The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

March–April 2021 • Volume 51, Number 2

"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

Handling excessive force and police brutality investigations

Eric Garner, George Floyd, and other citizens who have died at the hands of police are indelibly linked to the work prosecutors do on a daily basis.

By Gavin Ellis (left) and Michael Harrison
Assistant District Attorneys in Harris County

Even in our own state, Botham Jean and Joe Campos Torres—two men killed by officers—have changed the way many of us see our daily work and our relationship with police. These tragic situations cannot be healed, or even completely understood, by simply sharing platitudes on our social media pages. While the police are on the front lines, prosecutors have not been exempted from the scrutiny, discontent, and responsibility associated with failures of justice in the past.

The opportunity always exists, however, that we see justice done in the future. Prosecutors all have a responsibility to ourselves, the victims we fight for, and the criminal justice system as a whole, to maintain checks and balances and help protect integrity in policing. When that frontline integrity and trust is lost, the structure of everything supporting it begins to crumble.

As prosecutors, our remedies for injustice are, and have been, to recognize the injustice and to use the tools of justice to address the criminal transgression. What has previously impeded justice in police excessive force cases has often been a lack of recognition for the legal violations committed. When prosecutors are willing to and capable of recognizing excessive force, we can more effectively articulate it to juries, judges, and fellow attorneys. For prosecutors, recognition starts with knowing what makes force excessive, being familiar with the relevant laws governing use-of-force, and being willing to apply the law impartially.

One note to those in smaller offices: While many large prosecutor offices, including ours, have civil rights divisions dedicated solely to reviewing, presenting, and prosecuting allegations of excessive force, the two of us recognize this is not true for most counties across the state. Not all jurisdictions have the resources or the number of investigations to justify an entire unit. In these counties, the duty of case review, evaluation, and grand jury presentation is left to the

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The 2020 Annual Report

The 2020 Annual Report of the Foundation is now available online at www.tdcaf.org.

It discusses the slower year the Foundation had in terms of donations, presumablybecause of COVID-19, but we also saw gains in the fledgling endowment fund and offered crucial and timely support to TDCAA to ramp up our online training! Thanks to Foundation leaders—we couldn't have done it without you.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

In memoriam

I am saddened to report that in the last couple months we lost two former TDCAA presidents and leaders in the profession. **Oliver Kitzman** served two stints as a district attorney for Waller, Fayette, and Austin Counties, separated by a long career as a district judge. Oliver was the President of TDCAA in 1974, back in the association's formative years. He stepped up time and time again to support prosecutors as the profession moved to professionalize in the late 1970s.

David Williams, former County Attorney in San Saba County, was a cornerstone of the legal community for over two decades. He was a doer as well, serving on a multitude of state and local organizations that aimed to improve life for children in Texas. David has the distinction of having served as president of TDCAA for two straight years, 2006 and 2007 (because of the retirement of the current president while he was President-Elect). He was a steady hand at the wheel.

Both men have the distinction and honor of being in the inaugural class of the Texas Prosecutors Society, a group known as the Founding Fellows. Thanks to Oliver and David for leaving such a legacy for future Texas prosecutors. I am honored to have worked with them! ❇

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A way with words

I was very saddened to learn of the passing of **Judge Cathy Cochran.**

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Judge Cochran was my first court chief in County Court-at-Law 13 in Harris County back in the 1980s. She went on to be one of the best judges to ever serve on the Court of Criminal Appeals. She is flat-out the smartest and nicest person I will ever meet. But even if you didn't know her, you certainly would have appreciated that she could write an opinion that was cogent, transparent, and, well, rich with literary references and wonderful language.

Yes, you know what I am talking about—the legendary butt-crack case. In *McGee v. State*, 105 S.W.3d 309 (Tex. Crim. App. 2003), the issue was whether a warrant was required to search someone who had hidden illegal drugs between his buttocks. In her concurrence agreeing that the search was proper, Judge Cochran succinctly observed: "The human body is a private sanctuary which is generally entitled to significant protection under the Fourth Amendment. On the other hand, the human body is not 'a sanctuary in which evidence may be concealed with impunity.' A person who intentionally uses a body cavity as a pocketbook cannot claim 'King's X' when reasonable suspicion or probable cause points to that body-cavity pocketbook." Classic Cochran!

Her language was a device to drive a major shift in Texas jurisprudence. This *Texas Monthly* article about her is worth the read: www.texasmonthly.com/politics/the-reformer.

Shapeshifting is a real thing—we have proof

I am a believer in therianthropy (or shapeshifting)—how else does my dog always manage to get out of the house? He must turn into a human for purposes of opening the door handle.

We now have proof that people can shapeshift into animals right here in Texas. Recently our very own **Rod Ponton**, County Attorney in Presidio County, was caught on camera in his cat state in a court hearing. I am certain he was chagrined to have been caught: twitter.com/lawrencehurley/status/1359207169091108864?s=20.

OK, yes, it's probably more likely that there was just a cat *filter* on Rod's computer camera, but the "cat lawyer" video clip still made the rounds on Twitter, racking up more than 45,000 retweets in just a few hours after a Reuters reporter posted it. **Judge Roy B. Ferguson** of the 394th Judicial District tweeted, "Everyone involved handled it with dignity, and the filtered lawyer [Mr. Ponton] showed incredible grace. True professionalism all around!"

Report from the nation's capital

The National District Attorneys Association (NDAA) recently held its annual Capital Conference, which gives prosecutors from all over the nation an opportunity to gather—remotely—and talk about criminal justice issues on a national scope. These issues will play out in Congress, of course, but some will impact local criminal justice. Here are some of the issues that prosecutors discussed:

Victims of Crime Act: The Victims of Crime Act (VOCA) is suffering from a reduction in funding, so prosecutors discussed supporting the redirection of monetary penalties from federal

deferred prosecution and non-prosecution agreements into the Crime Victims Fund (CVF) to increase funding to support victims and victim services providers. In addition, it would be helpful to increase the federal grant calculation for funding to victim compensation programs from 60 percent to 75 percent of state-funded payouts and allow states to request a one-year, no-cost extension for these grant programs to ensure the long-term stability of the VOCA programs.

Electronic communications and encryption: A struggle with communication companies over encryption and law enforcement's access to electronic evidence continues. On the national level, there has been interest in allowing the use of cell phone jamming systems in prisons to ensure cell phones are not used to direct illegal activities outside prison walls.

Criminal justice reform: Prosecutors discussed the First Step Act, which President Donald Trump signed into law in 2018. The act was meant to reduce recidivism through various programs (see www.bop.gov/inmates/fsa/overview.jsp for details), and full implementation requires adequately funding the Bureau of Prisons (BOP) staff and facilities who are responsible for carrying out the law. There was also widespread support for ending driver's license suspensions for fines and fees to ensure we are not policing poverty, while ensuring suspensions remain for those who pose a risk to traffic safety. In addition, prosecutors supported the provision of certificates of rehabilitation to equip incarcerated individuals with the tools to successfully reenter society.

Funding goals: Prosecutors were concerned about insufficient funding to address DNA backlogs. And although this program has been defunct as far as Texas is concerned for years, many prosecutors still hold out hope for an increase in funding for the John R. Justice Student Loan Repayment program.

Meanwhile, back in Austin

As you read this edition of *The Texas Prosecutor* journal, the Texas legislature is in the middle of the 87th Regular Session, and our legislators are debating some very important proposals as well. Some of my favorites emerging from this session are:

- the sale of alcohol at high school stadiums;
- protections against fake catfish at restaurants;
- the abolition of Daylight Saving Time;
- recognition of the 1847 Colt Walker pistol as the official pistol of Texas;
- designation of the Bowie knife as the official knife of Texas; and
- the designation of San Marcos as the official mermaid capital of Texas.

It is always entertaining!

BJA grants and other financial assistance

Facing funding limitations from local and state sources, prosecutors and law enforcement continue to look to grants for programs and personnel. Significant funding from the federal government flows from the Bureau of Justice Assistance (BJA) and is often accessed through the Criminal Justice Division of the Office of the Governor. Over $100 million is available from the cornerstone Edward Byrne Memorial Justice Assistance Grants, and additional funding is directed at forensic science, violent crime reduction, cold case investigations, gun violence, opioid abuse, and mental health. A summary of the 2021 programs is available on our website (search for this article to find the PDF).

If you are looking for additional funding for various programs, you might also check out your local council of governments at www.txdirectory.com/online/abc/detail.php?id=200 and the Criminal Justice Division website at gov.texas.gov/organization/cjd/programs. And this just in: The founder of Facebook and his wife, **Mark Zuckerberg** and **Priscilla Chan**, just dedicated $350 million to criminal justice reform (https://www.vox.com/recode/2021/1/27/22251211/mark-zuckerberg-priscilla-chan-czi-criminal-justice-immigration-overhaul). One wonders if the innovations occurring in prosecutor offices and courthouses around the country will enjoy support from such efforts.

Even if you didn't know Cathy Cochran, you certainly would have appreciated that she could write an opinion that was cogent, transparent, and, well, rich with literary references and wonderful language.

2021 committees

Board President **John Dodson** (CA in Uvalde County) has been busy appointing the 2021 TDCAA committees. This is truly a member-driven organization, and the work of these committees is crucial in designing the training, publications, and other activities of the association. Thanks to everyone listed below for their service in 2021! ❇

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Confrontation in the digital age in *Haggard v. State*

Salute the trial prosecutors among us.

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

Appellate work is like being in a batting cage where the balls are coming out 215 percent faster than they should; it's hectic and stressful, but at least the balls more or less follow an expected schedule (except for writs, which is like getting beaned in the back of the head by someone you didn't even know was playing).

By contrast, trial work is like batting while riding a unicycle and juggling bats while someone blasts a firehose at you. Also the unicycle is on fire, the bats are on fire, you're on fire, and incredibly the fire hose is somehow on fire.

Which leads us to this issue's As the Judges Saw It case: *Haggard v. State*,[1] handed down from the Court of Criminal Appeals on December 9, 2020. This case addresses important and timely questions about the application of the Confrontation Clause in a digital and socially distanced age, and it perhaps raises even more questions about where we're headed. It began as so many cases do, with a trial prosecutor getting unexpectedly tossed a Friday afternoon flaming curveball.

Background

The two underlying cases involved one count of sexual assault of a child and another count of indecency with a child by contact, both committed in Liberty County against a single victim. Haggard was convicted on both counts, pleaded true to the enhancement paragraphs, and was sentenced to 25 years on each count, which the trial court ordered to be served consecutively. Haggard appealed to the Ninth Court of Appeals in Beaumont, alleging seven points of error, point one being that the trial court erred by permitting the Sexual Assault Nurse Examiner (SANE) to testify remotely via videoconference. The Ninth Court affirmed the conviction as to all seven issues, but as you may have guessed, it's that first issue that interests us—and that interested the Court of Criminal Appeals.

The SANE in this case had relocated to Montana since the child's examination, and the nurse was originally scheduled to come back to Texas to testify in person. Unfortunately for the State, it was learned that her plans changed the Friday afternoon before trial. That afternoon, the SANE informed prosecutors that she would not be appearing after all, citing "economic and personal reasons": She had traveled to Texas the week before to testify in another case, she had to travel to Houston again the weekend after to see a family member in hospice, the State would pay for her travel expenses but not for her testimony, and her attorney spouse said that she didn't have to appear if she wasn't under subpoena. Everyone who has done trial work of any kind can sympathize with this type of panic-inducing Friday afternoon call.

After voir dire was concluded but prior to the presentation of evidence, the State made an oral motion to allow the SANE to testify remotely via FaceTime. The defense objected to the State's motion and again objected on Confrontation Clause grounds immediately prior to her remote testimony. Haggard argued on appeal that:

1) the SANE's failure to appear was voluntary and the State did not issue a subpoena,

2) the SANE was given an oath in Montana by a notary public, not by the clerk of the court or judge in Liberty County,

3) the record does not reflect that the defendant was moved so that the SANE could see him

or that the trial court instructed the SANE be able to see Haggard, and

4) the jury's ability to observe the SANE's demeanor was impaired when the live videoconference connection was lost momentarily as she recited what the victim had reported to her.

The Ninth Court of Appeals avoided the Confrontation Clause question by going straight to the constitutional harm analysis under Texas Rule of Appellate Procedure 44.2(a).[2] The Ninth Court found that even if the trial court had erred, there was no harm in allowing the SANE's testimony via FaceTime. The testimony was cumulative of the victim's testimony, the SANE was not a crucial identification or fact witness, the defendant was permitted to fully cross-examine the SANE, the victim and other witnesses corroborated the material points of the SANE's testimony, and the State's case was not dependent on the SANE's testimony.[3]

Haggard filed a petition with the Court of Criminal Appeals alleging two grounds for review, both of which related to the remote SANE testimony: that the testimony violated the Confrontation Clause and that the Ninth Court's constitutional harm analysis was flawed. (The Ninth Court had found that even assuming error, there was no harm.)

The Court was somewhat sympathetic to the inconvenience to the SANE but found that "the right to physical, face-to-face confrontation lies at the core of the Confrontation Clause, and it cannot be so readily dispensed with based on the mere inconvenience to a witness."

As the CCA judges saw it

But that's not as the judges saw it in the Court of Criminal Appeals (I love that part). Judge Hervey wrote the majority opinion and was joined by Judges Keasler, Richardson, Newell, and Walker (Judge Yeary wrote a separate concurrence—more on that later). The majority noted that U.S. Supreme Court precedent has long held that under the Confrontation Clause, a criminal defendant has the right to physically confront those who testify against him, citing the 1988 case of *Coy v. Iowa*.[4] In *Coy*, a statute that allowed child victims of sexual abuse to testify behind a screen placed between the victims and a defendant was found unconstitutional under the Confrontation Clause, with the Court's discussion ranging from prior caselaw to the simple but deep-seated human concept of fairness found in the phrase, "Look me in the eye when you say that." The Supreme Court left open the question of whether an individualized finding that a particular child needed special protection might create an exception, saying, "We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy."[5]

"Another day" came two years later in *Maryland v. Craig*.[6] In *Craig*, a Maryland statute allowed a child victim to testify via a one-way closed circuit television, but unlike the statute in *Coy*, the trial court had to make a particularized finding that testifying would result in such serious emotional distress that the child would be unable to communicate. The Supreme Court found that this satisfied the "important public policy" requirement of *Coy*.

This is where the Court of Criminal Appeals's majority found fault with the SANE's remote testimony in *Haggard*: The trial court made no case-specific finding and heard no evidence as to the necessity of allowing the SANE to testify remotely that would satisfy the "important public policy" requirement of *Craig*, saying the closest thing to a necessity finding was the judge's observation that the State did not have time to subpoena her and noting that the State could have subpoenaed the SANE or asked for a continuance but didn't. The Court was somewhat sympathetic to the inconvenience to the SANE but found that "the right to physical, face-to-face confrontation lies at the core of the Confrontation Clause, and it cannot be so readily dispensed with based on the mere inconvenience to a witness."

The Court further found that a constitutional harm analysis should have reviewed a factor not addressed in the Ninth Court's opinion: The SANE's testimony proved up the chain of custody for highly incriminating DNA evidence. A forensic examiner testified that DNA evidence from a swab taken by the SANE was 219 quadrillion times more likely to have been contributed by the child victim and the defendant than by some other unrelated and unknown individual. The Court of Criminal Appeals did not itself find harm but remanded back to the court of appeals to conduct a new harm analysis.

The dissent

Judge Slaughter dissented very, very strongly and maintained that the U.S. Supreme Court cases that the majority found clear and binding were anything but. Judge Slaughter questions whether *Craig* and *Coy* are still good law after the Court's landmark decision in *Crawford* and points out that neither *Craig* nor *Coy* dealt with two-way video technology, which has vastly improved in

quality over the last 30 years. In her view, in the absence of express guidance from the U.S. Supreme Court on the proper test for two-way video testimony (and considering inconsistent opinions in the lower federal courts, which she carefully details), the Court should look to the underlying history and purpose of the Confrontation Clause as expressed in *Crawford* rather than try to force the square pegs of modern-day technology into the round holes of 30-year-old precedents that didn't deal with those issues.

Judge Slaughter goes on to observe that *Crawford* recognized that the Confrontation Clause was chiefly intended to prevent trials by deposition or *ex parte* written affidavits and says that each of the key components of the Confrontation Cause are satisfied in *Haggard*:

1) the witness was required to take an oath to testify truthfully, and the SANE was sworn in Montana in full view of the courtroom;

2) face-to-face examination of the witness is required, and the SANE could both see the questioner and be seen by the parties and the jury on monitor screens and a 60-inch TV screen;

3) cross-examination was performed just as it would have been in person; and

4) demeanor, which everyone in the courtroom could easily observe.

Because these requirements are satisfied by two-way video in some respects even better than if the witness had been testifying in the courtroom, in Judge Slaughter's view, there was no Confrontation Clause violation, so why must the trial court be required to make a necessity finding? As she puts it, "When there is no violation, a necessity finding seems ... unnecessary."

The concurrence

Judge Yeary's concurrence makes the very good argument that the majority's extensive discussion as to whether a Confrontation Clause violation occurred is outside of the Court's typical role of limiting itself to the review of decisions of the courts of appeal, as the Ninth Court very deliberately sidestepped that issue. The lower court's opinion found that "assuming without deciding" that there was a Confrontation Clause violation, no constitutional harm occurred.

Judge Yeary agreed that the lower court's harm analysis was flawed, but because it didn't decide the larger Confrontation Clause issue, he would remand without doing so either (Judge Slaughter's dissent expressed her agreement here in a footnote). Judge Yeary did feel compelled to weigh in on the robust debate between the majority and the dissent regarding the various strengths and weaknesses of in-person-versus-remote testimony. There was considerable pointed back-and-forth disagreement between the majority opinion and the dissent as to whether the sound and video quality in the case was worse, equivalent to, or better than a live witness. Judge Hervey's majority opinion cited several technical glitches with the video, the defense brief argued that the witness's body language could not be seen from the chest down; Judge Slaughter responded that glitches happen with courthouse sound systems as well and that body language can't be read behind a witness stand, either.

Judge Yeary concluded that which is better or worse is beside the point: Taking the Scalia-esque textualist position that our current technology was undreamed-of when the Sixth Amendment was adopted, Judge Yeary noted that it couldn't reside within the common understanding of the language then used. In Judge Yeary's view, physical confrontation is what the Constitution mandates, even if it could be proven that modern alternate procedures work just as well or even better.

In Judge Yeary's view, physical confrontation is what the Constitution mandates, even if it could be proven that modern alternate procedures work just as well or even better.

The takeaway

One good bit of news is the majority opinion seemed to suggest *in dicta* that some lower court opinions our office (and likely yours) had been using to justify remote testimony are acceptable:

- *Stevens v. State*,[7] which found no violation in a 75-year-old witness testifying remotely from Colorado because in the year before trial he had been hospitalized repeatedly for "decompensated congestive heart failure, gastrointestinal bleeding, atrial fibrillation, and vascular disease";
- *Rivera v. State*,[8] in which a crime scene investigator was allowed to testify remotely because he was on active duty in Iraq at the time of trial, and;
- *Lara v. State*,[9] in which a witness was allowed to testify remotely because he had a heart attack the night before trial and was in the hospital.

Haggard made clear what will not support a necessity finding: The witness was available to appear and testify but was not subpoenaed. Mere inconvenience to the State or to the witness will

It is inevitable that prosecutors will have to use such mechanisms as forensic evidence outstrips analysts' availability and resources, and these new-ish laws are a good indicator of where we're headed in the future.

not be enough to support a necessity finding, nor will the fact that the witness is an expert, standing alone. The State will need to put on evidence that shows that the witness is incapable of traveling without severe health repercussions, undue financial hardship, or some other consequence of equal severity, and given that the majority opinion noted with disapproval that the State did not seek a continuance, it would be wise to either do so or show why a continuance either isn't feasible or wouldn't rectify the situation.

Unfortunately, there is no bright-line test or list of nonexclusive factors to guide the State or the trial court, so our best bet is to make as strong of an evidentiary showing of necessity as possible and tread carefully when proposing that a witness be allowed to testify remotely over the defendant's objection.

This case obviously has a great deal of impact in our current pandemic climate, but the issue is one that will continue long after the current crisis has ended. W. Clay Abbott, TDCAA's intrepid DWI Resource Prosecutor, expressed to me that the *Haggard* opinion generated a great deal of interest in light of recent legislative efforts to use videoconference technology to ease the massive burden on Department of Public Safety forensic experts. In the 86th Regular Session in 2019, the Legislature created Code of Criminal Procedure Art. 38.076 (Testimony of Forensic Analyst by Video Teleconference) to facilitate the use of encrypted, interactive video and audio technology in criminal proceedings and allow the limited number of forensic analysts to testify more efficiently around the state, as they are currently severely limited by the travel and downtime required. The statute requires agreements among the parties so the *Haggard* opinion won't be a dealbreaker, and as with a Certificate of Analysis,[10] the defense may raise an objection to a forensic analyst testifying remotely; failure to object is a constitutional waiver. It is inevitable that prosecutors will have to use such mechanisms as forensic evidence outstrips analysts' availability and resources, and these new-ish laws are a good indicator of where we're headed in the future. This is an issue that we'll be seeing more and more, and it's an extremely good bet that the U.S. Supreme Court will be weighing in on the proper role of remote testimony in the criminal courts in the near future.

As to whether they'll lean in the direction of our Court's majority, Judge Slaughter's dissent, or somewhere in between, only time will tell. ❇

Endnotes

[1] 612 S.W.3d 318 (Tex. Crim. App. 2020).

[2] "[T]he court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." This is a harm standard you'd rather avoid if you can.

[3] *Haggard v. State*, No. 09-17-00319-CR, No. 09-17-00320-CR, 2019 WL 2273869, 2019 Tex. App. LEXIS 4378 (Tex. App.–Beaumont May 29, 2019) (mem. op, not designated for publication), reversed, 612 S.W.3d 318 (Tex. Crim. App. 2020).

[4] 487 U.S. 1012, 1017 (1988).

[5] *Id*. at 1021.

[6] 497 U.S. 836 (1990).

[7] 234 S.W.3d 748, 781 (Tex. App.–Fort Worth Aug. 23, 2007, no pet.).

[8] 381 S.W.3d 710, 711 (Tex. App.–Beaumont 2012, pet. ref'd).

[9] No. 05-17-00467-CR, 2018 Tex. App. LEXIS 5395, 2018 WL 3434547, at *4 (Tex. App.–Dallas July 17, 2018, pet. ref'd) (mem. op, not designated for publication).

[10] See Tex. Code Crim. Proc. Art. 38.41.

Handling excessive force and police brutality investigations (cont'd from front cover)

prosecutors who must also handle the rest of their caseload. Such an undertaking can be unwelcome and unorthodox when most of us are not used to using terms like "suspect," "target," and "defendant" in reference to the police we often work with and respect. Seeking out assistance, role-playing, and collaborating with fellow prosecutors and investigators can prove essential when navigating these often-uncharted waters. We hope this article, too, can provide assistance for prosecutors who are new to handling use-of-force investigations.

What makes force excessive?

Our laws recognize that law enforcement is one of the few occupations where using non-consensual, physical force against another person is sometimes a necessary duty of the job. That duty does not extend, however, to instances where police use a higher degree of force than is reasonable or use force when it is not immediately necessary.

Situations often arise where officers have a right to use force, but this does not mean they can use any force they see fit. Just because *some* force may be justified does not mean *all* force is reasonable. For example, if an unarmed arrested person is not complying during handcuffing and begins to resist, the officers have a reasonable right to use force to place the person under arrest and take him into custody. This force sometimes manifests itself through takedowns, tasing, and striking the arrested person. While some striking to the suspect's person may be a reasonable use of force in this particular situation, if an officer decides to use a baton to repeatedly and forcefully strike the resisting suspect in the face, the *degree* of force would likely be deemed excessive. Such force could cause death or serious bodily injury, such as brain damage or skull fractures. The officer would be meeting non-deadly resistance with deadly force, a degree higher than necessary. At that point, the force would exceed what any reasonable officer would believe was a necessary response to obtain compliance, place the person under arrest, or protect himself and fellow officers.

In addition, force may be used only when it is immediately necessary. Balancing immediacy can be understood much like the ripeness and mootness standards in civil procedure. If action is too early or too late, it becomes improper. Police make contact with people daily and develop intuitions about their behavior. Sometimes these interactions can be emotionally charged, and it is normal for police to anticipate conflict in certain situations. Clearly, though, an officer cannot preemptively use force that is not yet necessary. Officers should not tase detained people simply because they believed those detainees could become combative at some point in the future.

Furthermore, when officers are using force and the force stops being necessary to protect from harm or serve another lawful purpose, continued use of force becomes excessive. The Rodney King beating in 1991 is a well-known example of this. Long after King was on the ground and able to be taken into custody, officers continued striking him. King endured 33 baton strikes and seven kicks over one minute and 19 seconds. While some force may have possibly been reasonable earlier in the interaction, the strikes and kicks were not reasonable or immediately necessary at the time of the infamous video.[1] These facts are made more egregious considering that numerous officers were on the scene and participating. Reasonable alternatives to the force used were available, and the force was not furthering a lawful purpose, such as taking King into custody or preventing bodily harm.

The law governing excessive force

It is unquestioned that a key part of a peace officer's duties include using force when necessary. Hundreds of courses across the country totaling thousands of hours of instruction focus on teaching officers how and when to use force. The authority of peace officers to use force in appropriate situations changes the way that prosecutors evaluate allegations of excessive force. Prosecutors are accustomed to evaluating cases based on whether the facts of a case meet the elements of an offense. Different from many of the cases that we normally handle, these cases involve a critical question: not *who* is responsible, but *why* did the incident occur. Answering the question of why is essential in determining whether the conduct was justified or unjustified. In most force-related officer cases, justification

is the central issue, and it is where the legal analysis begins.

Chapter 9 of the Texas Penal Code prescribes a number of legal justifications.[2] Although most of the justifications listed in this chapter may be applied to a police officer's use of force, our focus will be on self-defense[3] and the law enforcement justification.[4] These two justifications are most often relevant in excessive force cases and are a great place to start evaluating your case.

Most prosecutors are familiar to some degree or another with self-defense. It should be reassuring to learn that our experience with self-defense is easily transferred to the evaluation of an excessive force case.

Self-defense

Most prosecutors are familiar to some degree or another with self-defense. It should be reassuring to learn that our experience with self-defense is easily transferred to the evaluation of an excessive force case. This is because there is not a separate self-defense law for peace officers and everyday citizens. The same self-defense analysis that is applied to an assault case between two neighbors is applied to a use-of-force case involving an officer and a detainee.

Section 9.31 provides, in part, that "(a) person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force."[5] Section 9.32 requires that the conditions of 9.31 are established but goes on to justify the use of *deadly force* "to protect [oneself] against the other's use or attempted use of unlawful[6] deadly force."[7] It is likely the facts of a case will include an officer's statement or a police report mentioning that the officer *feared for his life or safety* before resorting to force. These key words are an indication that a case requires a self-defense analysis. Contrary to popular belief, an officer's fear or genuine belief that force was necessary does not, by itself, make the use of force justified.[8] A key question in any self-defense case is whether or not the actor's fear or belief was reasonable under the circumstances.[9] The Penal Code defines a reasonable belief as one "that would be held by an ordinary and prudent [person] in the same circumstances as the actor."[10] Moreover, in the context of a peace officer's use of force, courts have further explained that the determination of reasonableness is based on the belief of a reasonable officer in the same circumstance.[11] Determining what a reasonable officer would do in a given situation is not always easy, but it is possible. Policy,[12] training, and an application of basic human experience and interaction are good places to start. An officer's training and years of experience may alert him or her to a danger that an everyday citizen may not instinctively perceive as dangerous, thus justifying a decision to use force. On the other hand, an officer may claim that a particular action caused him or her fear—for example, a driver reaching toward a glove box when asked for insurance information—but given the context and the application of everyday human experience, the fear may be deemed unreasonable.

When evaluating whether an officer's use of force was reasonable, the circumstances must be viewed from the standpoint of the officer.[13] Doing so requires taking into account the context of the interaction, as well as the speed at which events are occurring in real-time.[14]

Sections 9.31 and 9.32 not only require that the use of force itself is reasonable, but also that the *degree* of force is reasonable.[15] In *Warren v. State*, a jury convicted a Metro Police Department officer of assault for striking a homeless man 13 times with his baton during an altercation,[16] and the Court of Appeals upheld it. The jury decided that although the first several strikes may have been justified, the blows that were delivered as the man cowered on the ground (and continued even after the officer's partner instructed him to stop) were excessive.[17] Determining whether an officer has exceeded the degree of force reasonably necessary for protection will largely depend on the facts of the case.[18] Looking to policy and training can be instructive. However, it is important not to ignore conduct that—by virtue of the context, words, or demeanor of the officer—appears to be personal or vindictive in nature, rather than serving a legitimate law enforcement purpose.

Defense of a third party

Similar to §§9.31 and 9.32, §9.33 of the Penal Code justifies the use of force or deadly force in defense of a third party.[19] Whether it is in defense of a citizen or a partner, §9.33 may be applied to an officer's use of force if he or she reasonably believed that the force or deadly force was immediately necessary to protect the third party.[20] The evaluation of a defense of third party justification will require the same reasonableness analysis as self-defense, including an inquiry into the degree of force used.

Apparent danger doctrine

A complete analysis of a self-defense or third-party justification will require an understanding of apparent danger. The apparent danger doctrine is merely a deeper analysis of the term "reasonable belief" contained in §§9.31 and 9.32.[21] The doctrine is built on the reality that a belief can be reasonable but still be wrong. Furthermore, in some instances, waiting to confirm the legitimacy of a threat may not be possible or wise. If it would appear to a reasonable person that force is immediately necessary to protect oneself or a third party against unlawful force, the law justifies the actor's use of force without regard to whether the threat actually exists.[22] Excessive force cases involving toy guns, cell phones, and suspects reaching into their waistbands are all likely analyzed using the apparent danger doctrine. However, in addition to requiring that the actor's belief is reasonable, courts have also held that words alone are insufficient to justify the use of deadly force under the apparent danger doctrine.[23] A person's verbal threat of deadly force, without any conduct in furtherance of that threat, does not authorize the use of force in self-defense or in defense of a third party.[24]

The question of reasonableness is ultimately a question for the trier of fact. However, when evaluating a potential excessive force case, it is important for a prosecutor to answer these questions for him or herself.

Law enforcement justification

Another frequently visited justification in excessive force cases is §9.51. Unlike self-defense, §9.51 is specific to law enforcement or a person acting at the direction of law enforcement. This section also differs from self-defense in that it does not require the use or attempted use of force against the officer before he or she is justified in using force. Under §9.51, "a peace officer ... is justified in using force[25] against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest. ..." The language of §9.51 should sound familiar: With the exception of a few key differences, it has many similarities to self-defense and defense of a third party. The reasonableness standard that is applied when analyzing self-defense is also applied under §9.51. Additionally, a focus on the reasonableness of both the use *and* degree of force is present in both sections.

However, although reasonableness is our first inquiry in a self-defense evaluation, it is the second step in a §9.51 analysis. Section 9.51 justifies an officer's reasonable use of force to carry out an *arrest or a search* or to prevent *escape* after an arrest.[26] When evaluating a case under §9.51, it is important to first establish the officer's goal. Cases in which force is used against a resisting arrestee or a detainee during a search will most often be analyzed under §9.51. Conversely, in a recent Harris County case, a jury convicted an officer of Official Oppression after he used his Taser on a woman suffering from a mental health crisis; at the time, the woman was bound in four-point restraints in an emergency room bed. The jury convicted the officer over a §9.51 instruction. During the trial, the officer's supervisor testified that the complainant was not under arrest, and that the officer's duties had ended once the complainant had been transported to the hospital and was securely placed in the care of nurses. Multiple nurses testified that the officer re-entered the room after the complainant used profanity toward him. The jury decided that because the officer was not attempting to make an arrest, conduct a search, or prevent the escape of the bound complainant, the requirements of §9.51 had not been met. When evaluating an excessive force case under §9.51, it must be determined whether the officer was attempting to perform one of the enumerated job duties, in addition to determining whether the force was reasonable under the circumstances.[27]

The legal analysis in a police use-of-force case requires distinct attention to the justifications that may be present. However, in the absence of a sufficient legal justification, excessive force cases take on much of the same characteristics as any other case. A prosecutor must decide which offense best fits the facts of the case, then pursue that case and ensure that justice is done.

The agency's role

Generally speaking, an excessive force investigation will be initiated by the law enforcement agency with jurisdiction over the location of the incident. In many instances, this will be the agency that employs the involved officer(s). However, depending on the circumstances of the incident—for example, a motor vehicle pursuit that crossed jurisdictional lines—an incident may involve officers from one jurisdiction while the in-

The legal analysis in a police use-of-force case requires distinct attention to the justifications that may be present. However, in the absence of a sufficient legal justification, excessive force cases take on much of the same characteristics as any other case.

At times, an investigation may not be clear-cut. It is common for uses of force to be exhibited against suspects who are charged with serious crimes, who are currently incarcerated, or who have prior felony convictions. Also, uses of force are most often initiated after some sort of non-compliance or force by the victim or suspect.

vestigation is handled by another agency. Regardless of who is handling the investigation, the agency's chief role is to collect evidence, generate a report, and take witness statements, including statements from the officer(s) involved in the incident. Prosecutors must keep in mind that many statements by the officer(s) involved may not be considered free and voluntary under *Garrity*.[28] After all relevant evidence is collected, the agency will turn its investigation over to the DA's office with jurisdiction over the incident.

The prosecutor's role

After the law enforcement agency turns its investigation over to a prosecutor office, a comprehensive review must be conducted. Like most cases, this includes reviewing all evidence provided by the police agency; making contact with the victim or accuser; making evidentiary evaluations about the case; and closing the case, charging it, or presenting it to a grand jury. When undertaking an investigation, it is important that prosecutors know if their office has specific policies with regard to handling use-of-force cases. These may provide specific directives on how these investigations should be handled in a given jurisdiction.

In some cases, an allegation may be proven unfounded by the evidence or insufficient to legitimize a criminal charge. These cases can often be simply closed. It may be beneficial to draft a memorandum about the case and place it in the file to explain the issues and document why the case was closed. In most cases, public statements and press releases are not necessary after the administrative closing of a use of force investigation. Certain cases will, however, attract scrutiny from media and the public. In these situations, consult with leadership in your office about the best course of action with regard to handling public statements.

At times, an investigation may not be clear-cut. It is common for uses of force to be exhibited against suspects who are charged with serious crimes, who are currently incarcerated, or who have prior felony convictions. Also, uses of force are most often initiated after some sort of non-compliance or force by the victim or suspect. While these factors do not excuse an officer's use of unlawful force, they can be mitigating, can negate the credibility of victim testimony, and can garner the sympathy of jurors. Weighing these factors can create a complicated web of legality, morality, and justice in a prosecutor's mind. In such cases, presenting to the grand jury can be a valuable tool. A grand jury allows the prosecutor to empower the community to make decisions regarding the reasonableness of force and avoids having a single prosecutor making a unilateral decision about an important case.

Before presenting to a grand jury or making a charging decision, effective communication can help make the rest of the process run more smoothly. In some cases, the officers under investigation will have hired attorneys to provide them counsel. As is true in most cases, it helps to keep the defense updated, provide them a target letter, and give them notice when you decide to close, charge, or present a case to a grand jury. A standard target letter should notify the officer and counsel of the time and date of presentation and, in most cases, allow them to avail themselves to testify in front of the grand jury. Sometimes, attorneys will willingly make their clients available to testify at the grand jury. Effective communication also applies to notifying the officer's agency. Often, the agency will want to be able to promptly make decisions regarding the officer's employment, depending upon the result of the case. If there are officer witnesses or agency trainers you wish to testify at trial (should the case be charged), consistent communication can keep witnesses in the know and foster goodwill.

Seeking help from DA investigators

Prosecutor office's investigators can be highly valuable resources for evaluating the techniques and degree of force used. Reviewing use of force incidents often means understanding the perspectives of a reasonable officer, and investigators can provide insight into officer practices, training, techniques, and procedures. Furthermore, many have been in similar situations and have the knowledge to help prosecutors better understand the dynamics of citizen interactions.

We're not advocating that an investigator's opinion should be the determining factor in the reasonableness or illegality of another officer's force. Our own investigators and trusted officers may have an unrefined or overly sympathetic understanding of the reasonable bounds of force. This does not, however, negate their potential experiential and scientific contributions to an investigation. Even in cases where investigators have a different perspective from that of grand jurors or other prosecutors, their view-

points can be valuable in evaluating a case's trial readiness or preparing for trial arguments from the defense.

In the courtroom

Prosecuting the "good guys" often presents unique hurdles. Criminal cases against police defendants are often scrutinized heavily, especially when the victim has a criminal record. Some judges, prosecutors, and jurors have issues believing that an officer may have done something wrong, even when the evidence clearly suggests that a crime was committed. This can make trying cases against officers highly contentious. The State must overcome this difficulty and see justice done impartially. We must hold the other parties to that same standard.

Sometimes, judges may need to be encouraged to treat police defendants the same as other defendants. The optics of a judge's preferential treatment of a peace officer defendant may communicate unconscious suggestions about guilt to jurors, victims, and family members. The court may be less rigid about character evidence, let the defendant walk around the well during breaks, or even use the bathroom in chambers. These issues may be particularly challenging in smaller counties where the criminal justice community is smaller and more close-knit. It may not seem improper to the judge to allow more freedoms to someone he may have previously seen as a witness or for whom he may have signed a warrant. Trial prosecutors must be prepared and willing to endure the uncomfortable position of asking the court to enforce its own standards.

Conclusion

We have the responsibility to seek justice, no matter who is accused. Doing so protects the integrity of our criminal justice system and validates the good work of so many of the law-abiding, community-protecting officers who are not committing unlawful acts. While prosecutors have no right to demand perfection, we do have a right and a responsibility to hold officers accountable to the laws of the State of Texas. To do so, we must have the knowledge and the conscience to recognize excessive force when we see it. If the State is not actively recognizing it and willing to prosecute it, we are enabling it—and if we are enabling it, we are failing to protect our communities and neglecting our oath to the constitution. ❇

Endnotes

[1] While the officers in this case were acquitted in the state case, two of the officers were convicted on federal civil rights violations and served federal prison sentences.

[2] See, e.g., Tex. Penal Code §9.21 (Public Duty); Tex. Penal Code §9.22 (Necessity).

[3] See Tex. Penal Code §§9.31 and 9.32.

[4] See Tex. Penal Code §9.51.

[5] Tex. Penal Code §9.31(a).

[6] It is worth noting, especially in the context of law enforcement use of force, that §9.32(a)(2)(B) justifies an actor's use of deadly force "to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery."

[7] Tex. Penal Code §9.32(a)(2)(A).

[8] See *Mays v. State*, 318 S.W.3d 368, 385 (Tex. Crim. App. 2010); *Bell v. State*, 566 S.W.3d 398, 402 (Tex. App.–Houston [14th Dist.] 2018, no pet.); *Warren v. State*, No. 14-19-00589-CR, 2020 WL 7866798, at *5 (Tex. App.–Houston [14th Dist.].

[9] See *id*.

[10] Tex. Penal Code §1.07(42).

[11] See *Escobar v. Harris Cty.*, 442 S.W.3d 621, 629 (Tex. App. 2014); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

[12] See *Tennessee v. Garner*, 471 U.S. 1, 15-20 (1985).

[13] *Gonzales v. State*, 838 S.W.2d 848, 870 (Tex. App.–Houston [1st Dist.] 1992, pet. denied) (determining that the jury had to view the altercation from the defendant's standpoint, rather than the complainant's, when deciding the issue of self-defense).

[14] *Graham*, 490 U.S. at 396 (opining that triers of fact should make "allowance for the fact that police officers are often forced to make split-second judgments–in circumstances that are tense, uncertain, and rapidly evolving–about the amount of force that is necessary in a particular situation"); see also *Shannon v. State*, 36 S.W.2d 521, 523, (Tex. Crim. App. 1931)(noting that a

Sometimes, judges may need to be encouraged to treat police defendants the same as other defendants. The optics of a judge's preferential treatment of a peace officer defendant may communicate unconscious suggestions about guilt to jurors, victims, and family members.

self-defense analysis should take into account the "manner and character of [the interaction], taken in connection with all the surrounding circumstances happening at the time or beforehand, as viewed from the defendant's standpoint alone.").

[15] Tex. Penal Code §9.31(a); Tex. Penal Code §9.32(a)(2)(A).

[16] *Warren*, 2020 WL 7866798 at *1.

[17] See *id*.

[18] See, e.g., *Ryser v. State*, 453 S.W.3d 17, 27 (Tex. App.–Houston [1st Dist.] 2014, pet. ref'd) ("If an officer uses more force than is reasonably necessary, [the officer] exceeds [the officer's] statutory authority and may be subject to criminal liability.").

[19] Tex. Pen. Code. §9.33.

[20] *Id*.

[21] See *Valentine v. State*, 587 S.W.2d 399, 401 (Tex. Crim. App. 1979) (concluding that the term "reasonable belief" in the jury charge sufficiently instructed the jury that a reasonable apprehension of danger, whether actual or apparent, is sufficient to entitle an actor to exercise the right of self-defense).

[22] *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996) ("a person has the right to defend himself from apparent danger to the same extent as he would if the danger were real").

[23] *Espinoza v. State*, 951 S.W.2d 100 (Tex. App.–Corpus Christi 1997, pet. ref'd)

[24] *Id*.

[25] Section 9.51(c) justifies the use of deadly force when reasonably believed to be immediately necessary to make an arrest, or to prevent escape after arrest, "and 1) the officer reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; or 2) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to the actor or another if the arrest is delayed."

[26] Tex. Penal Code §9.51(a).

[27] See, e.g., *Kacz v. State*, 287 S.W.3d 497, 504–05 (Tex. App.–Houston [14th Dist.] 2009, no pet.)

[28] When reviewing statements in an excessive force case, it is very important to be familiar with *Garrity v. New Jersey*, 385 U.S. 493 (1967). In short, under *Garrity*, any statement that is made under threat of removal from office or termination–including statements made to internal affairs–is not a free and voluntary statement. Such a statement cannot be used by prosecutors.

Taking a closer look at intimate partner violence

To address an increase in intimate partner homicides and family violence felonies in our county, Sharen Wilson, our elected Criminal District Attorney, petitioned the commissioners court to create and fund an Intimate Partner Violence (IPV) team.

By William Knight (left)
Assistant Criminal District Attorney on the Intimate Partner Violence Team, and
Allenna Bangs
Assistant Criminal District Attorney and Chief Prosecutor on the Intimate Partner Violence Team, both in Tarrant County

It is comprised of five felony attorneys (including the two authors of this article), three investigators, and an administrative assistant, and its charge is to maximize protection for victims and hold offenders accountable. Chapter 5 of the Code of Criminal Procedure, titled Family Violence Prevention, in its Legislative Statement specifically says, "Family violence is a serious danger and threat to society and its members. Victims of family violence are entitled to the maximum protection from harm or abuse or the threat of harm or abuse as is permitted by law."

The IPV team focuses on strangulation cases, sexual assaults, aggravated assaults, and assaults where an offender has a prior conviction for family violence, and we implemented systematic changes within our office and county-wide. For example, the packet that police use at the scene of every family violence case was updated, briefs were drafted concerning family violence bond and evidentiary issues to be ready at a moment's notice, and expert and advocacy training took place office-wide. Major components of the transformation were advancements in trauma-informed responses and training in domestic violence dynamics so that our victim assistance coordinators (VACs), attorneys, and staff could better serve victims and see justice done. By 2019, three years after the team was founded, our office saw our FV homicides decrease by 50 percent and felony FV cases decrease by 10 percent overall.

While success with the felony cases was a welcome change, statistics revealed that the third most frequently filed case in our office was still assault bodily injury–family violence (ABI-FV). In 2019, 2,787 such cases were filed. As the number of ABI-FV cases mounts and the backlog in misdemeanor courts ages, the cases become more difficult to prosecute. Family violence cases historically present their own challenges as law enforcement engagement in personal relationships is often unwelcome or met with resistance. Adding months and years to the time between the incident and the potential trial only exacerbates those issues. With just under 50,000 cases filed in our office yearly, it is not feasible for the intake prosecutors to focus only on family violence cases and identify the unique challenges and pitfalls at each case's infancy. Simultaneously, law enforcement is also handling a large caseload and must always focus on spreading resources to meet the needs of their specific community. The need for a more thorough review and evaluation of these cases with an eye toward prosecution and justice was necessary. All of us who do this work recognize that the stakes can be very high in these cases as they involve children, families, and violence. Time is of the essence.

By reading senior attorneys' case evaluations, notes, requests, and communications with the police, misdemeanor attorneys see first-hand what is required to adequately work up a case and get it trial-ready from an evidentiary point of view.

New intake program

In light of these difficulties and the seriousness of family violence offenses, in late 2019, our team developed an intake program that combines prosecutors, investigators, and VACs with special knowledge and skills to evaluate and prepare misdemeanor ABI-FV cases as soon as they are filed.

Each day, the cases filed by our 56 law enforcement agencies from the previous day are assessed by the team with three main goals:

1) determine if the case should be accepted, rejected, or returned for more investigation,

2) identify items of evidentiary value, such as statements, pictures, videos, and recordings that could still possibly be obtained to strengthen the State's case, and

3) make first-day contact with the injured party to obtain crucial information, refer to necessary services, and explain the criminal process.

The team is comprised of the felony prosecutors of the IPV team, the misdemeanor section, felony and misdemeanor investigators, and victims services personnel. The felony prosecutors evaluate the case first. With more prosecutorial and trial experience, these team members can identify issues in the case and anything that might make the case unprosecutable. The felony members also determine what records or evidence may still need to be obtained if the case will be accepted, and attorneys on the team then request those additional items from the detectives filing the case.

An added benefit of this evaluation by a felony prosecutor is training for the newer attorneys. In a year where our county has seen no misdemeanor trials since the emergency order in March, actual trial training has been difficult to obtain. Certainly, we can provide CLE and talk about the law and advocacy, but observing other attorneys' work in docket and trial is invaluable. It is also currently impossible. By reading senior attorneys' case evaluations, notes, requests, and communications with the police, misdemeanor attorneys see first-hand what is required to adequately work up a case and get it trial-ready from an evidentiary point of view.

Additionally, newer attorneys learn about "evidence-based prosecution," a term that has been used frequently in recent years when discussing family violence cases. It is a bit of a confusing term because all prosecution should be evidence-based, but in the family violence realm, it refers to creating a case without a complaining witness. This concept can be difficult for newer trial attorneys who may have experience only in DWIs, thefts, and drug cases, where the witnesses are generally cooperative to prosecution. The art of working up a family violence case using all of the Rules of Evidence and exceptions to hearsay to our advantage has been something the newer attorneys have absorbed in this process.

The investigators and VACs on the intake team reach out to the injured parties in each case. With FV cases, there is a likelihood that while there may have been an "explosive" phase in a relationship, an injured or abused individual will return to that relationship. In many intimate partner violence relationships, research indicates it can take a person seven to eight attempts to leave an abuser. As prosecutors and investigators, we also recognize that someone's clearest recollection of an event may be closer to the time an event occurred. However, in watching body camera footage, we can also recognize that family violence scenes are hectic, dynamic, and oftentimes dangerous. Patrol officers are juggling quite a bit of information and are also keenly aware that the volatile nature of a family violence scene could result in their own injury or death. Therefore, we recognize that while we need information from a complaining witness close in time to the incident, it may not be collected, or collected thoroughly, at the scene.

As cases are pending with our office, we know that people's lives change. If we do not contact victims until several weeks or months after an incident, we risk not being able to locate them, losing their cooperation, or devaluing their trust in the criminal justice system. We learned that at a very popular family violence seminar for defense attorneys, attendees are taught, "You must contact the victim before the State does." A quick Google search of family violence defense attorneys in your area will show the large volume of information that victims are given by the defense when a family violence incident occurs. They are warned of divorce proceedings, custody issues, financial burdens, and in some cases immigration status. They are offered the chance to fill out Affidavits of Non-Prosecution. This is not to say it is a race to provide information; however, it is a missed opportunity if victims are not contacted, given a chance to explain their situations, and apprised of their rights and roles in a case. It is the only chance to gain their trust and make the im-

pression of how our office intends to handle the case. There is no worse feeling as a prosecutor than a first setting where a defense attorney asks, "Have you ever even talked to your victim?" and our answer is, "No."

We also clearly accept and understand our duty to divulge any exculpatory evidence in a case to the defense. Making initial contact with victims allows the State to gain additional information, evaluate the case further, provide information to the defense, and make informed decisions on making plea offers.

Benefits of the system

By streamlining the process each day and involving not only those with specialized knowledge but also the individual prosecutors who will be assigned to the case for disposition, the cases are strengthened. We can communicate more clearly and directly with law enforcement partners about the needs we have under the law. We are also able to identify cases where an individual defendant may be in need of reformative services, such as drug or alcohol rehabilitation, mental health evaluation, or counseling. By having a working knowledge of the victim's personal situation and opinion, the State can better understand the goals for each individual case.

As of December 2020, we have evaluated more than 1,600 cases using this method. We rejected about 19 percent of the cases submitted by law enforcement for various reasons: where no primary aggressor was identified, the incident appeared to be mutual combat, no one identified "pain," or where—worst case scenario—the true victim had been (wrongly) arrested. Making these evaluations led to increased communication with our law enforcement partners, and we have since offered six training sessions on family violence investigation, free of charge, to agencies in our county.

Of the cases we accepted, we enhanced 19 percent of them to felony charges. Affording the maximum protection the law allows for family violence victims meant changing some of the ways we looked at enhancements. We began using cases where the FV finding had been negotiated away on a prior judgment because we recognized that extrinsic evidence is allowed to prove that prior. We started evaluating criminal history and checking with other counties and states at a case's infancy to ensure we were accepting the case at the highest charge. By speaking with victims early, we frequently learned of other offense reports that had not made it to our office or of unreported incidents where evidence existed to upgrade a charge to Continuous Family Violence.

2020 also presented a time when we could spend a lot of our focus on bonds and bond conditions. We worked with law enforcement to file additional charges for Violation of Protective Order *and* Violation of Bond Conditions. Oftentimes when we could accept these additional charges, we approached the court to hold an individual with no bond under Art. 17.152 of the Code of Criminal Procedure.

This year, CDA Sharen Wilson created a position to bridge the gap between the civil and criminal divisions for mental health cases. Many of the family violence cases we evaluate involve individuals with serious mental health conditions whose needs were not being met. This new program helped us identify that scenario early in the process. Once the determination is made or we feel we need more information, we collaborate with the ACDA in this position, Ty Stimpson, who communicates with MH providers across the county. In communicating with the complaining witness in the assault–family violence case, who was usually a parent or sibling, we could also obtain the crucial mental health history that helps us direct the case away from a trial docket and into a more appropriate diversion or commitment.

Conclusion

Family violence cases can be difficult. Developing a program to rework age-old local customs to approaching such cases can be arduous and uninspired. In our county, all of us had become too comfortable—law enforcement, the defense bar, defendants, and we prosecutors had been comfortable with a status quo that did not serve victims, our cases, or our community. The trickle-down effect of not having a specific, focused process to identify the needs of these cases was apathy and atrophy in our system. Making these changes has, in a short time, turned intake of FV cases into one of our more robust processes. We have streamlined the work so that with the same resources, we are working smarter, and in turn, meeting our goals of seeing justice done. ❇

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An introduction to the Texas Children's Commission

No child enters or leaves foster care without a court order.

By Jamie Bernstein (left)
Executive Director, and
Renée Castillo-De La Cruz
Staff Attorney, both at the Supreme Court of Texas Children's Commission in Austin

Accordingly, the Supreme Court of Texas established the Children's Commission in 2007 to serve as the critical connection between the child protection and legal systems. For the approximately 30,000 children who are in the care of the state at any point in time, a judge will:

- determine where the child will live, with whom, and for how long;
- decide whether the child will be allowed to see siblings and other family members, how often, and under what circumstances;
- approve plans to provide services to the family;
- monitor progress to determine whether the family can safely stay together or reunify; and
- perhaps decide whether a child's legal relationship with his or her parents will be terminated.

Clearly, courts have a profound impact on children and families in our state, and the stakes are exceedingly high. The Children's Commission's purpose is to strengthen courts for children, youth, and families and thereby improve the safety, permanency, and well-being of children. The Children's Commission fulfills this mission by:

- administering the federal Court Improvement Program in Texas;
- training and educating judges, attorneys, and advocates about the federal and state laws and policies that govern foster care and adoption, so that children are protected, their well-being is maintained while in care, and positive and timely permanency can be achieved;
- communicating legislative and policy changes, along with information about best practices, in a timely manner to over 3,000 Texas judges and lawyers who handle child protection cases around the state;
- convening robust roundtable discussions about critical and urgent issues, such as permanency for children, the use of mediation, and the child's voice in court and in case development, among other topics;
- supporting committees and workgroups formed to address specific and timely issues (for example, expanding the understanding of trauma associated with child abuse and neglect, preventing human trafficking, and improving legal representation for all parties, including the state child protection agency); and
- engaging more than 500 stakeholders statewide across the child protection, legal, education, mental health, and other systems.

Child protection law is a very specialized field, and the Children's Commission aims to support and strengthen the response in the legal system to the complex and challenging issues presented in this area of law. In addition to the breadth of the above work, the Children's Commission has produced multiple training classes, resources, and tools to address the needs of the legal community, including information that may be of value to prosecutors.

Resources for attorneys

The Children's Commission supports high-quality training for attorneys practicing child protection law through partnerships with the State Bar of Texas, Texas Department of Family and Protective Services, Texas District and County Attorneys Association, and Texas Center for the Judiciary. The Children's Commission also provides in-house training opportunities, including

webcasts. Every year the Children's Commission also presents a Texas-specific hands-on Trial Skills Training that is designed for less-experienced attorneys to enhance their legal representation skills through a simulated child protection court case. Each Trial Skills Training includes an equal number of parents' attorneys, children's attorneys, and prosecutors, all of whom can practice their litigation skills without the pressure of having a family's future in the balance.

There are various free resources and tools available on the Commission's website (www.texaschildrenscommission.gov) to support attorneys and judges in the practice of child protection law. Some resources for prosecutors include:

- the *Child Protection Law Bench Book*,[1] which includes chapters on hearings and legal requirements, as well as topical issues such as evidence and the Interstate Compact on the Placement of Children.
- Tool Kit for Attorneys Representing the Texas Department of Family & Protective Services in Child Protection Cases,[2] and
- Tool Kit for Attorneys Representing Parents and Children in Child Protection Cases.[3] The tool kits cover essential legal basics at a glance, including pleadings, motions, evidentiary issues, hearing checklists, and related federal law issues. The tool kits also include concurrent and special issues related to child protection cases.
- the *Parent Resource Guide* in English[4] and Spanish. [5] The *Parent Resource Guide* is a handbook to help parents understand the Texas child protection system, their role and responsibilities when involved in a Child Protective Services case, and the roles and responsibilities of others.
- the Family Helpline, which assists callers with legal information and education but does not offer legal advice or establish an attorney-client relationship with callers. Parents will be given referrals to local resources that benefit children, families, and the community at large. The Family Helpline is available Monday through Friday, from 9 a.m. to 6 p.m. and can be reached at 844/888-6565.[6]

For more information about the Children's Commission, please email children@txcourts.gov or visit the website. Additionally, you may subscribe to receive Resource Letters for Attorneys from the Children's Commission, which include useful information and announcements about changes in law, practice, or policy, as well as upcoming trainings and scholarships available for attorneys practicing child protection law.[7] ❇

Endnotes

[1] Available at http://texaschildrenscommission.gov/for-judges/bench-book.

[2] Available at http://texaschildrenscommission.gov/media/83756/toolkit-for-attorneys-representing-the-texas-dfps-in-child-protection-cases-online-version.pdf.

[3] Available at http://texaschildrenscommission.gov/media/84508/parents-tk-as-of-827-web.pdf.

[4] Available at http://parentresourceguide.texaschildrenscommission.gov.

[5] Available at http://parentresourceguide.texaschildrenscommission.gov/espanol.

[6] For more information on the Family Helpline, please visit the Texas Law Help website at texaslawhelp.org.

[7] Subscribe at http://www.texaschildrenscommission.gov/reports-and-resources/resource-letter-for-judges-attorneys.

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A capital murderer's death sentence undone

On October 26, 2013, Charles Brownlow went on a five-person killing spree in Kaufman County, culminating in the robbery and murder of a convenience store clerk.

By Jennifer Ponder (left)
Assistant Criminal District Attorney, and
Erleigh Wiley
Criminal District Attorney, both in Kaufman County

At his capital murder trial, the jury recommended death.

However, seven years and thousands of man-hours after the murders, which included a capital murder trial, appeal, and writ, the United States Supreme Court expanded the definition of intellectual disability. No one in our office imagined the Supreme Court would set aside Texas' intellectual disability law and overturn the justice our community believed Brownlow deserved. This article explains the practical consequences of *Moore* and its progeny on intellectual disability.

Capital murder

Brownlow's murder spree began when he shot and killed his mother, took her ID and credit cards, doused gasoline around the house, and set it on fire. Next, Brownlow went to his aunt's house where he violently kicked in the door and shot her twice, killing her as well.

After murdering his mother and aunt, Brownlow checked into a hotel room with his dog. Later that evening, he drove to a friend's house and shot at the two people inside, who faked injuries. Believing them dead, he left. Continuing his rampage, Brownlow next drove to the home of two other friends, who attempted to flee as he forced his way into their house. Brownlow shot the man in the back and head and the woman six times. He left the victims' 4-year-old child with their bodies.

Later that evening, Brownlow walked into a convenience store, put beer on the counter, and rummaged around his pants. Instead of paying, Brownlow retrieved his gun from his car, and shot the store clerk in the head. After killing the clerk, Brownlow took two 12-packs of beer, tried to open the cash register, and stepped over the clerk's body to take the clerk's gun and extra magazine.

At the time Brownlow entered the convenience store, officers were aware of multiple shootings and were on the lookout for a person of his description. An officer on patrol saw Brownlow inside the store, and officers chased him when he left the store and apprehended him two hours later.

Procedural history

The State charged Brownlow with capital murder for killing the gas station clerk during an armed robbery and sought the death penalty. The murder was caught on 16 store cameras.

Before trial began, Brownlow's attorneys questioned his competency due to his delusional thoughts, auditory hallucinations, and other behaviors.[1] However, at the competency hearing, court-appointed experts testified that Brownlow was competent with a "very good grasp of court procedures" and was likely malingering. Ultimately, the trial court found Brownlow competent and denied additional challenges to his competency before trial.

Because Brownlow's guilt was plainly evident on film, punishment became the focus of his trial. Brownlow's defense team argued he was intellec-

tually disabled and therefore ineligible for the death penalty. However, the jury disagreed[2] and sentenced Brownlow to death.

A brief explanation of intellectual disability

The United States Constitution protects intellectually disabled individuals from eligibility for the death penalty.[3] The United States Supreme Court found that executing the intellectually disabled serves no penological purpose, is contrary to the nationally held consensus, and "creates a risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[4]

Although states have "the task of developing appropriate ways to enforce" the restriction against executing the intellectually disabled,[5] this discretion is not "unfettered."[6] Medical experts alone do not dictate a court's intellectual disability determination; instead, the decision must be "informed by the medical community's diagnostic framework."[7]

To qualify as intellectually disabled, an individual must meet three criteria:

A) deficits in general mental abilities (an IQ of 65–75);

B) adaptive deficits[8] (impairment in everyday adaptive functioning in comparison to an individual's age, gender, and socio-culturally matched peers); and

C) onset during the developmental period (before age 18).[9]

At Brownlow's punishment, the trial court applied then-valid Texas law, *Briseno v. State*, to assist the jury in determining whether he was intellectually disabled. In *Briseno*, the Court of Criminal Appeals (CCA) followed the three intellectual disability criteria but found the adaptive behavior criteria "exceedingly subjective," and created seven evidentiary factors to assist that analysis.[10] Approximately four months *after* Brownlow's trial, the Supreme Court determined that Texas's *Briseno* factors created an unacceptable risk that an intellectual disabled defendant could be executed in violation of the Eighth Amendment.[11]

At punishment

As in the matter of an affirmative defense, Brownlow's trial team presented his case for intellectual disability, arguing that he met the three necessary criteria from *Moore*. IQ testing by a defense and a State's expert showed that Brownlow met the first criteria for intellectual disability (deficits in general mental abilities).[12]

The State used Brownlow's witnesses to attack his qualifications regarding the second and third criteria for intellectual disability. The State elicited testimony of Brownlow's adaptive strengths, pursuant to the *Briseno* factors, and argued that they outweighed any potential deficits. In addition, the State argued that Brownlow's alleged adaptive deficits were not caused by intellectual disability but rather additional diagnoses, life choices, and personal motivation. The State also argued that Brownlow could not show by a preponderance of the evidence that the onset of any deficits occurred before he was 18.

Defense arguments

Pursuant to Texas law, Brownlow's schools destroyed his records, including elementary school test results for placement in special education, seven years after his graduation. The defense presented what remained of Brownlow's school records and elicited testimony from his teachers and other school officials, as well as testimony from a special education consultant. His first-grade teacher testified that Brownlow could have had a learning disability but was not intellectually disabled. Four of Brownlow's middle and high school teachers testified at punishment, and none reported that Brownlow was in special education because he was intellectually disabled. His biology teacher testified that Brownlow worked well when he chose to, but otherwise his grades suffered accordingly.

Four of Brownlow's middle and high school teachers testified at punishment, and none reported that Brownlow was in special education because he was intellectually disabled. His biology teacher testified that Brownlow worked well when he chose to, but otherwise his grades suffered accordingly.

Although Brownlow was placed in a special education program at some point, the State argued that placement was not an indication of intellectual disability. Instead, testimony showed that placement in a special education program could have served as:

- resource classes for specific subjects;
- a speech therapy class;
- a self-contained life-skills class and alternative education program for a student at a cognitively lower level; or
- an occupational or vocational program.

Enrollment in the life-skills class would have indicated that the school viewed Brownlow to be intellectually disabled, but that course did not appear on his transcript. Brownlow was allowed to take the state academic tests in all but the tenth grade, which would not typically have been

allowed if he were diagnosed with intellectual disability.

Finally, the defense's special education consultant could not diagnose Brownlow as intellectually disabled based upon Brownlow's school records. So, using defense witnesses, the State argued Brownlow's education failed to meet the latter two criteria (that his adaptive deficits were linked to intellectual deficits, or that Brownlow had an onset of deficits before age 18).

In addition, the defense presented expert testimony showing that Brownlow suffered from brain damage to support his claim of intellectual disability. MRI, EEG, and diffusion tensor images of Brownlow's brain showed that he had various deteriorating brain anomalies. Experts identified genetic blood vessel abnormalities in his brain called cavernous malformations, where tangles of blood vessels occasionally bleed. Patients with this diagnosis continue to develop additional malformations, and the accompanying bleeding kills brain cells in the surrounding areas. These cavernous malformations occurred in every part of Brownlow's brain, and more than 50 of them have bled. However, none of the defense experts could identify when the brain bleeding began.

Defense experts also found dilated perivascular spaces in Brownlow's brain, indicating missing brain substance. Brownlow had abnormalities in the areas of the brain involving executive functioning, decision making, and memory. At the time of those scans, Brownlow had lost significant white matter functioning in more than 50 percent of his brain. In addition, Brownlow had low connectivity between his left and right brain, which experts associated with disruptive cognitive abilities.

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Testimony about Brownlow's brain damage backfired because defense experts agreed that Brownlow could have caused his reduced brain-matter by his methamphetamine abuse. In fact, a defense expert diagnosed Brownlow with Substance Abuse Disorder.

Testimony by Brownlow's family and friends generally reflected that many thought Brownlow was capable of holding a job but refused to. He had worked various jobs in the past. Several described him as slow—not book smart but street smart. He had a reputation for selling drugs on the street, smoking marijuana and methamphetamine, and he was rumored to smoke "wet" (joints dipped in PCP). In addition, Brownlow was known to be a ladies' man, and many of his paramours testified at punishment.

The State's case against intellectual disability

A State's expert testified that Brownlow's subaverage intelligence and neurocognitive problems did not begin before he was 18 and instead began as a result of his abuse of methamphetamines. Brownlow's test scores[13] showed that he was more intelligent in the past than at the time of trial. The expert testified that some behaviors, which the defense attributed to intellectual disability, were due to Brownlow's diagnosis of antisocial personality disorder. In addition, the expert explained that some of the information defense experts used as evidence of adaptive deficits were instead the result of Brownlow's personality, motivation, and life choices.

Another State's expert, who had extensively interviewed Brownlow, evaluated numerous documents and phone calls, and spoken with witnesses, described Brownlow as "an eloquent writer" with good grammar and word comprehension. Her observation of Brownlow and his actions[14] led her to conclude that Brownlow did not have adaptive deficits. She further believed that Brownlow did not give a good faith effort on his IQ tests and lacked incentive to do so.

Using the *Briseno* factors, the State successfully argued that Brownlow failed to show he met the second and third intellectual disability criteria (adaptive deficits and onset before age 18). The jury recommended that Brownlow should receive the death penalty.

Expanded inclusion of intellectual disability

After Brownlow's trial, the Supreme Court ruled in *Moore I* that Texas's *Briseno* factors created an unacceptable risk that an intellectually disabled individual would be executed in violation of the Constitution.[15] *Briseno*'s seven evidentiary factors caused Texas courts to overemphasize a defendant's perspective adaptive strengths by finding that they could outweigh his adaptive deficits.[16]

The Supreme Court relied on the most updated versions of leading diagnostic manuals and their authors' amicus briefs to define intellectual disability.[17] The Supreme Court re-iterated the three criteria:

A) intellectual deficits;
B) adaptive deficits; and
C) the onset of these deficits prior to age 18.[18]

Adaptive deficits appear in three domains: "conceptual, social, and practical."[19] All that is necessary to demonstrate an adaptive deficit is showing deficiency in one of the three domains such that "ongoing support is needed in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community."[20]

Briseno, like the DSM-5, required that adaptive deficits be directly "related" to a person's intellectual-functioning deficits of Criterion A to qualify as intellectually disabled.[21] Although the Supreme Court acknowledged that the DSM-5 required adaptive deficits be related to intellectual functioning, it pointed out that the American Association on Intellectual and Developmental Disabilities did not retain this requirement.[22] Beyond this acknowledgement, the Supreme Court did not require a showing that an individual's adaptive deficits were related to his intellectual deficits.[23]

Most significantly, the Supreme Court held that an individual's surrounding circumstances or traumatic experiences could not be used to create alternatives to a diagnosis of intellectual disability; rather, they were "'*risk factors*' for intellectual disability."[24] In addition, a coexisting condition, such as a personality disorder or mental health issue, "is 'not evidence that a person does not also have intellectual disability.'"[25]

On remand from *Moore I*, the CCA reconsidered *Ex parte Moore* and once again determined that Moore was not intellectually disabled through analysis of adaptive deficits.[26] The day before Brownlow's oral argument to the CCA, the Supreme Court released its opinion in *Moore II*, finding that the CCA repeated the errors of *Moore I*.[27] Even though the CCA explicitly abandoned *Briseno*, the CCA opinion "repeat[ed] the analysis [the Supreme Court] previously found wanting, and these same parts [were] critical to its ultimate conclusion."[28] The *Briseno* factors "had no grounding in prevailing medical practice," and "they invited 'lay perceptions of intellectual disability' and 'lay stereotypes' to guide assessment of intellectual disability."[29]

The Supreme Court chastised the CCA for attributing Moore's deficient social behavior to emotional problems instead of intellectual disability.[30] In addition, *Moore II* held psychologists cannot consider adaptive improvements made while in prison.[31]

Moore's aftermath on *Brownlow* and beyond

On February 12, 2020, the CCA affirmed Charles Brownlow's guilt but reversed his death sentence and remanded his case to the trial court for punishment.[32] The CCA refused to decide whether Brownlow was intellectually disabled.[33] Given the significant changes to intellectual disability law, our office had to determine whether the State could legally execute Brownlow for his crimes or if the change to the law was so great that Brownlow was limited to life without parole.

Legal analysis and consultation show that the *Moore* doctrine vastly expanded the pool of candidates who can now legally qualify as intellectually disabled. Thus, it is almost guaranteed that Brownlow would meet his burden to prove by preponderance of the evidence that he was intellectually disabled.

Legal analysis and consultation show that the Moore *doctrine vastly expanded the pool of candidates who can now legally qualify as intellectually disabled.*

First, by eliminating any connection between an individual's adaptive deficits and his intellectual-functioning deficits,[34] the Supreme Court broadened the adaptive deficits criterion. In theory, dyslexia or a gambling addition could fulfill the adaptive deficits criterion.

Second, the Supreme Court essentially ordered courts to ignore any alternate explanations for a defendant's behavior or adaptive deficits when making an intellectual disability finding.[35] So long as a defendant's behavior could qualify as an adaptive deficit, then it should be considered a risk factor for intellectual disability.

Finally, the Supreme Court circumscribed a court's ability to examine adaptive strengths. The Supreme Court found because the medical community does not consider it, the courts should not either.

In Brownlow's case, his current IQ satisfies Criterion A of intellectual disability. Further, it is undisputed that Brownlow was involved in some form of special education prior to the age of 18. Brownlow's enrollment in special education alone is sufficient to qualify as an adaptive deficit, as it demonstrates that he needed support to perform adequately within the conceptual or academic domain. Any alternative explanation, such as a learning disorder, lack of motivation, lack of

support at home, etc., will be disregarded. And, because Brownlow was in special education prior to age 18, he meets Criterion C. Therefore, it would be unlikely that a jury, let alone a reviewing court, would find that Brownlow failed to show by a preponderance of the evidence that he was intellectually disabled.

Members of our trial team met with the families of Brownlow's victims to explain the change in the law. They are disappointed in the Supreme Court's decision to revise Texas's law on intellectual disability, but they take solace in the fact that Charles Brownlow will live out the rest of his life behind bars.

Given the expansion of who qualifies as intellectually disabled, prosecutors can expect future challenges to intellectual disability. The Supreme Court is likely to find execution of an intellectually disabled individual unconstitutional, regardless of when that disability began.

Where we go from here

Given the expansion of who qualifies as intellectually disabled, prosecutors can expect future challenges to intellectual disability. The Supreme Court is likely to find execution of an intellectually disabled individual unconstitutional, regardless of when that disability began. Further, the *en banc* Fourth Court of Appeals recently held that the automatic imposition of life without parole is unconstitutional for individuals with intellectual disability.[36]

Obviously, the execution of the intellectually disabled violates our sensibilities; however, the Supreme Court's expansion of who has an intellectual disability will drastically change how prosecutors proceed on capital cases and beyond. This ruling is a change we all must keep in mind in future prosecution. ❇

Endnotes

[1] A defense expert testified that Brownlow believed that his parents murdered him while he was a toddler and that he was resurrected. Further, Brownlow told the expert that he was being controlled by hacking and implants, was the victim of numerous scientific experiments, and that he was the sole interpreter of the Bible via his own system of numerology.

[2] Texas courts treat intellectual disability as an affirmative defense, requiring the defendant to meet a preponderance of the evidence standard. *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004), overturned by *Moore v. Texas* (*Moore I*), 137 S.Ct. 1039, 1044 (2017) (citing Tex. Penal Code §8.01(a); Tex. Code Crim. Proc. Art. 46.02(b); *State v. Lott,* 779 N.E.2d 1011, 1015 (Ohio 2002), overruled on other grounds by *State v. Ford*, 140 N.E.3d 616 (Ohio 2019)) (comparing intellectual disability to insanity, competence, and mental retardation).

[3] *Moore I*, 137 S.Ct. at 1048 (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Hall v. Florida*, 572 U.S. 701, 708–09 (2014); *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005)).

[4] *Atkins*, 536 U.S. at 313–17, 318–20, 320.

[5] *Moore I*, 137 S.Ct. at 1048 (citing *Hall*, 572 U.S. at 722–23).

[6] *Hall*, 572 U.S. at 719.

[7] *Moore I*, 137 S.Ct. at 1048 (quoting Hall, 572 U.S. at 721).

[8] Adaptive deficits appear in three domains: "conceptual, social, and practical." American Psychiatric Association, Diagnostic and Statistical Manual of Disorders (DSM-5), 5th ed. (2013) at 37; *Moore I*, 137 S.Ct. at 1050 (citing *Brumfield v. Cain*, 576 U.S. 305, 320–21 (2015)). The conceptual domain is also referred to as "academic" and involves things such as "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations. *Id*. The social domain involves things such as "awareness of others' thoughts, feelings, and experiences; empathy, interpersonal communication skills; friendship abilities, and social judgment." *Id*. The practical domain involves "learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." *Id*.

[9] *Moore v. Texas* ("*Moore II*"), 139 S.Ct. 666, 668 (2019) (citing *Moore I*, 137 S.Ct. at 1045 (citing *Hall*, 572 U.S. at 710); DSM-5 at 37.

[10] *Briseno*, 135 S.W.3d at 8. The CCA listed the seven *Briseno* factors as:

1) Did those who knew the person best during the developmental stage–his family, friends, teachers, employers, authorities–that he was intellectually disabled at that time, and, if so, act in accordance with that determination?

2) Has the person formulated plans and carried them through, or is his conduct impulsive?

3) Does his conduct show leadership, or does it show that he is led around by others?

4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

5) Does he respond coherently, rationally, and on point to oral or written questions, or do his responses wander from subject to subject?

6) Can the person hide facts or lie effectively in his own or others' interests?

7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Briseno, 135 S.W.3d at 8–9.

[11] *Moore I*, 137 S.Ct. at 1044, 1051; *Briseno*, 135 S.W.3d at 8.

[12] Brownlow scored a 67 and a 70 on recent IQ tests.

[13] For example, in 2009, at age 31, Brownlow received a 92 on a Beta-III test he took while incarcerated in TDCJ. This more basic IQ test was intended to be a "quick reliable measure of nonverbal intellectual ability" and not an exact correlation to a more comprehensive intelligence test.

[14] Brownlow rented a hotel room, cared for his dog, developed a scheme to steal a TV from Walmart, passed a written test to get his driver's license, described schizophrenia and bipolar to the expert, and thought the expert might help him go to a mental hospital instead of trial.

[15] *Moore I*, 137 S.Ct. at 1044, 1051; *Briseno*, 135 S.W.3d at 8.

[16] *Moore I*, 137 S.Ct. at 1050, 1051.

[17] *Moore I*, 137 S.Ct. at 1048–49.

[18] *Moore II*, 139 S.Ct. at 668 (citing *Moore I*, 137 S.Ct. at 1045 (citing *Hall*, 572 U.S. at 710); DSM-5.

[19] DSM-5 at 37.

[20] DSM-5 at 38.

[21] *Briseno*, 135 S.W.3d at 7; DSM-5 at 38.

[22] *Moore I*, 137 S.Ct. at 1055 (citing *Briseno*, 135 S.W.3d at 8).

[23] *Moore I*, 137 S.Ct.; *Moore II*, 139 S.Ct.

[24] *Moore I*, 137 S.Ct. at 1051 (quoting AAIDD-11, at 59–60) (stating "Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination").

[25] *Moore I*, 137 S.Ct. at 1051 (quoting Brief for American Psychological Association, APA, et al. as Amici Curae 19).

[26] *Moore II*, 139 S.Ct. at 670 (citing *Ex parte Moore II*, 548 S.W.3d 552, 555 (Tex. Crim. App. 2018)).

[27] *Moore II*, 139 S.Ct. at 668–69 (internal quotations omitted) (stating that the CCA: overemphasized the defendant's adaptive strengths; "stressed Moore's improved behavior in prison" although "[c]linicians … caution against reliance on adaptive strengths developed 'in a controlled setting,' as prison surely is"; allowed alternative explanations for Moore's behavior instead of intellectual disability, contrary to the medical community's determination that those are "'risk factors' for intellectual disability").

[28] *Moore II*, 139 S.Ct. at 670.

[29] *Moore II*, 139 S.Ct. at 669 (quoting *Moore I,* 137 S.Ct. at 1051).

[30] *Moore II*, 139 S.Ct. at 671.

[31] *Moore II*, 139 S.Ct. at 671 (stating that medical experts do not credit improvements in highly structured settings).

[32] *Brownlow v. State*, No. AP–77,068, 2020 WL 718026 (Tex. Crim. App. Feb. 12, 2020).

[33] *Brownlow*, 2020 WL 718026, at *21.

[34] Supra note 25.

[35] Supra notes 26 & 27.

[36] *Avalos v. State*, Nos. 04–19–00192–93–CR, –- S.W.3d –-, 2020 WL 7775186, at *3 (Tex. App.–San Antonio Dec. 30, 2020, pet. filed) (on reh'g en banc).

Collaboration between Air Force and civilian prosecutors

Collaboration can make all the difference.

By Capt. Kent Ferriss
Chief of Military Justice, Goodfellow Air Force Base in San Angelo

Whether prosecuting crimes committed by an Air Force member at the state court level or at a court-martial, a healthy Air Force-civilian prosecutor relationship can help secure convictions. Take the following for example:

A 5-year-old girl (we will call her Julie) in Arizona outcried to her grandmother that her stepfather was making her "suck it like a popsicle." The grandmother called police and filed a report. A few days later, Julie was interviewed by a child forensic interviewer, and after listening to the interview, the prosecutors in the local office decided not to indict the stepfather as the chances of winning at trial were too slim.

However, the accused was an active-duty military member, and as such, the Air Force Base legal office where he was stationed reviewed the interview recording and discussed the case in detail. Although there were potential challenges with the case, Air Force prosecutors met with the victim and her family to discuss the case further. Julie's biological father and grandmother wanted the accused to be held accountable for his actions and, upon speaking to the victim, the Air Force prosecutors found her to be credible and believed her testimony alone could secure a conviction at a court-martial.

Despite their confidence in the case, the Air Force prosecutors were new to their careers and had never tried a child sex assault before. While the Air Force has Circuit Trial Counsel—very experienced litigators who travel to each base to assist with prosecuting cases—the Air Force prosecutors did not have a Circuit Trial Counsel on this case. Furthermore, most of the Air Force Office of Special Investigations (AFOSI) investigators had never investigated a child sex assault. The Air Force prosecutors reached out to local Arizona prosecutors to brainstorm on how to proceed. Both offices worked together all the way through the life of the case, including matters involving jurisdiction, trial strategy, and trial preparation. Ultimately, the defendant was convicted of forcible sodomy of a minor (a felony military charge) and sentenced to 25 years in a federal military penitentiary. Without the assistance of the city prosecutors and the special victims' division of the local prosecutor office, it almost certainly would have been impossible to see this offender held accountable.

Collaborating with our military counterparts

This is a prime example of how military and civilian prosecutors can work together to pursue a criminal case toward a just resolution. Unfortunately, this level of collaboration has not been everyone's experience. I recently learned from former and current Texas prosecutors that they have experienced many frustrations when working with military prosecutors from several services. The difficulties include that they didn't understand the military justice system, they did not have a working relationship with the military prosecutors, and they were concerned the military prosecutors wouldn't pursue a case, much less get a conviction—especially for sexual assaults and domestic violence. If that type of experience and belief continues within our fields between civilian and the military prosecutors, it could lead to cases falling between the cracks and victims not being heard.

But it doesn't have to be that way! The example of the Arizona case shows that working together can lead to great results. I've learned that successful collaboration is rooted in understanding, communication, and support. We should provide all three to our counterparts to build working relationships and create synergy. That's my intent here.

To do so, I'm providing a primer on our military justice system, available resources for victims, and specific examples on how Texas prosecutors can collaborate with your Air Force counterparts, especially for sex-related and domestic violence cases, so that we can achieve successful, sustained prosecutions.

Achieving understanding

We hear it all the time: The only constant thing is change. Whether that's the law, resources, policy, or personnel, our legal practices are constantly changing. Constant changes makes it even more important to understand each other's practices and perspectives when the time comes to work together. Going back to the example of Julie, at the outset of the outcry, civilian prosecutors agreed to meet with Air Force prosecutors to discuss a variety of topics. When they met, both Air Force and civilian prosecutors swapped information on each other's processes. Local prosecutors began by explaining grand jury, why it would be tough to indict the case, and why it would likely be unsuccessful at trial if it made it that far. After the Air Force prosecutors explained the military justice process, local prosecutors agreed that its streamlined process would not only preserve the testimony of the very young victim, but also make it easier for a judge to produce the necessary witnesses and evidence. Understanding your counterpart's processes is critical to this collaboration.

The military is unique: worldwide deployment of military personnel; the need for instant mobility of military personnel to ensure mission readiness; maintaining good order and discipline; the need for speedy trial; mobility issues involving witnesses; and the peculiar nature of military life all necessitate a separate military justice system. Having a separate system drives the efficiency and effectiveness of the military and strengthens national security. To address the peculiar nature of military life and types of misconduct that come with it, we have a number of unique crimes enumerated in the Uniform Code of Military Justice (UCMJ), the military's criminal code equivalent, that do not have a civilian criminal equivalent. Those crimes include extramarital sexual conduct, absence without leave, conduct unbecoming of an officer, failure to go to a prescribed place of duty, gambling with a subordinate, jumping from a vessel, malingering, and unprofessional relationships—just to name a few.

Perhaps one of the most unique concepts of our justice system and the one that civilian attorneys find most interesting is that our justice system is commander-driven. Prosecutorial discretion is vested in commanders, not lawyers. Service members are under the control of their chain of command, and there are multiple commanders within a chain of command. Typically, a service member's first commanding officer, called the unit or squadron commander, in the chain of command decides what action to take on the service member. From the beginning stages of an investigation when the commander, Air Force Office of Special Investigations (AFOSI), or the legal office learn of an allegation of a crime, up until the charging decision, the commander consults with Air Force prosecutors. After the commander decides how to proceed, he or she is consulted throughout the process until final disposition of that case.

We hear it all the time: The only constant thing is change. Whether that's the law, resources, policy, or personnel, our legal practices are constantly changing.

Basic overview of military practice

At this point it makes sense to give a 30,000-foot view of our practice. Air Force "base legal offices" are similar to United States Attorney's Offices in their organizational structure. The highest-ranking officer and the person in charge of the legal office is called the Staff Judge Advocate (SJA). The subordinate attorneys are called Assistant Staff Judge Advocates or ASJAs. Each base legal office is separated into different practice areas. The fundamental sections include: Military Justice, Civil Law, and Operations Law. The ASJAs working on military justice matters are considered Air Force prosecutors. Typically, they are junior attorneys beginning their careers.

To supplement the prosecution teams at base legal offices, the Air Force has a robust Circuit Trial Counsel (CTC) program, as I mentioned earlier. CTCs are typically more senior attorneys with years of litigation experience prosecuting

complex cases who travel from base to base to assist with prosecuting cases. With few exceptions, base legal offices have a courtroom on-site where all legal proceedings are conducted. Currently, there are five Air Force bases in Texas: Dyess, Goodfellow, Sheppard, JBSA-Lackland, and Randolph, and there is also an Air Force legal office at Fort Sam Houston.

A primer on some of the key phases in our military justice process after receiving an allegation of a crime and leading up to a court-martial follows:

To put it simply, the military has jurisdiction over its service members regardless of where they commit an offense.

Jurisdiction: To put it simply, the military has jurisdiction over its service members regardless of where they commit an offense. Our formal guidance found in Air Force Instruction 51-201, Administration of Military Justice, tells us that: "Courts-martial have exclusive jurisdiction of purely military offenses. However, when a member is subject to both the UCMJ and state (non-federal) or foreign jurisdiction for substantially the same act or omission, the determination of which sovereign shall exercise jurisdiction should be made through consultation or prior agreement between appropriate authorities. With this in mind, Convening Authorities (along with the local SJA) should foster relationships with local civilian authorities with a view toward maximizing Air Force jurisdiction." The Air Force's policy for maximizing jurisdiction is directly tied to those overarching concepts of ensuring good order and discipline, along with mission readiness. By propagating the policy of maximizing jurisdiction at all base legal offices in the country, the Air Force creates a more standardized system of discipline, sending a message to members that they cannot escape good order and discipline by committing offenses off base, no matter where they are in the world. The underlying idea is that commanders have more control over their airmen and that this consistency will better enable service members to operate in multiple jurisdictions. While this policy is obviously not an absolute mandate that we must maintain jurisdiction in all cases, it highlights the goal of maximizing jurisdiction for the previously stated reasons, while understanding that some cases may be better suited for state and local prosecution.

Investigation: AFOSI agents investigate criminal activities similar to local law enforcement agencies, having received advanced training with other federal law enforcement agencies. Security Forces (SF) provide the security function, similar to that which a police agency may provide, for the installation. Additionally, SF also investigate certain offenses that are not under the purview of AFOSI.

Preferral: Service members are not typically placed under arrest in a similar fashion as their civilian counterparts. As they are by nature under the control of their chain of command, liberty restrictions can be placed swiftly on service members through the chain of command. As such, being informed of the charges they face is also performed through a different process. In the Air Force, an accused is formally notified of the charges he will face through a process called "preferral." It typically involves being served with those charges by the commanding officer and is typically the first official step in the court-martial process.

Article 32 Hearing: If the charges preferred are similar to felonies in the civilian world, a preliminary hearing may be held. This is commonly called an "Article 32 Hearing," as it is codified in Article 32, UCMJ. The burden of proof is on the government, hearsay is allowed, and both sides can present evidence. However, there does not have to be a judge involved. The person overseeing this hearing is called the preliminary hearing officer (PHO). The PHO also does not make a finding of whether probable cause has been met in the same manner as a judge would, but rather he or she makes a recommendation that addresses whether probable cause has been met. This is forwarded to the convening authority, a higher-level commander than the unit or squadron commander, who, upon the advice of the SJA, will decide whether the case will proceed forward.

Referred to court-martial: Once the PHO's recommendation has been reviewed, if the convening authority decides to proceed, the case is "referred" to court-martial. He or she is in essence giving the green light for trial.

Courts-martial: There are three different types of courts-martial that may be convened: General, Special, and Summary. There is an additional nuance to the special court-martial in that cases can be tried by a military judge alone. The

least severe in terms of sentencing for the accused is a summary court-martial, and the most severe is a general court-martial. In any given court-martial, the motions, findings (finding of guilt-innocence) and sentencing all happen at the same time. There is an option for bifurcated motions hearings, but typically written motions are submitted in the weeks leading up to trial and held orally on the first day trial is scheduled.

Victim resources

In the Air Force, victims of sexual assault can request to be represented by an attorney throughout the entirety of the sexual assault allegation process. These attorneys are called special victims' counsel (SVC), and they provide independent legal advice and representation to victims of qualifying offenses, which include sexual assault, aggravated domestic violence offenses, and the wrongful broadcasting or distribution of intimate visual images. SVCs are independent from both the client's (victim's) and accused's chain of command, which allows for unbiased advice unhindered by potential conflicts of interests. SVCs advocate on their client's behalf to protect enumerated rights, which may be found at Article 6b, UCMJ. These include the right to be reasonably protected from the accused; the right to receive reasonable, accurate, and timely notice of certain hearings; the right not to be excluded from any public hearing or proceedings; the right to be heard at certain hearings; the reasonable right to confer with the counsel representing the government at certain proceedings; the right to receive restitution as provided by law; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and with respect for the victim's dignity and privacy. While SVCs often work with Air Force prosecutors, the stated interests of their clients may not always align with the traditional goals of an Air Force prosecutor. (SVCs represent their client's stated interests, not their best interests.) As such, an SVC may be arguing a position more in line with the Area Defense Counsel (ADC) and the accused, rather than the prosecutors.

SVCs can assist victims in a number of ways, for example, with requesting an expedited transfer (ET). An ET is the process affording servicemember victims (who file an unrestricted report of sexual assault) the option of a permanent change of station or temporary or permanent change of assignment to a location that assists with the victim's immediate and future welfare. SVCs also ensure their clients who are dependents of the accused are financially supported in accordance with Air Force regulations. This may involve working with the base legal office to advocate to the accused's commander to order appropriate dependent support based on a formula found in Air Force Instruction 36-2906, Personal Financial Responsibility.

Additionally, SVCs ensure qualifying clients receive transitional compensation. It is the policy of the Department of Defense to provide monthly payments and other benefits for dependents of service members who separate following dependent abuse. Eligibility is triggered by an accused being separated from the military due to dependent abuse and does not require a criminal conviction. Therefore, criminal misconduct handled by civilian prosecutors may be used as a triggering event for a military discharge action and subsequent separation. While SVCs do not practice in local jurisdictions, they may advocate on their client's behalf in those jurisdictions.

Moreover, the National Defense Authorization Act of 2020 calls for SVCs to familiarize themselves with various law and procedures of the jurisdiction in which they are stationed to provide full advice on jurisdictional differences between civilian and military processes. This can also present an opportunity for a prosecutor's office located in the same area as a military installation to receive training on the military processes, including services available to crime victims even when the cases are prosecuted in civilian courts. Providing a victim with the understanding of the difference between a diversion program, an accountability court, or a traditional conviction lets that victim give input based the full range of possibilities. Currently, there are four Air Force SVCs working out of Texas Air Force bases.

Communication and support

I realize that those reading this article may also work with prosecutors from other service branches, and I recognize that other services may interact with their state and local prosecutor counterparts differently, so I can't promise that you will be able to duplicate the efforts laid out

In the Air Force, victims of sexual assault can request to be represented by an attorney throughout the entirety of the sexual assault allegation process.

here with other military prosecutors—but it won't hurt to try. It is certainly possible to get more mileage out of the basics set out in this article with other military prosecutors because communication and support are concepts that transfer seamlessly. If we look once again at the example of young Julie, the sexual assault victim, the local prosecutors in that case not only invited Air Force prosecutors downtown to sit and talk about exercising jurisdiction over the crime, but they also agreed to review evidence, including watching the entire victim interview with them, point out strengths and weaknesses in the victim's testimony, and discuss trial. These are just some of the many opportunities to come together to make a difference.

It would be highly beneficial to create a sort of exchange program, where the civilian prosecutor's office and the base legal office swap a prosecutor for the day and train him so that the prosecutor can return to his office and share that information.

The local prosecutors in that case contributed a wealth of knowledge and greatly assisted in preparing for trial. They explained some of the delicate intricacies of re-interviewing a child victim (something the Air Force prosecutors had to do to clarify some of the issues with the first interview). The Air Force regularly brings in highly experienced forensic psychologists and other relevant experts from around the country to assist with trial preparation, but even so, the local prosecutors still shared their best practices with their Air Force counterparts on how to properly use the forensic examiner to explain some of the odd descriptions the victim used in her interviews. They also helped identify potential evidence of the defendant's crimes or other bad acts that could be admissible at trial for limited purposes under Rule of Evidence 404(b). Their guidance led the Air Force prosecutors to look for more 404(b) evidence through electronic searches and interviews of other family members. In fact, a later search of the accused's phone led prosecutors to numerous photos and videos of concerning 404(b) misconduct, including videos of the accused engaging in sexual activity with his unconscious wife.

Finally, the local prosecutors helped the military prosecutors understand the importance of eliminating other potential suspects, including the victim's biological father and his roommates. In child sex cases, this is apparently a common defense, that the crimes happened but that the child is mistaken as to who committed them. Eliminating other suspects was not especially difficult, but it was still extremely important to establish alibis for each of the other men who had access to the victim.

On the other hand, there may be times when Air Force prosecutors can support civilian prosecutors working cases involving Air Force members. For example, one Texas prosecutor was working a sentencing case against a military member whose defense counsel argued that his client had already been discharged from military service for his crimes and should therefore receive a lesser sentence because he had already been punished. Afterward, the Texas prosecutor reached out to the servicing legal office. He learned that the defense counsel's argument was erroneous: The accused would have been discharged from military service in any event for his previous pattern of misconduct.

There are times when we can share information that will better equip local prosecutors to combat those arguments so that you are not caught off-guard. But that's just one example. Doubtless there will be many other opportunities to consult with your counterparts before an issue is presented in court so you are prepared to address it. This can make a big difference, especially on appeal. To the extent we can, we should be sharing information.

Training and exchange program

Another area of collaboration is through training. It would be highly beneficial to create a sort of exchange program, where the civilian prosecutor's office and the base legal office swap a prosecutor for the day and train him so that the prosecutor can return to his office and share that information. This exchange also may be helpful to open up the lines of communication with your counterpart on a range of topics to support each other.

Point of contact

Turnover in the military is constant. Judge Advocate Generals (JAGs) normally work on a two-year rotation. Understandably, it can be frustrating if you are working with a JAG one day and she is gone the next. There are a couple ways to ease the frustration. First, my contact info, including my office's Military Justice Email address, will be around long after my rotation is up (Kent.ferriss.1@us.af.mil; 17TRW.JA.MilitaryJustice@us.af.mil;325/654-3203).

Secondly, in our office, any time we transition from one job to the next, we make it a habit to train our successor so she can seamlessly take over our position. Typically, we have a brief period of shadowing, or on-the-job training. Other times we create physical binders or PDF binders containing continuity memoranda and documents that explain to the successor step by step how to operate in that position. I will make sure to save this article or link to it for the next person to take my seat. Please feel free to reach out to me or the Goodfellow Air Force Base Military Justice team with any questions or if you need help getting in contact with another Air Force JAG at a different base. I look forward to working with you all in the future, and thank you for all you do.[1] ❇

Endnote

[1] The views expressed herein are my own and do not represent the views of the Department of Defense or the Air Force.

Prosecutors go back to high school

What is the difference between reasonable suspicion and probable cause? What determines if evidence will be admitted in a trial? What are my rights while peacefully protesting?

By Matthew Jackson
Assistant Criminal District Attorney in Tarrant County

These are questions that many people cannot answer. But prosecutors can—and some of us in the Tarrant County Criminal District Attorney's Office have partnered with local schools to teach high school students the answers to these questions and many more.

Our Criminal District Attorney, Sharen Wilson, has always encouraged us to get involved in the community. Prosecutors in the office often spoke to community groups, typically reaching 20,000 citizens each year. "Not surprising in the COVID year of 2020, our presentations decreased dramatically," Ms. Wilson says. "As we continued to hear about the hurdles for schools to re-open, the idea was born of offering our prosecutors as educators." In late July, Ms. Wilson talked with several school trustees and pitched the idea of prosecutors teaching high school students about criminal justice. Her plan was to take an existing program of our office, Citizens Prosecutor Academy, and adapt its curriculum for high schoolers. "It would not only help the school districts but also keep our good lawyers in speaking and explaining mode—not unlike voir dire," Ms. Wilson explained. Officials in the Fort Worth Independent School District (FWISD) received the idea well, and in early August, steps were taken to make the program a reality. Prosecutors in High School (PHS) was born.

How it works

Amy Bearden, who is our community outreach coordinator, and I began meeting via Zoom with FWISD authorities to design the program. Through these meetings, the PHS team selected topics, dates for the presentations, and speakers to best fit the audience.

Prosecutors in High School includes presentations from prosecutors, investigators, and other staff members. The topics are:

- First Amendment rights;
- arrest, search, and seizure;
- the process of a trial; and
- investigations and forensic evidence.

Our office opted to present each topic four times per semester to senior history classes from six of the 21 local high schools. This program lets our office interact with about 750 students during each presentation in the 2020-21 school year. Students and teachers are provided a Zoom link to access the live presentations. Zoom's webinar format allows students from all six schools to view the presentations simultaneously. Students can participate live by asking questions in the Q&A box.

After months of preparation, the stage finally was set, and everyone was excited to begin this creative way of impacting the community. The first PowerPoint presentation was finalized, the dry run was a success, and we were days away from local students learning about their First Amendment rights directly from prosecutors. Everything had gone smoothly throughout the planning process; we had selected engaging topics, found knowledgeable presenters, and even overcame some technical difficulties.

Then, right before "showtime," we hit a snag. Due to COVID-19, the students' return to live instruction from virtual learning was delayed for two weeks. So the PHS team reluctantly postponed the first presentation. We were disappointed but not deterred and rescheduled for three weeks away.

The response

Finally, November 17 and 18 came. During a

morning and afternoon session on both days, Investigator Don Pilcher and I taught the dynamics of arrest, search, and seizure law to the students. We were excited to see that they asked questions in the Q&A box, and we were so relieved to complete all four sessions of the first phase without any technical issues. The inaugural phase of Prosecutors in High School was a success!

The program continued its success December 1 and 2 with the second phase, "Process of a Trial," presented by ACDAs Marcus Hanna and Jordan Rolfe-Stimpson. The students remained engaged during this second phase, and each subsequent presentation was better than the previous one. By their fourth session, the interplay between Marcus and Jordan was simply poetic. You could tell that they had found their comfort zone on camera as they flowed through the material.

Here's what two FWISD officials thought of the program:

> "The first day of the Prosecutors in High School Webinar Series was terrific. Thank you all so much for your tremendous hard work. Marcus and Jordan were great!" —Jennifer Cole, CTE Coordinator IV

> "Y'all did a great job this morning. I really appreciated how empowering the content was for students." —Xavier Pantoja, K-12 Social Studies Curriculum Coordinator

A local news station showed an interest in the program and interviewed Ms. Rolfe-Stimpson about it and about her presentation topic (the process of a trial). During the interview, she discussed the goals of the program and some of the questions that students asked throughout her presentations. Students wanted to know when they must give a peace officer their name, how a case gets no-billed, what determines if a jury is sequestered, and what a prosecutor's favorite part of the job is. She emphasized how important it is to make sure young people understand how the criminal justice system works and what career opportunities are available in this field.

"Prosecutors in High School gives us the opportunity to educate and reach an important part of our community we otherwise would not have the opportunity to speak to directly," Ms. Rolfe-Stimpson says. "The students seem to enjoy the program, and it has been wonderful for us as well."

The goal is to build trust between students and those who work in the criminal justice system. By developing this unique program, we had to pick topics of interest to students in today's society, make sure our presenters conveyed the material in a way that relates to and engages a younger audience, and adjust to all the complexities presented by the pandemic.

Another Prosecutors in High School class was held December 15 and 16, and prosecutors taught students about their First Amendment Rights. The final topic of the fall semester, "Investigations & Forensic Evidence," was presented in January. All four topics will be presented again to students enrolled in the spring semester history classes, and we are confident of continued success.

"Many of our seniors who are enrolled in Government classes will interact with professionals in the Tarrant County District Attorney's Office in a way most people never do," FWISD Superintendent Kent P. Scriber said when the program was beginning. "It is exciting to have our local industry practitioners coming to our classrooms and showing students how what they are learning in class is used daily in our community."

Other interested ISDs have approached us about expanding to their schools. It's been a nice silver lining in the dark cloud of COVID-19. ❇

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