Ponzi haven) and Value/Dividends. A sophisticated investor would have immediately scoffed at this list, but these were everyday people trusting Gallagher with their life savings.

However, they knew enough to demand statements from him. When they still had not gotten these statements after numerous requests, they decided to remove their money. They called Gallagher to find out what account the money was coming from for tax purposes, and they drove to Fort Worth to pick up a check. They received one in the amount of $100,000—far less than they had invested. And there was no explanation of the source of this check.

They demanded a meeting with Gallagher, at which they demanded that he return all of their money. Gallagher told them it would take five days, and he instructed them not to contact him or his office during those five days. The following week, they received a text that they were to meet him at the Vermillion Law Firm in Addison. They waited at the firm for three hours, at which time they were handed a letter saying Gallagher would not meet with them. They also received two checks, one for $85,000 and one for $45,000.

They had no idea that Gallagher was out recruiting other investors to get the money he eventually gave to them. Gallagher went so far as to have another attorney send the couple a letter ordering them to cease and desist defaming and harassing him. The couple, exasperated, went to the Hurst Police Department, the city where GFG's office was located.

Detective Hobbs had uncovered victims of the large Ponzi scheme TDI was already investigating. The two investigations merged when Hobbs contacted Sgt. Richardson and shared his investigation into the Oklahoma couple's money.

In October 2018, Detective Hobbs received another complaint about Gallagher, this time from a young man, an (adult) orphan from Bulgaria. He was brought to the United States by a missionary from a local church, who promised the orphan a family in the U.S., but this man ended up sexually assaulting the boy. When the orphan learned that the sexual abuse was not normal and was in fact a crime, he complained to his church's elders. A lawsuit ensued. Not wanting to let any opportunity go to waste, Gallagher began jockeying to be the orphan's advocate. After hiring a few lawyers, Gallagher settled the young man's lawsuit and had the proceeds paid directly to himself. He used them to feed his Ponzi scheme.

Gallagher spent much of the scheme's money to make Ponzi payments to early investors, to make payments to keep up his unrealistic promises, to buy advertising to get new investors, and to pay for an office staff who was kept entirely in the dark about the organization's books. Gallagher would scrawl out his calculations by hand, then give them to a secretary to type up on GFG

Gallagher spent much of the scheme's money to make Ponzi payments to early investors, to make payments to keep up his unrealistic promises, to buy advertising to get new investors, and to pay for an office staff who was kept entirely in the dark about the organization's books.

letterhead. Investors reported seeing mistakes in his calculations but overlooked them because of the onslaught of Christian bravado he would spin up for their consumption.

Some victims were eager to face him down and tell the judge what they thought should happen to the man who stole their life savings. Some, however, were angry that this new proceeding would open a wound they had worked hard to close.

Indictments and prosecution

By early 2019, Gallagher's scheme was unraveling. Dallas County arrested him in March, and Tarrant County followed suit with indictments in August. The Securities and Exchange Commission obtained a federal court order to appoint a receiver, TDI attorney Cort Thomas, to take over the operation of Gallagher Financial Group, marshal the assets, and return what money he could to the victims.

Prosecuting Doc Gallagher drew on the expertise of all the agencies and attorneys involved. The team included local officers talking to victims, forensic financial analysts assembling and reviewing spreadsheets, an expert receiver appointed by the Texas Department of Insurance, the United States Securities and Exchange Commission, the State Securities Board and its team of investigators, the Dallas County Criminal District Attorney's Office (including ACDA Alexis Goldate), and the Tarrant County Criminal District Attorney's Office. Both counties relied on their specially created Elder Fraud Units to spearhead the prosecutions.

After the COVID-19 shutdowns, in June 2020, Alexis Goldate in Dallas County contacted me about providing our office's discovery on the Gallagher case, which I did. Alexis also provided me with Dallas County's discovery. Shortly after that, Alexis called to say that Gallagher was pleading guilty in Dallas and would be incarcerated for 25 years. Tarrant County decided not to offer any plea in conjunction with Gallagher's Dallas County plea and proceed with its own case. That's because Tarrant County was Gallagher's home base. It was from his Tarrant County office that he created false statements, conspired to hide money, and operated his Ponzi scheme with hand-scrawled notes. His secret office was also in Tarrant County; it had a huge safe where investigators found a handwritten inventory of gold and silver in Doc Gallagher's scrawl. It was fitting that he would be forced to face his victims in open court in Tarrant County.

After a year of COVID delays, Gallagher was brought back to Tarrant County. Only four of us were present in court on the day he pleaded guilty to all the counts charged: one count of Theft Over $300,000, one count of Misapplication of Fiduciary Funds Over $300,000, two counts of Exploitation of the Elderly (for the Ponzi victims), and two counts of Forgery with elderly enhancements (TDI's original case). He was looking at three possible life sentences.

Sentencing in Tarrant County

We spent the days before sentencing speaking with victims. Some were eager to face him down and tell the judge what they thought should happen to the man who stole their life savings. Some, however, were angry that this new proceeding would open a wound they had worked hard to close. Others were angry that the justice system could offer retribution only in the form of prison time rather than full restitution. There was approximately $600,000 in GFG's accounts the day the receiver took possession and $2,000 in cash in a bank envelope in Gallagher's coat pocket during his arrest. After the receiver worked diligently to reclaim the transfers made by Doc Gallagher to related parties, including his mistress, Debbie Carter (whose criminal case is still pending), and his wife, as well as vendors, such as Salem Media (for radio station advertising; that civil case is still pending), the victims have received approximately 14 cents on the dollar of their investments. All of the victims expressed shame for being taken by this con. Such shamed responses are typical in cases where the offender had such close relationships with the victims.

On the morning of November 1, 2021, Tarrant County investigators in the Elder Financial Fraud Unit and White-Collar/Public Integrity Units dispersed in county vehicles to retrieve elderly victims from their homes and bring them to the courthouse. Our business office coordinated with Tarrant County facilities and John Peter Smith Hospital to bring a brigade of wheelchairs for those victims who were unsteady on their feet. It was a mammoth effort.

TDI receiver Cort Thomas, Forensic Analyst Justin Driscoll from our office, and many victims testified. All unanimously asked for life in prison. Some moments that stick out in my mind include when one victim said through her tears, "It wasn't enough that he took advantage of me—I am so dumb that I recommended him to my daughter." Another victim, who was in law en-

Continued on page 37 in the blue box

Sitting for the board certification exam

Like most of you, I told myself after the bar exam that I was never taking another test for the rest of my life.

By Daniel Cox
First Assistant District Attorney in Henderson County

But money can be the ultimate motivator.

In early 2019, when my then-boss, Tonda Curry, the elected Criminal District Attorney in Van Zandt County, offered attorneys in her office an on-the-spot bonus and an annual raise if they passed the board certification exam, well, it was time to fill out the application.

A few months ago, TDCAA Executive Director Rob Kepple mentioned in *The Texas Prosecutor* that he had heard from a number of prosecutors around the state that they were having a hard time even being qualified to sit for the exam. Having recently taken it, I thought maybe my experience with the board certification process could help others not only get qualified to sit for the exam, but to pass it, too. Besides the hassle of having to recall old trials and appeals and reach out to peers for a reference, it was a fairly smooth process.

I had actually flirted with the idea of trying to get board certified a few years earlier, when another boss, former Henderson County District Attorney Scott McKee, mentioned getting board certified to his attorneys. At that time, however, I was intimidated by the process, the application, and the test, and frankly, I didn't consider myself good enough or smart enough to be board certified.

But with the passage of time and the monetary incentive, I decided to get started.

Requirements

The first thing to know is the requirements. To sit for the exam, you must have been licensed at least five years, with three of those years primarily practicing criminal law. You must not have any disciplinary history with the State Bar. You must have 60 hours of TBLS-approved CLE in the field of criminal law for the three years preceding your application.

The application process is burdensome, time-consuming, and intimidating. You must have a minimum of five references. Of the five, at least one must be a judge of a court of record in front of whom you have practiced. The other four must be criminal law attorneys, either prosecutors or defense attorneys, whom you have tried a case either with or against. Those references will receive a questionnaire from TBLS asking, among other things, about your general knowledge of the law, the Code of Criminal Procedure, evidence, etc. If you know anyone who is board certified and you're confident that person will give you a good review, it cannot hurt to have a board-certified lawyer as one of your references.

After you choose references, it's time for the "substantial involvement" portion of the application where you list the cases in which you had, yes, substantial involvement. You will wish you had kept track of all your trials and even other contested matters. If you haven't, be prepared to suck up to court reporters and court clerks to help you get the information you need. TBLS wants to know cause numbers, styles, charges, resolutions, and the issues in each case. This seems to be where a number of Texas prosecutors get hung up in the application process.

It is a requirement that in the three years preceding application, you have handled as a first chair attorney three of the following four categories:

- five felony trials in state court,
- 10 misdemeanor jury trials in state court and five more felony jury trials in state court (for a total of 10 felony trials),
- five jury trials in federal court or substantial involvement in 10 federal cases with a contested issue, or
- any combination of five state or federal appeals.

It's the federal experience and the appeals that keep a lot of Texas prosecutors from qualifying to take the exam. I had no federal trial experience to list on my application.

Most of us in Texas prosecutor offices worked our way up from misdemeanors to felonies, so the required number of felony and misdemeanor trials should be a non-issue if you've been practicing criminal law long enough to sit for the exam. It's the federal experience and the appeals that keep a lot of Texas prosecutors from qualifying to take the exam. I had no federal trial experience to list on my application. Fortunately, though, I have worked only in offices without appellate divisions: If you try the case, you do the appeal. My appellate experience qualified me for the exam despite not having any federal experience. If you don't have any federal experience and you work in an office that does have an appellate division (so you're not handling your own appeals), I recommend getting some appellate experience for the TBLS application.

Speaking of substantial involvement, one area in the application is for listing other matters you have handled. TBLS considers the matters' complexity, nature, and duration, which I took to mean, "Throw the kitchen sink at them." If you had a bench trial with a novel legal issue, list it and explain the issue. Do the same with a motion to suppress on a complicated issue. If you sat second chair on some big trials, it doesn't hurt to list those either, and include what your responsibilities were as second chair. Did you cross a defense expert? List it along with the area of expertise. Did you do voir dire? Include that. The bottom line is, show the TBLS folks that you have handled many complex legal issues, be it in pre-trial hearings, jury or bench trials, or appeals. "Substantial involvement" are the two key words when it comes to listing your experience. Tell them what you've done. Beat them over the head with your experience.

I finished and submitted my application in early May 2019. A little more than two months later, I received an email notifying me that I had been qualified to sit for the exam. The exam was in Austin in mid-October, giving me roughly three months to study. Going back to that whole "not wanting to ever take a test again" thing, I of course procrastinated on studying for the first six weeks or so.

Time to study

After the references and substantial involvement portions are handled, it's time to study for the actual exam. Unlike the bar exam, there are no study guides—no Kaplan or BARBRI—and TBLS does not publish old tests to use as study guides. You're pretty much on your own. That being said, there is some help out there.

The Texas Criminal Defense Lawyers Association has some practice questions that have been culled from old tests. How the association got them, I don't know, but if you're lucky enough to know a board-certified defense lawyer with a copy of those old questions, get your hands on it. That's as close as you're going to get to practice questions.

Another great source for study material is the State Bar's Advanced Criminal Law Course. It's an expensive CLE, but the written materials are very helpful. It's usually around 25-ish hours of material that runs the gamut from ethics issues and recent caselaw updates, to pre-trial filings and post-conviction relief, and everything in between. If you're lucky, there will even be some federal law in there as well.

The Advanced Criminal Law Course is also as close as you're going to get to pre-made outlines. A lot of the presenters at the Advanced Course outline their material. If there is not an outline, you can usually use PowerPoint presentations and other written materials in lieu of specific resources like there was for bar exam preparation.

I studied for this exam pretty much like I did for the bar: with lots of notecards. I know some people read the Code of Criminal Procedure and the Penal Code from front to back. I didn't, but it can't hurt. Do what worked for you with the bar. I was also told that TBLS likes to test on new caselaw, typically from the Supreme Court of the United States (SCOTUS) or the Texas Court of Criminal Appeals. A former co-worker, Tyler Woudwyk, an ADA in Van Zandt County, became board certified in 2020, and he mentioned that TDCAA's weekly caselaw updates, which are emailed for free to subscribers on Friday mornings, are a great way to stay up-to-date on recent caselaw developments that may be asked on the exam.

When I was getting ready for the test in 2019, the big caselaw development from SCOTUS was *Tibbs v. Indiana*, which curtailed the government's ability to seize assets, so I studied that case a lot. Was there anything on my exam about *Tibbs*? Of course not. I was also told by an old col-

league who took the test the year before me that his essay questions were about the death penalty and motions for new trial, so of course I studied those subjects as well—because *obviously* they're going to test on the same subjects in back-to-back years, right? Did the test ask anything about the death penalty or motions for new trial on my exam? Nope. I guess the bottom line there is, you cannot predict what will be in the essay portion of the exam.

Taking the test

The exam itself consists of three essay questions in the morning and 100 multiple choice questions in the afternoon. My first essay question was right out of a motion to suppress I had lost a couple weeks earlier. The fact pattern was so similar I almost thought it was asking about my case. This question being on the exam was very serendipitous for me.

The second question gave a fact pattern and then asked what offenses the suspect could be charged with, which punishment ranges those offenses carried, and what possible defenses he could raise at trial. It also asked what the punishment ranges would be in federal court and which evidence would and would not be admissible in federal court. To answer this question, it was helpful that my boss, Tonda Curry, was once an Assistant United States Attorney. A week or so before the test, she gave me a crash course in the federal sentencing guidelines. I was also fortunate enough to have had a good Texas Criminal Procedure professor in law school, so I remembered that Texas does not recognize inevitable discovery for evidence that is fruit of the poisonous tree. Thus, some evidence in my essay question would be suppressed in state court but admissible in federal court. That little bit of federal knowledge was enough to get me through that question.

The third essay question, you ask? I can't remember it to save my life. The best I can tell you is it was another bar exam-like fact pattern with multiple different questions.

The multiple choice questions were much like those on the bar exam: four possible answers where two are clearly wrong and two could be correct, and you have to pick the most correct one. These questions ran the gamut from deadlines for pre-trial motions and post-conviction relief, to Fourth Amendment issues, specific statutes, and some federal law questions. There wasn't a whole lot about the appellate process, as

forcement, said, "I had to sell off land because I made the decision to retire based upon his lies." Still another victim held up the Law Enforcement Officer's Bible, a special version of the Bible that Gallagher had given to her husband while he was stealing their retirement funds. She yelled, "Who are you to give a Bible to anyone?" Gallagher sat at counsel table, arms crossed and defiant. He showed no emotion but rolled his eyes.

Finally, I stood to close. I did not prepare an outline, but I spoke from the heart. I felt the support of all the partners in this prosecution. I heard victims saying "amen" from the gallery. It was a surreal moment. As I stood pointing my finger at this wolf in sheep's clothing, I bellowed, "This man *is* to blame. He *is* to blame for the prison he has put these victims in. They got life sentences and so should he."

After finishing, I sat down and picked up my pen to record the judge's verdict, an old trick to keep my emotions in check. After Judge Elizabeth Beach read "life" three times, I pulled my phone out under the table and texted "life" to my Criminal District Attorney, Sharen Wilson, who created the Tarrant County Elder Fraud Unit. I then texted Alexis in Dallas County: "Life."

After the verdicts, there were a flurry of calls and interviews as far flung as the BBC. I received emails from all over the country. It was a surreal time. But the most gratifying message came from one of the victims. This particular woman had yelled at me on the phone when I asked her to come testify. After the hearing, she wrote to me, "Thank you so much, Lori! You're right—I do feel better for contributing to Doc's sentence. God bless you!"

Conclusion

My one piece of advice for those prosecuting elder fraud is, "Always remember for whom you are fighting." While one victim's testimony may or may not have changed the sentence, I knew it would change her. The victims who came to the sentencing left feeling heard and justified. The shame they were holding in secret was brought into the light and left in the courtroom. ❇

Criminal Appellate Law is its own area of expertise with TBLS.

There were also a number of questions on my exam dealing with ethics and conflicts of interest that are primarily issues for defense attorneys. I wasn't prepared for those questions and had to strain my brain to remember my professional responsibility classes in law school.

The exam was in mid-October 2019 and results came back in early January of 2020. The whole time I was waiting, I was hoping that either 1) I passed or 2) everybody forgot I took the exam if I failed.

The aftermath

After the exam comes the waiting game. It didn't take quite as long to get the results of the Board Certification Exam as it did the bar exam. The exam was in mid-October 2019 and results came back in early January 2020. The whole time I was waiting, I was hoping that either 1) I passed or 2) everybody forgot I took the exam if I failed. I was made aware that the results were available when my boss, Tonda, yelled at me down the hallway to check my email. With her looking over my shoulder, I opened up the message to see that I had passed. I should note here that Tonda took the test at the same time I did, and she too passed. The feeling was much like the post-Bar Exam feeling—just relief that I had passed and didn't have to tell everyone that I failed it.

Once you have passed the exam and become board certified, there are additional dues that have to be paid to TBLS, as well as additional CLE requirements in the field of criminal law. This is where it's great to have a boss like mine, District Attorney Jenny Palmer, who is willing to pay for the extra CLE required to maintain board certification. Every five years after you become certified, you must re-certify, which consists of reporting your substantial involvement and CLE hours. But there is no test for re-certification. I haven't had to re-certify yet, so I'm not sure how that process goes, but it can't be any more time-consuming than the initial application.

I think the bottom line is if, like most of us, you do not do federal work, diversify your experience—get involved in some appeals. And when it comes to the substantial involvement portion of the application, give 'em everything you got. Don't underestimate the power of luck—of having one essay question be on a motion to suppress you lost a few months earlier and having a boss who can give you a crash course in federal sentencing guidelines.

Besides the obvious financial benefit of passing the test, I found that studying for the exam was a good way to brush up on criminal law. You remember things you had forgotten and learn things you didn't know. There is one drawback to becoming board certified, though. You're expected to know everything. When somebody asks a question I don't know the answer to, the immediate refrain is "You don't know? I thought you were Board Certified!" ❇

Prosecuting a serial sexual abuser

On the evening of September 29, 2019, Richard Jay Dewhirst, a 52-year-old Army veteran, put a gun to his head in a parking lot.

By Nick Socias
Special Victims Prosecutor in Kendall County

Officers from multiple law enforcement agencies surrounded him. Hours earlier, years of sexual abuse suffered by his young stepdaughters had finally come to light, and Dewhirst was not ready to live with the world knowing who he really was: a serial sexual abuser of children.

Earlier that day, Dewhirst was in his truck with his 15-year-old stepdaughter; we'll call her Marian. They went to the river and Dewhirst asked to perform oral sex on Marian and violate her in other ways. Marian brushed it off and suggested they go back home. On the ride back he pulled out a gun and placed it on the dashboard. For Marian, it was one thing to put up with his constant sexual abuse, but it was another to deal with his threats of violence. She had had enough. Even if it meant her death, she wanted out. She managed to escape from the truck and ran to a police station. Marian told the police everything, that her stepfather had sexually abused her and her older sister, Patrice, for years.

Wanting to bring Dewhirst in safely, a deputy reached out to him via text by pretending to be Dewhirst's wife—Detective Lisa Rowe and Dewhirst's wife worked together to make sure Rowe sounded like her. The deputy arranged to talk with Dewhirst in an empty parking lot, but he had one condition: "Don't call the cops. Its (sic) called suicide by cop then." But police quickly arrived on the scene. After a brief standoff when Dewhirst pointed a gun at his own head, he surrendered. As they took him into custody, he cried out, "I'm not a pervert! I just wanted to make her feel good and loved." Only after he was apprehended and interviews with his stepdaughters began did the true depth of his heinous crimes come to light.

He was booked that day and was charged with six different crimes, including continuous sexual abuse of a child.

Finally exposed

During the interview with his two stepdaughters, Marian and Patrice disclosed years of harmful, sexual abuse. There was evidence of intense grooming, starting when he first came into their lives when they were about 7 and 3 years old. The types of sexual abuse varied from unsolicited touching to drug-facilitated sexual assault and penetration. After a search warrant was executed at the home, hidden cameras were found everywhere. One was even located in an air vent right above the younger girl's bed.

Dewhirst was always watching. He thought he was undetected, but his wife, Leslie Dewhirst, the girls' mother, knew her husband liked to watch the girls. Her solution was to buy locks for her daughters' doors and hide the key, frost their windows with white spray paint to keep him from seeing through the glass, and hang thick curtains over the windows. Over time, Dewhirst found the key to his stepdaughters' bedrooms and discovered ways to watch them unbeknownst to their mother. For example, he scratched out eyeholes in the windows' frosted paint so he could see inside the children's room.

After the police standoff, Dewhirst gained his confidence back. He had an explanation for everything—it was always some misunderstanding, or someone had an agenda against him. His stepdaughters misunderstood his touches—he was a touchy-feely guy. He looked through the stepdaughters' windows to make sure they were not wasting food. He installed cameras so the girls would be safe. The eye-shaped scratches in the frosting on the windows—the cat must have made them. And of course, he said the sexual as-

Typically, if I meet with child victims consistently and frequently, they eventually start to trust me. We prosecutors have to earn their trust by interacting with them, such as by playing games, building with Legos, working on puzzles, or coloring with them. With teenage victims, they want you to be real with them so they can trust you.

saults never happened—his mother-in-law made his stepdaughters lie. He offered to perform sexual acts only as a way of helping the children—to boost their confidence and make them feel good. He would never harm them. Dewhirst was a veteran who claimed to have suffered from post-traumatic stress disorder (PTSD), though no medical or Veterans Administration records support that claim, so he thought all of his erratic behavior could be explained–or at least forgiven. His lies flowed quickly and without hesitation, no matter how outlandish.

Our office's involvement

As the Special Victims Prosecutor in Kendall County, I prosecute cases involving a child or an offense that is sexual in nature. While we are technically a rural county with a population of less than 45,000 people, I am lucky to have an incredible, highly experienced team that includes Investigator Billy Hunt and Victim Advocates Liz Jimenez and Glenda Wilke. Outside our office, we work closely with our local Children's Advocacy Center, the Kids' Advocacy Place. To seek and see justice done for child victims requires prosecutors to use every resource at our disposal.

Before joining Kendall County, I was privileged to develop my skills at the Harris County District Attorney's Office, including in the child abuse division, until the end of 2016. From there, I went to the Bexar County Criminal District Attorney's Office and then I landed in Boerne at the Kendall County Criminal District Attorney's Office with fellow Harris County alumna Katherine McDaniel, our First Assistant.

Developing relationships with the kids

The first test for every child abuse case is meeting with the child victims. Whether the case is your first or your hundredth, prosecutors have to be approachable, confident, empathetic, and honest. As an attorney, I tell them the only promises I know I can deliver—justice. They need truthful, reliable allies.

In this case, Patrice, who was 21 years old by this time, was able to open up more quickly than her younger sister. In her mind, she wanted justice. She was able to tell her story even though it was hard for her to relive those experiences. Yet she was fiercely protective of her younger sister. I had to earn their trust.

I could immediately tell that the younger girl, Marian, would need multiple meetings for her to feel comfortable talking to me. She was 15 years old. To her, I was just another man who wanted her to relive her trauma. She did not want to talk at first.

I decided to spend the first few hours of meetings building trust and rapport. She needed to know that it was OK to share her story on her own time and to have reassurances that she was not in trouble. Eventually, she decided to go to counseling with one of our trauma counselors for help processing the abuse. She talked about the sexual abuse very matter-of-factly. What made her the most upset, she realized, was feeling stupid for loving Dewhirst and wanting a father figure, and in return for her love and trust, he had betrayed her in one the worst ways possible. After months of multiple pretrial meetings, Marian's transformation was amazing. She was confident and ready for the courtroom. While she suffered from nerves and dread at having to recount her abuse in open court in front of the defendant and a room full of strangers, she knew she could face her fears and tell her story on the witness stand.

Typically, if I meet with child victims consistently and frequently, they eventually start to trust me. We prosecutors have to earn their trust by interacting with them, such as by playing games, building with Legos, working on puzzles, or coloring with them. With teenage victims, they want you to be real with them so they can trust you. Have a victim's advocate with you so that person can help too. We also always promote counseling for child victims. I will often share with them that I see a counselor for dealing with my vicarious trauma. Unfortunately, there is a stigma about getting mental health help from a professional, especially in rural counties. Life is hard, and child victims often suffer from issues that only a mental health professional can help them with.

Building the case

While interviewing child victims can be challenging, the other hurdle was building a case against Dewhirst that could prove his child-predator relationships. In the past, prosecuting child abuse cases was not easy due to evidence rules. After the expansion of Article 38.37 of the Texas Code of Criminal Procedure, child-abuse prosecutors finally had a much-needed tool for presenting pre-

viously excluded evidence to a jury in the guilt-innocence phase to explain the child-predator relationship, which often includes Child Protective Services (CPS) records.

To start building our case, we subpoenaed CPS records. What came back shocked us. The only report we received was from CPS licensing about 20 years prior. We learned that Richard Dewhirst had been a licensed foster parent with several teenage girls placed in his care, always from 12 to 17 years of age. The girls made multiple complaints about him peeping under doors with mirrors, rubbing up against their legs at night, watching them, making inappropriate comments, and even having an "affair," as Dewhirst called it, with a foster child after she aged out.

Unfortunately, no criminal charges came from his abuse of the foster children: no forensic interviews, no criminal investigation, nothing. Because CPS shut Dewhirst down as a foster parent and removed all the children, all the agencies just closed the case. One lone caseworker who handled CPS licensing fought for these children 20 years ago: Jevi Rodriguez. We were able to locate and meet with Jevi, who remembered Dewhirst well even after all these years. To make matters even more difficult, the children, who were now adults, were identified in the reports only by their first names and last initials.

Based on my own experiences fostering children, I knew that the placement agency—not CPS—had to keep records of the children placed in Dewhirst's home. We drafted subpoenas, and our investigator, Billy Hunt, went to the placement agency to see what records on Dewhirst were archived from 20 years ago. We got lucky and found records with the names and identifying information for his six foster children.

The next step involved contacting these young women and explaining why I needed to talk to them. It was a difficult ask—they were vulnerable teenagers in the foster care system 20 years ago who were sexually abused by the person the State of Texas appointed to take care of them. The number of trust issues or trauma suffered by these young women cannot be overstated. By interviewing them, I knew I would be asking these women to dig up decades' worth of horrific memories. All I had to offer in return was delayed justice for the crimes committed against them.

We went to their last known addresses, left voicemails, sent letters, everything. Out of the six potential victims, three of them responded to us. One victim, Donna (a pseudonym) explained it the best. She had bounced around from foster home to foster home, and each time she hoped for the best. Then she was placed with the Dewhirst family in 1999. Soon afterward, she realized that Dewhirst was looking under the door to watch her shower. All of the children in the home noticed the mirrors placed under the large gap between the doors and the floor and nicknamed Dewhirst the "mirror man." They knew if they were behind a closed door to undress, he would be trying to watch. Donna told the defendant's then-wife, who insisted Donna misunderstood. Donna then asked to be removed from the home, tried to run away, and did anything she could to escape "the pervert." She finally gave up and waited to age out of the system. When we asked why she did not contact the police or CPS earlier, she simply stated: "Who was going to believe me?"

Another foster child, Tara (also a pseudonym), explained how Dewhirst would come into her room at night, move the covers, and try rubbing up against her legs. When she woke up, he said he was just turning off the radio in her room—but she knew the radio was not on.

The last foster child victim-witness, Vivian (also a pseudonym), explained her fear of taking a shower or even changing clothes because she knew she was being watched. These foster children who craved safety and security never experienced it under Dewhirst's roof.

This progression all made sense. Dewhirst's abuse started the same way with all of them. He had clear voyeuristic and pedophilic kinks as he always tried to watch the children naked. He progressed to touching by rubbing up against their legs. Fast forward 10 to 20 years, and instead of a mirror, he used wireless cameras. Instead of foster children, he abused his own stepdaughters. Instead of touching only their legs, he had penetrative sex. Because he had always gotten away with the abuse, he had gotten more sophisticated and even bolder.

These foster children who craved safety and security never experienced it under Dewhirst's roof.

On the road to trial

Preparing child victims for trial is a huge undertaking that involves a delicate balance of building trust and asking them to share their stories of abuse. At first, the defendant refused to take a

plea and wanted a jury trial. A few months before trial in February 2021, the younger girl, Marian, had a mental breakdown that landed her in the hospital. As someone who asked her to relive the trauma, I felt responsible. The task I was asking these survivors to undertake was monumental.

Eventually, though, a month before the trial, everything started clicking. Marian recovered and regained her confidence. Her older sister, Patrice, started opening up more and offered additional details about Dewhirst's sexual abuse and life inside the home. I felt the evidence collected against Dewhirst was very strong, especially because the stepdaughters' details were corroborated by the other victims' experiences from two decades prior.

I felt the evidence collected against Dewhirst was very strong, especially because the stepdaughters' details were corroborated by the other victims' experiences from two decades prior.

Once I felt confident that the guilt-innocence case was as strong as it could be, we focused on punishment. I knew we had to deal with Dewhirst's claims of being a veteran with PTSD and claims of his own abuse as a child. Even after hearing about all the atrocities he committed, someone might have some sympathy for him due to his "PTSD" and his own childhood abuse. On the other hand, he was a serial child predator, so if he ever got out of prison, there would be another victim—it was not a question of "if," but "when." In my mind, justice for the victims could only be one thing: Dewhirst must never leave confinement.

At the final pretrial hearing, I had one last talk with the defendant's attorney. I informed him about the other foster-care child victims; what the stepdaughters, the foster-care victims, and CPS investigator Jevi Rodriguez had said about Dewhirst; and that all the victims were ready to testify against him. Dewhirst was set to go to trial for the charge of Continuous Sexual Abuse of a Young Child or Children, which carries a punishment range of 25 years to life without any possibility of parole. On August 20, the defendant changed his plea from not guilty to guilty. We were no longer going to trial, and we were moving into the punishment phase.

The appropriate punishment for justice

After the defendant took a plea for the first-degree felony offense of Continuous Sexual Abuse of a Child, I let the victims know what happened and what the punishment process meant. Under the statute, the minimum sentence he could receive would be 25 years in prison, which meant he would be released when he was around 77 years old. For the maximum, he could remain in prison until his death. I informed the victims that I was asking the judge for the maximum punishment possible.

On November 1, during the hearing, I called Marian and Patrice to the stand to testify how their stepfather severely abused them and how they have healed in his absence. The three former foster children, now all adults, also testified regarding their horrific experiences with Dewhirst. One of them, Donna, saw testifying as the closure she needed after 21 years of no one believing her about the abuse. She would help put her abuser in prison. She testified to her life as a foster child, and most importantly, her life as a foster child in the home of Richard Dewhirst.

Before closing arguments began, the courtroom was filled with survivors, advocates, counselors, and support people. I gave the victims a warning ahead of time: Closing arguments could be very tough to hear. They would bring up the trauma these victims had experienced, but their stories needed to be told. They all gave me a thumbs up. Some were crying. I asked the judge for the only sentence I felt was justice for the victims: life in prison without the possibility of parole.

I should note that our jurisdiction has an odd procedure: The Community Supervision and Corrections Department (CSCD) can recommend a prison sentence on the pre-sentencing investigation (PSI) reports. Kendall County is one of the few counties in Texas that has probation officers prepare PSI reports prior to sentencing, although the law specifically says it is not required. In this case, the probation officer, to everyone's shock, recommended 25 to 35 years in prison for the defendant, which was almost the minimum. The defense's sad story seemed to have swayed the CSCD's recommendation, much to the detriment of the experiences of a long line of victims. We were thankful that the judge returned with a verdict of 50 years in prison with no parole. Dewhirst would be eligible for release at around 102 years old. While it was not officially a life sentence, it might as well have been—no one ages that well in prison.

Supporting victims never stops

After sentencing, I sat in a room filled with the survivors of Richard Dewhirst. After almost two

years of trial prep, I witnessed these women and children transform from traumatized victims to empowered survivors. I had such admiration for their strength and resolve. They found a bravery within themselves to voice their stories of abuse to absolute strangers. They helped send a child predator to prison so he will no longer harm any more children. The line of child victims was over. Justice was done.

Even though the case was closed, our team of advocates and counselors let the survivors know they are never alone. We do not stop advocating for victims. Like Dewhirst's sentence, I will be an advocate for these survivors for the rest of my life.

Note: None of the survivors' real names are used, but Dewhirst's stepdaughters' identities could be inferred from context. Both of them have granted permission for me to write this article, as they want other prosecutors to understand the struggles with these cases. ❇

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