The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

The meaning of 'material' in *Watkins v. State*

If you are a prosecutor, certainly you have heard of the Michael Morton Act. The Act has caused a significant change in the practice of all prosecutors and has impacted the workload of prosecutor office staff.

By Alan Curry
Assistant Criminal District Attorney in Galveston County

But did you know the Michael Morton Act did not create a new statute? The Michael Morton Act actually amended part of Texas's discovery statute, which had been on the books for decades, and it added several new subsections to it.[1]

The Michael Morton Act specifically amended Art. 39.14(a) of the Texas Code of Criminal Procedure, which now requires that the State produce, after a timely request from the defendant, various pieces of "evidence material to any matter involved in the action."[2] Prior to the enactment of the Michael Morton Act, Art. 39.14(a) had long required the State to produce, "upon motion of the defendant showing good cause," various pieces of "evidence material to any matter involved in the action."

Thus, the Michael Morton Act removed the "good cause" requirement from the previous versions of Art. 39.14(a), and it based the State's duty to disclose upon a request made by the defendant, instead of a motion made to the trial judge. The Michael Morton Act added several new types of evidence that the State is required to disclose, but—as you can see—there has been no change to the language as to the nature of the evidence that the State is required to produce. The State is, and always has been, required to produce "evidence material to any matter involved in the action."

So if the Michael Morton Act is such a big deal—and it is—that must be based upon some *other* addition to Art. 39.14 caused by the Michael Morton Act, right? Not so fast.

In *Watkins v. State*,[3] the Texas Court of Criminal Appeals was squarely confronted with the meaning of this quoted

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The Escamilla–Wortham Challenge

The Foundation Board of Trustees is honored and proud to announce a first-ever event: the **Escamilla–Wortham Challenge**.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

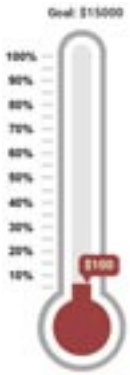
David Escamilla, former District Attorney in Travis County and 2021 Chair of the Foundation Board, announced after he left office that he was offering up to $10,000 of his leftover campaign funds as a dollar-for-dollar challenge grant to the Foundation.

Bob Wortham, the current CDA in Beaumont, thought that was such a great idea that he added another $5,000 to the challenge!

So, TDCAA supporters, it is time to rally together by contributing to the Foundation so David and Bob can match your donations—up to $15,000! Every dollar you donate helps! I've already started us with $100. Who will be next?

Current Foundation supporters, watch for a card in the mail (yes, an actual paper card!) inviting you to give toward the matching gift. We'll also send out an electronic invitation later as a gentle reminder to contribute. If you want to give now, you can do so at www.tdcaf.org.

Please note that because David and Bob's contributions are personal gifts, they can be matched only with personal gifts that will support the Foundation's unrestricted funds. If you have any questions about contributing, please call me at 512/474-2436.



We will track our progress with a trusty "thermometer" graphic in each addition of this journal (at right), and the challenge ends December 31. So let's heat this up! ❇

Recent gifts to the Foundation*

Art Bauereiss
Donna Bennett *in memory of Oliver Kitzman*
Joe Edd Boaz
David Finney
Bob Gage
Casey Garrett *in memory of Mike Hinton*
Michaela Kee
Rob Kepple
Bud Kirkendall *in memory of Cathy Cochran*
Tom Krampitz *in memory of Mike Hinton and Oliver Kitzman*
Cheryl Lieck *in memory of Mike Hinton*
Crawford Long *in memory of Cathy Cochran*
Doug Lowe
Lyn McClellan *in honor of Beth Exley*
Sunni Mitchell
Kim Ogg
Tiana Sanford
Stephen Smith
Beth Toben
Bob Wortham

* gifts received between February 6 and April 2, 2021

Texas District and County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701 • www.tdcaa.com

About *The Texas Prosecutor*

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Women in prosecution

In March, I received a wonderful letter from a former DA and good friend of TDCAA, **Steve Smith**, a judge in Sutton County.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Steve had been reading in the *Texas Bar Journal* about Women's History Month, but the article did not mention the name of the first woman district attorney in Texas. He wondered in his letter if it was the former 51st Judicial District Attorney **Charlotte Harris**, who took office in 1992. My curiosity piqued, I decided to find out.

My first stop in the way-back machine was the archives of *The Texas Prosecutor* journal, where I found a great article written by **Lori Kaspar**, then the County Attorney in Hood County, about Texas's first female county attorney, **Nellie Gray Robertson**. Nellie was one of the first women to graduate with a law degree from the University of Texas. In 1918, just six years after entering law school, Nellie was elected as the County Attorney in Hood County. The article reveals that Nellie actually served as an officer—secretary and treasurer—of TDCAA in 1921. (Read the whole article at www.tdcaa.com/journal/meet-nellie-gray-robertson-the-first-female-county-attorney-in-texas—it's fascinating!) So, Nellie was the first county attorney. What about the first *district* attorney?

After talking with some of my mentors at the association, I was invited to explore the rumor that a lawyer in the Valley had served as the first female district attorney a long time ago. It took me no time at all to discover that **Edna Cisneros** was reported to have been elected as the District Attorney in Willacy County in 1956, a post she held for 30 years, which would mean she served earlier than Charlotte Harris. But wait: Technically, Willacy County does not have a district attorney—Willacy County is served by a county attorney with felony responsibility, which are two different offices, even if they are functionally equivalent. So while Edna Cisneros was elected as the county attorney with felony responsibility, she was not a district attorney, so my hunt for the first female DA continued. (You can read about Edna at www.tshaonline.org/handbook/entries/carroll-edna-cisneros.)

It took a little more digging, and for a moment I thought I had hit the jackpot when I discovered an article about the **Honorable Bonnie Leggat Hagen**, who had been appointed as the first district attorney in Harrison County in 1985. But then I quickly discovered that the article's author—like most every Texan—doesn't appreciate the nuances of elected prosecutor offices. Judge Leggat Hagen had actually been appointed as the first female *criminal* district attorney for Harrison County. Again, Charlotte Harris was looking like a possible contender for the DA crown.

I got to thinking about Nellie having actually been an officer at TDCAA, and about all of the women who have served as leadership at the association in my 30 years. Then it occurred to me: Our TDCAA president in 1997 was **Becky McPherson**, 110th Judicial District Attorney from Floydada. Sure enough, Becky was elected DA in 1989, which puts her a hair in front of Charlotte.

Unless someone has access to some courthouse history that updates our "Final Four," I think we have found the first women to be elected to the various prosecutor offices in Texas. I am proud to have served with and for our female prosecutors, elected and otherwise. Our profession in Texas is more than 50-percent female today, and we are stronger than ever!

Elected Prosecutor Conference

The TDCAA staff has been pretty excited these last couple months because we have had the

pleasure of planning an actual live training! We will begin with our Elected Prosecutor Conference, which was postponed from December 2020 to June 2021. We intend to be very cautious with how the conference takes place. For example, there will be two sections of attendees so that we can observe 6-foot distancing, with each attendee at his or her own table. This means that we have had to limit attendance, and I am sorry if you didn't get the chance to register before the course filled up.

In addition, face masks will be mandatory, and we will minimize the amount of paperwork changing hands. The way we see it, these are minor inconveniences that we all will gladly accept to receive four days of quality training! And if you didn't get into this course, have no fear—we are on schedule to host the 2021 Annual Criminal and Civil Law Conference in September and the 2021 Elected Prosecutor Conference in December. See the article by TDCAA Training Director Brian Klas on page 6 for more info on our 2021 courses.

Goodbye to Russ Thomason

I want to give a warm thank-you to **Russ Thomason**, CDA in Eastland County, who is retiring at the end of May. Russ has been a steady hand and a great friend of the association, and he has had a great 18-year run. Thanks, Russ, and good luck!

Prosecutor Management Institute (PMI) training

With a return to live training, I want to remind folks that we are ramping up efforts to bring our ground-breaking management training to you. We are planning to host a conference soon for management-level assistant prosecutors and are prepping our training teams to come to your office or host regional courses. If you want more information, please contact Training Director **Brian Klas**.

Amazon Counterfeit Crimes Unit

I don't know about you, but I love the magic of Amazon. I can just think of something I want, and after a few mouse clicks, it appears on my doorstep a couple of days later. But I also hate it when the item I receive is not the one advertised on the website.

Enter **Kebharu Smith** and the Amazon Counterfeit Crimes Unit. Many of you already know Kebharu, who was an ADA in Harris County before going to the United States Attorney's Office in Houston. His rising star soon found him in Washington D.C. as the Senior Corporate Counsel with the Department of Justice Computer Crime and Intellectual Property Section. Last summer Kebharu joined Amazon to spearhead its effort to curtail counterfeit products that might enter its supply stream. In the future you might be hearing from Kebharu in his professional capacity.

You can read about Amazon's new anti-counterfeit initiative at www.aboutamazon.com/news/company-news/amazon-establishes-new-counterfeit-crimes-unit.

Annual Report from Tarrant County

I was delighted again this year when my mail included a copy of the Tarrant County Criminal District Attorney Annual Report for 2020. **Sharen Wilson**, CDA in Tarrant County, has done a terrific job of sharing the successes of her office and the challenges of the profession yet again, and the report is worth a read—it could even be a guide for how other offices might go about highlighting their work. In the report you will find raw data on crime, discussions of innovative programs, a recitation of trial successes, and articles honoring her employees' hard work. And what would a report be without a picture of the adorable emotional support dog Brady?

You can read the report online at www.tarrantcounty.com/content/dam/main/Criminal-District-Attorney/annual-cda-reports/CDAAnnualReport2020.pdf. Well done, Sharen! ❇

The TDCAA staff has been pretty excited these last couple months because we have had the pleasure of planning an actual live training! We will begin with our Elected Prosecutor Conference, which was postponed from December 2020 to June 2021.

Cautious optimism is the order of the day

The last time I wrote an update on TDCAA training, I laid out our plan for the first part of 2021.

By Brian Klas
TDCAA Training Director in Austin

Any number of things are supposed to happen when you make plans—God laughs, faces get punched, and even the homes of mice are destroyed. Still, you have to make a plan, but any good one has a secondary option for what to do when the initial plan fails. Thanks to the professionals I work with here at TDCAA and a succession of skilled presenters willing to take on the training challenge, we are about where we planned to be. (Really, a huge thanks to all the Texas prosecutors who delivered hours of training to the cold eye of a camera lens!)

At present, you should be able to go to tdcaa.com and watch the last two conferences that were switched from live courses to online ones. Crimes Against Children is one of them; it will be available to watch online until the end of May, and the other is the Civil Law Conference, which will be posted for viewing until the end of June. That is, unless something changes between the time I wrote this column and when it arrives in your mailboxes. If that is the case, know that my fallback plan is to embody the shruggie emoji. What are you going to do, right?

Back to in-person courses

Fate tempted, let's look at how we are *planning* to transition back to live conferences. (Just note that online training is not going away, and I'll make sure and update y'all on those plans in a future article.)

Elected Prosecutor Conference. Our first live event in over a year will be the Elected Prosecutor Conference in June, which is a makeup of the conference we would have held in December 2020. That 2020 Elected Conference was the first booking that we believed we had enough information to postpone rather than simply cancel. The makeup event will be at a hotel on the San Antonio River Walk, and as I write this, it is available for registration on our website. While this course targets the elected portion of our membership only, it does illustrate a major pandemic transition issue. That issue is capacity. We set an attendee limit for this conference that allows us to meet certain spacing guidelines. In fact, the capacity was so severely limited for this course that we are essentially conducting the conference twice in one week so we can serve as many attendees as possible. Due to the length and structure of most of our conferences, that doubling will not work for other live courses. As I said, the order of the day is cautious optimism: My belief is that we will be able to expand capacity and dining limitations as time passes.

Prosecutor Trial Skills Course. The Prosecutor Trial Skills Course (PTSC) is the second live offering of the summer. It is scheduled here in Austin July 11–16. I expect to open this course with a limitation on capacity as well, so check our website for expansion news. We had to cancel two PTSCs (July 2020 and January 2021), and I know that means a backlog of attendees. I hope we can catch up and eventually get everyone into this foundational training. Some of you may have attended the online Fundamentals of Prosecution Course back in January. While PTSC covers many of the same topics as that course, the PTSC focus is much more on courtroom action, and though there may be some overlap in content, the live experience cannot be replicated online.

Advanced Trial Advocacy Course. Two weeks after PTSC, we plan to offer our Advanced Trial Advocacy Course. Attendance is by application only and it is normally limited to 32 attendees. This year, maybe fewer than 32. Traditionally, we hold the course in Waco at the Baylor Law School, and the week is split between lectures over a singular type of case and courtroom exercises relating to an actual case curated by the course director. Courtroom work is filmed

and critiqued by experienced faculty. If you are serious about developing trial expertise, this is the course for you.

Baylor has consistently been an ideal partner for this course. Right now, officials at the school need to make sure they can safely host events, and we are waiting to see if and when they are able to get campus operations up and running. If all goes according to *plan* (see?), the topic for Advanced will be adult sexual assault, and the course director will be Allenna Bangs, an ACDA in Tarrant County. Brochures (with applications) will be available online and in your mailbox in the coming weeks.

Investigator Conference. Originally scheduled for February 2021, we will host this course in Rockwall August 9–12. The jury is out on capacity limits, but we will have all that information available on our website when registration opens. I know that TCOLE credit has been tough to come by this last year, as TCOLE does not allow credit for online training, so we are diligently working to get as much of our investigator membership into this course as is safely possible. Rest assured the Investigator Board has done a great job planning the curriculum, and there will be something on the agenda for all DA or CA investigators no matter how they are assigned. If you are new to the world of prosecutor office investigation, make sure to enroll in the one-day New Investigator School, which we host alongside the rest of the conference.

Legislative Updates. Mid to late summer of a legislative year, like this one, is when we typically hit the road for Legislative Updates. Our biggest change for 2021 is with these courses. For a host of reasons, including the very up-in-the-air nature of the legislative session, we will produce an online Legislative Update rather than visiting 20-plus cities around the state for in-person conferences like we normally do. We have only two live Legislative Updates planned: One is tacked onto the end of the Investigator Conference, and the other is just before the Annual Conference in Galveston. As usual, these courses require separate registration.

For those of you who need TCOLE credit, we are still unable to give TCOLE credit for online training. (If that changes, it will be very clear on our website.) For now, to receive credit for attending our Legislative Update, you will need to attend a live conference.

Annual Criminal & Civil Law Conference. The return to planned normalcy culminates with the 2021 Annual Criminal & Civil Law Conference. We'll be in Galveston from September 22 to 24. In years past, I've wanted to shake up the way we deliver Annual content, do something a little different. But this year, expect a glorious return to all the usual Annual training and events! We'll have a rural prosecutors' forum, a juvenile prosecutors' forum, a meeting to discuss diversity in prosecution, a reception or two, and a whole bunch of training options. Along with the aforementioned Legislative Update, we'll have a special domestic violence course at the beginning of the week. Both will require separate registration.

Cautiously optimistic

If you told me this time last year that I would be only cautiously optimistic when planning in-person courses for the summer of 2021, I would have called you a lunatic. And I know that offices all over the State are returning to trying cases, and the case backlogs may feel backbreaking. But here we are, right?

Getting back to normal may end up being twice the work that adapting to the pandemic ever was. We want to help you however we can. Remember that TDCAA is your service organization. If there is any way that we can assist you in your mission to see justice done, please don't hesitate to reach out. ❇

In years past, I've wanted to shake up the way we deliver Annual content, do something a little different. But this year, expect a glorious return to all the usual Annual training and events!

TDCAA's 2021 training calendar

Live, in-person training

Elected Prosecutor Conference	*June 8–11*	*San Antonio*
Prosecutor Trial Skills Course	*July 11–16*	*Austin*
Advanced Trial Advocacy Course	*July 26–30*	*Waco*
Investigator Conference	*August 9–12*	*Rockwall*
Legislative Update	*August 12*	*Rockwall*
Legislative Update	*Sept. 21*	*Galveston*
Annual Criminal & Civil Law Conference	*Sept. 22–24*	*Galveston*

Online training

Crimes Against Children Conference	*Until May 31*
Civil Law Conference	*Until June 30*

Dusting off the knowledge we forgot and learning new things

In TDCAA's 2019 Legislative Update courses—before the pandemic hit and the world flipped upside-down—nothing caused more concern and consternation among the audience than an agriculture bill that upended marijuana prosecutions.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

We promised we would get back to you with some solutions when the lab problems were resolved—and then we got distracted by that pesky pandemic.

Since then, we have found a whole new way to get information out to Texas prosecutors (that would be online video courses), and you have likely started receiving DPS lab reports on felony marijuana cases. To explain these lab reports (what they are and why you're getting them), TDCAA created a short online video, "DPS Crime Lab Marijuana Testing Policy & Procedure," which is totally free and accessible at www.tdcaa.com/training/dps-marijuana-policy-and-procedure-online-training. It provides a half-hour of CLE and is similar to many of our other DWI training videos (more on those in a moment).

In this video, I interview those who oversaw the creation of the current DPS marijuana testing program and those who are training the scientists whom prosecutors will soon call as witnesses. Although the training is not a mock trial, my interview may seem a bit like a direct examination. That is not an accident, as my hope for the online course was not only to educate prosecutors on science and lab procedures, but also to be a template for preparing a forensic scientist to testify.

Some of you are already making charging decisions, negotiating, and perhaps even trying felony marijuana cases, so this is information you need immediately. TDCAA learned from the pandemic that the best way to get information across the state quickly and cheaply is through short online videos, so please check out this new one and let us know what you think.

Additional resources

Speaking of trials resuming, anyone feel a little rusty on your DWI trial skills? Please don't forget about the tremendous number of resources available from TDCAA that will help shake off the dust—because y'all have an avalanche of cases the pandemic delayed coming your way soon (or maybe right now).

For one, every Texas prosecutor received an updated edition of TDCAA's DWI book. It was shipped in the last month or two courtesy of our Texas Department of Transportation (TxDOT) traffic safety grant. If you have not seen it, it has a nice bluebonnet-blue cover and is called *DWI Investigation & Prosecution* by W. Clay Abbott and Diane Beckham (our senior staff counsel). If you have not read a previous edition, I recommend a thorough reading of this one. If you've already read earlier versions, I suggest a quick browse, as there are new suggestions, charts, and resources. Plus, a year without DWI trials is a long time, and this book will kick out the cobwebs.

Second, check out the DWI page of our website (www.tdcaa.com/resources/dwi). There you'll find a DWI caselaw document updated by Jessica Frazier, ACDA in Comal County; the whole thing is searchable and downloadable.

There are also a good number of training videos. Many are similar to the aforementioned marijuana testing video, and all are meant to disperse information in a short, easy-to-digest format. Two of them, "Testing Blood for Drugs in Texas" and "Breath Alcohol Testing," were created with the help and participation of the forensic scientists you will have to call to admit breath or blood results. These videos' purpose is to launch your preparation of witnesses for direct and cross in what is often very difficult expert testimony.

Are you feeling a bit out of practice in jury selection? Take another (or a first!) look at the two videos on this topic, "Jury Selection in DWI Prosecution," and "Special Issues in Jury Selection in DWI Prosecution." You'll see some of the best DWI prosecutors in Texas present their most effective jury selection techniques. For those who participated in athletics in the past, think of these videos as the film room sessions you spent with your team getting ready to start the season.

And there's a lot more where that came from, including additional videos, demonstrative exhibits, documents, and more, so go take another look at the website's DWI page. You just might find exactly what you need there.

Regional training is coming soon

Lastly, regional DWI training is coming back in June. Regional training is when I journey the state to deliver a day's worth of free CLE and TCOLE training, for both prosecutors and peace officers, on various intoxication-related topics. I ask prosecutors in jurisdictions across Texas to host these events, and I book them weeks and even months ahead, so the rest of my year is planned out well in advance. I cannot tell you how restless I have been in waiting to travel again.

This year's topics are "Effective Courtroom Testimony," "Rolling Stoned" (how to prepare and try drugged driving cases), and "Worst Case Scenario" (preparing and trying intoxication assault and manslaughter cases). If you're interested in receiving this training and you want to host me, watch the "Live Training" side of our website's Training page (www.tdcaa.com/training/#live-training) for information on signing up in late April. It will be great to see everyone in person this summer! ❇

Victim services FAQs and answers

Here at TDCAA, I am available daily to answer questions from TDCAA members about victim services.

By Jalayne Robinson, LMSW
TDCAA Director of Victim Services

I thought it would be interesting and informative for you to read the latest questions we have received from the field, plus my answers.

Q I recently read an article titled "The history of crime victims' rights" by Suzanne McDaniel, former Victim Services Director for TDCAA (www.tdcaa.com/journal/the-history-of-crime-victims-rights). It is an enlightening view of the development of crime victims' rights in Texas from 1985 up till 2005. I was wondering if you have at your fingertips a timeline of the continued evolution of victims' rights from 2005 to the present. I am presenting to the local Citizens Police Academy and wanted to include three minutes on the history and development of crime victims' rights in our state.

A Below are a few links with a write-up on victims' rights that may be helpful in developing your presentation:

- www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/victim_rights15.pdf
- https://victimlaw.org/victimlaw/pages/victims Right.jsp
- https://ovc.ncjrs.gov/ncvrw2018/info_flyers/2018NCVRW_Landmarks_508.pdf

Q Do Crime Victims' Compensation victim benefits (counseling, mileage reimbursement, etc.) apply to pre-indicted cases, or do they have to wait until a case has been indicted before a crime victim can apply for benefits?

A No indictment or arrest is necessary; however, the crime must have been reported to law enforcement and a law enforcement report/case number assigned before a crime victim can apply for the Crime Victims' Compensation Program.

Q Our office has a question regarding victim reimbursement for gas and mileage. We need to request that a victim come to our office

for further questioning regarding the case. Is this something that can or should be reimbursed through county funds, or is there another way it should be handled? If it can be reimbursed, what are the specifics on that?

A The State Comptroller of Texas has a Witness Fee Reimbursement Program for mileage, public transportation (airfare, taxi, shuttle, rental car), hotel, and meal costs for out-of-county witnesses who are subpoenaed by the court or summoned by the prosecuting attorney. Witnesses requested, subpoenaed, or summoned for grand jury proceedings, habeas corpus proceedings, pre-trial hearings, courts of inquiry, and examining trials are eligible to be reimbursed if they reside outside the county of the request. The program can reimburse the witness directly, or the witness can sign over the reimbursement to the county.

Here are links to claim forms and brochures explaining the Witness Fee Claim program:

- Checklist for Witness Fee Form Completion: https://comptroller.texas.gov/taxes/publications/96-762.pdf
- Witness Fee Reimbursement Claim form: https://comptroller.texas.gov/programs/support/judiciary/forms.php

If a crime victim has applied and been approved for CVC travel and lost wages, the Crime Victims' Compensation Program has a travel and lost wages reimbursement benefit. This form (www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/Awards_Travel_Appointment%20Verification%20Information%20Form.pdf) should be completed when the victim is requesting reimbursement for travel expenses or lost wages incurred to attend crime-related medical or counseling appointments, police investigation appointments, criminal proceedings, post-conviction or post-adjudication proceedings (executions), or a victim's funeral.

Q I have a notification question. We have a 17-year-old girl who is the victim of sexual abuse by her half-brother. Their mother knew about the abuse and never reported it. (Her case is being handled also.) My question is, "Is the law enforcement agency required to notify the biological father because the girl is 17 years old?" I do not think the victim has much contact with the bio father; he lives in another state, and I do not know what the girl told law enforcement about him. The bio father and stepmother found out about the abuse from mutual family friends and are not happy. They have contacted our office upset that they were not notified by law enforcement. Our elected district attorney wanted to know what the requirements are for notification. This is an unindicted case at this time.

A Several attorneys at TDCAA, Children's Advocacy Centers of Texas, the Texas Department of Criminal Justice's Victim Services Division, and others have reviewed this question, only to find there is not a definitive answer in Texas law. Here is where we looked and what we found:

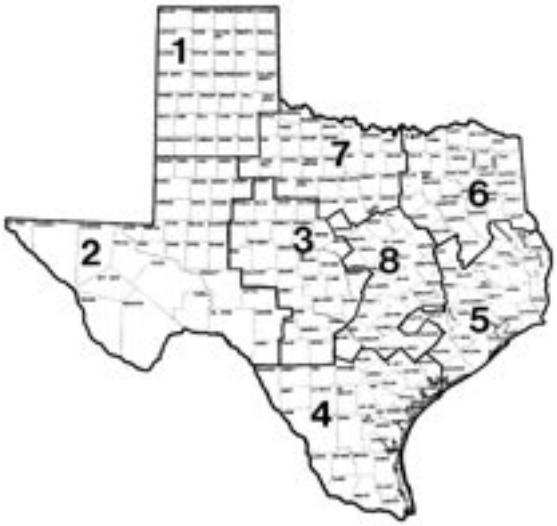
- Code of Criminal Procedure Art. 56A.051(13) references a victim of an assault or sexual assault who is "younger than 17 years of age," meaning that 17 might be the cut-off age for a victim to be considered a child whose parents must be notified.
- CCP Art. 56A.401-402 talks about law enforcement notifications but does not specifically make reference to who gets notified.
- Prosecutor notifications are now located under CCP Art. 56A.451 but does not address who is entitled to receive notice of the crime.
- Texas Family Code §261.101 is the mandatory reporting statute, and it requires an individual to report suspicions of child abuse to either law enforcement or the Department of Family and Protective Services, but clearly that is different from requiring law enforcement to then report back to the biological father, as in this instance.

TDCAA did some general Lexis research and combed through the Family Code, Government Code, and Code of Criminal Procedure, and we did not finding anything regarding a parent's right to notification by law enforcement. We looked in Chapter 411 of the Government Code and did not find anything regarding specific notification duties that law enforcement has. The only rights to notification were under the Family Code regarding reports of abuse, but they seem to be related to when a parent is being investigated for allegations of child abuse. Victims of crime (or their guardians) are entitled to certain rights addressed in Chapter 56A of the Code of Criminal Procedure—nothing specifically addressing this question, though.

Q I noticed that the TDCAA Region 5 Victim Services Board representative's term ends on December 31, 2021. What is the process for running for the board?

A TDCAA's Key Personnel–Victim Services Board elections will be held in-person at our Key Personnel–Victim Assistance Coordinator Conference on Thursday, November 11 at 1:00 p.m. at the Inn of the Hills Conference Center in Kerrville. In 2021, the East Area (Regions 5 and 6) and the South-Central Area (Regions 4 and 8) are up for election. Please see the map, below, to find out your region.

Texas regional map



Q I have a question about submitting my Victim Impact Statement (VIS) activity report. The information I've read says it needs to be done quarterly. Do I register through TDCJ's Integrated Victim Services System (IVSS) website and report it there?

A Yes, please create a profile in IVSS and select a username and password at this link: https://ivss.tdcj.texas.gov. Once you have created a profile, click "Add Monthly Statistics" to complete a VIS report. The VIS report is collected quarterly by the Texas Crime Victims Clearinghouse, but you can enter VIS activity monthly in IVSS.

Q I have been told there is a newer version of the Victim Impact Statement (VIS) packet. How can I get a copy of the new version?

A The latest version (updated in September 2019) of the VIS is available at tdcj.texas.gov/publications/victim_impact_statement.html#vis.

Q I need to order more VINE (Victim Information and Notification Everyday) brochures in English and Spanish. Do you know where I can order them?

A The Office of the Attorney General has a Crime Victims' Materials Request Form with publications available for free at this website: www.texasattorneygeneral.gov/sites/default/files/files/divisions/crime-victims/Crime-Victims-Material-Request-Form.pdf.

That's it! If you have a victim services question, please reach out to me at Jalayne.Robinson@tdcaa.com, and I'll answer.

Key Personnel-Victim Services Board for 2021

For the first time ever, elections for the TDCAA Key Personnel-Victim Services Board were held via Zoom. The chairperson and representatives from the West Area (Regions 1 and 2), and North Central Area (Regions 3 and 7) were elected. Congratulations to Chair Amber Dunn, VAC in the Denton County CDA's Office; Becca Kinikin, VAC in the 47th Judicial DA's Office (Region 1); and Ebonie Daniels, VAC in the Wichita County CDA's Office (Region 7)! Becca and Ebonie were elected to serve on the Board beginning January 1, 2021, for a two-year term. Amber, the chairperson, serves a one-year term.

Also in January 2021, two additional representatives (one KP and one VAC) were appointed by John Dodson, President of the TDCAA Board of Directors, and by Amber Dunn, Chair of the KP–VS Board. Congratulations to our newly appointed board members Adina Morris (KP) in the Palo Pinto County DA's Office and to Karen Bertoni (VAC) in the Henderson County DA's Office! See the whole list of KP–VS Board members in the box on page 12.

The KP-VS Board prepares and develops training programs for TDCAA conferences. Area representatives serve as a point of contact for their regions. To be eligible for board service, each candidate must have the permission of his or her elected prosecutor; pay TDCAA membership dues; and either attend the elections at the KP-VAC Conference, attend the election process via Zoom, or be appointed to the Board. 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.

If you have any questions, please email me at Jalayne.Robinson@tdcaa.com.

For the first time ever, elections for the TDCAA Key Personnel-Victim Services Board were held via Zoom.

The 2021 KP–VS Board

Amber Dunn, Chairperson
Becca Kinikin, West Area Representative
Mona Jimerson, East Area Representative
Ebonie Daniels, North Central Area Representative
Katie Etringer Quinney, South Central Area Representative
Adina Morris and Windy Swearingen, Designated KP Representatives
Karen Bertoni and Tracy Viladevall, Designated VAC Representatives
Cyndi Jahn, Training Committee Liaison
Stephanie Lawrence See, Chair of the Board (ex officio)

Go Blue for Kids

On April 1, the Rockwall County Criminal District Attorney's Office gathered together, wearing blue for "Go Blue for Kids" in recognition of Child Abuse Prevention Month. Numerous awareness events and activities are planned in Rockwall County during April. Pictured below in the first row (left to right): Jeff Shell, Shane Cannon, Craig Stoddart, Cara Janes, Shelby Sedberry, Kenda Culpepper, Rachel Lines, Anna Gajkowski, Meredith Gross, Mandy Waite, Jordan Williams, Lacy Olvera, and Brinley Dougalas. In the second row (left to right): Destry Wilson, Justin Almand, John Cooper, Rachel Johnson, Gina Savage, Amie Gonzales, Mike Sandlin, Stacey Brezik, and Pat Kirlin. In the third row (left to right): Jacob Piper, Kelly Carter, Esther Miramontes, Brandi Dial, Felicia Oliphant, and Suzie Smith.

Upcoming TDCAA training

- **Annual Criminal & Civil Law Conference**, September 22–24, in Galveston
- **Key Personnel & Victim Assistance Coordinator Conference**, November 10–12, in Kerrville.

Please watch your mailbox (both email and snailmail) for brochures and alerts about upcoming conferences and that registration is open. Registration is always online at www.tdcaa.com.

Victim services consultations

As TDCAA's Victim Services Director, my primary responsibility is to assist elected prosecutors, victim assistance coordinators (VACs), and other prosecutor office staff in providing support for crime victims in their jurisdictions. I am available for victim services training and technical assistance to you via phone, email, or videoconference (Zoom) for individual or group training. The services are free of charge.

If you would like to schedule a Zoom meeting, please email me at Jalayne.Robinson@tdcaa.com. Many VACs across Texas are taking advantage of this free training! ❇

The meaning of 'material' in *Watkins v. State* (cont'd from front cover)

language and the meaning of "material" in particular. The Court's construction of the quoted phrase is one of the more significant developments from the Court in recent years.

Now that the Michael Morton Act has been in place for several years, odds are that the Court's opinion will not change much of the actual practice of what prosecutors are disclosing to the defense. But make no mistake, *Watkins* is now the leading decision on the Michael Morton Act and Art. 39.14(a). *Watkins* also provides the foundation for any subsequent decision on the Michael Morton Act.

The facts of the case

In *Watkins*, the defendant was on trial for possession of a controlled substance with the intent to deliver. The State also alleged that the defendant had previously been convicted of two prior felony offenses, aggravated assault and retaliation.

Prior to trial, defense counsel timely requested disclosure of any "evidence material to any matter involved in the case" pursuant to Art. 39.14(a). Under Art. 37.07 of the Texas Code of Criminal Procedure, the prosecutor provided notice of the State's intent to introduce evidence of prior convictions and extraneous offenses at punishment.

At the punishment stage, the prosecutor introduced into evidence 33 exhibits to prove up the defendant's prior convictions and extraneous offenses. While the State had given notice under Art. 37.07, the State had not previously provided copies of these exhibits to the defense.

On appeal, the defendant claimed that the trial court erred by admitting these exhibits because they had not been produced by the State prior to trial in violation of Art. 39.14(a). In *Watkins*, the appellate courts reviewed the question of whether the trial court erred in admitting the exhibits into evidence. However, it should be noted that the courts were not confronted with whether exclusion of the exhibits from evidence was an appropriate remedy.

The intermediate court

The Waco Court of Appeals noted that the phrase, "evidence material to any matter involved in the action," was present in Art. 39.14(a) before it was amended by the Michael Morton Act, and what is "material" had been subject to substantial judicial interpretation prior to the Act's passage. Therefore, the court of appeals held that the definition of "material" should be the same after the passage of the Michael Morton Act as it had been before passage, regardless of what the Legislature may have intended when it passed the Michael Morton Act.[4]

Consequently, the court of appeals held that "materiality," for the purposes of Art. 39.14(a), means that there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different.[5] This definition mirrored the definition that the United Supreme Court had arrived at in determining what is "material" under *Brady v. Maryland*.[6] And that makes sense, right? I mean, both *Brady* and the Michael Morton Act deal with the prosecutor's duty to disclose, and both use the word "material." The definitions must be the same. The court of appeals certainly thought so.

Applying the *Brady* definition, the court of appeals held that, even if the undisclosed exhibits had been produced, there was no reasonable probability that the outcome of the trial would have been different or that the defendant's sentence would have been reduced. Thus, under the standard for determining "materiality" by which it claimed to be bound, the court of appeals found that the exhibits were not "material."[7]

Before the Court of Criminal Appeals

On petition for discretionary review, the Court of Criminal Appeals—with Judge David Newell writing the opinion—was squarely confronted with the issue of how to construe the statutory phrase "material to any matter involved in the case." The issue for the Court was one of pure statutory construction. The Court relied upon oft-used rules and noted that determining legislative intent is not the Court's goal. Instead, the goal is interpreting the text of the statute—what legislators actually wrote, not what they meant to write.[8] An appellate court usually reads words and phrases in context and construes them according to rules of grammar and common usage. A court usually will not consider things such as legislative history, unless the language of the statute is ambiguous or leads to absurd results.[9]

Over many years, some legislators had previously attempted to expand the scope of discovery in criminal cases by filing bills that would have amended Art. 39.14, but their efforts had been unsuccessful. The wrongful conviction of Michael Morton changed all of that. Michael Morton had spent 25 years in prison for a crime that he did not commit because the prosecutor trying his case had withheld material, exculpatory evidence.[10] After this tragedy, there was significant motivation to make real change. The Michael Morton Act made significant revisions to Art. 39.14(a), and it added subsections (c) through (n). The Michael Morton Act was an overhaul of criminal discovery in Texas. The statutory changes broadened criminal discovery for defendants, making disclosure the rule and non-disclosure the exception.

The evidence should not be judged in relation to the entire record after trial. Rather, prosecutors now assess whether a particular piece of requested evidence has some logical connection to the facts of the case, looking forward at the time of the request, most often prior to trial.

An examination of Art. 39.14(h)

On the road toward construing Art. 39.14(a), the Court took a look at Art. 39.14(h) and made the following observations about that subsection of the statute:

- the State has a free-standing duty to disclose all "exculpatory, impeaching, and mitigating" evidence to the defense that *tends* to negate guilt or reduce punishment;
- the duty is not limited to "material" evidence;
- the duty to disclose is much broader than the prosecutor's duty under *Brady*;
- there is an independent and continuing duty for prosecutors to disclose evidence that may be favorable to the defense; and
- the duty to disclose evidence that merely "tends" to negate guilt or mitigate punishment echoes the definition of evidentiary relevancy.[11]

The Court was not confronted with construing Art. 39.14(h), so this could be considered dicta—not necessarily a binding part of the Court's opinion. But prosecutors would do well to consider this construction of Subsection (h).

While you might see in Subsection (h) some commonality with language from *Brady* caselaw, the Court held that the creation of Art. 39.14(h) is in fact inconsistent with *Brady*'s concept of "materiality."[12] The Court held that, when Arts. 39.14(a) and 39.14(h) are read together, any relevant evidence that does not fall under Art. 39.14(h) must be disclosed upon request under Art. 39.14(a).[13] The Court detailed many of the other changes made to Art. 39.14 by the Michael Morton Act and concluded that these changes significantly expand the scope of criminal discovery in Texas to require disclosure of a great deal of evidence, even though the Legislature retained the word "material" in Art. 39.14(a).[14]

The meaning of "material"

The Court held that the meaning of "material" is plain, unambiguous, and synonymous with "relevant" when considered in context.[15] Students of statutory construction know that this means that there would be no need for the Court to look at legislative history to determine the meaning of the word "material." Unambiguous text would be construed according to its common usage. The Court looked at the common definitions of "material" and noted their similarity to the word "relevant."[16]

The Court noted that the Legislature did not use the phrase "material to guilt or punishment." This contrasts with how *Brady* and cases that follow *Brady* define the concept of "materiality." Materiality under *Brady* is specifically tied to the jury's determination of guilt or punishment and judged *in hindsight* in relation to all the evidence admitted at trial.

Materiality under Art. 39.14(a) is not.[17] Under Art. 39.14(a), "material" evidence need only have a persuasive effect on any issue in the case—what the Court called subsidiary issues.[18] The evidence should not be judged in relation to the entire record after trial. Rather, *prosecutors* now assess whether a particular piece of requested evidence has some logical connection to the facts of the case, *looking forward* at the time of the request, most often prior to trial. The Court acknowledged the difficulty for the prosecutor in making this determination prior to trial.[19]

The presumption from the Court's prior decisions

In determining what is meant by "material," one would think that the Court would look to its past decisions that have construed the language. And there is in fact a presumption that the Legislature's continued use of the phrase "material to any matter involved in the action" indicated an attempt to incorporate the Court's precedent interpreting the previous version of the statute. However, the Court held that this presumption applies only when there has been a previous, *authoritative* judicial construction of the phrase.[20]

The Court held that its many prior judicial interpretations of Art. 39.14 had not clearly focused on the meaning of the phrase "material to any matter involved in the action." Rather, the Court had focused on whether a trial court's refusal to order disclosure amounted to reversible error. Consequently, there was no previous, authoritative interpretation of what constitutes evidence that is "material to any matter involved in the action."[21]

Where did "material" come from?

The Legislature originally enacted Art. 39.14 as part of a revision of the Texas Code of Criminal Procedure in 1965—two years after *Brady* had been decided. So what about the Legislature's use of the word "material" and *Brady*'s use of the word "material?" That has to count for something, right? The Court made it clear that is simply not the case.

Beginning in 1958, a committee created by the State Bar began looking at revisions to criminal procedure in Texas. A resulting proposal was submitted in 1962—before *Brady* had been decided—and the revisions were passed in 1963, but the bill was vetoed by the Governor for non-substantive reasons. The bill passed again in 1965 with no substantive changes to the discovery provision.[22] Therefore, Art. 39.14 could not have come from *Brady*.

Art. 39.14 was actually patterned after its civil counterpart, Rule 167 of the Texas Rules of Civil Procedure.[23] At the time, Rule 167 provided, "Upon motion of any party showing good cause ... the court ... may order any party to produce [evidence] which constitutes or contains evidence material to any matter involved in the action."[24] The 1963 bill that proposed reformation of the Code of Criminal Procedure borrowed the phrase "material to any matter involved in the action" directly from Rule 167 of the Rules of Civil Procedure.[25]

Legislative history

As noted, the Court found the meaning of "material" to be unambiguous. Therefore, examination of legislative history was not necessary. Nevertheless, the Court held that the legislative history of the Michael Morton Act did not require a different interpretation.[26] The goal behind the passage of the Michael Morton Act was first to preserve a criminal defendant's rights under *Brady*. There was no specific discussion of why the Legislature chose to keep the phrase "material to any matter involved in the action."[27]

The Court did note that the first version of the bill specifically used the word "relevant," rather than "material," to describe the evidence subject to disclosure. The sponsors reached a compromise that deleted some text from the previous version of Art. 39.14(a) but kept the reference to evidence "material to any matter involved in the action."[28] Yet, throughout the life of the bill, the bill analyses continued to refer to the disclosure of "relevant" evidence.[29] Even though the Legislature did not use the word "relevant," the Court found that its intent was for "material" to mean essentially the same thing as "relevant." Therefore, the 7–2 Court held that the word "material," as it appears in Art. 39.14(a), means "having a logical connection to a consequential fact" and is synonymous with "relevant."[30]

The Court then had no difficulty in determining that the 33 exhibits in the *Watkins* case were "material to any matter involved in the action." The exhibits constituted documents used to prove two prior convictions for enhancement and other extraneous offenses. These exhibits were at least "subsidiary facts" that could assist a fact-finder in assessing the defendant's punishment. They had a logical connection to a consequential fact and should have been disclosed upon a proper request.[31]

Conclusion

What does the decision in *Watkins* mean for prosecutors attempting to decide if something should be disclosed to the defense when requested? If evidence is exculpatory for the defendant or impeaching of the State or its witnesses, it should be disclosed under *Brady* and Art. 39.14(h)—frankly, whether it was requested or not. If the evidence is not subject to a privilege, such as the work-product privilege or the confidential-informant privilege, it should be disclosed if it is relevant to any issue in the case—not just the controlling issues of guilt or punishment. ❇

Endnotes

[1] See Acts 2013, 83rd Leg., R.S., Ch. 49 (SB 1611), §2, eff. Jan. 1, 2014 (The Michael Morton Act).

[2] Tex. Code Crim. Proc. Art. 39.14(a).

The 7–2 Court held that the word "material," as it appears in Art. 39.14(a), means "having a logical connection to a consequential fact" and is synonymous with "relevant." The Court then had no difficulty in determining that the 33 exhibits in the Watkins case were "material to any matter involved in the action."

If evidence is exculpatory for the defendant or impeaching of the State or its witnesses, it should be disclosed under Brady *and Art. 39.14(h)–frankly, whether it was requested or not.*

[3] *Watkins v. State*, ____ S.W.3d ____, No. PD-1015-18, 2021 WL 800617 (Tex. Crim. App., Mar. 3, 2021).

[4] *Watkins v. State*, 554 S.W.3d 819, 821 (Tex. App.–Waco 2018).

[5] *Watkins*, 554 S.W.3d at 822.

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] *Watkins*, 554 S.W.3d at 822.

[8] *Watkins*, 2021 WL 800617, at *4.

[9] *Watkins*, 2021 WL 800617, at *5.

[10] *Watkins*, 2021 WL 800617, at *6.

[11] *Watkins*, 2021 WL 800617, * at 9. See Tex. Code Crim. Proc. Art. 39.14(h); Tex. R. Evid. 401.

[12] *Watkins*, 2021 WL 800617, at *18.

[13] *Watkins*, 2021 WL 800617, at *9.

[14] *Watkins*, 2021 WL 800617, at *10.

[15] *Watkins*, 2021 WL 800617, at *10.

[16] *Watkins*, 2021 WL 800617, at *12.

[17] *Watkins*, 2021 WL 800617, at *10.

[18] *Watkins*, 2021 WL 800617, at *11.

[19] *Watkins*, 2021 WL 800617, at *12. A prudent prosecutor "looking forward" in this manner should lean toward disclosure of a piece of evidence. See *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) ("a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. [See *Agurs v. United States*, 427 U.S. 97, 108 (1976)] ('[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure'). This is as it should be").

[20] *Watkins*, 2021 WL 800617, at *12.

[21] *Watkins*, 2021 WL 800617, at *13.

[22] *Watkins*, 2021 WL 800617, at *13.

[23] *Watkins*, 2021 WL 800617, at *13.

[24] *Watkins*, 2021 WL 800617, at *13-14.

[25] *Watkins*, 2021 WL 800617, at *14.

[26] *Watkins*, 2021 WL 800617, at *18.

[27] *Watkins*, 2021 WL 800617, at *19.

[28] In her dissenting opinion, Presiding Judge Keller used this circumstance as suggesting that "material" must mean something different from "relevant" because the Legislature consciously chose not to use the word "relevant."

[29] *Watkins*, 2021 WL 800617, at *19.

[30] *Watkins*, 2021 WL 800617, at *20.

[31] *Watkins*, 2021 WL 800617, at *20.

Zooming in to TDCJ

Do you remember when you were a kid, if you were watching a TV show or movie set in the future, everyone spoke to each other on some kind of video phone?

By Jon English
Prosecutor, Special Prosecution Unit

From the bridge of the U.S.S. Enterprise, to the living room of Marty McFly in *Back to the Future II*, we all just knew that when you spoke to a person in the future, you'd be able to both see and hear them, and they'd be able to see and hear you. Then, in 2010, the iPhone introduced us to FaceTime and it ... didn't change our lives. Like flying cars or jet packs, two other things Hollywood promised we'd all own by now, just having the technology available didn't create demand.

It took the pandemic for us to willingly turn on the cameras in our phones and laptops and intentionally point them at our washed-out, poorly lit faces and adopt video teleconferencing for, well, just about everything in our lives now. Today, the default meeting type is a "Zoom" meeting. Just the company title, Zoom, something most of us had never heard of in March 2020, has become a generic term like Kleenex or Legos.

In large part, conducting court over teleconference has been possible only because of the Texas Supreme Court's emergency orders during the pandemic.[1] Eventually, those pandemic orders will expire and not be renewed, and the question becomes whether Zoom court is here to stay. Some of that depends on pending legislation that would theoretically make it possible to have all forms of court proceedings over Zoom indefinitely.[2] Even if that legislation passes, it's not clear which courts would choose to continue on with virtual hearings over traditional in-person hearings.

There's no legislation required at all to continue with pleas over Zoom: It's already codified. Many of you have become familiar with the requirements of Texas Code of Criminal Procedure Art. 27.18, which sets forth guidelines for how to conduct a felony plea over videoconference. All you need is a program like Zoom that fulfills all the statutory requirements of CCP Art. 27.18 and a written waiver from all parties saying they consent to the use of videoconference.[3] And of course, always remember that even Zoom court has to be available to the public, so make sure you're simulcasting on YouTube or making the proceedings visible and audible in open court.

Pleading a prisoner

But what do you do when you need to obtain a plea from someone who is incarcerated in the Texas Department of Criminal Justice (TDCJ)? At least pre-pandemic, my guess is that most of you were having the inmates bench-warranted to your county. Maybe they're coming from a prison unit hundreds of miles away from your court. Maybe they have chronic medical issues. That's a lot of expense and risk on the part of your sheriff's office and your jail.

"Jon," I hear you saying. "There's got to be a better way!"

Well, I'm here to tell you there *is*! And it's just next door to CCP Art. 27.18, the videoconference statute's lesser-known cousin: CCP Art. 27.19.

This is the statute that allows prosecutors to take pleas from inmates the same way we take pleas from anyone else over videoconference. Legally, just like with CCP Art. 27.18, all you need is a platform like Zoom and a written consent form, and all of your prison-Zoom dreams can come true![4]

Except for one small problem. Who the heck knows how to logistically accomplish all the steps necessary to get an inmate in front of a camera, onto the internet, and into a Zoom meeting? I can tell you that the Special Prosecution Unit

(SPU), the organization I work for, most certainly did not. And that's surprising, because practically all our criminal division does is prosecute people who are already in prison for crimes they commit on TDCJ property while serving their sentences.

But teamwork makes the dream work. Or hang in there, kitten—it's almost Friday. Or when there was only one set of footprints, that's when I carried you. Or whatever motivational-poster saying floats your boat—the bottom line is a lot of unsung heroes (mostly our fearless investigators), dug in, worked the problem, and had us slowly moving our dockets again from remote locations all across the state.

Now that we've successfully completed several hundred of these online pleas, I can share with you the secrets of the trade that we at SPU have guarded with our lives, lo, these past 10 months. Mostly because we didn't want anyone to see how wince-inducing it was at the beginning. Also, because no one asked until now.

Now that we've successfully completed several hundred of these online pleas, I can share with you the secrets of the trade that we at SPU have guarded with our lives, lo, these past 10 months.

Step One: Access to Courts

When an inmate has been scheduled on a docket and you have decided he should appear by Zoom, your journey begins by contacting the Access to Courts division of TDCJ. In a nutshell, Access to Courts has existed in the past to allow inmates access to legal materials that educate them on the law so they can fight perceived injustices while confined. Notice nowhere in that job description does it say "field calls from around the state so you can help put inmates in front of a laptop computer to plead a case." But like so many of us, folks in the Access to Courts division of TDCJ have found themselves in an "other duties as assigned" situation while they wear all the hats required to bring the justice system through this pandemic.

Through hard work and diligence on the part of people such as Travis Turner, Deputy Director of the Administrative Review and Risk Management Division of TDCJ, the department has put into place its own policies and procedures for when an office requests an inmate for a plea. That process begins by emailing a request to Jeania Pegoda at jeania.pegoda@tdcj.texas.gov. Include in the email the inmate's name, his TDCJ and SID numbers, the unit where he is, and the day and time you will need him for the hearing. It doesn't hurt to include the cause number of the case you're trying to plead, just to make it easier to match up the plea paperwork later. And of course, it goes without saying that you need to include all of your contact information, including the county you work for.

Remember, your perception of time in the free-world is not the same as time in TDCJ-world. Everything takes longer in TDCJ-world than you think it's going to, through no fault of the folks who staff the units. People who work for TDCJ know this and have become accustomed to it. Now that you have read this paragraph, you know it too, so no pleading ignorance. Get requests in early. We're told a week is technically early enough, but that's cutting it extremely close. Two weeks is better. A month is fantastic. If your court resets cases four to six weeks out or more, start setting up the Zoom call as soon that happens.

The Access to Courts division needs advance notice partly because people there need to ensure that the unit housing the inmate is set up for a Zoom hearing. Not all TDCJ units are already outfitted with the technology needed for Zoom calls; some don't even have reliable internet connections. Setting everything up in advance with Access to Courts means they can send an IT strike-team out in anticipation of the hearing. Many catastrophic headaches are avoided this way.

The other reason Access to Courts needs advance notice is because they have now essentially become air traffic controllers when it comes to coordinating these dockets. My office, the SPU, with the sheer volume of defendants we request from around the state on a weekly basis, has more than enough work to keep the prisons hopping. Throw in requests from other free-world prosecutor offices, and some of the units may have several inmates scheduled to be in front of the sole laptop at the unit at the same time. Proper notice is essential to keep things from crashing, literally and figuratively.

Step Two: Law library

Access to Courts will put you in touch with the person or people at the unit who will be the contacts for getting the plea paperwork to the unit and for actually getting the inmate online the day of the plea. Most likely it will be someone at the law library who helps with these important but time-consuming steps.

The reason things get so tricky at this point in the journey is because the prosecutor, law library, and defense attorney all have to coordinate to make the next steps happen. The defense attor-

ney has to schedule a lay-in (prison lingo for "visitation") with the defendant/inmate. Almost certainly this will happen over the phone. That means the defendant/inmate and his attorney must both have identical copies of the plea paperwork to review together.

For this to happen, the prosecutor has to let the contact at the law library know when the lay-in is and coordinate with that contact about the best time to get her the paperwork. This is important because, again, these employees have lots of other jobs and lots of other responsibilities that do not involve the headaches of Zoom hearings. You need to be like Goldilocks and get them the papers not too early, not too late, but just right. That's going to solve a lot of headaches going forward.

After the lay-in has happened and the paperwork is all signed by the defendant/inmate, the law library will send it back to you. At this point, it's just up to you and the defense attorney to shuffle the papers back and forth like you would with any other Zoom plea until everything is signed and filed according to your local customs.

The law library will also be the go-to on the day of the plea. Supply these folks with the Zoom link and any other pertinent information you'd send to anyone else attending a Zoom hearing. Best practice is to touch base with your contact in the law library the day before to make sure she has received everything she needs from you to have the inmate in front of a laptop the next day.

Don't forget the judgment

Now that I prosecute all across the state in multiple jurisdictions, I can tell you this: No two counties anywhere in Texas seem to have the same procedure for preparing judgments. Some have the local prosecutor's office do it. Some have designated departments that do it. Some have the district or county clerk's office do it. Some have the court do it.

No matter who is supposed to do the judgments in your jurisdiction, you're not going to have a thumbprint on your judgment if you don't send it to the TDCJ unit along with the other plea paperwork. The unit will happily get the defendant printed for you, solving a major logistical problem. They'll even mail the originals of the documents back to you if that's what your office or court has decided needs to be filed (it's essentially the only way the fingerprint on the judgment will be legible enough to ever be used for enhancement purposes; once it's been faxed or scanned three or four times, it just looks like an unfortunate beetle was smushed into the thumbprint box).

Warden, I'm worried about the Beaver

Whenever you have business with a TDCJ unit, it behooves you to check in at some point with the warden's office. Not because the warden is your point person in securing a plea from an inmate (although he or she may prove to be so), but because in the TDCJ universe, the warden of the unit is absolutely the commander-in-chief and should be thought of as such. It is therefore at the very least a courtesy and at the very most a necessity to give the warden a heads-up about your plan to Zoom in to the unit and broadcast a plea back out to the free-world.

In fact, in some units, the warden's office is the only place where there is sufficient internet connection to even join a teleconference. Don't be that person who makes the warden come to work one day, only to find out his or her office isn't available because it's been hijacked for a plea by an out-of-county prosecutor who forgot to make a phone call.

Whenever you have business with a TDCJ unit, it behooves you to check in at some point with the warden's office. Not because the warden is your point person in securing a plea from an inmate (although he or she may prove to be so), but because in the TDCJ universe, the warden of the unit is absolutely the commander-in-chief and should be thought of as such.

Conclusion

I can't predict how long Zoom calls will be a tool that Texas courts choose to utilize for daily proceedings. And based on the number of pairs of cargo shorts I still own (and wear), you don't want me trying to predict the lifespan of fads. But even if Zoom court falls out of favor, it will remain an option for pleading inmates, and that means it's a tool you can keep in your own toolbox to meet your county's needs. At least until the next wave of technology comes along and changes everything again. ❇

Endnotes

[1] See 36th Emergency Order Regarding the Covid 19 Disaster, Misc. Docket No. 21-9026 (Tex. 2021).

[2] See SB 690 and HB 890, 87th Legislative Session.

[3] Tex. Code Crim. Proc. Art. 27.18(a)(2) and (3) (allowing for videoconference if "the videoconference provides for a simultaneous, compressed full motion video, and interactive communication of image and sound between" all parties, and requiring the software to allow counsel and client to communicate privately).

[4] Tex. Code Crim. Proc. Art. 27.19(a)(1).

Understanding the insanity defense

If you do this job long enough, you will inevitably have a brush with insanity.

By Zack Wavrusa
Assistant County and District Attorney in Rusk County

The long hours and high-stress caseload get to everybody. But because self-care isn't my area of expertise, I will just tell you about how the insanity defense works in Texas.

The insanity defense is not as common, nor is it as easy to execute as it appears on television and in books. That fact itself is not surprising, but the result is that some prosecutors, especially those who have never dealt with the defense directly, might have major misconceptions about how it works. Eventually, you will get a case where insanity, at least initially, is a real possibility. None of us can predict when that case will arise, so all of us need to have at least a basic understanding of the defense: what it is, how it is raised, how it is proven, and what happens after it is proven.

What insanity is not

Before anyone can really understand the insanity defense, we must first be able to distinguish the defense from incompetency to stand trial. This may seem like an obvious distinction, but crime victims, court clerks, and local journalists might not immediately understand it. For that reason, it's important for prosecutors to be able to clearly and simply articulate the differences between the two.

First and foremost, know that competency refers to a defendant's ability to stand trial. It's governed by Chapter 46B of the Code of Criminal Procedure and applies to misdemeanors and felonies where a person is facing incarceration.[1] A person is incompetent and therefore unable to stand trial when he doesn't have the ability to consult with a lawyer with a degree of rational understanding or doesn't have a rational and factual understanding of the criminal proceedings against him.[2] Either party or the court can suggest, by motion, that the defendant is incompetent to stand trial.[3]

Once a suggestion of incompetency has been made, the court will conduct an informal inquiry into the issue of incompetency.[4] This informal inquiry may consist of as little as defense counsel's suggestion that the defendant is incompetent.[5]

The next step is a formal incompetency evaluation conducted by a mental health expert. Once the evaluation is complete, the parties can choose to accept the expert's findings or proceed to a competency trial. If, through agreement or trial, the defendant is found to be incompetent to stand trial, the court has a few options but, at least in serious cases, the defendant will be placed in an appropriate mental health facility.[6] At this point, the defendant's competency to stand trial will be successfully restored or the health facility will determine that restoration is not possible. If the defendant is restored, the case can proceed to plea bargain or trial. If he cannot be restored, the State can pursue an involuntary civil commitment.

What insanity is

Some of you read the subheading above and said to yourselves, "The definition of insanity is doing the same thing over and over and expecting different results." A criminally insane person might do that, but it is not the legal definition of insanity.

Texas law, like that of all American jurisdictions, presumes that a criminal defendant is sane and that he intends the natural consequences of his acts.[7] Texas law, like that of many American jurisdictions, excuses a defendant from criminal responsibility if he proves, by a preponderance of the evidence, the affirmative defense of insanity.[8] This defense excuses the person from criminal responsibility even though the State has proven every element of the offense, including the *mens rea*, beyond a reasonable doubt. The test for de-

termining insanity is whether, at the time of the conduct charged, the defendant, as a result of a severe mental disease or defect, did not know that his conduct was wrong.[9] Under Texas law, "wrong" in this context means "illegal."[10]

The insanity defense isn't the kind of thing that gets sprung on you, nor is the process one that moves particularly quickly. Despite that, a possible insanity defense is something prosecutors should try to identify early and begin preparing for. How do you identify the cases where the insanity defense might be raised?

Raising the insanity defense

When it comes to the insanity defense, there is no laying behind the log for the defense. There is no reserving opening statement, offering unexpected evidence during the defense's case in chief, and hoping to put prosecutors on our heels in rebuttal. If the defense intends to raise the insanity defense, the attorney must file a notice of intent to offer that evidence at least 20 days before the case is set for trial.[11] If the court sets the case for a pre-trial hearing, the defendant must give notice at that hearing.[12] If the defense fails to provide this notice, evidence on the issue of insanity is inadmissible unless the court finds that there is good cause for the failure.[13]

The examination and report

After the defense files notice to present evidence on the issue of insanity, either party can request the appointment of one or more experts to examine the defendant and testify at any trial or hearing on the issue.[14] Once an expert is appointed, be prepared to forward copies of the offense report, witness statements, the defendant's statement, etc., to the expert prior to the examination.[15]

Both psychiatrists and psychologists can be appointed as experts by the court under Chapter 46C. Psychiatrists are medical doctors who specialize in psychiatry; they use talk therapy *and* medication with their clients. Psychologists still have advanced degrees, usually PhDs, but they most commonly use therapy only to treat their clients' mental health conditions.

Defendants will not always want to cooperate with whatever expert is appointed by the court. If this is the case, the judge can order him to submit to the examination even if he is free on bail.[16] If need be, the court can order a defendant on bail to be confined for up to 21 days for the examination to be completed.

The court-appointed expert must return a written report to the court within 30 days of when the examination was ordered.[17] After the court receives the report, it should provide copies to the defense and the State. The report should detail the procedures used in the examination as well as the examiner's observations and findings pertaining to the insanity defense.[18]

There will be instances where both parties agree that the court should enter a verdict of not guilty by reason of insanity (NGRI). The decision on whether to agree will depend on 1) the specific facts of the case, 2) the apparent quality or lack of quality of the psychiatrist's or psychologist's report, 3) office policy, or, more likely 4) some combination of all of the above. In deciding whether to agree, ask yourself questions such as:

- "Is it the best use of the State's time and resources to contest the issue of insanity before a jury when the defendant is charged with misdemeanor criminal trespass?" Does that answer change if the charged offense is injury to a child? Sex assault? Possession of a controlled substance?
- Can the decision to agree to a judgment of NGRI be justified to a crime victim when the psychologist or psychiatrist appointed by the court spent little time actually testing the defendant?
- Does your office have a policy that obligates a prosecutor to agree to NGRI when the court-appointed expert reaches that conclusion? Is there an internal office process to request the hiring of a new expert to conduct his or her own evaluation?

The insanity defense isn't the kind of thing that gets sprung on you, nor is the process one that moves particularly quickly. Despite that, a possible insanity defense is something prosecutors should try to identify early and begin preparing for.

Preparing for expert witnesses

Where the State and defense do not agree on an NGRI verdict, the case will go before a jury. Expert witnesses are not required to get the issue of sanity before a jury. They are, nonetheless, a reliable fixture in trials where the defendant's sanity at the time of the offense is at issue. Like all witnesses, it is critical to prepare for both the direct examination of the State's expert and the cross-examination of the defense's expert.

The State's expert. Do not call the State's expert to testify without speaking to her extensively beforehand. I don't care how many times you have read her report—pick up the phone and call her. If it's an option, drive to her office and talk face to face. Pre-trial preparation with the expert

is critical. It doesn't matter how many times you have read the relevant portions of the DSM-5 or how well you think you understand the work of a forensic psychiatrist or psychologist. You are (probably) not licensed in psychiatry or psychology, and these mental health sciences are not taught in law school or tested on the bar exam. The material is complicated and regularly evolving.

If the defendant was in jail at the time of the examination, look at the visitor logs to see how much time the expert spent at the jail. It's always nice to find out that the expert spent only 20 or 30 minutes with the defendant prior to issuing the report.

At trial, it will be the prosecution's goal for the expert to clearly communicate her opinion that the defendant was not insane under Texas law at the time the offense was committed. Set aside any prior experience you have with the subject and ask the expert to explain her opinion in terms so simple that even the least sophisticated jurors will understand it.

There will be a lot of ground to cover with the expert at trial. Talk about every bit of it during witness preparation. For example, discuss all the case materials she went over before even interviewing the defendant. Then you can let the jury know about all the offense reports, witness statements, school records, and medical records that the expert reviewed. The more well-versed the expert is regarding the particulars of the case, the more weight her testimony will carry with the jury (let's hope).

Part of the expert's examination of the defendant will have been a battery of tests to determine whether the defendant suffers from a severe mental disease or defect. Make sure that you understand and elicit testimony about how each of those tests work, how long they have been accepted in the profession, and what measures are in place to identify a defendant who might be malingering or exaggerating his symptoms.

It's very possible, maybe even likely, that the expert will diagnose the defendant with some mental ailment. Have her show you where in the DSM-5 the disease is mentioned. Make sure you understand how the disease presents itself and what symptoms the people who suffer from it will exhibit. Ask the expert if she believes the disease qualifies as a *serious* mental disease or defect. The first time I tried a case where the insanity defense was raised, I presumed that the mental disease our expert had diagnosed the defendant with was a serious one. Had the expert not happened to mention how he believed the disease, while very real, did not amount to a serious disease or defect, I would have never thought to ask.

If the expert does diagnose the defendant with a serious mental disease or defect, prepare to explain how someone can have said mental disease or defect but still be able to differentiate between right and wrong. This is where many insanity defenses come apart.[19] Remember here that while voluntary intoxication is not a defense to criminal prosecution in Texas, temporary insanity due to intoxication is an affirmative defense in Texas that can be raised during the punishment phase of the trial,[20] and it is not the same as an insanity defense. Make sure to get a good grip on this issue while preparing the expert.

The defense's expert. Cross-examination of the defense's mental health expert might end up being one of the most important parts of a trial where this defense is raised. Every case is different, as is every mental health expert, so don't look at the following as the Rosetta Stone of crossing defense experts because it's not. It's a series of jumping-off points for you to explore with the hopes that the ideas will lead to something valuable to your case.

Start by digging into the expert's background. Go to his website and see how he markets himself. If the expert says he specializes in OCD and anxiety disorders, do you think jurors would assign different weight to his testimony than if he billed himself as a forensic psychologist who specializes in competency to stand trial, mental states at the time of the alleged offense, and sentencing issues such as assessing future dangerousness? Of course they would, so be prepared to elicit that testimony from the expert.

If your office doesn't have a lot of experience with this particular expert, ask around at the prosecutor's offices in neighboring counties. Find someone who has dealt with this person before. Copies of reports in other cases, transcripts of testimony, and the first-hand experience of other prosecutors will all make your job a little easier.

Read the expert's report to see what materials he reviewed in preparation for examining the defendant. Did he review only the offense report and accompanying witness statements while overlooking other important records? If the defendant was in jail at the time of the examination, look at the visitor logs to see how much time the expert spent at the jail. It's always nice to find out that the expert spent only 20 or 30 minutes with the defendant prior to issuing the report.

The deeper your understanding of the DSM-5, the easier your cross of the defense expert will go. Brush up on the diagnoses you and the State's expert think the defense is most likely to reach.

The DSM-5 is full of material explaining how to diagnose a particular illness, how and when the illness presents itself, and what the associated symptoms are. Look for any inconsistencies between what is included in the DSM-5 and the defense expert's diagnosis. For example, if the defendant is diagnosed with Illness X and the DSM-5 says that Illness X typically presents during puberty, it would be very significant if the defendant was never diagnosed with that illness and the telltale symptoms were not exhibited during the defendant's puberty.

It goes without saying that the State's expert will be very helpful when it comes to preparing this portion of cross-examination. The State's expert can make sure that the defense's expert is applying the right medical criteria in diagnosing the defendant's mental illness. Esteemed Texas prosecutor Roe Wilson once encouraged attendees at a CLE to keep copies of both the DSM-IV and the DSM-5 handy when cross examining the defense expert, as it's not unheard of for an expert to reach a diagnosis based on DSM-IV material that has been updated or outright changed by the DSM-5. Your expert will be very helpful in designing a cross-examination that highlights those distinctions and the deficiencies of a diagnosis based on outdated criteria.

At the end of the day, remember that despite the prosecution's extensive preparation, the defendant's expert will probably know more about forensic psychology and psychiatry than you do. Go into cross with the mindset that you will get whatever concessions from the expert you can and make the points that you (and your expert) know you can make. Don't try to over-extend yourself in an attempt to get that "Perry Mason" moment in front of the jury. Letting the defense expert get the better of you is one of the worst things that can come out of cross, so play it smart and remember that you still have your own expert's testimony to combat anything that comes from the defense expert.

Voir dire

Address the likelihood of expert testimony and the law regarding the insanity defense with venire members during voir dire. You don't have to reinvent the wheel here. Question the panel about mental health testimony the same as you would with a DNA or controlled substance expert. Identify those people who have personal experience with mental illness or those who have expertise in the field who might second-guess the State's expert. Draw out those people who could never convict someone with a mental illness or never consider the full range of punishment even in situations where having the mental illness doesn't meet the legal definition of insanity.

When it comes to the law itself, make sure you spend time explaining Texas's version of the insanity defense. Like most areas of criminal law, there will be a lot of misconceptions about what "not guilty by reason of insanity" means. Clear that up for jurors and commit them to the law. You will undoubtedly have people on the panel who say that the insanity defense is just nonsense that criminals use to escape punishment for their crimes. There might not be any rehabilitating jurors who are out there on that extreme. If you start hearing that kind of comment from a venire member, politely shut him down and prepare for him to be struck for cause. If you let him ramble for too long, he may end up influencing those jurors who have honest misconceptions about the law and cause some people who could follow the law and be good jurors into saying something that gets them struck for cause.

Determining the issue of insanity

Both judges and juries shall find the defendant not guilty by reason of insanity if:

1) the State has proven the criminal allegation beyond a reasonable doubt and

2) the *defense* has established that the defendant was insane at the time of the alleged conduct by a preponderance of the evidence.[21]

If a jury trial is waived, the judge is permitted to determine the issue of insanity.[22] More often than not, the issue of insanity is decided by the judge when both parties are in agreement that NGRI is the appropriate verdict. When this is the case, the parties can agree to an NGRI verdict on the basis of stipulated evidence.[23]

In a jury trial, the issue of the defendant's sanity is submitted to the jury only if it is supported by competent evidence.[24] The jury cannot be informed about the consequences of an acquittal.[25] As in all criminal jury trials, defendants are entitled to instructions on defensive issues when raised by the evidence.[26] It's improper for a trial court to instruct a jury on insanity if the evidence is insufficient to raise the issue.[27]

In *Pacheco v. State*,[28] the Court of Criminal Appeals recognized that "predicated lay opinion testimony, when considered with facts and circumstances concerning an accused and of the offense" may be sufficient to raise the defensive

At the end of the day, remember that despite the prosecution's extensive preparation, the defendant's expert will probably know more about forensic psychology and psychiatry than you do. Go into cross with the mindset that you will get whatever concessions from the expert you can and make the points that you (and your expert) know you can make.

issue, but the evidence of lay witnesses who never undertake to express a conclusion or opinion on insanity is insufficient to raise the issue.[29] Evidence of a severe mental disease or defect alone is not evidence of insanity[30]—there must be some credible evidence that the defendant did not know his conduct was wrong.[31]

Jury instructions

If the case is tried before a jury, jurors will have three options when it comes to the verdict: guilty, not guilty, and not guilty by reason of insanity. Preparing the jury for these options is not as simple as adding NGRI to the court's verdict form. The jury must be specifically instructed on the insanity defense. Failure to include this instruction when there is credible evidence to raise the issue will result in a reversal on appeal, so be certain the instruction is in there. Where the language of that instruction comes from is a matter of personal preference to some degree. Many offices draw on their own charge banks; others will use a pattern charge book like McClung's, the Texas Bar's Pattern Jury Charge books, or samples provided in TDCAA's *Mental Health Law for Prosecutors* book.

There are big differences in the post-acquittal procedures for dangerous and non-dangerous defendants.

Regardless of which source you rely on, it is very important to spend time in closing argument addressing the jury instructions on the issue of insanity. The insanity defense is the perfect opportunity for a skilled defense attorney to put the idea of diminished capacity into the jurors' minds. Diminished capacity is not a defense in Texas, so don't let the defense do this. Dedicate time in the State's first closing argument to thoroughly explain the defense to the jury, using the language from the charge of the court itself. Save a minute or two of your remaining time in second close to refocus the jury on the issue and clear up any ambiguity or misconception the defense may have created during its closing argument.

Result of an NGRI

A verdict of NGRI is a verdict of acquittal.[32] NGRI is not like an ordinary acquittal, though. After receiving an NGRI verdict, the court must make a determination whether the offense the defendant was acquitted of:

1) involved serious bodily injury to another person,

2) placed someone in imminent danger of serious bodily injury, or

3) consisted of a threat of serious bodily injury to another person through the use of a deadly weapon.[33]

There are big differences in the post-acquittal procedures for dangerous and non-dangerous defendants. If the court finds the acquitted person was not dangerous, the court must determine whether there is evidence to support a finding that the person is someone with a mental illness or intellectual disability.[34] If the person does suffer from a mental illness or intellectual disability, the criminal court shall enter an order transferring the person to the court in your county with jurisdiction over mental health services under Title 7 of the Texas Health and Safety Code.[35] If need be, the court can order the person detained until such proceedings can be initiated.[36]

The story is decidedly different if the court determines the newly acquitted person is dangerous. The court's jurisdiction over such a person will continue until the person no longer suffers from mental illness or intellectual disability; the person is not likely to cause serious harm to another because of any severe mental illness or intellectual disability; or the total amount of time spent in jail prior to trial, institutionalization after being acquitted, and outpatient treatment equals the maximum term of the offense for which he was found NGRI.[37]

What does the court do with its jurisdiction of the acquitted person? Step one is to have the person evaluated for his present mental state and for a treatment plan. To do that, the court must order a transcript of the trial's medical testimony and all of the acquitted person's vital statistics be sent to the mental health facility where he has been committed.[38] Based on this information, the mental health facility will issue a report that details the acquitted person's mental health diagnoses, whether the person is likely to cause harm to another person, and treatment options and recommendations.[39]

Within 30 days of acquittal, the court will hold a hearing to determine the disposition of the acquitted person.[40] This hearing will function the same way as an involuntary civil commitment hearing under Title 7 of the Health and Safety Code. At this hearing, the State must satisfy a three-pronged test by clear and convincing evidence that:

1) the person has a severe mental illness or intellectual disability,

2) as a result of that mental illness or intellectual disability, the person is likely to cause serious bodily injury to himself or others if not

provided with treatment and supervision, and

3) inpatient treatment or residential care is necessary to protect the safety of others.[41]

The aforementioned report from the mental health facility is the key piece of evidence in presenting the person's mental state and appropriate treatment options.[42] If the court finds that the available evidence fails to establish that inpatient treatment is necessary but still finds the first two elements have been proven by clear and convincing evidence, the court will order outpatient treatment.[43] If the court finds that the first two elements have not been proved by clear and convincing evidence, it will consider whether civil commitment under Title 7 of the Health and Safety Code is proper, or it will order the person discharged and immediately released.[44] Orders committing an acquitted person to inpatient or outpatient treatment have to be reviewed by the court every year so that the judge may determine whether to renew the order.[45]

It's also possible that over time and between annual renewal dates, a person sentenced to inpatient treatment will see his mental health improve. If this happens, the acquitted person, the facility treating the person, or the State may request the court to modify its order to require outpatient or community-based treatment and supervision instead of inpatient treatment.[46] A court may similarly revoke an order placing an acquitted person in outpatient treatment on its own motion or the motion of any interested party if it finds that the person is failing to comply with the treatment regimen in such a way that indicates he *will* become likely to cause serious bodily injury to another person or that he already *has* become likely to cause serious bodily injury to another person.[47]

Jury trials

Obviously, the defendant has a right to a jury trial on the defense of insanity itself. It's less obvious what other proceedings can be decided by a jury too. Art. 46C.255 addresses which matters may be determined by a jury and which must be determined only by a judge. The State, the acquitted person, or the court can request a jury trial on the following:

- the disposition hearing under Art. 46.253;
- a renewal proceeding under Art. 46C.261;
- a modification or revocation proceeding under Art. 46C.266; and
- a discharge proceeding under Art. 46C.268.

A jury can never hear a proceeding to determine outpatient or community-based treatment under Art. 46C.262 or a proceeding to determine the modification or revocation of outpatient or community-based treatment under Art. 46C.267.

Appellate possibilities

An NGRI judgment can be appealed by the acquitted person and, in some limited circumstances, by the State. These possibilities are governed by Tex. Code Crim. Proc. Art. 46C.270. The acquitted person can appeal the finding that he committed the offense and the finding that the offense involved serious bodily injury or the threat of serious bodily injury.[48] Both the State and the prosecuted person may appeal the following:

1) Order of Commitment to Inpatient or Outpatient Treatment,

2) the order renewing or refusing to renew an order for inpatient or outpatient treatment,

3) an order modifying or revoking an order for treatment, and

4) an order discharging or denying discharge of an acquitted person.[49]

Conclusion

The insanity defense isn't something we see every day. Often enough, when prosecutors do see it, the experts will be in agreement and it won't be an issue to take before a jury. There will be, however, times when prosecutors must be prepared to explain the law to a victim before entering an agreed judgment of not guilty by reason of insanity, and other times where we have to argue the issue to a judge or jury. When those instances arise, they often do so in cases of the utmost importance to the victim and the community at large. For that reason, it remains an important issue for prosecutors to study and understand. ❇

There will be times when prosecutors must be prepared to explain the law to a victim before entering an agreed judgment of not guilty by reason of insanity, and other times where we have to argue the issue to a judge or jury.

Endnotes

[1] Tex. Code Crim. Proc. Art. 46B.002.

[2] Tex. Code Crim. Proc. Art. 46B.003(a)(1-2).

[3] Tex. Code Crim. Proc. Art. 46B.004(a).

[4] Tex. Code Crim. Proc. Art. 46B.004(c).

[5] Tex. Code Crim. Proc. Art. 46B.004(c-1).

[6] Tex. Code Crim. Proc. Arts. 46B.071 and 46B.073.

[7] *Martinez v. State*, 867 S.W.2d 30, 33 (Tex. Crim. App. 1993).

[8] Tex. Penal Code §8.01(a).

[9] *Id*.

[10] *Bigby v. State*, 892 S.W.2d 864, 878 (Tex. Crim. App. 1994).

[11] Tex. Code Crim. Proc. Art. 46C.051(b)(2).

[12] Tex. Code Crim. Proc. Art. 46C.051(c).

[13] Tex. Code Crim. Proc. Art. 46C.052, I researched the issue thoroughly and I could not find an instance where trial counsel was found to be ineffective for failing to timely file a notice of intent to raise the insanity defense.

[14] Tex. Code Crim. Proc. Art. 46C.101.

[15] Tex. Code Crim. Proc. Art. 46C.101(b).

[16] Tex. Code Crim. Proc. Art. 46C.104(a).

[17] Tex. Code Crim. Proc. Art. 46C.105(a).

[18] Tex. Code Crim. Proc. Art. 46C.150(b).

[19] There is certainly a political debate to be had about whether this element of the insanity defense is too difficult to meet. Because the purpose of this article is to discuss what the insanity defense is and not what it should or should not be, I will leave that debate for Twitter and the Texas Legislature.

[20] Tex. Penal Code §8.04(b).

[21] Tex. Code Crim. Proc. Art. 46C.153(a)(1-2).

[22] Tex. Code Crim. Proc. Art. 46C.152(a).

[23] Tex. Code Crim. Proc. Art. 46C.152(b).

[24] Tex. Code Crim. Proc. Art. 46C.151(a).

[25] Tex. Code Crim. Proc. Art. 46C.051.

[26] *Ferrel v. State*, 55 S.W.2d 586, 591 (Tex. Crim. App. 2001).

[27] *Jeffley v. State*, 938 S.W.2d 514, 516 (Tex. App.–Texarkana 1997, no pet.).

[28] *Pacheco v. State*, 757 S.W.2d 729, 736 (Tex. Crim. App. 1988).

[29] *Id*. at 735-736.

[30] *Nutter v. State*, 93 S.W.3d 130, 132 (Tex. App.–Houston [14th Dist.] 2001, no pet.).

[31] *Plough v. State*, 725 S.W.2d 494, 500 (Tex. App.–Corpus Christi 1987, no pet.).

[32] Tex. Code Crim. Proc. Art. 46C.155.

[33] Tex. Code Crim. Proc. Art. 46C.157.

[34] Tex. Code Crim. Proc. Art. 46C.201(a). The language of the CCP still refers to the terms "mental illness and mental retardation." Most other area statutes, including Texas Penal Code §8.01 defining insanity, do not use the term retardation. The medical profession, not to mention society as a whole, consistently uses the terms "mental illness" and "intellectual disability." In fact, the DSM-5 does not use the word "retardation" at all. Please know that my use of the term "intellectual disability" in reference to Chapter 46C of the Code of Criminal Procedure is synonymous with that statute's use of the term "mental retardation."

[35] Tex. Code Crim. Proc. Art. 46C.201(b).

[36] Tex. Code Crim. Proc. Art. 46C.201(b)(1).

[37] Tex. Code Crim. Proc. Arts. 46C.158 and 46C.268.

[38] Tex. Code Crim. Proc. Art. 46C.251(b).

[39] Tex. Code Crim. Proc. Art. 46C.252.

[40] Tex. Code Crim. Proc. Art. 46C.251(d).

[41] Tex. Code Crim. Proc. Art. 46C.256(a).

[42] Tex. Code Crim. Proc. Art. 46C.253(b).

[43] Tex. Code Crim. Proc. Art. 46C.257.

[44] Tex. Code Crim. Proc. Art. 46C.253(f).

[45] Tex. Code Crim. Proc. Art. 46C.261.

[46] Tex. Code Crim. Proc. Art. 46C.262.

[47] Tex. Code Crim. Proc. Art. 46C.266.

[48] Tex. Code Crim. Proc. Art. 46C.270(a).

[49] Tex. Code Crim. Proc. Art. 46C.270(b).

The unit-of-prosecution test strikes again in *Ortiz v. State*

In two separate cases, Orlando Ortiz and Dewey Barrett were charged with felony occlusion assault—assault committed by impeding the breath or blood circulation of a family member.

By Ali Nasser
Assistant Criminal District Attorney in Dallas County

Both requested a lesser-included-offense instruction on misdemeanor bodily-injury assault based on the theory that they caused bodily injury but did not impede the breath or circulation of the victim, and both were convicted after the trial courts denied their requests.

Two courts of appeals reached different conclusions on whether each defendant was entitled to a lesser-included instruction, and the Court of Criminal Appeals (CCA) settled the split. The CCA then held, in an opinion consolidating the two cases, that when the defendant challenges only the type of injury proved at trial, not the family relationship between offender and victim, bodily-injury assault is not a lesser-included offense of occlusion assault.

Facts and procedural history

Orlando Ortiz was charged with occlusion assault of Odilia Gomez.[1] The evidence at Ortiz's trial showed that he was in a dating relationship with her, and that on August 12, 2016, he hit her on the back of the head, strangled her, twisted her knee until it "popped," and hit her over the head with a frozen water bottle. Gomez's injuries from this assault included swelling, abrasions, and bruising.

Ortiz testified that he restrained Gomez by putting his hands on her neck but denied ever squeezing her neck or trying to strangle her. Based on his testimony, Ortiz requested a lesser-included-offense instruction on misdemeanor bodily-injury assault under the theory that he caused Gomez only bodily injury but did not impede her breathing or blood circulation. The trial court denied the request, and the jury convicted Ortiz of the charged offense.

On appeal, the San Antonio Court of Appeals agreed with Ortiz that the trial court should have allowed the lesser-included instruction and reversed the conviction, finding that bodily-injury assault is a lesser-included offense of occlusion assault and that there was some evidence that Ortiz only committed bodily-injury assault.[2]

Barrett v. State

Dewey Dewayne Barrett was also charged with occlusion assault.[3] The evidence showed that Barrett got into an argument with his wife, Glenda Mackey, and that Barrett strangled Mackey twice to the point that she "wheezed and gasped for breath." But at trial, Mackey denied that Barrett ever strangled her and instead said that he "punched her in the face several times."

Barrett requested a lesser-included-offense instruction on misdemeanor bodily-injury assault under the theory that he caused Mackey bodily injury by punching her in the face but did not impede her breathing or blood circulation. The trial court denied the request and the jury convicted Barrett of occlusion assault.

On appeal, the Tyler Court of Appeals disagreed that Barrett was entitled to the lesser-included instruction, noting that Barrett relied on evidence that he punched Mackey, which proved conduct different from the charged conduct of strangling Mackey. Because the conduct establishing the lesser-included offense differed from the conduct alleged in the indictment, the court of appeals held the trial court correctly refused

the lesser-included instruction and affirmed the judgment.[4]

The CCA weighs in

In November 2019, the CCA granted discretionary review of these two cases and consolidated them to determine whether Ortiz and Barrett were entitled to a lesser-included-offense instruction on bodily-injury assault. In March 2021, the Court issued its opinion, holding that Ortiz and Barrett were not entitled to a lesser-included instruction because, in their specific cases, bodily-injury assault is not a lesser-included offense of occlusion assault.[5]

Bodily-injury assault requires that the defendant cause bodily injury to another.[6] Although occlusion assault also requires a baseline showing that the defendant caused bodily injury to another, it requires two additional elements:

1) the family-relationship element: that the victim share a family or dating relationship with the defendant as defined by certain sections of the Texas Family Code; and

2) the occlusion element: that the offense be committed by impeding the normal breathing or circulation of the blood of the victim ("impeding injury") by applying pressure to the victim's throat or neck or by blocking the victim's nose or mouth.[7]

Any offense is a lesser-included offense if "it is established by proof of the same or less than all the facts required to establish commission of the charged offense."[8]

One helpful way to analyze this issue is to ask whether the family-relationship element was disputed at trial. If the family-relationship element is undisputed and the State then proves impeding injury, the jury must convict the defendant of occlusion assault, and it cannot convict the defendant of bodily-injury assault based on that same impeding injury.

What facts establish occlusion assault?

The majority in *Ortiz* relied on the unit-of-prosecution test to identify the facts required to establish the commission of occlusion assault. In applying this test, the majority explained that the unit of prosecution of occlusion assault is the specific injury from impeding the breath or blood circulation of the victim. Therefore, an impeding injury is required to prove occlusion assault.

So occlusion assault requires a showing of bodily injury—specifically, by proving impeding injury, and bodily-injury assault requires proof of any bodily injury—whether it is impeding injury or non-impeding injury. Does that mean proof of occlusion assault establishes bodily-injury assault?

It depends.

Scenario One: The family-relationship element is undisputed.

The CCA held that proof of occlusion assault would not establish bodily-injury assault "*when the disputed element is the injury*."[9] In other words, a defendant charged with occlusion assault can never receive a lesser-included-offense instruction on bodily-injury assault by arguing that the State proved only non-impeding injury.

One helpful way to analyze this issue is to ask whether the family-relationship element was disputed at trial. If the family-relationship element is undisputed and the State then proves impeding injury, the jury *must* convict the defendant of occlusion assault, and it *cannot* convict the defendant of bodily-injury assault based on that same impeding injury. The only way bodily-injury assault could be established in this scenario is if evidence of a *different, non-impeding injury* were shown.[10] This would require proving facts that are "different" from and "additional" to the impeding-injury facts that are required to prove occlusion assault.[11] Therefore, in this scenario, bodily-injury assault would not be established by proof of the same or less than all the facts required to establish occlusion assault.[12]

Scenario Two: The family-relationship element is disputed.

But what if the family-relationship element *is* disputed? The CCA said that "if the [family] relationship is at issue, then an instruction on misdemeanor assault may be warranted."[13] This is because, if the family-relationship is disputed, proving impeding injury would not require the jury to convict the defendant of only occlusion assault. If the jury found the defendant did cause impeding injury but did not have a family or dating relationship with the victim, then it would have to convict the defendant of bodily-injury assault.[14]

In such a scenario, bodily-injury assault would be proven by the same impeding injury required to prove occlusion assault. Therefore, bodily-injury assault in this scenario would be a lesser-included offense of occlusion assault because it could be established through the same or less than all the facts required to prove occlusion assault.

Applying the rule

Barrett and Ortiz never challenged the family-relationship element at trial.[15] Therefore, they fit

into the first scenario above, and bodily-injury assault was not a lesser-included offense of the charged occlusion-assault offense. Concluding that neither Ortiz nor Barrett were entitled to a lesser-included-offense instruction, the CCA reversed the San Antonio Court of Appeals' judgment in *Ortiz* and affirmed the Tyler Court of Appeals' judgment in *Barrett*.

Concurring and dissenting opinions

Judge Yeary issued a concurring and dissenting opinion, and Presiding Judge Keller, joined by Judges Walker and Slaughter, issued a dissenting opinion. Both Judge Keller and Judge Yeary agreed that:

1) impeding injury is not a unit of prosecution,

2) bodily injury is the unit of prosecution in occlusion assault cases, and

3) the occlusion element is a specific manner and means of causing bodily injury that may elevate misdemeanor bodily-injury assault to a third-degree felony.[16]

But Judge Keller disagreed with Judge Yeary about the unit of prosecution for bodily injury. She reasoned that the unit of prosecution in assault cases is all "damage suffered by the victim in a single transaction."[17] She gave both a textual rationale—the legislature defined the unit of prosecution as "bodily injury" and not "a bodily injury"—and a policy rationale—pointing out that the transactional interpretation avoids proportionality, jury unanimity, and double jeopardy concerns.

Judge Yeary expressed that he was "unprepared" to say that the unit of prosecution for assault is transactional, instead reasoning that the unit of prosecution for assault is "any physical injury sustained as a result of a particular, discrete, assaultive act."

The effect of *Ortiz* going forward

Prosecutors of occlusion-assault cases should be aware that if only the injury element is disputed at trial, not the relationship element, the defendant is not entitled to a lesser-included-offense instruction on bodily-injury assault. Similarly, prosecutors should not rely on getting such a lesser-included-offense instruction on bodily-injury assault in occlusion assault cases. Whether an instruction is warranted will come down to whether there is evidence disputing the family-relationship element.

However, prosecutors can still seek a conviction for bodily-injury assault without relying on a lesser-included-offense instruction. As discussed in *Ortiz*, occlusion assault relies on a different unit of prosecution from bodily-injury assault, so where there is proof of both impeding injury and non-impeding injury arising from the same assaultive transaction, a prosecutor should be allowed to charge a defendant with both occlusion assault and bodily-injury assault based on the same transaction without violating double jeopardy.

The imminent demise of *Irving v. State*?

In some interesting dicta, the CCA also suggested that its opinion in *Irving v. State* was misguided.[18] In *Irving*, the defendant was charged with committing aggravated assault by either 1) attacking the victim with a deadly weapon, a baseball bat, or 2) causing serious bodily injury to the victim by hitting her with a baseball bat.[19] After the State's case in chief, Irving presented evidence that he never hit the victim with the baseball bat but instead physically struggled with her until both of them fell into glass shelves. Irving denied ever attacking the victim or causing her serious injury.

Based on his testimony, Irving requested a lesser-included-offense instruction for bodily-injury assault. The CCA held that the trial court did not err in refusing the request because it was not "based on facts required to establish the commission of the offense *charged*."[20] The conduct of falling on top of the victim is not included within the charged conduct of hitting the victim with a baseball bat. On that reasoning, the CCA affirmed the trial court's judgment.

In *Ortiz*, the majority labeled the *Irving* analysis as "faulty."[21] The majority pointed out that the manner and means of committing aggravated assault is not the unit of prosecution for the offense. Therefore, a difference between the non-statutory manner and means alleged in the indictment and the non-statutory manner and means of committing a proposed lesser-included offense "should not foreclose an instruction on a proposed lesser-included offense."[22]

This logic borrows from the CCA's variance jurisprudence. In *Johnson v. State*, the CCA held that a variance between indictment allegations

In some interesting dicta, the CCA also suggested that its opinion in Irving v. State *was misguided.*

and the proof presented at trial can never be material if the allegations in question 1) are not statutory elements of the charged offense and 2) do not describe the unit of prosecution.[23] The majority in *Ortiz* suggests that, similarly, where there is a variance between the indictment allegations and the proof presented to establish a lesser-included offense, the instruction should be given if the allegations in question 1) are not statutory elements of the charged offense and 2) do not describe the unit of prosecution.

Therefore, while the majority declined to overrule *Irving*,[24] its focus on the unit of prosecution in its lesser-included-offense analysis may well preclude *Irving*'s application.

Finally, the CCA also declined to address whether discrete injuries sustained during a single assaultive transaction constitute separate units of prosecution, but the concurring and dissenting opinions in Ortiz *at least shed some light on how certain judges feel about the issue.*

Just what is an assaultive unit of prosecution?

Finally, the CCA also declined to address whether discrete injuries sustained during a single assaultive transaction constitute separate units of prosecution, but the concurring and dissenting opinions in *Ortiz* at least shed some light on how certain judges feel about the issue. Judge Yeary would find each injury sustained by a discrete assaultive act constitutes its own unit of prosecution for assault.[25] Presiding Judge Keller and Judges Walker and Slaughter, on the other hand, would find that the unit of prosecution for assault is "all the damage suffered by a victim in a single transaction."[26] ❇

Endnotes

[1] *Ortiz v. State*, No. 04-18-00430-CR, 2019 WL 4280074, at *1 (Tex. App.–San Antonio Sep. 11, 2019, pet. granted); Tex. Penal Code §22.01(b)(2)(B).

[2] *Ortiz v. State*, 2019 WL 4280074, at 2-4.

[3] *Barrett v. State*, No. 12-18-00023-CR, 2018 WL 4907822, *1 (Tex. App.–Tyler Oct. 10, 2018, pet. granted).

[4] Id. at *2–3.

[5] *Ortiz v. State*, Nos. PD-1061-19, PD-1362-18, ____ S.W.3d ____, 2021 WL 900673, at *1 (Tex. Crim. App. Mar. 10, 2021).

[6] Tex. Penal Code §22.01(a)(1).

[7] Tex. Penal Code §22.01(b)(2)(B).

[8] Tex. Code Crim. Proc. Art. 37.09(1).

[9] *Id*. at *1.

[10] *Ortiz*, 2021 WL 900673, at *3–4.

[11] *Id*. at *4.

[12] See Tex. Code Crim. Proc. Art. 37.09(1).

[13] *Ortiz*, 2021 WL 900673, at *4.

[14] See Tex. Penal Code §22.01(a)(1), (b).

[15] *Ortiz*, 2021 WL 900673, at *4.

[16] *Id*. (Keller, P.J., dissenting); *id*. at 6 (Yeary, J., concurring and dissenting).

[17] *Id*. at *13 (Keller, P.J., dissenting).

[18] *Id*. at *4–5.

[19] *Irving v. State*, 176 S.W.3d 842, 845 (Tex. Crim. App. 2005).

[20] *Id*.

[21] *Ortiz*, 2021 WL 900673, at *5.

[22] *Id*.

[23] *Johnson v. State*, 364 S.W.3d 292, 298–99 (Tex. Crim. App. 2021).

[24] *Ortiz*, 2021 WL 900673, at *5.

[25] *Ortiz*, 2021 WL 900673, at *6 (Yeary, J., concurring and dissenting).

[26] *Id*. at *13 (Keller, P.J., dissenting).

Making the most of the time jury trials have left behind

As a young prosecutor, there is nothing more intriguing than the chance to work on a big, exciting, or complicated case.

By Amy M. Eades
Assistant District Attorney in Brazos County

We want to be in the middle of it all right away. Although it's unlikely we would be working on a murder in the first few years, there are many ways we can start to work on the skills we need to be successful down the line.

In many ways, COVID-19 has changed the way our offices operate. Many jurisdictions have foregone jury trials during the pandemic, leaving prosecutors without their weekly, bi-weekly, or monthly chance to exercise and strengthen their courtroom skills. Our calendars may still be full of daily tasks and non-jury dockets, but our work life is missing the excitement and challenge that comes with being in jury trial representing the great State of Texas. This is especially true for young prosecutors who rely heavily upon jumping into the well with our more experienced counterparts to develop strong trial muscles.

My office, like many all over this state, is filled with what I like to call subject matter experts. I'm fortunate that if I step into any given workspace, the prosecutor inside has a wealth of knowledge and experience he or she is willing to share. All of them started with a desire to learn and grow, but that desire can't stand alone—these subject matter experts also had the drive to reach that goal, the gumption to ask for opportunities, the confidence to walk through doors when they opened, and the humility to recognize they didn't know it all.

While conventional methods of learning and growing aren't necessarily at our fingertips, there are still many opportunities for the taking. The void in our schedules left by the lack of jury trials has created time and space for prosecutors to challenge themselves and sharpen their trial practices.

I took my own advice when preparing for this article and reached out to some of the human treasure troves in my office to get their suggestions on what a young prosecutor can do to develop skills and knowledge without going to trial, and I have written them out below. Keep in mind that each of the things you choose to spend your time on should have a purpose. The goal is to make intentional choices toward honing your skills that will translate to value at every stage of your career, from Class B misdemeanors to capital murders. Here are some suggestions.

Start with your own caseload

When we are dealing with the fast pace of trial preparation and presentation, it can become difficult to spend the amount of time and effort on our new cases we would like to. One of the unique opportunities we're presented with is the time to really dive deep into what should be the first priority: our own caseload. While this is a great way to make sure you're extremely prepared for docket, we can also develop strategies, craft arguments, and identify weak spots in cases. These practices are instrumental in formulating a strong and successful trial plan.

Dig into the details. Take time, for example, to watch every minute of that body camera footage and look for things that could be helpful—or harmful!—to your case. Let's assume you just received a drug possession case and you anticipate, from the evidence, you may get the classic "not my pants" defense argument (it happens more than one would think!). As you watch the video, you observe the defendant, over the course of the investigation, continually placing his hand

The void in our schedules left by the lack of jury trials has created time and space for prosecutors to challenge themselves and sharpen their trial practices.

inside the pocket where the drugs were later found—that may be something you use to counteract the defense's argument. Paying attention to the details will pay off.

Even if the cases don't go to trial, the additional time spent reviewing and analyzing cases will build necessary skills: how to develop strategies, formulate persuasive arguments, and anticipate defense claims. Applying this practice and using the arguments you craft during negotiations may show which are more effective than others. You'll quickly learn that it pays to be the most prepared person in the room.

Try contested hearings. Another way to weaponize one's own caseload is to lean into contested hearings before a judge. Contested hearings before the court, which can include probation revocation hearings, bench trials, motions to reduce bond, motions to revoke or increase bond, etc., are a great opportunity to create trial-like scenarios and test your preparation and presentation skills until juries are back in the box. The first few jury trials or hearings a young prosecutor does are kind of a blur—you really are just trying to make sure nothing blows up and that you remember where to stand! These court settings help you understand how things operate and learn what works for you. Always remember to be respectful of the court's time, of course, but don't be afraid to use *every single opportunity* to practice these essential skills—yes, even in a motion to reduce bond hearing!

Each hearing is an opportunity to practice and strengthen core advocacy muscles required for jury trials: witness interviews, witness examination and cross examination, anticipation of defense strategy, caselaw research, and more. While some of these skills are basic, that doesn't necessarily mean they are simple, and if they're done correctly, they can be very effective and persuasive. Time spent honing these foundational skills is time well-spent. Remember, the goal is for each part of a presentation to work together and to work toward final argument. You read that right: Closing argument begins to build long before the State rests. In fact, direct and cross examinations should be laying the groundwork for closing argument, and you can begin to compose that argument before ever meeting with a witness.

Craft direct and cross examinations. Take advantage of this extra COVID-era time to dig into crafting direct and cross examinations. This process begins long before you ever sit down to write a question. For example, a meeting with a probation officer on a motion to revoke probation or motion to proceed with adjudication can include more than going through the list of the alleged violations. Before that meeting, read through the hundreds of pages of chronological notes and find the gems hidden there. The notes you take during that review will later be the foundation for your questions for direct examination, which should lay the groundwork for closing argument, before the meeting even begins.

As the meeting is happening, it should be driven by the information you already have in the officer's reports, but it should also be flexible enough that you don't miss the additional insights from the live witness. This ability to be purposeful as well as flexible in witness meetings comes with time and experience—start working toward that now, as these hearings require prosecutors to present a thorough and thoughtful case to meet the State's burden of proof.

Try bench trials. The most jury trial-like scenario of these options is a bench trial. If a case has broken down in negotiations, or if it's on a jury trial docket already but you are confident that a trial to the bench would result in a just outcome, consider waiving a jury. Preparation for a trial to the court will require most, if not all, of the same work as a jury trial, including interviewing witnesses, preparing direct examinations, anticipating defense strategy, writing cross examinations for defense witnesses, and building a caselaw portfolio by researching specific legal issues.

Build punishment cases. You can also use this time to learn how to build a punishment case. Each prosecutor approaches punishment a little differently, but some examples of such evidence can include juvenile records, jail phone calls, offense reports, photographs from extraneous offenses, witnesses or victims of prior offenses, and evidence from the case at hand. Some cases will have more punishment evidence than others and not all of it is necessarily effective, but the nuance in determining which evidence to present is a skill worth honing.

This practice of building a punishment case—requesting and analyzing records and reports, meeting with witnesses or victims of prior offenses, etc.—will teach you about strategy and witness presentation and will also help you to craft offers and arguments. While not exactly the same as a jury trial, you can also use these hearings to develop your own method of preparation.

This is both practical and strategic. Find what works for you and then learn what persuades others.

Volunteer to help other prosecutors

This might be a great time for young prosecutors to venture into other divisions to get some diverse experience. Step into other areas of the office that haven't stopped—or even slowed down—because of COVID. If your office handles juvenile cases, chances are good that you can help out with a contested hearing any day of the week. Juvenile detention hearings, like miniature writ hearings, are an opportunity to examine witnesses and make arguments, with the added challenge of having to think on your feet a little more quickly than in a bench trial for which you've prepared over weeks or months.

You can also reach out to intake or appellate prosecutors. While it may seem counter-intuitive to seek out experience in the processes that happen before and after trial, having an understanding of the intake process, as well as issues that arise in appeals, will be tremendously helpful as you prepare and present a compelling and solid case to a jury. Having the experience of working up a possession of marijuana case to be filed by complaint and information or a possession of controlled substance case to be presented to a grand jury will give you a broad understanding of what work goes into intake, as well as aid you in case evaluation. When you see the next drug possession case come across your desk, you'll know what work was done to get the case to you, and you'll be better equipped to evaluate that case for its strengths and weaknesses.

There is also a ton of valuable insight and experience to be gained by writing appeals. Preparing an appellate brief requires reviewing the reporter's record and becoming familiar with how the trial progressed, giving you insight into every detail of the trial and allowing you to read every direct examination and cross examination, each objection and argument in response, bench conferences, and arguments. Working on appeals allows you to continue to build on your own skills by learning from the successes and mistakes of other prosecutors. This practice also teaches you about legal issues that present themselves before, during, and after trial. You may see these same legal issues in a case down the line. Whether the case presents a legal argument that is very nuanced or one that comes around quite often, having a caselaw portfolio to call upon later is extremely valuable.

Diversifying your experience by reaching out to other divisions is valuable in many ways. Not only will you be actively working to become a better trial attorney, but you are showing your chief and other leaders around the office that you are willing and able to step in and fill other roles within the office.

Be willing to help

One of the very best things about our profession is how willing we are to share our experiences and knowledge with each other. The human treasure troves sitting in the offices around you are great resources—and we should all seek them out!

Experienced prosecutors often have the complex cases that young prosecutors are itching to work on. Maybe you are interested in learning the intricacies of a case involving organized crime and gangs, you have a passion for trying domestic violence cases, or you want to learn how to prepare a capital murder case for trial. These cases probably aren't landing on your desk just yet, but the chance to learn is likely still there. Complex cases require an extensive amount of work outside of the courtroom, including document review and analysis, caselaw research, discovery review and organization, and much more. Helping with such projects opens the door to new challenges and learning. Don't be afraid to ask a more seasoned prosecutor if she needs help with these cases. There is a chance that she hasn't had time to get to some of those more detailed and time-consuming projects.

Some things you work on won't be something you want to pursue as a career path, but that's OK. In fact, that's a good thing! Everything you say yes to—every project, every opportunity—will teach you something. You probably won't be doing the most exciting work, but the best opportunity to get involved is to seek out those projects that allow access to something you are excited to learn about and work alongside a more experienced prosecutor. Reviewing documents for a capital murder trial has more significance to the case and to your growth than simply knowing how to read PDFs. Each prosecutor has a unique preparation style that has developed over the years. What better way to develop your own prep

This might be a great time for young prosecutors to venture into other divisions to get some diverse experience. Step into other areas of the office that haven't stopped–or even slowed down–because of COVID.

technique than to observe the different styles of the more experienced prosecutors in your office?

Seeking out these projects will also mean deeper discussions with senior prosecutors. For example, if you are tasked with reviewing a phone dump in a case where there are allegations of gang activity or organized criminal activity, you will likely spend hours going through all of the data pulled from the phone. Sure, you need to know what to look for to be helpful, but you should take the time to ask *why* that information is important or pertinent to the case. Don't miss the chance to learn something beyond the task. Most likely, you will collect quite a bit of information while reviewing the data, and it may be fine to just type it out in a bulleted list. But here is another opportunity to create value from this task: Talk with the senior prosecutor about how he might use this information during trial and how he wants the information documented or saved. Not only will such a query start a conversation about trial strategy with the more experienced prosecutor, but you will probably also get some insight into this colleague's preparation style.

Understand that growth happens over time and it is a marathon, not a sprint. All experts start at square one, but they did have to start.

These opportunities might not be as readily available as we would like, but showing that you can take initiative and make yourself available goes a long way; it may even put you at the top of the list for the next project. If you continue to make a purposeful choice to be available and willing to learn, the right door will open.

Conclusion

Before I began writing this article, a coworker and friend asked what I did in 2020 that makes me the proudest. I had to think about it. Any other year, I would have found a moment from trial to call on—a challenging cross-examination that went well or maybe a clever line from a closing argument—but last year was different. The year 2020 and COVID forced me to get creative in finding opportunities for growth. As much as I miss having a jury in the box, I'm proud to say that I challenged myself by stepping outside of what I believed was "for me" and into opportunities by being present and willing to say "yes."

If you feel, as I did, unsure or afraid to step into opportunities that seem "too big" or "too advanced," this is your invitation to do just that. Understand that growth happens over time and it is a marathon, not a sprint. All experts start at square one, but they did have to start. We are limited only by our willingness to try, so don't be afraid to take advantage of the wealth of knowledge throughout your office and across the state. Make the most of this time to practice those trial skills, so when you finally have a jury looking to you, you'll know exactly what to do—and even where to stand! ❇

Crossover Court helps juvenile offenders with open CPS cases

Let's state the obvious: We cannot view the juvenile justice system as a mini version of the adult criminal system. Although there are plenty of shared aspects[1] between them, they are two distinct systems.

By Joshua Luke Sandoval
Assistant Criminal District Attorney in Bexar County

At its core, juvenile justice seeks a result in the best interests of the respondent (juvenile).[2] As such, many tools the State utilizes when prosecuting delinquent conduct[3] focus on rehabilitation. Part of the logic behind this focus is imparting upon the respondent life skills and coping mechanisms to avoid involvement in the adult criminal justice system down the road. Although living in the fallen world that we do, where rehabilitative conclusions are not always feasible, it is praiseworthy to look deeper into some of the unique approaches that juvenile justice specialists use daily to effectuate some of this desired change.

One of these unique approaches is the Crossover Court, which serves youth who have both referrals for offenses as well as Child Protective Services (CPS) involvement. This program seeks to decrease recidivism while increasing services to such youth. As one can expect in a state as large and diverse as Texas, there are many differences among our jurisdictions, and there can be multiple solutions to these shared similar problems. For this article, I will focus on some of the specific approaches Bexar County has undertaken over the past decade in combatting this issue.

The intellectual beginnings

In 2010, the Georgetown University Center for Juvenile Justice Reform established a practice model for handling juveniles who have both referrals for delinquent conduct and a particular involvement with CPS.[4] Research has identified this specific subset of youth as being at particular risk of "crossing over" between the two systems (CPS and juvenile justice), often suffering negative outcomes. To minimize them, the Center created a program that could "improve outcomes for youth, families, and communities" through increased communication and concentrated services with a dual-system approach that involves assistance from both agencies.[5]

As you have probably guessed, discerning reader, communication is of foundational importance, and the first step is quick identification of eligible youth between the juvenile system and CPS. The necessity of communication continues throughout the process as well, involving not only the aforementioned agencies, but also the youth and her family, as the practice model encourages collaborative case management among multiple involved parties. Thus, frequent team assessment discusses improvement in the youth's supervision and progress toward the ultimate goal of permanency and case closure. Currently, seven jurisdictions in Texas have created provisions for crossover courts based on this model.[6]

Identifying problems and constructing solutions

Nearly 10 years ago, Bexar County began to address an issue that was anything but new. For quite some time, those working with CPS or within the juvenile justice system saw a burden on a very specific subset of youth, namely those with both juvenile referrals for delinquent conduct and CPS involvement in their families. As participants in these two systems, youth had to

abide by two sets of requirements and orders, one from the CPS court and the other from the juvenile court. On paper this doesn't sound like too much of a burden; however, as with most things in life, it could be difficult in practice.

For the juveniles and their families trying to stay afloat in the choppy water of both systems simultaneously, successful participation was not an easy task. In Bexar County, the two dockets are not only held in different courts but also in different judicial complexes roughly three miles apart. Each court had its own set of participants, and each was managed independently. For a system that can already be confusing for those trained and well-versed in it, it became impossibly frustrating for those with not a bit of training.

Knowing who is eligible is one thing–readily identifying them can be slightly more difficult. Eventually, the computer systems of CPS and the juvenile department were modified to open up communication between the two agencies on this matter.

Furthermore, supervision of the youth was often separate, with CPS officials peering in for one matter and juvenile justice professionals touching base on another. Worse, when the systems weren't separating issues, they were needlessly duplicating services and functions. Youth could find themselves required to attend two sets of services that were nearly identical in nature. These redundancies were frustrating for the youth and did not disseminate valuable information efficiently for the two systems. Additionally, the separate dockets required double the number of court appearances, which frequently had adverse effects on school attendance and academic performance for the youth and caused hardship with jobs and childcare for their families. For those youth involved in both CPS and juvenile justice, there was clear threat of getting lost in the labyrinth.

In 2012, the involved professionals began to review methods to improve the situation. After a 10-month research and planning process, Bexar County adopted the Crossover Court model as developed by the Georgetown University Center for Juvenile Justice Reform. Accepting its first case in January 2013, this court provides a mechanism to transfer youths' CPS cases to the juvenile district court so that both matters can be heard in the same location, by the same judge, and with services offered by the same team. Operating under the mantra of "one child, one team," this court makes communication an important pillar and ensures that participating youth receive effective care and services in both systems.

Eligibility

The obvious first two requisites are a youth's involvement in both the CPS system as well as a juvenile referral for delinquent conduct. In Bexar County, the level of CPS involvement required to trigger eligibility for Crossover Court includes 1) an open legal CPS case where the children have been removed from the family and who 2) are in the conservatorship of the state. For our purposes here, CPS involvement can include either Permanent Managing Conservatorship (PMC) or Temporary Managing Conservatorship (TMC).[7]

Knowing who is eligible is one thing—readily identifying them can be slightly more difficult. Eventually, the computer systems of CPS and the juvenile department were modified to open up communication between the two agencies on this matter.[8] Thus, in practice, if a juvenile with CPS involvement receives a referral for delinquent conduct, the computer system reflects this youth's eligibility for the crossover program. This quick identification of eligible juveniles starts initial discussions between agencies, which transforms into consistent communication throughout the process.

Case staffing

Once a participant is deemed eligible, a series of intensive staff meetings commence. The conversation begins when representatives of CPS and Juvenile Probation meet to discuss eligible youth. In Bexar County, this conversation is consistent and frequent, with meetings taking place weekly to look deeper into the lives of these youth. If, after an initial screening of a particular case, representatives from both agencies feel that a particular juvenile may be a good fit for the program, the case will proceed to a secondary level of staffing. It is noteworthy that these staffings are not constructed for exclusionary purposes. Most youth who qualify for the program are accepted, the exceptions normally due to matters still pending in the CPS court or a particularly serious charge.

This secondary staffing involves a representative from the local Juvenile Probation Department discussing specific cases with members of the Criminal District Attorney's Office. Prosecutors from the CPS unit and Juvenile Division offer input on the cases and the particular challenges that a youth may face. Both prosecutors have very specialized roles within the system and possess unique insight into important aspects of an eligible youth's CPS case or juvenile referral.

The CPS ACDA in Bexar County has a variety of considerations when contemplating if a youth

will be a good fit for Crossover Court. Some of these include placement options, family involvement, whether other specialty courts could better serve the youth's needs, and where the case is in the CPS process. In terms of placement options, those that are closer are obviously preferred, especially in situations where the youth's family is actively involved.[9] Many offices have multiple "diversion" programs, including those for youthful offenders, human trafficking, mental health, or other specialty courts, that may give a child a better chance to succeed. And if the child is in TMC and a trial on termination of parental rights is on the horizon, it may be advantageous to at least temporarily delay the transfer out of CPS court.

Regarding the Juvenile ACDA, the staffing considerations are slightly different from what one may expect. For many specialty court programs, the main issue a prosecutor considers is whether a respondent merits admission or will succeed; however, in the juvenile system, the calculus is different, as the entire purpose of the crossover program is to aid youth who are dually involved and to increase efficiency in the system. As such, many on the referral (juvenile justice) side have a more liberal approach to participation and avoid approaching staffing with a yea-or-nay mentality. For most juvenile justice specialists, the focus in Crossover Court is the increased communication and efficient resolution of the CPS matter. When reviewing cases, the Juvenile ACDA serves as an important resource for information on the status of a referral and even the likelihood the case may be resolved. Finally, the juvenile prosecutor's knowledge of a respondent's referral history can be of particular benefit, especially in instances when thinking of a suitable placement facility if a change is needed.

It is very important to note that the ACDA in the juvenile division still has a case of delinquent conduct to consider. Participation in Crossover Court does not mean that a juvenile referral should be rejected. This is especially true in situations with a victim or public safety concerns. Although this prosecutor is part of a team to aid the respondent, the referral is by no means abandoned in a misguided attempt at altruism. Most of us can agree that for respondents at this young age, delinquent conduct is often a symptom of a greater problem. In these situations, court supervision and various juvenile probation services are often the most efficacious means of addressing this behavior, and to prematurely non-suit a referral may be depriving the team of the only way of offering those services.

Once secondary staffing is completed, the Juvenile Probation crossover supervisor will prepare a list of recommendations and present it to the judge for independent review. In Bexar County, the 436th Judicial District Court, one of three juvenile courts, serves as Crossover Court. Once the presiding judge decides the candidate is a good fit for the program and accepts her, the appropriate documents are sent to the CPS court officially transferring the CPS component of the case to the juvenile district court.

Participation in Crossover Court

Up until this point, the focus has been on identifying and screening eligible youth, but once they've been properly identified, numerous parties work together to concentrate on the juvenile enrolled in the program, all with the same goal of offering services to these at-risk respondents. This is where we really begin to see the formation of the "dual docket" approach, with both the CPS and juvenile matters being handled in the same court and with an assembled team of specialists from both agencies ready to contribute.

Let's become acquainted with the specialists who comprise the Crossover Court team. Some of the parties seem rather obvious, whereas others a little more unusual:

- Juvenile Probation officer,
- CPS caseworker,
- ACDA from the Juvenile division,
- CASA (Court Appointed Special Advocate) volunteer(s),
- the respondent's defense attorney for the juvenile justice matter,
- a guardian ad litem,
- the juvenile's parents if they are involved,
- attorneys representing members of the family (in some cases), and
- if applicable, the juvenile's siblings.

The Juvenile Probation officer is a key member of the team; he is the go-to person in terms of reporting on the progress the youth is making on her juvenile supervision. Unique to the juvenile justice system, a probation officer has involvement in a juvenile referral from the beginning of the process.[10] This officer keeps in very close contact with the youth and her family and monitors important issues such as home life, academic performance, and any problems the youth may have, such as substance abuse.

Similarly, the CPS caseworker monitors the

Participation in Crossover Court does not mean that a juvenile referral should be rejected. This is especially true in situations with a victim or public safety concerns.

youth's home life and living situation but does so with a different perspective; this person focuses more on the youth's environment.

Earlier in the process, before the transfer, the CPS court judge appoints a CASA volunteer for each respondent. This volunteer advocates for and supports the juvenile during what is assuredly a frustrating phase of life. The CASA can serve also as a bit of consistency in a rather uncertain time, acting like a trusted Sherpa guiding the youth along a new and unfamiliar path.

In some instances, a respondent's attorney for the juvenile referral will participate in the staffing and hearings on the CPS aspect. Whereas the focus may not be on the referral, the attorney may have valuable insight into aspects of the youth's progress and areas of struggle.

In cases where the respondent's family may not be in the picture and the child is in a Permanent Managing Conservatorship, a guardian ad litem may also monitor and advocate for the best interests of the respondent from a legal standpoint.

Another strong example of the program's flexibility is ensuring future success by keeping the CPS case in front of the juvenile judge and the Crossover Court team, even after the youth's juvenile case has been resolved.

Flexibility

As the discerning reader probably noticed, a youth's siblings may be involved in the crossover process. This is a great example of the program's flexibility to achieve an efficient resolution. In Bexar County, if a youth in Crossover Court has siblings who are also in CPS conservatorship, the CPS cases of those siblings are also transferred to the juvenile court, even if they do not have juvenile referrals. When viewed in light of the goals of the program—that is, to aid youth who are dually involved and to increase efficiency in the system—this makes perfect sense. The "one-stop shop" dual docket makes for a more efficient process. Furthermore, the enhanced communication minimizes the odds of the respondent failing, and involving other siblings ensures that they too can benefit from the streamlined process and support of combined services.

Another strong example of the program's flexibility is ensuring future success by keeping the CPS case in front of the juvenile judge and the Crossover Court team, even after the youth's juvenile case has been resolved. In Bexar County, if a youth's probation term is completed before CPS issues are resolved, the case can still remain in front of the juvenile district court judge, which ensures the team can continue offering services to the youth, as well as keeping the judge who is familiar with the special circumstances and needs of the youth and family involved and engaged in the process. This special system recognizes that a juvenile's case for delinquent conduct establishes a manifested need, and that need doesn't magically disappear once the delinquent conduct has been addressed.

What happens in Crossover Court

One of the first things to occur post-transfer is that the youth's CPS case is scheduled for a docket hearing in the juvenile court. This is basically what would have happened in the CPS court had the crossover never occurred. This docket date is disseminated to the youth and other members of the team. At this point, whatever CPS issue was pending is now heard by the district court judge. This can be anything from status updates on the youth, her current placement situation, academic progress, and even medical treatment. Sometimes the matters at hand will also involve CPS working to reunite the youth with her parents. Such CPS hearings continue as the process plays out. There may be various modifications in conservatorships or even a withdrawal of CPS involvement in the best-case scenarios.

In addition to CPS matters, each party in the process shares what he or she knows about the case and the youth. This information is also used to create various assignments for the youth or other members to work on in anticipation of the next hearing. Some of these assignments can be as simple as the youth improving the quality of her schoolwork or a guardian scheduling follow-up medical appointments for the juvenile. This is a fine example of communication at work and also a high level of support from numerous people who want to see the youth succeed.

What about the juvenile referral, you may ask? Well, the referral isn't ignored, nor is it put on hold—after all, in many cases the referral is indicative of special issues the youth is having. It is undeniable that the youth's delinquent conduct must be addressed. For all intents and purposes, Crossover Court involvement doesn't disturb how the juvenile referral is handled. Keep in mind that the purpose of this model is not to afford the youth a more lenient supervision or promises of a rejected case; rather, the main goal is to aid and support youth identified as high-risk for reoffending. Pursuit of this goal does not require that the prosecutor ignore the safety of victims or the well-being of the community. These are always important considerations, and in-

volvement in this process does not cast them aside.

At the hearings for the delinquent conduct, it is mostly business as usual, but one shouldn't be surprised that members of the respondent's crossover team will frequently "stop by" to keep the prosecutor up to speed on the respondent's progress. Sometimes these little progress reports are motivated by a bit of pride on the part of the team member; other times they may be looking to troubleshoot and brainstorm on ways to help a youth who may be struggling.

Crossover Court results

Perhaps at this point you're wondering about the substantive results of the Crossover Court in achieving its goals of reduced recidivism among juvenile participants and increased efficiency in the system. Regarding the former, some of the data from Bexar County's review of the Crossover Court's first five years indicate a 7 percent lower recidivism rate amongst crossover youth compared to the general Bexar County juvenile probation population. This statistic is more impressive when considering that the same data shows the crossover youth are nearly six times more likely to have a high-risk level in initial PACT assessments.

In terms of efficiency, let's take a moment to look at things globally. Because Crossover Court handles both CPS and juvenile referrals, mandated services or treatments are not unnecessarily duplicated. Some affectionately refer to this conservation of services as "resource sharing" between the CPS and juvenile justice systems, which not only saves time but also valuable funding for programs already stretched thin. Plus, given the presence of more specialists at Crossover meetings and hearings, fewer questions go unanswered, a big benefit that reduces how often a case must be reset. Whereas postponements are not necessarily a negative, when they arise out of a need for more information (information that could have readily been proffered if the beautiful doors of communication were already open), it is mighty difficult to argue that they are something positive. After all, why put off until tomorrow what can be resolved today?

Conclusion

The Crossover Court here in Bexar County fills an excellent role in identifying at-risk youth, affording them efficient services to avoid reoffending, and supporting their families. At this important stage in their lives, the youth in this group are particularly vulnerable. Many are only a couple of years away from attaining the age of majority for purposes of penal law. Working with them in these important years to minimize the risk of reoffending, especially as adults, is a long-term goal that has huge societal implications. This approach demonstrates the significance in interagency communication and demonstrates an innovative approach to a problem that can unfortunately be all too common. ❇

Endnotes

[1] Yes, there is plenty of overlap: Both systems rely on the same Penal Code, for the most part the rules of evidence are the same, and prosecutors are held to the same ethical standards.

[2] Keep in mind that due to the quasi-civil nature of the juvenile justice system, the youth charged with delinquent conduct are referred to as respondents as opposed to defendants.

[3] Tex. Fam. Code §54.03(a): Recall that respondents are charged with "delinquent conduct" as opposed to criminal activity.

[4] See the Center for Juvenile Justice Reform at Georgetown University, https://cjjr.georgetown.edu/our-work/crossover-youth-practice-model/cypm-background.

[5] See *Id.*, and https://cjjr.georgetown.edu/our-work/crossover-youth-practice-model/implementation-of-the-practice-model.

[6] https://cjjr.georgetown.edu/our-work/crossover-youth-practice-model/participating-jurisdictions.

[7] See Tex. Fam. Code Ch. 262 & 263.

[8] Just to put things into perspective, the Crossover-eligible population is a sizeable one. Data from the Bexar County Juvenile Probation Department from 2018 indicate that out of all the youth who are have juvenile referrals, nearly 33 percent are eligible for Crossover Court.

[9] Remember that even though a youth may be in a conservatorship, that doesn't necessarily mean the family is completely out of the picture.

[10] See Tex. Fam. Code §53.01.

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