

# The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

## Uncovering our own implicit biases

True confession: I have an implicit bias against domestic violence victims.

I have been working on overcoming that unintentional bias since it was pointed out to me back in 1996 when I first started working for TDCAA. While I believe I am now capable of checking my bias (and understanding the ignorance from which it arose), this is something I have to know about myself every day on the job.<sup>1</sup>

My first day as TDCAA’s Research Attorney involved boarding a plane and flying to South Padre Island for the 1996 Annual Update (unquestionably the best-ever start to a job). After our traditional TDCAA staff dinner on Monday night, a collection of us sat on the porch of another staff member’s hotel room to continue chatting.

Earlier in the day, we had seen a newly married couple happily arrive at a nearby room. Their car in the parking lot was still decorated with streamers and “just married” shoe polish on the windows. But later that night, while four or five of us sat on the porch visiting and laughing, we heard screaming and loud thumping sounds coming from their room. We all froze. Someone eventually called the police. We were frightened about getting involved and in disbelief that this was happening to a honeymooning couple on beautiful South Padre Island. The couple had left the hotel by the next morning. The conference went on. And when we staff members talked during the week about what happened that night, it was always with overtones of horror and a lot of disbelief. (“On their *honeymoon*?!”)

The following week at a post-conference staff meeting, executive director Tom Krampitz brought up the incident



**By Diane Beckham**  
*TDCAA Senior Staff Counsel in Austin*

and asked us all to share our feelings about what had happened. At some point during the meeting, I said, “I don’t understand why she just didn’t leave him. I would never let someone hit me and get away with it.”<sup>2</sup>

My beloved officemate, Sarah Buel—a national expert on domestic violence whom we were lucky enough to have on TDCAA staff at the time, and a former victim of domestic violence herself—let me know forcefully that it wasn’t nearly this simple. That the statements I had made about domestic violence dynamics were offensive and came from an ignorance of the complicated issues faced by domestic violence victims.

And she was right. I had never been involved with an abusive partner. I had never been financially dependent on or shared a child or pet or home with a violent partner. I knew nothing about grooming—that the violence rarely starts on date No. 1, or even date No. 5. And while I consider myself an empathetic person generally, I clearly had not ever

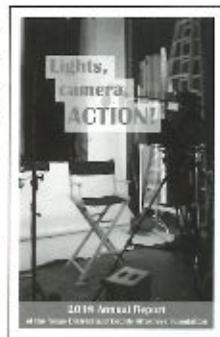
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# The 2018 Annual Report

2018 was a very busy year for the Texas District and County Attorneys Foundation.

The Foundation was created to support the training and assistance mission of TDCAA, and it sure came through! You can read the details in the Foundation's 2018 Annual Report that was released in February—just look for this column on our website, [www.tdcaa.com](http://www.tdcaa.com), to download a PDF.

Significantly, the Foundation continued to support TDCAA's ethics education by assisting in the production of the 2018 online *Brady* training. The project, funded in large part by the Criminal Justice Section of the State Bar and grant funding from the Court of Criminal Appeals, was a huge effort, and the Foundation leadership guaranteed that taking the course would be at no cost to prosecutors. Second, the Prosecutor Management Institute (PMI) honed its presentations and materials and recruited and developed additional trainers. The Institute will schedule a number of trainings in 2019, so keep an eye out!



Finally, the Foundation supported core



**By Rob Kepple**  
*TDCAF and TDCAA Executive Director in Austin*

training programs for TDCAA: the Train the Trainer program, the Advanced Trial Advocacy Course, and our Victim Services Director, **Jalayne Robinson**, who has crisscrossed the state to bring victim services training directly to your offices.

I want to thank the Foundation Board of Trustees for their dedication to improving the profession of prosecution. There is a lot to do in 2019, and the board will be ably led by this year's Chair, **Helen Jackson**. Helen, a former Harris County Assistant District Attorney and a foundation development guru in a past life, will keep us plenty busy! ✨

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# 'How to make NY as progressive on criminal justice as Texas'

Wait—what?! Not used to seeing many positive things about Texas criminal justice in the *New York Times*, I was initially shocked to read the above headline and the article, which you can find here:

<https://www.nytimes.com/2019/01/15/opinion/new-york-texas-criminal-justice.html>. The issue is discovery. You may not know this, but many states, including New York, do not have broad discovery statutes akin to Texas's Michael Morton Act (MMA) that require pre-trial disclosure of offense reports and witness statements. So in an effort to support proposed legislative reforms, the *Times* highlighted the Michael Morton Act as an "industry leader."

Perhaps Texas prosecutors don't spend enough time talking to folks around the country about the programs and policies we are putting in place in discovery, victim services, mental health, drug diversion courts, and conviction integrity. Is it time we invite the *New York Times* down for a visit?

## A reminder about mandatory *Brady* training

Speaking of the Michael Morton Act, just a quick reminder that as a prosecutor you must take mandatory *Brady* training within 180 days of starting work and take a refresher every four years. That free training is available now at [www.tdcaa.com](http://www.tdcaa.com). And a new idea that is catching on: Some prosecutors are asking that their police officers watch the free training to better understand their discovery obligations. Great idea! Officers will not get any continuing education credits, I'm afraid, but I think they would better understand why you are asking for all that stuff from them if they knew more about prosecutors' discovery obligations under the MMA.



**By Rob Kepple**  
*TDCAA Executive Director in Austin*

## A new focus on mental health

Hats off to the folks at the Office of Mental Health Coordination in the Texas Health and Human Services Commission for recently making a bid for a grant to create a Criminal Justice Learning Collaborative, which would be focused on competency to stand trial and competency restoration. That all sounded suitably governmental grant-speak, of course, but the grant would allow the commission to aim resources at developing best practices for competency restoration programs with state and local participants. Indeed, Lubbock County CDA **Sunshine Stanek**, and Tarrant County CDA **Sharen Wilson** are already on board with their local mental health authorities to be part of the project. Good luck, and I'm looking forward to seeing the results of this work.

## Cognitive bias training

I want to thank **Jarvis Parsons** (DA in Brazos County) and **Bill Wirskye** (First Assistant CDA in Collin County) for producing our first training on cognitive and implicit bias at our Prosecutor Trial Skills Course in January. How cognitive and implicit biases impact us as prosecutors is an important topic that has been the focus of attention of our Diversity, Recruitment, and Retention Committee (chaired by **Sharen Wilson**, CDA in Tarrant County). The committee's work led to ground-breaking roundtable discussions moderated by **Jeremy Sylestine** (ADA in Travis County) at the 2018 Annual and Elected Prosecutor Conferences.

Cognitive and implicit biases affect everyone, of course, but as prosecutors and ministers of justice, it is crucial that we are making decisions based on evidence and the circumstances of an individual case. In addition, it is important to understand how implicit bias may impact our office work environments. I am proud that Texas prosecutors are developing training geared toward prosecutors and that we have solid action items and insights into what steps we can take to recognize and guard against these biases. **Diane Beckham**, TDCAA Senior Staff Counsel, is heading this effort, so if your office has instituted policies and practices that address these issues, she would love to hear about it. Just email her at [Diane.Beckham@tdcaa.com](mailto:Diane.Beckham@tdcaa.com).

## Welcome, Will Dixon

The governor has appointed **Will Dixon** as the Navarro County Criminal District Attorney. Will, an assistant CDA in that office, is filling the vacancy left by the late **Lowell Thompson** after Lowell's untimely passing. Good luck, Will! Let us know what we can do to help.

## A Permian problem?

I am happy to welcome **Steve Simonsen** as the new Loving County Attorney. Happy in that as long as I have been at TDCAA (coming up on 29 years!), Loving County has never had a county attorney. That is probably because according to the latest Texas State Directory, it has only 81 residents. As of now, only three very small counties don't have a county attorney—Armstrong, Cottle, and Glasscock.

Here is a problem that Steve has (and I am wondering if this is also a challenge for other prosecutors in the Permian Basin and Eagle Ford shale play): There are thousands of itinerant workers camped out in the county committing crimes, but there aren't any jurors. If that is a problem for you as well as Steve, I'd love to hear about it. Can't say I have a solution, but it seems like a problem that needs to be addressed if it is widespread.

## Thank you, David Hajek

I was saddened to learn of the passing of **David Hajek**. David served as the Baylor County Attorney in the 1980s before becoming a district judge for 20 years. I got to know him when he retired from the bench and became the 50th Judicial District Attorney, serving Baylor County again. David served with distinction on the TDCAA

board of directors, and when he retired, I was surprised to see that he had become the King County Attorney. David's career trajectory always struck me as backwards: being a district judge first, running for district attorney, and then capping off a great career as a county attorney. Isn't it supposed to go the other way?!

Thanks, David, for all you did in a great career of service. It was a pleasure to serve you.

## TDCAA family makes good

It is always gratifying to watch as former TDCAA employees make waves in the world. I can report that two shining stars got their beginnings at our association. First, congratulations to **Dade Phelan**, who has started his third term as a state legislator out of Beaumont and who has just been appointed to his first chairmanship of the influential House State Affairs Committee. You can say, "I know him when ..." because you may have bought a TDCAA book from him back in 1999 and 2000.

Second, congratulations to our former research attorney **Markus Kypreos**, who has suspended his law practice in Fort Worth to start a new venture, Blackland Distillery. You can read about his new business here: [www.fwweekly.com/2019/01/16/blackland-distillery-arrives](http://www.fwweekly.com/2019/01/16/blackland-distillery-arrives). It is a departure from law to be sure, but those of you who know Markus understand that he is a man of many talents—from game show contestant and gambling expert to TV legal commentator and, well, distiller. The stories about Markus are too many and too long for this journal—you will just have to stop by his tap room and ask him yourself!

## What motivates you?

A law professor and prodigious Twitter commentator recently published a law review article titled "Career Motivations for State Prosecutors." (You can read it here: [www.nytimes.com/2019/01/15/opinion/new-york-texas-criminal-justice.html](http://www.nytimes.com/2019/01/15/opinion/new-york-texas-criminal-justice.html).) **Ron Wright** researched and wrote the article to explore who should be working in a prosecutor office if the elected prosecutor is seeking to reform office practices. It is an interesting read for line prosecutors, if only to engage in self-reflection about your motivations for being in the profession. Wright's research identified five motivators: identity (you like being a crime-fighter), trial experience, public service

*Cognitive and implicit biases affect everyone, of course, but as prosecutors and ministers of justice it is crucial that we are making decisions based on evidence and the circumstances of an individual case.*

generally, public service to the defendant, and quality of life. The biggest motivator was public service, and Wright explores an interesting component to that: the notion that prosecutors are motivated not just by a desire to help victims of crime, but also a desire to be fair with respect to the defendant (I'm paraphrasing). Indeed, he notes that "the overall frequency of this narrative contrasts sharply with the common academic assertion that prosecutors rarely display compassion for defendants."

I can't say I am surprised by that twist he didn't see coming. My experience with Texas prosecutors is that first and foremost, you seek justice for victims and citizens, but you spend a good deal of time figuring out (along with the loyal opposition) what is best for the defendant. In other words, you take the job of "minister of justice" to heart. I'm proud to serve you. \*

## Law & Order Award winner



State Rep. Joe Moody (D-El Paso) recently received his TDCAA Law & Order Award for the work he and his staff did last legislative session on criminal justice and public safety legislation. Moody, a former prosecutor who served as chairman of the House Criminal Jurisprudence Committee last session, remains on that committee this session but now also serves as House Speaker Pro Tem. Pictured at the award presentation in the state capitol are (from left to right): Travis County Asst. DA Amy Meredith, TDCAA Executive Director Rob Kepple, State Rep. Joe Moody, Montgomery County Asst. DA Tiana Sanford, TDCAA Director of Governmental Relations Shannon Edmonds, and Tarrant County Asst. CDA Vincent Giardino.

# Starting with the man in the mirror

One of the expressions I have used with young prosecutors in my office is that our job is to be the referee.



By Jarvis Parsons  
District Attorney in Brazos County and TDCAA Board President

Prosecutors "throw the flag" or "make the call" on criminal conduct without regard to who the defendant is or where he comes from. It's something I was taught when I was a young prosecutor.

But I have learned in my 16 years as a prosecutor that we all have lenses through which we see the world. Put another way, we all have biases or prejudices about the world and the people in it. Many times our biases affect the way we "make the call." Whether a defendant gets probation or prison or the length of a prison sentence depends on how the facts look in our eyes. Is the crime something we ourselves could've committed? Are we scared by the defendant's conduct? Do we identify with the victim? What if, at a subconscious level, we are looking at things other than just the facts of a case? And what effect do these biases have on the decisions we make?

In this issue of the journal, we are speaking about bias from different perspectives. Bill Wirsky, First Assistant Criminal District Attorney in Collin County, and Diane Beckham, TDCAA's Senior Staff Counsel, have written about their journeys in dealing with their biases, and I am addressing it too. Why are we writing about this topic? Because with great power comes great responsibility. Prosecutors should not only recognize the power we have, but we must also wield that power effectively. To accomplish the mission of justice, we must know the traps and pitfalls that can so easily beset us. This article will highlight the issue of bias, look at the research on it, and—I hope—start the conversation about strategies to decrease bias in our decision-making.

### What is bias?

A bias is simply an inclination or prejudice for or against one person or group. Some biases are completely legitimate. Rooting for your chosen team to win is a situation where having a bias is a good thing. (I'm pretty sure all Texas Aggie fans who are reading this agree with that statement.) This is called conscious or explicit bias.

Another type of bias is just starting to come to light as a pervasive force in our world; it's

called implicit bias. Implicit biases are "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner." These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.<sup>1</sup> These biases are formed when we are very young and are shaped by our life experiences, what we are taught, and the media, along with a variety of other influences.

Unlike explicit bias, implicit bias operates beneath the surface, informing and shaping our decisions and judgments in ways that we often can't detect. These views often defy our conscious awareness and self-reported value systems. Because we don't leave our biases at home when we come to the courthouse, this type of bias can invade and infect our thinking when it comes to handling cases in the criminal justice system. For purposes of this article I am going to focus on one: implicit racial bias.<sup>2</sup>

But before we get too far into this topic, I want to include a couple of caveats. First, my goal in tackling this tough subject is not to sound like I have it all together as a prosecutor. I don't, as you will read later. My purpose is to shed light on something that can lead to injustice in our communities and that can hamper our ability to fulfill our duty "to see that justice is done."<sup>3</sup> Second, this is a marathon, not a sprint. The issues we are addressing will take time to work through, and this is the beginning a long conversation, not the end.

From young to old, male to female, black to white, and conservative to liberal, implicit biases are not held by a select few but are readily observed among all social groups.

### Reading the research

Since the late 1990s, a vast amount of research on implicit bias has demonstrated that a majority of Americans harbor negative implicit attitudes toward African-Americans and other socially disadvantaged groups.<sup>4</sup> A study published in 2017 showed that people judge identically sized African-American and white men differently, with African-American men seen as larger, stronger, and more apt to cause harm in an altercation.<sup>5</sup> Additionally, people are more likely to remember hostile details about African-Americans than Caucasians, sometimes even wrongly recalling hostile details of incidents involving African-Americans.<sup>6</sup> In one study, mock jurors who were told the facts of an aggravated robbery found the same evidence presented to them more indicative of guilt when the defendant was a darker-skinned person than mock jurors who saw a photo of a lighter-skinned person with the exact same evidence.<sup>7</sup>

Now I assume the individuals in these studies are well-meaning people. In my opinion, most people don't walk around saying, "Today I want to be a racist person." (If this is you, then you can stop reading now.) In fact, in many of these studies the subjects expressed, either before or after the actual experiment, *explicit* attitudes of racial equality. However, over and over again, individuals who don't know each other and from all races and backgrounds are shown to harbor *implicit* biases that could affect how we see people in the criminal justice system.

The effects of implicit bias on lawyers specifically has also been subject of study. In 2014, researchers explored racial and confirmation bias by creating an experiment geared toward partners in law firms.<sup>8</sup> Researchers drafted a memo for a hypothetical third-year law student applying for employment in a firm. In the memo, researchers deliberately inserted 22 writing and analytical errors.<sup>9</sup> The memo was then given to 60 partners at 22 law firms, who were told they were participating in a "writing analysis study." (It's important to note that the individuals who evaluated the writing samples were a diverse mix of men, women, Caucasians, and some racial/ethnic minorities.) While all of the partners received the same memo, half the partners received a note stating that the applicant was African-American while a note to the other half said the applicant was white. The results showed that across the

spectrum, the attorneys evaluated the exact same memo—which was purported to have been written by an African-American and a white lawyer—differently, finding more of the errors in the African-American's memo than his white counterpart.<sup>10</sup> Additionally, the law firm partners ranked the writing ability of the African-American lawyer lower than the writing ability of the white lawyer for the same writing sample.

Dr. Arin Reeves, in diagnosing the implicit racial and confirmation bias in this experiment, put it best when she said:

When partners say that they are evaluating assignments without bias, they are probably right in believing that there is no bias in the *assessment* of the errors found; however, if there is bias in the *finding* of the errors, even a fair final analysis cannot, and will not, result in a fair result.<sup>11</sup>

To reiterate, these are tons of studies that reach the exact same conclusions about our racial biases, whether it be in healthcare, education, judges, jurors, etc. Implicit racial bias is pervasive and insidious. From young to old, male to female, black to white, and conservative to liberal, implicit biases are not held by a select few but are readily observed among all social groups. No one is exempt, including me.

I am subject to the same implicit biases that I just outlined above. About 18 months ago, I first heard about implicit bias and decided to look into it.<sup>12</sup> I found an instrument called the Implicit Association Test (IAT), which anyone can take online (<https://implicit.harvard.edu/implicit>).<sup>13</sup> It gauges whether someone has implicit bias in one or more areas (race, gender, etc.). The IAT measures the strength of associations between concepts (e.g., black people and white people) and evaluations (e.g., good or bad) or stereotypes (e.g., athletic or clumsy).

When I took the IAT, I was surprised by my results, which showed I had a slight preference for whites over African-Americans. It hit me like a ton of bricks.<sup>14</sup> When I reveal my test results to others, most of them look very surprised—they assume that my preference would be different. Interestingly, research shows that my score isn't unusual compared with other African-Americans. In fact, in a study of more than 600,000 implicit association tests, African-Americans showed a slight implicit bias toward whites.<sup>15</sup> Re-

searchers posit that this is a result of the broader culture's impact on our internal preferences, which has been known for decades.

In *Brown v. Board of Education*,<sup>16</sup> for example, the plaintiff's attorneys used psychological research and experiments to look at the impact of segregation on black and white children. In what has been aptly named "The Doll Test,"<sup>17</sup> black children ages 3 to 7 were shown four dolls: two with white skin and yellow hair and two with brown skin and black hair. Each student was asked to identify the race of the doll and which one they preferred to play with. The children were asked questions such as: "Which doll is the good doll? Which doll is the smart doll? Which one is the pretty doll?" The majority of the black students preferred the white doll, assigning positive traits to it. Most of the children discarded the brown doll with black hair, assigning it negative traits. The psychologists concluded that black children formed a racial identity by the age of 3 and attached negative traits to their own identity, which were perpetuated by segregation and prejudice.

This test's conclusions from more than 60 years ago mirrored the findings we see today: African-Americans' own implicit biases *against other African-Americans* reveal the influence of the negative attitudes held by the culture at large toward this group, and those implicit biases, left uninspected, can still lead to unjust outcomes.

My purpose in discussing this research and revealing what I would consider personal details about myself will, I'm hoping, make it OK to start having the uncomfortable but necessary talks in our offices about how bias affects us as prosecutors.

### Why does it matter?

Why should it matter for me or any other prosecutor to inspect our implicit biases? Because prosecutors are afforded an enormous amount of discretion at every level in the criminal justice system.

- Should a person be charged with a crime?
- What type of bond should be set?
- Should I ask for a higher bond?
- Should I dismiss the charges?
- What plea should I offer?
- Do I believe a particular person is violent?
- What sentence do I ask for from a jury?
- Do I feel comfortable putting a particular person on my jury?

These discretionary decisions allow us to become the most powerful actors in the criminal justice system. But as I said earlier—and it bears repeating—with great power comes great responsibility. Prosecutors don't have the luxury of turning a blind eye to implicit bias because it can be a silent driver of our decisions of punishment and mercy. As public servants, we are called to a higher standard, and that standard compels us to be humble, realize our shortcomings, and see that justice is done.

So how do we overcome implicit bias? The truth is that our biases are formed over a lifetime of interactions, and it's next to impossible to eliminate these biases entirely. But we can start using strategies to attack them.

### Strategy One: Raising awareness

Experts who study implicit bias generally agree that awareness of the existence of implicit bias is an important first step in reducing bias. One way to raise awareness is to simply inform people about its existence (e.g., this article). Workshops on implicit bias have become more common in businesses, higher education, police departments, and other enterprises.<sup>18</sup> Learning about these issues helps to decrease our bias by making us deal with the issue head-on and become more sensitized to when bias may be playing a role in our decision-making.

Well-intentioned people can overcome automatic or implicit biases when they are made aware of stereotypes and biases they hold, have the capacity to self-correct, and are motivated to do so.<sup>19</sup> There are literally thousands of articles about implicit bias online and nearly as many books. As for myself, after taking the online IAT test, I had Bill Wirskye, First Assistant Criminal District Attorney in Collin County, come do a talk in my office on cognitive and implicit bias. I also read the book *Blindspot: Hidden Biases of Good People*, by Mahzarin R. Banaji and Anthony G. Greenwald. Seeing my own biases and learning how they can affect my decisions have made me want to learn more how bias affects prosecutors in all areas.

TDCAA is also taking on the challenge of creating awareness among its ranks. At the Prosecu-

African Americans' own implicit biases against other African Americans reveal the influence of the negative attitudes held by the culture at large toward this group, and those implicit biases, left uninspected, can still lead to unjust outcomes.

One way to incorporate blinding is when you are looking at résumés for a new hire: Ask your secretary to redact the name at the top so you see just the résumé and cover letter. Similarly, you can remove mugshots from folders and race identifiers from lists in your office.

tor Trials Skills Course in January, Bill Wirsky and I spoke on cognitive and implicit biases. (There's a photo of us below at the conference.) We will also have presentations on this subject at TDCAA's Domestic Violence Seminar in April, Annual Criminal & Civil Law Update in September, and Elected Prosecutor Conference in December. We feel this topic is important for everyone in prosecutor offices: attorneys, investigators, and office staff.



### Strategy Two: Blinding the bias

If we understand that biases affect us at a subconscious level, we may solve for it with something called blinding. Blinding means removing any indicators of race from the information you're working from so they don't become a factor in decision-making. Police have employed blinding in eyewitness lineups, for example, and I believe a form of it can be used in prosecution to decrease our own implicit bias. One way to incorporate blinding is when you are looking at résumés for a new hire: Ask your secretary to redact the name at the top so you see just the résumé and cover letter. Similarly, you can remove mugshots from folders and race identifiers from lists in your office. These are simple yet effective ways to safeguard against implicit biases that may be playing a role in your decision-making.

Blinding has also been used to decrease gender bias in orchestras. Before 1970, the top five orchestras in the U.S. had fewer than 5 percent women players. In the 1970s and '80s, orchestras began holding blind auditions, where candidates

are situated behind a screen to play for a jury who cannot see them. In some orchestras, blind auditions are used just for the preliminary selection, while others are employed until a hiring decision is made. Even when the screen is used only for the preliminary round, blind auditions have had a powerful impact: Researchers have determined that this step alone makes it 50 percent more likely that a woman will advance to the finals. It's also been shown that the screen has produced a surge in the number of women being offered positions on the orchestra.<sup>20</sup>

This empirically proven procedure has even found its way onto the hit TV show "The Voice," where judges can only hear a singer's voice (and not see his or her race or physical appearance) and must decide if that candidate is worthy of their team based on voice alone. (It just happens to be my daughter's favorite TV show.)

### Strategy Three: Outsmarting the bias

One of the premises of implicit bias is that it happens at a subconscious level. You don't know you're doing it. If we *all* have bias, then we can outsmart implicit bias by bringing other people into our decision-making, from pre-trial strategy sessions to the prosecution of cases (and everything in between). This team concept aids not only in bringing good ideas to the table but it also exposes bad ideas and biases. It is important to involve as many people as possible in the strategy session. Others can spot our biases in a way that we ourselves cannot see.

Such a team approach has worked wonders in our office. (Read all about it here: <https://www.tdcaa.com/journal/stop-collaborate-and-listen>.) It doesn't solve every problem, but putting a diverse group of prosecutors, investigators, victim assistance coordinators, and key personnel—men and women, seasoned and newer, of all races, ethnicities, and backgrounds—in a room to talk about the cases makes implicit biases rise to the surface so they can be challenged. We also see powerful concepts and ideas rise to the top: Our best closing arguments, opening statements, and witness orders come when we all get in the room and determine what is the best way to present a case, as opposed to doing things "our own" way. Sometimes the process is exhausting, but in the end it's always worth it.

### Conclusion

My first boss, Bill Turner, told me I would learn all the skills I needed to be a prosecutor in about

five years. After that, I would realize that you won't become a better prosecutor until you become a better person. We get the privilege of being prosecutors, and good prosecutors don't hide from issues—we face them head on. I want to be a better prosecutor. I've started my journey by looking first at the man in the mirror because I believe our community deserves the best from us. I hope you will join me in this journey. ✨

### Endnotes

<sup>1</sup> See Cheryl Staats, Kelly Capatosto, Robin A. Wright, & Danya Contractor, *State of the Science: Implicit Bias Review* 2015, p. 62, available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf>.

<sup>2</sup> There are many articles that speak to biases in regard to gender, weight, sexual orientation, etc., and those biases have their own unique issues and concerns. I would not be able to give those issues the focus and detail they deserve by putting them all together in one article.

<sup>3</sup> "It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." Tex. Code Crim. Proc. Art. 2.01.

<sup>4</sup> See, for example, Robert J. Smith & Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," 35 *Seattle U.L. Rev.* 795 (2012), available at <https://digitalcommons.law.seattleu.edu/sulr/vol35/iss3/9/>. Some of these views associate women with family, men with the workplace, Asian-Americans with foreigners, and more. Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, "Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site," *Group Dynamics: Theory, Research, and Practice*, Vol. 6(1), 2002, pp.101-102 (reporting results from 600,000 Implicit Association Tests), available at <https://www.projectimplicit.net/nosek/iat/harvesting.GroupDynamics.pdf>.

<sup>5</sup> John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, "Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat," *Journal of Personality and Social Psychology*, Vol. 113(1), July 2017.

<sup>6</sup> Justin D. Levinson, "Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering," 57 *Duke*

*L.J.* 345-424 (2007), available at <https://scholarship.law.duke.edu/dlj/vol57/iss2/2>.

<sup>7</sup> Justin D. Levinson & Danielle Young, "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," 112 *W. Va. L. Rev.*, 307-350 (2010), available at <https://ssrn.com/abstract=1601615>.

<sup>8</sup> Arin N. Reeves, "Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills," *Nextions*, Apr. 2014, available at <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

<sup>9</sup> Seven errors were minor spelling and grammar mistakes, six were substantive technical-writing errors, five were errors of fact, and four were errors in the analysis of the facts.

<sup>10</sup> The overall rating system for the experiment was 1 to 5, with "1" indicating the memo was extremely poorly written and "5" indicating the memo was extremely well-written. The exact same memo submitted by the "African American" scored 3.2 out of 5 as opposed to a 4.1 out of 5 submitted by the "Caucasian American."

<sup>11</sup> *Ibid.*, 5 (emphasis added).

<sup>12</sup> My wife used to be a high school debate coach. One of her former students wrote a law review article that mentioned the term implicit bias and the implicit association test.

<sup>13</sup> Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, "Measuring Individual Differences in Implicit Cognition: The Implicit Association Test," *Journal of Personality and Social Psychology*, 1998, Vol. 74(6), 1464-1480.

<sup>14</sup> I would've guessed that I had no preference or a preference of African-Americans over whites. I then started to think about my history and how I grew up: who my neighbors were, what I watched on television, and the like. I was raised in an almost all-white neighborhood, and I went to private school for eight years where most of the time I was the only black kid in class. During my most formative years, the kids I hung out with at school, my teachers, and my neighbors were all white.

*Continued in the pink box on page 13*

If we all have bias, then we can outsmart implicit bias by bringing other people into our decision-making, from pre-trial strategy sessions to the prosecution of cases (and everything in between).

# Now is the time to talk about implicit bias and race

Implicit bias is tough for prosecutors to talk about, probably because it's wrapped up in the issue of race.

For me at least, the topic of race has long been too sensitive to write about or discuss openly.

But recently I have sensed a change both within me and within our profession, so even though this discussion may be long overdue, I think it's time for us to frankly talk about implicit bias and race, how it can affect the decisions we prosecutors make every day, and how it can affect the public's perception of us.

I know my reluctance to talk about race stems from my time as a prosecutor in the Dallas County Criminal District Attorney's Office. The 12 years I spent there were a dizzying exposure to the good, bad, and ugly of how race and prosecution can intersect. When I joined the office in 1994, my teammates were a fairly motley group of prosecutors (by 1990s standards at least), and we worked in a courthouse that was considered very diverse. Despite this diversity, many in our community believed that we were racists and that we perpetuated a two-tier system of justice—one for white defendants and another for everyone else. While I bristled at the charge of racism, I couldn't help but notice just how many young black males we were sending to prison.

I also learned very quickly that every time I struck a minority juror from a panel, I was going to get *Batson*-ed by the defense. Although this rankled me, I kept my anger and my opinions to myself. My anger subsided some when I found a 1977 voir dire manual in an old file cabinet that explicitly recommended striking all minority jurors. I saw in black and white, on the printed page, what we would now call explicit bias. I was just beginning to understand why some in the defense bar—and the community—were skeptical of our motives.

And when the Dallas DNA exonerations came to light, many of them involving a large number of wrongly convicted African-American



**By Bill Wirskye**  
*First Assistant Criminal District Attorney in Collin County*

men, it seemed to me that the issue of race in prosecution was too dangerous for me to discuss openly. My survival strategy became one of trying to treat everyone equally while simultaneously avoiding any discussion of race or racism.

So I kept my head down and my mouth shut.

But that all changed recently, and this article is proof. Over the last few years, it's been increasingly clear to me that certain segments of our society don't trust prosecutors to do justice in a colorblind fashion. Because I care about our profession and because I care about being the best and fairest prosecutor I can be, I've finally decided to talk openly about the issue of race and prosecution. While I don't profess to have all the answers about implicit bias and race, I believe that these topics must be confronted on both a personal level, by each and every prosecutor, and by the profession as a whole.

On a personal level, we must each check ourselves for any hidden biases we might possess. This process will inevitably make each of us better by giving us the confidence to make solid, unbiased prosecutorial decisions, and to be better teammates to our minority colleagues.

As a profession, we must transparently answer tough questions about our past and current practices. Did we have explicitly racist prosecution policies in the past? Are we now unwittingly perpetuating the disproportionate incarceration of minorities? I don't really know. But by having

the courage to try and answer tough questions like this, we prosecutors can gain—or regain—the trust of all the communities we serve.

Some of us in leadership positions around the state have begun asking the tough questions and having frank conversations about race. We are learning much about ourselves, each other, and our profession. My tactic of "head down, mouth shut" will no longer suffice. We must listen to our critics, actively address the difficult issues, and wring whatever lessons we can from the process. It is sometimes painful, but it's also absolutely necessary. Both individually and as a profession, we must be prepared to confront our past so that we can confidently face our future.

Under the leadership of TDCAA, it seems that Texas prosecutors are finally ready to train on and talk about implicit bias. I've always believed that no one can train Texas prosecutors better than Texas prosecutors, and this sensitive subject is no exception. So along with TDCAA President Jarvis Parsons, TDCAA Training Committee Chair Tiana Sanford, and Diane Beckham and Rob Kepple from the Association, I'm happy to finally be joining the discussion on race and prosecution. ✱

<sup>16</sup> See Nosek et al supra note 4, pg. 112: "Black Americans ... do not show positive implicit in-group effects. Instead their own implicit attitudes reveal the influence of the negative attitudes held by the culture toward those groups. Although the exact origins of all forms of attitude and beliefs are not known, we regard implicit attitudes to reveal the deep influence of the immediate environment and the broader culture on internalized preferences and beliefs."

<sup>15</sup> 347 U.S. 483 (1954) (*Brown I*).

<sup>17</sup> K.B. Clark, "Effect of Prejudice and Discrimination on Personality Development" (Midcentury White House Conference on Children and Youth, 1950). Their work is cited in footnote 11 of *Brown I*.

# Tree of Angels celebrations

Over the past 27 years, hosting a Tree of Angels has become a memorable tradition observed in communities throughout Texas.

The Tree of Angels program helps communities recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime.

During the week of December 2-8, 2018, Tree of Angels events were held to honor surviving victims of violent crime and their families. Community ceremonies where loved ones brought an angel ornament to place on a special Christmas tree were held throughout Texas, and TDCAA would like to share photos from a few of these events.

If you are interested in hosting a 2019 Tree of Angels event in your community, a how-to guide is available from Licia Edwards at 512/837-PAVC or pavc@peopleagainstviolenterime.org. Please note the Tree of Angels is a registered trademark of People Against Violent Crime (PAVC), a group committed to sustaining the original meaning and purpose of the Tree of Angels. For this reason, PAVC asks that you complete the information form on the website to receive the how-to guide. After the form is completed electronically and submitted to PAVC, you will receive instructions on how to download the guide. PAVC asks that you do not share the electronic document to avoid unauthorized use or distribution of the material.

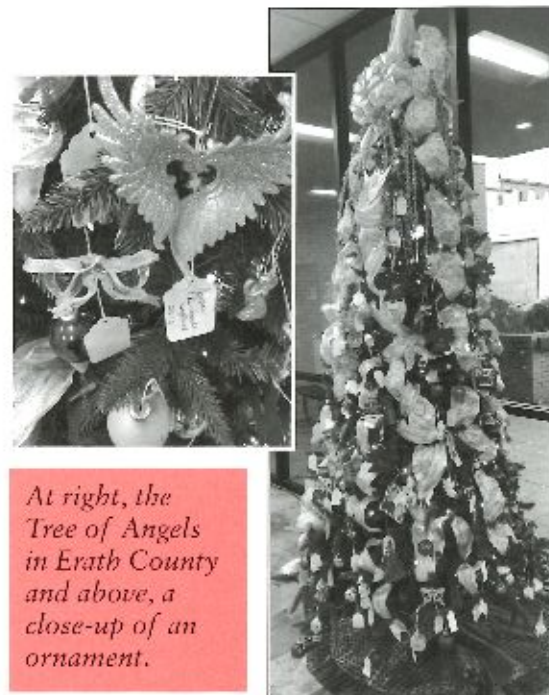
## Laurie Gillispie VAC in the Erath County DA's Office

During our Tree of Angels ceremony, our guest speaker was Jamie Richards-Hogland, a young Tarleton State University student who was shot in her apartment on December 11, 2017, by Shawn Patrick Layton. Layton thought he was at his drug dealer's apartment, which was the next building over. As soon as Jamie opened the door, she was shot in the face and left lying in her doorway for

At right are Jessica Hogland (standing) and Jamie Richards-Hogland (seated on the right). Jamie was the guest speaker at Erath County's Tree of Angels ceremony.



By Jalayne Robinson, LMSW  
TDCAA Victims Services Director



At right, the Tree of Angels in Erath County and above, a close-up of an ornament.



several hours until neighbors heard her moaning. She is now paralyzed from the neck down. Layton was found guilty by a jury on October 11, 2018, and was sentenced to the maximum of 20 years in prison.

## Erica Craig, MA VAC in the Dallas County CDA's Office



Above are Erica Craig (left), Dallas County DA Juvenile Division VAC, and June Mitchell (right), Secretary. Below are the Dallas County Tree of Angels and the program for the event (inset).



## Tracy Viladevall VAC in the McLennan County CDA's Office



Above, a child placing an ornament on the Tree of Angels in McLennan County, and at left, a close-up of that ornament.



## Dana Bettger VAC in the Bell County DA's Office

This was our 15th Annual Tree of Angels event in Bell County, and it was a great success. Many families attended and lots of community participation, from the Honor Guard to TAPS.

Below, the Bell County Tree of Angels gathering.





*I can honestly say The Amendment movie adequately reflects the many stages a crime victim faces during the aftermath of a violent crime and how after something like this happens, families face years of interaction with the criminal justice system.*

### New judgment forms

The Office of Court Administration (OCA) has recently updated its standardized felony judgment forms, instructions, affirmative orders, and special findings, all of which can be found at [www.txcourts.gov/rules-forms/forms](http://www.txcourts.gov/rules-forms/forms). The revised forms became effective on January 1, 2019.

I was delighted to see how the following question is pre-printed on the judgment: "Was the victim impact statement returned to the attorney representing the State? (circle yes or no)"

Historically statewide, it has been challenging for Victim Impact Statements (VISs) to be routed properly through the criminal justice process. A VIS returned to a prosecutor's office by a crime victim may erroneously never be forwarded to community supervision (probation) or to the Texas Department of Criminal Justice.

I hope that having this question on the standardized judgment forms will create another VIS checkpoint in local criminal justice systems, that will cause paralegals or other staff typing judgments to collaborate with VACs to find out whether a VIS has been returned. If a VIS has been returned, it can then be routed to the person responsible for compiling the penitentiary packet, who would then attach the VIS to the offender's commitment papers to be included in the pen packet that is sent to TDCJ (per the Texas Code of Criminal Procedure Arts. 56.03, 56.04, and 42.09). If a form hasn't been returned, prosecutor staff can then make another effort to reach out to the victim(s) in the case to request the return of the form.

If you are a VAC, please collaborate with those in your county who type judgments and with those who compile penitentiary packets to ensure the VISs are being recognized, received, and routed appropriately.

### The Amendment movie

In April 2018, I was informed of the release of a movie called *The Amendment*, which is based on a very tragic true story, a 1979 home invasion in Oklahoma where two teenagers, Brooks and Leslie Douglass, lost both of their parents during a very violent crime. The movie reflects how Brooks Douglass went on to become Oklahoma's youngest state senator and how he fought to change the state's crime victims' rights legislation.

Being very interested, I quickly secured my ticket because the movie would be in theaters for just one day, April 12. As I watched the movie, I reflected on my career as a victim assistance coordinator (VAC) for a criminal district attorney's office and how I had worked with so many families much like the Douglasses—families who are trying to pick up the pieces of their lives after going through horrific circumstances, circumstances no one expects to face during their lifetime. I can honestly say this movie adequately reflects the many stages a crime victim faces during the aftermath of a violent crime and how after something like this happens, families face years of interaction with the criminal justice system. This movie speaks to your heart on the loss Brooks and Leslie Douglass experienced, their victimization, their struggle and fight for justice, and their desire to remain involved in their perpetrators' case for years and years during the criminal justice process. I truly admire Brooks Douglass for sharing his story and for his persistence in seeking justice for his family and for future crime victims in Oklahoma.

*The Amendment* features actors Mike Vogel and Taryn Manning, and in his film debut, Brooks Douglass plays tribute to his late father by portraying him in the movie. It's really a must-see for VACs and other staff who work with victims of violent crime.

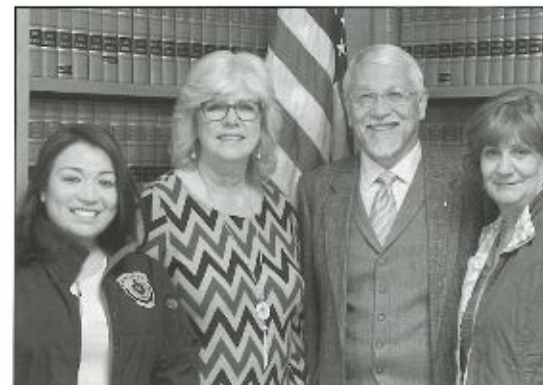
A DVD of the movie is available online at [www.theamendmentmovie.com](http://www.theamendmentmovie.com).

### In-office visits

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

Recently, my travels have taken me to Kerr, Gregg, Matagorda, and Victoria Counties—see the photos from my visits on the opposite page. Thank you to all of the offices that hosted me!

If your office would like to schedule a visit, please e-mail me at [Jalaync.Robinson@tdcaa.com](mailto:Jalaync.Robinson@tdcaa.com). I am available for inquiries, support, in-office consultations, group presentations, or training for brand-new VACs in your office. ❄



**CLOCKWISE FROM TOP LEFT:** In Kerr County (left to right) are VACs Carole Machetta and Pam Peter; in the Gregg County CDA's Office (left to right): VAC Tammy Loggins, Family Violence Legal Assistant Laura Lara, and Director of Victim Services Karen Bertoni; in the Victoria County CDA's Office (left to right) are VAC Gwendolyn Sanford, TDCAA Director of Victim Services Jalayne Robinson, CDA Constance Filley Johnson, and VAC Amanda Roessler; and in the Matagorda County DA's Office (left to right) are DA Investigator Ashley Orta, TDCAA Director of Victim Services Jalayne Robinson; DA Steven Reis, and Investigator Jeannette Bell. Not pictured is VAC Shelby Baker.

# Real-time cell phone tracking in statutory and constitutional law

Cell phones have become one of the most important sources of evidence today.

Not only can they contain valuable information, but also people carry their phones with them everywhere. Being able to track a cell phone's location can mean placing the defendant at the scene of the crime or finding a suspect on the run. But both state and federal law have their own series of requirements for tracking cell phone locations that can be a minefield for the unwary.

In *Sims v. State*, the Court of Criminal Appeals took up two important issues on cell phone tracking: 1) whether exclusion of evidence is a remedy for not following state and federal statutes on cell phone tracking and 2) whether the Fourth Amendment requires a warrant for cell phone tracking.

## *Sims v. State*<sup>1</sup>

Sims's grandmother was found dead on her back porch, shot once in the back of the head. Her Toyota Highlander, purse, and two handguns were missing. One of her credit cards had been used three times since the murder, including at a Walmart in Oklahoma. Surveillance footage showed that Sims and his girlfriend had used the stolen credit card and left in a Highlander.

The police decided to ping the suspects' phones to try to locate them faster. Instead of getting a warrant, they filled out Verizon's "Emergency Situation Form." Verizon provided ping information showing that the phone was at a truck stop along the Indian Nation Turnpike in Oklahoma. Sims and his girlfriend were found at a motel across the road, along with a loaded gun, a bloody towel, and other evidence.

## Stored Communications Act and Art. 18.21

Sims tried to suppress the evidence at trial because Verizon's Emergency Situation Form did not meet the requirements of either the federal Stored Communications Act<sup>2</sup> or Art. 18.21 of the Texas Code of Criminal Procedure. Both statutes deal with accessing electronically stored data,



By Andrea L. Westerfeld  
Assistant County & District Attorney in Ellis County

such as cell phone location information. The Court of Criminal Appeals (CCA) presumed that the State violated the statutes, but the question was whether the evidence should be excluded.<sup>3</sup>

Ordinarily, any evidence obtained in violation of a state or federal law is excluded under Art. 38.23 of the Texas Code of Criminal Procedure. But both the Stored Communications Act and Art. 18.21 contain exclusivity clauses, stating that the only remedies for violating the acts are those listed in the statutes themselves.<sup>4</sup> Sims argued that the clauses were not specific enough because they did not specifically exclude a statutory remedy.<sup>5</sup> But the CCA found that an exclusivity clause does not have to be that specific. There would be no practical way for a statute to list every possible federal and state remedy and then exclude it. Rather, the general statements that only the remedies in the statute are available for violations is enough.

Sims also argued that CCP Art. 38.23 should control because it is the more expansive statute, but the rules of code construction dictate that the more specific statute controls over the general.<sup>6</sup> Both the Stored Communication Act and Art. 18.21 are more specific statutes, and they were enacted *after* Article 38.23 was passed. That means their specific rules are considered exceptions to Art. 38.23's more general rule of exclusion.

Therefore, even if the State did violate both statutes, the evidence does not have to be ex-

cluded under either the Stored Communications Act or CCP Art. 18.21.

## Fourth Amendment

Even though the Stored Communications Act and Art. 18.21 did not require the evidence to be excluded, Sims argued that the cell phone tracking was generally unconstitutional and should still be excluded. The lower court of appeals ruled that Sims had no expectation of privacy in the records because a person does not have an expectation of privacy when he is in a public place.<sup>7</sup>

The CCA reviewed the U.S. Supreme Court's sometimes contradictory caselaw. In *Knotts*, a 1983 decision, the Supreme Court concluded that a person did not have an expectation of privacy in his movements in public areas after the police placed a tracker in a vat of chemicals used to manufacture methamphetamine.<sup>8</sup> The Court concluded that there was no expectation of privacy because the defendant's movements were "voluntarily conveyed to anyone who chose to look." But importantly, it reserved the question for whether a different principle might apply if 24-hour surveillance became possible.

The future contemplated in *Knotts* has become possible, so the Supreme Court re-examined current technology in *Carpenter*,<sup>9</sup> where the FBI had remotely monitored the defendant's car for 28 days. The Court developed the "mosaic theory," determining that long-term GPS monitoring could reveal not only a person's physical location but also a snapshot of "familial, political, professional, religious, and sexual associations" that would affect the expectation of privacy. Also, the Court concluded that the traditional third-party doctrine—that there is no expectation of privacy in evidence voluntarily turned over to a third party—did not apply because cell phone location records are not intentionally handed over to cell phone providers.

The CCA determined that *Carpenter*, not *Knotts*, applied in *Sims*.<sup>10</sup> Neither the third-party doctrine nor the public-place doctrine prevented Sims from having an expectation of privacy in his cell phone location information. Instead, the question centers on whether the police obtained "enough" information under the mosaic theory to violate a reasonable expectation of privacy. The Court provided no clear answer for when "enough" information is found for a privacy violation, but the Court of Criminal Appeals concluded that Sims did not reach this threshold.<sup>11</sup> The police pinged Sims's phone fewer than five

times total, which was not enough to reach into the "privacies of his life" and so did not violate a reasonable expectation of privacy. Thus, the cell phone tracking did not violate the Fourth Amendment, and the CCA upheld Sims's conviction.

Also note that the CCA did not address the State's argument in *Sims* that exigent circumstances justified the warrantless seizure of the cell phone location information. In a case where an ongoing emergency necessitates quick access to information from a cell phone, officers and prosecutors should be sure to justify any warrantless seizure of this type of information by explanation of all the facts that established an emergency that precluded them from getting a warrant.

## Going forward

What does *Sims* mean for prosecutors? The best way to get cell phone location information is always a warrant. However, *Sims* does give some protection if a warrant was not or could not be obtained. First, its SCA/Art.18.21 holding takes a big weight off our shoulders. Defense attorneys have been raising these claims more often, and that forced prosecutors to fight the war on two fronts. Now we can focus solely on the constitutional arguments.

The expectation of privacy holding is not groundbreaking. It is simply an application of the Supreme Court's recent *Carpenter* decision, and prosecutors should watch the U.S. Supreme Court to make sure that in future cases, the justices agree with the way the CCA has read *Carpenter*. But it is still good to have the CCA's interpretation of the matter. It reinforced that each decision has to be on a case-by-case basis—there is no bright-line rule that all tracking under a certain number of days is acceptable. Rather, the court has to consider all the factors, such as how long the tracking lasted, the number of pings involved, and what type of information was retrieved. A search solely to find a suspect on the run from a recent offense does not have the same impact on privacy as a longer-term surveillance that shows the suspect going to friends' houses, churches, or his mistress's place. It is important to lay out all the factors in a case that make it less of an invasion of privacy and more a matter of public concern. \*

A search solely to find a suspect on the run from a recent offense does not have the same impact on privacy as a longer-term surveillance that shows the suspect going to friends' houses, churches, or his mistress's place. It is important to lay out all the factors in a case that make it less of an invasion of privacy and more a matter of public concern.

# Photos from our Prosecutor Trial Skills Course

### Endnotes

<sup>1</sup> *Sims v. State*, \_\_\_ S.W.3d \_\_\_, No. PD-0941-17, slip op. at 4-7 (Tex. Crim. App. Jan. 16, 2019).

<sup>2</sup> 18 U.S.C. §2701.

<sup>3</sup> *Sims*, slip op. at 10.

<sup>4</sup> 18 U.S.C. §2708; Tex. Code Crim. Proc. art. 18.21, §13 (renumbered as art. 18B.553 effective Jan. 1, 2019). The statutes provide civil and administrative remedies instead.

<sup>5</sup> *Sims*, slip op. at 10-11.

<sup>6</sup> Tex. Gov't Code §311.026(a).

<sup>7</sup> *Sims v. State*, 526 S.W.3d 638, 644 (Tex. App.—Texarkana 2017).

<sup>8</sup> *United States v. Knotts*, 460 U.S. 276 (1983).


<sup>9</sup> *Carpenter v. United States*, 138 S.Ct. 2206 (2018).

<sup>10</sup> *Sims*, slip op. at 18-19.


<sup>11</sup> *Id.* at 20.

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# Photos from our Investigator School



## Award winners



TOP: Recipients of the Professional Criminal Investigator certificate are (left to right) Karl Ortiz, Stephanie Strickland, and Aston White. Not shown are Terry Kuepker, Tammy Pearson, and Richard Sepolio. MIDDLE: Gregory Bowers, CDA investigator in Collin County (at right) was named Chuck Dennis Investigator of the Year; he's pictured with Chad Smith, who presented the award. BOTTOM: Melissa Hightower, retired CA investigator in Williamson County, was given a lifetime achievement award. She's pictured with Bob Bianchi, CDA investigator in Victoria County.

# A roundup of notable quotables

**"What is the corruption of the American soul that makes us want the drugs in the first place? Opioids—which are killing more Americans now than either car crashes or guns—are a response to pain. We have to ask the question: What is the pain?"**

—Don Winslow, who authored an article in *Vanity Fair* magazine entitled "The Dirty Secret of El Chapo's Downfall." <https://www.vanityfair.com/news/2019/02/the-dirty-secret-of-el-chapo-downfall>

**"I gave her a big hug. I told her how proud I was of her."**

—Pickens County (South Carolina) Sheriff Rick Clark, discussing his response to a local woman who shot and killed an escaped inmate who had kicked in her back door. The inmate, Bruce McLaughlin Jr., had just escaped from county jail with an accomplice, and he broke into the unnamed woman's house at 3 o'clock in the morning. She was home alone, and she shot McLaughlin in the head, having gone through training for a concealed weapon permit. <https://www.yahoo.com/news/sheriff-woman-kills-jail-escapee-kicks-her-door-181806403.html>

**"We take some disturbing cases. Delivering meals is one of the highlights of our week as we are able to focus on something positive."**

—Greg Whitley with the Special Prosecution Unit in Huntsville, on that office's volunteer work for Meals on Wheels for nearly two years. (contributed by Jack Choate, SPU Executive Director) [https://www.itemonline.com/news/features/meals-on-wheels-provides-homebound-texans-with-food-interaction/article\\_5fd3f4ae-20b-5e71-ad71-f376ce38412a.html](https://www.itemonline.com/news/features/meals-on-wheels-provides-homebound-texans-with-food-interaction/article_5fd3f4ae-20b-5e71-ad71-f376ce38412a.html)

**"People in our community take better care of their pets than you took care of your kids."**

—Judge Keith Williams of Kerr County as he sentenced Amanda Hawkins to four sentences of 20 years each for leaving her 2- and 1-year-old children alone in a hot car overnight while she attended a party, smoked marijuana, and had sex. She also delayed getting medical treatment for the kids because she "didn't want to go to jail." <https://hillcountrybreakingnews.com/2018/12/12/amanda-hawkins-sentenced-today-40-years-in-prison>

Have a quote to share? Email it to the editor at [Sarah.Wolf@tdcaa.com](mailto:Sarah.Wolf@tdcaa.com). Everyone who contributes will get a free TDCAA ball cap!

**"PLEASE GOD, DON'T LET HIM HURT LORA."**

—the last words of Doug White, a newlywed from Mesquite, just before Alvin Braziel Jr. shot and killed him in 1993. Mr. White had been on a hiking trail with his wife, Lora—they'd been married just 10 days—when Braziel jumped out from behind some bushes with a pistol, demanded money, and shot White twice, killing him. When Braziel went to shoot Lora, his gun malfunctioned, and instead of shooting her, he took her to a bushy area near the trail and sexually assaulted her. Braziel was executed in mid-December for White's murder. <https://www.statesman.com/news/20181212/man-who-killed-newlywed-during-robbery-executed-in-texas/1>

## Uncovering our own implicit biases (cont'd)

consciously considered a need to put myself in the shoes of a victim of domestic violence.

But I sure learned it that day and have continued to educate myself further since then. I've learned more about the dynamics of domestic violence in my years at TDCAA from generous experts who have devoted their professional lives to combatting it, and I'm grateful for their help.<sup>3</sup>

I'm ashamed to confess that before I really grasped how complicated and fraught life is for domestic violence victims—and without actively intending to—I believed I was stronger and smarter than those victims, because I would never remain in a relationship where I was being victimized. We can call this my “relationship privilege” that needed quite a bit of checking. You may have seen a similar thing coming from grand jurors or venire members in a sexual assault case, where their first, unstudied reaction is: If the victim wouldn't have dressed a certain way, kissed a man at the bar, jogged alone in the dark, none of this would have happened to her. Bias (explicit or implicit) in the form of victim-blaming, in other words.

While we think of implicit bias as primarily revolving around race, bias can crop up in the criminal justice system in numerous categories. My bias is pretty textbook: While I didn't believe I was biased against victims and didn't consciously act negatively toward them, subconsciously I held a belief that I was better than members of a certain group because of: 1) ignorance about what victims actually go through and 2) a privilege of never having lived through it myself (or seen it with a close friend or family member). Because of this bias, without further education on domestic violence victims, I likely would have continued reacting judgmentally without necessarily intending to. Can you imagine having pre-1996 me on a jury in a domestic violence case? I'm embarrassed to even think of that.

But I've done something about it. And I believe that any willing person can do the same thing.

### Types of biases and the brain's role

Our brains love to make mental associations from the direct and indirect messages we receive—in other words, to shortcut the process of going through steps to make a conclusion. The unconscious mind works faster than the conscious mind. The brain wants to reach a conclusion quickly and then move on to other things.

This is known as “heuristics,” a mental shortcut that saves cognitive effort but does not necessarily lead to the correct decision.<sup>4</sup>

Cognitive biases are subconscious tendencies to think in certain ways that deviate from good judgment and rational thinking. “Cognitive bias” is an umbrella term covering a veritable buffet of inherent thinking errors that humans make in processing information. Bias categories include:

**1 Explicit bias:** Attitudes or beliefs that one endorses consciously and intentionally. You are aware that you like certain things and don't like others. Growing up watching the Dallas Cowboys with my dad every Sunday, I love the Cowboys and dislike the Philadelphia Eagles. The challenge with these biases is making sure you do not convert your own preferences (e.g., I strongly dislike quinoa) into a belief that others who do not share those preferences are lesser beings than you (e.g., everyone who loves quinoa is a tree-hugging snowflake<sup>5</sup>).

**2 Confirmation bias:** Giving more credence to information that confirms an existing belief system and disregarding information that contradicts the belief system. Think of this as the ostrich-with-its-head-in-the-sand bias, or tunnel vision. For example, if someone truly believes the earth is flat, he may ignore every photo taken from space and any scientific study that suggests otherwise and instead base his opinion on a photoshopped Instagram post purportedly showing his neighbor falling off the end of a flat Earth.

Or if an officer and prosecutor working together have encountered a number of spousal murder cases in which a husband has been found guilty of killing his wife each time, they might tend to ignore evidence in a new murder case that suggests a perpetrator other than the husband could be responsible. Instead, they will focus primarily (or exclusively) on evidence supporting their theory that the husband killed his wife in the new case.<sup>6</sup>

**3 Attribution bias:** This bias might cause a person to make more favorable assessments of behaviors and circumstances to people like her (“in groups”) and to judge people in her “out groups” by less favorable group stereotypes.<sup>7</sup>

**4 Affinity bias:** Similarly, this tendency can lead us to gravitate toward those who are more like us, with similar interests and backgrounds, while unintentionally leaving others out.<sup>8</sup> For instance, people who graduate from Texas A&M University are generally associated

with loyalty (but not exclusive preference) toward other A&M graduates in some hiring or business decisions.

**5 Implicit bias:** The automatic associations and stereotypes that people assign or make between groups of people without intent.<sup>9</sup> Under certain conditions, these automatic associations can influence behavior, making people respond in biased ways even when they are not explicitly prejudiced or do not consciously accept the stereotype.<sup>10</sup> Implicit bias:

- is unconscious and automatic—the bias is activated without individuals' intention or control;
- is pervasive—everyone has them, even people who believe they are impartial or committed to impartiality;
- does not always align with *explicit* beliefs;
- has real-world effects on behavior; and
- is malleable—with work and education, these biases can be uncovered and minimized.<sup>11</sup>

In prosecutor offices, while all five of the listed biases have potential to interfere with the pursuit of justice, confirmation bias and implicit bias by far have the most potential for eroding the fairness and legitimacy of the criminal justice system.<sup>12</sup>

### Bias-affected decisions

Many studies that have looked at bias in the criminal justice system (and speakers who give presentations on the topic) have focused on things that happen before a case gets to a prosecutor's office—such as arrest rates—or things that happen after a case has been presented and a prosecutor no longer has control—such as judge or jury sentencing results. But there are still many decision points in the middle where undiscovered biases could adversely affect whether prosecutors are achieving just results, including:

- charging decisions;
- bail recommendations;
- plea offers;
- choice of prosecutors to try a case;
- jury selection;
- sentencing recommendations; and
- terms of probation and decisions to revoke.

Implicit biases are most often associated with race—appropriately so, as shown by abundant studies showing inequality in the criminal justice system.<sup>13</sup> Gender and sexual orientation are also common breeding grounds for bias. But implicit biases can also be directed at other circumstances, such as status as a victim (e.g. victim-blaming), economic or employment status,

weight, types of crimes, or neighborhoods in a community.

Have you ever heard a homicide that happened among a certain group or in a certain part of town called a “misdemeanor murder”? Or heard someone giving a nickname to a crime that happened in a specific neighborhood (such as a “Southside Special”)? Words like these minimize the impact of those crimes and diminish the worth of the victims, thereby displaying an implicit bias against people who fit in certain categories.

Whether our implicit biases deal with race, gender, victims, or neighborhoods, it is imperative for each of us to root them out and combat them. The good news is, those who study implicit bias contend the biases can be unlearned and replaced with new mental associations.<sup>14</sup> Brains are miraculous things. Left to their own devices, our brains—including the subconscious levels of the brain—can take over, like Hal the Computer in *2001: A Space Odyssey*. But with intention, we can override them or rewire them, especially when it comes to bias, with a little work and education.

### How to identify your own bias

Attention on the justice system these days is high. Read a newspaper or watch the news and you can't miss stories that involve our business, from wrongful convictions and exonerations to racial tensions and distrust in the fairness of the criminal justice system. At a time like this, it seems more urgent than ever to ensure that prosecutors demonstrate they are committed to fairness and justice for all.

Studies have shown that by merely exposing, discussing, and understanding our own cognitive biases, we can begin to change them and become aware of other potential implicit bias.<sup>15</sup> In my case with domestic violence victims, it began with exposure of the bias and continued with learning more about the reality of domestic violence victims' lives. I replaced my subconscious negative views about domestic violence victims with a more educated view of the cycle of violence and victims' struggles to overcome it. Some studies have shown that something as simple as exposure to positive photos of or interactions with members of the group relevant to a person's bias can weaken a subconscious bias.<sup>16</sup>

It feels a little like jury selection to me. If I had been on a venire panel back in 1996, and a prosecutor had asked me the broad question, “Do you have a bias against domestic violence vic-

*Have you ever heard a homicide that happened among a certain group or in a certain part of town called a “misdemeanor murder”? Or heard someone giving a nickname to a crime that happened in a specific neighborhood (such as a “Southside Special”)?*

tims?" I almost certainly would have answered, "No," because I believed myself to be a fair and unbiased person who tried hard to treat everyone the same way.

But prosecutors in voir dire never stop with the broad question ("are you biased?"), because those answers will be unreliable. None of us want to think of ourselves as biased. Asking the deeper questions is the only way to unlock the subconscious (implicit) biases. Instead, we might ask the panelists in a DV case, "What should a victim do if she is hit by her partner?" Answers like, "Leave immediately and call the police" may expose potential jurors like me, who thought leaving an abuser is a very simple and praiseworthy act, while answers like "make a safety plan" or "bring in your closest friends and family members for help" indicate a person who is more attuned to family violence dynamics. Or asking "Why do you think a family violence victim wouldn't leave?" could also expose an implicit bias.

The point is, if you stop your search for your own biases by asking, "Do I have a bias?" chances are, you will only uncover those that are explicit. Equally important, I don't believe you can only ask yourself the questions. Just as prosecutors often run the facts of a case by another prosecutor before making critical decisions (charging the case, trying the case) to make sure they aren't missing something, it is important to have conversations with people you trust about potential cognitive bias you may have.

And just as prosecutors don't mean to insult potential jurors by asking venire panelists questions about their bias, we should fight the impulse to be defensive or in denial about our own. No one is free of bias. Our brains won't let us. The first step is realizing this and being open to learning more about your own bias.

Other ways to identify and eradicate your own implicit biases:

**1 Take a quiz.** A few quizzes readily available online, such as the Implicit Association Test (IAT) offered by Harvard University's "Project Implicit," or MTV's "Look Different" program (biases based on race, gender, and sexual orientation), purport to show biases and affinities.<sup>17</sup> While exclusive use of these results to determine bias has been criticized, consider the results as an interesting diving-off point into your own potential bias. Spend some time asking yourself deeper questions about the subject, as you would during jury selection. Do you have discomfort around certain groups of people or in certain settings?

Do you know less about some cultures than others? Read books about cultures that are unfamiliar to you to gain better understanding of those different from the one in which you grew up.<sup>18</sup>

**2 Collect data to identify patterns.** For instance, look at statistics of plea recommendations to make sure your (or your office's) recommendations do not favor a group based on gender, race, victim characteristics, or other identifiable characteristics. Pay attention to the types of cases you are receiving from officers in your jurisdiction. If patterns emerge there, favoring or disfavoring certain groups, talk about it with those officers (or their supervisors).

**3 Shape your message.** Pay attention to words you or officemates use to describe crimes with certain characteristics ("misdemeanor murder") and ask yourself whether this shows an implicit bias. If you are a supervisor, take care that you don't rely on catchphrases that denigrate certain crimes or classes of individuals or have racial overtones ("thug"). Doing so sends a message to less experienced prosecutors that the bias underlying the words is acceptable.

**4 Recruit and retain a diverse work force that includes a variety of life experiences.** Have conversations in the office about issues related to bias and diversity, both in the workplace and in the criminal justice system. Without a diverse workplace and honest conversations, you may be unaware that certain words carry racial overtones or have gone out of favor with regard to gender, race, nationality, or sexual orientation. Encourage programs that allow (or require) prosecutors to engage with all members of your community.

#### TDCAA's bias initiative

In September 2012, TDCAA released a first-of-its-kind report responding to a claim by the Northern California Innocence Project that prosecutorial misconduct was rampant in Texas. The Innocence Project's study released a list of 91 Texas cases from 2004–2008 involving alleged prosecutorial misconduct. TDCAA's eight-month study of that work contended that only six of those 91 cases actually involved prosecutor misconduct, and the other cases instead involved reversals based on misidentification, faulty science, or procedural errors.<sup>19</sup>

But TDCAA's report also noted in one of its findings that cognitive bias can play a negative role in prosecutor decision-making.<sup>20</sup> In the months and years ahead, TDCAA will be offering

its members training and resources on dealing with cognitive bias that could affect criminal prosecution, particularly implicit and confirmation bias. One of those projects involves collecting suggestions for combatting cognitive bias in prosecuting cases and in the workplace. TDCAA staff will be working with committees to brainstorm suggestions that would apply to prosecutors' offices specifically (rather than the criminal justice system as a whole), such as:

- Eliminate photos or references to race wherever possible in all documents reviewed by the prosecutor's office pre-charging decision (such as mug shots paper-clipped to the front of a case file and listing race of arrestees on a grand jury docket). Try to make decisions about plea recommendations without any knowledge of the defendant's race.

- Be careful about introducing evidence that may hit on a racial stereotype. Example: Using an African-American defendant's history of listening to rap music as punishment evidence, in a case where the crime committed doesn't match the lyrics of the song (and therefore isn't directly relevant).<sup>21</sup>

- Before trial, get feedback from a variety of employees in your office on a case's strengths and weaknesses. Allow wide-open discussion on where officers or prosecutors might have missed or ignored something important.

TDCAA will continue collecting ideas and periodically offer a list of concrete examples to assist in eradicating bias in prosecutor offices. If you or your office has instituted procedures to try to avoid bias, I'd love to hear about it. Please send any of the procedures (or even ideas that haven't yet been implemented) to me at Diane.Beckham@tdcaa.com.

As past TDCAA Training Committee Chair Bill Wirsky said in a cognitive bias presentation to TDCAA's Prosecutor Trial Skills School in January: "If you care about being a good prosecutor, you will care about this topic." ❖

#### Endnotes

<sup>1</sup> Tremendous thanks to Richard A. Baker, Assistant Vice Chancellor and Vice President at the University of Houston, and Alim Adatia, Director at Outreach Strategists in Houston. Their work with a TDCAA ad hoc group focusing on bias issues and training (Jarvis Parsons, Tiana Sanford, Bill Wirsky, and me) has been incredibly helpful and inspirational. And equally

tremendous thanks to my fellow group members—Bill, Jarvis, and Tiana—for our courageous conversations, hard work, and friendship. And to my friend Cathy Cramer, who first introduced me to small-group study of racial biases.

<sup>2</sup> It hurts me to write that sentence and remember that not only did I think that, I actually said it out loud. In a room that included a victim of family violence.

<sup>3</sup> Experts including Patricia Baca, Beth Barron, Jaime Esparza, Staley Heatly, Dana Nelson, Jarvis Parsons, Ellic Sahualla, Jennifer Varela, and Jane Waters.

<sup>4</sup> See Paul Tremblay, "Interviewing and Counseling Across Cultures: Heuristics and Biases," *Boston College Law School: Digital Commons* (Jan. 2002). See also resources on the website of the Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, found at <http://kirwaninstitute.osu.edu>.

<sup>5</sup> Patently untrue: My black-belt Jiu Jitsu stepson loves quinoa.

<sup>6</sup> See *Getting Life: An Innocent Man's 25-Year Journey from Prison to Peace*, by Michael Morton (Simon and Schuster © 2014). See more about Michael Morton's story on the TDCAA website under [www.tdcaa.com/Resources/Brady-Resources](http://www.tdcaa.com/Resources/Brady-Resources).

<sup>7</sup> See, e.g., "Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees," by Nextions leadership consulting firm, Dr. Arin N. Reeves, lead researcher (2015 update from 2005 study), which found that when law firm partners read the same mistake-filled research memo, they graded the Caucasian-labeled candidate more favorably than the minority-labeled candidate.

<sup>8</sup> Descriptions of the first three biases found in "Strategies for Confronting Unconscious Bias," by Kathleen Nalty, originally printed in 45 *The Colorado Lawyer* 45 (Colorado Bar Association © 2016).

<sup>9</sup> Described another way: "The attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Activated involuntarily, without awareness or intentional control. Can be either positive or negative. Everyone is susceptible." *State of the Science: Implicit Bias Review*, 2017; Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, p.

Asking the deeper questions is the only way to unlock the subconscious (implicit) biases. We might ask the panelists in a DV case, "What should a victim do if she is hit by her partner?"

In the months and years ahead, TDCAA will be offering its members training and resources on dealing with cognitive bias that could affect criminal prosecution, particularly implicit and confirmation bias.

## Cold-case CODIS hits: 6 lessons about statutes of limitations in sexual assaults

In 1995, Texas created the Combined DNA Index System (CODIS).<sup>1</sup> Since that time, cold-case sex crime charges have been on the rise, particularly with the recent push to end the rape kit backlog plaguing our criminal justice system.<sup>2</sup>



**By Tiffany Larsen**  
Assistant District Attorney in Harris County

As older sexual assault cases with newly-obtained DNA evidence appear on our desks, it will be helpful to have a thorough understanding of the statute of limitations that applies in each case. This article aims to tell if and when there is no statute of limitations (SOL) for a particular sex case.<sup>3</sup>

Texas Code of Criminal Procedure Art. 12.01(1)(C)(i) states that there is no SOL on sexual assault if, during the investigation of the offense, these three prongs are met:

- 1) biological matter is collected,
- 2) it is subjected to forensic DNA testing, and
- 3) test results "show that the matter does not match the victim or any other person whose identity is readily ascertained."

This statute became effective September 1, 2001, after House Bill 656 was passed during the 77th Regular Session. The chief purpose of this change was to give prosecutors the "necessary flexibility to take advantage of scientific advances when handling sexual assault cases that involve biological evidence."<sup>4</sup> In some cases, biological evidence may not be subject to a DNA test within the statute of limitations period; thus, the statute recognizes that such evidence can be preserved and accurately tested decades after the offense, making the prosecution of sexual assaults feasible after the standard SOL has expired.

Since this law was enacted, there have been only a handful of cases to assist us in interpreting the meaning and implications of the Legislature's words. Frequently, the holding of the cases are derived from the defendant's arguments, but sometimes we hear these same arguments from

those who fail to look beyond the black letter law. In an effort to assist prosecutors to counter such arguments, here are six lessons we have learned from the caselaw on what CCP Art. 12.01(1)(C)(i) really means for the survival of these cold cases.

### Lesson No. 1: "Readily ascertained" means "certain," not "ascertainable."

*Ex parte Lovings*<sup>5</sup> takes much of the guesswork out of understanding the language in Art. 12.01(1)(C)(i), particularly the phrase "readily ascertained."

For some background on the case, the victim was sexually assaulted on October 14, 1998, but defendant Lovings was not formally charged until 2014. At the time of the sexual assault, the suspect was unknown, and a sexual assault kit was collected from the victim the following day. Officers closed the investigation two weeks later because the victim had not responded to phone calls and letters requesting more information.

In October 2013, a CODIS hit occurred. Though the original statute of limitations (10 years) would have expired October 14, 2008, the Court held that under Art. 12.01(1)(C)(i), there was no limitation because Lovings' identity was not ascertained when the DNA kit was tested.

Lovings complained on appeal that the prosecution was barred from charging him outside of the 10-year SOL because his identity "could have

<sup>10</sup> Accessed at <http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf>.

<sup>16</sup> "Bias and its Implications on Prosecutors," presentation by Richard Anthony Baker and Alim Adatia to TDCAA Bias and Diversity Working Group, November 2018.

<sup>11</sup> *State of the Science: Implicit Bias Review*, Kirwan Institute.

<sup>12</sup> See "Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence," by Justin D. Levinson and Danielle Young, 112 *West Virginia Law Review* 207-350 (2010); "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," by Robert J. Smith & Justin D. Levinson, 35 *Seattle U. L. Rev.* 795 (2012); "Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response," 86 *Fordham L. Rev.* 667 (2018); "Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat," by Rachel D. Godsil and HaoYang (Carl) Jiang, *CDAA Prosecutor's Brief*, Vol. 40, No. 2 (Winter 2018).

<sup>13</sup> African-American men were more than six times as likely as white men in 2010 to be incarcerated in federal and state prisons and local jails. "Incarceration gap widens between whites and blacks," Pew Research Center Analysis of Decennial Census Data (IPUMS), Sept. 6, 2013. Accessed at: [www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens](http://www.pewresearch.org/fact-tank/2013/09/06/incarceration-gap-between-whites-and-blacks-widens).

<sup>14</sup> *State of the Science: Implicit Bias Review*, 2017; Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, p. 10. Accessed at <http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf>.

<sup>15</sup> See, e.g., "Durably reducing transphobia: A field experiment on door-to-door canvassing," by David Broockman and Joshua Kalla, *Science*, Vol. 352, Issue 6282, pp. 220-224 (April 8, 2016), accessed at <http://science.sciencemag.org/content/352/6282/220>; "Long-term reduction in implicit race bias: A prejudice habit-breaking intervention," by Patrick G. Devine, et al., 48(6) *Exp. Soc. Psychol.* 1267-1278 (Nov. 2012), accessed at: [www.ncbi.nlm.nih.gov/pmc/articles/PMC3603687/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3603687/).

<sup>16</sup> See Irene V. Blair, et al., "Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery," 81 *J. Personality & Soc. Psychol.* 828 (2001); Brian S. Lowery, et al., "Social Influence Effects on Automatic Racial Prejudice," 81 *J. Personality & Soc. Psychol.* 842 (2001).

<sup>17</sup> The MTV-sponsored test is found here: [www.lookdifferent.org/what-can-i-do/implicit-association-test](http://www.lookdifferent.org/what-can-i-do/implicit-association-test). Harvard's Project Implicit test is found here: <https://implicit.harvard.edu/implicit/takeatest.html>. I took the MTV tests in November 2018, and my results were a slight preference for white people over black, a slight preference for heterosexual people over gay, and no preference on gender. I took the race-measuring test again on Jan. 17, 2019, and my result was a moderate preference for black people. So while the tests aren't what we'd consider hard science, my initial results intrigued me enough to want to explore all of this further.

<sup>18</sup> A potential reading list might include books such as: Ta'Neheisi Coates, "Between the World and Me" (Spiegel & Grau © 2015); Jodi Picoult, "Small Great Things" (Ballantine Books © 2016); Michelle Alexander, "The New Jim Crow: Mass Incarceration in the Age of Colorblindness" (Macat Library © 2017); J.D. Vance, "Hillbilly Elegy: A Memoir of a Family and Culture in Crisis" (HarperCollins Publishing © 2018). To find out more about bias, consider Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux © 2011); and Mahzarin R. Banaji & Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* (Delacorte Press © 2013).

<sup>19</sup> "Setting the Record Straight on Prosecutorial Misconduct," Texas District & County Attorneys Association, Sept. 10, 2012. Accessed here: [www.tdcaa.com/sites/default/files/page/Setting%20the%20Record%20Straight%20on%20Prosecutorial%20Misconduct.pdf](http://www.tdcaa.com/sites/default/files/page/Setting%20the%20Record%20Straight%20on%20Prosecutorial%20Misconduct.pdf)

<sup>20</sup> "Setting the Record Straight," p. 6, Finding 5.

<sup>21</sup> Note that many country music songs, such as Johnny Cash's Folsom Prison Blues ("I shot a man in Reno/Just to watch him die") have similarly violent messages but are rarely used as evidence against a defendant who was listening to country music near the time of the crime.

Some lawyers will argue that if prosecutors had enough info to ascertain a suspect (e.g., a name, a description, another pending case, etc.), then Art. 12.01(1)(C) doesn't apply—but that is simply not what the law says. The Court has rejected this idea expressly.

been readily ascertained if the State had looked for it" (emphasis added), as his DNA had been in the CODIS system since April 2001. The Court rejected this argument, and it assigned meaning to the words "readily ascertained" by defining "readily" as "without delay or difficulty; easily" and "ascertain" to mean "to find something out for certain; make sure of." The Court specifically rejected the argument that "ascertained" means "ascertainable" or "can be ascertained," as that would require the Court to modify or change the word chosen by the legislature.

Some lawyers will argue that if prosecutors had enough info to ascertain a suspect (e.g., a name, a description, another pending case, etc.), then Art. 12.01(1)(C) doesn't apply—but that is simply not what the law says. The Court has rejected this idea expressly.

#### Lesson No. 2: The statute places no additional due diligence requirements on the State.

Lovings additionally argued on appeal that the language of Art. 12.01(1)(C) "imposes a duty on the State to look for a match," and that if the State fails to diligently look for a DNA match, then Art. 12.01(1)(C) does not apply. Again, though, the Court declined to add or subtract from the plain language of the statute, including placing any additional limitations on the timeframe for testing the biological materials collected in the investigation. Specifically, the Court held that the word "investigation" includes re-opening a case for new information. The Court then noted that because the legislature imposed time limits on investigation in other parts of the Code of Criminal Procedure, "we presume the legislature meant *not* to impose those limits to Art. 12.01(1)(C). ... If the legislature meant to impose additional duties on the State in the circumstances at issue here, it could have done so explicitly" (emphasis added).

#### Lesson No. 3: Absent meeting the statute's three-prong test, the 10-year SOL applies.

In *Ex parte S.B.M.*,<sup>6</sup> the victim reported being sexually assaulted in March 2003. A sexual assault kit was recovered and sent to the lab at the Department of Public Safety (DPS) for testing, and semen was detected on a vaginal swab and panty liner. Before the kit could be tested, defendant S.B.M. was arrested in September 2003 for the sexual assault after the victim identified him.

After S.B.M.'s arrest, the DNA lab analyst returned a report concluding that there was insufficient male DNA for comparison. The State presented the case for indictment, but a no-bill was returned. Defendant S.B.M. then moved for expunction in April 2013, and the trial court granted his motion. The State appealed, arguing that the Art. 12.01(1)(C)(i) exception applied.

The Court held that although the first two prongs of Art. 12.01(1)(C) had been met, the third had not, as the forensic DNA testing results did not show that the matter did not match any other person whose identity was readily ascertained—instead, the results simply showed nothing. The Court explained that "the plain language of Art. 12.01(1)(C) requires, at a minimum, as a prerequisite to its application, that the biological matter collected contain a sufficient quantity of DNA to enable forensic DNA testing to be performed." The Court concluded that because the three-prong test from Art. 12.01(1)(C)(i) had not been met, the general 10-year sexual assault statute of limitations applied.

#### Lesson No. 4: Advances in DNA testing may prompt an SOL exception.

The Court went on to clarify in a footnote in *Ex parte S.B.M.*, however, that its holding did not "preclude the possibility that if, through scientific advances in DNA testing, the forensic testing of the biological matter collected from [the victim] is able to yield actual readable test results showing that the DNA profile in the collected biological matter does not match [the victim] or any other person whose identity is readily ascertained, there is no reason Art. 12.01(1)(C) could not apply at that time," and that should this become the case, the defendant could even potentially be charged with the offenses at some point in the future.

The Court's reasoning indicates that the dominant factor in determining whether the exception applies is the result of the testing, not the initial identification of a known suspect ("biological matter is collected and subjected to forensic DNA testing and the testing results show ..."). Even where a victim contends she knows for certain her attacker's identity—but prosecutors do not believe they have probable cause to ascertain his identity—the statute allows the State to wait until the testing or further evidence gives that certainty.

Importantly, if the Court's decision in *Ex parte S.B.M.* as to the applicable SOL hinged on

the pre-DNA testing identification of the suspect, the Court's analysis would not include the consideration of the testing results or the ability to obtain clear results in the future. Waiting for DNA results to identify the perpetrator with certainty is in everyone's best interest, especially the defendant's. DNA is reliable, and the legislature and courts recognize this.

#### Lesson No. 5: Prosecutors may wait to file charges until they are satisfied they can establish a suspect's guilt in the courtroom.

In *Bailey v. State*,<sup>7</sup> the victim reported in July 1999 that an unknown suspect broke into her home and raped her. A sexual assault kit was collected at the hospital immediately following the incident, and the kit and the victim's clothing and cane were submitting for testing at the state crime lab. During the investigation, an informant told police that defendant Bailey had committed the offense, but officers failed to promptly show a lineup to the victim, and she died in 2005. In 2006, a CODIS hit matched Bailey to DNA found on the victim's skirt and cane. Bailey was subsequently indicted in February 2007 and convicted of aggravated sexual assault of an elderly person.

On appeal, Bailey argued that the State had intentionally delayed bringing the charges. But in affirming the defendant's conviction, the Court held that under Art. 12.01(1)(C), the State is not required to conduct a continuous investigation or file charges once it has *probable cause*—instead, prosecutors may file charges when they are satisfied that they can establish the suspect's guilt *beyond a reasonable doubt*. The Court ultimately held there was no due process violation and there is an unlimited statute of limitations under Art. 12.01(1)(C)(i). Though Bailey had been preliminarily identified by an informant and a photo array could have been presented to the victim for identification, the Court based the applicability of Art. 12.01(1)(C) on the ultimate results of the DNA testing, indicating that the preliminary identification of a potential suspect by law enforcement is not the determining factor.

Defense counsel or others may suggest that a defendant's identity was "ascertained" during an investigation, either through speculation based on circumstantial evidence or even through the victim's direct accusation (e.g., "It was a guy named Joe Smith"). However, this argument is inconsistent with the holdings of the appellate courts in *Lovings* and *Bailey*, because

this type of evidence supports only a *reasonable suspicion* as to identity, not identity that is "certain." Where prosecutors have only a reasonable suspicion that a suspect is responsible for a sexual assault, his identity has not yet been "ascertained" under the definition the Court assigned to that word in *Lovings*. Specifically, *where a perpetrator has not been properly identified by the victim herself, no direct evidence of the perpetrator's identity had been obtained through any other witness in the case, and no DNA profile has yet been obtained through testing the rape kit*, the perpetrator has not been "ascertained" for purposes of CCP Art. 12.01(1)(C)(i), and there is no statute of limitations for the offense.

#### Lesson No. 6: There is no deadline imposed on the State for testing a rape kit.

In *Ex parte Montgomery*,<sup>8</sup> the child victim, P.J., was 11 years old (born on December 30, 1977) when she was sexually assaulted by a stranger on October 31, 1989. The crime was reported to the Houston Police Department, and as part of the investigation, P.J. underwent a sexual assault examination, where biological matter was collected and put into storage. In December 2008, that biological matter was sent to a crime lab, and four years later, a Houston police officer requested that the crime lab perform DNA testing on it. The testing was completed in September 2013, and the DNA results were entered into CODIS that November. In December of that same year, there was a match between defendant Montgomery's DNA and the DNA collected during P.J.'s exam. The State indicted Montgomery in June 2015 for aggravated sexual assault of a child.

Montgomery applied for a writ of habeas corpus based on the statute of limitations. At the time of the offense, the statute of limitations for aggravated sexual assault of a child was 10 years from the date of the offense, and was, therefore, set to expire on October 31, 1999. In 1997, however, the statute of limitations was amended to expire 10 years after the date of the victim's 18th birthday. P.J.'s 28th birthday was December 30, 2005—long past—and Montgomery contended the SOL for aggravated sexual assault expired that day. Specifically, he argued on appeal that any testing contemplated by Art. 12.01(1)(C) must be completed prior to expiration of the original statute of limitations.

Where prosecutors have only a reasonable suspicion that a suspect is responsible for a sexual assault, his identity has not yet been "ascertained" under the definition the Court assigned to that word in *Lovings*.



Given the backlog of sexual assault kits, it is reasonable that the legislature intended to give the survivors of these sex offenses the extra time necessary for proper testing of the biological materials collected in their cases.

The State responded that this case is governed by the exception established in subdivision (1) of Art. 12.01, which took effect September 1, 2001, before the limitations period expired, and the Fourteenth Court of Appeals agreed. Reaffirming its opinion in *Lovings*, the Court declined again to “insert language” into the statute, holding that because “no such deadline is contained in the plain text of Art. 12.01(1)(C),” the Court would not hold any such deadline to apply. Because 12.01(1)(C)(i) was passed in 2001, prior to December 30, 2005, it effectively changed the SOL to no SOL in 2001.

Having worked on many cold-case sexual assault cases, I have seen first-hand the look of genuine shock and dismay on these offenders’ faces when they are ultimately charged with a sexual assault they committed so long ago. It is understandable that the defendant will argue, seemingly logically, that the statute of limitations has surely passed. Some may even go as far as to claim that it is unfair to the defendant to delay charges by many years because of an apparent lack of follow-through by law enforcement.

Given the backlog of sexual assault kits, however, it is reasonable that the legislature intended to give the survivors of these sex offenses the extra time necessary for proper testing of the biological materials collected in their cases. *Montgomery* re-confirms the Fourteenth Court’s position that there is no deadline imposed on the State for actually testing the kit. Caselaw and the plain language of Art. 12.01(1)(C)(i) support extending the SOL to no statute of limitations in these cases.

#### Conclusion

There is no worse feeling as a lawyer than missing an important deadline. In prosecution, that feel-

ing is exponentially worse when we have the evidence but we missed the chance to file charges within the SOL. As you review cold-case sexual assaults, I hope these lessons will put you at ease that justice delayed does not always have to be justice denied.

If you have any questions or concerns, please contact the author, Tiffany Larsen (Appellate Division at the Harris County District Attorney’s Office) at 713/274-5826. ✱

#### Endnotes

<sup>1</sup> Tex. Gov’t Code §411.142.

<sup>2</sup> According to [www.endthebacklog.org/texas](http://www.endthebacklog.org/texas), 2,138 untested kits remain out of the 18,955 backlogged kits reported to the Texas Department of Public Safety in August 2017.

<sup>3</sup> In 2007, the limitations period was eliminated entirely for child sexual abuse offenses; see Tex. Code Crim. Proc. Art. 12.01(1). For sexual assault of an adult in cases not covered by Art. 12.01(1)(C), the statute of limitations is 10 years from the date the offense was committed. Tex. Code Crim. Proc. Art. 12.01(2)(E).

<sup>4</sup> House Research Organization Bill Analysis for HB 656 (March 13, 2001).

<sup>5</sup> 480 S.W.3d 106 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

<sup>6</sup> 467 S.W.3d 715 (Tex. App.—Fort Worth 2015, no pet.).

<sup>7</sup> No. 11-11-00020-CR, 2013 WL 398943 (Tex. App.—Eastland, Jan. 31, 2013, pet. ref’d) (mem. op., not designated for publication).

<sup>8</sup> No. 14-17-00025-CR, 2017 WL 3271088 (Tex. App.—Houston [14th Dist.], August 1, 2017, pet. ref’d) (mem. op., not designated for publication).

## Thanks for your service—you’re fired

Prosecutors are, by their nature, people drawn to a life of service. A great many of them serve beyond the courtroom in the armed forces.



By Jason Bennyhoff  
Assistant District Attorney in Fort Bend County

Service in the federal or state military forces necessarily entails certain sacrifices—of time at least, and potentially even life and limb. For those who choose to serve, both the federal and state governments have instituted protections to ensure that these sacrifices do not include the loss of the service member’s employment. This article is designed to give a rough primer to those who serve and to those considering serving on the protections the governments have put in place.

#### Federal law

Members of the federal armed forces include the active, reserve, and National Guard components and are protected by the Uniformed Services Employment and Reemployment Rights Act (commonly known as USERRA).<sup>1</sup> USERRA precludes any discrimination against members of the armed forces.<sup>2</sup> It further requires that an employee who is called up for service with the federal armed forces be allowed a leave of absence to perform that duty and be allowed to return to his prior employment without any penalty.<sup>3</sup> USERRA also requires that an employer reinstate the employee with whatever seniority, pay rate, and vacation time that the employee would have accrued had he not left.<sup>4</sup> The employee’s right to take a leave of absence to perform military duty and also to return from that duty without penalty applies regardless of whether it was active duty or training,<sup>5</sup> and his rights under USERRA apply regardless of whether the employee volunteered for the military duty or was ordered to perform it.

Generally, an employee who is taking military leave must give his employer notice before the leave begins.<sup>6</sup> Likewise, the employee must give the employer notice of his intent to return to his prior employment when his service ends.<sup>7</sup>

USERRA’s protections do have their dreaded exceptions, as we lawyers are familiar with in so many other contexts. Employers can refuse to reemploy an eligible employee where the em-

ployer can demonstrate that doing so is impossible or that the employee was only temporary, the employee was not honorably discharged, or his reemployment would work an undue hardship on the employer.<sup>8</sup>

#### State law

One might first ask, “If federal law already provides protections for service members, why even worry about the state statute?” The reason is that the National Guard is a hybrid organization, a state military force subject to state control and state law that can be called into federal service and subject to federal law. When the National Guard is acting purely under state authority rather than federal, state law provides the remedy for violations of a Guardsman’s employment rights. This likewise applies to members of the Texas State Guard because that organization is solely a state military force and does not receive USERRA protections under federal law.

The state statutes that govern employment rights of service members can be found in Chapter 437 of the Texas Government Code. These statutes apply to members of the Texas military forces,<sup>9</sup> including the Texas National Guard (Army and Air) when operating under state authority and the Texas State Guard.<sup>10</sup>

The general Texas statute dealing with employment rights of service members is §437.204 of the Texas Government Code. This statute effectively mirrors USERRA. Under it, an employer may not terminate the employment of an employee who is a member of the state military forces because that person is ordered to authorized training or duty.<sup>11</sup> Like USERRA, the Texas

For those who choose to serve in the military forces, both the federal and state governments have instituted protections to ensure that these sacrifices do not include the loss of the service member's employment.

statute requires that the employee may return to the same employment he held before leaving for military service and that the employer not only reemploy the service member, but also do so without any loss of seniority, vacation time, or any other benefit of employment.<sup>12</sup> Additionally, the employee must give notice of his intent to return to employment "as soon as practicable" following his release from duty.

The Texas Government Code also provides for 15 work days' worth of paid military leave specifically for employees who are employed by the state, a municipality, a county, or another political subdivision of the state (such as prosecutors and their staff members).<sup>13</sup> The statute also reiterates that such employees may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time as a result of their leave to perform military duty.

#### Conclusion

To all those prosecutors and members of county and district attorneys' offices who serve, let me give you a heartfelt "thank you" for your service. Luckily, in my experience, the heads of such offices are overwhelmingly supportive of their service members, even when that service works a hardship on the office if that employee is deployed. It is nonetheless comforting for employees who serve and those considering service to know that the law provides them employment protections. \*

#### Endnotes

<sup>1</sup> 38 U.S.C. §§4303-4326. Although it likely does not apply to most prosecutor offices, it should be noted that USERRA's employment protections apply only to service members who are employees of an organization, not independent contractors. 38 U.S.C. §4303(3).

<sup>2</sup> 38 U.S.C. §4311.

<sup>3</sup> 38 U.S.C. §4312.

<sup>4</sup> 38 U.S.C. §§4313, 4316.

<sup>5</sup> 38 U.S.C. §4303(13) (defining service in the uniformed services as including voluntary or involuntary performance of duty including active duty, active duty for training, inactive duty training, full time National Guard duty, etc.).

<sup>6</sup> 38 U.S.C. §4312(a)(1); but see 38 U.S.C. §4312(b) (notice need not be given where giving such notice is precluded by military necessity, or where it is impossible or unreasonable under the circumstances).

<sup>7</sup> 38 U.S.C. §4312(e).

<sup>8</sup> 38 U.S.C. §4312(d).

<sup>9</sup> Tex. Gov't Code §437.204(a) (note that this statute also applies to persons who are members of the military forces of another state).

<sup>10</sup> Tex. Gov't Code §437.001(14)(16).

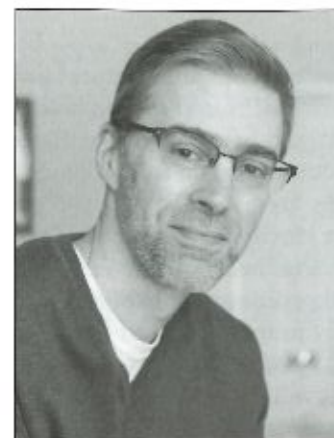
<sup>11</sup> Tex. Gov't Code §437.204(a).

<sup>12</sup> *Id.*

<sup>13</sup> Tex. Gov't Code §437.202(a).

## Get suppression appeals right (the first time)

Findings of fact and conclusions of law can make or break an appeal from a motion to suppress.



By John R. Messinger  
Assistant State Prosecuting Attorney in Austin

If there aren't any, the reviewing court will assume the judge implicitly made findings that support the ruling.<sup>1</sup> But if a prosecutor requests them, the trial court must enter its "essential findings," i.e., "findings of fact and conclusions of law adequate to provide a reviewing court with a basis upon which to review the trial court's application of the law to the facts."<sup>2</sup> So a simple request will make the appeal run smoothly, right?

Not so much. As it turns out, "essential findings" means whatever the reviewing court deems essential, including arguments not presented in the trial court.<sup>3</sup> This is because the trial court's ruling will be upheld on any applicable theory of law.<sup>4</sup> Unfortunately, when the reviewing court goes in a different direction, the trial court's findings can become inadequate. Reviewing courts are directed to remand for additional findings made necessary by those new legal theories.<sup>5</sup> The Court of Criminal Appeals has called these "future findings."<sup>6</sup> Four judges now see this practice as "an incentive ... to micro-manage trial courts,"<sup>7</sup> and the practice may come to an end.

#### State v. Martinez

Two years ago, in *State v. Martinez* (*Martinez I*), the Court of Criminal Appeals remanded the case for further findings of fact.<sup>8</sup> In addition to technical complaints about the findings,<sup>9</sup> a plurality detailed testimony that, if credited, would support probable cause for the arrest.<sup>10</sup> In his concurrence, Judge Newell agreed that remand for additional "essential findings" was prudent under the precedent cited in earlier footnotes, which had "not yet proven to be unworkable or wrongly decided."<sup>11</sup> But he disagreed with the plurality's pre-emptive evaluation of probable cause on "facts" that did not yet exist. "If we keep issuing opinions like the one in this case," he wrote, "we may have to revisit whether remanding for essential findings is truly an act of prudence rather than micro-management."<sup>12</sup>

Judge Newell says the time to stop micro-managing is now. In *Martinez II*—back on a sec-

ond petition for review—a unanimous Court held there was probable cause to arrest Martinez based on the collective knowledge doctrine.<sup>13</sup> That ground, which was raised but not considered in *Martinez I*, became necessary for disposition because the trial court did not make the findings posited by the plurality the first time around,<sup>14</sup> which reinforced Judge Newell's belief that addressing the "facts" in *Martinez I* was wrong. It was "equally clear" to him that the Court's "precedent requiring a remand for 'necessary' findings provides an incentive for reviewing courts to micro-manage trial courts rather than defer to their findings."<sup>15</sup>

More to the point, he urged the Court to reconsider its "self-inflicted" precedent. "We should remand for 'essential' findings only if there was some objection in the trial court regarding the inadequacy of the existing findings."<sup>16</sup> In the absence of objection, he says, reviewing courts should presume findings in support of the ruling like it does when findings aren't requested.

This call for reconsideration was joined by three members of the current Court.<sup>17</sup> Two of them, joined by a third still on the Court, would go further and hold that interlocutory appeals—such as those from motions to suppress—should not be upheld on theories not raised in the trial

court.<sup>16</sup> This makes sense, as the need for additional findings arises most often when new theories are considered.

#### So what now?

If either change comes to pass,<sup>16</sup> prosecutors (and defense counsel) will be limited on appeal to what they did in the trial court—win or lose. Here are some tips prosecutors should follow even if nothing changes:

**1 Make the defense clarify its grounds before the hearing.** Pre-trial hearings are not supposed to be fishing expeditions, and boiler-plate motions stink—many judges are tired of them, too. Forcing counsel, by objection or agreement, to narrow his grounds will allow prosecutors (and the judge) to bone up on the relevant law and identify the necessary witnesses.<sup>20</sup> It might also limit the ways in which an adverse ruling can be affirmed by reducing the testimony that lends itself to new theories on appeal.

**2 Raise all possible responses to those grounds.** This is not a new rule. The losing party cannot rely on an argument it did not raise in the trial court. What would be new (if Judge Newell prevails) is the State being unable to keep a favorable ruling if the judge was correct for the wrong reason and the prosecutor did not raise the right one. So always raise everything.

**3 Object—and, if necessary, request a continuance should the unexpected happen.** If counsel has narrowed his grounds, object when he goes astray. But don't expect the judge to prevent exploration of unanticipated testimony or assume he will refuse to consider an unpled ground. If the State needs another witness to respond to something unexpected, say so and ask for time. Refusing to participate on principle doesn't work.<sup>21</sup>

**4 Request findings on everything.** Obtaining findings of fact should already be prosecutors' practice when the State loses because prosecutors cannot win on appeal without them. If Judge Newell's argument is adopted, prosecutors must do this when we win, too, especially if reviewing courts retain the ability to affirm on any theory of law. Don't guess at what might become relevant—get everything in writing.<sup>22</sup>

**5 Request conclusions on everything.** We tend to ignore legal conclusions because they are reviewed *de novo*. Don't. If you lose, request a ruling on every legal argument you made. If review-

ing courts lose the ability to affirm on any theory of law, the same will be true when you win. Proper conclusions of law will show which theories—State and defense—were considered.

**6 Object to the omission of any finding or conclusion you might need on appeal.** Judge Newell would permit remand for additional "essential" findings if the complaining party objected to their absence. Win or lose, make sure the judge's findings and conclusions embrace every alternative ground the State raised—formally object, if necessary. If the objections go unheeded, raise the issue in a motion to abate the appeal or as a separate point of error.<sup>23</sup>

#### Help you help yourself

No reviewing court should work harder than prosecutors do to secure victory in a motion to suppress. Following the tips above could avoid numerous problems and years of delay.<sup>24</sup> If the law changes, these steps may become necessary even when the State wins a case. Help yourself by making both the facts and the rulings clear to the reviewing court the first time around. \*

#### Endnotes

<sup>1</sup> *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000).

<sup>2</sup> *State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006).

<sup>3</sup> See, e.g., *State v. Saenz*, 411 S.W.3d 488, 496-97 (Tex. Crim. App. 2013).

<sup>4</sup> *Ross*, 32 S.W.3d at 855-56. There's an exception, because of course there is. See *State v. Esparza*, 413 S.W.3d 81, 90 (Tex. Crim. App. 2013) (alternative legal theory cannot turn upon the production of facts the appellant "was never fairly called upon to adduce").

<sup>5</sup> *State v. Elias*, 339 S.W.3d 667, 675-76 (Tex. Crim. App. 2011). This can also occur when the theory hasn't changed but the findings are meh.

<sup>6</sup> *Saenz*, 411 S.W.3d at 496-97.

<sup>7</sup> *State v. Martinez*, \_\_\_ S.W.3d \_\_\_, PD-0324-17, 2019 WL 137754 at \* (Tex. Crim. App. Jan. 9, 2019) (*Martinez II*) (Newell, J., concurring) (pagination of side opinions not complete).

<sup>8</sup> PD-1337-15, 2016 WL 7234085, at \*8 (Tex. Crim. App. Dec. 14, 2016) (plurality) (*Martinez I*).

<sup>9</sup> *Id.* at \*2 ("Many of the findings simply recount the trial court's recollection of the hearing without evaluating the evidence for accuracy or credibility or declaring what the trial court found to have happened on the night of the arrest").

<sup>10</sup> *Id.* at \*5-7.

<sup>11</sup> *Id.* at \*9 (Newell, J., concurring).

<sup>12</sup> *Id.* at \*8.

<sup>13</sup> *Martinez II*, 2019 WL 137754 at \*6.

<sup>14</sup> *Id.* at \* (Newell, J., concurring) (pagination of side opinions not complete).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Keller, P.J., and Hervey and Richardson, JJ.*

<sup>18</sup> *State v. Esparza*, 413 S.W.3d 81, 92-93 (Tex. Crim. App. 2013) (*Keller, P.J., concurring, joined by Keasler and Hervey, JJ.*).

<sup>19</sup> Our office has asked for both. See *State v. Sanders*, PD-0080/81/82-18 (pet. ref'd May 2, 2018).

<sup>20</sup> See *State v. Velasquez*, 539 S.W.3d 289, 294 (Tex. Crim. App. 2018) (order setting hearing should ensure the parties will have time to subpoena witnesses, conduct legal research, and "otherwise prepare for impending litigation").

<sup>21</sup> *Id.* at 297 (Hervey, J., concurring) (calling the State's refusal "taking its ball and going home").

<sup>22</sup> Oral findings can work but will likely lack the detail needed.

<sup>23</sup> See *Cullen*, 195 S.W.3d at 698-99 (casting omissions following request as a "failure or refusal to act" under Tex. R. App. P. 44.4).

<sup>24</sup> *Martinez's* suppression hearing was four years ago.

## TDCAA wants you! (to write for this journal)

Have you ever found yourself flipping through *The Texas Prosecutor* journal and asked yourself, "How do I join the ranks of these suave, articulate, knowledgeable paragons of the profession?"



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

(Or asked yourself how those poor souls got dragged into the task?) Have you ever been interested in writing for the journal but didn't know where to start? Have you ever had an idea for an article you hoped to see someday, but you haven't seen anyone write it yet?

If you answered yes to any of those questions (or even answered no but kept reading for some reason), then TDCAA wants you to write for the journal! The articles you enjoy and dog-ear for future reference are almost entirely written by your fellow prosecutors, investigators, victim assistance coordinators, and support staff, and we (that's your friendly neighborhood editorial committee) are always on the lookout for new contributors. If you've ever had questions about how to start or wondered about the process, we'll try to clear things up, bring light to darkness, insert cliché here, etc.

#### Why write for the journal?

That's a great question, and there are lots of reasons to write. First, it's an opportunity to learn. Even when writing on a topic that you know well, the research and writing process gives you a chance to revisit the subject, kick off the rust, and learn a new useful tidbit or two. Second, it's a chance to share an experience that you or your office had with others who may be facing similar problems. Third, it's one way to steward the profession, by sharing your knowledge with those coming after you. Of course, there's also getting the chance to wow friends and family with seeing your name in print.<sup>1</sup>

#### How to get started

If you asked Sarah Wolf, the journal's brutal taskmistress—hard-working, diligent editor/

Forcing counsel, by objection or agreement, to narrow his grounds will allow prosecutors (and the judge) to bone up on the relevant law and identify the necessary witnesses.

*Even if you don't think your first idea is a good one, run it by someone. Give it a test pitch. Your idea might be better than you think, or we might help you come up with something else that you'd like to do.*

coach/cheerleader combo, she'd probably tell you that her preferred way of getting new articles is to have someone drop one in her lap, fully cited and edited, and completely out of the blue. Because this scenario almost never happens, the next best way is to get in touch with Sarah. If you have an article idea, she'll help you refine that into a specific topic. If you want to write, but don't have a topic in mind, she has a list of topics you can choose from. She'll help you come up with a deadline that works with your schedule, and finally, she'll work with you on revisions and possibly even connect you with someone else to provide feedback. From start to finish, you won't be writing alone; you'll have someone to help you be successful.

While we're at it, let's cover a few of the most common objections or excuses not to write.

**I'm not a very good writer.** Don't worry! None of us was good our first time around, but we had help from others who wanted us to be successful. We'll be there to help you while you're working.

**My idea's not interesting.** Even if you don't think your first idea is a good one, run it by someone. Give it a test pitch. Your idea might be better than you think, or we might help you come up with something else that you'd like to do.

**Everything's already been done before.** Did you know that a good chunk of prosecutor ranks turns over every three years or so? Even if a topic was covered a few years ago, there are likely plenty of people who could benefit from such an article—and even older readers can use another perspective.

**I don't want to write by myself.** Safety in numbers works! If you feel like team authorship works better for you, we will work to pair you with a partner. On top of that, you'll still have help from us to keep you on track.

**I don't have the time to write a long article.** Write a short one instead. We try to publish book reviews in most issues, and someone's got to write them.

**Bill Wirsky writes for the journal, and I'm just not on the same level as Wirsky.** Let's face it, none of us are. It doesn't stop us from trying, though.

#### Last call

Just like every other TDCAA activity, the journal is member-driven; it is written by and for Texas prosecutors and staff. If you want a chance to hone your skills and knowledge, contribute to others' development, and pay forward what other members have invested in you, please consider writing an article (or six). You'll find it both rewarding and achievable. \*

#### Endnote

<sup>1</sup> Kaylee, my Australian Shepherd and occasional co-author, is always suitably impressed by my articles; my 3-year-old old daughter, not so much.

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RETURN SERVICE REQUESTED



4966 P-2 P82  
SARAH WOLF  
COMMUNICATIONS DIRECTOR  
505 W 12TH ST STE 100  
AUSTIN, TX 78701-1864

