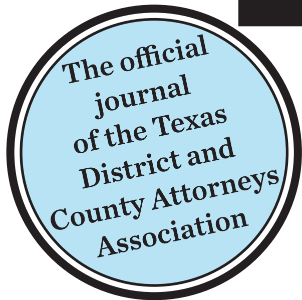
The Texas Prosecutor



March–April 2025 • Volume 55, Number 2

"The primary duty of an attorney representing the state … is not to convict but to see that justice is done."
Art. 2A.101, Texas Code of Criminal Procedure

When children witness domestic violence

As the chief prosecutor in Kaufman County's Special Victims Division, I often see offense reports where victims of domestic violence and their offenders told responding officers that children were in the home during the assault:

By Ashley Holman
Assistant Criminal District Attorney in Kaufman County

"My kids were in the other room." "They're here, but they were asleep when we were fighting." "They may have heard, but they didn't see anything." A victim of domestic violence may truly believe these words. She may believe she is shielding her children from a trauma. She may be concerned about additional information the children may share. She may also be seeking to downplay the severity of an assault. Whatever the motivation, we will never know crucial details of an abusive situation if we don't take the time to interview all parties involved, even the smallest ones.

Flash forward to the jury trial on an assault family violence case, and defense counsel is grilling the patrol officer on cross-examination, asking why no one spoke to the children who were on scene. Often the defense attorney can wonder aloud in closing argument, "How bad could this supposed incident have really been if none of the children heard or observed any part of this assault?" Or worse, those children have now been pressured to testify favorably for an abusive parent.

Prosecutors, our investigators, and victim assistance coordinators (VACs) are all too aware of the dynamics at play in an abusive home. However, by the time we get our hands on an assault family violence case, access to the best evidence about those dynamics may be long gone.

When officers respond to a call of assault family violence, their goal is to assess the situation quickly while keeping the parties calm, ensuring that everyone walks away safely. Once the case reaches our office, our goal as prosecutors is to achieve a just and efficient case disposition. However, in our collective efforts to be efficient, we should not lose sight of effectiveness in investigating offenses of assault family violence where children are in the home.

This article seeks to provide those of us who work family violence cases with tools to enhance the quality of our cases for prosecution, while also ensuring that we comply with our legal duty to protect children who witness domestic violence. In Kaufman County, we have prioritized a multi-disciplinary approach to victim cases. This means that we share

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Texas District and County Attorneys Association

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Spring has sprung

"No man's life, liberty, or property are safe while the Legislature is in session."
—Gideon Tucker, New York lawyer, judge, and politician (1866)

By Shannon Edmonds
TDCAA Executive Director in Austin

It's the most wonderful time of the … biennium. Doesn't have quite the same ring as the holiday classic by Andy Williams, does it?

Nevertheless, Austin is abuzz with activity that rivals the busiest Black Friday shopping mall frenzy as legislators from around the state are hard at work trying to pass all the thousands upon thousands of great ideas they and their constituents have thought up since the last session. By the time the bill filing deadline closes in mid-March, we expect as many as 9,000 bills and joint resolutions will be filed, which is many more than they actually have time to review and debate. And they all know that, too. Many bills get filed by a legislator with no intention of it ever actually becoming law, which is why you should be wary of lauding your legislators for merely filing a bill for you. Yes, it is a good start, but the filing of a bill is merely the end of the beginning of the process, not the beginning of the end.

If you are working on legislation that has been filed and need assistance or advice, feel free to reach out to us here at TDCAA. Or even if you don't need any help, a text or email letting us know which bill number is yours is helpful to us and the other prosecutors working on legislation during the session. That way, if any of us get asked about that bill by a legislator or staff member, we know to refer them to you for further information. Things happen quickly down the stretch of a session and time is short. Don't let your good idea die because not enough people know it is *your* good idea.

Changing of the guard

In February, the new Texas Supreme Court Chief Justice Jimmy Blacklock had the privilege of addressing the Legislature on The State of the Judiciary, a biennial rite of passage for that officeholder. His counterpart across the hall, Court of Criminal Appeals (CCA) Presiding Judge David Schenck, gets no such opportunity, which is a shame. But it also got me thinking about the role of the presiding judge, or "PJ," and I recently did some internet sleuthing. Did you know that Texans have elected only *four* PJs for the CCA? It's true! Now, that trivia is a bit misleading because prior to 1970 the holder of that middle seat on the dais was selected by the governor. But ever since the PJ became a statewide elected office, it has been held by only four "The Honorables": Frank Onion (1971–1988), Mike McCormick (1989–2000), Sharon Keller (2001–2024), and now David Schenck (2025–).

Why is this type of continuity important? One answer to that question comes from something a wise ol' prosecutor told me when I was a young 'un. I asked him if a particular judge was a "good judge," and his reply was one I've often paraphrased and used as my own since then. In a nutshell, he replied, "What makes a judge 'good' is not how often he rules for or against you, it's how *predictable* he is. You can plan for the predictable. It's the judges who have no consistent judicial philosophy or approach to their role that cause craziness in the courtroom." Over my years in and around the court system, I've seen that rule of thumb confirmed again and again, and perhaps you have, too.

So, as we segue into a period of new leadership at the CCA, I'd like to pause and tip my cap to Judge Keller, who was the first woman to ever sit on the CCA and who served the State of Texas as a prosecutor, judge, and presiding judge for more than 35 years. Hers was an honorable career of *predictable* public service for which she should be proud. In addition, I wish Judge Schenck similar good fortune as he embarks on his own PJ journey and hope it leads to many years of steady leadership for our criminal justice system.

TDCAA committees

We like to say around here that we are a "member-driven organization," but what does that really mean? Well, one thing it means is that our members decide what the association should do and how it should do it. The most obvious mechanism for that is through our member-elected Board of Directors whom you can find listed on the "About" page of our website and on the inside cover of this journal. But we are much too big of an operation for that small group of members to direct and implement everything, which is why we also have committees.

Earlier this year, President David Holmes appointed more than 60 TDCAA members to serve on eight different standing committees (listed here alphabetically and including the appointed chair):

Bylaws (Jack Roady, CDA in Galveston County)
Civil (Charlie Madrid, Asst. CA in El Paso County)
Editorial (Erik Nielsen, Asst. DA in Travis County)
Finance (Philip Mack Furlow, 106th Judicial DA)
Legislative (Jacob Putman, Criminal DA in Smith County)
Nominations (Brian Middleton, DA in Fort Bend County)
Publications (Jon English, Asst. CDA in Hays County)
Training (Glen Fitzmartin, Asst. CDA in Dallas County)

If our board members run things from the cockpit of this proverbial ship, then these committees and their members are down in the engine room doing the dirty work along with our staff to move the ship forward.

If our board members run things from the cockpit of this proverbial ship, then these committees and their members are down in the engine room doing the dirty work along with our staff to move the ship forward. We are grateful for their expertise and assistance!

Each calendar year, a new president appoints committee members for these or other committees. If you have ever thought about getting more involved in your professional association, serving on a committee is a great way to do just that. Reach out to me at TDCAA HQ and I'll be happy to put you on my running list of potential committee members for our next president to consider in 2026.

Mandatory *Brady* & Morton training

If you are an elected or assistant prosecutor who is just starting out in our profession and who prosecutes jailable (read: not Class C) criminal cases, Government Code §41.111 requires that you complete a special CLE course addressing your legal and ethical obligations under *Brady v. Maryland* and the Michael Morton Act. This training is to be completed within 180 days of your start date. And for those of you who have been at this game a long time but haven't taken the course since before it was revised in 2022, you also must complete the new course during this current four-year cycle (2022–2026). You can find this online training on our website at www.tdcaa.com/training/mandatory-brady-training-2022. Upon completion, TDCAA will record your compliance and report it to the Court of Criminal Appeals and the State Bar of Texas, which will award you 1.25 hours of MCLE ethics credit.

This course was created in 2022 with the support of the Court of Criminal Appeals and TDCAF (our educational foundation) and is provided free of charge to anyone who wishes to take it. And yes, that includes non-lawyer prosecutor office employees and local law enforcement officers as well. Feel free to share this opportunity with them to make sure everyone on the State's "team" is pulling in the same direction on these important issues. For more details on how to do that, contact Assistant Training Director Joe Hooker at Joe.Hooker@tdcaa.com. ❇

A wealth of resources on DWI and intoxication offenses

In this era when discovery mechanics has become a predominant focus of prosecution, it is nice to hear that technology that actually helps prosecutors may be on its way.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

Included in this article is a letter from the Department of Public Safety (DPS) labs concerning Texas Crime Lab Records Connect. (See the blue box, below.) The idea is simple: The lab already keeps massive amounts of records—why not simply make them available to criminal law practitioners through an online portal? (Rather than gathering, screening, transmitting, retransmitting, retransmitting, rescreening, and retransmitting ad infinitum.) Prosecutors will have the privilege and responsibility of helping to implement this change. Change is scary, yes, but this program gives grounds for hope and not despair!

The letter sets out the next steps in making a lab record portal a reality, and it is still in the very early stages. TDCAA will continue to post updates, as they are available, on our website (in the document section of DWI Resources). While this help is not imminent, it is coming.

Enhancing discovery for attorneys with Texas Crime Lab Records (CLR) Connect

By Kevin Callahan
Records Portal Program Supervisor, Texas Department of Public Safety

In 2023, the 88th Texas Legislature enacted SB 991 during its Regular Session. This enactment included the codification of Texas Government Code 411, Subchapter G-1, establishing the Texas Crime Lab Records (CLR) Connect. Directed by the Department of Public Safety (DPS), this portal will serve as a centralized hub for crime laboratory discovery.

Attorneys representing the State, along with parties authorized to access records under Texas Code of Criminal Procedure Art. 39.14, will leverage this newly created portal to request crime laboratory records. The primary aim? To enhance Art. 39.14 compliance and streamline the dissemination of discoverable records in a manner that is timely, efficient, accurate, and complete for all necessary stakeholders through a standardized process.

This innovative approach will ensure crucial records are readily accessible to legal practitioners involved in criminal cases. By centralizing access to discovery materials through the Texas CLR Connect portal, Texas is taking proactive steps to enhance transparency, facilitate informed decision-making, and foster the principles of justice.

To establish this portal, DPS is currently working with a steering committee comprised of prosecutors, defense attorneys, DPS officials, and laboratory professionals. Together, we are determining the rules, policies, and procedures surrounding the system. In the coming months, we will post the rules for comment on the DPS website, inviting feedback and input from statewide stakeholders. Once implemented, district and county attorney's offices will play a key role in granting access to appropriate stakeholders. These offices will be responsible for designating which defendants' attorneys will have authorized access to the discovery portal to obtain crime laboratory records subject to Art. 39.14 discovery.

The expected timeline to award a contract to develop the portal is within the next several months and for development to begin in earnest within this calendar year. Throughout the process, we will provide periodic updates ensuring transparency and accountability as we work toward Texas CLR Connect's successful implementation. ❇

DWI Resources

Speaking of the DWI Resources page at on our website (www.tdcaa.com/resources/dwi), please go take a look. It is flush with documents and videos to help you.

First I'd like to call your attention to two great technical resources on the page (look under the Updates section). One is the DWI Caselaw Update, which is managed and revised twice yearly by Jessica Frazier, ACDA in Comal County. (It was originally created by Richard Alpert, former Misdemeanor Chief in Tarrant County and current Baylor Law School professor.) It is a nicely outlined and pretty darn complete summation of all the caselaw on intoxication offenses you need to know. It should be the start of any DWI legal research project—unless, of course, reinventing the wheel is just your thing.

The DWI Caselaw Update is a nicely outlined and pretty darn complete summation of all the caselaw on intoxication offenses you need to know. It should be the start of any DWI legal research project–unless, of course, reinventing the wheel is just your thing.

Second is a very solid review of standardized field sobriety tests (SFSTs) to go over with officers before trial. Look for updates to that resource later this year.

If you look under the Featured Video section, click on the hyperlink that says "+Show all videos" (or go straight to www.tdcaa.com/resources/dwi/video). There you'll find a dozen hours of DWI training videos.

If you've never picked a DWI jury (or it has been a while), take an hour to watch the best impaired driving prosecutors in the state of Texas outlining their advice in two videos, "Jury Selection in DWI Prosecution" and "Special Issues in Jury Selection in DWI Prosecution"—they're in the Trial Preparation section. Both are completely free; all they require is your time.

Are you worried about directing a toxicologist in a blood draw case? Take a look at "Testing Blood for Drugs in Texas" (under Breath & Blood) where actual forensic toxicologists answer all the questions you need to ask on direct to get blood admitted and explain it to the jury. Are you working with a breath test? Well, we have a video on that too: See "Breath Alcohol Testing" in the same section.

There are several courtroom testimony videos (all under Trial Preparation) and even a couple we made as demonstrative evidence for trials. They would also make a great addition to any police officer training you do or for in-office presentations. All the videos are free, and you can either stream them on our website or download them through Vimeo.

More where that came from

But wait—there's more, just like in the Sham-WoW commercial (which is worth looking up on YouTube). A one-hour video on intoxication manslaughter is back in our online library; it's called "Prosecuting Intoxication Manslaughter: A Panel Discussion." Imagine being able to sit down with three of the best prosecutors on impaired driving cases and get an hour of advice on how to try your case. Well, we did just that with Jessica Frazier, Allison Baimbridge (ADA in Fort Bend County), and Andrew James (ACDA in Dallas County). They sat down and related how they address causation, pick juries, present evidence, and prepare for punishment. If you are trying an intoxication manslaughter for the first time, or the first time in a long time, it would be irresponsible not to spend an hour with this video. Did I mention it is free, and did I mention you can earn CLE for watching?

But that's not all! For the first 35 people who finish the course, TDCAA will mail you a free copy of our *Intoxication Manslaughter* book, courtesy of the Texas Department of Transportation grant that funds my position.

Lastly, if you would like to host a one-day regional training for prosecutors and officers in your jurisdiction, we still have a few spots open for 2025. If it has been a while since I've taught in your county or you want to apply for the first time, please email Kaylene.Braden@tdcaa.com to book a date. Spots fill up pretty quickly so don't wait to reach out to Kaylene or to return the application.

It has long been my pleasure to help prosecutors and peace officers with these common but complex cases. Please check out the resources we have prepared for you and take advantage of them all. ❇

Sad news about Allison Bowen

With deep sadness and a very heavy heart, I regret to let you know that Allison Bowen passed away unexpectedly from natural causes as this issue went to press.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

She had been recently elected as the Chair of the Key Personnel–Victim Services (KP–VS) Board and worked as the Victim Services Director in the Tarrant County Criminal District Attorney's Office. Allison had been an integral part of office and was dedicated to supporting victims in Tarrant County and sharing her knowledge with TDCAA's membership. Her work touched the lives of so many, and her presence will be greatly missed by everyone who knew her. Our support and heartfelt condolences go out to her family and friends during this incredibly hard time.

What is a Tree of Angels?

The Tree of Angels is a meaningful Christmas program specifically held in memory and support of victims of violent crime. The Tree of Angels allows a community to recognize that the holiday season is a difficult time for families and friends who have suffered the crushing impact of a violent crime.

This special event honors and supports surviving victims and their families by hosting a Christmas tree where loved ones can place an angel ornament. The first program was implemented in December 1991 by People Against Violent Crime (PAVC) in Austin. In December over the past 33 years, the Tree of Angels has become a memorable tradition observed in many communities, providing comfort, hope, support, and healing.

A "how-to guide" for establishing a Tree of Angels ceremony in your community is available by contacting pavc@peopleagainstviolentcrime.org or vernalee@peopleagainstviolentcrime.org. Please note that Tree of Angels is a registered trademark of PAVC, which is extremely sensitive about ensuring that the original meaning and purpose of the Tree of Angels continues and is not altered in any way. For this reason, PAVC asks if your city or county is interested in receiving a copy of the how-to guide, please complete a basic informational form. After the form is completed electronically and submitted back to PAVC, you will receive instructions on how to download the guide. Please do not share to avoid unauthorized use or distribution of the material.For a list of all counties who participate, check out http://treeofangels .org/index.html.

I'd like to thank the following people across the state who submitted write-ups and photos of their own communities Tree of Angels ceremonies.

Jack Roady
Criminal DA's Office in Galveston County

The Galveston County Criminal District Attorney's Office hosted its 25th Annual Tree of Angels ceremony on December 10 at the Galveston County Justice Center. Families and members of

ABOVE: Allison Bowen. BELOW: From left to right are DA Jack Roady, VAC Tobi Williams, VAC Ricci Rodriguez, Chief VAC Ambar Marenco-Lazzaro, and VAC Ashley Justice, all from the CDA's Office in Galveston County.

law enforcement memorialized a total of 70 victims of violent crime that evening. Fifty-five families personally attended the event to hang Christmas ornaments in honor of their lost loved ones.

We would like to thank the following agencies and individuals who generously assisted in making the evening such a meaningful success for the victims and their families:

- Galveston County Sheriff's Office
- Galveston County Citizen Sheriff's Academy Alumni Association
- City of Galveston Fire Department
- The Gulf Coast Center
- Pastor Jervie Windom, Resonate Church in La Marque
- Nellie Loewen, UTMB Sexual Assault Nurse Examiner

ABOVE: the Tree of Angels in Palo Pinto County. ABOVE RIGHT: The staff of the DA's Office in Williamson County. RIGHT: The Williamson County Honor Guard at the Tree of Angels ceremony.

Adina Morris
DA's Office in Palo Pinto County

Palo Pinto's 11th Annual Tree of Angels program was held on December 9. Our guest speaker for the program was Janet (White) Cole. Janet tragically lost her husband, Randy White, on April 2, 2009. Randy was a sergeant with the Bridgeport Police Department assisting the Wise County Sheriff's Department during a high-speed pursuit when the suspect intentionally collided with Sgt. White's vehicle.

Janet is also a published author. She wrote *Murder to Miracles* about her tragic loss but also about the healing and blessings she received in the years following her husband's death. Although she has spoken publicly about her loss, she had never spoken in the company of others who have also tragically lost loved ones. Janet felt a strong urgency to speak of that healing and the blessings that coincided with the devastation of losing someone she loved. During her special tribute, she brought forth tears but also smiles and laughter, as she focused on the privilege of honoring our Angels.

DA's Office in Williamson County

The Williamson County District Attorney's Office started its first Annual Tree of Angels ceremony in December 2013, and we celebrated our 12th on Tuesday, December 3.

The Tree of Angels ceremony allows the community to remember families whose lives have forever been touched by violent crime. Families and friends of victims and survivors of a violent crime bring an angel ornament to place on this special tree.

The ceremony also includes the dedication and lighting of the unadorned Tree of Angels and victims, families, and friends decorating the tree with their angel ornaments. The audience is a broad reflection of the community, including families of homicide crimes, law enforcement, and victim services agencies from the county and state.

This year the trees remained up for public viewing from December 3–17. This allowed those who were unable to attend the ceremony to come and honor their loved ones.

Glyn Sloan
DA's office in Limestone County

On December 17 at the Limestone County Courthouse, local residents gathered for the annual Tree of Angels ceremony, a heartfelt event dedicated to honoring crime victims. It was so very nice to honor 20-25 victims who were escorted by law enforcement down the stairway to our Tree of Angels event via violin accompaniment as our DA Roy DeFriend welcomed guests.

Roy DeFriend, then-DA in Limestone County, speaking at the Tree of Angels event.

Board elections and appointments

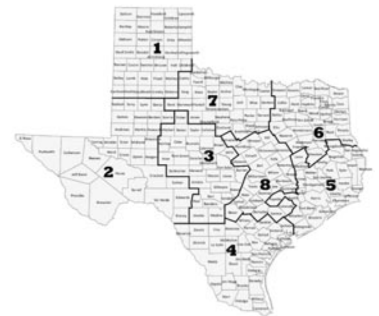
Board elections were held on Thursday November 7, at the Key Personnel & Victim Assistance Coordinator Conference in Sugar Land for the West (Regions 1 & 2) and North-Central Areas (Regions 3 & 7). Recent elections to the board are as follows:

- Wendy Porter (KP/VAC) (Region 2) of the Pecos County Attorney's Office was elected as the West Area representative.
- Chree Henderson (KP) (Region 7) of the Palo Pinto County District Attorney's office was elected as the North-Central Area representative.
- Rosie Martinez, Victims Unit Director (Region 4) of the Hidalgo County Criminal District Attorney's Office was elected as 2025 Vice-Chairperson.

The recent appointments to the board are as follows:

- Regina Brooks (VAC) (Region 6) of the Cherokee County DA's Office was appointed as a Designated VAC representative.
- Michelle Bork (KP) (Region 6) of the Kaufman County Criminal DA's Office was appointed as a Designated KP representative.

The Key Personnel–Victim Services Board assists in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region. To be eligible, each candidate must have permission of the elected prosecutor, attend the elections at the annual seminar or be appointed, and have paid membership dues.



If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. Elections are held each November at our Key Personnel & Victim Assistance Coordinator Conference and appointments are made each January. (See the regional map, right, to find out what region you're in.) If you have any questions, please email me at Jalayne.Robinson@tdcaa.com. Below I have included an introduction and photos of the newest members of the KP–VS Board.

Michelle Bork
Designated KP representative (Region 6)

Hello, my name is Michelle Bork, and I am thrilled to introduce myself as a proud employee of the Kaufman County District Attorney's Office, where I have dedicated 20 years of service. Currently, I serve as the Civil Supervisor Paralegal and recently achieved a significant milestone by

Michelle Bork

becoming a TBLS Board Certified Paralegal in Criminal Law.

I am deeply honored to have been appointed to TDCAA's KP–VS Board. This opportunity to collaborate with such an incredible group of professionals is truly exciting. I look forward to sharing the knowledge and experiences I have gained over the years while learning from the diverse expertise of my peers. Together, I am confident we can continue making a meaningful impact within the counties.

Chree Henderson

Chree Henderson
North Central Area representative (Region 7)

My name is Chree Henderson, and I am the Legal Assistant for the Palo Pinto County District Attorney's Office in Palo Pinto. I have been with the office since July 1, 2023. I am looking forward to serving on the TDCAA Key Personnel-Victim Services Board. I feel serving on the board will build confidence in not only my work but also for other people in the Key Personnel position across the state.

Regina Brooks

Regina Brooks
Designated VAC representative (Region 6)

I am honored to have been selected to serve on the TDCAA Key Personnel–Victim Services Board representing Region 6. I have been employed with the Cherokee County District Attorney's office for six years, serving under The Honorable Elmer Beckworth throughout that time. I look forward to working under the guidance and supervision of the newly elected District Attorney, Jonathan Richey, with whom I have worked closely throughout the duration of my time at the DA's Office, mostly regarding crimes against women and children. We have worked very hard in the office to obtain justice for all victims of crime.

I sought to serve on the Board to gain more knowledge of how to effectively serve the victims of crime in our county while working as a team with the prosecutors in the office and to provide support and education to other victim services professionals as my skills and knowledge base is enhanced.

Wendy Porter
West Area Representative (Region 2)

My name is Wendy Porter, and I represent Region 2 of the KP–VS Board. I am the Victim Assistance Coordinator for the Pecos County Attorney's Office as well as the Juvenile Case Coordinator and the Office Administrator. I began my career in 2012 as the Case Intake and Legal Assistant and have since held the positions of Pretrial Intervention Coordinator, Investigator's Assistant, NISI Coordinator, and Truancy Coordinator. I am blessed to work with an amazing prosecutor and outstanding coworkers. Our office works well together with the goal of moving cases quickly while keeping victims a priority. I am excited to serve as a Board member and look forward to this year.

Wendy Porter

National Crime Victims' Rights Week

Each April communities throughout the country observe National Crime Victims' Rights Week (NCVRW) by hosting events promoting victims' rights and honoring crime victims and those who advocate on their behalf. NCVRW will be observed April 6-12, 2025, with the theme "**Connecting < KINSHIP > Healing**." Check out the Office for Victims of Crime (OVC) website at https://ovc.ojp.gov/news/announcements/2025-national-crime-victims-rights-week-dates-and-theme. Sign up for the NCVRW subscription list at https://ovc.ojp.gov/program/national-crime-victims-rights-week/subscribe.

If your community hosts an event for NCVRW, we would love to publish photos and information about it in a future edition of *The Texas Prosecutor* journal. Please email me at Jalayne.Robinson@tdcaa.com with information and photos of your event.

Victim services consultations

As TDCAA's Victim Services Director, I am available to provide victim services training and technical assistance to you via phone, by email, in person, or by Zoom. I can tailor individual or group training specifically for needs. The training and assistance are free of charge. Are you a new VAC? This training would be perfect for you!

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

Texas Prosecutors Society nominations are now open

The Texas Prosecutors Society (TPS) was established in 2011. Its purpose is to bring together those who have demonstrated enduring support for the profession of prosecution.

By Rob Kepple
TDCAF Executive Director in Austin

The TPS uses the Texas Bar Foundation as a model and asks nominees to donate $2,500, or $250 over 10 years, to an endowment fund. The Society gathers each year in conjunction with the Elected Prosecutor Conference. The Society now has 276 members, and this year the endowment should surpass one million dollars.

Nominations are accepted by the Foundation Board, which also seeks nominations from the TDCAA Board. Nominees must have a minimum of five years' service as a prosecutor or other criminal justice professional and a significant and sustained contribution to the advancement of the profession and criminal justice in Texas. If there is someone you would like to nominate, contact me at Rob.Kepple@tdcaf.org. Nominations will be open through May.

Texas Prosecutors Society scholarship program

The Texas Prosecutors Society is about connection to the profession we love. It can be harder, though, for those who have retired from prosecution but still want to be involved. Therefore, the Foundation Board has created a scholarship program for TPS members who are no longer in a Texas prosecutor office but who would like to attend a TDCAA conference. Are you a retired prosecutor who wants to come to the Annual but don't have the registration fee? Please contact me and I might be able to help.

Domestic Violence Resource Prosecutor

TDCAA is fortunate to have Kristin Burns on staff as the Domestic Violence Resource Prosecutor. She is a great resource, and she is leading the way in a national trend to focus resources on family violence cases. The Foundation leadership is dedicated to supporting Kristin's work with the resources she needs, so if you have an interest in supporting her, we'd love to talk with you more. Just give me a call.

Prosecutor Management Institute

One of the most successful programs created and sustained with Foundation support is the Prosecutor Management Institute (PMI). If you have been to the first module, Fundamentals of Management, it is a safe bet that it was one of the best TDCAA courses you have attended, and you probably want more. We are expanding our pool of trainers in an effort to expand the course's reach to more offices, so if you are interested in bringing Fundamentals of Management to your area, let me know.

In addition to the fundamentals course, we are looking to expand the offerings to include courses on two additional topics: hiring and firing, and evaluating employees for success. We all recognize that these are hard areas of management. Our job will be to give you some tools that work for a prosecutor office. Stay tuned. ❇

In *Andrew v. White*, the Supreme Court weighs in on undue prejudice

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

Character and bad acts evidence is tricky. On the one hand, "[i]t is a well-established and fundamental principle in our system of justice that an accused person must be tried only for the offense charged and not for being a criminal (or a bad person) generally."[1]

We nonetheless do allow character and bad acts evidence for other purposes, such as the defendant's motive for committing the offense, modus operandi, lack of mistake, and all the other purposes allowed in Texas Rule of Evidence 404(b). We also allow propensity evidence in certain very limited circumstances involving the sexual abuse of children and child molestation cases under Texas Code of Criminal Procedure Art. 38.37 and its federal counterpart, Federal Rule of Evidence 414. At punishment, character and bad acts evidence is much fairer game: "The jury is concerned … with evaluating a defendant's background and character independent of the commission of the crime on trial."[2]

There is a line, however. As an evidentiary issue, the trial court's rulings on admissibility of character and bad acts evidence are subject to an abuse of discretion standard, and harm is analyzed under a non-constitutional error standard,[3] as is the analysis of admissible but unfairly prejudicial evidence under Texas Rule of Evidence 403. In *Andrew v. White*[4] the Supreme Court of the United States (SCOTUS) tells us that there is also a Fourteenth Amendment Due Process Clause aspect to undue prejudice in what we generally consider evidentiary issues, both in the guilt–innocence and punishment stages. This broadly applies to all evidence admitted, but it is of particular concern in character evidence admitted under 404(b) and Art. 38.37.

Background

Brenda Evers Andrew was charged with first-degree (malice) murder and conspiracy to commit first-degree murder in Oklahoma District Court for the shooting death of her husband, Rob Andrew, which occurred on November 20, 2001. The two were separated at the time and Rob had come to the home where Brenda still lived to pick up their two minor children for the Thanksgiving holiday. Ordinarily Brenda would take the children to the car, but this time she asked Rob to come to the garage to relight the pilot light on the furnace. Brenda's version of events was that as Rob was trying to light the furnace, two masked men entered the garage and shot him twice with a 16-gauge shotgun, as determined by the spent shells that were found. Shells from the same manufacturer were found in the home. Brenda had a superficial gunshot wound on her arm that she said was a graze from the second shot.

When police arrived, the children were in a bedroom watching television with the volume

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[1] *Templin v. State*, 711 S.W.2d 30, 32 (Tex. Crim. App. 1986); see also *United States v. Foskey*, 636 F.2d 517, 523 (1980) "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is'") (quoting *United States v. Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978).

[2] *Sparkman v. State*, 580 S.W.2d 358, 360 (Tex. Crim. App. 1979); see also Tex. Code Crim. Proc. Art. 37.07, §3.

[3] See Tex. R. App. P. 44.2(b).

[4] 220 L.Ed.2d 340 (U.S. 2025).

turned up very high, oblivious to the murder. Rob had told several friends that Brenda had refused to let him take his 16-gauge shotgun with him when he moved out. A witness had seen her eight days prior at an area near the Andrew's country home used by locals for target practice and found 16-gauge shotgun shells there afterwards. Brenda's superficial arm wound was found to be caused by a .22 caliber bullet fired at close range rather than shotgun pellets fired at medium range. James Pavatt, whom Brenda met at church when they taught Sunday School together and with whom she later began an affair, had purchased a .22-caliber handgun about a week before the murder. Pavatt was a life insurance agent and had assisted Rob in setting up an $800,000 life insurance policy around the same time the affair began. You see where this is going.

A jury found Brenda Andrew guilty on both counts and found true two aggravating factors: murder for remuneration and murder that was especially heinous, atrocious, or cruel. She was sentenced to death for the murder and to 10 years and a $10,000 fine for conspiracy. The Oklahoma Court of Criminal Appeals (OCCA) upheld her convictions and sentence on June 21, 2007. The OCCA concluded that the trial court hadn't abused its discretion by admitting the majority of the challenged evidence, because it was used to show her motive, intent, preparation, and "the schemes she used to enter into a conspiracy with Pavatt to kill Rob Andrew." The evidence of Brenda Andrew's other, unrelated extramarital affairs, for example, the OCCA found proper as it showed that "her co-defendant [Pavatt] was just the last in a long line of men that she seduced."

Other evidence, however, found the OCCA "struggling to find any relevance to this evidence, other than to show [Brenda Andrew's] character," such as testimony of another man with whom Brenda had had an affair that she had "come on to" his two adult sons; that she was dressed provocatively in a dress that was "very tight," "very short," and exposed "a lot of cleavage" when the Andrews and another couple went to dinner together six to eight weeks before the murder; that someone in that restaurant had called her a "hoochie"; that she had made inappropriate talk about a trip to Mexico; that she changed her hair color to red the day after hearing Rob's best friend say that the friend preferred redheads. The State admitted that this evidence was not relevant but argued that it was nonetheless harmless, and the majority of the OCCA had agreed.

OCCA Judge Johnson dissented and would have vacated the sentence and remanded for a new hearing on punishment. He stated that although the evidence of her guilt was overwhelming, the prosecution engaged in an "egregious … pattern of introducing evidence that has no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman. The jury was allowed to consider such evidence, with no limiting instruction, in violation of the fundamental rule that a defendant must be convicted, if at all, of the crime charged and not of being a bad woman. … I believe one effect was to trivialize the value of her life in the minds of the jurors." OCCA Judge Chapel wrote a separate brief dissent saying that he would remand altogether for a new trial.

Her state remedies exhausted, Andrew then began her climb through the federal system with a petition for writ of habeas corpus. Among the claims brought to the U.S. Tenth Circuit Court of Appeals was the impermissible introduction of personal and sordid evidence about Brenda Andrew's sex life admitted as evidence of "bad acts," which she claimed violated the Due Process Clause in both the guilt–innocence and punishment phases. The Tenth Circuit, with Judge Bacharach dissenting, held in a divided opinion that it could not grant relief on this claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[5] The AEDPA presents three independent prongs for federal habeas relief by showing that a state court decision that was adjudicated on the merits was:

1) "contrary to" or

2) "involved an unreasonable application of" federal law that was clearly established by the Supreme Court, or

3) that "a state court decision was based on an unreasonable factual determination."[6]

Andrew had argued, and the lower federal district court had agreed, that the U.S. Supreme

James Pavatt, whom Brenda met at church when they taught Sunday School together and with whom she later began an affair, had purchased a .22-caliber handgun about a week before the murder. Pavatt was a life insurance agent and had assisted Rob in setting up an $800,000 life insurance policy around the same time the affair began. You see where this is going.

[5] 28 U.S.C. §2254.

[6] *Andrew v. White*, 62 F.4th 1299, 1311, 1355 (10th Cir. 2023) *reversed*, 220 L.Ed.2d 340 (U.S. 2025); 28 U.S.C. §2254(d)(1)-(2).

Court case of *Payne v. Tennessee*[7] met the "clearly established law" requirement, but the Tenth Circuit did not see it that way. *Payne* had broadly announced that improperly admitted evidence may be so unduly prejudicial that it renders the trial fundamentally unfair under the Due Process Clause of the Fourteenth Amendment, but the Tenth Circuit had previously held[8] that *Payne* was limited to the issue that that case had addressed, namely victim impact statements before the jury in the punishment phase of a capital trial. The Tenth Circuit observed that Andrew was raising a claim challenging a state court's evidentiary rulings, and the Court's own precedent meant that *Payne* was not "clearly established law" that produces a framework for due process violations arising from ordinary evidentiary rulings at trial.

The per curiam opinion of the Court stated bluntly that "the Court of Appeals rejected [Andrew's] claim because, it thought, no holding of this Court established a general rule that the erroneous admission of prejudicial evidence could violate due process. That was wrong.

As the judges saw it

The U.S. Supreme Court reversed in a 6–1–2 ruling, rejecting the Tenth Circuit interpretation that limited *Payne* to its facts. The per curiam opinion of the Court stated bluntly that "the Court of Appeals rejected [Andrew's] claim because, it thought, no holding of this Court established a general rule that the erroneous admission of prejudicial evidence could violate due process. That was wrong. By the time of Andrew's trial, this Court had made clear that when 'evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief,'" citing *Payne*.

The Court noted that *Payne* had overruled a line of cases that had barred victim impact evidence entirely from the punishment phase of a capital trial. *Payne* had observed that in many circumstances, "victim impact evidence serves entirely legitimate purposes," although it may be prejudicial in others. *Payne* concluded that a *per se* rule was not necessary to protect against risk of prejudicial testimony because "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" against the introduction of evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." In other words, the Court removed the protection of a *per se* rule because the Due Process Clause was sufficient protection against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. The language from *Payne* that the Due Process Clause "provides a mechanism for relief" when the introduction of unduly prejudicial evidence "renders [a] trial fundamentally unfair" was not mere dicta or a "pronouncement," as the Tenth Circuit has said; it was central to the holding. In support the Court cited numerous other cases prior to *Payne* holding that prosecutors' prejudicial or misleading statements violate due process if they render a trial or capital sentencing fundamentally unfair.[9]

Addressing the facts of Andrew's case, the Court observed that some evidence should have been analyzed under *Payne*, quoting in particular Judge Bacharach's dissent in the Tenth Circuit case that the State's focus "from start to finish on Ms. Andrew's sex life," in which he argued "portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals … plucking away any realistic chance that the jury would seriously consider her version of events," the cumulative effect of which "deprived Ms. Andrew of a fundamentally fair trial."[10] The Court held that the lower court erred in refusing even to consider whether the OCCA unreasonably applied established due process principles to Andrew's case and held that the Tenth Circuit must on remand determine "whether a fairminded jurist reviewing this record could dis-

[7] 501 U.S. 808 (1991).

[8] See *Holland v. Allbaugh*, 824 F.3d 1222, 1228 (10th Cir. 2016).

[9] *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (observing that prosecutor's misconduct during trial and closing argument could "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process"); *Caldwell v. Mississippi*, 472 U.S. 320, 338-340 (1985) (applying *Donnelly* to reverse death penalty where prosecutor's remarks were unambiguous and uncorrected by the trial court); *Darden v. Wainwright*, 477 U. S. 168, 179-183 (1986) (applying standard in *Donnelly*).

[10] *Andrew*, 220 L.Ed.2d at 345 (quoting *Andrew*, 62 F. 4th, at 1366).

agree with Andrew that the trial court's mistaken admission of irrelevant evidence was so 'unduly prejudicial' as to render her trial 'fundamentally unfair.'" The Court directed that the Tenth Circuit must make that determination separately as to both guilt–innocence and punishment, considering for each the relevance of the disputed evidence to the charges or sentencing factors, the degree of prejudice Andrew suffered from its introduction, and whether the trial court provided any mitigating instructions.

Justice Alito concurred with the judgment, writing simply, "I concur in the judgment because our caselaw establishes that a defendant's due-process rights can be violated when the properly admitted evidence at trial is overwhelmed by a flood of irrelevant and highly prejudicial evidence that renders the trial fundamentally unfair. … I express no view on whether that very high standard is met here."[11]

The dissent

Justice Thomas dissented, joined by Justice Gorsuch, on both the majority's recitation of facts and its application of the AEDPA to Payne, saying that the Court "summarily vacates the opinion below for failing to elevate to 'clearly established' law the broadest possible interpretation of a one-sentence aside in *Payne*" and observing that the Court just months after *Payne* reserved the very question that it now says *Payne* resolved, in *Estelle v. McGuire*.[12] Justice Thomas faulted the majority for its characterization of the trial proceedings, citing the overwhelming evidence of guilt that rendered the irrelevant evidence harmless, and arguing that some of the character evidence was either admissible to show motive or was legitimately rebutting points that Andrew herself had placed at issue.

Justice Thomas points out that the Court's precedent held that "holdings that speak only at a high level of generality … cannot supply a ground of relief under the AEDPA,"[13] instead requiring lower courts to evaluate whether Supreme Court precedent supplies a specific rule.[14] Thomas further faults the majority for finding a clearly established rule when the holding of the precedent at issue is debatable. Because "fairminded jurists" could disagree with the majority's reading of *Payne*, it cannot in Justice Thomas eyes be clearly established.

The takeaway

It is very likely that we will hear and see *Andrew v. White* in the trial courts and appellate briefs cited as new authority for a constitutional right of exclusion of evidence by the defendant, so it is important to be familiar with it. Remember that due process arguments to evidentiary issues are not new to *Andrew*; these arguments have been made in state courts of appeal previously. Texas courts will likely continue to hold that the normal rules of admissibility sufficiently protect against due process violations in all but the most grievous cases, particularly cumulative, repetitive, and egregious errors such as Alito's "flood of irrelevant and highly prejudicial evidence that renders the trial fundamentally unfair." Remember that even the State on appeal admitted that much of the evidence complained of in Andrew was simply irrelevant "bad person" evidence.

The best preparation we can make is to continue to rigorously observe best practices as to our theory of admissibility for each piece of evidence that we put in, particularly when it comes to character evidence under 404(b) and CCP Art. 38.37 and potentially inflammatory evidence under 403. For character evidence we seek to admit under 404(b), be able to articulate exactly why it has relevance apart from propensity and that you are not trying to enter it to show that the defendant is simply a bad person who does bad things. Propensity evidence under Art. 38.37 has

Remember that due process arguments to evidentiary issues are not new to Andrew*; these arguments have been made in state courts of appeal previously.*

[11] *Andrew*, 220 L.Ed.2d at 348 (Alito, J., concurring) (internal citations omitted).

[12] 502 U.S. 62, 67 (1991) (reversing when the court of appeals granted habeas relief on the ground that the admission of irrelevant and prejudicial prior-bad-act evidence had helped render the prisoner's trial "fundamentally unfair in violation of due process").

[13] *Andrew*, 220 L.Ed.2d at 353 (Thomas, J. dissenting) (quoting *Brown v. Davenport*, 596 U.S. 118, 136 (2022)).

[14] *Andrew*, 220 L.Ed.2d at 353 (Thomas, J. dissenting) (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014)).

been repeatedly held constitutional by the courts, but we shouldn't be taking that as an invitation to overwhelm the jury with inflammatory evidence about a defendant. The same goes to an unfair prejudice analysis of all other evidence we seek to enter. Don't merely think of the 403 balancing test as a trial court hurdle to overcome; be consciously aware of the strength and importance of the evidence weighed against the danger of unfairly prejudicing the jury or inflaming jurors' passions. If you anticipate where you will see those objections and are able to articulate how the evidence weighs for admissibility under the *Gigliobianco/Montgomery* factors,[15] the due process argument will likely take care of itself.

I suspect we will have to see how things shake out in the lower courts, but there's no reason to panic. Be aware that there is a due process line for admissibility, and stay well on the correct and fair side of it. *Andrew* should serve as a reminder of what we are (let's hope) already doing. ❇

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15 *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006); *Montgomery v. State*, 810 S.W.2d 372, 390 (Tex. Crim. App. 1990) (op. on reh'g).

TDCAF News

Recent gifts to the Foundation*

Elmer Beckworth, Jr. *in memory of Charles Holcomb, Davis Sorrell, Randy Hatch, and Marvin Acker*
Elmer Beckworth, Jr. *in honor of James Cromwell and Jonathan Richey*
Tom Bridges *in honor of Rob Kepple*
Henry Garza
Cheryl Henry
Douglas Howell III
Rob Kepple *in memory of Don Stricklin*
Rob Kepple *in memory of Allen Ahlschwede*
Rob Kepple *in honor of Travis Jack Koehn*
Sonny McAfee
Greg Miller *in memory of Tim Curry*
Rick Miller *in honor of Henry Garza*
Sunni Mitchell
Ann Montgomery
Murray Newman
Laura Nodolf
Denise Oncken
Lisa Peterson
Abigail Placke *in memory of the Honorable John L. "Jack" Placke*
Jack Roady
John Rolater Jr.
Daphne Session
Ken Sparks *in honor of Rob Kepple*
Stephanie Stroud
Beth Toben
N. Krispen Walker

* gifts received between December 6, 2024, and February 7, 2025

Photos from the Prosecutor Trial Skills Course

Photos from our Investigator Conference

Award winners from Investigator Conference

CLOCKWISE FROM TOP LEFT: Bob Bianchi, DA Investigator in Victoria County and past Chair of the Investigator Board, received the Career Investigator Award. He is pictured (on the right) with Joe Medrano, DA Investigator in Bell County and Investigator Board member. Another Career Investigator Award recipient was David Parkinson (third from left), who is pictured with his colleagues from McLennan County. Next are recipients of the Professional Criminal Investigator (PCI) certificates in attendance at the conference. Lastly, the Chuck Dennis Investigator of the Year Award was given to Jeff Case, DA Investigator in Wilbarger County. He is pictured at left (with microphone) as then-DA Staley Heatly (right) presents the award. Congratulations to all these winners!

When children witness domestic violence (cont'd from the front cover)

information and training resources with our partner agencies (law enforcement, medical personnel, the Department of Family and Protective Services [DFPS], and members of the Special Victims Division in the DA's Office) on a regular basis so that we all improve together. My hope is that you can share these tools with local police agencies so that we can respond to and prosecute cases of domestic violence.

Responding at the scene

Great family violence investigations start with the responding officer. Responding officers to a domestic violence call should *always* collect the full names, dates of birth, and school information of any children who were present where violence occurred. "Present" does not just mean being in the room when the assault happened, but rather being in any part of the location where the child may have been exposed to domestic violence.

A key reason is that officers have a mandatory reporting responsibility.[1] A child's exposure to domestic violence requires a report to DFPS, so responding officers must provide this information to the Department upon leaving the scene.[2] While DFPS may investigate a report of a child being exposed to domestic violence, it is not an automatic finding that the parent-victim of domestic violence is neglectful or abusive—DFPS will not hold the victim accountable for abuse and neglect just for being victimized in a domestic violence event.[3] However, DFPS policies state, "Domestic violence that physically harms a child or puts the child at substantial risk of immediate harm would constitute an allegation of child abuse or neglect."[4]

Unfortunately, involvement from Child Protective Services (CPS, a division of DFPS) is often a barrier to disclosures of abuse. Victims of domestic violence may have prior negative experience with CPS, and they may fear they will not be believed. They may be concerned that their statements will provide ammunition to a noncustodial parent for removal of their children based on this new abusive relationship. They may have been threatened by a perpetrator that information will be provided to CPS should they ever try to leave, or worse, the children could be placed with a relative from the offender's family. Whatever the case may be, law enforcement, prosecutors, and victim advocates should be cognizant of how these concerns may affect an investigation, while still working to ensure that justice is done and resources are made available.

If you do not see a CPS reference number noted in the offense report once you receive the case, please follow up with the police agency to make sure a report has been made. If not, you should make your own report as soon as possible to fulfill our own duty as mandatory reporters. This is particularly important when we have information that a victim has returned to the abusive home where a protective order or bond conditions are in place to prohibit such contact.

The dynamic of serving a victim of domestic violence, while also bringing DFPS into her life, can feel like a difficult position for prosecutors, investigators, and VACs. However, by reporting, we are not only following our legal duty, but also we may protect a child from harm. How many victims of domestic violence immediately return to an abuser? An adult victim may decide to go back into the cycle of abuse for herself, but in doing so, she is placing her child back in harm's way. Our mandatory referral will allow CPS to come alongside the family with the clear message that a victim must stay the course for her own safety as well as to protect her child. Not to mention that victims often become uncooperative with prosecution simply due to a lack of access to resources once leaving an offender. CPS can work with a victim to build a safety network around her, locate childcare, make referrals to community resources, and find resources to pay for essential needs. Responding officers and prosecutors who ensure that information is provided timely to CPS can play a critical role in

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[1] The phone number to report abuse or neglect to DFPS is 800/252-5400.

[2] www.dfps.texas.gov/Investigations/domestic_violence.asp.

[3] *Id.*

[4] *Id.*

keeping a victim cooperative until the case reaches disposition.

Help for investigations

Another critical reason responding officers should gather information on children present in the home is so they can provide this information to their criminal investigations division and facilitate timely forensic interviews. It goes without saying: If a child has directly witnessed a domestic violence incident, a forensic interview should be set up immediately. But I also encourage agencies to schedule forensic interviews for any children who were merely present in the home at the time of offense. If a forensic interview is not available to your agency, an officer with a body-worn camera should check in with that child while on scene. In a non-leading manner, using age-appropriate questions, and outside the presence of either adult party, the officer should ask the child whether or not s/he has anything to tell the officer about anything s/he saw or heard.

Some of the best evidence of family violence dynamics comes from the children who spend every day in the home with the victim and offender. The only way we can ensure that we gather such information is by an age-appropriate interview conducted away from the victim and offender as soon as practicable after the offense. This is one of the many reasons why Children's Advocacy Centers (CAC) exist. CACs are designed to interview any witness or victim to a crime age 18 and younger. While Kaufman County is still considered a smaller jurisdiction, we are fortunate to have our own Children's Advocacy Center and multi-disciplinary team (MDT). Cases in which a child has witnessed domestic violence and are subsequently forensically interviewed are staffed as a part of our MDT.

What if the children did actually hear the assault but were too scared to leave their rooms? What if they witnessed the whole thing and were coached or sent back to their rooms prior to the officers' arrival? What if they did not see the assault itself but saw the aftermath or the concealment of a weapon? We will never know those answers—or many other pertinent details about the family's dynamics—if we never ask. If a child is awake and present on scene, I encourage patrol officers to at least capture that child on body cam. If the child is talking, just listen and be a calm presence for him or her. This should not serve as a replacement for a forensic interview, but rather a supplement of evidence for the child's demeanor that evening. Whenever possible, forensic interviews are a best practice when working with child witnesses and victims.

Here is a real life example from one of our cases in Kaufman County: In the wake of a traumatizing ordeal, a simple "Are you doing OK, buddy?" from the responding officer led to a three-minute narrative by a pajama-clad 5-year old about how "angry daddy was to mommy in the bathroom" and how "daddy hitting her made mommy have to drop me and I hit my head." This is all valuable information for prosecutors and powerful potential evidence for a jury.

Prior assaults

In addition to collecting what knowledge a child may have of the crime, we may also gather valuable information about prior assaults or abuse within the home. Article 38.371 of the Texas Code of Criminal Procedure allows both the prosecution and defense to put forth evidence of the dynamics of the relationship in a prosecution of family violence. These cases are one of the rare instances where we may present to a jury prior bad acts in a relationship, patterns of abuse, and a full glimpse of what is going on behind the scenes. Children observe much more than we ever give them credit for. A trained forensic interviewer can help an investigator understand what dynamics exist in the home where the crime occurred and assist law enforcement and DFPS in responding appropriately to these crimes.

Children observe much more than we ever give them credit for. A trained forensic interviewer can help an investigator understand what dynamics exist in the home where the crime occurred and assist law enforcement and DFPS in responding appropriately to these crimes.

In a recent Kaufman County prosecution, two young children and a teenager who resided in the home at the time of the assault were interviewed at our local Children's Advocacy Center. Their father had cut their mother with a kitchen knife. When police arrived, the father claimed that the couple suffered from a deteriorating marriage and that his wife had given herself the superficial wounds in an attempt to get a U-Visa and secure her residency in the United States. During the forensic interviews of the children, they each described what lead up to the assault that day. They told interviewers how angry their father was that their mother would not drive to the store to buy him more alcohol. They described how he often

Growing up in a home where there is physical abuse can be traumatizing to children. According to the Centers for Disease Control and Prevention, in homes where violence between partners occurs, there is a 45- to 60-percent chance of co-occurring child abuse, a rate 15 times higher than average.

got angry when he drank, which would fuel even more fighting. The two younger children explained how terrifying it was when he came into their mother's bedroom and began jabbing toward her with a knife, eventually cutting her across her arm. Once she was assaulted, the children explained that their mother came out of the bedroom and went into the kitchen dripping blood.

The couple's teenage son was not in his mother's room at the time of the assault, but he told the interviewer how the screaming initially failed to bring him out of his own bedroom because such arguments were so common. He eventually did decide to come out—just in time to see his father set down a knife and grab a mop to start wiping up blood. The detail in his account is both compelling as evidence and, for a juror listening, heartbreaking—that such violence is so frequent in this youngster's home that it took a stabbing to bring him out of his room.

Collecting this information at the onset of the case, rather than much later, maintained the integrity of the children's testimony, ultimately ensuring that we could put forth the strongest case for prosecution.

Services for child witnesses

I have touched on DFPS's ability to connect adult victims to services, but there are also services available to children who witness family violence in the home. By bringing these child witnesses to the CAC, we may offer them counseling services or play therapy at the advocacy center or with other community partners. Growing up in a home where there is physical abuse can be traumatizing to children. According to the Centers for Disease Control and Prevention, in homes where violence between partners occurs, there is a 45- to 60-percent chance of co-occurring child abuse, a rate 15 times higher than average.[5] Even children who are not physically harmed by a perpetrator are affected by witnessing such abuse. Compared with other kids, these kids have higher rates of insomnia; bed-wetting; verbal, motor, and cognitive issues; learning difficulties; self-harm; aggressive and antisocial behaviors; depression and anxiety; and a higher likelihood of becoming a victim or perpetrator of violence.[6]

By following the steps outlined in this article, we have an opportunity to hear from, and respond to, all the victims domestic violence in the home touches. When we take the time to work efficiently and effectively with child witnesses of domestic violence, we may be able to ensure that those victims and children receive the support they need to stop the cycle of violence and receive justice. ❇

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[5] www.psychologytoday.com/us/blog/progress-notes/201902/alarming-effects-childrens-exposure-domestic-violence

[6] Brown, B., and Bzostek, S. (2003, August). Violence in the lives of children. Crosscurrents, 1. Bethesda, MD: Child Trends. Retrieved from https://cms.childtrends.org/wp-content/uploads/2003/01/2003-15ViolenceChildren.pdf.

Remotely stored electronic data

Editor's note: This article is the first in a series of excerpts from TDCAA publications.

Our hope is to provide information prosecutors and staff need to do their jobs well and to alert readers to the availability of these books and manuals, which are for sale at www.tdcaa.com/books.

By Diane Beckham
TDCAA Publications Director in Austin
Excerpted from Chapter 6 of Warrants *(TDCAA © 2025)*

The amount of digital multimedia evidence is growing exponentially, not just quantitatively but qualitatively. This article discusses information available from a variety of sources, including social media websites, GPS, geofencing, cloud data, email, websites visited, text messages, photos, and metadata.

James Madison and his 1789 contemporaries could have had no inkling of the current evidentiary value of intangibles, such as information invisibly lodged in silicon chips. Nevertheless, protection of "papers and effects" in the Fourth Amendment can reasonably bring within constitutional purview "electronic customer data," as well as a seemingly unlimited cache of information generated, transmitted, and retained electronically.

New and different types of information are continually being added to the world's digital library, so law enforcement personnel should not be limited by their prior practice, the narrowly drawn categories that the Legislature has established, or this article. They should use their imagination to look for additional sources of information and be prepared to use a combination of new and old methods to obtain it. Nowhere is this truer than in the search for evidence on the internet, in the still-evolving marketplace for information and digital consumers. Generally, federal and state statutes dealing with the transmission of data or the storage of transmitted data are more protective than the Fourth Amendment. Therefore, as a practical matter, the search and seizure of transmitted data raises many statutory issues, but few constitutional ones.

As a matter of practice, most providers of electronic communications or remote computing services will comply with requests for information if those requests are sufficient under the federal Stored Communications Act (SCA).[1] This makes business sense for those providers—they do not want to hire legal experts for all 50 states. Therefore, they often assume that state law enforcement is complying with state law and will produce the data as long as the request complies with federal law. But this is a trap for Texas law enforcement because Art. 38.23 of the Code of Criminal Procedure requires the suppression of all evidence obtained in violation of the laws of Texas.[2] And the laws of Texas regarding access to stored communications are not the same as the federal SCA. Therefore, Texas officers must comply with the laws of Texas even if providers are disclosing information in response to a legal procedure that falls short of that standard.

The Texas statutory framework for accessing remotely stored data takes a stair-step approach, with more due process required as more detailed data is sought by an authorized peace officer, as follows in this chart:

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[1] 18 U.S.C. §2703.

[2] Tex. Code Crim. Proc. Art. 38.23(a); but see Tex. Code Crim. Proc. Art. 18B.553 (statutory violations of Chapter 18B are not subject to suppression under Art. 38.23); *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019) (not all warrantless tracking of a cell phone constitutes a "search" under the Fourth Amendment, and the inquiry turns on whether the State searched "enough" information to violate a legitimate expectation of privacy); *Wells v. State*, 675 S.W.3d 814, 827 n.5 (Tex. App.–Dallas 2023, pet. granted) ("We note that no case has been willing to go as far as the State suggests and hold that law enforcement officers do not need to obtain a warrant before searching Google's location history data stores").

Requirements for obtaining remotely stored electronic data

Information sought	Provider notice?	Document required	Notice required
Only the name of the subscriber of record	Telephonic communications service	No document required, but authorized peace officer must provide the published telephone number to the provider	No
Only subscriber listing information (name, address, and telephone number or similar access code) that is publicly available or used in emergency dispatch	Telephonic communications service	No document required	No
Only identity of customers and customer's use of the service	Electronic communications or a remote computing service provider	• grand jury subpoena • administrative subpoena • search warrant under CCP Art. 18B.354 • court order under CCP Art. 18B.352 • customer consent (which often also requires a court order under CCP Art. 18B.352) • as otherwise permitted by applicable federal law (Stored Communications Act, 18 U.S.C. §2703)	No
Identity of customers, customer's use of the service (but not cell-site location information), with notice to customer	Electronic communications or a remote computing service provider	• grand jury subpoena • administrative subpoena • search warrant under CCP Art. 18B.354 • court order under CCP Art. 18B.401	Yes
All electronic customer data (includes identity of customers, customer's use of the service, cell-site location information, identity of recipients or destinations of a communication sent to or by the customer, contents of any communications sent to or by the customer, and any data stored by or on behalf of the customer)	Electronic communications or a remote computing service provider	Search warrant under CCP Art. 18B.354	No

Warrants under CCP Chapter 18B

The Texas Legislature has singled out certain types of stored digital evidence for special statutory treatment. Specifically, Article 18B.351 provides that an authorized peace officer may require a provider of an electronic communications service or a provider of a remote computing service to disclose electronic customer data that is in electronic storage by obtaining a special warrant.[3] If a judge approves, the warrant will issue under Art. 18B.354.

A remote computing service is generally a third-party provider that supplies computer storage or processing services to the public by electronic means, which includes wire, radio, and electromagnetic systems.[4] Therefore, Art. 18B.354 covers the data stored by most third-party providers of remote computing services such as Microsoft, Apple, Google, and Amazon. Those warrants also cover the data stored by many corporations, such as Coca-Cola and InBev, which maintain their own remote data storage facilities, not because they are remote computing service providers but because they are providing an electronic communications service.

Article 18B.001(7)(B) provides that electronic customer data is data or records that are in the possession or control of those providers and contain:

- information revealing the identity of customers;
- information about a customer's use of the service;
- information that identifies the recipient or destination of a communication sent to or by a customer;
- the content of a communication sent to or by a customer;
- any data stored with the applicable service provider by or on behalf of a customer; and
- location information.[5]

Therefore, warrants under Art. 18B.354 could theoretically encompass almost every type of data that is not being stored on a discrete device in the possession of law enforcement. It can include documents, photos, video, emails, text messages, GPS coordinates either of the device or in the metadata of other files and cell tower usage—and the list keeps growing.

Subsection (ii)—a customer's use of the service—refers to everything short of individual call or communication details. Some providers store only basic usage data, such as name and minutes used. Other providers store basic and expanded usage data, which can include email addresses, billing information, IP authorization logs, other numbers on the account, and sub-subscribers on the account. Officers should ask for all the expanded usage data that is available. If it is not requested, the data may not be produced. Large providers often maintain an online law enforcement guide that will explain the types of customer data kept in storage so that officers can incorporate those specific categories into the warrant or court order.

Subsection (iii)—identification of the recipient or destination—is often called transactional data. It is akin to the name and address on the outside of an envelope. Subsection (iv)—content—is the letter or pictures or other documents that are inside the envelope. While the envelope metaphor is conceptually useful in understanding the different types of data, it is not useful when attempting to analogize caselaw. That is because, as stated previously, the law of searching envelopes is a product of the constitution, but the law of searching stored data is primarily governed by statutes.

Subsection (vi)—location information—refers to "data, records, or other information that is created by or accessible to a provider of an electronic communications service or a provider of a remote computing service and may be used to identify the geographic physical location of a

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[3] Tex. Code Crim. Proc. Art. 18B.351(a).

[4] Tex. Code Crim. Proc. Art. 18B.001(12); Tex. Code Crim. Proc. Art. 18B.001(6).

[5] Tex. Code Crim. Proc. Art. 18B.001(7)(B).

communication device," including current, real-time, or prospective physical location.[6]

With the rapid advance of encryption software, making it more difficult to overcome the security of digital devices,[7] it is often easier to obtain the data stored on a device from the backup file stored on a remote server of some third-party provider rather than from the device itself. Of course, not every device backs up to a cloud. And even devices that do have a backup on a remote server do not necessarily send every file to the backup. Also, the data on the remote server is only going to be as current as the most recent backup. So there are limitations to relying on warrants under Article 18B.354 as a substitute for a copied image of the device itself.

On the other hand, data obtained from cloud providers often far exceeds what would be available on the personal digital device. For example, many cell phone companies are now advertising a cloud as a form of virtually unlimited memory extension of the phone so that photos, music, and many other files would not be stored on the device. Moreover, for most social networking applications, all the important content remains on the servers of the third-party providers, not on the consumer's personal device.

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Geofencing

While cell-site location information was initially the most common location tracking search used, with information obtained from a cell service provider, geofence warrants have become more common. "There is a relative dearth of case law addressing geofence warrants,"[8] with Google receiving its first geofence warrant request in 2016.[9] Few Texas cases have addressed geofencing warrants, but notably, there is a split between the Fourth and Fifth federal circuits on the constitutionality of their use.[10]

A geofence warrant allows law enforcement to search location history data for compatible mobile devices located within a specified area during a specific period of time.[11] A geofence warrant "is essentially the reverse of a global positioning systems (GPS) warrant which allows a search of location data generated by a specific device belonging to a person known or suspected to

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[6] Tex. Code Crim. Proc. Art. 18B.001(9-b); *Wells v. State*, 675 S.W.3d 814 (Tex. App. – Dallas 2023, pet. granted) (geofence warrant satisfied Fourth Amendment because it established probable cause to search every person found within the geofence area and the defendant did not argue that it was objectively unreasonable for the detective to rely on the geofence warrant to obtain his location history); see also *Melson v. State*, 2024 Tex. App. LEXIS 4086 (Tex. App.—Beaumont June 12, 2024, no pet. h.) (not for publication) (location data supported trial court's finding of reliability); but see *United States v. Smith*, No. 23-60321, 2024 U.S. App. LEXIS 20149 (5th Cir. Aug. 9, 2024) (use of geofence warrant violated the Fourth Amendment, although law enforcement relied in good faith on the warrant).

[7] Caleb Downs, "FBI agents can't crack Texas church shooter's cell phone, officials say," *San Antonio Express News*, November 7, 2017, www.mysanantonio.com/news/local/crime/article/FBI-agents-can-t-crack-Texas-shooter-s-cell-phone-12338438.php.

[8] *United States v. Chatrie*, 590 F.Supp.3d 901, 906 (E.D. Va. 2022), *aff'd*, 107 F.4th 319 (4th Cir. 2024).

[9] *United States v. Smith*, No. 23-60321 at *5 & n.2, 2024 U.S. App. LEXIS 20149 (5th Cir. Aug. 9, 2024) (citing Geofence Warrants and the Fourth Amendment, 134 Harv.L.Rev. 2508, 2512-13 (2021) (companies such as Apple, Lyft, Snapchat, and Uber have all received geofence warrant requests, but Google is the most common recipient and "the only one known to respond")). Note that Google has more recently announced changes to its maintenance of location data, such as "auto-delete" and "Incognito mode," to give users "even more control over this important, personal information." See blog.google/products/maps/updates-to-location-history-and-new-controls-coming-soon-to-maps/ ("Your location information is personal. We're committed to keeping it safe, private and in your control").

[10] *United States v. Smith*, No. 23-60321, 2024 U.S. App. LEXIS 20149 at *44 (5th Cir. Aug. 9, 2024) ("geofence warrants are general warrants categorically prohibited by the Fourth Amendment"); *United States v. Chatrie*, 107 F.4th 319 (4th Cir. 2024) (no Fourth Amendment violation in obtaining two hours' worth of defendant's location information because he voluntarily exposed that information to a website).

[11] *Wells*, 675 S.W.3d at 821, citing *In re Search Warrant Application for Geofence Location Data Stored at Google Concerning an Arson Investigation* ("*Arson*"), 497 F.Supp.3d 345, 351 (N.D. Ill. 2020).

have been involved in criminal activity. … With a geofence warrant, police investigators identify the geographic area in which criminal activity occurred and seek to identify device users at that location when the crime was committed."[12] Google calculates the location of a device that has enabled Google location history using input from cell towers, GPS, and signals from nearby wireless internet networks (wifi) and Bluetooth beacons.[13] Because Google location history includes multiple inputs, it is more precise than other types of location data. For each device, Google retains subscriber information that may include the subscriber's name, address, telephone number, and other identifiers.[14] Law enforcement uses a geofence search warrant to seize this data using a multi-step process to identify criminal suspects and potential witnesses to the crime.[15]

In *Wells*, a detective submitted a warrant application outlining a three-step search process:

1) asking Google to create an anonymized list of all devices located within the target location during a specified 25-minute time period on a specific date. The detective defined the target location by using four latitude and longitude coordinates and included a visual reference image of the search area. The search area was limited to the house where the offense occurred and a portion of church property across the street.

2) after reviewing the list, analyzing the data by law enforcement to identify users who may have witnessed or participated in the crime (in this case, a capital murder). For users identified as relevant to the investigation, Google would then provide additional location history outside the target location for a period of no more than 60 minutes before and after the last timestamp associated with the device within the target location. This enabled law enforcement to eliminate users who did not appear to fall within the scope of the warrant. For all remaining relevant accounts, Google would then provide the subscriber information, including the user's name and email address.

3) including background information on Google's location services, the prevalence of Google accounts on cell phones, and a probable cause statement laying out the basic facts of the offense.

But can a geofencing search be constitutional? The Fourth Circuit—the first federal circuit to address whether geofencing is a "search" subject to the Fourth Amendment[16]—held that that location history data did not implicate a privacy interest because the user had voluntarily turned over location information to Google, and the information retrieved was "far less revealing" than a search of CSLI[17] or information obtained through a GPS tracking device.[18]

In *Smith*, postal inspectors used a three-step process similar to that used in *Wells* to obtain geolocation information from Google, but the Fifth Circuit concluded while "the results of a geofence warrant may be narrowly tailored, the search itself is not. A general warrant cannot be saved simply by arguing that, after the search has been performed, the information received was narrowly tailored to the crime being investigated. These geofence warrants fail at Step 1—they allow law enforcement to rummage through troves of location data from hundreds of millions of Google users without any description of the particular suspect or suspects to be found."[19] The Fifth Circuit also disagreed with the idea that Google users had truly voluntarily abandoned

But can a geofencing search be constitutional? The Fourth Circuit—the first federal circuit to address whether geofencing is a "search" subject to the Fourth Amendment—held that that location history data did not implicate a privacy interest because the user had voluntarily turned over location information to Google.

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[12] *Id*.

[13] *Id*.; *United States v. Rhine*, No. 21-0687, 2023 U.S. Dist. LEXIS 12308 at *17 (D.D.C. Jan. 24, 2023).

[14] *Arson*, 497 F.Supp.3d at 351.

[15] *Wells*, 675 S.W.3d at 321-22 (citing *In re Search of Info. that is Stored at Premises Controlled by Google LLC*, 579 F.Supp.3d 62, 69 (D.D.C. 2021)); see also *McDonald v. State*, 676 S.W.3d 204, 212 (Tex. App.—Houston [14th Dist.] 2023, pet. filed) (an affidavit is not required to explain what geolocation data is).

[16] *United States v. Chatrie*, 107 F.4th 319 (4th Cir. 2024).

[17] See *Carpenter v. United States*, 585 U.S. 296 (2018); Johnson v. State, 682 S.W.3d 638 (Tex. App.—Tyler 2024, pet. filed) (search warrant affidavit to seize CSLI does not require the State to establish a nexus between the defendant's phone and the offense).

[18] See *United States v. Jones*, 565 U.S. 400 (2012).

[19] *Smith*, No. 23-60321, 2024 U.S. App. LEXIS 20149 at *42–43.

their right to privacy: "As anyone with a smartphone can attest, electronic opt-in processes are hardly informed and, in many instances, may not be voluntary."[20]

Until the U.S. Supreme Court settles the split, proceed with caution—if at all—on these searches and establish particularlized probable cause. While Fifth Circuit opinions are not binding on Texas courts, it may be persuasive to Texas judges. And look for the Court of Criminal Appeals' eventual decision in *Wells v. State* (discussed above).

State vs. federal warrants

A district court judge can issue an Art. 18B.354 warrant regardless of whether the customer data is held at a location in Texas or another state.[21] Just as with a search warrant under Art. 18.02, the application for a warrant under Art. 18B.354 must demonstrate probable cause and be supported by the oath of an authorized peace officer. The sworn affidavit must show "sufficient and substantial facts" that a specific offense has been committed, that the electronic customer data sought constitutes evidence of that offense or evidence that a particular person committed that offense, and that the data is held in electronic storage by the service provider on which the warrant is served.[22] Article 18.01 requires only "sufficient" facts to issue a search warrant.[23] So an Art. 18B.354 warrant for stored electronic customer data arguably requires more evidence than any other type of search warrant.

One of the methods that may be used to obtain the data in question is by obtaining a warrant "issued using State warrant procedures … by a court of competent jurisdiction." If the judicial officer signing the search warrant has authority to issue the warrant under state law, then the provisions of the Stored Communications Act are met.

In the alternative, officers could proceed under §2703 of the federal Stored Communications Act, which also sets forth the mechanism necessary for a governmental entity to obtain data stored by a provider of electronic communication services.[24] One of the methods that may be used to obtain the data in question is by obtaining a warrant "issued using State warrant procedures … by a court of competent jurisdiction." If the judicial officer signing the search warrant has authority to issue the warrant under state law, then the provisions of the Stored Communications Act are met.[25] Further, these warrants are generally not limited to the territorial jurisdiction of the issuing authority.[26] Therefore, whether the officer proceeds under Code of Criminal Procedure Art. 18B.354 or §2703 of the federal Stored Communications Act, the officer must still obtain a search warrant from a Texas district court judge. ❇

Author's note: Many thanks to Eric Kugler, former ADA in Harris County, for his work on the original version of Chapter 6 of TDCAA's Warrants *in 2018.*

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[20] *Smith*, 2024 U.S. App. LEXIS 20149 at *36–37, *38–39 ("Not to mention, the fact that approximately 592 million people have 'opted in' to comprehensive tracking of their location itself calls into question the 'voluntary' nature of this process. In short, 'a user cannot simply forfeit the protections of the Fourth Amendment for years of precise location information by selecting "YES, I'M IN" at midnight while setting up Google Assistant, even if some text offered warning along the way'" (quoting *Chatrie*, 590 F.Supp.3d at 936)).

[21] Tex. Code Crim. Proc. Art. 18B.354(a). But note that issuing a warrant for a foreign location and enforcing it are two different things.

[22] Tex. Code Crim. Proc. Art. 18B.354(b).

[23] Tex. Code Crim. Proc. Art. 18.01(b).

[24] See 18 U.S.C. §2703(a).

[25] See *Lozoya v. State*, No. 07-12-00142-CR, 2013 WL 708489, at *2 (Tex. App. – Amarillo Feb. 27, 2013, no pet.); *United States v. Orisakwe*, 2013 U.S. Dist. LEXIS 128323 (E.D. Tex. 2013) (under Nevada law, Facebook fit the definition of a provider of network service); *Hubbard v. MySpace, Inc.*, 788 F.Supp.2d 319, 323–24 (S.D.N.Y.2011).

[26] Clarifying Lawful Overseas Use of Data Act (CLOUD Act) §103(a)(1), amending 18 U.S.C. §2701 et seq. ("A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, *regardless of whether such communication, record, or other information is located within or outside of the United States*.") (emphasis added).

Addressing fraud in the Supplemental Nutrition Assistance Program (SNAP)

The Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, is a vital government initiative administered by the U.S. Department of Agriculture’s (USDA) Food and Nutrition Service (FNS).

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It provides crucial assistance for people with limited resources to buy food. In fiscal year 2023, SNAP served an average of 42.1 million participants each month, with annual program expenditures amounting to $114 billion.[1] The significant funding for this program underscores its importance and the integral role of each of us in its success.

As the federal agency responsible for authorizing and overseeing SNAP retailers, FNS plays a crucial role in maintaining the program’s integrity. State agencies manage recipient program eligibility and the issuing of benefits. SNAP benefits are deposited onto an electronic benefits transfer (EBT) card, also called a Lone Star card in Texas; they can be accessed using a personal identification number (PIN). SNAP recipients can use their benefits at authorized retailers in person or online to purchase approved food items. Retailers must apply for and be determined eligible to accept SNAP EBT payments via a point-of-sale (POS) device. SNAP retailers receive training on regulations, must affirm their responsibility in maintaining compliance, and are warned that violations may lead to criminal or administrative penalties. The importance of compliance cannot be overstated, as it is the cornerstone of the SNAP program’s integrity. There are more than 265,000 SNAP-authorized retailers in the United States, with 22,342 in the state of Texas.[2]

This article examines the various forms of SNAP fraud and their profound impact on taxpayers and the beneficiaries of this essential program. By understanding the implications of such fraud, we can all ensure the integrity of the program and taxpayers’ money. Furthermore, it will discuss opportunities to improve SNAP fraud enforcement and accountability by collaborating with the Special Investigations Unit (SIU). The majority of SIU’s investigators have backgrounds in law enforcement and possess substantial experience in working alongside various prosecutors, as well as access to valuable resources that can help meet prosecution standards. By partnering with local agencies, SIU investigations can be optimized to ensure that individuals who misuse the system are held accountable and face appropriate legal consequences.

Special Investigations Unit (SIU)

Fraudulent activity within the SNAP program is a pervasive issue that impacts American taxpayers. Estimates suggest it costs the program billions of dollars annually. The USDA has dedicated resources to improving anti-fraud measures through regular audits, investigations, and specialized teams, including the SIU.

[1] www.ers.usda.gov/topics/food-nutrition-assistance/supplemental-nutrition-assistance-program-snap/key-statistics-and-research.

[2] *Id.*

The SIU conducts investigations of those who defraud SNAP (including retailers) in all 50 states and the U.S. Virgin Islands, primarily focusing on benefit-trafficking activities. SNAP trafficking refers to the exchange of SNAP benefits for cash or ineligible items, which include alcohol, drugs, tobacco, and nonfood products.

The SIU receives referrals from the USDA's fraud analysts within the Retailer Operations and Compliance (ROC) branch, the public, and various state and local agencies. Once a referral is received, cases are assigned based on established criteria, including redemption data analysis—the SIU contracts with licensed undercover investigators to expose EBT trafficking and document their findings in detailed reports. In 2023, the SIU conducted more than 13,000 investigations and assisted federal, state, and local partners with dozens more.

Like conventional skimming practices involving credit or debit cards, EBT card data has historically been vulnerable to card skimming activities. While many credit card companies have advanced their fraud prevention technologies, SNAP EBT cards have not undergone similar improvements, making them an appealing target for skimming, cloning, and other criminal activities.

Types of fraud

There are several types of SNAP fraud; however, this article will concentrate on the most common schemes that SIUs encounter that may warrant criminal prosecution. Specifically, activities related to trafficking and the skimming or cloning of EBT cards are summarized below.

Direct trafficking. SNAP trafficking usually involves collusion between retailers and recipients, but some retailers exploit their position to gain more benefits than agreed. Some everyday trafficking activities utilized by retailers include:

1) The retailer enters a fictitious transaction on their POS device and pays the recipient a cash payment (typically 50 percent lower than the transaction amount). In this scenario, the retailer receives full reimbursement from SNAP for the total transaction amount, and the recipient can use the cash without restrictions.

2) The retailer permits purchasing items not SNAP-eligible, such as tobacco, alcohol, or drugs, using an EBT card at their location. This arrangement allows the retailer and the recipient to utilize SNAP funds for items not authorized for purchase with SNAP benefits.

3) The retailer keeps the recipient's EBT card on-site or maintains the card number and PIN to deplete the benefits gradually. The recipient is paid a percentage of the value depleted in cash. The retailer slowly depletes the benefits of this method to remain under FNS's radar.

Trafficking outside the EBT system or indirect trafficking. This practice can involve authorized SNAP retailers or businesses, such as bars and restaurants. The establishments use SNAP benefits to acquire inventory at a reduced cost. In this scenario, the recipient allows the business owner to utilize the EBT card at a large grocery store to purchase items needed to stock their establishment. The business owner then pays the recipient cash for half the value of the benefits spent. For example, if the business owner purchases $200 worth of Red Bull using the recipient's EBT card at Costco, the owner then returns the card to the recipient and provides $100 in cash. This approach helps authorized SNAP retailers avoid being flagged for fraudulent transactions, as they do not occur at their own stores.

EBT skimming and cloning. Like conventional skimming practices involving credit or debit cards, EBT card data has historically been vulnerable to card skimming activities. While many credit card companies have advanced their fraud prevention technologies, SNAP EBT cards have not undergone similar improvements, making them an appealing target for skimming, cloning, and other criminal activities. Skimming occurs when a device is installed on POS terminals to capture EBT card numbers and PINs. The information obtained from skimming is then used to create cloned digital or physical EBT cards. The unauthorized funds accessed through these fraudulent cards are subsequently used for purchases at SNAP-authorized retailers.

Additionally, there has been a rise in breaches of EBT card information stemming from third-party mobile applications. These applications allow recipients to input card details to monitor spending and check balances, resulting in EBT card cloning.

In late December 2022, Congress passed legislation designed to replace SNAP benefits that were compromised through card skimming, cloning, and other similar methods. The law mandated that states use federal funding to replace benefits stolen between October 1, 2022, and December 20, 2024. According to data reported by FNS, state agencies have approved 450,015 claims nationwide, resulting in the replacement of benefits amounting to $211,786,610.[3]

[3] www.fns.usda.gov/data-research/data-visualization/snap-replacement-stolen-benefits-dashboard.

SNAP fraud undermines the program's effectiveness and drains valuable federal, state, and community resources. SIU seeks to collaborate with local district and county attorneys to prosecute these more serious violations and reduce fraudulent activities and misappropriation of public funds. Below are case studies outlining key highlights from recent SNAP investigations conducted by SIU which resulted in criminal prosecution.

Case study No. 1

The SIU, in collaboration with the Buffalo Police Department, conducted a two-year investigation into EBT trafficking at a SNAP-authorized retailer in Buffalo, New York. The case was initiated due to the store's transactions triggering alerts within FNS's redemption data analysis system. Most of the cases handled by the SIU originate in this way. Once a store is flagged, a team of analysts utilizes data mining tools and techniques to detect potential fraud. If it is concluded that an investigation is warranted, a referral is submitted to the SIU for further examination. During the initial undercover operations, the store clerk allowed the investigator to purchase several ineligible items, including alcohol, using her EBT card. After a few undercover buys, the clerk swiped the undercover's EBT card on the store's POS device and gave her half of the transaction amount in cash.

The investigation escalated when the clerk expressed interest in purchasing the undercover's EBT card and cards belonging to others to buy stock for his store. Initially, the undercover investigator provided the clerk with two EBT cards that did not have her assumed identity's name on them. The clerk used the EBT cards to go shopping, and the undercover returned a few days later to retrieve the funds owed by the clerk.

Eventually, the clerk proposed to keep the EBT cards and send cash payments to the undercover investigator via Western Union. The clerk would make monthly purchases with the EBT cards and send the undercover cash for the agreed-upon amount. He would alert the undercover investigator of the payments by texting a photo of the Western Union transfer receipt, which included the transaction number, date, time, and amount. Throughout the investigation, the store clerk sent more than 15 Western Union payments totaling $7,600 in exchange for more than $26,000 in SNAP benefits. These benefits were depleted from four different EBT cards the clerk had acquired from the undercover investigator.

The case was referred to and prosecuted by the local district attorney's office for:

- one count of Welfare Fraud in the Third Degree (Class D felony),
- one count of Criminal Use of a Public Benefit Card in the Second Degree (Class A misdemeanor), and
- one count of Misuse of Food Stamps, Food Stamp Program Coupons, Authorization Cards, and Electronic Access Devices (Class D Felony under New York Social Services Law).

The store owner eventually pleaded guilty to one count of misuse of food stamps, food stamp program coupons, authorization cards, and electronic access devices (Class E felony under New York Social Services Law).[4]

Case Study No. 2

The SIU has responded to numerous complaints of cloned and skimmed SNAP EBT cards nationwide. In a case in Texas, the SIU launched an investigation into an authorized SNAP retailer as a result of findings related to another investigation. The SIU partnered with the FBI's Fort Worth Resident Agency, the USDA Office of Inspector General, and various law enforcement agencies to conduct surveillance and gather intelligence, ultimately identifying two additional co-conspirators.

The suspect had opened two retail stores and cleared the approval process to become an authorized SNAP retailer. He and his associates installed skimming devices on POS terminals across the United States, stealing EBT card data from hundreds of SNAP recipients. The stolen EBT information was used to create cloned EBT cards swiped on the POS terminals registered to his stores. By processing these fraudulent transactions on his store POS devices, the store owner made them appear as legitimate SNAP transactions, leading to the unauthorized redemption of over $2.6 million in SNAP benefits.

Once a store is flagged, a team of analysts utilizes data mining tools and techniques to detect potential fraud. If it is concluded that an investigation is warranted, a referral is submitted to the SIU for further examination.

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[4] www4.erie.gov/da/sites/www4.erie.gov.da/files/archive/index.php-118.html?q=press/south-buffalo-corner-store-clerk-pleads-guilty-felony-misuse-food-stamp-cards.

The store owner was prosecuted by Leigha Simonton, U.S. Attorney for the Northern District of Texas, leading to a 20-year federal prison sentence for conspiracy to commit wire fraud.[5]

Collaborating with SIU

Through close collaboration with our law enforcement and private sector partners, the SIU continues to improve its expertise in various methods for identifying and investigating SNAP fraud. However, we encounter significant administrative challenges and resource limitations that hinder our ability to pursue all cases to the extent they warrant. SNAP fraud can be associated with other criminal offenses such as money laundering, identity theft, organized crime, and drug-related activities. Investigations frequently uncover involvement in these crimes, which can significantly impact the local level. Unfortunately, many SNAP fraud cases are not prosecuted due to a limited understanding of the program and associated criminal statutes. The mission of the SIU is to demonstrate to local prosecutors the strength and versatility of our investigations. This approach will highlight our commitment to addressing SNAP fraud and communicate that such activities will not be tolerated.

The SIU encourages prosecutors and law enforcement agencies to contact us to discuss collaboration efforts. Together, we can address the critical issues of fraud, waste, and abuse, enhancing confidence in this program that supports the most vulnerable members of our communities.

Our investigation approach is designed to be flexible, allowing us to explore additional crimes or collaborate with local law enforcement agencies when necessary. We have the financial resources to modify the duration and methods of our investigations to ensure we meet legal requirements. Our undercover investigators are professionally licensed in their respective states. Upon completion of an investigation, the undercover investigator and SIU team are available to assist throughout the entire legal process, from arraignment to the conclusion of the trial. The SIU encourages prosecutors and law enforcement agencies to contact us to discuss collaboration efforts. Together, we can address the critical issues of fraud, waste, and abuse, enhancing confidence in this program that supports the most vulnerable members of our communities.

About the author

Nicole Housley is a Lead Investigator with the Special Investigations Unit and has a B.A. from Winona State University. She has successfully conducted numerous SNAP investigations in partnership with local, state, and federal government agencies. Before joining the USDA SIU, Nicole investigated SNAP, Medicaid, and childcare public assistance fraud for the state of Wisconsin. Nicole has 14 years of experience managing SNAP fraud cases at criminal and administrative levels. If you would like to explore collaboration strategies, have any inquiries, or wish to schedule a virtual meeting, please email her at Nicole.Housley@usda.gov. ❇

[5] www.justice.gov/usao-ndtx/pr/liberian-man-sentenced-20-years-stealing-26m-snap-benefits-needy.

To tell the truth: the Rules of Evidence and a victim's character for truthfulness

By Jon English
Assistant Criminal District Attorney in Hays County

Last year, I was trying an assault family violence–impeding (strangulation) case.

Those trials are difficult to win under the best of circumstances, but we were proceeding on a case that was truly a he-said-she-said, in that the primary evidence came from the victim's testimony. The assault happened literally behind a closed door in the couple's bedroom. There were no eyewitnesses, though there were several people in the living room during the assault, including the defendant's two teenaged children and his (adult) best friend. To make things even more difficult, the report of the assault was delayed by almost two months. The victim had photographed her injuries the night of the assault, but her primary injury was a knot on her forehead. There was no visible evidence of strangulation.

As we headed into trial, it was obvious that everything would depend on the jury finding the victim credible. And when she took the stand, she did well on both direct and cross, and her testimony was compelling. I even felt like we may have had a few jurors on our side at that point. The State rested and prepared for the defense to present its case.

The defense attorney started calling witnesses in what we assumed would be a parade of largely impermissible character bolstering for the defendant. But that wasn't what happened at all. Instead, the defense called the defendant's children and his best friend who had been at the house that night, and their testimony about many facts from the evening in question directly contradicted the victim's. They also each testified that, in their opinions, the victim did not have a reputation for truthfulness. OK. Not great, but not lethal, right? It seemed fairly obvious that those witnesses were biased toward the defendant, and their testimony wouldn't count for much. It felt like we were still in the running.

Then the defense called the victim's mother. That's right, her own mother. Her mom testified that in her opinion, her daughter was not a truthful person. Ouch. We were on the ropes. But then the defense began to ask for specific instances of when the victim had lied. I stood up and objected, and I asked to approach.

At the bench, I argued that a witness's character for truthfulness could be proven only by reputation or opinion evidence. This wasn't a fancy argument on my part. It was literally the black-letter law of Rule 608. We even got out the code to look at it and yep, right there, it said exactly what I thought it said.

But the defense attorney had a comeback. His position was that I had overlooked Rule 404(a)(3)(A), which says that the defense can offer evidence of a victim's pertinent character trait, and it can even be used to show that the victim (witness) acted in conformity with that character trait on a particular occasion. The defense also argued that under Rule 405(b), specific instances of conduct are admissible to illustrate a character trait that is an essential part of a defense. And in this case, the defense continued, that character trait was that the victim was a liar, which was essentially the *entire* defense.

I wasn't buying it. Why would there be a rule specifically to set out proper methods for attacking a witness's character for truthfulness if another rule, which doesn't mention truthfulness at all, could serve to supersede it? I thought that was a pretty sound argument. The judge didn't. He overruled my objection and allowed the victim's mom to unload on her.

And unload she did. By the time her mom got off the stand, she had alleged many incredibly heinous, specific instances of lying on her daughter's part. None in relation to this offense but nonetheless spanning years and years of her life. After hearing all of that, the jury wouldn't have convicted even if they had personally witnessed the assault themselves.

Needless to say, the defendant walked. And as soon as I completed the judgment of acquittal, I started to scour the Rules of Evidence and caselaw to keep in my back pocket in case this situation ever came up again.

What the Rules of Evidence say

The U.S. Supreme Court and the Texas Court of Criminal Appeals have both found that the right to attack the general credibility of witnesses is included in the Sixth Amendment.[1] But that right can be qualified by the state's Rules of Evidence, provided those rules allow for a method of discrediting a witness when the witness's motive, bias, or prejudice is part of an essential defensive theory.[2]

Needless to say, the defendant walked. And as soon as I completed the judgment of acquittal, I started to scour the Rules of Evidence and caselaw to keep in my back pocket in case this situation ever came up again.

And the Texas Rules of Evidence do just that. There are many situations where you can get into specific instances of a witness's conduct under the Rules of Evidence. For example, the most well-known is built right into Rule 608, and that's Rule 609: impeachment by evidence of a criminal conviction. You can impeach a witness with a prior inconsistent statement under Rule 613(a) or a statement establishing bias or interest under Rule 613(b), provided you lay the proper foundation.

Rule 412 also allows specific instances of a witness's prior sexual conduct to be admitted under certain circumstances. And Katy bar the door when it comes to Rule 404(b); the exceptions for admitting extraneous offenses under that rule are presumably unlimited, as long as they're not used to show character in conformity and as long as they aren't expressly prohibited by another rule.

Rule 405(b) most certainly says what the defense in my case claimed: that specific instances of conduct are admissible if the conduct was an essential element of a charge, claim, or defense. Furthermore, that same rule allows for specific instances of conduct to be raised when cross-examining a character witness. And there are many more circumstances where extrinsic evidence can be admitted, provided they are for some purpose other than one specifically prohibited by the rules.

And I want to be clear that extrinsic evidence is not inadmissible simply because it illustrates that a witness is an untruthful person. As long as it is being offered for a purpose explicitly permitted by the rules, extrinsic acts are admissible for a variety of reasons. It's just that the extrinsic evidence can't be offered for the purpose of showing that the witness is not a truthful person, and most certainly it can't be offered to show that, in a specific instance, the victim acted in conformity with that character for untruthfulness.

This means the defense can't sidestep Rule 608's prohibition against offering specific instances of conduct to show untruthful character simply by claiming "she's a liar" as the defense. Saying that someone is a liar is not a formal defense to a crime; rather, it merely negates an element of an offense.[3] And Rule 608(b) states with alarming specificity that, except for evidence of a criminal conviction under Rule 609, you can't support or attack a witness's reputation for truthfulness with extrinsic evidence.

Takeaways

I'll never know if we would have obtained a conviction in that trial had the judge excluded the mother's stories of specific instances of conduct. He-said-she-said cases are common in our line of work, and painting a victim as a bad or dishonest person is an equally common defense strategy. But the Rules of Evidence frown on unnecessary character assassination.[4] Cases like mine are exactly why.

It's hard for us as human beings to hear specific evidence that someone has a habit of dishonesty and then still believe her in regard to a certain moment in time. That's why a victim's

Continued in the blue box on page 37

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1 *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009)(citing to *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)).

2 *Id*. at 562–63.

3 *Stewart v. State*, No. 05-96-00128-CR, 1997 WL 524154, at *4 (Tex. App.—Dallas Aug. 26, 1997, no pet.).

4 *Hammer*, 296 S.W. 3d at 563.

Motions for Speedy Trial in the juvenile system

I always describe the Texas juvenile justice system as quasi-criminal and quasi-civil.

By Kathleen Takamine
Assistant Criminal District Attorney in Bexar County

Although the Juvenile Justice Code, Title 3 of the Texas Family Code, oversees the charging and disposition of criminal offenses against juveniles, the procedure is generally civil in nature.[1] To make it more confusing, sometimes we juvenile practitioners must rely on court rulings and Attorney General Opinions to clarify what rules to follow when neither the Rules of Civil Procedure nor the Code of Criminal Procedure are clear enough.

Even then, the situation can get muddied. One such situation is speedy trial.

On October 5, 1978, Texas's Attorney General issued an opinion on whether the Texas Speedy Trial Act[2] can be applied to juvenile cases.[3] According to the opinion, because the juvenile system is civil in nature, the speedy trial statute does not apply to juvenile proceedings. It is important to note that the opinion is specific that it is addressing the statute, not the constitutional right to speedy trial—and then the statute was declared unconstitutional in *Meshell v. State*[4] and was repealed. However, I still see *Meshell* used as an example of when the Code of Criminal Procedure is not always followed in juvenile law.[5] In terms of speedy trial in a juvenile case, there is no statutory basis for it. But what do we do when we receive a speedy trial motion from a defense attorney anyway?

Last year, I had such a situation come up. An attorney filed a motion requesting a non-suit[6] for denial of his client's constitutional right to a speedy trial.

Background of the case

On November 8, 2022, a search warrant was executed in A.C.'s residence. There, police found multiple full auto-sears and switches[7] along with a number of firearms. About 12 days later, an arrest warrant for A.C. was obtained for two counts of Unlawful Use of Criminal Instrument or Mechanical Security Device[8] and two counts of Possession of a Prohibited Weapon.[9] Officers tried to serve the arrest warrant but were unsuccessful. The case was filed with the district attorney's office in December 2022, and the case was filed as

[1] Tex. Fam. Code §51.17. Except for specific provisions in the Family Code, the Texas Rules of Civil Procedure governs proceedings under Title 3.

[2] Tex. Code Crim. Proc. Art. 32A.02.

[3] 1978 Op. Att'y Gen. No. H-1252.

[4] *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987).

[5] See Robert O. Dawson, *Texas Juvenile Law*, p. 2 (Texas Juvenile Probation Commission 9th ed. 2008).

[6] In juvenile, dismissals of filed cases are called non-suits. I'll be using them interchangeably.

[7] Full auto-sears and switches are a device that can transform a semi-automatic firearm into a fully automatic firearm. I know this is Texas and most of you probably know what those are, but I include this detail for those who might not know.

[8] Tex. Pen. Code §16.01, more specifically for this case, §16.01(a)(2): A person commits an offense if: (2) with knowledge of its character and with the intent to use a criminal instrument or mechanical security device or aide or permit another to use the instrument or device in the commission of an offense, the person manufactures, adapts, sells, installs or sets up the instrument or device. This is a state jail felony.

[9] Tex. Pen. Code §46.05, Prohibited Weapons.

an original petition in August 2023. Due to the large number of firearms, there was a perceived danger in serving the petition on the juvenile and his family and so he was never served.[10] The case was never set on the court docket and the juvenile was not taken into custody until July 2024. During that time, he was booked into the Juvenile Detention Center and the case was finally placed on the docket. Perhaps understandably, his attorney filed a Motion to Dismiss and Request a Non-suit for Denial of Constitutional Right to Speedy Trial. By this time, A.C. was 18 years old.

Before delving into this further, I want to note a couple of important points.

First off, juvenile appeals are governed by the Rules of Appellate Procedure.[11] Where the juvenile system before appeal is quasi-criminal and -civil, the appeals process is civil in nature. Juvenile appeals will ultimately end up before the Texas Supreme Court instead of the Texas Court of Criminal Appeals.[12] Secondly, the State does not have a right to a jury trial in the adjudication phase.[13] I'll touch on these points again later.

Defense counsel's main argument was that his client's constitutional right to a speedy trial had been violated. To answer, I had to cover any arguments that the court of appeals would examine, including the fact that a juvenile does not have a statutory right to a speedy trial.

Defense counsel's main argument was that his client's constitutional right to a speedy trial had been violated. To answer, I had to cover any arguments that the court of appeals would examine, including the fact that a juvenile does not have a statutory right to a speedy trial. In other words, what would the court of appeals look at?

The rule of thumb I follow is that I look for cases coming out of my jurisdiction first, then I follow up by looking at other jurisdictions. The first case I found (and the one I used extensively in my argument) was *In the Matter of H.S.M.*,[14] a memorandum opinion from the Fourth Court of Appeals. All appeals out of Bexar County district and county courts will go to this court. It is not a published opinion, but because appeals in juvenile law fall under the Rules of Appellate Procedure,[15] we can use unpublished opinions;[16] even unpublished, all caselaw has precedential value under this rule. I printed a copy of the rule to submit it to the court and defense counsel in my argument. (Always make copies of caselaw, rules, and statutes that you will use in your arguments to present to the court.)

What was significant about the *H.S.M.* case?

In the Matter of H.S.M.

H.S.M. was 16 years old when he shot and killed Hezakiah Williams in January 2019. The State sought to certify and transfer H.S.M. for murder but certification was denied in October 2019. The case was then filed as a determinate sentence case, and it was set for a jury trial but was reset about three times. The last setting was for March 2020, just when the COVID-19 pandemic hit and the emergency orders began. During this time, Bexar County suspended all county functions including jury trials. Again, the case was reset several more times due to the suspension of jury trials. It was not until April 2021 when there was any activity on the case.

By this time, H.S.M. was 18 going on 19. Keep in mind that the State does not have a right to a jury trial in juvenile law, but because all the courts were operating under such extraordinary circumstances, the State actually did file a motion re-questing a trial.[17] The trial court granted the motion, and the case was set for trial on June 14, 2021. Prior to trial, H.S.M. moved to have the case dismissed due to the failure to provide a speedy trial and for lack of jurisdiction on two separate occasions. During this time, he was 18 years old and would be turning 19 before the trial date. Both times, the trial court denied H.S.M.'s motion, and the case went to trial.

The jury found that he had engaged in the delinquent conduct of murder and placed him on

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[10] Reminder that juveniles are summoned to appear in court. They are served just as in a civil case.

[11] Tex. Fam. Code §56.01.

[12] *Ibid*.

[13] The right to a jury trial is in Family Code §54.03. Texas courts have ruled that it is a statutory right and not a constitutional right for juveniles. See *In the Matter of R.R.*, 373 S.W.3d 730 (Tex.App.–Houston ([14th Dist.]) 2012, reh'g denied). Under the Family Code, a jury trial is required unless it is waived by the juvenile and his or her attorney.

[14] 2024 WL 2732319; it is not reported in the S.W.3d Reporter.

[15] Tex. Fam. Code §56.01.

[16] Tex. R. App. P. 47.7(b).

[17] Shout out to my fellow prosecutors, Ellen Wheeler-Walter and Joshua Luke Sandoval, for taking the case to trial. And a special shout out to Ellen for taking the initiative and filing the motion.

probation for 10 years. By this time, H.S.M. was 19 years old, so the case was transferred to adult probation.

On appeal, one of the arguments dealt with the constitutional issue of speedy trial. The Fourth Court of Appeals used the U.S. Supreme Court case *Barker v. Wingo*[18] to determine whether a violation had occurred. In *Barker*, there are four factors the courts must examine:

- the length of the delay,
- the government's reason for the delay,
- the defendant's assertion of his right, and
- the prejudice to the defendant.[19]

The four factors

The length of the delay is generally what triggers an examination into whether the individual's right had been violated. According to caselaw, if the delay lasted over a year, it is considered presumptively prejudicial and the analysis starts.[20] In H.S.M.'s case, the delay was 20 months, triggering further analysis of the *Barker* factors.

The reason for delay was simple. The cessation of all jury activities made it impossible for the case to go to trial. The resets were not attributed to either H.S.M or the State.

The third factor, whether the defendant demanded his right to a speedy trial, was weighed against H.S.M. The court noted that he never asserted his right for a speedy trial for all that time—he just moved for a dismissal. A person asserting his right to a speedy trial must show that he was diligent in asserting that right.[21]

For the fourth factor, prejudice to H.S.M., the court examined three interests that the right to speedy trial protects:[22] preventing oppressive incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired.[23] The court found that the record did not show H.S.M. was incarcerated

[18] *Barker v. Wingo*, 407 U.S. 514 (1972).

[19] *Id*. at 530. See also 2024 WL 2732319.

[20] *Id* at 530. See also *Balderas v. State*, 517 S.W.3d 756, 767-768 (Tex. Crim. App. 2016).

[21] *Cantu vs. State*, 253 S.W.3d 273, 280-281 (Tex. Crim. App. 2008).

[22] See 2024 WL 2732319. *H.S.M.* cites *Balderas*, 517 S.W.3d at 776.

[23] *Id*.

propensity for untruthfulness in the past is likely to be interpreted by a jury as a reasonable doubt that she is not telling the truth in the instant case. Likewise, therein lies the reason that propensity is not permitted through anything other than reputation or opinion evidence: We don't want juries basing their decisions on the way people have acted in the past; we want them looking at the evidence of behavior in the moment in question. Sometimes, that moment is when the witness is on the stand. And while the jury is the sole judge of the witness's credibility, that assessment should not be tainted by allegations of specific conduct that a jury simply won't be able to disregard.

If you've got a case on the trial docket that relies heavily on the credibility of a victim (don't they all?), you might consider a motion in limine that sets out the law on extrinsic evidence regarding a victim's character for truthfulness. It may not prevent the defense from violating the motion anyway, but it gives you a chance to educate the court about what the rules and caselaw really mean, and more importantly, makes your voice the first one heard on the subject. In the end, it could be the difference between holding a violent offender accountable and watching that defendant walk free. ❄

during this time and that "he did not argue ... that the delay impaired his defense."[24] The court also did not find any evidence, nor did he present any testimony, that he suffered anxiety and concern.

After outlining the factors, the court balanced them all together and found that it "weighed against finding a violation of H.S.M.'s right to a speedy trial."[25]

Back to the present case

Upon receiving defense counsel's motion, I read it through very carefully. This is a very important point. You need to know exactly what type relief the defense is requesting and to make sure you cover all possible arguments that may come up. If defense counsel is not clear in the motion, have the attorney declare on record what relief is being sought. But the motion in my case was clear.

The length of the delay is generally what triggers an examination into whether the individual's right had been violated. According to caselaw, if the delay lasted over a year, it is considered presumptively prejudicial and the analysis starts.

For my part, although the facts that caused the delay in A.C.'s case were vastly different, I used *H.S.M.* to draw out the factors that the court examined in determining whether the juvenile's constitutional right to a speedy trial was violated. A.C.'s case would be appealed to the Fourth Court of Appeals so these were factors I addressed.

The first thing I covered was when does the right to speedy trial attach? Under caselaw, "the right to a speedy trial attaches once a person becomes an 'accused'; that is, once he is arrested or charged."[26] For A.C., although there was a warrant pending since November 2022, the actual filing of the case didn't occur until October 2023. A.C. was not taken into custody until July 2024. Based on these dates, the delay was well under a year. That the delay was less than a year also covers the second factor. We did not have to present an argument for the delay.

In addition, defense counsel was not asking for a speedy trial. (This is where a thorough reading of the motion is important.) His motion was similar to H.S.M.'s in that he asked for a dismissal (non-suit) due to a violation of his client's right to speedy trial. He was not asking for a speedy trial, which should count against him. (Keep in mind that if he had asked for a speedy trial instead of the dismissal, the State had better be ready to try the case as soon as the court gives a trial setting, even though in juvenile law there is no statutory right to a jury trial.)

In regard to prejudice to the juvenile, he had not been in custody prior to July 2024, so he was not deprived of his liberty.

Based on balancing all four factors together, I argued that A.C. was not denied his right to a speedy trial and his motion should be denied.

In the end, the court denied the motion, and A.C. pled to his charges and was sentenced to time in the Texas Juvenile Justice Department. For the court's part, the judge mentioned that in some jurisdictions, speedy trial is not applicable to a juvenile case. Even though that is a legitimate argument to make on its own, I could not limit myself to that single argument. I had to consider all possible arguments that a trial court and court of appeals could apply. In most of the cases we will see as prosecutors, defense attorneys will be thorough and throw everything in the case on behalf of their client. Our responses should not be any less.

Conclusion

Even though speedy trial motions are rare in juvenile law, there is always a chance prosecutors will have to face such rare motions. The general rule is that speedy trials do not apply to juvenile cases. However, when you hear the phrase, "That is the general rule or practice" in any case, always question why that is so. Nowadays, it is easy to do the research using the available online legal research services, as well as talking to more experienced prosecutors about such matters. That way, when we are hit by a rare motion, we will be prepared to take on that challenge. And whether the court grants or denies the motion, we should consider it a win since we are expanding our skills as prosecutors. ❇

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[24] *Id*.

[25] *Id*.

[26] *Cantu vs. State*, 253 S.W.3d 273, 280 (Tex. Crim. App. 2008); the case also cites *U.S. v. Marion,* 40 U.S. 307, 321, 92 S.Ct.. 455, 30L.Ed.2d 468 (1971).

Collecting bail bond forfeitures

Neither bail bonds nor bond forfeitures are intended to enrich the coffers of a governmental entity.[1]

By Andrew Wipke & Jennifer Fox
Assistant County Attorneys in Fort Bend County

Rather, the purpose of a bail bond is to ensure the appearance of the accused at required hearings.[2] However, portions of the costs recovered in bond forfeiture proceedings serve state and county purposes, and district and county attorney offices are eligible to receive a commission on amounts collected in bond forfeiture proceedings pursuant to §41.005 of the Government Code.[3]

Regardless of the reasons to pursue bond forfeiture collections, if you encounter an overdue bond forfeiture judgment, this article provides some background information which may assist in the collection of said judgment.

First, let us note what this article does not cover. It is neither a primer nor an overview of bond forfeitures;[4] other articles from past issues of this journal examine those topics.[5] Rather, this article explores bond forfeiture *collections*. If a defendant-surety[6] or a defendant-principal (a defendant who was released on bond) fails to timely pay a judgment, what tools may you employ to collect the judgment?

Chapter 22 of the Code of Criminal Procedure governs the forfeiture of bail bonds.[7] When a criminal defendant is bound by a bail bond and fails to appear for a requisite hearing, a judicial declaration of forfeiture must be taken against the defendant and the sureties, if any, on the bond.[8] This judicial declaration of a bond forfeiture is referred to as the "judgment nisi" and is

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[1] *Gramercy Ins. Co. v. State*, 834 S.W.2d 379 (Tex. App.–San Antonio 1992, no pet.) (internal citations omitted).

[2] See generally *Trammel v. State*, 529 S.W.2d 528, 529 (Tex. Crim. App. 1975).

[3] "The district or county attorney may retain a commission from money collected for the state or a county. The amount of the commission in any one case is 10 percent of the first $1,000 collected, and five percent of the amount collected over $1,000." Tex. Gov't Code §41.005(b). See also Tex. Att'y Gen. Op. Nos. KP-0030 (2015), GA-0997 (2013).

[4] "Bail" means "the security given by the accused that he will appear and answer before the proper court the accusation brought against him and includes a bail bond or a personal bond." Tex. Code Crim. Proc. Art. 17.01. A "bail bond" is "a written undertaking entered into by the defendant and the defendant's sureties for the appearance of the principal therein before a court or magistrate to answer a criminal accusation." *Id*. Art. 17.02.

[5] See generally Skyler Schoolfield, A guide to bond forfeitures, *The Texas Prosecutor* (September-October 2022) at 33; Benjamin I. Kaminar, Forfeiting bail bonds, *The Texas Prosecutor* (November-December 2018) at 17.

[6] The defendant-surety executes a bond for another person (i.e., the defendant-principal). See generally Tex. Occ. Code §1704.001(2).

[7] See Tex. Code Crim. Proc. Arts. 22.01–.18. There are multiple types of bail bonds. Bail under the Code of Criminal Procedure includes both bail and personal bonds. *Id*. Art. 17.01. Article 17.02 permits a bail bond to be in the form of a surety bond or a cash bond. *Id*. Art. 17.02. Instead of a surety bond, Art. 17.02 authorizes the defendant to execute a bail bond and deposit "current money of the United States" in an amount equal to the bond into the court registry. *Id*. This cash deposit by a defendant is known as a "cash bail bond." *Melton v. State*, 993 S.W.2d 95, 97 (Tex. 1999). Alternatively, at the discretion of a court, a person may be released on a "personal bond without sureties or other security." Tex. Code Crim. Proc. Art. 17.03(a). See also *Id*. Art. 17.04. This article is primarily concerned with surety bonds.

[8] Tex. Code Crim. Proc. Arts. 22.01, .02.

an interlocutory, conditional judgment.[9] A judgment nisi "declares that the bond is forfeited unless the defendant shows good cause for his failure to appear."[10] If insufficient cause is shown for the defendant-principal's failure to appear at trial, then the judgment will be made final against the defendant-principal and the defendant-sureties, if any, "for the amount in which they are respectively bound."[11]

While bond forfeitures concern criminal proceedings, these cases are governed by the Rules of Civil Procedure.[12] Thus, a final bond forfeiture judgment is subject to execution (enforcement) as in other civil actions.[13] If we assume no applicable post-judgment motions, such as a motion for new trial, are filed and if a final judgment is not timely paid (generally within 31 days from the entry of the judgment), then the judgment is subject to execution.[14] If you encounter an overdue bond forfeiture judgment, the below items may assist in the collection of the judgment.[15]

While bond forfeitures concern criminal proceedings, these cases are governed by the Rules of Civil Procedure. Thus, a final bond forfeiture judgment is subject to execution (enforcement) as in other civil actions.

Abstracts of judgment

If a judgment is not timely paid, consider filing an abstract of judgment. This is a process that enables a person, in whose favor the court rendered judgment, to create a judicial lien on nonexempt real property[16] owned by the person against whom the judgment was rendered (the "judgment debtor").[17] To be effective, the abstract of judgment must contain specified information, including the names and other identifying information of the parties, the amount of the judgment, and the balance due.[18]

The abstract is filed with the county clerk in the real property records of a county where the judgment debtor owns nonexempt real property (which may include the county where the judgment is taken *and* in any other county where the defendant possesses nonexempt real property).[19] When an abstract is properly recorded and indexed, the abstract of judgment creates a judgment lien that "is superior to the rights of subsequent purchasers and lien holders."[20] Upon payment of the judgment amount by the judgment debtor, a release of the abstract judgment should be filed in the counties where the abstract was recorded.[21] While filing an abstract of judgment is a relatively quick process, it may take an extended amount of time to collect upon a judgment via an abstract of judgment. They often do not resurface in the real property records except when someone is seeking to sell property.

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9 *Jackson v. State*, 422 S.W.2d 448 (Tex. Crim. App. 1968); see also *State v. Sellers*, 790 S.W.2d 316, 320 (Tex. Crim. App. 1990).

10 *Int'l Fid. Ins. Co. v. State*, 71 S.W.3d 894, 896 (Tex. App.–Texarkana 2002, no pet.) (internal citation omitted).

11 Tex. Code Crim. Proc. Art. 22.14.

12 *Id*. Art. 22.10.

13 *Id.* See also Tex. Att'y Gen. Op. No. JM-779 (1987).

14 Tex. Occ. Code §1704.204. See also Tex. R. Civ. P. 627. There are situations in which execution may occur before the expiration of 30 days. See Tex. R. Civ. P. 628.

15 If you encounter any delinquent bond forfeiture judgments, it would be advisable to maintain some sort of list concerning these judgments, such as an Excel spreadsheet, an automated report from your case management system, or something similar.

16 Nonexempt real property is property such as land (and anything growing upon or attached to it) that is not exempt from forced sale or seizure by law. See Tex. Prop. Code §52.001; see also *San Antonio Area Foundation v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000).

17 Tex. Prop. Code §52.001. In Texas, a judgment is insufficient on its own to create a lien. *Burton Lingo Co. v. Warren*, 45 S.W.2d 750, 751–52 (Tex. Civ. App.–Eastland 1931, writ ref'd). An abstract of judgment "[creates] a lien against the debtor's property and [provides notice] to subsequent purchasers and encumbrancers of the existence of the judgment and the lien." *Hibernia Energy III, LLC v. Ferae Naturae, LLC*, 668 S.W.3d 745, 761 (Tex. App.–El Paso 2022, no pet.).

18 Tex. Prop. Code §§52.001, .003.

19 See generally *Hibernia Energy*, 668 S.W.3d at 761; Tex. Prop. Code §§552.001, .004.

20 *John F. Grant Lumber Co. v. Hunnicutt*, 143 S.W.2d 976, 976 (Tex. Civ. App.–Waco 1940, no writ).

21 See Tex. Prop. Code §52.005.

Writ of execution and motion for turnover

Although an abstract of judgment can be an effective enforcement mechanism, a writ of execution may be a quicker enforcement process.[22] A writ of execution is a judicial writ directing a sheriff or constable to enforce the judgment of any district, county, or justice of the peace court by seizing and selling any nonexempt property owned by the judgment debtor to satisfy the judgment.[23] Texas Rules of Civil Procedure 621 through 656 govern the procedures for obtaining and executing a writ of execution. A writ of execution is generally issued 30 days after the date the final judgment is signed.[24] However, it can be suspended if the defendant (judgment debtor) files a proper supersedeas bond.[25]

With certain exceptions, a judgment generally becomes dormant if a writ of execution is not issued within 10 years after the rendition of a judgment.[26] However, §52.006(b) of the Property Code prevents "a judgment in favor of the state or a state agency" from becoming dormant. While a county or district attorney's office may be the entity which obtains a bond forfeiture judgment, the judgment is in favor of the State of Texas.[27] Thus, pursuant to §52.006(b) of the Property Code, a bond forfeiture judgment "does not become dormant."

This section of the Property Code was enacted in 2007, and the Legislature expressly stated that this change in law applied to: "1) a judgment, if the judgment is not then dormant, that exists on the effective date of this Act; 2) a judgment lien on record before the effective date of this Act; or 3) a judgment entered or abstract of judgment recorded and indexed on or after the effective date of this Act."[28] If a bond forfeiture judgment was not dormant on or before the change in law, then §52.006(b) prevents the judgment from becoming dormant.[29] If your jurisdiction has judgments that were dormant prior to 2007, §31.006 of the Civil Practice and Remedies Code prescribes how a dormant judgment may be revived. Generally, under §31.006, an action to revive a dormant judgment (known as a writ of scire facias) must be brought no later than the second anniversary of the date the judgment became dormant. However, pursuant to §16.061 of the Civil Practice and Remedies Code, a political subdivision of the state, such as a county, is not barred by this two-year limitations period. Thus, at any time, a county may revive a dormant bond forfeiture judgment.[30]

A motion for turnover, which is related to a writ of execution, "is a procedural mechanism by which a judgment creditor can reach assets of a judgment debtor that are otherwise difficult to attach or levy on by ordinary legal process."[31] This motion enables a court to use its injunctive powers to compel the judgment debtor to turn over nonexempt property to a sheriff or constable for

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[22] See generally Tex. Code of Crim. Proc. Art. 22.14.

[23] Tex. R. Civ. P. 621, 622, 629, 637. See also Tex. Att'y Gen. Op. No. JC-0377 (2001) at 4.

[24] Tex. R. Civ. P. 627. Generally, a writ of execution may not issue until "after the expiration of 30 days from the time a final judgment is signed" or, if a motion for new trial is filed, 30 days "from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law." *Id*. There are situations in which execution may occur before the expiration of 30 days. See Tex. R. Civ. P. 628.

[25] Tex. R. Civ. P. 634; Tex. R. App. P. 24.1(f); *In re City of Cresson*, 245 S.W.3d 72, 75 (Tex. App.–Fort Worth 2008) (orig. proceeding).

[26] Tex. Civ. Prac. & Rem. Code §34.001(a).

[27] Bond forfeiture judgments are "entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, if any, the amount of money in which they are respectively bound." Tex. Code Crim. Proc. Art. 22.02. See also Tex. Att'y Gen. Op. No. GA-0903 (2011) at 1.

[28] Act of April 4, 2007, 80th Leg., R.S., ch. 11, §2.

[29] Tex. Att'y Gen. Op. No. GA-0903 (2011) at 1; *$60,427.11 U.S. Currency v. State*, No. 02-18-00165-CV, 2019 WL 3024475 at *4 (Tex. App. – Fort Worth 2019, no pet.) (mem. op.).

[30] See Tex. Att'y Gen. Op. No. GA-0903 (2011) at 2. If a judgment is revived, then the county may also file an abstract of judgment according the procedures prescribed in Chapter 52 of the Property Code. See Tex. Att'y Gen. Op. No. GA-0903 (2011) at 2.

[31] *Gerjets v. Davila*, 116 S.W.3d 864, 868 (Tex. App.–Corpus Christi 2003, no pet.).

execution.[32] However, instead of the sheriff or constable selling the judgment debtor's nonexempt property (as in a writ of execution), the court may appoint a receiver to receive and sell any nonexempt property and pay the proceeds to the judgment creditor to satisfy the underlying judgment.[33] A motion for turnover may be useful in situations when a defendant is secreting property in a home or other private place.

Attorney bonds

In certain situations, an attorney may be able to write a bail bond and act as surety.[34] Periodically, an attorney, like other bail bond sureties, will fail to pay a final judgment. Rather than using the enforcement methods described above, §154.045 of the Local Government Code provides another avenue to collect these judgments. Section 154.045(b) generally prohibits a county from paying a person indebted to the county until the person is notified of the debt and the debt is paid. If an attorney fails to timely pay a bond forfeiture judgment and this attorney is on any of the county's court appointment lists, then the county cannot pay the attorney until the bond forfeiture judgment is paid. The county should abstract the debt and notify the attorney in writing of the debt as required by §154.045(b)(1). Further, the notification to the attorney may include a "statement that the amount owed by the county to the person [for court-appointed related work] may be applied to reduce the outstanding debt."[35] If properly notified, the county may reduce the amount owed to an attorney for court appointment-related work by the amount of the bond forfeiture judgment under §154.045(c).

If an attorney fails to timely pay a bond forfeiture judgment and this attorney is on any of the county's court appointment lists, then the county cannot pay the attorney until the bond forfeiture judgment is paid.

If you practice in a county with a bail bond board, attorneys are exempt from the licensing requirements of Chapter 1704; however, attorneys are still subject to the other regulatory aspects of Chapter 1704.[36] For example, an attorney acting as a surety "may not engage in conduct involved with that practice that would subject a bail bond surety to license suspension or revocation" or the attorney risks having his bonding privileges revoked by the local bail bond board.[37] The failure to pay a final bond forfeiture judgment can lead to suspension or revocation of an attorney's ability to write bonds for his clients.[38] Sometimes a friendly reminder that a bail bond board is able to suspend or revoke an attorney's bonding privileges may spur payment of any outstanding judgments.

Notification to sheriff and withdraw of security

Sureties operating in counties without a bail bond board are governed by Chapter 17 of the Code of Criminal Procedure.[39] Chapter 17 generally governs procedures and requirements for taking bond.[40] Under this framework, a bail bond surety must offer sufficient security.[41] When bail is being taken, a sheriff is in the position to evaluate the sufficiency of the security. Code of Criminal Procedure Arts. 17.11, 17.13, and 17.14 give a

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32 Tex. Civ. Prac. & Rem. Code §31.002(b)(1).

33 *Id*. §31.002(b)(3).

34 See generally Tex. Occ. Code §1704.163, Tex. Code Crim. Proc. Art. 17.10.

35 Tex. Loc. Gov't Code §154.045(c).

36 See *Minton v. Frank*, 545 S.W.2d 442, 445 (Tex. 1976) (construing the statutory predecessor to Chapter 1704).

37 Tex. Occ. Code §1704.163(b).

38 *Id*. §§1704.252(8), .253(b)(1); see also Tex. Att'y Gen. Op. No. GA-0197 (2004).

39 See generally Tex. Code Crim. Proc. Arts. 17.11, .13; Tex. Occ. Code §1704.002.

40 See Tex. Att'y Gen. Op. No. JC-0541 at 2 (2002).

41 Tex. Code Crim. Proc. Art. 17.11, §1 provides that "one surety shall be sufficient, if it be made to appear that such surety is worth at least double the amount of the sum for which he is bound, exclusive of all property exempted by law from execution, and of debts or other encumbrances; and that he is a resident of this state, and has property therein liable to execution worth the sum for which he is bound." The officer who takes the bail bond may require an affidavit attesting to the surety's worth. See *id*. Art. 17.13.

sheriff broad discretion in determining whether security offered by a specified surety is sufficient, "including the discretion to consider other bonds executed by the surety."[42] If a person is in default on a prior bail bond judgment, he is disqualified to serve as a surety until the prior judgment is paid.[43] If a bondsman defaults on a judgment in your county and the bondsman also does business in other non-bail bond board counties, please consider notifying the sheriffs in all of these counties. If the other counties are notified, then the surety should be prohibited from writing bonds in these counties,[44] giving the surety an incentive to promptly rectify this situation, including paying any outstanding judgments.

Similarly, in bail bond board counties, if a surety fails to pay a final judgment, the bail bond board is required to notify the sheriff.[45] Upon notification, the sheriff may not accept bonds from the surety until the judgment is paid. When the judgment is paid, the surety's privilege to write bonds is reinstated.

Further, in a bail bond board county, if a surety licensed in the county does not pay a final judgment, then the judgment will be paid from the security deposited or executed by the surety.[46] The failure to pay a final bond forfeiture judgment is also grounds to suspend or revoke a surety's ability to write bonds.[47]

Report unpaid judgment to the Texas Department of Insurance

In a bail bond board county, if an insurance corporation acting as a surety does not pay a bond forfeiture judgment, the judgment should be reported to the Texas Department of Insurance (TDI).[48] Sometimes informing the insurance corporation that the county intends to report the unpaid judgment to TDI may aid in securing payment, because the Texas Department of Insurance is responsible for licensing these insurance corporations to write surety bonds.[49]

Rule 11 Agreement

A Rule 11 agreement is an agreement made between the attorney or parties in a pending suit. Agreements made under T.R.Civ.P. 11 are not a *per se* bond forfeiture collection method. However, depending on the situation, such an agreement may be used for payment of a bond forfeiture judgment. Some jurisdictions will use Rule 11 agreements, especially in situations where large bonds are forfeited, to better specify payment terms and the timing of payment(s). A Rule 11 agreement is enforceable if it is "in writing, signed and filed with the papers as part of the record, or … made in open court and entered of record."[50] If your jurisdiction believes that a Rule 11 agreement is appropriate in certain instances involving a bond forfeiture collection, it may be an easier way to collect on non-payment of judgments. ❇

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[42] Tex. Att'y Gen. Op. No. DM-483 at 5 (1988).

[43] Tex. Code Crim. Proc. Art. 17.11, §2; Tex. Att'y Gen. Op. No. GA-0903 at 3 (2011).

[44] *Id*.

[45] Tex. Occ. Code §1704.2535(a).

[46] *Id*. §1704.204(b). If the required withdraw of funds causes the surety's security to fall below the requisite limits of § 1704.160, then the surety is required to replenish those funds. Id. §1704.206.

[47] *Id*. §§1704.252(8), .253(b)(1); see also Tex. Att'y Gen. Op. No. GA-0197 (2004).

[48] Tex. Occ. Code §1704.108. Additionally, a "corporation may not act as a bail bond surety in a county in which the corporation is in default on five or more bail bonds." *Id*. §1704.212(a).

[49] See generally Tex. Occ. Code §§1704.152(b)(2), .154(b)(2)(B)(ii).

[50] *Id*. See also *Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health & Hum. Servs*., 540 S.W.3d 553, 561 (Tex. 2018).

The case for prosecution

My journey to prosecution has not been a straight path.

By Mike Holley
First Assistant District Attorney in Montgomery County

I went to college on a military scholarship to be a chaplain, but the Army thought I should instead be a military police officer. After a few years of racing Humvees around and amongst tanks in Killeen, the Army sent me to law school in Lubbock, and they graciously paid the bill. They posted me to North Carolina to jump out of airplanes and prosecute field artillerymen. They assigned me to Seoul, Bangkok, and Tokyo to defend servicemembers charged with crimes. They flew me to Baghdad to prosecute military police, where I found myself in a makeshift courtroom surrounded by a figurative army of reporters and a literal brigade of soldiers. They then kindly arranged for me to teach criminal law and advocacy at the LL.M. level (Master of Laws) in Virginia.

After I left the Army in 2006, I had the rare privilege of working for W. Mark Lanier, who I believe is the best civil trial lawyer in the country. In 2012, I crossed paths with the late Carol Vance, the renowned and respected former District Attorney of Harris County. At the time, we were both doing prison ministry—he as an expert, I as an amateur. He gently suggested I apply to be a prosecutor at the Montgomery County District Attorney's Office. He said that leadership mattered and that the leadership there was good. He was right on both counts, and I followed his advice. I have been there ever since, and I hope to remain there as a prosecutor for as long as I can.

I cannot say that the quality of my work in any of those previous positions has been particularly remarkable. I am more of a grinder than a natural talent. However, the experiences I have been afforded have been remarkable, giving me an unusual perspective on litigation jobs. My aim is not to denigrate those other jobs but rather to encourage current prosecutors and spark something in those considering the profession.

Civil work

Civil work was rewarding, not just because of the money. I suspect my civil experience was particularly gratifying because I had an excellent and genuinely exceptional boss. The work was often engaging. There were some opportunities to help others in powerful ways. I also saw how civil attorneys' work allows our society's great machinery to continue operating, and I saw how civil practice can change society for the better. There is a lot of good in civil practice.

Criminal defense work

I also valued my time in criminal defense and enjoyed that work immensely. Defense work was fascinating, fulfilling, and frequently fun. As a defense attorney, I—like defense attorneys everywhere—did my best to give of myself to those in times of dire need. Helping others was gratifying, and I felt like I was doing my part to keep the formidable powers of the government in their proper place. As a prosecutor now, I look for ways to encourage, honor, and uplift our colleagues in the defense bar. What they do matters and protects us all.

But not for me

In all of this, I learned that civil work can be rewarding and defense work is important, but prosecution is where I belong. When done right—and that's an all-important caveat—prosecution offers a unique blend of benefits that, while present to some degree in both civil and defense work, are unmatched in their depth and combination by life as a prosecutor.

Those advantages are as follows:

Justice. By my light, justice is too often an indirect byproduct for other litigation jobs—if it is achieved at all. The main aim for other litigators is advancing the individual client's interest. Sometimes that results in justice, and sometimes it does not. In contrast, the reason for a prosecutor's existence is to see justice done. This entails:

1) clearing the innocent,
2) holding the guilty accountable, and
3) upholding the rule of law.

As a prosecutor, I can accomplish all three myself directly at any time. If someone is innocent, I dismiss the case. If someone is guilty, I seek accountability. And if anyone undermines the rule of law, I can confront that behavior head-on.

In all circumstances, the path to justice is direct. In contrast, as a civil practitioner or defense attorney, my sole, unwavering duty—first, last, and always—was to zealously fight for my client's legal interests, no matter who or what stood in the way. I did so regardless of whether or not my client's interests conflicted with the welfare of others and sometimes, frankly, even when the *legal* interest were not in my client's *ultimate* interest. Occasionally, as a defense attorney, my efforts were in the vein of "clearing the innocent" when my client was wrongly charged or overcharged. Still, far more often, they were not. Instead, my efforts were to avoid all accountability if possible. Infringements of the law concerned me mainly to the extent they could be used in my client's favor. A violation of the law committed by others that benefited my client was something I could readily set aside. Through my zealous representation, I knew I was serving the greater good by protecting the rights of all, and I knew that I was obtaining justice in my way. But while that was true, it often felt too indirect for me.

As a prosecutor, I can pursue justice directly without detours, distraction, or deviation—which is deeply satisfying because justice is vitally important to me. And I suspect it is important to you, too.

Mercy. Human behavior is complex. There is a great deal of gray in this world. Our legal system is a system of trade-offs and an imperfect mechanism for regulating the endless complexity of human life. Most criminal cases involve some degree of mitigation, extenuation, or defense. As a prosecutor, I have the great privilege of considering those factors, and I do so on a case-by-case basis. Happily, in some circumstances—though not as often as I would hope—defendants can be restored to their families and communities in a way that honors the law and respects victims. Very few things in the law are as satisfactory as those moments. This job reserves a sacred place for mercy, and mercy matters.

Purpose. Speaking for victims. Helping the hurting. Resolving cases with wisdom and humanity. Uncovering the truth. Guiding police officers. Protecting constitutional rights. Standing shoulder-to-shoulder with fellow public servants. Taking a stand for right against wrong. Not every litigation job provides such a deep sense of purpose, but this one does.

Safeguarding freedom. I care about people and want them to be free. Free to pursue peace, security, and fulfillment. Free to worship or not, free to raise children or not, free to enjoy the rewards of their hard work, and free to speak their minds. I want men, women, and children in my county, state, and country to live without fear of those who would exploit, harm, or steal from them. All of those freedoms depend, first and foremost, on safety and security. Prosecutors are the people who ultimately deliver both. They do so in collaboration with law enforcement, but make no mistake, without prosecutors, there is no safety or security and therefore, no freedom of any kind. I take pride in this role of ours.

I want men, women, and children in my county, state, and country to live without fear of those who would exploit, harm, or steal from them. All of those freedoms depend, first and foremost, on safety and security. Prosecutors are the people who ultimately deliver both.

Rooted in community. To be a prosecutor is, I hope, to be woven into the fabric of a community. At the end of life, I suspect that what truly matters isn't money, fame, or power: It's the people you knew, those who knew you, those you helped, and those who helped you along the way. In other words, it is to be a part of a community, and prosecution draws me cheerfully into a life of community.

Independence. We do not chase billable hours, nor do they rule us. The commands of individual clients don't steer us, but rather we chart the course ourselves to the destination we believe to be right. We are not driven by profit. We are not subject to the tremendous gravitational pull of money, which can so easily cloud judgment, corrode integrity, and corrupt character. We are not beholden to anyone. We are charged with the moral, ethical, and legal duty to treat the rich and poor equally. When done correctly, those with in-

fluence and connections receive no more and no less than the protections and considerations afforded to everyone else. As my boss, District Attorney Brett Ligon, says, "There is a front door to our office, but there is no back door." This kind of independence is not always easy to maintain, but it is rare, powerful, and liberating. And this independence is what sets prosecutors apart—or should.

Endlessly interesting work. The people we meet, the experts we collaborate with, and the disciplines we engage with—science, industry, psychology, medicine, technology, and law enforcement—all contribute to a constantly evolving and intellectually stimulating profession. The ever-evolving nature of criminal law—and our pursuit of mastering it—presents a dynamic and compelling journey. Every case offers new tests, fresh opportunities for growth, and a deeper appreciation of the complexity that is human life. We meet the most remarkable and fascinating people, people we would never have known otherwise. We see people go through the most painful experiences, and their perseverance in difficulty and triumph in adversity inspire and humble us. In short, unless you are deliberately incurious, the prosecutor's work is intellectually demanding and endlessly interesting.

Some litigation jobs–much of defense work–is lonely. Prosecution is not. Some litigation jobs–many civil firms for example–are plagued by envy, infighting, and quiet (or not-so-quiet) backstabbing. But not this one, at least not in my office.

Camaraderie. As a prosecutor, I am privileged to work with good people trying to be good at doing good. They encourage me, challenge me, and hold me accountable. They push me to be better every day, not just as a lawyer but as a person. They pick me up when I am down, and litigation has many downs. They make me laugh. So much laughter! Some litigation jobs—much of defense work—is lonely. Prosecution is not. Some litigation jobs—many civil firms for example—are plagued by envy, infighting, and quiet (or not-so-quiet) backstabbing. But not this one, at least not in my office. The men and women I work with are more interested in fighting for justice than fighting each other. That matters. If I have a choice of who I want to be around when I'm not with my friends and my family—and I do—I choose these people.

Trial work. Criminal law offers significant trial opportunities, and state practice provides more frequent and diverse courtroom experience than federal practice (though the federal practice has its own distinct benefits, to be sure). With a few notable and noble exceptions, I found civil law to be more general litigation—depositions, discovery, and hearings—than advocacy before a jury. Resolving cases took years and frequently concluded with unsatisfying results, and actual jury trials were scarce.

If you wish to try cases before juries regularly and consistently with full-throated advocacy and clear, well-defined stakes, ours is the place to be. I understand that not every attorney wants to be in trial as an advocate, but for those of us who enjoy it, is there anything else like it in the law?

No bad facts. In every other litigation role, I had to contend with "bad" facts—facts that hurt my client's case. When those surfaced, and they always did, I hoped the other side wouldn't get wind of them. If the other side did hear about them, I hoped I could keep them from getting their hands on those facts. If they managed to get them, I then tried to convince jurors that those facts weren't what they appeared to be (even if I secretly believed otherwise). This approach is quite common in other litigation jobs, but not so for the principled prosecutor.

For the principled prosecutor, there are no bad facts—just facts. I follow the evidence wherever it leads—again, liberating. This reality also protects me from becoming the kind of person who can "spin" any fact to serve his interests. The legal profession highly values and rewards the ability to cleverly spin reality, even if practitioners don't always say it out loud. I have found that this "skill" can create (in some) a state of the soul in which nothing is true or false. It can also deprive one of the ability or willingness to tell the truth to others or even to oneself. In contrast, the prosecutor can be—and must be— a man or woman who believes the truth is a real thing that can be found. A prosecutor is also someone who tells the truth in all things, first to themselves and then to others. I want more truth in the world, not less. Don't you?

Victory is always attainable. A prosecutor "wins" by presenting a case ethically and skillfully. Both are within our control. The outcomes belong to someone else. When a judge or jury decides a case, as Military Judge Colonel Patrick Parrish once told me, that decision is, by definition, "appropriate." Because that's how our sys-

tem works, and this, too, is freeing. Do adverse outcomes still sting? Of course. Do things go wrong? Sometimes. Does the innate competitive nature of human beings threaten this standard? It absolutely does. With all that said, as a prosecutor, my ability to obtain "victory" is always within my grasp, and as long as I'm faithful in how I practice, I can never truly lose.

Final thoughts

Prosecution is not for everyone. It is a calling that requires grit, sacrifice, and deep empathy. It is a profession not for the faint-hearted, the hard-hearted, or the half-hearted. To enter into this work is to acknowledge that the criminal justice system is far from perfect and that we face many challenges. Yet, despite those challenges—or perhaps because of them—I remain a prosecutor. I believe in this work, in seeking truth, and in serving my community.

To my fellow prosecutors: if you can, stay the course. Our work matters.

And to those considering this path, I urge you to take it. Justice needs you. We all do. ❇

Notifying TDCAA about passings and milestones

We at TDCAA would like to keep the readership of this journal informed about milestones within our service group (current employees of Texas prosecutor offices) as well as alumni (former prosecutors and staff).

But with more than 6,000 current staff and many more in the wider prosecution community, we need your help to do so.

To report on a person's professional accomplishment (awards, etc.), appointment to office, retirement, or death, please email the editor at Sarah.Halverson@tdcaa.com. You can write about the milestone yourself, or you can include links to a press release, obituary, or other resource. Please keep it short (no more than a few sentences). We plan to publish these notifications in every issue or as such news is available.

Thank you for your help in informing us of these milestones and in disseminating that information more widely to TDCAA's service group. ❇

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