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The Texas Prosecutor

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

A Texas first: a punishment hearing via Zoom

We all know the feeling—you're about to walk into the courtroom for a battle.

By Nicole Phillips (left) and Sade Mitchell (right)
Assistant Criminal District Attorneys in Bexar County

You're about to put your hard work on display and hope that it rises to the challenge of achieving justice for your victims and your community.

Only instead of walking into the courtroom—instead of sitting down at counsel table, taking a deep breath, closing your eyes for that brief second of clarity before it all becomes automatic—you're sitting in your office with your computer propped up on a box and half the contents of the room thrown into one corner off-camera. You're about to conduct the first virtual murder sentencing in the State of Texas on a case that you have worked on for more than two years. You're still ready for that battle. It just looks—and feels—very different.

The defendant in this case, Montrail "Trail" Butler, was charged with murdering one woman and shooting another in the back of the head. The woman who was shot in the back of the head survived and was able to identify Butler as the shooter. The killing took place in March 2017, and even though the defendant was arrested just days later, the case did not make it to trial until January 2020. Butler was ultimately convicted by a jury on February 5, 2020, of both murder and aggravated assault with a deadly weapon. He elected before the trial to have his punishment assessed by Judge Stephanie Boyd if he were found guilty.

Judge Boyd ordered a pre-sentence investigation (PSI), and sentencing was set for February 26, but due to scheduling issues, the hearing was reset twice, first to March 4 and then to March 18. Between those dates, talk about COVID-19 was already spreading quickly. The deceased victim's mother lived out of state, so we suggested that she be able to

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Our first online course after COVID-19

By now many of you have logged in to your TDCAA Litmos account and accessed our first multi-presenter course on General Advocacy.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

(If you haven't, it's here: https://tdcaa.litmos.com/online-courses.) It is really terrific, and I can't thank the presenters enough—that's **Brian Klas**, TDCAA Training Director, and **Erik Nielsen**, ADA in Travis County (and former TDCAA Training Director) on the screen. TDCAA Meeting Planners **LaToya Scott** and **Andie Peters** have pivoted from their regular duties to help build the program's capabilities, from lighting and microphones to recording and editing. None of this could have happened without the enthusiastic support of our Foundation Board members, who stepped up with funding, and I hope that when we all finally get together as a group, you won't let them buy their own beer! ❇

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Texas District and County Attorneys Association

505 W. 12th St., Ste. 100
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About *The Texas Prosecutor*

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In the aftermath of George Floyd's death

On the evening of George Floyd's funeral in early June, more than 100 black Texas prosecutors met over Zoom to share what it means to be a dedicated public servant in a criminal justice system under fire.

By Rob Kepple
TDCAA Executive Director in Austin

The meeting was organized by **Tiana Sanford**, TDCAA Training Committee Chair, Assistant Prosecutor Representative on the TDCAA Board, and a felony chief in the Montgomery County DA's Office; **Jerry Varney**, ACDA in Dallas County; and **Jarvis Parsons**, Chair of the TDCAA Board and DA in Brazos County, in the wake of Mr. Floyd's death at the hands of a police officer in Minneapolis. It was meant to give some of our members space to discuss the challenges of having a foot in two worlds, that of the black community and a prosecutor's office.

After the meeting, Tiana and I talked one-on-one. I wanted to know what I, as a servant of the profession, should be doing. I recognize that as a white man, I've not experienced what my black colleagues have. I feel like we have made progress in our profession here in Texas (more on that below), but I admit to being uncertain of exactly what to do or say at this critical and significant moment.

In response, Tiana reminded me of something that happened six months ago. At the time, she was training for a 10K race. I am a long-distance runner, so I offered to go out with her and pace her on a long training run. I think she agreed reluctantly, knowing that I might push her some. She was right—I did push her, and she went along with me. She knew that she would be a little sore afterwards, but she also knew that it would make her stronger. She told me it was time to be pushed, time for her to use muscles she hadn't used before. The push and the soreness would strengthen her for longer runs, for the race ahead of her.

And now it's my turn to be pushed. It is my turn to use muscles I haven't used before, understanding that it might be uncomfortable and it might make me sore. But I am ready to recommit to this run. If nothing more, I have learned that it is OK to not always know what to say. That leaves space to both listen and learn. I invite those in our profession to use muscles we might not have used before and as a result be stronger than ever.

TDCAA initiatives

We at TDCAA have done a lot of listening to what some of our members have to say about race and disparity in prosecution and among allied professionals, and I wanted to outline some initiatives TDCAA has undertaken over the past 12 years to respond to what we've heard—and to keep the conversation going.

In 2008, some racist language was used in a DA's office (under a former administration) and it went unchecked. That incident led to a meeting not unlike our recent Zoom conference, which in turn sparked an initiative at TDCAA to address race and cultural competence in our profession. We began the discussion at the Elected Prosecutor Conference when **Jarvis Parsons**, then an ADA in Brazos County, and **Kebharu Smith**, then an ADA in Harris County, addressed attendees with a presentation from the perspective of black

prosecutors. They relayed: "When you say this, I hear this." Additionally, TDCAA leadership created the Diversity, Recruitment, and Retention Committee to point TDCAA training—and prosecutor offices' attention—toward community involvement and office diversity.

Then the events in Ferguson, Missouri, came along. It was there, in August 2014, that **Michael Brown Jr.**, an 18-year-old black man, was shot and killed by **Darren Wilson**, a white police officer. The killing ignited unrest and protests both peaceful and violent in that small city and elsewhere. (Both the St. Louis County grand jury and Department of Justice declined to indict Wilson, concluding that he had killed Brown in self-defense.) In the aftermath of the shooting, our attention turned to how police treat those in minority communities and what a prosecutor's role should be in weeding out and prosecuting bad cops. At the end of 2015, TDCAA held a prosecutor summit to discuss best practices in the investigation and prosecution of police use-of-force cases, and we continue to train on the subject. You can view a summary of the summit's conclusions on our website (search for "Police Misconduct Summit")

In 2018, **Sharen Wilson**, CDA in Tarrant County, took the helm of the Diversity, Recruitment, and Retention Committee and launched a number of programs, including community outreach and law school recruitment and education. **Bill Wirskye**, First Assistant CDA in Collin County and then the chair of the TDCAA Training Committee, gathered a group to develop training for prosecutors on cognitive bias. These initiatives have been supported by the Texas District and County Attorneys Foundation and have led to several presentations at TDCAA's Prosecutor Trial Skills Courses and Annual Conferences, among others.

So, what's next? As for me, I am starting with my terrific TDCAA staff. We will have the conversations we need to have and talk about how we can help our profession grow in diversity and awareness. I can tell you that the TDCAA Board President, Rockwall County CDA **Kenda Culpepper**, and the entire Board are all-in when it comes to appreciating where we as a profession are at this moment, and we are working to make prosecution stronger and to improve the criminal justice system. We must continue the conversation about race in the criminal justice system, wherever that takes us.

Student loan forgiveness update

We have had a lot of reports that the federal government has been slow-walking public service student loan forgiveness. As you may know, the program promised the discharge of a student loan if the participant worked for 10 years in a qualified government or non-profit job, and prosecution qualifies. But we have heard that the government is making it as hard as possible to actually discharge the loan.

There may be hope yet. Take a look at a recent article written by a finance professional and student loan expert: www.nerdwallet.com/blog/loans/student-loans/public-service-loan-forgiveness. If you are careful and have your paperwork in order, you may just be able to prevail.

"Can I pick your brain?"

That is invariably how my weekly calls from **Jeri Yenne**, CDA in Brazoria County, would begin. Jeri is set to retire at the end of September, and I want to take a moment to thank her and honor her for her work. Jeri told me that she considered herself the Columbo of prosecutors, and I totally get it. (For all you youngsters out there, Lieutenant Columbo is a fictional detective played by Peter Falk whose shrewdness is matched only by his, shall we say, inelegance. Wikipedia says his trademarks are a shambling manner, rumpled raincoat, and relentless approach to investigation.)

Like Columbo, Jeri is always humble and thoughtful, and her apparent disorganization is an act. Jeri is constantly evaluating the right course of action, and she seemed to get there constantly in her career. Two examples of Jeri's persistence and thoughtfulness:

First, in a high-publicity case, she prosecuted a man for murder who had just witnessed his children being hit and killed by what turned out to be a drunk driver. The drunk driver was shot and killed in his wrecked car moments after the collision, but the father denied that he did it and the murder weapon was never found. However, an empty holster and ammunition matching that used in the killing were both at the father's house. Jeri tried the case, knowing that it might not have been a popular decision, but vigilante justice could not be condoned. And Jeri was ever so respectful of the jury when they voted to acquit.

Continued on page 7 in the orange box.

And now it's my turn to be pushed. It is my turn to use muscles I haven't used before, understanding that it might be uncomfortable and it might make me sore. But I am ready to recommit to this run.

Taking action after a mass shooting

Before COVID-19 struck, I had started working on an article about mass shootings.

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

At the Elected Prosecutor Conference last December (gosh, that seems like years ago), TDCAA hosted a panel of prosecutors to discuss how they had reacted to traumatic mass shootings in their jurisdictions. It was a really impactful presentation, in part because each of us in the audience understood that something like that could happen in any of our localities, large or small, at any time. As a result, I wanted to create a written resource that would help a prosecutor jump into action if—and as soon as—any similar event happened in their own community.

After talking to a number of people, I decided that the best format would be to hear straight from some of those prosecutors who have lived through tragedies in their jurisdictions. I posed questions to four of them who were willing to write about those experiences, and some of their answers appear below. We'll hear from:

Bobby Bland, District Attorney in Ector County. Bobby was the DA on August 31, 2019, when a killer shot multiple victims from a moving vehicle. During the multi-county mass shooting, seven people were killed and 25 people injured, including three police officers. The subject was killed by police in Odessa. (Following the recommendations of Dr. Matt Logan, a noted researcher on mass killers, I am not naming any of the shooters in these situations. We should all refuse to give these criminals additional notoriety.)

Audrey Louis, 81st Judicial District Attorney. Audrey was the DA on November 5, 2017, when an assassin walked into First Baptist Church of Sutherland Springs and fatally shot 26 people and wounded 20 others. The subject fled the church after the shooting, was wounded by an armed citizen, and was then involved in a high-speed chase with two local residents. He died after the chase from his wounds and a self-inflicted gunshot to the head.

Laura Nodolf, District Attorney in Midland County. Laura was the DA on August 31, 2019, during the same shooting as in Ector County. The perpetrator shot his first victim, a DPS trooper, during a traffic stop in Midland. He then drove to Odessa where he hijacked a United Postal Service vehicle, killed the driver, and continued to drive and shoot people until he was killed by law enforcement in the parking lot of an Odessa movie theater that falls within the city limits of Odessa and overlaps into Midland County.

Jack Roady, Criminal District Attorney in Galveston County. Jack was the DA on May 18, 2018, when a 17-year-old student and executioner walked into a high school in Santa Fe, Texas, and began shooting. Eight students and two teachers were fatally shot, and 13 others

were wounded. The subject was taken into custody at the scene. Capital murder and attempted murder charges are currently pending, as are federal charges.

As you read, keep in mind that while these prosecutors' narratives include much valuable information, this article is simply meant to be a starting place. We all understand that every event is different and needs open-minded reaction. It is clear, however, that it's important to be ready to make initial decisions. (Well, as ready as anyone can be for such senseless and random acts.) What do you do first? How can you be valuable at the crime scene? How do you preserve evidence, collaborate with multiple law enforcement agencies, and deal with the public? How do you protect victims, families, your own staff? Here are their answers to these questions—and more.

When you get word of a shooting or other mass casualty event in your jurisdiction, what's the first thing an elected prosecutor should do?

Bobby Bland
District Attorney in Ector County
The first thing you should do is authorize the DPS State Response Team to come into your jurisdiction to begin processing and collecting the evidence and securing the scene(s). In our case, we did this with the Texas Ranger Lieutenant over our district. Also, if this occurs outside of regular office hours, you should mobilize investigators and prosecutors so they are available to assist law enforcement during the investigation's initial stages.

Audrey Louis
81st Judicial District Attorney
Go to the scene immediately and send your office's victim advocate too. It's impossible for you to be fully apprised and understand the gravity and nature of what's going on without being there. Be there to support and lend assistance to law enforcement as well as to the victims and their families.

You are also at the scene to meet with and control what information is released and shared with the media. Discussions about that and coordination of press conferences is critical to keeping the public adequately informed without compromising the investigation.

The second case was a more recent one, that of the investigation into Texas House of Representatives Speaker **Dennis Bonnen**, who was accused of official misconduct after a secretly recorded conversation with a political activist was made public. There was arguably a case to be made that Speaker Bonnen committed a crime, but Jeri used her experience and discretion to decline prosecution. She knew she would fade some heat over *any* decision she made, but no one could credibly criticize her after her career as a selfless public servant.

Jeri, I am going to miss your calls! You've been a rock for our profession. Thank you.

Mental health training

As we have been forced to cancel live conferences because of COVID-19, I was particularly disappointed that we could not host our regional mental health courses at the end of June. But the good news is that the training is very conducive to moving online, so we are busy planning the production of a number of online courses featuring our most excellent faculty. And thanks to the Court of Criminal Appeals for supporting our training efforts not only for mental health, but for a wide range of topics that we will be training on in the near future. ❇

Laura Nodolf
District Attorney in Midland County
As an elected, the first step to take is to contact the Texas Rangers State Response Team. This is a specialized team prepared to deploy and manage mass events and large crime scenes. It takes some pressure off of local investigators and crime scene units and allows for a central agency to maintain direction over the investigation and evidence.

"I wish I would have had an action plan for my staff to be available and report for duty as soon as it was practicable and safe." –Bobby Bland, DA in Ector County

Jack Roady
Criminal District Attorney in Galveston County
It is important to establish immediately with the sheriff and the heads of any other responding law enforcement agencies who will be in charge of the scene so that the appropriate agency can coordinate operations on the ground. Likewise, the elected prosecutor should determine which prosecutor staff should respond to the scene and who should remain at the office to manage warrants, charging decisions, and investigative information as it comes in. As part of that process, I believe it's important to have as many of the victim assistance coordinators from the prosecutor's office on the scene as possible. If they are not available to your office, then identify any victim assistance personnel who might be responding to the scene from other agencies, and coordinate the victims' contact through them.

What is one thing you wish you'd known before your jurisdiction's shooting that you can pass along to other prosecutors?

Bobby Bland
District Attorney in Ector County
I wish I would have had an action plan for my staff to be available and report for duty as soon as it was practicable and safe. Since our mass shooting, I have instituted such a plan for all investigators and attorneys to report to the office or by phone with the First Assistant or elected prosecutor if they cannot be present.

Audrey Louis
81st Judicial District Attorney
There is nothing to truly prepare you for these events, but having a close working relationship with law enforcement agencies is critical. There is no time or room for egos, and sometimes you may need to be the one to call folks out on that.

Laura Nodolf
District Attorney in Midland County
I wish I had known about the Texas Health and Human Services Disaster Behavioral Health Services Unit. This unique team of individuals are experienced in providing psychological, emotional, and cognitive assistance to survivors and law enforcement as they respond and recover. If I had known such a team existed, we would have centralized a location for them to set up and start providing services in a more efficient and effective manner than we did. (Find information about it at hhs.texas.gov/about-hhs/process-improvement/behavioral-health-services/disaster-behavioral-health-services.)

How should prosecutors communicate with victims and their families?

Bobby Bland
District Attorney in Ector County
The mass shooting that occurred in Ector and Midland Counties was unique in that there were so many crime scenes and so many disparate victims experiencing separate events over an extended period of time. Furthermore, our shooter had been killed, so there would be no direct prosecution of these crimes. Therefore, in this situation, it was important to let the victims know we are available and that we can connect them with the help they need and Crime Victims Compensation. However, without a prosecution, there is a fine line that can be overstepped because the elected prosecutor cannot make any assurances for justice or guide them through the legal process other than to let them know we are there to help.

Audrey Louis
81st Judicial District Attorney
Communication is key. Death notifications need to be done as soon as possible. For obvious reasons, you do not want next of kin to be notified by anyone other than law enforcement or the prosecutor's office. Having clergy and counselors assist with death notifications is very beneficial, too.

Then make sure your office talks to every victim or immediate family member to notify them of Crime Victims Compensation (CVC) and the

expenses it will cover, including burial. We coordinated with local funeral homes and the Office of the Attorney General to get everyone's CVC applications processed immediately. Victims' lives are impacted forever, and following up with their needs and that of their families is ongoing, many times long after the end of any criminal case. Victims need someone they can rely on to provide accurate information and assistance.

Also, the resources will come, and with those resources comes experience. FBI Victim Services offered tremendous help in coordinating the cleaning of the victims' belongings, and the Red Cross provided immediate cash cards for victims to purchase necessities.

Laura Nodolf
District Attorney in Midland County
I sincerely believe that this depends on your jurisdiction and the needs of constituents. For me, I was most helpful at the hospital where I spoke with the wife of the trooper who had been shot. I was also able to communicate with emergency room staff regarding injuries the victims sustained. This was critically important because until the gunman was deceased, I was unsure if we would be proceeding with capital murder, attempted capital murder, aggravated assault, or other charges. Regardless of the charge, I was prepared to make a swift and informed decision based on information relayed by law enforcement and emergency personnel.

Jack Roady
Criminal District Attorney
in Galveston County
We should meet with victims as soon as possible—optimally on the day of the event, either at the scene or by visiting medical facilities if necessary—to establish personal rapport and connect them with victim assistance resources. I've learned that outside of answering specific questions, it's best to provide only basic information at first because the victims and their families will have so much to process that day and in the days that follow.

I also believe it was important to let our victims and their families know that our relationship would be ongoing, throughout the life of the case and beyond, and that they would always have easy access to me and my staff. At some point, it is also important to establish with the victims and their families the scope of information you will be able to share while the case is pending, along with an explanation as to why that scope may be very small. Our limited ability to share extensive details about the event with our victims and their families has proven to be a major challenge following the Santa Fe shooting.

How involved should the prosecutor be at the scene and during the investigation?

Bobby Bland
District Attorney in Ector County
In my opinion, either the elected prosecutor or a senior prosecutor should be at the scene as soon as possible. There will be federal, state, and local law enforcement present, and it is your duty to ensure that the scene is handled so it can be prosecuted effectively in state court. If the DPS State Response Team is on the way, then you will be prepared to match any resources the federal agencies can bring, placing the state in an equal position with the feds. The result is an investigation that benefits both federal and state prosecution.

While at the scene of our crime, I talked to the federal prosecutors as well as my own prosecutors to ensure that any search warrants and all evidence collection was done in full cooperation of federal, state, and local law enforcement.

Audrey Louis
81st Judicial District Attorney
Prosecutors should remain at the headquarters or hub of the operation. And if you leave, notify others where you'll be. You are a legal resource for search warrants, witness issues, and the like and need to be available. Coordinating press conferences and what information will be shared is critical to ensure information is relayed in a way that's meaningful and beneficial to the general public—without compromising the investigation or invading the victims' privacy.

Laura Nodolf
District Attorney in Midland County
When a mass event occurs in your jurisdiction, the public is going to look to the elected prosecutor and the head of local law enforcement for answers and comfort. As a result, you need to be engaged from the outset. I believe visiting the scene is the best way to gain an understanding of how the events took place. Even though I knew

"I believe it was important to let our victims and their families know that our relationship would be ongoing, throughout the life of the case and beyond, and that they would always have easy access to me and my staff."
–Jack Roady, CDA in Galveston County

we would not have an active criminal prosecution because our shooter was deceased, I visited the multiple scenes so I could fully understand what transpired. This information has become crucial in developing a more defined strategic plan in case a tragedy like this occurs again.

Jack Roady
Criminal District Attorney
in Galveston County
Prosecutors should be at the scene if at all possible and closely involved in the investigation that follows. Establish early on which agency will assume primary responsibility for the scene and follow-up investigation. Determine which federal agencies, if any, plan to be involved and make every effort to ensure that the fruit of the federal agency's investigation will be available to the state and admissible in state courts. Make sure that a trusted local agency participates in the scene investigation and witness interviews along with any federal agency. State prosecutors may not have ready access to federal investigators and their reports by the time trial comes around, so it will be important that local investigators have personal knowledge of the scene, investigation, and evidence.

Finally, coordinate with law enforcement leaders while still at the scene concerning the dissemination of information to the public. While a local prosecutor cannot stop others from coming to the scene to command a microphone and camera, it's important to get agreement and establish boundaries on the release of information as much as possible.

"Prosecutors and their staff, much like law enforcement and first responders, have to be a fairly resilient group. But to suggest self-care after something like this isn't important would be a disservice. We are a close-knit office and rely on one another for support."
–Audrey Louis, 81st Judicial District Attorney

What are some proactive things elected prosecutors can do now (before an event) that will make things run more smoothly if something happens in the future?

Bobby Bland
District Attorney in Ector County
Create a mass shooting action plan for the office and make sure all of employees understand it. It should include a provision that all staff contacts you or a senior member of the office as soon as something like this happens so that you can determine how to best help the investigation and victims.

Contact the Ranger Lieutenant or supervisor now and give authorization ahead of time to bring the DPS State Response Team as soon as a mass shooting happens. Two weeks prior to the shooting in Ector and Midland Counties and two weeks after the Walmart shooting in El Paso, I gave authority to our Ranger Lieutenant to summon the response team immediately if something like this happened. Therefore, on the day of the shooting, one of my first calls was to our Ranger Lieutenant. He assured me that the team was already on its way because of my pre-authorization. As a result, federal, state and local authorities were able to work together in an efficient and mutually beneficial manner.

Audrey Louis
81st Judicial District Attorney
Federal law enforcement agencies, Texas Rangers, local agencies, my office, and the U.S. Attorney's Office have monthly Crisis Management Response Meetings. Different agencies speak about topics relating to mass casualty and crisis practices. But just as importantly (if not more), we develop a strong working relationship with one another for a better coordinated response.

Laura Nodolf
District Attorney in Midland County
First, make sure law enforcement knows that you want to be notified as quickly as possible. Second, if the Texas Ranger State Response Team may be necessary, either issue a letter stating that they have standing authority to handle mass events or get them on the phone as quickly as possible. Third, know your neighboring elected prosecutors and have their cell numbers handy. When it was apparent that the shooter in Midland was traveling to Ector County, I called Ector County DA Bobby Bland immediately to let him know what was coming his way so he could react appropriately for what happened in his jurisdiction. We decided immediately that there would not be a jurisdictional turf war but rather a collaborative effort if we needed to prosecute.

Jack Roady
Criminal District Attorney
in Galveston County
Establish personal relationships of communication and trust with local and federal law enforcement leaders and federal prosecutors. If possible, meet with them long before an event occurs to

plan out a coordinated response among as many agencies as will participate. Likewise, meet with local government leaders, including school districts, to develop a coordinated response plan.

This early planning should also include an agreement as to how each entity will handle responses to public information requests. In the days and months following an event, these requests will likely be sent to the county, city, law enforcement agencies, and school districts. Establish a notification procedure so that the prosecutor's office can intervene in any such requests to prevent the inadvertent disclosure of information, as such disclosure could compromise the case's prosecution and the defendant's right to a fair trial.

How do you, as a leader, care for staff and fellow law enforcement during such a high-stress event and the aftermath?

Bobby Bland
District Attorney in Ector County
You can take care of your staff and law enforcement by being available, patient, and understanding during these horrific times. While an elected prosecutor is accustomed to leading, when there is no case to be prosecuted, the role becomes one of support for first responders, staff, and survivors.

Audrey Louis
81st Judicial District Attorney
Prosecutors and their staff, much like law enforcement and first responders, have to be a fairly resilient group. But to suggest self-care after something like this isn't important would be a disservice. We are a close-knit office and rely on one another for support. Sometimes that may mean just talking and working through things in our office, or it may mean a happy hour, birthday celebrations, lunches, or just true daily camaraderie. But additionally, particularly after the shooting, our office has developed a close working relationship with many of the counselors in the area. If anyone needs counseling, we have the resources available for it.

Laura Nodolf
District Attorney in Midland County
These events take a toll on your staff, law enforcement, and community more than you might realize. Make sure that everyone knows that there are counselors and professionals available for them to speak with. Let them know it's OK to take some downtime and regroup. Also, if you know that one of your fellow elected prosecutors has experienced an event like this, be available to them. You may not be able to assist with an investigation or prosecution, but you do know what it is like to carry the weight of an office on your shoulders. Sometimes just knowing that someone is there if you need him or her makes a world of difference.

Jack Roady
Criminal District Attorney
in Galveston County
In the days that followed the Santa Fe shooting, I did my best to stay in close contact with all of our staff who were working on the case, especially those who responded to the scene. Likewise, I tried to follow up with the responding officers whom I knew personally. Our office did not offer any formal counseling services outside of what was normally available through county resources. However, as much as possible, we sought to ensure that our staff members had the opportunity to process their responses to the event in their own ways and that they were not overwhelmed by stress or workload in the weeks that followed.

Conclusion

Many thanks to these four prosecutors who agreed to share some of their experiences. It could not have been easy re-living these tragedies, but I so appreciate their willingness to be a valuable resource for others across the state. If any lesson they learned helps another prosecutor in a future similar situation, it is well worth the time we spent in this endeavor. I hope this article can additionally be a resource, but I also sincerely pray that once you have read it, you will never need to reference it again.

Stay healthy and safe in these uncertain times. ❇

"When a mass event occurs in your jurisdiction, the public is going to look to the elected prosecutor and the head of local law enforcement for answers and comfort. As a result, you need to be engaged from the outset."
–Laura Nodolf, DA in Midland County

What TDCAA's Training Team has been up to

Setbacks produce opportunity. If you look hard enough, there is always a way to do a job or finish a project, even in the midst of difficulty.

By Brian Klas
TDCAA Training Director in Austin

Delivering quality training in the age of social distancing has been a challenge for us at TDCAA. To answer the challenge, we launched the first in what will be a library of online courses.

Live conferences cancelled

Somewhere on the list of pandemic consequences lies the cancelled bulk of TDCAA's 2020 schedule of live training. To date, we've lost the Crimes Against Children Conference, Civil Law Conference, Organized Crime Conference, two regionals on mental health, multiple DWI regional courses, the Advanced Trial Advocacy Course, July's Prosecutor Trial Skills Course, and September's Annual Conference. That's a whole lot of training. Each of those courses was planned, packaged, and ready to go, too.

Fortunately, we will be able to salvage and reissue a good portion of the cancelled material once the opportunity arises—it's good stuff. Still, it is enormously frustrating that we cannot deliver these live courses to our members. I know the prosecutors, investigators, and key personnel scheduled to speak at those events spent hours in preparation. TDCAA has a pool of talented professionals to pull from, and I know that when the time comes, they will all answer the training bell again. It is a cowbell.

Going online

As someone with the title of Training Director, I am *especially* alarmed at the loss of so much training. So what training have I been directing these past three months? I'll tell you. Alongside the Sisyphean task of planning and then canceling so many live courses, I and the rest of the TDCAA Training Team have been developing online videos. Really, we've been working on it for a while. Our directive since TDCAA's last long-range planning meeting has been to create online courses that do not take away from the existing (live) conference schedule. The networking opportunities, camaraderie, and getting out of your office and county cannot be replicated with a recorded video you watch on a monitor or phone. It's just not the same as sitting in a room full of your colleagues from across the state. That means that recording our live conferences and then releasing those recordings on our website has never been our goal for web-based training. We want our online offerings to be standalone products—early and successful efforts include the *Brady* video built by our Executive Director Rob Kepple and W. Clay Abbott's videos on intoxication-related topics (all of those are on our website, tdcaa.com). Unfortunately, the cost in time and cash to replicate those efforts for additional topics has made routine online courses an impossibility—until now.

In stepped the Texas District and County Attorney Foundation (TDCAF) with some funding, which we used to build TDCAA's recording studio. The training team has dedicated themselves to video creation. Hour upon hour of test footage has been created and edited. Lights have been moved hundreds of times, sometimes only a fraction of an inch. Camera angles, camera types, settings, microphones, adapters, and tripods have been swapped in and out to find combinations that work. Finally, we can produce recorded training in weeks instead of months, and we can do it ourselves. We may not possess the skills of a seasoned professional, but it looks pretty good. (Just ask my mom.)

LaToya Scott (far left) and Andie Peters (second from left) have pitched in to produce our first post-COVID online training course, which was filmed at TDCAA headquarters in Austin. Erik Nielsen, ADA in Travis County (far right) and I (second from right) host the course.

Two new formats

We will be offering training in two formats initially. First is Multiple Presenter Training, or MPT. For MPT videos, several TDCAA presenters are tasked with creating their own videos that are then discussed by hosts at TDCAA headquarters. This relatively unscripted format allows us to tap into the strength of our membership to quickly develop training videos. Unlike live conferences, this format is not intended to cover every aspect of a given topic. Instead, we want to get the personal insights of experienced prosecutors on discrete issues. You can see our first foray into online training in this format in a discussion of General Advocacy on our website (tdcaa.litmos.com/online-courses). Additional MPT presentations are forthcoming.

Our second online format will be similar to the MPT in that clips of a presenter will be intermixed with a discussion. Here, though, a single presenter will record multiple videos on a single topic, allowing for a more in-depth look at the subject that is still presented in a distinct manner from our live conferences. This type of recording is reserved for topics that require presenters from outside our membership and that don't fit into our live presentation mold. Two talks that discuss mental health issues in criminal justice are currently in development.

Phase one of our online training, to be produced this summer, will include:

- MPT: General Advocacy (already on our website)
- MPT: Caseload Management (already on our website)
- MPT: Domestic Violence
- Mental Health 101: Understanding Mental Illness
- Using the Sequential Intercept Model
- Effective Courtroom Testimony in DWI Cases (TCOLE only)

Please note that all titles are subject to change.

Of the prosecutors I have asked to participate in our online training, everyone has said yes. Texas prosecutors' desire to share information, improve our profession, and increase justice is unquestionable. It would be remiss of me to not mention the first six presenters to volunteer for our online training. Being first is chancy, and each of these prosecutors dove in without hesitation. A huge thank-you to our General Advocacy presenters: Allenna Bangs, Sarah Moore, Lauren Sepulveda, Nicole Washington, Zack Wavrusa, and Bill Wirskye. Erik Nielsen helped some too.

ABOVE: A screen capture of me and Erik as we dive into the course, and BELOW, another screen capture of presenter Lauren Sepulveda, an ACDA in Hidalgo County.

For the moment, we are sticking to our long-standing plan that our online training does not merely replicate our live courses, but that may change. Should travel and gathering restrictions persist, it may become necessary to look at a quasi-live recorded format to release through our website. That isn't ideal, but it is important that we deliver training to our membership. And if we do produce online courses by recording live presentations, we will do so in an informative and entertaining way with rock-solid presenters.

So if you've been wondering what the good training folks at TDCAA have been up to, that is it. If you have questions about this training or any other training, please shoot me an email or check the website, which we are updating regularly. I know that as I write about finding ways to deliver training to our membership, many of you are similarly finding new ways to do the work of Texas prosecutors. I appreciate the work you are doing.

Please don't hesitate to tell us how the TDCAA Training Team can better serve you. ❇

A threefer with something for everyone

My favorite "Saturday Night Live" character, Stefon, likes to regale the Weekend Update hosts with a review of the hottest new club in New York City, telling them "this place has everything," including screaming babies in Mozart wigs and puppets in disguise practicing karate.

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

Similarly, this installment of "As the Judges Saw It" features a threefer opinion from the Court of Criminal Appeals that also has something for everyone: a complex history in the lower courts for procedure mavens, some judicial philosophy of statutory and caselaw interpretation for jurisprudence wonks, and an easy-to-understand and useful holding for trial prosecutors who just want the nitty-gritty.

On April 29, the Court of Criminal Appeals ended a split among the circuits regarding an interpretation of Subsection (f) of the sexual assault statute (now renumbered (f)(1); more on this below) with three identical opinions in the cases of *Lopez v. State, Senn v. State, and Rodriguez v. State*.[1] At heart, the issue was this: To enhance sexual assault from second to first degree, is the State required to prove that the defendant committed bigamy, or only that the defendant was legally married to someone other than the victim at the time of the offense?

Background on three cases

The three underlying cases involved sexual assaults committed in three different counties:

- in Moore County, Rito Gregory Lopez was accused of multiple counts of sexually assaulting his 14-year-old stepdaughter;
- in Tarrant County, Michael Ray Senn was also accused of sexually assaulting his stepdaughter; and
- in Galveston County, Abel Diaz Rodriguez was accused of three counts of sexual assault of his 14-year-old daughter.

In each case, the defendant was married to the victim's mother at the time of the assault. All three defendants were further charged with sexual assault under Penal Code 22.011(f), which enhances the offense from a second-degree felony to a first-degree "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under §25.01," which is the bigamy statute.

All three defendants were found guilty of both sexual assault and the enhancement: Lopez was convicted of 11 counts and sentenced to 25 years on each, Senn received a life sentence, and Rodriguez received three life sentences. All three appealed, respectively, to the Seventh, Second, and First Courts. There was no allegation made or proof presented at any of the three trials that any of the defendants actually committed bigamy with their victims, but the State's position was that there didn't need to be, as a plain reading of the statute showed that the State was required to show only that the victim was a person that the defendant "was prohibited from marrying" under the bigamy statute.

The appeals

Things got confusing pretty quickly. After the Second Court of Appeals affirmed Senn's conviction (*Senn I*), the Court of Criminal Appeals vacated that opinion (*Senn II*) with instructions to reconsider in light of its recent opinion in *Arteaga v. State*.[2] Further clouding the issue was the fact that the body of the opinion in *Arteaga* seemed to support the defendant's position, saying that "we conclude ... that the State is required to prove facts constituting bigamy under all three

provisions of 22.011(f)," while Footnote 9 of the opinion seemed to support the State's position, saying "What we mean is that, to elevate second-degree felony sexual assault to first-degree felony sexual assault under §22.011(f), the State must prove ... the defendant committed sexual assault and that, if he were to marry or claim to marry his victim, or to live with the victim under the appearance of being married, then he would be guilty of bigamy." Are you confused? That's OK, because every court of appeals in Texas was confused at this point too.

Clearly this was a mess ripe for a high court cleaning–and clean it up it did.

On remand, the Second Court tried to reconcile these two passages in *Senn III*,[3] holding:

1) the Court of Criminal Appeals' remand quoted the body of the opinion, not the footnote,

2) caselaw says footnotes carry less precedential value than the body of the opinion anyway, and

3) "more importantly," as the court put it, the legislative intent was that Subsection (f) required proof of bigamy.

The Second Court then reversed its previous opinion in a 2-1 decision with written dissent and remanded to the trial court for a new punishment hearing. The Seventh Court of Appeals followed the same logic in *Lopez*,[4] expressly citing to the reasoning in *Senn III*. However, the First Court of Appeals went the opposite direction in *Rodriguez*,[5] saying that it could not simply disregard the *Arteaga* Court's holding in Footnote 9.

The result was both a split between three courts of appeals and a dissenting opinion in one of those courts, each of which are stated reasons in the Texas Rules of Appellate Procedure for the Court of Criminal Appeals to grant review.[6] Clearly this was a mess ripe for a high court cleaning.

As the Court of Criminal Appeals saw it

And clean it up it did. The defendant petitioned the First Court's ruling in *Rodriguez*, the State petitioned the Seventh Court's and Second Court's rulings in *Lopez* and *Senn III*, and the Court granted review in all three.

The appellants collectively and individually argued that the legislative history showed that the intent was to criminalize sexual assault during the commission of actual bigamy, and that a plain reading of the statute that did not do so led to an absurd result the Legislature did not intend. The State responded in each case that the Court's reasoning in Footnote 9 of *Arteaga* should control not only as precedent, but also as a correct, plain-language reading of the statute. Briefs on the merits were filed by the State by Helena Faulkner of the Tarrant County Criminal District Attorney's Office in *Senn*, Rebecca Klaren for the Galveston County Criminal District Attorney's Office in *Rodriguez*, and by Emily Johnson-Liu of the State Prosecuting Attorney's (SPA's) Office in *Lopez*, each arguing that a plain reading of the statute showed that the State need not prove the actual commission of bigamy.

Each of the State's briefs are examples of how solid appellate work in the Court of Criminal Appeals isn't just good mechanics and drafting, but also good jurisprudence, as the cases hinged on competing philosophies of statutory interpretation. The Seventh and Second Courts had ruled in *Senn III* and *Lopez* that the main text and Footnote 9 in *Arteaga* were irreconcilable, and these courts turned to the legislative intent in enacting Subsection (f) to determine what the Court meant in ruling.

The State's briefs argued that the courts of appeals should have attempted to harmonize the two passages rather than declaring them irreconcilable, and that this should have been accomplished by a plain reading of *Arteaga* and Subsection (f) rather than resorting to legislative intent. To this end the SPA's brief quoted Antonin Scalia and Bryan Garner's seminal work on textualism, *Reading Law: The Interpretation of Legal Texts*, coincidentally also the only legal treatise authored by a U.S. Supreme Court Justice to tackle the issue of whether a burrito is a sandwich (spoiler alert: It is not).

Judge Keel authored the opinion for the majority, joined by Presiding Judge Keller and Judges Richardson, Walker, and Slaughter. The opinion acknowledged the ambiguity of the two passages in *Arteaga*, but, in a move that surely made Scalia smile from the afterlife, resolved the ambiguity by focusing on the plain language of the sexual assault and bigamy statutes rather than an examination of legislative intent or consideration of extra-textual sources. Judge Keel found that a plain reading of the two statutes in conjunction showed that Subsection (f) did not require the State to show that the defendant had actually committed bigamy, only that bigamy would have occurred had the defendant and victim been married.

Judge Keel further observed that the plain reading ends the analysis absent "absurd results that the legislature could not possibly have intended" and rejected the defendants' assertion

that such absurdity resulted here, noting that the Court had recently held in *Estes v. State*[7] that there was a rational basis for treating child sexual assault cases differently based on the defendant's marital status. Judge Keel noted that *Estes* pointed out the "strong societal connection between the union of marriage and the ideas of family, home, safety, stability, and security," and found that the higher degree of punishment based on marital status here was not so absurd that it could not have been intended.

Judge Keasler authored a concurrence joined by Judge Hervey agreeing with the result but disagreeing with the majority's analysis of *Estes* (Judges Yeary and Newell concurred with the majority without writing). In Judge Keasler's view, the point of *Estes* wasn't that it was rational to harshly punish a married child rapist because he abuses the ideas of family, home, and safety *per se*, but rather that a greater punishment is merited because a married person is in a position to more easily gain access to children and abuse their trust. Judge Keasler would frame the absurd results analysis in terms of the Legislature's rational conclusion that the offender has actually victimized two people, the person assaulted and the spouse who has been psychologically injured.

The takeaways

What does this mean for me, the hard-working, front-line prosecutor? I'm so glad you asked. The basic holding of *Lopez, Senn*, and *Rodriguez* is simple: Subsection (f) allows enhancement to a first-degree felony if the defendant was married to a person other than the victim at the time of the offense. This has far-reaching implications for sexual assault prosecutions across Texas.

One question that went unanswered, however, is whether the plain language of Subsection (f) also allows the enhancement based on the *victim's* marital status? The opinion did not reach this question, instead limiting the holding to the particular facts of the three cases. But because a defendant would be prohibited from marrying an already married person as well, it's difficult to see how Subsection (f) wouldn't apply. Expect a case on that issue to come down the pike soon.

One final note: After the Court of Criminal Appeals's opinion in *Arteaga*, HB 667 (dubbed "Melissa's Law") added new Subsection (f)(2) in the sexual assault statute, re-designating the original Subsection (f) as Subsection (f)(1).[8] Subsection (f)(2) enhances sexual assault to a first-degree felony if the victim is a person with whom the actor was prohibited from engaging in sexual intercourse or deviate sexual intercourse under Texas Penal Code §25.02, Prohibited Sexual Conduct. This means sexual assault is now a first-degree felony if the victim is a person the defendant knows to be, without regards to legitimacy:

1) the actor's ancestor or descendant by blood or adoption;

2) the actor's current or former stepchild or stepparent;

3) the actor's parent's brother or sister of the whole or half blood;

4) the actor's brother or sister of the whole or half blood or by adoption;

5) the children of the actor's brother or sister of the whole or half blood or by adoption; or

6) the son or daughter of the actor's aunt or uncle of the whole or half blood or by adoption.

HB 667 also amended the "Romeo and Juliet" affirmative defense in (e)(2)(B)(ii)(b) to exclude incest, so the higher penalty range in (f)(2) applies in intrafamily sexual assault regardless of age.

As you can see, between the favorable rulings from the Court of Criminal Appeals in *Senn, Lopez*, and *Rodriguez* and the Melissa's Law addition from the legislature, Subsection (f) has evolved from what might have been overlooked as a curiosity to a formidable tool in the sex crimes prosecutor's toolbelt. ❇

The State Prosecuting Attorney's brief quoted Antonin Scalia and Bryan Garner's seminal work on textualism, Reading Law: The Interpretation of Legal Texts, *coincidentally also the only legal treatise authored by a U.S. Supreme Court Justice to tackle the issue of whether a burrito is a sandwich (spoiler alert: It is not).*

Endnotes

[1] Nos. PD-1382-18, PD-1265-18, PD-0013-19, PD-0014-19, PD-0015-19, –- S.W.3d –-, 2020 Tex. Crim. App. LEXIS 362 (Tex. Crim. App. Apr. 29, 2020).

[2] 521 S.W.3d 329 (Tex. Crim. App. 2017).

[3] –- S.W.3d –-, 2018 WL 5291889 2018 Tex. App. LEXIS 8722 (Tex. App.–Fort Worth Oct. 25, 2018).

[4] 567 S.W.3d 408 (Tex. App.–Amarillo 2018).

[5] 571 S.W.3d 292 (Tex. App.–Houston [1st Dist.] 2018).

[6] See Tex. R. App. P. 66.3 (a), (e).

[7] 546 S.W.3d 691 (Tex. Crim. App. 2018).

[8] A separate Subsection (f)(2) dealing with nonconsensual assisted reproduction or "fertility fraud" was also added in the same session by SB 1259. Look for a renumbering in the next session.

Returning to *My Cousin Vinny* for more lessons for lawyers

Sheltering in place has been rough for a guy whose job is traveling around the country and making presentations to crowds.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

There have been several moments when I've pondered, "What do I do now?"

On one of those days I re-watched the 1992 movie *My Cousin Vinny*. If you have never seen it—and there might be quite a few of you who haven't because it's almost 30 years old—put this article down, step away, and go watch it. Really. (Also watch *To Kill a Mockingbird* while you're at it.) I will wait for you.

This movie is chock-full of lessons for prosecutors, a lot more than just the advocacy portions I have seen in so many PowerPoint presentations in the past few years. It shouldn't be surprising because the director, Jonathan Lynn, has a law degree and insisted the film's legal proceedings be realistic. They're so helpful, in fact, that I'm going to share several overlooked lessons from the movie.

Obviously, this column contains spoilers. But I've already told you to go watch the movie—seriously, your jurors have seen it and so has your judge—so I will now continue as if you've watched it. Proceed at your own risk if you have not.

Mirroring real life

The plot of *My Cousin Vinny* is a classic fish-out-of-water tale. Two New Yorkers (the original Karate Kid, Ralph Macchio, plays Bill Gambini, and his college friend, Stan Rothenstein, is played by Mitchell Whitfield) are driving through rural Alabama on their way back to school when they are falsely accused of murder. One of them calls his cousin Vinny Gambini (Joe Pesci at his best), a loudmouth lawyer with no trial experience, for help.

Part of what I love about this movie is that it matches my own experience as a prosecutor more than any other legal drama or comedy ever made. It ratifies every single one of my own hard-earned, experience-based prejudices against judges, public defenders, and small-town hotels. (Cognitive bias, I know.) But as I watch Vinny and his girlfriend Mona Lisa Vito (actress Marisa Tomei in a role for which she won an Oscar) check into a progression of hotels with progressively terrible alarm clocks, I laugh because I have been there—yes, to places just as bad and even worse. The scenes with the judge, played by character actor Fred Gwynne (the one-time Herman Munster), also seem very familiar, but perhaps that says as much about me as it does about judges.

The prosecutor, Jim Trotter III, is played by an excellent and familiar actor you probably cannot name, Lane Smith. He plays the part very well. He has many moments that make him unlike most movie prosecutors. When he and defense counsel Vinny Gambini are sharing back-stories in Vinny's first visit to the prosecutor's office, he relates his own: "My conscience got to me. Wouldn't I be better off putting the guilty in jail? Well, that is what I have been doing, and I am better off for it," he says. But District Attorney Trotter also shows, despite his glib comments, that he truly believes his job is to see justice is done. In the exciting finish, neither a judge nor a jury declares our wrongly accused protagonists not guilty—rather, District Attorney Trotter moves, "Your Honor, in light of Ms. Vito's and Mr. Wilbur's testimony, the State would like to dismiss all charges!" How he says it matters: He has a huge grin on his face. He delightedly declares victory in the midst of dismissing the

charges—just as any prosecutor should when we see that justice is done. I love this moment in the movie because it is real. Most movie portrayals of similar events miss the mark.

There are many other moments worth mentioning.

Lesson No. 1: Prosecutors are not the star.

There is a reason prosecutors in movies are played by more obscure actors: We are not the star of the show. When we try for that role, we end up the villain.

Boy, this was a hard lesson for me to learn. Seeing this movie again reminds me of the hardest advocacy advice I have ever been given. My misdemeanor chief in Lubbock County at the time, Rusty Thornton, once sat me down after a misdemeanor loss and a conversation with my judges and told me, "Abbott, clever is not your friend." *Ow*. Cleverness was my favorite thing about myself. But he was right. It was great advice it took me years to fully follow.

In the movie, DA Trotter makes a couple of "clever" mistakes. During opening statement, he tries to be chummy with the jury and refers to "all our little old ancestors back in England." The look on the faces of his black jurors proves the validity of Rusty's advice. Later, on direct of his expert, he plays to the jury by turning the word identical into "EYE-den-TA-CULL," with an accompanying jazz hand flourish. I laugh out loud every time I see it. Again, he proves Rusty's point—clever is never a prosecutor's friend.

Lesson No. 2: Never count on the judge to protect the verdict.

This too was a lesson that was hard-earned. Vinny goes most of the movie bumbling with procedure and the law, but finally, when the DA calls a surprise witness, Vinny makes exactly the right objection. Judge Chamberlain Haller finally gives Vinny his first compliment in court: "That is a lucid, intelligent, well-thought-out objection." Then the judge promptly follows with, "Overruled."

I learned that a judge who always rules your way is much more dangerous to a prosecutor than one who slams the door on you sometimes. I had to advise many of the prosecutors in my office to be very careful what they asked for in court. Sometimes you get what you ask for, and sometimes you shouldn't. A prosecutor should always be the first and most important barrier against reversible error in court. This is hard to do in the blazing heat of battle, but it separates good prosecutors from great ones.

Lesson No. 3: The real key to cross is not technique but preparation.

I have seen a number of great cross techniques taught with *My Cousin Vinny* clips—it may contain some of the best cross-examination examples on film anywhere. Controlling a witness—perfectly demonstrated. Building a cross one fact at a time—flawless. Using photos and demonstrations—funny and dead-on. Go watch the trial part of the movie again; it is a clinic on cross-examination. (I am glad defense lawyers do not love the movie as much as prosecutors do and don't take its lessons to heart. Those defense lawyers who have learned that kind of discipline and focus on cross are formidable in court.)

Notice how disciplined Vinny's cross examinations are. Vinny can laser-focus his cross because he is prepared. He knows exactly where he is going with each question. He absorbs each witness's testimony. He knows each vantage point better than the witness or prosecutor. There is no fishing. There are no tricks.

This too took me a while to learn. Sure, cross is an artform, but like good art, it never happens on accident. Preparation (and the focus it allows) make a great cross-examination.

Lesson No. 4: Prosecutors never win cases by themselves.

During a lunch break right before the defense puts on its case, a very familiar scenario takes place. Like every trial attorney ever, Vinny is deep in thought about his case. He then must interact with someone he loves, and the trial attorney in him lashes out.

Mona Lisa asks, "Can I help?" and Vinny just goes off. (If you have been doing this job long enough, you have also had these embarrassing moments where you take out tension on the wrong people.) He declares, "No, you can't help! I wish you could, but you can't!" Turns out he is completely wrong. Mona Lisa as his unexpected expert saves the case.

In the final scenes, we return to their earlier fight. Vinny explains his sour mood after winning: "My problem is I wanted to win my first case without help from anybody. Well, I guess that plan is moot." Anybody relate?

Continued on page 21 in the orange box.

In the movie, the DA makes a couple of "clever" mistakes. During opening statement, he tries to be chummy with the jury and refers to "all our little old ancestors back in England." The look on the faces of his black jurors proves the validity of my misdemeanor chief's advice, that clever is never a prosecutor's friend.

A Texas first: a punishment hearing via Zoom (cont'd from the front cover)

watch the hearing and give her victim impact statement virtually. The defendant, his attorneys, and the judge were amenable to the idea. We would soon see that the suggestion was a foreshadowing of what was to come.

Even with all the uncertainty surrounding the response to COVID-19, we were still on for March 18. Then everything changed.

Emergency declaration

Bexar County's first Declaration of Public Health Emergency was issued on March 13. By then, we knew that Butler's sentencing would not happen on the 18th. The Bexar County District Courts started having smaller dockets and eventually eliminated in-person hearings altogether. Beginning the week of March 23, there was one Presiding Court and one Alternate Presiding Court that would handle "essential hearings." Judge Boyd's courtroom, the 187th District Court, was the Presiding Court the week of May 4.

With courts under immense pressure to move their dockets, even with us prosecutors and defense attorneys working from home, judges began brainstorming ways that didn't involve in-person contact to resolve cases. The concept of doing pleas and other routine hearings via Zoom was just getting off the ground around this time, with a few courts utilizing it on various occasions.

Going forward on punishment

In Butler's case, it took the court almost three years to try him and another three months after his conviction to conduct a punishment hearing. With the punishment range for murder being anywhere from five to 99 years or life in prison, the court had a great interest in giving both the defendant and the victim's family finality after such a long wait.

After the court contacted us about putting this hearing together via Zoom, we had a lot of questions regarding the procedure and the judge's expectations. Would witnesses have to appear in person to give live testimony while attorneys and the defendant appeared via Zoom? How would we admit evidence into the record? It was a shock for both of us, but as the saying goes, "The State is always ready." So we got ready.

We found out that the judge would allow us to proceed however we felt comfortable, meaning we could appear via Zoom from our home or office, or we could appear in person in the courtroom (where the judge would be), and the same went for our witnesses. Once we had a basic understanding of what the judge expected, we then had to take a realistic approach to condensing our evidence. With no court reporter in court to take custody of physical exhibits, such as narcotics, was it still worth putting on a case where the defendant was found with .08 grams of cocaine? Ultimately, we felt it was not right to ask witnesses to go to the courtroom when we would be working safely from our offices.

The PSI report listed the defendant's criminal history, his gang affiliation, and even included a Victim Impact Statement. The defendant also spoke briefly about the offense. Although he still denied committing the murder, he admitted to being involved and asked for a punishment of no more than 35 years. Having all of this information in the PSI report and knowing the judge would be able to view and consider it made condensing the punishment evidence easier.

Finding fingerprints

That brings us to the fingerprints. How were we to fingerprint the defendant in the jail, get the certified pen packet to the print examiner to make his comparison, and then retrieve the pen packet to give to the court reporter to enter into the record? The answer: baby steps.

Once we found out that we would be conducting this hearing entirely via Zoom, the very first thing we did was have the judge sign off on our motion to fingerprint. We sent the signed motion to the supervisors in the Central Records Division at the Bexar County Sheriff's Office. The office is located in the jail, so they set up a time with the detention staff to have the fingerprint examiner take the defendant's prints. During this time, there were still very strict requirements for everyone in the jail to wear masks at all times. This, of course, included the defendant; he was masked while the examiner collected his fingerprints—an issue that would be raised later in the hearing.

When we got word that the fingerprint examiner made the inked print card, we contacted the investigator on duty that day for our division, Mario Esparza. We directed him to the physical file in Nicole's office where the certified pen packet was located. He took it over to the jail and gave it to the fingerprint examiner who made the inked print card earlier that morning. Mario waited while the comparison was done and then

took the inked print card and the certified pen packet back to our office and put them on Nicole's desk.

Preparing witnesses

After we thought through these practical and logistical concerns, it was then time to figure out how to prepare our witnesses for the hearing. We've all had to talk a witness through the process of giving in-court testimony before—but we had never done a Zoom hearing. We didn't have any idea what to tell the witnesses because we ourselves didn't know how it would go.

We decided early on to make sure all of the potential participants had actually used Zoom so it wasn't during the hearing that we found out that someone's webcam wasn't working or somebody didn't have the correct internet browser on their county-issued computer. We set up practice calls with all of the witnesses the day before to make sure their devices were working correctly and to fill them in as best we could on how we expected the hearing to go procedurally.

On Nicole's very first practice call, she discovered that the webcam wasn't working on the county-issued computer in the Sheriff's Office's Central Records department. This was where the fingerprint examiner would testify to the fingerprints on the defendant's pen packet. She was told it was the only computer in the whole section that even had a webcam. Luckily, because we completed the call early in the day, the supervisors from Central Records got together with the County IT Department and were able to get it up and working by the next day. The morning before the sentencing hearing, Nicole conducted a successful Zoom call with the fingerprint examiner, where they were able to look at the exhibits together.

After countless hours of preparation, the day of the hearing was finally upon us. At that point, all we could do was have faith that we had made all of the necessary preparations to allow things to go the way that we envisioned them. We were as ready as we could be, but we still had only a vague idea of what to expect at the hearing itself. As it turned out, there were a few surprises in store for us yet!

The day of the hearing

The hearing was scheduled to begin on May 6 at 1:30 p.m. We put some thought into where each of us would be for the hearing. We both considered that we could just stay home, but the idea of Mona Lisa sets him straight: "You know, this could be a sign of things to come. You will win all your cases—but with somebody's help, right?"

"Oh my God, what a f—ing nightmare!" Vinny responds.

It's maybe the best lesson in the movie. I learned this one slowly as well. I never won a case alone. I had a victim assistance coordinator, an investigator, at least one support staff member, an officer, or a witness in every case who owned the victory more than I did. Because I was young and stupid, I missed way too many opportunities to acknowledge it. So, to many more folks than I can list here, thank you. Vinny is wrong on this one—it's not a nightmare to win with help.

Other minor lessons worth a mention

Apparently, Alabama had open file discovery before the Michael Morton Act. (When you are behind Alabama ...)

Always keep an eye on opposing counsel. There's a moment where Vinny is watching the DA furiously conference with his expert and then not call him to the stand. It was the perfect time for Vinny to recall that witness.

Recorded confessions were probably overdue. Without a recording, Bill Gambini's question, "I shot the clerk?" easily and understandably turned into a statement: "I shot the clerk." But if we'd been able to watch a video of the conversation, we would all know what the suspect said and that it wasn't a confession of guilt.

Conclusion

Sometime soon, set aside two hours to watch (or re-watch) *My Cousin Vinny*. You'll come away with some of the most realistic depictions of trial strategy and courtroom procedure on film and a few important lessons for your own practice of law. ❇

Recorded confessions were probably overdue. Without a recording, Bill Gambini's question, "I shot the clerk?" easily and under- standably turned into a statement: "I shot the clerk." But if we'd been able to watch a video of the conversation, we would all know what the suspect said and that it wasn't a confession of guilt.

the defendant being able to see inside our houses ultimately motivated us to conduct the hearing from our offices. It's a good thing, too, or else our living rooms would have ended up on the evening news! Although we didn't know about it ahead of time, some news reporters were admitted into the Zoom hearing as "participants," but the judge explained that they would be on mute for the duration of the hearing. We could see them on screen at their homes, taking notes during the duration of the hearing.

The judge started by referencing the TV show "All Rise," telling us we were no longer at home or in our offices, but that we were before the court and should act accordingly.

After coordinating everything from home on the days leading up to the hearing, we both went into the office early the morning of the 6th. We got ready in our own separate ways. When Nicole got to the office, the first thing she did was make sure everything was in order with the exhibits. She marked the inked print card and the certified copy of the pen packet with State's Exhibit stickers and made high resolution scans of them. She then emailed the scanned copies to the judge, court reporter, defense attorneys, and fingerprint examiner.

Nicole then cleaned out her office so it was camera-ready, made sure her laptop (which she had been using from home for the past month and a half) was set up and working properly, and did her usual preparations to calm her nerves and get in the right headspace. Sade arranged and rearranged her desk set-up to make sure everything was in the right spot.

We learned late that morning that the court had a YouTube channel and would broadcast the hearing live. Because the surviving victim was not going to participate in the hearing itself, we sent her the link to watch on YouTube. We also had a victim from one of the defendant's prior cases watching via YouTube. As it got closer to 1:30, our victim advocate, Aurora Gomez, was communicating with the witnesses and victims to make sure they were ready to join and watch.

About 15 minutes before the hearing, we signed on with the Zoom link provided by the court coordinator. We sat in front of our computers, poised, smiling, and ready to be admitted at any second. We did that for about 15 minutes, thinking that once we were admitted, it would be game on, but that was not the case. The judge brought in each party one by one. We could see the court reporter in her home, the defendant in what looked like a classroom in the jail, and his attorneys in their office.

Once the attorneys and the defendant were all signed on, we had to wait for the defendant to sign his waiver stating that he wished to proceed with the hearing electronically. The judge used a Zoom feature that allows the meeting's host to create "breakout rooms" where only certain participants are grouped together in a separate submeeting.

After about 30 minutes of waiting for the setup and for the defendant to sign the documents with assistance of detention staff, we were ready to go. The judge asked for objections to be made by physically raising our hands because it was difficult enough for the court reporter to hear with only one person talking during direct. The judge started by referencing the TV show "All Rise," telling us we were no longer at home or in our offices, but that we were before the court and should act accordingly.

Once we went live, the judge called the case and both sides made their announcements. "Nicole Phillips and Sade Mitchell on behalf of the State," Nicole said. "Are both sides ready?" the judge inquired. "The State is ready," Nicole again responded—as ready as we could ever be to do something that no one, at least to our knowledge, had ever done before in the State of Texas.

The virtual hearing

Right out of the gate, the defense objected to the majority of the PSI. To avoid speaking over each other, the two of us decided ahead of time to designate a speaker. We each had our phones out, and the non-speaker could text the speaker and vice versa. Our phones were constantly buzzing. After both sides made some arguments, the court allowed a 10-minute break so the State could provide her with caselaw indicating the Texas Rules of Evidence do not apply to the PSI report. When we returned, the judge sustained the objection in regard to the defendant's criminal history in the report but overruled the objection related to the remainder of the PSI. Luckily, we didn't really need the criminal history portion of the PSI; we were ready to prove up the defendant's pen packet.

About an hour and a half after the hearing was scheduled to begin, the State called its first witness: the fingerprint examiner. He appeared via Zoom from the Central Records division of the Bexar County Jail. We discussed the exhibits that we had scanned and emailed to everyone during his testimony. However, the actual physical certified copy was presented to the judge in

court by another prosecutor, Tamara Strauch, the Court Chief assigned to the 187th District Court, watching from inside the courtroom. That's the document that was ultimately entered into the record.

Of course, just when you think you have thought everything through, you ask your witness to identify the defendant on his computer screen and he says, "No, I don't see him." It took Nicole a few panicked seconds to figure out why that was, but soon enough she realized he was in the wrong view setting! She walked him through how he could see all participants. Once that was done, he was able to identify the defendant easily.

Remember how everyone in the jail had to wear a mask? Well, the defense attorney did, and he was quick to ask the witness on cross about his identification of the defendant; he astutely pointed out that Butler was wearing a mask at all times while the fingerprint examiner was taking his prints. "How can you say that is the same person if you could only see half his face?" he asked. But the witness never wavered; he knew it was the same person he printed the day before. The fingerprint examiner explained they were face-to-face when the fingerprinting was done and he could recognize the defendant's face. (Incidentally, the label on the defendant's Zoom screen was "187th"—not his name or any other identifier.) The examiner testified that he compared the prints on his inked print card to those in the pen packet and they were both from the defendant. The pen packet, showing that the defendant had been sentenced to prison for two Burglary of a Habitation cases in 2014, was admitted without objection.

The next witness was a classification officer from the Bexar County Jail. As soon as we asked our first question about the defendant's gang affiliation, the defense attorney objected. He claimed he wasn't given proper notice. The judge asked if and when the notice was filed, and there we were again—phones buzzing and eyes searching our screens trying to find the file-marked copy of the notice we filed the year before. We found it and provided the date to the judge. The witness's testimony continued, and the defense objected to just about every question that was asked. That means there was a lot of hand raising.

The problem with this system was that Nicole, the speaker during all of the questioning, couldn't see the defense attorney's feed because he was not speaking at all during the hearing. Speaker view is the default setting in Zoom, and because the only prior experience Nicole had with Zoom was meetings and trainings where it was only necessary to see the speaker (not the other participants), she had never thought to change the setting or to instruct her witnesses to do so. This means that Nicole couldn't tell until the judge spoke, usually after she finished asking the question, that an objection had been made. (The witness also couldn't see defense counsel's hand going up and would often keep talking until he heard the judge say that there was an objection.) Whether it was intentional or not, this system actually made things a lot easier than verbal objections, because Nicole was able to get through her entire question without being interrupted. After the question was completed, the judge would then ask the defense to state the reason for his objection. The State was allowed to respond, and then the Court made its ruling.

ABOVE: A screen capture of the Zoom hearing, which includes reporters from local TV stations and crime victims and their kin who did not participate in the hearing but who wanted to watch the proceeding.

When it came to identifying Butler, Nicole made sure to walk the witness through getting to the proper view before asking if he saw the defendant. This time the answer was "yes" from the start. The officer was able to testify about Butler's gang affiliation and the defendant's gang tattoos.

After the classification officer's testimony concluded, the State rested. The defense asked for some time before calling any witnesses, so the judge put defense counsel and his client in a breakout room. There was some awkward silence while we waited. They came back after about five minutes and rested without calling any witnesses.

Continued in the orange box on page 25.

Bail in the age of COVID-19

We live in interesting times. It is safe to say that at the beginning of 2020, none of us would have predicted that a global pandemic would have upended our lives.

By Joshua A. Reiss
Division Chief,
Harris County District Attorney's Office

From a criminal justice perspective, among the topics that COVID-19 has laid bare are some very real differences among prosecutors, the defense bar, and certain judges about the role and purpose of bail.

This article will explore critical aspects of Texas bail law in the context of common defense arguments (with recommended rebuttals) and discuss at some length a recent Harris County COVID-19 bail case with implications for criminal law practitioners.

Important aspects of Texas bail law

While we all intrinsically have an understanding of bail, how exactly does Texas law define it, and what is its purpose? Bail is the security given by the accused that he will appear and answer before the proper court the accusation brought against him. It includes a bail bond or a personal bond.[1]

Defense arguments for bail lower than that sought by the State generally fall into one of the following categories:

1) the defendant is entitled to bail;

2) the defendant is entitled to bail he can afford; and

3) a defendant who can make bail is not less of a threat than one who cannot.

A fourth argument, that a defendant is entitled to bail in light of the threat of COVID-19 in the jail, is a more recent development. I will address each of these arguments in turn.

"My client is entitled to bail."

The argument that all defendants are entitled to bail arises from Texas Constitution Art. 1 §11: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law." The Court of Criminal Appeals recognizes: "The general rule favors the allowance of bail. Thus, presumptions are not to be indulged against the applicant, and the power to deny or require bail will not be used as an instrument of oppression."[2]

However, as is common with general rules, there are exceptions. Defendants charged with capital murder,[3] true habitual criminals, individuals with a prior felony conviction now charged with a felony involving a deadly weapon, and violations of certain court orders or conditions of bond in a family violence case are some of the exceptions when "no bond" is permitted.[4]

"My client is entitled to bail he can afford."

The wealth-based argument against bail is prevalent, and it carries many underlying concerns about the justice system generally.[5] Prosecutors presenting bail arguments need to be cognizant of this argument and circle back to what is permitted under Texas law. In all instances, Code of Criminal Procedure Art. 17.15 is the proverbial home base. It reads:

> The amount of bail to be required in any case is to be regulated by the court, judge, magistrate, or officer taking the bail; they are to be governed in the exercise of this discretion by the Constitution and by the following rules:
>
> 1) The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
>
> 2) The power to require bail is not to be so used as to make it an instrument of oppression.
>
> 3) The nature of the offense and

the circumstances under which it was committed are to be considered.

4) The ability to make bail is to be regarded, and proof may be taken upon this point.

5) The future safety of a victim of the alleged offense and the community shall be considered.

Of particular note, the mandatory "shall" appears in the context of "sufficiently high" bail to give "reasonable assurance" that the defendant will appear in court while simultaneously taking into account "the future safety of a victim ... and the community."

Simply put, the ability to make bail is to be taken into account, but it is *not* dispositive. Contemplate this scenario: A defendant is charged with a sexually violent offense and is able to afford only $250 bail. If the defendant were to be entitled to bail he can afford, then the magistrate would be required to set bail at $250. This is nonsensical. As the 14th Court of Appeals recognizes, "To show that he is unable to make bail, a defendant generally must show that his funds and his family's funds have been exhausted. The accused's *ability to make bond is merely one factor* to be considered in determining the appropriate amount of bond."[6]

"A defendant who can make bail is not less of a threat than one who cannot."

The notion that wealthier defendants are no less a potential danger to the community than those less affluent is intertwined with the wealth-based critique that a defendant is entitled to bail he can afford. While counties should ensure that their systems of setting bail are applied even-handedly to all defendants, this argument generally is outside the confines of the Art. 17.15 requirement that the safety of the victim and the community "shall be considered." The legislature can change Art. 17.15 to remove this public safety consideration if it would like; the judiciary cannot.

"My client should not be subject to pre-trial detention due to COVID-19."

This is the argument of the moment. It is being used to advance the previously discussed wealth-based and entitlement arguments. In responding to this argument, prosecutors can steer the discussion back to controlling law.

Art. 17.15 lacks a specific catch-all to permit consideration of public health. In addition, nothing in the Court of Criminal Appeals' First Emer-

Finally, it was time for argument. It's kind of amazing how long five minutes of argument seems when you're alone in your office—it feels like you are talking to yourself. The words are coming out of your mouth, but without anyone else around, you wonder, "Is this thing on? Can anyone actually hear me?" And there is always the chance that they actually *can't* (or don't) hear you! Because at the end of the day, it's a lot easier to ignore or give less credit to someone on a screen than someone standing right in front of you.

After arguments, the judge found the repeat offender enhancement allegation true. Then she gave a short statement and sentenced the defendant to 40 years on both cases to run concurrently, after which she invited the deceased victim's mother to give her Victim Impact Statement. And just like that, the hearing was over and the judge stepped away, but no one wanted to leave without being excused. The judge returned shortly and excused all parties. In an interesting twist, the defense attorney asked to be placed in a breakout room to speak with Nicole about another case.

Conclusion

Virtual sentencings have their place in times like this. The criminal justice system has an obligation to do everything in its power to continue resolving cases where possible. The reality is that virtual hearings can be a means to that end, even more so in the coming months.

However, when we as prosecutors, as those tasked with seeing that justice is done, are asked to conduct a Zoom hearing, we have to think about whether it is best for our case. That includes considering what is best for the victim, the community, and even the defendant's interest in finality.

In this case, we knew that we would have to cut some witnesses, but we also knew that the surviving victim and the deceased victim's family wanted nothing more than to have the hearing over. They were craving closure. We are happy that we were able to give that to them after three years of waiting. In the end, it all goes to show that as a Texas prosecutor, you really do have to be ready for anything. ❇

Timothy Singleton's case was a special circumstance. He was a violent, habitual felon charged with a crime involving a firearm, the victim was a senior citizen, the defendant failed to appear in court on other occasions, his bail was 99 percent lower than called for by the Harris County District Court's felony bond schedule, and a generalized concern about COVID-19 factored into the insufficient bail determination. The "nature of the case" required $50,000 bail.

gency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-007, directs a court to circumvent Art. 17.15.

Texas caselaw has developed a variety of permissible, individualized bail considerations. These considerations work in concert with Art. 17.15:

1) the defendant's work record;
2) the defendant's family and community ties;
3) the defendant's length of residency;
4) the defendant's prior criminal record;
5) the defendant's conformity with previous bond conditions;
6) the existence of other outstanding bonds;
7) aggravating circumstances alleged to have been involved in the charged offense; and
8) whether the defendant is a U.S. citizen.[7]

Public health is notably absent from this list.

Read together, Texas law is (at the moment) unmistakable: *A generalized concern about COVID-19 is not permissible in setting bail.* However, a properly framed individualized argument might call for a different approach. A defendant facing a nonviolent charge with multiple high-risk factors that place him at greater risk of contracting COVID-19 (e.g., over 60 years old, diabetic, immunocompromised, and with malignant hypertension) is likely to get a sympathetic ear at a bail hearing.

Though in the context of release from federal pretrial detention, U.S. Magistrate Judge Steve Kim eloquently identified the problems created when judges stray from normal decision-making about bail and the law because of COVID-19. Prosecutors are encouraged to consider his argument:

> Judges cannot responsibly—much less legally—make what would essentially be momentous public health decisions for prisons under the pretense of individual pretrial release determinations. Defendants' unbounded argument for pretrial release because of the COVID-19 pandemic, if accepted and extended to its logical conclusion, would mean the release—en masse—of all federal pretrial detainees. So it is up to Congress, not the courts, to legislate in the current crisis a comprehensive solution for the federal prison system at large.[8]

The Timothy Singleton case

All of these arguments over bail and COVID-19 converged in the Harris County case *State v. Singleton*. The result is the (re)birth of a form of review of insufficient bail in dangerous cases.

Singleton was arrested for aggravated assault with a deadly weapon. He allegedly threatened a senior citizen with a firearm over a debt. Prior to this event, Singleton was a true habitual offender with convictions for robbery, retaliation, assault of a family member by strangulation, and credit card abuse.

The hearing officer found probable cause and then set Singleton's bail at $500 without any no-contact or curfew conditions. By contrast, the Harris County District Court felony bond schedule called for $50,000 bail.

The hearing officer's comments, contrary to existing state statutory and case law and the newly-imposed mandates of GA-13, Governor Greg Abbott's executive order intended to restrict the release of violent offenders during the pandemic, reflect that an extra-judicial, generalized concern about COVID-19 improperly controlled her decision-making:

> It's not for protection of the community to say that I cannot give a personal bond when the person who can pay gets out and the person who can't pay stays in. So then it's not about safety. It's about who can pay. ... When we have, as mentioned, a pandemic going on in which we have had someone test positive in the Harris County Jail, it becomes very problematic to arbitrarily say that anyone who has a prior conviction for violence or a prior conviction for threat of violence, or is currently charged with violence or threat of violence can't get a personal bond. So you are just trying to fill the jail up which is the exact opposite of what should be happening right now.

Singleton paid a fee to the bondsman, made his bail, and was discharged from custody. Two weeks later, he was accused of assaulting his ex-girlfriend and her grandmother.

In the interests of public safety, the State sought to raise Singleton's bail under Art. 17.09(3) to $50,000 when Singleton made his initial appearance in the 230th District Court.[9] The State urged the judge that Singleton's $500 bail was insufficient given the nature of the offense, prior violent criminal offenses, and his history of failure to appear for court appearances, including failure

to appear for a jury trial. However, that judge kept the $500 bail in place.

Having exhausted the usual remedies, we got creative. Based on a suggestion by attorneys at the Texas Attorney General's Office, we examined Code of Criminal Procedure Art. 16.16:

> Where it is made to appear by affidavit to a judge of the Court of Criminal Appeals, a justice of a court of appeals, or to a judge of the district or county court, that the bail taken in any case is insufficient in amount, or that the sureties are not good for the amount, or that the bond is for any reason defective or insufficient, such judge shall issue a warrant of arrest, and require of the defendant sufficient bond and security, according to the nature of the case.

On its face, the clear language of Art. 16.16 offered some hope. However, Art. 16.16 is unusual. It is a carryover from the original Code of Criminal Procedure and is outside Chapter 17, which details the procedural requirements of bail. In addition, it has been infrequently litigated. The most recent case on point is nearly a century old.[10]

Encouraged by Harris County District Attorney Kim Ogg, we decided to give it a go. Along with the required affidavit detailing the procedural and factual background of Singleton's case, we filed a motion arguing that jurisprudence and practitioner commentary recognizes Art. 16.16 as a pre-indictment vehicle to reopen bail proceedings in special circumstances.[11] Singleton's case was a special circumstance. He was a violent, habitual felon charged with a crime involving a firearm, the victim was a senior citizen, the defendant failed to appear in court on other occasions, his bail was 99 percent lower than called for by the Harris County District Court's felony bond schedule, and a generalized concern about COVID-19 factored into the insufficient bail determination. The "nature of the case" required $50,000 bail.

The Court of Criminal Appeals agreed. It issued an arrest warrant (reprinted on this page). Some things of note about this warrant. First, the Court of Criminal Appeals never issued an opinion, but the warrant makes clear that it is issued "Pursuant to Article 16.16 of the Texas Code of Criminal Procedure." Therefore, it is safe to argue that the Court of Criminal Appeals recognizes Art. 16.16 as a pre-indictment vehicle to reopen bail proceedings in special circumstances.

THE STATE OF TEXAS	§	Court of Criminal Appeals
V.	§	Austin, Texas
TIMOTHY SINGLETON	§	Cause No. AP-77,097
	§	
DOB: 12/15/1988	§	
SPN: 02343527	§	230th District Court
	§	Harris County, Texas
WARRANT OF ARREST	§	Cause No. 1670011
BOND INCREASE	§	
BOND: $100,000.00	§	
cash or surety bond only (no personal bond)	§	

THE STATE OF TEXAS, TO ANY PEACE OFFICER OF THE STATE OF TEXAS - GREETINGS:

You are hereby commanded to arrest **TIMOTHY SINGLETON**, Defendant, to be dealt with according to law. Said Defendant has been accused of the felony offense: **Aggravated Assault□Deadly Weapon** , which is against the laws of the State of Texas.

Resolution of the felony accusation against Defendant is pending in the 230th District Court of Harris County, *State of Texas v. Timothy Singleton*, Cause No. 1670011. Defendant has been released on bail in said cause.

Pursuant to Article 16.16 of the Texas Code of Criminal Procedure, it has been made to appear by affidavit to a judge of the Court of Criminal Appeals that the bail taken in Defendant□s case is insufficient. The statements made in the affidavit are found to be credible and true. Defendant is required to post sufficient bond and security, according to the nature of the case: **$100,000.00 cash or surety bond only** (no personal bond).

Herein fail not, but make due service and return of this Warrant of Arrest, showing how you executed the same. The Clerk of this Court shall issue this Warrant of Arrest.

Signed this 17th day of April, 2020.

Bert Richardson

Judge, Court of Criminal Appeals of Texas,
by Order of the En Banc Court of Criminal Appeals of Texas

Second, Judge Richardson signed the arrest warrant for an *en banc* court; this was a unanimous action. Third, the Court of Criminal Appeals raised Singleton's bail to $100,000 when we asked for $50,000. The message was unmistakable; the "nature of the case" coupled with the decision-making of the magistrate and judge disturbed the Court of Criminal Appeals. (A downloadable copy of the State's renewed emergency motion is at www.tdcaa.com/emergency-motion-to-increase-bail-ccp-art-16-16.)

Framing a bail argument

COVID-19 does not appear to be leaving us soon. So what are some best practices to deal with this reality as it affects bail? Here are some thoughts.

First, do not request "high" bail. Optics matter. Articles 16.16 and 17.09(3) refer to "sufficient" bail. Track the statutes with your wording by asking for "sufficient" bail given the "nature of the case."

Second, always use Art. 17.15 and established caselaw to structure a bail sufficiency argument.

When a defense attorney asks to approach the bench to request lower bail, politely reply that you want a formal hearing based on a motion. A record here is critical, and the hearing gives an opportunity for the court to hear from any victims.

Things to detail include: violence of the offense, a defendant's prior failures to appear or bond forfeitures, his criminal record, age of the complainant, a defendant's requested deviation from the bond schedule, and gang affiliation. Remember there are two "shall(s)" in Art. 17.15: The court shall consider risk of flight and danger to the community.

Third, when a defense attorney asks to approach the bench to request lower bail, politely reply that you want a formal hearing based on a motion. A record here is critical, and the hearing gives an opportunity for the court to hear from any victims. Do not just approach the bench with the defense attorney as I did far too often as a junior prosecutor.

Fourth, do not be afraid to push back on the notion that COVID-19 creates a new bail dynamic that necessitates pre-trial release considerations outside the Code of Criminal Procedure and caselaw for all cases. As I've shown, it is not a universal "get out of jail free" card for all defendants.

Fifth, be mindful that Art. 16.16 exists as a remedy in a special circumstance. But be clear-sighted. The appropriate case will most likely involve a violent crime, bail set far below a bond schedule, and a record that extra-judicial considerations entered into the bail determination. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 17.01.

[2] *Ex parte Davis*, 574 S.W.2d 166, 168 (Tex. Crim. App. 1978).

[3] Tex. Const. Art. 1 §11 ("unless for capital offenses, when the proof is evident").

[4] Tex. Const. Art. 1 §11 (a)–(c); Tex. Code Crim. Proc. Arts. 17.152-3. When seeking to hold a defendant at "no bond," prosecutors must be mindful of the differing pleading and burden of proof requirements of the exception at issue.

[5] See e.g., *O'Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2020); Cynthia E. Jones, "Accused and Unconvicted: Fleeing From Wealth Based Pretrial Detention," 82 *Alb. L. Rev*. 1063 (2018-2019).

[6] *Ex parte Castellano*, 420 S.W.3d 878, 883 (Tex. App.–Houston [14th Dist.] 2014, no pet.) (emphasis added); see also *Richardson v. State*, 181 S.W.3d 756, 760 (Tex. App.–Waco 2005, no pet.) (considering funds of the appellant's father and brother).

[7] *Ex parte Melartin*, 464 S.W.3D 789, 792 (Tex. App.–Houston [14th Dist.] 2015, no pet.).

[8] *United States v. Joel Antonio Villegas*, No. 2:19-cr-568-AB, 2020 WL 1649520, *3 (C.D. Cal. April 3, 2020) (order denying application to reconsider detention).

[9] "Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pending finds that the bond is defective, excessive, or *insufficient in amount*, or that the sureties, if any, are not acceptable, or *for any other good and sufficient cause*, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested, and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody." Tex. Code Crim. Proc. Art. 17.09 §3 (emphasis added).

[10] *Shipp v. State*, 21 S.W. 2d 297 (Tex. Crim. App. 1929) (per curiam) (holding that a bail increase was appropriate after the district attorney filed an affidavit arguing that bond was insufficient under facts of the offense); but see *Jenkins v. State*, 77 S.W. 224 (Tex. Crim. App. 1903) ("The article in question is found in the chapter on procedure in preliminary or examining trials, and, in our opinion, is applicable alone to such trials, and does not apply after indictment").

[11] See *Ex parte Selfin*, 618 S.W.2d 766, 768 (Tex. Crim. App. 1981) ("There is no indication in the record that the State moved for a new bond after Williams' bond was reduced … or that affidavits to reopen the bond proceedings were filed with the court pursuant to Arts. 16.16 or 23.11); 29 Thomas S. Morgan & Harold C. Gaither, Jr., Texas Practice, *Juvenile Law and Practice*, §33:32 (3d ed.) (2019) ("If the prosecutor believes the bail is set too low, the prosecutor can file, upon affidavit, a motion to increase bail, stating why the bail is insufficient").

What financial cybercrime looks like

Regardless of your jurisdiction's size, someone who lives in your county has likely been affected or victimized by a financial cybercrime.

By Keith F. Houston
Assistant District Attorney in Harris County

These offenses can range from using a victim's eBay account to purchase a nonexistent item; theft or misuse of identity; infecting computers with ransomware; romance or catfishing scams; or the redirection of funds from legitimate business transactions, real estate closings, and payments from government contracts. There are many more in Chapter 33 of the Penal Code that are not included in this article for space reasons.[1] My cases of financial cybercrime typically involve people, companies, governments, and organizations from all parts of Texas and the world. In fact, many of my complainants are citizens of cities of less than 50,000 residents and from small businesses or organizations with fewer than 50 employees. These crimes are rising and can happen to anyone in Texas. My goal in this article is to increase the awareness and prosecution of these crimes.

A tangled and twisted web

The following story is based on actual cases in which money laundering[2] was the primary charge.

Lamar was a Houston engineering student on the honor roll. He came from a wealthy family in West Africa. Lamar's parents had him on a budget, and he wanted more money. One day a man named Blake approached Lamar at a gas station. Lamar recognized Blake from local clubs that cater to African immigrants. Blake told Lamar he needed someone to move money for his business—he could not open a bank account himself because of his immigration status. Blake and Lamar made a deal that Lamar would keep 10 percent of the money sent to the account and withdraw the rest in cash for Blake.

Blake drove Lamar to the Harris County Clerk's Office and gave him $100. Blake told him to go inside and file a DBA (which is an assumed name that means "doing business as") for "Libby Enterprises." Blake let Lamar keep the change as his first payment from their new joint business venture.

Hundreds of miles away, Archie was a widower in his late 60s living in the coastal Carolinas. Archie met a woman he knew as Libby on a dating website. Libby was good-looking but not out of Archie's league. She emailed or messaged him regularly, and Archie quickly fell in love with her. They communicated daily for three months (though they never met in person) before Libby told Archie she wanted to move in with him and take care of him. She asked for $20,000 to move to his place, and he eventually agreed to give her the money. Libby gave Archie a business bank account number owned by Lamar (DBA Libby Enterprises), and Archie sent the money.

Lamar received the funds and immediately transferred $2,000 (his 10-percent cut) to a savings account. Blake had Lamar wire $9,900 to a bank account in China and withdraw $8,100 in cash for Blake. Blake drove Lamar to two different bank branches, waiting in the car both times, to watch Lamar complete the transactions. Over the next eight weeks, Lamar's account received over $150,000 from seven different victims. All of these victims were romance-scammed by someone named Libby. One victim filed a complaint with her bank, and Lamar's account was closed for fraud. Before the account was closed, though, Lamar had sent an additional seven wires of $9,900 ($69,300 in total), to different Chinese bank accounts. He also withdrew $63,000 for Blake in amounts of less than $10,000 each time

and kept about $17,000 for himself. (The Bank Secrecy Act requires a bank to obtain identification for any transactions of $10,000 or more, so criminals will typically stay beneath this limit.) Lamar spent most of his money at clubs, hookah shops, restaurants, and Uber. The account had less than $500 in it when the bank finally closed it.

Layers of crime

This scheme shows the three typical layers of financial cybercrime. There is a hacker, typically outside the United States, who finds a victim and takes advantage of him. In this case, an unknown hacker used the persona of Libby. The hacker will usually be scamming several people at the same time using similar methods on each victim. When the hacker starts asking for money, she will hire a recruiter, in this case, Blake. The recruiter may be found using family or friends, or he may be recruited from a scammer chat room on Reddit or Facebook. The recruiter will then hire a "money mule" or mules (Lamar here) to open accounts to receive funds. The United States Computer Emergency Readiness Team defines money mules as people used to transport and launder stolen money.[3] Funds are typically withdrawn in a way to avoid bank reporting limits as mentioned above.[4] Most mules will obtain a DBA or assumed name to open a business checking account so that large money transfers are less suspicious. It is rare for a money mule to be the actual hacker. While it is possible for one person to assume all roles, most hackers in these cases live outside of U.S. jurisdiction. A hacker can mask his identity and let others take the risk while still reaping a large part of the proceeds. This setup is seen primarily in crimes involving business email compromise, real estate sales, government contracts, and the like.

In the above case, the victim who contacted her bank also filed a report with IC3.gov, the FBI's Internet Crime Complaint website. It is extremely important that these crimes be reported to IC3.gov because the FBI will add the information to a database. The FBI or an agency with access to the database can discover a person involved in multiple reports and open an investigation. At least 10 percent of the defendants I've prosecuted were discovered this way or went from a single case to an aggregate because of a victim's report. The U.S. Postal Inspectors obtained and reviewed bank records before bringing Lamar in for questioning. Lamar admitted that he should've known it was a scam because of the amount of funds going to his account from different sources. Lamar implicated Blake, but the Inspector discovered that Blake was using a fake name. Lamar was arrested and indicted for third-degree money laundering. I became aware of this crime when the postal inspectors approached me about charges. About half of the charges I have filed were because of tips from IC3.gov. These reports continue to increase, but reports directly to law enforcement are increasing at a faster pace. In the past, many complainants would report to IC3 after being told by local authorities that the crime was civil or a federal issue. Most law enforcement agencies today will begin an investigation and then ask for assistance if needed. Cooperation among agencies has allowed for recent progress in the prosecution of these crimes.

A few months later, Lamar's attorney approached me and gave me several pictures of Blake, which were screenshots Lamar took on social media; Lamar wanted to work out a deal. For immigration reasons, he did not want to plead to money laundering because it is a crime of moral turpitude. Because of his cooperation with the investigation, I offered to refile the charge as Engaging in the Business of Money Transmission without a License.[5] A person commits this offense if he receives compensation for the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location. This is a third-degree felony as well[6] but is not listed as a crime of moral turpitude.[7] In essence, Lamar acted as Blake's banker without having the proper license. Lamar pled guilty to that offense and paid his portion of the restitution prior to the plea. The complainants received just under $17,000 from Lamar but had combined losses of over $150,000. In most cases no restitution is available.

One additional note about Lamar's case. Of the eight victims, only five were cooperative. Two others wanted to "move on," while the remaining victim was hostile and clearly in denial. Archie, though, was very cooperative. He admitted that this was not the first time he had fallen victim to a scam. In fact, he estimated he had lost over $200,000 to these swindles over the previous three years! Archie subsequently agreed to let his daughter take over his finances so he doesn't fall for the scam again.

One additional note about Lamar's case. Of the eight victims, only five were cooperative. Two others wanted to "move on," while the remaining victim was hostile and clearly in denial.

This is not the end, but just the beginning of the story.

Another related scam

About the time Lamar's case was filed, Dayna was opening bank accounts for her boyfriend, Ken. Dayna was a single mom who met Ken at a club that catered to African immigrants. Ken had Dayna obtain a DBA and open a business bank account. Almost every day, Dayna would go to Western Union and pick up amounts ranging from $100 to $2,800 for the DBA. She always told the clerk it was for eBay sales, which is what Ken told her to say. We later learned that she was collecting money for various Craigslist and eBay scams. Once a week, she would send a wire to a bank account in China and give the rest of the money to Ken. Every few weeks Ken would change the China bank account. Dayna was in love with Ken and received only small sums directly from him; plus, Ken paid for her to live in a luxury apartment. He regularly supplied her with food and alcohol and paid for her child's preschool.

One day, Dayna told Ken she wanted to earn more money. Ken had her set up three additional DBAs with corresponding business bank accounts. Over the next month, one of the accounts received just under $100,000 in funds from 14 different sources. All 14 victims believed they were pre-paying for a vacation and getting a great deal. For the new accounts, Ken had Dayna send half of the funds to China, withdraw 40 percent for him, and keep 10 percent for herself. A month later, Ken told Dayna to be prepared to transfer money to four different bank accounts he provided.

The next day Dayna opened the bank app on her phone and saw the account had a new wire deposit for almost $600,000. She immediately called Ken, who had her go to the bank and obtain a cashier's check for $100,000 made out to a business name Ken provided. He met her at her apartment and used her phone app to wire funds to the four new bank accounts. The next day, Dayna received a wire for $100,000 to her own account from an account she didn't recognize. She tried to call Ken but was unable to get a hold of him. Dayna went to the bank to try and withdraw some of the funds but was told her account was temporarily frozen and she would need to wait 24 hours.

The $600,000 deposit was from an overseas company paying another overseas company for materials. Both companies had their email systems compromised. Hackers had been watching the email exchange between the companies, then intercepted the email for payment and changed the wiring instructions. Within 24 hours, the scam was discovered and reported to IC3.gov. The Financial Fraud Kill Chain (FFKC)[8] was initiated (available only for international transactions), which resulted in freezing Dayna's account as well as the four accounts to which she sent funds. The FFKC is a process to help recover large international wire transfers stolen from the United States and return funds to victims, though normal bank procedures are still used to attempt to recover fraudulent funds. The company was able to retrieve just over half of its loss. Dayna was detained at the bank the following day and arrested for first-degree money laundering.

Dayna initially refused to cooperate and remained in custody for several weeks. Her attorney arranged a proffer with myself and the FBI. Dayna gave us the bank information for an account she had opened without Ken's knowledge. It contained about $33,000 in funds she had received from the earlier schemes. She opened it because she knew Ken was "shady" and wanted to make sure she had her own money. We were able to distribute those funds to the victims via a Chapter 47 asset forfeiture.[9] When talking about Ken, Dayna mentioned the name Blake. I retrieved a photo of the Blake I knew from Lamar's case, and Dayna confirmed that Ken and Blake were the same person. At this point, I emailed the photo of Ken/Blake to the defense attorneys on similar cases. One attorney for a woman named Anise responded that she also knew Ken/Blake.

Yet another scam

Anise's case was unusual for several reasons. Anise was a business professional in her early senior years. She had lost her husband at the age of 50 and had not remarried. She was arrested after law enforcement traced the proceeds of 30-plus fraudulent transactions through accounts she controlled. The transactions totaled almost $1 million in fraud. Anise's attorney had been asking to let her plead open to the court because I had offered only prison time. We agreed to a proffer, but I made no guarantees. Anise disclosed information regarding 15 other transactions totaling $500,000. All the accounts had been closed for fraud, but one had been frozen and

A Chapter 47 restitution was done to distribute the funds from the frozen account to three victims. None of them were made whole, but one small business owner told me we had saved his business from probable bankruptcy.

Many of these crimes are interconnected because of the global nature of cybercrime. Cooperation and sharing information is the key to combatting these crimes. You may think this story is unique, but I have several other cases in which similar connections have been found.

contained almost $150,000. With Anise's assistance and our own subpoena power, we determined exactly which victims the seized funds belonged to. A Chapter 47 restitution was done to distribute the funds from the frozen account to three victims. None of them were made whole, but one small business owner told me we had saved his business from probable bankruptcy.

Anise started as a victim of these scams. A couple years after her husband died, she got on a senior dating site just to look around. She met Bob, an athletic architect who traveled the world for business. Bob was a widower, and Anise quickly fell in love. Bob and Anise always had issues when trying to meet in person. After a few months, Bob contacted her from Dubai and said he needed $25,000 to pay local authorities to get his supplies out of customs. She thought about it for a while, then sent the funds. A week later, he paid her back and sent flowers. They continued to talk for about a month before Bob contacted her saying he had an opportunity for her. One of his investors had backed out at the last minute from a deal that they needed to close within four days. The other three investors had each put in a million dollars, but she could take over the other investor's part for just $700,000. Anise had no mortgage and outright owned a couple rental properties, and all the properties were in her name. (Her information was publicly available from the assessor's office, which is likely how Bob knew she had access to so much money.) She used those properties to obtain a $700,000 loan and sent the money to Bob. That was the last she heard from him. Anise eventually had to sell her rental properties to pay back the loan.

For the next month, Anise frantically sent messages to every number and email she had for Bob. About a month later, someone responded and told her they would help her get her money back. She just needed to open some bank accounts and move money. That is when Anise went from victim to money mule. She worked as a mule for a year before meeting Blake/Ken. She knew him as Ben. Ben took Anise to London where she met a person introduced as "Mr. E." Mister E and Ben explained that she would now be receiving money from mules and forwarding the money to overseas bank accounts. Six months later she was arrested. Two months after Anise's arrest, Dayna was arrested, and the person known as Ben/Ken/Blake left the United States using Ben's fake United Kingdom passport.

The vast majority of these events occurred in 2016 and 2017 and are connected to other investigations, including some current ones. Investigating and prosecuting these crimes usually leads to other people who have committed similar crimes. I have been pursuing primarily the money mules at the bottom of the scheme. With the information our office has obtained from money mules, state, federal, and foreign agencies have pursued the recruiters and hackers. I intentionally left details of this story hanging to avoid interference.

This whole story likely would not have been discovered but for the one victim who filed a report with IC3.gov. The other two who made reports in Lamar's case made them to local authorities outside of Texas. One agency told the victim it was a civil matter, while the other investigated the crime but declined to prosecute because they did not want to extradite Lamar. Many of these crimes are interconnected because of the global nature of cybercrime. Cooperation and sharing information is the key to combatting these crimes. You may think this story is unique, but I have several other cases in which similar connections have been found.

The sad numbers

In 2019, the FBI's IC3 reported 467,361 cybercrime complaints in the United States with a total loss of $3.5 billion. About $1.4 billion of that loss was from victims 50 or older. Criminals are increasingly turning to cybercrime because there is little physical risk. A criminal can search for victims from anywhere at any time, and small efforts reap big rewards.

The key for investigating and prosecuting cybercrime is cooperation. In 2018, our office participated in Operation Wire Wire, which resulted in 74 arrests worldwide, 42 of those in the United States and 11 of which were charged in Harris County. In 2019, we participated in Operation Re Wire, which netted 281 arrests worldwide, 74 in the U.S., and 19 in the Houston area (17 charged in Harris County). Since 2018 we have participated in over 250 investigations and filed about 200 charges in Harris County. These charges have involved people of all ages from all over the world including individuals, companies, and organizations from large and small jurisdictions in Texas. Because most of my charges involve aggregate amounts, the total loss is usually over

$300,000. In some cases it is over $10,000,000. Many of the complainants became victims because they were lonely and sought companionship online. Because of the current pandemic and shutdown, I expect these crimes to increase even further. If you have not seen them yet, you will. Even if you don't plan to prosecute yourself, please make sure the information is reported to IC3.gov so it can be added to the database. In these cases, one report can make a huge difference. We can make a difference.

If you need any assistance, I'm available at houston_keith@dao.hctx.net. ❇

Endnotes

[1] Financial cybercrimes in Chapter 33 of the Texas Penal Code include: 1) §33.02, Breach of Computer Security, 2) §33.022, Electronic Access Interference, 3) §33.023, Electronic Data Tampering, and 4) §33.024, Unlawful Decryption.

[2] Tex. Penal Code §34.02. Elements for money laundering include:

1) knowingly;

2) [choose one or more conjunctively] (a) acquire and maintain an interest, (b) conceal, (c) possess, (d) transport, (e) receive, and/or (f) offer to receive;

3) [amount] (a) at least $2,000 and less than $30,000, (b) at least $30,000 and less than $150,000, (c) at least $100,000 and less than $300,000, or (d) at least $300,000;

4) [choose one] (a) constituted or (b) the defendant believed to constitute

5) The proceeds of criminal activity namely _____.

Note: For an aggregate charge, we must also show that the crime was "pursuant to a single scheme and continuing course of conduct." And when investigating or prosecuting money laundering, it is helpful to remember this from Tex. Penal Code §34.02 (a-1): "Knowledge of the specific nature of the criminal activity giving rise to the proceeds is not required to establish a culpable mental state under this section."

[3] Detailed description of money mules available at https://www.fbi.gov/news/stories/fbi-joins-international-campaign-to-stop-money-mules-121718 and https://www.us-cert.gov/sites/default/files/publications/money_mules.pdf.

[4] Information on the Bank Secrecy Act available at https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html.

[5] Tex. Finance Code §151.302.

[6] Tex. Finance Code §151.708.

[7] "Crime involves moral turpitude if 'the act denounced offends the generally accepted moral code of mankind.' It involves 'baseness, vileness, depravity in the private and social duties which man owes to his fellow man or to society in general.'" *Matter of Humphreys*, 880 SW2d 402, 408 (Citing *In re Hallinan*, 272 P.2d 768; In re Shorter, 570 A.2d 760, and *In re McBride*, 602 A.2d 626 (D.C.1992). Some examples of these crimes can be seen in Texas Rule of Evidence 609. For examples related to immigration, see Immigration and Nationality Act §212(a)(2)(A)(i)(I).

[8] More information about the financial fraud kill chain is available at https://www.alta.org/news/news.cfm?20190131-Hit-by-Wire-Transfer-Fraud-Use-the-Kill-Chain-Process.

[9] Tex. Code Crim. Proc. Chapter 47 (Disposition of Stolen Property).

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Showing (not just telling) a story

Human beings are naturally drawn in and captivated by what we see.

By Maritza Sifuentez-Chavarria
Assistant District Attorney in Brazos County

Visuals can connect us to people we've never met and make us feel a part of experiences we've never had. Using visuals to create a well-crafted demonstration can make us feel sad, angry, or violated on behalf of a stranger—even a fictional character on a television screen. How does that happen? Because of the power of visuals. Bringing to life things that are unspoken, demonstrations command attention and make an impact where words simply aren't enough.

Prosecutors' cases usually involve situations that are foreign to the average juror, and demonstrations can bridge that gap. They can be complex, such as when then-Harris County prosecutor Kelly Siegler famously demonstrated stabbing a victim more than 200 times on a bed in the well of a courtroom. They can also be simple, with no props at all. They are useful for a variety of reasons, but most importantly, in-court demonstrations help jurors view the case and the defendant from the State's perspective, drive our points home, give jurors a sense of ownership and relatability, and allow them to live in the victim's world, even for a few minutes.

A court will ordinarily permit in-court demonstrations if 1) it is supported by the evidence, and 2) its probative value is not substantially outweighed by danger of unfair prejudice.[1] And while the trial courts holds the discretion to permit an in-court demonstration, this discretion is balance by the fact that the State is "*entitled* to demonstrate their theory of the case and show how the defense's theory could not be."[2] For guidance in satisfying some of the predicate requirements, prosecutors can turn to the TDCAA *Predicate Manual* for assistance in drafting questions relevant to their in-court demonstrations.

Why do demonstrations?

Unlike movies, books force readers to create visuals in their minds. Similarly, when attorneys examine a witness, a juror will imagine the scene in his own mind based on the facts he's heard. That's normally fine, and prosecutors try cases like that all the time. Sometimes, though, jurors need to be *shown* what happened. In-court demonstrations take the jury from the jury box and make them part of the action, just like a good movie can do. The prosecutor can use demonstrations to bring things to life and highlight the most important details of a case.

Physical demonstrations are not appropriate in every trial, but they can clarify fast-paced and dynamic events, such as assaults, or illustrate what happened when words alone do not do the event justice. They breathe life into the facts of our cases. They can show jurors the reality of a crime more powerfully than mere words within the sterile walls of a courtroom. In-court demonstrations also highlight a case's human elements, such as fear, sadness, rage, or sheer brutality. Any time we want jurors to *feel* what a victim experienced, consider a demonstration.

Here are some situations where a demo might be helpful:

- when self-defense is the issue (to show how the defense's position is physically impossible),
- to explain what type of act would cause a victim's particular injuries,
- to help a jury understand unfamiliar scenarios that are important to the case (e.g., sexual assault exams—more on this in a moment), and
- to show the jury exactly what it was like when the defendant held the weapon in his hand. (Note that you'll want to prepare the judge and bailiff for any scenarios involving weapons. Guns will need to be checked by the bailiff first to absolutely ensure there are no bullets accidentally left in the chamber.)

In our office, prosecutors have used demos in a number of cases. Some are very simple. For example, the defense in an evading with a vehicle

trial claimed mistaken identity—the defendant said he was not the driver who evaded the officer. Our officer, however, spoke to the defendant for 20 minutes before the defendant drove away from him. The idea that the officer was mistaken about the defendant's identity after they spoke face-to-face for 20 minutes simply wasn't plausible. In closing argument, I stood in silence for 20 *seconds* so the jury could have a sense of how long 20 *minutes* was.

In another case, ADA Ryan Calvert put an unloaded gun into the defendant's hands and had him demonstrate the exact way he shot the victim. Ryan instructed the defendant to put the gun in his waistband and then cover it with his shirt, as he testified it had been. Ryan asked him if he had a round in the chamber initially, and he said no (meaning that he had to pull it, rack it to chamber a round, aim it, and pull the trigger). Ryan told the defendant to imagine Ryan was the victim and to show what he did. The defendant jerked that pistol out, racked it, pointed it right at Ryan, and pulled the trigger in one fluid motion. He looked *really* comfortable doing it too. And it terrified the jury. After the trial, jurors said putting the gun in the defendant's hands was the smartest thing the prosecutors could've done.

There's always a risk with doing demonstrations with defendants. Before doing one, prosecutors must consider all variables and determine if there's a way the defendant could use the demonstration to hurt the State's case. If the answer is yes, then the prosecutor should not proceed. Often, though, the defendant will have no good options in a demonstration. For example, consider an assault case where a defendant is asked to show the jury what he did to the victim. Often, defendants will seek to avoid "looking guilty" in front of the jury so they will minimize their actions, such as demonstrating a mere push or a slap, rather than punching with a closed fist. Such actions, though, might be inconsistent with other evidence in the case, such as photos of the victim's injuries. Thus, the physical demonstration illustrates that the defendant is lying to the jury. In the alternative, the defendant might demonstrate what he actually did, which will bring the crime to life in a way that words cannot.

Practice

In-court demonstrations are not for everyone, and that's OK. The only way to know if they're for you is if you try one. And if you are going to try, you must practice it before performing it for a jury. (There are some rare situations that are better left to the spontaneity of in-court surprise. I've watched experienced prosecutors in my office do this with ease, but for the rest of us, I suggest that we practice.)

If it's a demonstration you will do alone, practice the entire demonstration in front of the mirror. This will help you figure out if it's weird or awkward. Toss it away if it is.

If your demonstration is something you will do with another person—say, your trial partner or a witness—practice it with him so he knows what to do. The last thing we want is to be stumbling over each other in the well of the courtroom. The demonstration should be fluid but at the same time, not gimmicky or forced. Make sure the other person is just as comfortable with the demonstration as you are.

Prepare

Recently, I tried a sexual assault where the defense claimed that the victim was lying about the crime. The victim, though, had immediately reported the incident and had undergone a sexual assault examination. From our training, we know that these exams can be invasive, humiliating, and traumatic experiences. And they are voluntary every step of the way. I wanted to *show* the jury how this victim, whom the defense had labeled a liar, had voluntarily subjected herself to a physical examination that most of us would never choose to experience.

One option was to simply direct the nurse to explain the several parts of the sexual assault exam. But I needed the jury to feel like they were in the room with the victim. I wanted them to be uncomfortable *for* her. I wanted them to be uncomfortable *with* her. I wanted them to understand that a person who underwent such a brutal exam was a person who was telling the truth. How could I do that?

I prepared. Before trial, I watched a "Grey's Anatomy" clip where a victim underwent a sexual assault exam.[3] I watched that video several times before preparing the nurse for our demonstration. I also watched an excerpt from the Netflix show "Unbelievable." It was another scene of a victim undergoing the highly invasive sexual assault exam. Those videos are powerful because they bring viewers from their living rooms into the examination rooms with the victims. I knew if I wanted that same impact, I needed to do something similar with my nurse.

We know that sexual assault exams can be invasive, humiliating, and traumatic experiences. And they are voluntary every step of the way. I wanted to show the jury how this victim, whom the defense had labeled a liar, had voluntarily subjected herself to a physical examination that most of us would never choose to experience.

So that's what we did: We brought the exam into the courtroom. I chose to act as the victim so that I could control any unnecessary theatrics and so I wouldn't subject another person to the humiliation of the exam. We walked through whatever was practicable and appropriate for court demonstration step-by-step as best as we could. The nurse stayed in the middle of the well with me, and we did her direct examination there. It was more fluid than re-taking our seats and then popping into the well for each step of the exam.

She described the procedure. First, once in the exam room, the victim strips off all of her clothes while standing on a large white paper napkin. So I stood on the same type of napkin. I removed my shoes and my suit jacket and laid them in the corners of the paper just as the victim was required to do. Obviously, I didn't remove all of my clothes! I wouldn't get completely undressed in the courtroom, but the victim certainly had to be naked for the exam. To make that clear, the nurse and I discussed how I removed only my jacket and shoes, but the victim was left completely naked. I asked the nurse if the victim was given privacy to undress or if she was required to be with the victim the whole time. The nurse said that she was in the room with the victim while she undressed. Just like the victim was forced to undress in front of strangers, I wanted the jury to see what it must have felt like when I partially undressed for them. I wanted them slightly uncomfortable—but also sad for the victim.

There were mouth swabs. There were skin swabs. She took scrapings from underneath my fingernails with a wooden stick, and she took fingernail clippings, too. She pulled hair out of my head. She brushed through my hair with a small plastic comb. The jury watched my head jerk as the comb tugged and pulled at my straightened hair. Each step of the way, she described the procedure, and asked if I consented to it—just as the nurse had done with the victim.

Some parts of the exam are either not practicable (i.e., that the length of time the exam is over three hours) or not appropriate for court (such as the speculum exam). But we didn't ignore them; we just figured out a different way to include them. I highlighted how long the exam was by simply asking the nurse about it during direct examination.

I had the nurse describe the things we were not able to show. Still standing in front of the jury, she talked about how she runs a comb through the victim's pubic hair to gather evidence. The nurse showed jurors a speculum that she brought with her from the hospital and demonstrated how it stretches a woman's vagina open for examination. Words alone don't do it justice. The demonstration was long, and it was uncomfortable for everyone, including the jurors. And that was the point. The jurors *felt* some of the humiliation that the victim voluntarily experienced simply to report that she had been raped. It made it impossible for jurors to believe the victim was a liar and undermined the defense's claim. The jury found the defendant guilty and sentenced him to prison.

Point back to the demo

Once you've done a demonstration in court, don't just forget about it. Tie it into other parts of the trial—closing argument for sure. In fact, figure out a way to tie it into opening statement and voir dire, too.

Once you've done a demonstration in court, don't just forget about it. Tie it into other parts of the trial–closing argument for sure. In fact, figure out a way to tie it into opening statement and voir dire, too.

I am lucky to work in an office with some of the best teachers and mentors in the entire State of Texas. I've been taught to prepare my case backwards. That is, first, we prepare the court's charge. Second, we prepare voir dire. After that, we focus on closing argument, and lastly, we work on our opening statement. Going in this order forces us to focus on the issues that might cause problems in proving the case, and then build our case around that.

For example, we obviously cannot discuss a sexual assault examination in voir dire, but the ultimate issue in the sex assault case above was the victim's credibility—was she lying about the assault? In voir dire, we discussed witness credibility and got jurors talking about whether an alleged victim had anything to gain or lose by making an allegation. This discussion fit beautifully with our eventual closing argument that the victim gained nothing but shame and humiliation from making the report, yet she did it anyway—and that could be only because it was true. That argument was supported by the jurors' own embarrassment from witnessing parts of the sexual assault exam in court. Each phase of trial becomes part of a single continuous message.[4]

Alternatively, if a demonstration is not needed to clean up an issue in a case, then it's probably not essential to the trial and should be left out. If it doesn't serve a legitimate purpose, a jury might be inclined to think you're disingenuous or just playing games with their time. Time is

valuable—for the judge, for yourself, and especially for the jury. A judge who believes a prosecutor wastes time on pointless matters might be less likely to go with us when we want to do something outside of the box in the future. When the time comes that an in-court demonstration is truly needed, we want the judge on our side rather than questioning the validity or necessity of our choices. Furthermore, in presenting our cases, every minute of a prosecutor's time is precious. We hold jurors' attention for only short periods of time. Unnecessary demonstrations focus the jury on issues that are not pertinent to the case's resolution, potentially causing them to miss other things that need attention. The focus should always be on what we need to prove (either for guilt or punishment). The ultimate point is, just because you *can* do a demonstration doesn't mean you *should* do one.

Pitfalls

We bask in the demonstrations that have gone great, but the real lessons have come from mistakes we've encountered along the way. I will share an example of a pitfall that I've experienced in hopes that other prosecutors can avoid them when employing visual demonstrations of their own.

Once, I did an in-court demonstration of a stabbing. The victim was stabbed numerous times all over his upper body, but the defendant claimed he acted only in self-defense. I needed the jury to see how much effort it took to plunge a knife into another person more than 20 times. I also wanted them to see how the victim and defendant had to have been standing during the stabbing. Let me tell you, just acting it out was exhausting. We showed a blown-up medical chart of the victim's injuries on the televisions behind us, and my chief and trial partner, ADA Nathan Wood, acted as the victim. I crossed the defendant on all of the injuries he inflicted on the victim. Each time the defendant admitted that he stabbed the victim, I simultaneously made stabbing motions toward Nathan in those areas. Where the victim showed injuries to the backs of his forearms, Nathan raised his hands in the same defensive position, and I showed the jury how that stab wound happened. The demonstration felt awesome. I was excited, and I thought it was going well. But there were so many stab wounds in so many directions that I inadvertently stopped counting and lost myself in the demonstration.

After the jury found the defendant guilty, one juror told me that he noticed I "stabbed" Nathan more times in the forearms than the actual victim sustained in real life. Though it didn't affect this verdict, a misstep like that might have created problems in a different scenario. The point I took away was that precision matters. Jurors pick up on even minor discrepancies. The slightest inconsistency can potentially undermine the entire demonstration, undo the work you did, and call your credibility into question. Sometimes we lose ourselves in the moment, but with practice, these mishaps can be minimized.

Also, demonstrations that drag on or use more props than necessary to make the point work against us. When deciding what is actually needed for demonstrations, we should focus on the objects that are absolutely essential. Anything else will serve as a distraction and raise the chances of drawing (and the judge sustaining) an objection. Ask what point you are trying to prove and what can make it happen. If you must set up an entire courtroom with props, arrange everything during breaks or before court starts in the morning so you don't waste the jury's time while they're in the box or fumble over yourself in the jurors' presence. Furthermore, be conservative with time. We lose the jury's focus pretty quickly. Take only the time you need to highlight whatever your demo serves to prove—and nothing more. Never-ending demonstrations are problematic in the same way too many props are: They are distracting, and they weaken the very impact we are aiming to achieve.

My advice is to use as few props as possible, be extremely cautious of demonstrations that require the defendant's participation, and be creative with it. ❇

Demonstrations that drag on or use more props than necessary to make the point work against us. When deciding what is actually needed for demonstrations, we should focus on the objects that are absolutely essential.

Endnotes

[1] *Wright v. State*, 178 S.W.3d 905, 923 (Tex. App.–Houston [14th Dist.] 2005).

[2] *Id*. at 922.

[3] It's from the episode "Silent All These Years" in Season 15, Episode 19. Here is a clip of just the exam: https://www.youtube.com/watch?v=ZrsR7I1mLX4.

[4] For more information about discussing these issues during voir dire, see *Jury Selection* by Ryan Calvert (TDCAA © 2020), available at tdcaa.com/books.

Enhancement in the time of coronavirus

It normally takes a hurricane threatening the TDCAA Annual to trigger the Penal Code's disaster enhancement provisions for a handful of (un)lucky coastal counties, but not in the age of coronavirus.

By Benjamin I. Kaminar
Assistant County & District Attorney in Lamar County

For those of us who don't see disaster declarations as often (or who haven't convinced the Governor that being near Oklahoma counts as a disaster[1]), we'll take a look at when it may apply and how to use it.

Tucked away in the furthest reaches of Penal Code Chapter 12 is §12.50, the lesser-known, disaster-related cousin of the more frequently used repeat and habitual offender enhancements. Section 12.50 authorizes increased punishments for certain offenses if committed in areas subject to specific types of disaster declarations or an emergency evacuation order. The 2019 Legislative Session resulted in two bills that expanded the included offenses; you'll find both in the TDCAA *Criminal Laws of Texas* book, but the only difference is that one bill added an additional offense.[2] Sometimes known as the "looting enhancement," it applies primarily to property crimes, specifically arson (§28.02), robbery (§29.02), burglary (§30.02), burglary of coin-operated machines (§30.03), burglary of vehicles (§30.04), criminal trespass (§30.05), and theft of property (§31.03). It also applies to assault under §22.01 in all its forms, including against peace officers and involving family violence. It does *not*, however, apply to aggravated robbery or assault or to other types of theft under Chapter 31.

Much like enhancements for repeat and habitual offenders, the disaster enhancement increases punishment but not the degree of the offense. Generally, the punishment range is increased to that for the next higher category of offense. For example, a Class B criminal trespass would instead be *punished as* a Class A misdemeanor while a state jail theft would be *punished as* a third-degree felony. In both cases, however, the degree of the offense remains the same.[3] There are two exceptions to this general rule: Class A misdemeanors instead have their minimum punishment raised to 180 days' confinement, and first-degree felonies are unaffected (looking at you, Theft of an ATM from an Elderly Individual). The proper punishment range should be reflected in any plea admonishments and the proper degree of offense on any judgment.

For one of the enumerated offenses to qualify for enhancement, it must have been committed in an area that was subject to one of three types of disaster declaration at the time of the offense. Qualifying disaster declarations are those made by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, the state governor under §418.014 of the Government Code, and presiding officers of the governing body of political subdivisions[4] under §418.108 of the Government Code (read: "mayors or county judges"). A presidential declaration was issued on March 25, 2020, and is available through the Federal Register. The governor's declaration was issued on March 13, 2020, and renewed continuously since then (as of the date this article was published). Both of those can be found on the governor's website. Fortunately, both the presidential and gubernatorial declarations recite the appropriate statutory authorities listed in the enhancement statute. If, however, you need or choose to rely on a local declaration, check the declaration to make sure it recites the authority upon which it relies. It may be difficult to prove a declaration was issued under that authority if it isn't explicitly laid out.

Once we've determined that the offense qualifies and was committed during a disaster declaration, it's time to decide whether to include

the enhancement at all. Some offices may have a policy applying it to all qualifying offenses, to only certain types of offenses (such as enhancing family violence assaults but not non-FV assaults), or to some offenses on a case-by-case basis. As with any other charging decision, that should be decided based on office policy, the facts of the case, and the interests of justice. The ever-helpful *TDCAA Charging Manual* provides charging language for the disaster enhancement, including all three types of declaration.

In the courtroom

If you've made it this far, it's time to look at how we handle it at trial. Although this is a punishment enhancement, because it is not based on a prior conviction, it must be submitted to the jury and proven beyond a reasonable doubt.[5] This should include reading the disaster enhancement at the beginning of guilt-innocence and the entry of a plea of true or not true. The jury should be charged with a special issue when it is sent to deliberate. Basically, we treat the disaster enhancement like any other special issue, such 1as a drug-free zone or hate crime finding.

That still leaves us with proving up a declared disaster. As we discussed earlier, both the presidential and gubernatorial declarations are available on government websites, and Texas courts have repeatedly taken judicial notice of information available on various government websites.[6] Another route is to offer a copy of the governor's declaration posted on that office's website. The PDF of that declaration includes the State seal and the secretary of State's attestation, meeting the requirements of Rule of Evidence 902(1). "But wait! We don't have the original or a certified copy!" you may be thinking right now. Under Rule 1003, a duplicate is admissible to the same extent as the original unless a question is raised about the original's authenticity or circumstances make it unfair to admit the duplicate. The Court of Criminal Appeals has affirmed the use of a faxed copy of a certified copy as a "duplicate."[7] Finally, if using a local declaration, a certified copy may be readily obtained from the appropriate city or county clerk. For a misdemeanor in a rural county before the constitutional county judge, there's always the option of asking the judge to take judicial notice of his own position as county judge and his own signature on the declaration.

One final thing to take care of when dealing with any enhanced Class A misdemeanors is ensuring, once again, that the finding of true to the enhancement and proper range of punishment are documented. A family violence misdemeanant facing a probation revocation on a disaster enhancement will have a sentencing floor of six months. A different prosecutor handling the revocation might not even be aware of the enhancement's effect if it's not clearly documented, potentially leading to an illegal sentence falling below the minimum. Make that clear in the documentation.

Conclusion

Disaster declarations may not be something that we prosecutors deal with every day (or even every year), but when we do, the Legislature has given us an additional tool for our kit. A little legwork ahead of time to prepare can help us employ it in appropriate cases once our courts move toward normal operations. In the meantime, let's stay safe and enjoy that curbside margarita service. ❇

For those of us who don't see disaster declarations as often (or who haven't convinced the Governor that being near Oklahoma counts as a disaster), we'll take a look at when it may apply and how to use it.

Endnotes1

[1] Exhibit A: "Tiger King" on Netflix.

[2] We'll be using the slightly more expansive list in HB 1028 here.

[3] For an in-depth discussion of this distinction, see Jon English's excellent article, "State jail dungeons and bad judgment dragons" in the November–December 2016 issue of this journal (www.tdcaa.com/journal/state-jail-dungeons-and-bad-judgment-dragons).

[4] Defined as a county or incorporated city (Gov't Code §418.004(6)).

[5] See *Ex parte Boyd*, 58 S.W.3d 134 and *Apprendi v. New Jersey*, 530 U.S. 466.

[6] See Tex. R. Evid. 201; see, e.g., *Payan v. State*, 199 S.W.3d 380, 383 & n.4 (Tex. App.–Houston [1st Dist.] 2006, pet. ref'd) (taking judicial notice of information available on "[t]he State Library and Archives Commission website"); see also *Chen v. Hernandez*, No. 03-11-00222-CV, 2012 Tex. App. LEXIS 7518, 2012 WL 3793294, at *14 (Tex. App.–Austin Aug. 28, 2012, pet. denied) (mem. op.) (noting trial court took judicial notice of "government websites," including "website for the U.S. Department of State"); *Hayden v. State*, 155

Continued in the orange box on page 41.

A plan for cross-examination

For a long time I was pretty uncomfortable with cross examination. Cross was an afterthought.

By Brian Foley
Assistant District Attorney in Harris County

Defense is never going to call a witness or put the defendant on the stand. Why do I need to worry about that anyway? I have no idea what they are going to say so how can I prepare? This isn't civil law with depositions and discovery.

Then I heard from the great prosecutors who came before me. The secret to a good cross-examination is preparation. You must watch the dashcam video 10 times, talk to the defendant's neighbors, and subpoena his seventh-grade teacher to grand jury to lock down her testimony.

That sounds great in theory, but we don't always have time for all that. So how do we prepare to cross-examine a witness or defendant who isn't making headlines with a preferential trial setting? How do we prepare for a surprise witness in the eighth case on the docket?

I was inspired to write this article by the great prosecutors with whom I have worked and stumbled upon these ideas. I hope you can share in their great success using the below strategies. I'd like to offer three priorities for cross-examination: the right organization, the right goal, and the right attitude. Then I'll share specific cross-examination questions for scenarios that occur frequently.

The right organization

I've found that asking questions in a specific order has helped show when a defense witness is hiding the truth. The best organization is to start with:

1) the elements, and move on to
2) the evidence, and finish up by
3) confronting him about his lies.

This plan helps secure the jury's "permission" to go after the recalcitrant witness.[1] It's also a great plan when you have to cross someone without a lot of time to prepare.

The elements

First, try to get the defendant or witness to say yes as many times as you can. See how many elements he will agree to. By doing so first, you keep the questions and answers focused. If he agrees with you as to all the elements of the offense, then you can stop asking questions.

But more likely, he will disagree about something, and that's where you can focus your attention. It also allows you to appear reasonable while the witness has the confrontational attitude. With each question, you build up the squirm factor—that feeling in the defendant that the doors around him (directions his story could take) are closing one by one. He can no longer pretend that the State can't prove what day the crime occurred or that he wasn't at the scene of the crime. These facts might not mean much to the jury, and you might not have thought they were important because there's really no credible argument to the contrary. But a defendant under cross-examination thinks differently. Forcing him to close these doors from the witness stand seems to make him more and more uncomfortable, and he squirms in his chair and wants to wiggle out of the next answer. He may even become hostile.

Such a cross could look something like this:

"You're John Abuserston?"

"Yes."

"You were there that night?"

"What night?"

"The night we've been talking about this whole trial, April 23, 2018—the night you were arrested for assaulting your girlfriend?"[2]

"Yes."

"It's a house?"

"Yes."

"In Nueces County?"

"Yes."

"Everything you did that night you did intentionally?"

"No."

"So you were on drugs and that made you do it?"

"No."

"Then everything you did that night was a conscious choice?"

"I guess so."

"You did it because you wanted to do it?"

"Did what?"

"Everything you did that night, every choice you made, you made for yourself?"

(The defendant is silent.)

"You knew what you were doing?"

"Yes."

"You did everything knowingly?"

"Yes."

In this line of questions, you haven't really said anything groundbreaking at all, but you have forced the defendant to disagree with you when he doesn't really need to. If you can get him to say he knew what he was doing and he did it intentionally, I think the jury will be halfway there to "... and you didn't do it in self-defense."

Another example of starting with the elements is questioning about bodily injury. If opposing counsel is presenting a self-defense argument, then the defendant shouldn't be reluctant to say that he caused bodily injury to another person. If you ask, "You caused bodily injury to Suzie Sweetheart?" he will either say, "Yes," in which case you will move on to the manner and means, or he will say, "No," in which case you can move into the "evidence" section (below) and confront him with the evidence that shows bodily injury. Once you compel a witness's disagreement on a particular point, you can start hitting him with all the evidence.

The evidence

Say a witness just disagreed with the prosecutor on the element of bodily injury, or he minimized how much injury he caused. Now it's time to show him photos of the injuries and ask about them. If I have a good photo showing blood on clothing, blood on the floor, or an obvious red mark on a person's skin, I will show it to the defendant and ask a non-leading, "What's that?"[3]

This strategy works only with a photo where the injury is really obvious. If it isn't obvious in the photo, don't show it to the defendant. Otherwise you may hear about all the "crazy skin con-

S.W.3d 640, 647 (Tex. App.–Eastland 2005, pet. ref'd) (taking judicial notice of information available on "website of the United States Naval Observatory").

[7] *Englund v. State*, 946 S.W.2d 64 (Tex.Crim.App. 1997).

ditions" he knows the victim has to explain away the injury.

If the defendant was at the scene and gave a statement to police that "nothing happened," have him admit that he didn't claim self-defense or that he didn't say he arrived after the assault. But don't just ask him that one question. Rather, think about all the things an innocent person who was acting in self-defense might do in such a situation, and ask him *those* questions:

"You told the jury you were acting in self-defense."

"Yes."

"You were still at the apartment when the officers arrived?"

"Yes."

"You saw the police?"

"Yes."

"You saw their badges?"

"Yes."

"You knew why they were there?"

"Yes."

"You didn't tell Officer Davis that you were acting in self-defense?"

"Yes" or "No"—it doesn't matter.

"You didn't tell Officer Flores it was self-defense?" [and] "You didn't shout at the victim across the room that she knew it was self-defense?" [and] "You didn't call 911 and ask for help?"

"I'm showing you State's Exhibit No. 1, the dashcam recording. Not one time on this recording do you say that you were acting in self-defense."

Once a witness starts down the path of dishonesty, every additional photo or inconsistent statement starts to sting a little more.

Once a witness starts down the path of dishonesty, every additional photo or inconsistent statement starts to sting a little more. This is the most important time for the prosecutor to be listening to the defendant's answers. I know that when you are standing right by the defendant, it can be a little difficult to take note of his answer while you are planning your next question, but it's important to try. When the prosecutor is referring to physical or photographic evidence, the defendant tends to do the most explaining and minimizing. Great cross-examiners use these explanations and minimizations against the defendant so that he becomes his own worst enemy.

Lies

You may discover a defendant or witness lied when you listen to the officer's body camera, or you might find a lie when you read a witness statement. But I find that the best place to find them is when the witness is testifying on direct. The witness will be more adept at making the lies sound acceptable on direct because the defense attorney might be helping him frame his answers or jog his memory, often through leading questions. So a good place to start a cross-examination of a defense witness is through objecting to defense counsel's leading questions. Compel the witness to remember his story himself.

Additionally, take good notes during direct examination of a defense witness. I use a yellow legal pad, draw a line down the center, take notes for the direct examination on the left side, and write notes about what cross examination point or evidence might contradict the direct examination testimony on the right side. I save these for the end of cross; when I start cross, I go through the same elements and evidence first and then go into where the witness might have lied. Saving the lies allows you to end with a bang. Try to show the jury not just that the defendant lied, but also question him about why an innocent person would lie like he did.

Say you discover that the defendant lied to officers by saying he called 911, and the call log for the address shows no other 911 call besides the victim's. I would hold onto this until the end of cross-examination. See what elements the defendant wants to fight about, and confront him with the physical evidence first. The jury will have picked up on his discomfort by then.

"So you don't agree that this photo shows a red mark on the victim's face?"

"No, it doesn't. She was the one attacking me."

"That's right. In fact, you told the officer that you called 911 on *her*?"

"I don't remember."

"You don't remember if you called 911?"

"No."

"Don't you think it's a pretty important decision to call 911?"

"Yes."

"And now you don't even remember if you did it or not?"

"No."

"You were in here when we played the footage from the officer's body camera, right?"

"Yes."

"You heard yourself tell the officer that you called 911?"

"I don't remember."

"But you didn't call 911."

"I don't remember."

"You didn't know that the sheriff's office keeps

records of all 911 calls dispatched to a certain address, did you?"

"I don't know."

"I'm showing you what's been previously admitted with a business records affidavit as State's Exhibit No. 7. Your phone number isn't anywhere on this list, is it?"

"I don't see it there."

"But you wanted the police to think you had called 911?"

"No."

"Because that's what real victims do?"

"No."

"And the only person who called 911 in this case was Suzie Sweetheart?"

Prior convictions are kind of like lies. I keep the defendant's prior convictions for impeachment under Rule 609 in my back pocket. If you start off cross examination with *"You're a felon, aren't you!"* it can come off as name-calling, and it's not particularly persuasive if presented this way. Instead, while each juror is making up his own mind about the defendant's credibility, let the defendant give an answer that is a little outlandish first—and then pull out the felon card.

"So you're saying that a woman who weighs 115 pounds put you in fear of your life?"

"Yes."

"You weigh 280 pounds?"

"Yes."

"You just don't want to be convicted of this, do you?"

"No, I'm not guilty."

"But you've been convicted before, right?"

"Uh yes, I have a past."

"You're a felon."

Now when you go through his criminal history, there is a reason. It isn't name calling at this point—it's telling the whole truth to the jury. Remember also that 609 says that the criminal conviction for a felony or moral turpitude crime *must* be admitted regardless of punishment if the conviction is less than 10 years old. If it is older than 10 years, it is admissible only if its probative value substantially outweighs its prejudicial effect—a reverse 403 standard if you will.[4]

The right goal

Even with all the preparation in the world, none of us are television lawyers and we will likely never have a television moment on cross-examination. The best cross-examinations in the real world happen because a witness goes off the rails after the prosecutor calmly and persistently tells them things that are undeniable and damaging. My goal on cross is to either:

1) get the witness to admit all the elements of the crime, or

2) prove the witness is not truthful.

I stop asking questions as soon as I do either of those two things. If you don't think you can achieve either of these goals, you might not want to ask the witness any questions. The only exception to this rule of thumb is if the defendant is called to the stand—if that happens, I think you have to cross-examine him no matter what.[5]

A defendant will almost never admit to all the elements of the crime. However, I have seen where the prosecutor simply read off the elements listed in the information and the defendant agreed that he did each of those things. Can you guess what the prosecutor did afterwards? Did he pass the witness? No. He kept asking more questions, and the defendant walked back an answer. Quit while you're ahead!

If the defendant doesn't testify himself, his friend or family member might, and these folks are fairly likely to admit most, if not all, of the elements of the offense—they just may not know what is happening when they are doing it. Don't underestimate a prosecutor's ability to make some headway by just going over the elements with them.

Once I tried a defendant for possession of marijuana. His girlfriend was in the passenger seat when he was pulled over for expired inspection, the officer smelled marijuana as he approached the vehicle, and he found marijuana when he searched the trunk. At trial, the defense called the girlfriend to testify, and she said she knew what marijuana smelled like and that the vehicle did not smell like marijuana. Defense counsel was trying to prove a lack of probable cause to search the vehicle; the defense had also been challenging if the substance itself was actually marijuana. I had no idea the girlfriend was going to testify, nor for what purpose, so I sat there for a moment and thought about my two goals (getting a witness to admit all of the elements of the crime or proving her to be a liar) and my organization for success (elements, evidence, and lies). Maybe she could help me prove the case?

I had already admitted the marijuana in a baggie labeled State's Exhibit No. 1. It *reeked* of marijuana—the odor was undeniable. So I asked her, "You said you know what marijuana smells like?"

A defendant will almost never admit to all the elements of the crime. However, I have seen where the prosecutor simply read off the elements listed in the information and the defendant agreed that he did each of those things.

"Yes."

I approached her with the baggie and asked, "What does this smell like?"

"I don't know—I don't smell anything."

I asked the court, "May I publish the exhibit to the jury?" and the jurors passed the baggie around to each other as they shook their heads in disgust at the overwhelming smell.

I probably should have sat down right there, but I couldn't resist and asked her again, "Are you sure you don't smell anything?"

Defense counsel jumped up and objected to argumentative and badgering the witness. I finally said, "No further questions."

I had started out by seeing if I could use her to prove one of my elements, and I inadvertently proved she was untruthful. I was worried at the time because I had done so little to cross-examine her, but I asked the jurors about it after trial, and they told me, "We knew she was a liar right then. It didn't matter what else she said after that."

If we keep our goal posts low, it will be easier to get into cross, score a point or two, and get out.

The right attitude

Unlike direct examination, where we want the jury to focus on the witness, during cross-examination we want the jury's attention focused on our own words and credibility. Prosecutors enhance the evidence with our own credibility when we can control the other side's witness, and we control defense witnesses through the wording of our questions and the attitude we present. I think we should be fearless, genuine, and in control.

When waiting on a verdict, I often tell new prosecutors, "If you think this makes you nervous, just imagine how the defendant feels!" The same is true for cross-examination.

Be fearless. Sometimes, the way we say things is more effective than what we actually say. Like most prosecutors, I was nervous before my first cross-examination, and 10 years later I still get a little nervous. But we should be confident! We have every reason to be confident. We have read more about the case than the witness. We are more comfortable in a courtroom than the witness. We have a lot less to lose than the witness. If the witness is the defendant and he gets ripped apart on cross-examination, he could go to jail or prison. Friends or family members of the defendant who testify are worried about messing things up for someone they care about. We prosecutors are in a much better position than others in the courtroom.

When waiting on a verdict, I often tell new prosecutors, "If you think this makes you nervous, just imagine how the defendant feels!" The same is true for cross-examination. When a prosecutor cross-examines a witness, it means we have already rested our case. We already proved the defendant guilty beyond a reasonable doubt. And guess what? He agreed with you! If he didn't think you had proved him guilty, he wouldn't be taking the stand. If the defense attorney thought you had failed, she likely wouldn't have called the girlfriend to say what a peaceful guy he was or how he wasn't really drunk that day. Be fearless because the truth is on our side. If it weren't, we wouldn't be trying this case in the first place.

Be genuine. Sometimes I see new prosecutors trying to do an impersonation of other successful prosecutors. Sometimes it works, and sometimes it falls really flat. I am a thief when it comes to good ideas related to prosecution—I will take and borrow from anyone at any level if it helps me get justice for a victim or safety for the community. But I've seen prosecutors say and do things that I just cannot say or do, not effectively anyway. It works great for them, but it's not great for me. If you're a total bulldog and you're ready to bite off the defendant's head, don't pretend to be the nice guy. If you're friendly and measured throughout the trial, don't go straight for the jugular on cross-examination. Jurors have formed some kind of opinion about who you are and how you act, and if you change it all just for cross-examination, then it may hurt your credibility instead of the witness's credibility.

Be in control. I think Terence MacCarthy probably has the best advice on how to be in control; he says to ask leading questions that are as short as possible. Generally, the rule is one fact per question. For example, if you want to prove that the defendant has a 2007 green Mitsubishi Eclipse, you can ask, "Isn't it true you drive a 2007 Green Mitsubishi?" But you are in greater control if you break up the question into:

"You drive, right?"

"A car?"

"It's a Mitsubishi?"

"It's a 2007?"

"Green?"

The last question is only one word. It is extremely difficult for someone to argue with a one-word question. If they do, they make themselves look a little unhinged or like they're lying.

My other favorite advice on control comes from Irving Younger's "10 Commandments of

Cross Examination," which is still available for free on YouTube.[6] You won't get better advice on cross. Commandment No. 6 is "Don't quarrel with the witness." You don't want to get into an argument with the witness—it just makes you look like you are on the same level as he is. If an offense report and a judgment say the defendant committed a robbery by stealing from a bartender with a knife, and the defendant denies it, don't argue with him. Just point out all the evidence you have to the contrary in a direct manner:

"So you didn't rob the bar?"

"You didn't go up to the counter?"

"You didn't have a knife?"

"You didn't say [looking down at the offense report and reading directly], 'Bitch, give me the money or you're gonna get it!'?"

"You just got arrested for it?"

"And you just pled guilty to it?"[7]

By the end of this line of questioning, everyone in the room will believe that the defendant did everything you just said, and they will think of him as a liar. You don't have to deliver these questions in a sarcastic or indignant manner for them to be effective. Remember that the only thing you likely proved with these questions was that the defendant pled guilty to robbery. Don't argue facts in closing argument if the only thing that happened on the record was that a witness denied those facts.

If you have 10 days—or 10 minutes—to prepare for cross examination, you can get results with the right organization, the right goal, and the right attitude.

Conclusion

Because so many of us are struggling with large dockets and weekend prep time, having some kind of plan to start thinking about cross examination can make a difference. I hope that you find this article helpful to your effort to preserve justice in your community. God bless you all for what you do, and if there is anything I can do to help, feel free to email me at Foley_Brian@dao.hctx.net. ❇

Endnotes

[1] "Permission" in this context is that feeling when everyone in the room knows the defendant or witness is full of it, and they want the prosecutor to reveal it. You get that feeling from the witness's responses to questions, where he is lying and then has to stick to the lie over and over again. I've found that confronting a defendant or witness with the elements, followed by the evidence on the State's side and the logical destruction of his explanation, is the best way to show the holes in the witness's story and get that "permission" to reveal his lies.

[2] In the beginning, I'll always ask, "This is what you were arrested for?" not "What are you guilty of?" A defendant can't deny getting arrested for a crime, though he can certainly argue whether he's guilty. If he answers this question by saying he never assaulted his girlfriend, the prosecutor can go down a list of questions about who agrees that he *is* guilty of it: "The officer thought you did it? Your girlfriend said you did it? The only one who was there that night that says you didn't do it is you, right?"

[3] Yes, yes, I know we should *never* ask a non-leading question on cross examination, but I do it in limited instances when I don't care what the answer is. If I ask him, "What's that?" as I point to an extraordinarily obvious photo of blood, then I don't care what he says. I have asked an assault defendant this very question while pointing to a white shirt soaked wet with blood as red as a cardinal. Did he say blood? No. He said it was sweat! Give defendants the chance to lie, and a lot of them will take you up on it.

[4] TRE 609 (a) & (b).

[5] I think this is unavoidable because if the defendant takes the stand, he is going to testify to something that negates an element or establishes a defense. Even if he doesn't, refusing to question him makes the prosecutor look scared–as though the defendant will reveal something you are afraid of.

[6] Available at https://youtu.be/dBP2if0I-a8.

[7] On this question, they may say no or something like, "I just did it to get out of jail." These answers generally fall flat without the necessity of a response from the prosecutor.

If you have 10 days–or 10 minutes–to prepare for cross examination, you can get results with the right organization, the right goal, and the right attitude.

The process of child abuse disclosure

"A child's voice, however honest and true, is meaningless to those who have forgotten how to listen."—Albus Dumbledore

By Kara Comte
Assistant District Attorney in Brazos County

Child sexual abuse cases: You either stay as far away from them as you can, or you love trying them.

If you are one of those prosecutors who takes on child sexual abuse cases and you haven't already had *that* case, one day you will. You know which case I'm talking about: A child discloses abuse that occurred six months ago, or two years ago, or five years ago, or abuse that started when she was 6, ended when she was 12, and now she's 16 and she's never told anyone. In fact, she's even denied being abused to some people. As with most child sexual abuse cases, you will be left trying to prove a case with the testimony of the child alone.

When we prosecutors are faced with such a set of facts and left with just the word of the child—and no one believes kids—I guess we should just walk away from it, right?

Wrong!

I know you must be wondering, "How on earth can I prove a child sexual abuse case that happened years ago with just the kid's testimony?" Using the tools in this article, you don't have to. It is possible, and even encouraged, to try such cases just by seeing the world through the victim's perspective and, more importantly, helping the jury to do the same.

Of course, it is important to find any kind of evidence to corroborate a child's testimony in any way you can.[1] But at a minimum, the jury needs to understand how children disclose abuse. Specifically, jurors must understand that disclosure is generally a *process*, rather than an event, and that the process of disclosure has several stages. In some instances, children may disclose abuse immediately, but it is much more common for children to disclose at a later date. Likewise, while some children may give all of the details in their first disclosure, it is more likely that they will disclose a little at a time, rather than giving all the details at once.

To help jurors learn how disclosure works, prosecutors should use expert witnesses.[2] That expert testimony can corroborate the child victim and help the jury understand the horrible world they are hearing about. In other words, remind the jury how to listen to children. This article will focus on the process of disclosure of child sexual abuse and how prosecutors can use experts to their advantage in this area.

Finding an expert

What type of expert are we talking about? You could use a counselor who has treated the child, a psychologist, or even the forensic interviewer who did the initial interview of the child.[3] In Brazos County, we often use one of the forensic interviewers from Scotty's House, our local Children's Advocacy Center. We do this for two reasons: 1) they are expertly trained and have spoken to hundreds, if not thousands, of child abuse victims,[4] and 2) frequently, they will also be the outcry witness and can serve multiple roles in the case.[5]

What evidence can we introduce through an expert? What specialized knowledge does he or she have that could help the jury? The world of child abuse is often unfamiliar to the average juror. Most parents teach their children to tell immediately if someone touches them, so it may seem odd to some jurors if a child does not disclose abuse for years or is inconsistent in what she reports. Unfortunately, we must bring those jury members into the world of child abuse and help them understand why a child might wait to disclose abuse or why they might change their testimony over time. Remember that disclosure of abuse is generally a process, not a singular event.[6] Walking the jury through that process is

critical in supporting the credibility of a child victim.

Steps of disclosure

The process of disclosure can be broken down into five steps: [7]

1) denial
2) tentative disclosure
3) active disclosure
4) recantation
5) reaffirmation

While we refer to them as steps, not every child will experience each step, nor will a child progress through the steps in any particular order. However, it is critical to understand each step and how it plays into the disclosure of abuse.

Denial. It is not uncommon for children to deny any form of abuse, even when asked directly if anything has happened to them.[8] This denial can occur for any number of reasons: fear of not being believed, fear of getting in trouble, a promise to keep a secret, or even not understanding that what is happening is wrong.[9] In one Swedish study, experts reviewed a case in which officers conducting a search warrant found numerous videotaped acts of abuse on 10 different children.[10] Prior to the videos' discovery, none of the children had disclosed any abuse. Even after the discovery, most of the victims denied or minimized the abuse they endured when they were interviewed.[11]

In a 1991 study published by Teena Sorensen, a Licensed Psychiatric Nurse Specialist, and Barbara Snow, a Licensed Clinical Social Worker, 116 confirmed cases of child sexual abuse were examined, and they found that 72 percent of those children initially denied any form of abuse before moving into disclosure.[12] If you have ever tried a child sexual abuse case and asked potential jurors if any of them had experienced childhood abuse (and in my experience, many people raise their hands to say yes), my guess is that you have had someone disclose sexual abuse for the first time.

Two types of disclosure. Before talking about the types of disclosure, note that there are two methods of disclosure: accidental (not an intentional or deliberate disclosure on the victim's part) and purposeful (a child makes a conscious decision to disclose).[13] Examples of accidental disclosure might include telling a friend in confidence, writing in a journal with no intent that it be discovered, or even sexual behaviors that are not appropriate for the child's age. In a case in which a child discloses accidentally, it is less likely that the defense will successfully argue that the child was trying to get the defendant in trouble. If the child didn't want anyone to know about the abuse, why would he or she falsify these allegations?

Purposeful disclosure can occur after an educational situation, such as sex education at school, during a time when the perpetrator no longer has access to the child, or even when the child victim is concerned that a younger sibling is also being abused. A purposeful disclosure can be corroborated by school records to show what the child was learning, or with the testimony of another victim in a situation where a sibling or another child also discloses.

In their study, Sorensen and Snow found that accidental disclosure was more common in young children, while purposeful disclosure happens more with adolescents.

So, how does disclosure occur?

Tentative disclosure. In most cases, disclosure starts tentatively. This can be best compared to dipping a toe in the swimming pool to test the water's temperature. The child making a tentative disclosure is trying to discern what reaction she will receive by revealing this very private information. When a child receives a "favorable" response or is embraced and believed, she is more likely to move on to the active disclosure step. However, if the child is not believed or perceives that she is in any form of trouble, she is more likely to back off the statement and maybe even recant.[14]

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Active disclosure. When a child progresses to or is engaged in active disclosure, he is giving details of specific events of sexual abuse.[15] It is most often done during the investigation of the case or during forensic interviews. During the active disclosure step, it is critical for prosecutors to look for information that could be used to corroborate the child's outcry and support the victim's testimony in court.

As we have previously discussed, disclosure is generally a process and not an event. As a result, it is very common that "rolling" disclosures will occur.[16] Rolling disclosures happen as the process goes on, in that the child is likely to give additional details or even describe additional acts of abuse. These ongoing, or rolling, disclosures may occur to parents, therapists, counselors, or even prosecutors and victim assistance coordinators. In my experience, it is not uncommon for a

child to disclose additional acts of abuse while preparing for trial or even in the middle of trial while waiting to testify. When those additional disclosures are made to a counselor who also serves in an advocacy role (for example, a counselor at the Children's Advocacy Center who specializes in treating victims of abuse), that witness can serve as an expert in disclosure as well as possibly an outcry witness to any additional acts of abuse that are disclosed.[17] Active disclosure, when a child is giving details of the abuse, is how we as prosecutors ascertain whether an offense occurred and whether we can prosecute. If a child does not give the details to *someone*, we are unable to look for corroborating evidence and often will not have an offense to charge.

Recantation. Even after a child has disclosed abuse in a forensic setting, it is not unusual for him to later recant the disclosure. The reasons for recantation are not that different from why victims of family violence later want to drop charges: pressure from the abuser, pressure from family, investigatory or legal proceedings, or even negative personal consequences.[18] When a child recants, it is critical to schedule a recantation interview at the Children's Advocacy Center.[19] A recantation interview is generally done by the same forensic interviewer the child saw the first time. However, this time, the interviewer does not discuss the abuse with the child. Instead, she talks about what has been happening in the child's life since the initial disclosure.[20] For instance, the interviewer might ask, "What's going on at home? Who is in the home now? How is your mom doing?" The answers to these questions may allow the prosecutor to use the reasons for recantation as evidence to corroborate the child, much like forfeiture by wrongdoing in family violence cases. Sorensen and Snow found that children recanted their allegations in 22 percent of the cases they studied.[21]

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Reaffirmation. However, the study further showed that of those who recanted, 92 percent later reaffirmed their initial disclosure.[22] A recantation interview can help with the movement to reaffirmation. When a child victim feels supported and believed, she is more likely to stand firm in the truth than to revert to a place that's unsafe but that feels familiar.

At this point, I want to take a minute to hop on my "soapbox," as a coworker calls it. When a child recants, it does *not* mean that we should walk away from the case. By taking the time and putting in the extra work of a recantation interview to find out *why* the child is recanting and following up on the child's answers during that interview, we may find evidence of post-outcry pressure or abuse in the home. We also might discover the rare instance when a child has made a false disclosure and a true recantation. In either situation, we are not jumping to conclusions and are ensuring that justice is done.

Using this info in trial

As in every jury trial, it is critical for prosecutors to begin this discussion of disclosure of abuse during voir dire. In a delayed outcry case or one where the child victim has been inconsistent, have a discussion with the panel about expectation versus reality. As I discussed earlier, parents teach their children to tell someone when they have been touched inappropriately. In cases where a child has not told, we must help the jury understand why a child might delay in disclosing or deny any abuse occurred. This conversation will undoubtedly reveal that our expectation that a child will tell immediately doesn't really apply in certain cases, such as when the parent or other authority figure in the home is the one abusing the child. We want to prepare the jury for what they will hear from an expert and from the child victim regarding why the outcry was delayed or recanted. The testimony they will hear will likely very closely resemble the responses panel members will give in response to the prosecutor's questions during voir dire.

Conclusion

Child sexual abuse is a crime that happens behind closed doors. It is a crime with no outside witnesses and typically no physical evidence. Prosecutors are left with the word of a child who has often been inconsistent. That inconsistency, though, can be a powerful factor if the jury can understand the steps of disclosure.

That process of disclosure is what child abuse cases often look like, and as prosecutors, we should fearlessly pursue them. Hearing the word "guilty" and seeing the relief on a child's face after testifying is a feeling that cannot be replaced. As we say in our office, these cases are high-risk, high-reward. There are no cases that are more important. Experience teaches us that with child predators, there are other kids out there who will become victims if we do not see justice done. When we are armed with the rea-

sons behind the delays, denials, and inconsistencies, we can use those reasons as a guide to bring the jury to a true and just verdict. ❇

Endnotes

[1] Corroboration of a child's testimony can be found in school records, counseling records, pictures, journals, and so much more. But that is an entirely different article!

[2] *Morales v. State*, 32 S.W.3d 862 (Tex. Crim. App. 2000) (expert testimony must relate to pertinent facts of the case); *Cohn v. State*, 849 S.W.2d 817 (Tex. Crim. App. 1993) (expert can testify about behaviors that are consistent with sexual abuse, including delayed disclosure, and that testimony can be presented as substantive evidence rather than being allowed only to rehabilitate child victim), overruling *Duckett v. State*, 797 S.W.2d 906 (Tex. Crim. App. 1990).

[3] *Lair v. State*, No. 02-12-00068-CR , 2013 Tex. App. LEXIS 9906, *6-*8 (Tex. App.–Fort Worth 2013, pet ref'd) (not designated for publication), citing *Morris v. State*, 361 S.W.3d 649, 666 (Tex. Crim. App. 2011) (discussing "grooming" testimony and explaining that such "evidence has been received by courts from numerous types of experts–which include psychiatrists, psychologists, therapists, []social workers[, and] law enforcement").

[4] See *Martinez v. State*, No. 01-15-00823-CR, 2016 Tex. App. LEXIS 12345, *11-15 (Tex. App.–Houston 2016, pet ref'd, cert denied) (not designated for publication) for a great summary of the testimony of Cameron Collins Hines, the forensic interviewer we, as well as several surrounding counties, often use in our child abuse cases.

[5] Be sure to use expert witness's curriculum vitae (CV) in trial preparation. Oftentimes, the CV is useful to learn more about what the expert has done and is able to testify to, allowing prosecutors to call this particular expert for more than just outcry or disclosure purposes. For instance, maybe this expert witness has created a tool for preparing children for court or helping them through the criminal justice process. This creates instant credibility in the eyes of the jury and enhances all of the testimony the expert will provide.

[6] See *Lair*, 2013 Tex. App. LEXIS 9906 at *6-*8.

[7] Teena Sorensen and Barbara Snow, How Children Tell: The Process of Disclosure in Child Sexual Abuse, *Child Welfare*, 70(1):3-15 (1991). If you want a copy of this study, feel free to reach out to me at kcomte@brazoscountytx.gov, and I will send it to you.

[8] *Id*.

[9] Ann-Christin Cederborg, Michael E. Lamb and Ola Laurell, Delay of Disclosure, Minimization, and Denial of Abuse When the Evidence is Unambiguous: A Multivictim Case, in Child Sexual Abuse: *Disclosure, Delay, and Denial*, 159-173 (2007).

[10] *Id*.

[11] *Id*.

[12] Sorensen & Snow.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] See *Lair*, 2013 Tex. App. LEXIS 9906 at *8-*11.

[17] Counselors who treat other children as well as child abuse victims may not be as well-versed in the dynamics of child abuse disclosure.

[18] Sorensen & Snow.

[19] Carmit Katz, "Please believe me; I am the biggest liar that exists": Characterizing children's recantations during forensic investigations, *Children and Youth Services Review* 43, 160-166 (2014).

[20] *Id*.

[21] Sorensen & Snow.

[22] *Id*.

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7 simple suggestions for leading in a crisis

A friend at TDCAA thought I could write about leadership in a time of crisis. My first reaction was, "My need to read that article far exceeds my ability to write that article."

By Mike Holley
First Assistant District Attorney in Montgomery County

My second thought was that I might be able to share some suggestions for two reasons. First, I have made many mistakes in leadership—more than most. Second, I have observed several outstanding leaders in times of crisis, and two men in particular stand out in the legal field. With my mistakes and those men in mind, let me offer a few practical suggestions.

Walk around.
There is no substitute for the physical presence of a leader.

I first met then Colonel Clyde Tate in 2005 at his "law firm" in Baghdad, Iraq, in a palace—Saddam Hussein's palace, to specific.[1] Colonel Tate set up his Staff Judge Advocate (SJA) office in Saddam's bedroom, a space of about 5,500 square feet.[2] Lawyers and legal assistants were scattered around the room in a maze-like configuration of moveable partitions and makeshift desks. Colonel Tate had his own enclosed space with a door.

The work at the SJA office was hard, urgent, and stressful. There were significant and random physical threats to the staff. There was a massive flow of information, and much of that information was uncertain or unreliable. Things changed rapidly from day to day—often on the same day. Resources were generally adequate but never abundant.

In other words, it was very much like a Texas prosecutor's office today.

Colonel Tate was the senior military attorney in Iraq at the time.[3] He did many things I seek to emulate now. Perhaps the most important was deceptively simple, namely, that he took the time to walk around the office and speak to everyone who worked for him. These interactions were often only a few minutes long, but they meant the world to his soldiers. These walks encouraged his subordinates, but they also kept Colonel Tate apprised of any number of things—general conditions, unexpected challenges, specific cases, etc. Colonel Tate was extraordinarily busy, but he made the time for these encounters, probably because there was no better way to get a feel for how those under his command were doing than to see it with his own eyes. As someone who benefited from his "walk-arounds," I assure you those moments with Colonel Tate were tremendously important to those who worked for him.

By contrast, another colonel working 20 miles from our office took a drastically different approach. This colonel's charge was to lead soldiers at the infamous Abu Ghraib prison, a place in a constant state of crisis. The colonel, by all accounts, was brilliant. And busy. So busy, he stayed in his office working around the clock. His work was indisputably important, but it occupied him entirely behind a closed door. His subordinates rarely saw him, and he rarely spoke to them.

The results were predictable. His people lost focus, they became confused and discouraged, the mission faltered, and disaster resulted. You can read all about it on Wikipedia.[4] The United States Army would later promote Colonel Tate to the rank of major general. The other colonel's career ended with disciplinary action and deep regret.

In my office, District Attorney Brett Ligon consistently and intentionally does what Colonel Tate did years ago.[5] He walks around. He talks. He jokes. He sits in an office not his own, and he listens. It makes all the difference.

I struggle with this. As I get older, I find myself becoming more introverted. I also find myself "Abu Ghraib"-busy all the time. I can justify why the work on my desk must be done and done right now. I discount physical presence as being too simplistic to make a difference. I can convince myself I'm bothering my people, who are busy themselves. I worry that my interactions will be uncomfortable. (I do not wish to brag, but I have an advanced degree in awkward.) And, as I write this, a pandemic gives me perfect cover to do what I instinctively want to do, which is to stay right here safely at my desk and avoid others.

But those are all just excuses, and I know staying in my office is precisely the wrong approach, especially in times of crisis. So I remind myself, and you, to walk around.[6]

Dispense calm.

Emotions are contagious. Anger and frustration can spread like ... a virus. Fortunately, so can calm.

During times of crisis, ordinarily self-sufficient people find themselves looking to their leaders for reassurance, guidance, and, perhaps most importantly, stability. Their fundamental question to us becomes, "In the midst of this turmoil, what can I expect from you?"

At this precise moment, a leader has to dispense calm. Sometimes this means leaders have to manifest a calm they don't themselves feel. Here is an illustration in the negative: While I was in Iraq, there was an Army officer (a lawyer, sadly) who was in the area of a rocket attack. He was not injured, but he was rattled as a person tends to be rattled after explosives are uncharitably directed one's way. Unfortunately, while still rattled, this officer grabbed a young enlisted soldier by the shoulders, looked him in the eye, and said with all the intensity he could muster, "We aren't going to make it out of here alive!"

The opposite of this encounter is what I'm referring to when I say use the term "calm."

There is some nuance here. Calm does not mean the leader does not take risks seriously. A credible threat to an employee's safety, for example, requires a serious, timely response, but not a panicked one. Equally important, calm does not mean "passive." It does not imply a retreat into inaction. A crisis requires movement and decisions with a sense of urgency. But how do you move with urgency and still be calm? A particular phrase might help here—one I learned years ago on the island of Okinawa, Japan.[7]

At the time, I was (unsuccessfully) representing a soldier at an administrative separations board. During a particularly important moment in the hearing, I was trying to get several documents in order and hand them to various board members while at the same time make some complicated points about the facts and the relevant Army regulations. I was hurried, harried, and not a little panicked, and I was making a mess of it all. I remember my hands visibly shaking and my words running together as I rushed through things. My client, an experienced Special Forces non-commissioned officer, gently laid his hand on my forearm and quietly said, "Slow is smooth; smooth is fast."

Great wisdom can be found in this statement, and I still think about it when I feel like things are stressful. The idea is that if I rush, I will regret it. Instead, I move with deliberation and at a speed that obtains the best outcomes. Calm is a deliberate, smooth, forward movement. Calm is contagious.

Pace yourself.

You can't lead others if you don't first manage yourself.

From time to time, we all need to work around the clock and to do so for an extended time. Some trials are like this. Those situations may require us to surge, staying up late and pushing ourselves beyond our comfort level. A surge, however, is not sustainable. We all have physical, mental, and emotional limits, and we have to manage ourselves to stay within those limits. Failure to do so makes us ineffective, and an ineffective leader can be worse than no leader at all.

Many years ago, when I was a military police officer, I took 20 military policemen and seven heavily armed Humvees to the National Training Center in Fort Irwin, California, for a massive training exercise.[8] A giant "war game," if you will. I was a newly commissioned second lieutenant with little experience, but because of a quirk in the organizational scheme, I did not have anyone to supervise me directly. It did not end well. At one point during the two-week "war," I stayed awake for 3½ days and ate twice. At the end of those 3½ days, I literally could not complete a sentence. My extreme fatigue also caused me to miss a crucial piece of information during a briefing by the brigade commander.[9] Missing the in-

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formation, in turn, caused my platoon to fail at its mission at a critical time during a particular "battle."

If you had asked me why I had not slept for more than three days or why I hadn't taken the time to eat, I would have given you many excuses framed as reasons. Most of my excuses would have leaned on my self-perceived "indispensability" or the urgent "need." The truth is I exceeded my limits—indeed, I did not even recognize I had them—and others suffered for my mistake. Fortunately, this wasn't actual combat.

You would think a lesson so painfully learned—take care of yourself so you don't become non-mission capable—would stay with a person. But just a few weeks ago, I forgot the lesson. During the pandemic and the protests surrounding the death of George Floyd, I found myself working more or less around the clock and not doing the things I should to stay effective, such as exercising, eating well, and resting. In a crucial meeting with other key leaders, I found myself unreasonably impatient, disorganized in my thinking, and unclear in my communications. I did no one any good and made a difficult situation worse. Brett, in a very gracious manner, suggested I take a day off in the middle of the week. The day off made all the difference—a break was exactly what I needed.

Here, then, is our challenge as leaders: Most of the time, we don't have someone to monitor us carefully and to tell us when we should sit out a few plays. Almost always, we have to do this for ourselves. This is especially true during a crisis when everyone else is already fully engaged, and we are most likely to try to surge for an unreasonable time. The first rule of leadership, however, is to manage oneself. Violating this rule generally ends poorly, not just for us but also for the men and women we are privileged to lead. So we have to pace ourselves. As Brett often says, "This is a marathon, not a sprint."

Most of the time, we don't have someone to monitor us carefully and to tell us when we should sit out a few plays. Almost always, we have to do this for ourselves. This is especially true during a crisis when everyone else is already fully engaged, and we are most likely to try to surge for an unreasonable time.

Prioritize mission.

An appeal to the mission focuses and unifies.

I cannot think of a time when our community and our office has been more polarized, both emotionally and philosophically, or more stressed. This is an extraordinarily challenging time. Within a few months, we've been through an impeachment crisis, which flowed into a global pandemic, which is taking place during an economic crash that is occurring at a time of significant civil unrest. (In a sense, we are living through 1974, 1918, 1929, and 1968, respectively, all at once.[10]) And, by the way, none of the other challenges we were dealing with before these events have gone away.

Our office boasts a substantial diversity of experience, background, political philosophy, and personal principles. Our diversity serves us well, and we would not trade it for anything. The same diversity, however, which makes us so effective in service, can create divisions when controversial matters arise, as different groups earnestly and honestly grapple with different issues in different ways. For example, some people within the office have opposing views concerning the government's approach to the pandemic. We have people of goodwill struggling to think through the significant issues connected to current protests. And with a national election around the corner, we have many differing opinions about a whole host of other issues.

Without forgoing the conversations that must take place about all of these and other issues, Brett recognizes that all of our employees share a desire to execute our mission. And so, Brett presses them to do that very thing, making a consistent appeal to that mission. The mission is our shared bond; the mission is our unifying call. The mission provides a firm place to stand when everything else seems to be moving. And the mission is why we are all together in the first place.

Colonel Tate used the same approach when I lost someone close to me in Iraq. My friend's trailer was struck by a rocket a short distance from my own sleeping trailer, and his death was devastating. Without discounting my pain in the least, Colonel Tate helped me channel those emotions to productive, meaningful work. In a way that only someone who truly cares about you can do, Colonel Tate told me I should use my love for my fallen friend to do the best I could by him going forward. I won't ever forget that moment. It was an appropriate appeal to honorable service that allowed me to work through my struggles and my pain. All of us have honorable and important missions, and we can point our people to the mission again and again.

Define reality.

"The first responsibility of a leader is to define reality." —Max Depree.[11]

One of the challenges in a crisis is the rapid flow of changing information. For example, during the recent flurry of county and state orders connected to the pandemic, a fair question posed by our employees and by law enforcement was, "Is it illegal to do X activity *today*?"[12] For those of us who lived through that remarkable time, we will remember that the answer to the question was not always obvious or easily discerned.

Another challenge during times of crisis is the rapid flow of disinformation. This has especially been true in the problems surrounding the pandemic and the protests. A great deal of misinformation and uncertainty abounds.[13] Leaders have a responsibility to sort through the noise. The folks we lead expect help to figure out what is true and what is inaccurate, what is essential and what is irrelevant. To "define reality," as it were. Defining reality requires reading and discernment. I have three suggestions in this regard.

The first is to read from balanced sources. We all have a personal political philosophy, and we all tend to read from sources that mostly agree with our philosophy. This is completely normal human behavior, but it means our reality can get skewed when we don't expose ourselves to the arguments of the other side.

The second suggestion is to read in balanced portions. Of late, I have found myself reading the news in excessive ways, which were neither good for my soul nor the best use of my time. (You can't "walk around" when you are endlessly surfing.) Just as there has to be balance in how much food you eat, there must be a balance in how much information you take in.[14]

The third involves focusing on what is essential to the mission and not merely what is of personal interest. Our people need to be informed about what matters to them and their mission. We go astray, I think, when we lobby them on issues that are highly debatable, excessively contentious, and not needed for their day-to-day work and life. By way of example, spending extensive time arguing why a particular witness in a Supreme Court confirmation hearing should or should not be believed arguably detracts from the mission. On the other hand, explaining why family violence victims are particularly vulnerable during a pandemic would be worthy of our time and theirs.

In sum, we do the hard work of helping our people interpret information in ways that are helpful, necessary, and relevant to the mission. We do not leave them to "figure things out" on their own. After all, they are busy executing the mission for the rest of us.

Communicate relentlessly.

Err on the side of over-communicating. I am confident that I regularly overestimate my ability to communicate effectively, and I strongly suspect I am not alone in this. For many years, one of my grounding trial mantras has been, "The greatest problem with communication is the illusion that it has been accomplished."[15] Put another way: We convince ourselves we've successfully conveyed information, but we have not. This is particularly important during a crisis when the normal, natural hunger for information sharply intensifies. The importance of communicating as much as possible, in as many ways as possible, and as often as possible cannot be overstated.

For many years, one of my grounding trial mantras has been, "The greatest problem with communication is the illusion that it has been accomplished."

Colonel Tate initially taught me this, and I see Brett Ligon practice it consistently. Both men share information freely, value transparency and repeat key messages again and again. Both use a variety of different means (and rarely email!) to get their messages across, and they explain not just what they are doing, but *why* they are doing it. Both listen to learn, not just waiting for their chance to speak, and they ask questions to ensure their messages have been received. Both are masters at communication, and both men communicate relentlessly.

Follow their example. In times of crisis, turn up your communication efforts to 11. You may think you are over-communicating—you aren't.

Trust others.

Let your people run. My friend Kelly Blackburn, an ADA in our office, had to (painfully) remind me of this lesson recently. In a time of crisis, it is a temptation for leaders to put everything on one's back and press forward. The belief is, "Only I can do this." The problem, in leadership or on a hike, is no one gets very far or moves very fast when overloaded. (Incidentally, this is precisely the type of thinking which led to me to stay up for 3½ days in the California desert and crash so spectacularly.)

I understand the strong pull to handle things on your own, especially during a crisis, but it is a mistake—a major mistake. As Kelly reminded me, we spend considerable time hiring good men and women, then we spend significant effort in training them. We then provide them with both

sufficient resources and adequate authority to handle matters of the highest importance. And yet when a crisis comes, the tendency—my tendency anyway—is to try to do it all myself.

This tendency is arrogant and unhelpful. When a crisis comes, I have to trust our people to do the right things and to make the right calls. Of course, they will make mistakes, but mistakes are inevitable when action is required.[16] If we have previously led our people well, they will respond well when it matters most. Let them run.

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Final thoughts

This is a difficult time in our country and our state.[17] We are in the midst of many challenges, and more problems will be coming. There are tremendous opportunities in these times—opportunities to advance the cause of justice in ways most of us never dreamed. But we have to get through them first. As the public servants of our jurisdictions and guardians of our profession, I have no doubt we can endure these challenges. After all, we have done it before. And what did that look like then? How did we survive a crisis in the past? We did it by committing ourselves to honor the rule of law. We did it by reasoning together through a million different complex problems. We did it through faithful, sacrificial service to ourselves and our communities. We did it by guarding our collective integrity, by admitting our mistakes, and by dealing with one another with empathy, humor, and humanity. We have triumphed during past crises—we will overcome the current crises now. In the end, if you are in doubt as to whether I'm right about this, just walk around. Your people are all the proof you need. ❇

Endnotes

[1] Major General (Ret.) Clyde J. Tate, II was the the 19th Deputy Judge Advocate General of the United States Army, https://en.wikipedia.org/wiki/Clyde_J._Tate_II.

[2] This was the Al-Faw Palace, also known as the Water Palace. By coincidence, the size of Saddam's bedroom at 5,500 square feet is also the size of my current bedroom, give or take 5,350 square feet.

[3] Major General (Ret.) Tate served as the Staff Judge Advocate for Multi-National Corps-Iraq (MNCI), https://en.wikipedia.org/wiki/Multi-National_Corps_%E2%80%93_Iraq.

[4] https://en.wikipedia.org/wiki/Abu_Ghraib_torture_and_prisoner_abuse.

[5] Brett W. Ligon is the District Attorney of Montgomery County; he has also served as a jailer in the Montgomery County Sheriff's Office, an Assistant District Attorney in the Harris County District Attorney's Office, and Senior Staff Counsel for the Houston Police Officers' Union. Mr. Ligon is expected to begin his fourth term in January 2021. See also https://mctxdao.org/meet-brett-ligon.

[6] See "A Face-to-Face Request is 34 Times More Successful Than Email," https://hbr.org/2017/04/a-face-to-face-request-is-34-times-more-successful-than-an-email.

[7] You know who else learned something in Okinawa? Daniel Russo, that's who. So, that's right, me and the Karate Kid learned stuff in Okinawa.

[8] The National Training Center, or the NTC, is used by the Army to train large units in a realistic, challenging setting. https://en.wikipedia.org/wiki/Fort_Irwin_National_Training_Center.

[9] General George Casey would later go on to become the 36th Chief of Staff of the United States Army. https://en.wikipedia.org/wiki/George_W._Casey_Jr.

[10] This conceptualization is borrowed from David French in "The Center is Not Holding," The French Press, The Dispatch, 31 May 2020, https://frenchpress.thedispatch.com/p/the-center-is-not-holding. French borrowed this from Michelle Goldberg of the *New York Times* podcast, "The Argument."

[11] I saw this quote in an excellent series of articles about leading through the pandemic. The articles are written in a religious context which may be off-putting to some, but they offer an excellent framework for thinking through the challenges of dealing with a "new" world. Praxis, "Strategies for Winter: Redemptive Leadership in Survival Times," Medium, *The Praxis Journal*, 23 Apr 2020. https://journal.praxislabs.org/strategies-for-winter-redemptive-leadership-in-survival-times-f15a7791035a.

[12] I'm not dreaming, am I? That did happen, right? I recall at one point looking at more than 20 different state, local, and OCA orders, along with a number of relevant statutes to try to determine what was happening. I still don't know.

[13] "Plandemic," anyone?

[14] Quick question: Has anyone else found their clothes inexplicably tighter?

[15] This quote is misattributed to George Bernard Shaw, but he didn't say it–it's true. Here are two mantras: 1) "To see is to understand," and 2) "Passion and prejudice rule the world under the guise of reason." (The second saying I shamelessly stole from Jarvis Parsons and his folks at the Brazos County District Attorney's Office. It perfectly captures this idea that people do what their emotions tell them, then come up with reasons to justify their actions.)

[16] To assume I wouldn't make the same or more serious mistakes is the height of arrogance. I would add that it's axiomatic that when things are difficult, the number of mistakes increase. More grace is needed in these times!

[17] To paraphrase Sheriff Ed Tom Bell from *No Country For Old Men*, "If this ain't a difficult time, it'll do till the difficult times come."

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