The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

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

Forensic genetic genealogy takes down a serial rapist

In North Texas in 2011, three police agencies learned that the suspect in three home invasions involving stranger-on-stranger sexual assaults were connected by a single male DNA profile.

By Calli Bailey
Assistant Criminal District Attorney in Collin County

CODIS had told them that much. The victims' accounts of their assaults also made it clear that it was the same attacker. But more than that, all three victims had something very personal in common: They were all alumnae of the same sorority, leading police agencies and the media to dub the assailant the "Sorority Rapist." Law enforcement spent the next decade running down every tip, following every lead, identifying a fourth victim through a CODIS match seven years later, and ultimately, employing a new and emerging advancement in DNA testing to identify the person responsible. That man, Jeffrey Wheat, is now serving two life sentences, plus additional time for a total of four charges.

Background

Over my career, I have developed a deep interest in forensic science, an interest I would not have predicted when I started practicing law. Like many prosecutors, I did everything I could in college to avoid hard science classes (sign me up for "Rocks for Jocks" and oceanography!). But in 2019, I became Collin County's first Conviction Integrity Unit (CIU) chief. That same year, I was appointed to the Licensing Advisory Committee of the Texas Forensic Science Commission, where I am now serving my fifth year. As a result, I became the "DNA expert" for my office. By no means a true expert, I jumped head-first into the forensic science world and signed up for as many trainings and conferences as my office would allow. I have had two additional felony chief assignments since CIU and have tried multiple trials with DNA. But the Sorority Rapist case was the first time I saw the results of groundbreaking science have a long-lasting human impact.

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Honor the best!

There are many types of gifts to the Foundation, and all of them make a difference by enhancing the training and support we can give to TDCAA.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

But why not add some extra pop to your gift by honoring someone deserving of recognition? It can be for a success everyone knows about, or it can be just to let someone know you recognize the great work they have done and you want everyone else should know about it too. I think it is downright fun to drop an "in honor of" donation on an unsuspecting friend. After all, we could all use a little boost now and again!

To honor someone with a contribution, go to tdcaf.org and click on the "give online" button. ❇

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About *The Texas Prosecutor*

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Rule 3.09 proposal: And the results are ...

During April, all Texas attorneys had the opportunity to vote on a series of changes to the Texas Disciplinary Rules of Professional Conduct.

By Rob Kepple
TDCAA Executive Director in Austin

That referendum contained a proposal to amend Rule 3.09, Special Responsibilities of a Prosecutor, about which I last wrote in the July–August 2023 edition of this journal. In a nutshell, the proposed amendment extends a prosecutor's ethical obligations to disclose exculpatory and mitigating evidence to the post-conviction world, something not covered by the current Rule 3.09 (although it is addressed by the Michael Morton Act). This is a significant rule change because it can lead to a grievance based on a prosecutor's failure to disclose newly discovered evidence of innocence in a post-conviction setting (a remedy *not* addressed by the Michael Morton Act).

If you read the article and comments on the proposed amendment in the April 2024 edition of the *Texas Bar Journal*, you saw that **Kriste Burnett**, Chair of the TDCAA Rule 3.09 Committee, TDCAA Board President-Elect, and DA in Palo Pinto County, wrote a column in favor of the amendment. She observed that the State Bar Committee on Disciplinary Rules and Referenda (CDRR) had worked diligently to address prosecutors' concerns about the scope of original rule proposal, and the committee had, in her opinion, drafted a fair and workable proposal.

What was surprising was that an attorney writing on behalf of the criminal defense bar lambasted the proposal, arguing that it should go way further than anything ever even proposed in the CDRR process.

By the time you read this column, we will all know the answer to this question: Did the *defense bar* manage to kill a rule proposal that would have extended the ethical obligations of prosecutors under *Brady*?!

Thanks, Mike Criswell

Mike Criswell, County & District Attorney in Swisher County, retired at the end of March after 30 years of service as a prosecutor. (That's a photo of his retirement party, below left.) You probably know Mike best as a co-host (along with **Mike Fouts**, 39th Judicial District Attorney) of the popular Rural Prosecutors Forum at our Annual Criminal & Civil Law Conference. I was never quite sure which one was playing the straight guy and which one was playing the comedian, but their "You know you are from rural Texas if ..." introduction was an instant classic.

Mike has been that steady hand in the Panhandle for many years. Indeed, when his town of Tulia was thrown into chaos after the drug bust scandal of 1999, Mike stepped up and took control of the crisis in leadership by seeking and gaining felony jurisdiction for his office. He restored confidence in prosecution and law enforcement with his no-nonsense approach to the job.

Over the years, Mike has served as the president of TDCAA, and he is one of the 106 prosecutors who make up the Founding Fellows of the Texas Prosecutors Society. Thanks, Mike, for all you have done for our profession.

Financial support for an out-of-county special prosecution

Because of the changes to Article 2.07 of the Code of Criminal Procedure, which mandates that only

Texas prosecutors may be appointed to be a prosecutor pro tem, and the increasing lack of assistance from what was once called the Prosecutor Assistance Division of the Office of the Attorney General, many of you are being appointed as a prosecutor pro tem in counties sometimes far away from home. It can put a dent in anyone's budgets.

I'd like to remind everyone about §43.004 of the Government Code, which provides that a district attorney engaged in the discharge of official duties in counties other than the DA's county of residence is entitled to travel and other necessary expenses from the state. Indeed, the state has a budget for these expenses that doesn't always get used. So, if you are looking for ways to cover the cost of out-of-county special prosecution expenses, you may wish to call the good folks at the Comptroller's Department (the Judiciary Section).

If you have any questions, you can also contact me for more details.

New appointees to the Criminal Pattern Jury Charge Committee

Congratulations to **Natalie Cobb Koehler**, County Attorney in Bosque County, and **David Holmes**, County Attorney in Hill County, for their appointment to the State Bar Criminal Pattern Jury Charge Committee. They will begin their three-year terms after this summer's State Bar Annual Meeting. This is important, if sometimes behind-the-scenes, work. Thanks, Natalie and David, for stepping up!

Our "first round" of newly elected prosecutors

During the U.S. Presidential election cycle, most Texas district attorneys and county attorneys also run for election or re-election. In a nutshell, 268 out of our 336 elected prosecutor seats are up for grabs this year (criminal district attorneys run on the gubernatorial election cycle). After the primary elections on March 5, we are down to 13 remaining contested elections, where either a runoff takes place on May 28 or the winner is decided at the general election on November 5. To see all the election results and remaining contested elections, go to www.tdcaa.com/2024-prosecutor-races-and-candidates.

In the unsolicited advice department

When I retire at the end of this year, I will be in my 35th year at TDCAA. That and my six years at the Harris County DA's Office have given me a lot of time to learn a thing or two about this great profession of ours. Throughout my career, I have had the good fortune to teach prosecutor ethics in Texas and around the country, as well as a prosecutor clinic at a law school. Teaching has truly been a gift to me.

So as I start to sort through drawers containing past presentations, allow me to share a few of my favorites in the next few issues of this journal.

This first offering comes from a talk to aspiring prosecutors in the venerable "Top 10" tradition. Here are my Top 10 Tidbits of Advice. I don't claim that these are original, and yes, they are kinda random. But each one springs from a lesson learned the hard way, so that is probably why I remembered them!

My Top 10 Tidbits of Advice

1) Be yourself. Everyone else is taken.
2) Ask every *potential juror at least one question.*
3) Ask your investigator for help and *their opinion. Investigators are experienced, and they won't let you down.*
4) Defense attorneys are the loyal opposition. Treat them with respect.
5) Listen to the defense attorney when she is warning you about your case.
6) Memorize how to impeach with a prior inconsistent statement, oral and written.
7) On closing, remind your jury of the commitments they made during jury selection.
8) Maintain a poker face.
9) Be nice to the defendant's mother.
10) Don't take a "not guilty" verdict personally. One plus one does not always equal two in a criminal trial. ❇

Read all about it: the results of our survey

TDCAA membership answered the call and responded to our survey. Thank you!

By Erleigh Wiley
TDCAA Board President & Criminal District Attorney in Kaufman County

The survey asked a few open-ended questions to gauge how those in TDCAA's service group (that is, prosecutor office staff) feel about the association's direction and priorities for the new executive director. The answers are going to be helpful in the selection of that new person, but they also provided some interesting feedback about the work of the association. Some of the areas that survey responses focused on were online training, regional meetings, recruitment of new prosecutors, and the association's involvement in legislative activities.

I am happy to report that the input we received was generally positive. Members made plenty of suggestions for improvement and services, but the general tenor of the remarks was, "We want more of a good thing." That is reassuring, but for a successful organization, that can also be a challenge because we must remember that any organization can do 10 things well or 100 things poorly.

So, what is the core mission of TDCAA? Its Mission Statement focuses on three areas: "To promote excellence in prosecution and government civil representation in the State of Texas, by providing 1) *education* and 2) *technical assistance* to prosecutors and their staffs, by providing educational and technical assistance to the law enforcement community, and by serving as a 3) *legislative resource* in criminal law and government representation matters" (emphasis added).

Education

In that vein, the survey responses encouraged TDCAA and the new executive director to explore additional training in the form of virtual lunch-and-learn sessions or podcasts, plus continued and additional training in civil law, juvenile law, CPS representation, and capital murder. The good news is that with TDCAA's expanded emphasis on distance and online education, we will see more and more training that meets our members' needs.

Remote training can never be replaced by the engagement of in-person training, but since COVID, we have learned the efficiency and flexibility of online training. Joe Hooker is now on TDCAA staff as the assistant training director, and his job duties include producing online training, which means more content for our membership. Keep a lookout for more online training available on the TDCAA website and read Joe's latest column on page 8 regarding two new ethics videos soon to come online.

In the past—and revived in recent years—TDCAA Board members have been hosting regional meetings. Some of TDCAA's eight regions hold regular Zoom meetings that are initiated by their regional directors, but additional in-person regional meetings started back in 2023. Last year, I attended one of them in Amarillo, and it was a blast! Not only did we have a great meeting, but it was also fun to experience Amarillo's nightlife. (Yes, Amarillo has a fun nightlife.) Regional meetings will return this fall, so check the TDCAA website and legislative emails for more information as the dates get closer.

Technical assistance

When it comes to technical assistance, one thing everyone was unified on was that the TDCAA publications team does a great job of getting you the written resources you need and use every day. And TDCAA now has six seasoned attorneys on staff to answer legal questions or connect you to the person who has your answer.

Another hot topic was the difficulties in recruiting prosecutors and staff into our profession, which is a new reality that county and district attorney offices throughout the state have struggled with. For the first time in my career as the district attorney, our office had vacancies we couldn't fill. The need to hire attorneys, investigators, and support staff who want to work in law enforcement is a real need. Years ago, TDCAA initiated a pilot program where staff attended job fairs at law schools and reported back to the membership with resumes from interested candidates. Back then, not much happened with the efforts, perhaps because the vacancy problems weren't as acute. From the survey responses, it appears there may be more interest in offices working together on this subject. If you are interested in serving on a recruitment committee to look at this issue, please let me know. My email is erleigh.wiley@kaufmancounty.net.

Legislative resources

Additionally, several responses noted our association's involvement (or lack of involvement) in political campaigns and legislative activities. I know from my experience that TDCAA does not take positions (for or against) on particular bills, nor does its staff testify on behalf of all prosecutors, but I didn't fully understand why.

The answer regarding TDCAA's legislative resource mission is a little longer, because more than one survey response urged TDCAA and the new executive director to speak for prosecutors and take positions at the capitol that the respondents favor. There is a good reason why that has not happened in the past and why that type of advocacy is not TDCAA's mission.

TDCAA was incorporated in 1971 as a nonprofit service organization that supports more than 300 independent elected officials and their staffs. The mission of TDCAA staff is to serve these elected officials and help give them *their* voice. That approach comes directly from our Association bylaws, which state in relevant part that "no officer, director, or agent of the Association shall, in their capacity as such, endorse or promote any political candidate, nor shall the association funds be spent for such purpose." The bylaws go on to provide that "nothing herein shall prevent political activity by any person in their individual capacity," such as taking positions on legislation or endorsing or promoting those positions. To speak candidly, I'll say that our elected legislators in Austin don't care so much what a nonprofit employee says as much as they care what their local elected district or county attorney thinks. Therefore, while TDCAA can help you be an effective advocate in Austin for your preferred policies, it cannot carry that water for you.

In addition, it would be impossible for the association, as a service organization with so many members, to truly speak with one voice. A great example of why that doesn't work happened back in 2005: When the legislature considered adding life without parole as an alternative in capital murder cases, the Tarrant County CDA's Office supported the measure and helped write the bill—and the then-Harris County DA appeared in person to oppose it. The lesson: Our profession can include lots of differing opinions on the nature of the law, and we should never allow those opinions to distract us from the duty—and the mission of TDCAA—to train prosecutor office staff to be the best they can be when they represent the State in criminal or civil court. I believe our position has served our organization well.

It would be impossible for the association, as a service organization with so many members, to truly speak with one voice.

A new executive director

Finally, an update on the executive director's selection. After the surveys were completed, the application process began. The opening and qualifications were posted on several websites, including those of TDCAA, the National District Attorneys Association, and the State Bar. The application period closed May 1, and starting in June, the selection committee will begin the interview process and a finalist will be selected. The plan is to announce the new Executive Director by TDCAA's Annual Conference in September.

I'm looking forward to the continued success of our organization by implementing your suggestions and the hard work of our dedicated TDCAA staff. ❇

Get in line for online ethics

As the new Assistant (to the) Training Director, I have been fortunate to meet many people in our service group, help with research questions, and prepare the case summaries that are emailed out every Friday.

By Joe Hooker
TDCAA Assistant Training Director in Austin

But one of the main tasks I was hired for is to expand TDCAA's online video library. While I have not received any calls or emails yet, I know our entire readership has been wondering where these new videos are and when will they be available. Well, the wait is finally over, folks! Our first videos will be available in the coming weeks.

TDCAA pulled one of our ethics scholars away from his writing desk and put him in front of a camera for a long day of filming to bring you two presentations on ethics that will be helpful to our newest prosecutors as well as seasoned veterans. Scott Durfee spent 32 years at the Harris County DA's Office; he served as general counsel for 26 years. Scott worked for 11 years on the State Bar's rules committee and this past year has been co-writing on a book on ethics procedure. Both in private practice and as an ADA, Scott has represented and helped prosecutors through the challenges of the State Bar's grievance process. He was happy to bring the knowledge and expertise he has acquired both in his research and in the courtroom to two ethics videos for TDCAA. Not only are we confident that Scott's presentations will help prosecutors in their daily decision-making, but also these videos will be worth 2 hours of ethics MCLE.

"When the State Bar Comes Knocking." "Until recently, complaints against prosecutors were fairly uncommon," Scott says. "This historical 'underreporting' of prosecutorial misconduct is a trend that appears to have reversed itself, at least in Texas. Grievances against prosecutors are now common."[1] In his first presentation, "When the State Bar Comes Knocking," Scott walks viewers through the entire grievance process. What is the difference between an inquiry, a discretionary referral, and a complaint? Who can file a complaint against a prosecutor? What should prosecutors do if they receive the dreaded envelope from the State Bar telling them they are the subject of a grievance? Scott answers all these questions thoroughly and prepares his viewers for what steps to take if the State Bar comes knocking.

"Keeping Up with the Ethical Rules." In his second presentation, "Keeping Up with the Ethical Rules," Scott covers in detail a number of topics related to the Texas Disciplinary Rules of Professional Conduct (TDRPC). Scott gives special attention to TDRPC Rule 3.09: Special Responsibilities of a Prosecutor and also covers a number of topics prosecutors will encounter, including *ex parte* communications, communicating with a represented party, media relations, and preparing a witness for testimony.

Free for paid TDCAA members

These two ethics videos will be available for free only to paid members of TDCAA (including associate members). If you're not yet a member but would like to join TDCAA (and take these online courses for free), that's great—please fill out a membership application on our website at www.tdcaa.com/membership/application. Membership costs $100 for elected prosecutors, $85 for assistants, $80 for investigators, $75 for key personnel and victim assistance coordinators, $85 for general associate membership, and $60 for law student associate membership.

Coming soon

Our next projects are already underway. We will be filming our first-ever Juvenile Law series in May. Featuring a number of resident Texas experts, this series is geared toward new practitioners in juvenile law and will cover a range of issues encountered daily in a juvenile court docket that may be unfamiliar to prosecutors new to that area of the law. Have you recently been moved to the juvenile division and are feeling lost, or do you just want to expand the breadth of your juvenile law knowledge? This series is for you!

Also, the fifth and final installment in our Mental Health Video Series is in the planning stages and will be filmed in the coming months. We will recap where this series has taken us, as well as discuss issues facing some offices, including jail-based competency. Be on the lookout for this concluding chapter of our Mental Health series. ❇

Endnote

[1] Laura Bayouth Popps, Prosecutorial Misconduct and the Role of Discipline, 80 Tex. Bar J. 430 (July 2017).

Case analysis in drugged driving cases

Editor's note: This article is excerpted from the latest edition of TDCAA's DWI Investigation & Prosecution book written by W. Clay Abbott and Diane Burch Beckham. It is available for purchase at www.tdcaa.com/product/dwi-investigation-and-prosecution-2024.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor

Controlled substance vs. prescription

DWI cases involving illegal drugs give a prosecutor the advantage of a defendant who got impaired illegally and then drove a vehicle. The majority of hard drugs are viewed unfavorably by most jurors right from the start. Prosecutors need to be aware that overdependence on the illegal nature of a substance can backfire. DWI laws are still based on a reckless decision to imperil other drivers, not a desire to curtail use of certain substances. Curtailed use is instead the focus of possession and delivery of controlled substance laws. Prosecutors have plenty to prove in these cases without talking about dry policy.

If a prosecutor tries a controlled substance DWI just like a possession case, he is leaving a powerful jury motivator—public safety—out of the picture. With the focus on possession of the drug itself, the prosecutor also may fail to prove intoxication. Jurors may have heard of these drugs, they may have a negative reaction to them, but they still have little experience with what exactly they do. Instead, the prosecutor should keep the focus on the defendant's decision to endanger everyone else on the road.

Marijuana

Marijuana may not follow the trend of other controlled substances. With the legalization of marijuana by an increasing number of states, this substance brings a degree of difficulty to the prosecution of marijuana-impaired drivers.[1] Prosecutors must perform two difficult (and seemingly at odds) tasks during jury selection:

1) discovering jurors' opinions about marijuana, and

2) separating an impaired-driving case from marijuana possession prosecutions.

A panelist's strong belief advocating for legalized marijuana use can prejudice the State's case, but not always. Prosecutors should compare the use of alcohol (which is obviously legal) with marijuana use. A person can drink all he wants in his home, and he has not broken the law. But when legal alcohol use is combined with driving, the law steps in. Jurors can be asked if they will treat marijuana the same as alcohol. A juror who believes in legalization—but agrees marijuana should be treated equally to alcohol in making driving decisions—might be an acceptable juror. The biggest error would be in failing to address this issue with the panel.

Marijuana's effects are also misunderstood by jurors, and movies and television shows exacerbate this. Similarly, many older users are simply unaware what marijuana is like after its legalization in Colorado and other states.[2] Expert witnesses—the DRE or toxicologist—should be prepared to educate the jury.

Marijuana and cannabis and hemp are all the same plant: cannabis, Cannabis sativa L., and marijuana are identical terms used by the two sides of the legalization debate. Hemp is cannabis sativa L. with less than .03% delta-9 tetrahydrocannabinol.[3] While this complicates possession of marijuana cases, it does not legally complicate marijuana-impaired driving cases. Delta-9 THC is the impairing substance in marijuana, and that is all a lab tests for and reports. Because DWI can be committed based on "a drug" or "any other substance," no legal issue is raised by the legalization of hemp in 2019. But prosecutors will be in a hole they cannot dig themselves out of if they do not explore opinions, knowledge, and misconceptions about marijuana during jury selection. Expert witnesses, both toxicologist and DREs, should be ready to explain marijuana, cannabis, hemp, and Delta-9 THC to the jury.

The difficulty of prosecuting the prescription-drug-impaired driving case is even greater. Here, the defendant is taking a substance for legitimate medical (and not recreational) reasons, yet he faces prosecution. In these cases, a prosecutor first must ascertain whether the suspect has a prescription and if so, obtain evidence to prove it. This task is rarely done by the investigating officer.

If the drug causing impairment was prescribed, the prosecutor must address this issue head-on in jury selection and at trial. During jury selection, a prosecutor can ask if anyone has had a medical procedure in which a driver was required by medical staff to take the patient home afterward. Ask the panel why the doctor would require this. Ask if they agree with this temporary limitation on the patient's life and mobility. Nothing makes this point better than the jury panelists' own experience. Make sure the jury can convict even if the substance causing the impairment was legitimately prescribed. If any panelists say they can't, trust them, and move to strike for cause.

During presentation of evidence, the prosecutor must address the issue in several ways. In questioning the toxicologist, ascertain whether the drug was in, or over, therapeutic range, pointing out doses above those prescribed and possible abuse of the medication. Prosecutors will need to discuss this issue long before trial with the toxicologist.

Prosecutors must also sponsor witnesses who can educate the jury about required warnings from doctors or pharmacists, and warnings sent home in writing on the pill bottles or in literature that accompanies the prescription. The Physician's Desk Reference (PDR) and other resources mentioned earlier this chapter also include discussion of this information. Potential witnesses on this issue include DREs, toxicologists, or a pharmacist. Remember that showing and telling always beats just telling.

In closing argument, prosecutors must acknowledge the need for medicine but convince the jury that this need must be balanced with every driver's responsibility not to place others on the road in danger.

CSI depressants

This category includes many prescription drugs and many controlled substances. Prosecutors should make sure they are on the same page with the toxicologist in cases that involve CSI depressants. Sometimes a drug can be found in both a commercial and illicit form.

Alcohol is a CSI depressant, so the look of this category will be pretty familiar to officers, prosecutors, and juries. CSI depressants are more dan-

gerous in combination. Often a user will have taken smaller doses of more drugs, but this does not make them safer. Be sure to explored dosage issues with the toxicologist.

CSI stimulants

Most of the time, the CSI stimulant in an intoxicated driving case will be methamphetamine. Meth is scary. There are no TV shows about funny and lovable meth addicts. So this is pretty simple. Methamphetamine is so bad it has no medical uses. Be aware that a metabolite of methamphetamine is amphetamine. Finding both in the tests probably does not mean the suspect was taking both. Prosecutors, be sure to cover this with the toxicologist witness.

Unlike alcohol, most controlled substances do not metabolize back to normal or homeostasis. Stimulant abusers are as much or more dangerous when the meth runs out. This is called the crash phase, and the suspect may well look like he is on depressants. There may be stimulants in the blood, but there will also be metabolites. These are hard cases and will take extra time working closely with the toxicologist.

There are prescription stimulants, which in most cases and used in therapeutic range, may have minimal or no impairment. But abusers will not have a blood test that reflects the therapeutic range. Again, cover this with the toxicologist.

Hallucinogens

Bad news and good news in these cases. The bad news: Most of these drugs will not show up on a lab report due to difficulty in testing. The good news is that juries get that driving in another reality is a bad idea. This substances in this category are almost entirely illicit.

Dissociative anesthetics

This category previously included only PCP. But there are now drugs, including Ketamine, that are entering the therapeutic realm. Like stimulants, juries (if they have heard of them at all) have heard scary things. This is not a casual-user category. Impairment is primarily mental but is most often fairly profound.

Narcotic analgesics

This category includes pain medications. including both commercial and illicit substances. It can run from the very scary (like heroin and Fentanyl) to the much more common (like Oxycontin and Demerol). These drugs keep the brain from being plagued by constant pain, but they also slow down other sensory input.

Officers and prosecutors (in person and on video) should take a close look at verbal discussions. Is there lag? Then that is what to look for and point out. Did it take awhile to get through SFST instructions? This may be much more relevant than standardized clues. This category is very susceptible to tolerance. A long-time user or abuser may look very different that the novice user. Yet regardless of tolerance and masking, this category of substances makes dangerous drivers.

Inhalants

With a half-life in seconds—not hours—positive lab tests are very unlikely. Suspects recover quickly from inhalants. But the impairment is profound. If the suspect has a face full of spray paint, the case may be easy to prove. But if the floorboard is full of empty dust-off cans, prosecutors may have to consult with a DRE. Prosecutors should also call a toxicologist to the stand to explain half-lives and why a clean lab report is not a surprise. ❇

Endnotes

[1] Note that an officer's training, experience, and senses of sight and smell are sufficient to establish probable cause for marijuana possession even though hemp has become legal in Texas and can be confused for marijuana. *Isaac v. State*, 675 S.W.3d 116 (Tex. App.–San Antonio 2023, no pet. h.); *State v. Gonzales*, 676 S.W.3d 261 (Tex. App.–Dallas 2023, no pet. h.) (passage of the Texas Hemp Farming Act in 2019 did not preclude officers from relying on the odor of marijuana in justifying a warrantless search based on probable cause under the automobile exception because hemp and marijuana come from the same plant (*Cannabis sativa L.*) and can give off the same smell and appearance).

[2] www.ncbi.nlm.nih.gov/pmc/articles/PMC4987131.

[3] Tex. Agric. Code §121.001.

Forensic genealogy takes down a serial rapist (cont'd from the front cover)

This case had all the bad features of a cold case, coupled with all the bad features of a stranger-on-stranger rape. My DA investigator, Stephanie Strickland, had to track down detectives out of retirement. Some of those detectives had been retired as long as the case had been cold. One crime scene tech is now deceased. A DNA analyst moved to Australia and couldn't return for our trial. The victim here in Collin County wanted nothing to do with me when I first reached out. My contact brought up horrible memories she had tried hard to repress over the last 10 years—but I kept calling. I showed up unannounced at her home and place of work. I called her daughter and begged her to convince her mother to talk to me. And she wasn't the only rape victim I had to force to talk about the worst moment of their life. There were three others.

The news of these offenses terrorized the alumnae from not just one particular historically African-American sorority, but also African-American women across north Texas for years. We don't get cases like this in Collin County—home invasion sexual assaults by strangers, let alone an offender who violates a victim in each of the four major counties in the Dallas–Fort Worth Metroplex. In addition, it was the first case in which a Collin County agency used forensic investigative genetic genealogy to identify the suspect.

But this case is also an example of the criminal justice system at its best, a true reflection of teamwork across multiple law enforcement agencies and multiple prosecutor offices and a symbol of survival and perseverance of victims who had long awaited answers and justice. It was almost 10 years before the victims in Collin, Dallas, and Denton Counties knew the name of their attacker, and it was an 18-year wait for the victim in Tarrant County.

The investigation

On April 2, 2011, officers from the Plano Police Department responded to a home invasion sexual assault that occurred sometime after 2 o'clock in the morning. The victim was awakened by an unknown man in her bed. She fought back and her attacker's blood was transferred to a pillowcase on the bed. When the attacker responded by putting a pillow over her face and threatening her, she knew she would need to comply to save her own life. After the assault, the attacker forced her to shower, and he warned her not to call the police. He knew her name, and he knew that she was not married. The victim called her sister first out of fear, who encouraged her to call the police. The pillowcase was collected as evidence, as was a routine sexual assault nurse examination (SANE), both of which were forensically analyzed by the regional crime lab to develop a clear single-source male DNA profile. But there was no match in the CODIS database.

In September and October of 2011, Coppell Police Department (Dallas County) and Corinth Police Department (Denton County) responded to similar home invasion sexual assaults. In both cases, the attacker knew things about the victims, including that they were not married, and warned them not to call to the police. He made them shower or bathe, and he disconnected or hid all phones in the home. Each victim also underwent a SANE exam.

For small cities like Coppell (my hometown) and Corinth, these were the only stranger-on-stranger home invasion sexual assaults these investigators had ever seen, and some of those officers had 20 years of experience. The cases stuck with them all those years, just as it did for the victims. Everyone remembered it. My parents remembered it. Each officer had vivid memories of working these cases over a decade later when I met with them to prepare for trial, so finding the person responsible also meant that much more to them as well.

The evidence in the Dallas County case went to one crime lab, while the evidence in the Denton County case went to the same regional crime lab as Collin County's evidence. Both labs received a CODIS hit within days of the initial processing, indicating the unknown male profile in both cases was a forensic match to the suspect profile in the Plano case. The Plano, Coppell, and Corinth Police Departments joined forces and worked tirelessly for years collecting DNA from persons of interest and following up on any and all viable tips. The suspect was even the subject of an "FBI: Most Wanted" episode.

Several years later, in 2018, Arlington Police Department (in Tarrant County) sent sexual assault kits on unsolved cases for additional testing in hopes that advancements in DNA technology would result in new leads. Doing so uncovered evidence from a 2003 home invasion sexual assault case that matched to the same offender

from all three 2011 cases. It had been sent for testing in 2003, but DNA technology at the time wasn't sensitive enough to develop a suspect profile to be entered into CODIS.

Enter forensic genetic genealogy

Also in 2018, Plano PD assigned a new detective, Daniel Bryeans, to review the case when the department received notification of the new CODIS match to the old Arlington case. That detective and his civilian sex offender registrar decided it was time to look into forensic genetic genealogy (FGG for short) to help solve this case. FGG takes traditional forensic DNA samples and converts them into samples suitable for genetic analysis before uploading them into public volunteer consumer genealogy databases. But that is almost the easy part. There is then what could be thousands of hours or even years of traditional historical and genealogical record research.

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After being told to get lost by Ancestry.com (the largest consumer database company in this arena), the Plano detective turned to Parabon NanoLabs, headquartered in Virginia, to begin the FGG journey. Parabon's Snapshot Investigative Genetic Genealogy Unit will take a forensic DNA sample and convert it to an SNP (single nucleotide polymorphism) profile. SNP profiles contain vastly more information than traditional STR profiles, allowing the profile to find matches all the way to the ninth degree of a relative, versus traditional STR testing's first-degree relationships. SNP profiles look at the entire human genome, versus the 13 to 24 specific locations used in STR profiles. The Snapshot Unit can use Parabon's technology to predict the unknown profile's ancestry and pigmentation to produce a detailed phenotyping report, complete with a composite sketch.[1] The SNP profile is then uploaded into the public volunteer consumer genealogy databases to determine whether there are any relatives of the SNP profile in the database and identify how closely related they are. Parabon uses the public database GEDmatch to conduct searches.

But after almost two years and hundreds of hours of database searching by both law enforcement personnel and Parabon genealogists without any concrete leads, Plano PD decided to contact a second, nationally recognized genealogy laboratory, Gene by Gene, which is in Houston. Gene by Gene utilizes similar technology to convert forensic samples into a SNP profile suitable for upload into its public database, FamilyTreeDNA. Both companies upload volunteer consumer kits from multiple sources, but it's always possible that a consumer kit does not exist in both databases. It also could be that with the passage of time, more consumer profiles have been added to a database. So this time, in 2020, genealogists discovered a much closer relative to Plano's unknown male profile. Plano PD then took those family tree results and spent additional months doing their own online records and social media searching before finding the suspect's half-sister.

Identifying the suspect

After an interview with this woman, who was a Texas resident, Plano PD obtained search warrants to collect DNA samples from two people whom they believed would be direct relatives of their suspect—one from his child and one from his brother. The FBI guidelines for FGG call this "target testing." Forensic comparison by Bode Technology confirmed that the two target test subjects were immediate relatives of Plano's suspect. And after almost three years utilizing investigative genetic genealogy, Plano PD identified the suspect as Jeffery Wheat, formerly of Carrollton, Texas.

After a multi-state coordination with Mississippi and Arkansas law enforcement agencies, Wheat was arrested in January 2021. He had been working as a long-haul truck driver with a residence in Mississippi. Mississippi State Highway Patrol helped install a tracker on his truck, and he was arrested in Arkansas with the assistance of Arkansas state police. Arkansas authorities also helped Plano PD obtain a warrant for Wheat's DNA. When Detective Bryeans went to collect the DNA, he told Wheat that he had a buccal swab for each case they were investigating so that he could send one swab to each police agency. Bryeans collected 12 swabs just to see if Wheat would react to the large volume, but he had no reaction.

When Wheat's identity made the news, the Arlington victim informed her lead detective that her daughter worked with Wheat at a Brinks security branch, and her daughter worried that he may have even installed the victim's home alarm system. During the offense, Wheat told that victim that he knew where her security alarm system was, made her take him to it to disable it completely, and told her that she really should have turned it on. Plano PD's investigation also revealed that the 2011 victims' sorority had used

a credit card processing company that employed Wheat, which would have given him access to personal identifying information.

The prosecution

Despite having one victim in each of the four major Metroplex counties, Wheat was in Collin County custody and thus would see a jury in our jurisdiction first. But this case was unprecedented for us: a multi-county serial rapist, on top of being the first FGG case to be tried here. We wanted to do it right, and we wanted to do it with the full support of each of the other three counties. (Quick shoutouts to my fellow prosecutor counterparts: Britney Gendron and Paul Hiemke in Denton County, Leighton D'Antoni and Haley Pratt in Dallas County, and Stephanie Simpson in Tarrant County.) When all prosecutors gathered to discuss what trial would look like (presenting all four cases whether in guilt or punishment) and what we believed the cases were worth, there was unanimous support to seek a maximum sentence. This defendant deserved to spend the rest of his life in prison.

As we got closer to our trial date, I kept in touch with each prosecutor office. Everything was coming together. The victims were strong. They were going to show up for us. We had located enough law enforcement witnesses to get over authentication and predicate hurdles. Our plan for trial was to briefly mention genealogical research as an investigative tool for solving this case, but not to put on that evidence in tedious detail. The FGG part of this investigation spanned almost three years, so to put that on during trial would have taken days if not weeks. Our traditional STR testing from Wheat's known buccal swabs was ironclad and irrefutable (1.09 octillion times strong, in fact). It confirmed to whom the FGG investigation led us.

Ultimately, the tireless law enforcement investigation, thorough trial preparation, and multi-county coordination left the defense with no choice but to accept responsibility and plead guilty to the maximum sentence in hopes of avoiding stacked sentences in each county. To be honest, I was very disappointed by this initially. The trial prosecutor in me could not wait to try this case. But it was also very clear that it was the right thing to do for these women. Logically, no prosecutor would pass up a plea to a maximum sentence and a waiver of appeal. Wheat took life sentences in Collin and Tarrant Counties on first-degree burglary of a habitation with intent to commit sex assault, the maximum on Denton County's second-degree sex assault indictment, and 30 years on Dallas County's first-degree aggravated sexual assault indictment (to offer him equivalent parole eligibility to the non-aggravated 2011 burglary charges).

Now we just had to work out plea logistics. Conveniently, our judge had just coordinated a remote plea with Dallas County last fall on a capital murder defendant who had additional cases in Dallas, so her court staff was up for the challenge of coordinating three other counties' personnel for a remote plea in this case. The importance of this case and the unprecedented nature of the sentencing hearing was not lost on any of the participating counties. All personnel went out of their way to make themselves available and to make the process as seamless as possible.

The most difficult part of the entire sentencing hearing was for the victims as they made their victim impact statements. To see their attacker for the first time after over 12 years required a level of courage and perseverance that most of us will never know. And yet, Wheat sat expressionless during the sentencing hearing—no emotion, no sign of remorse, just ... cold. As cold as these cases had sat for years.

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In conclusion

These are the cases that stay with you for the rest of your career: cases where victims become victors. Where the combination of tenacious police investigation is met with the power of forensic science. Where a serial rapist who haunted the nightmares of the entire Metroplex was held accountable to the fullest extent of the law. The strength of this case and the unwavering support of everyone involved speaks for itself, but it was truly the honor of my career to see it through to its conclusion. For the women in my community, I hope I never have another one like it.

For the prosecutor in me, I can't wait to see where forensic genetic genealogy takes the criminal justice system in the years to come. We should not underestimate the strength of women or the strength of forensic science.

If anyone has questions about this case or forensic genetic genealogy, you can contact me at cdbailey@co.collin.tx.us. ❇

Endnote

[1] Read another article about a Texas cold case helped by Parabon NanoLabs at www.tdcaa.com/journal/snapshot-of-a-killer.

Government contracts—let's negotiate

"My client will *never* agree to this provision!" roars a vendor's in-house counsel during yet another tediously prolonged and animated procurement negotiation.

By Bushra F. Khan
Assistant County Attorney in Montgomery County

I inwardly debate whether I should question opposing counsel or my life choices, and I decide that the former might elicit a more satisfactory and faster response. So, with a deep and resigned intake of breath, I proceed to ask why said client would *never* agree and how I might reassure all concerned that this provision is actually quite necessary.

I have found that such protests are more common from vendors or other contracting parties who are generally used to dealing with private entities as opposed to government bodies. So, in addition to investing in noise-reducing earbuds, below are a few contract negotiation tips for my fellow civil practitioners to tackle some predictable arguments.

Pre-negotiation stage

Whether a contract involves purchase of goods and services from a private entity or is an interlocal agreement (ILA) memorializing an exchange of governmental functions and services, it is critical to understand the goals of our own departmental client. Generally, in counties where the governing body has designated a purchasing agent, the Purchasing department acts as central hub for processing other departments' procurement matters. Essentially then, for potential procurement contracts, the concerned clients are often both Purchasing and the initiating department, e.g., a precinct, risk management, IT, etc., making it a necessity to understand the need and limitations of both. With ILAs, the particular department that desires a contractual relationship with another government entity will typically be the point of contact for operational and fiscal details in the contract (as governmental functions are concerned). However, because an ILA will eventually need approval of the political subdivision's governing body, from an advisory standpoint, an awareness of that body's broader policy inclinations is highly recommended.

To that end, a contract received from another entity should be read to confirm its factual relevance to current circumstances and aims before embarking on its full legal review,[1] as it may not actually reflect what our clients want to achieve. It might employ inapplicable or incorrect boilerplate terms, e.g., sale terms when our clients are seeking lease terms, or it might have been drafted for an entirely different purpose and sent over in a hurry without addressing present needs. In such an event, you might wish to discuss this preliminary issue with the other party to get a corrected or redrafted document sent over as soon as possible. Or, if the problematic areas are minimal and in the interest of efficiency, you might adjust and redline the agreement yourself to address both current aims and all legal concerns, then send it back for the vendor's review.

For certain routine service-related agreements, such as engineering, architectural, and professional services, and for ILAs that are significantly detailed, it might be beneficial to draft the agreement in its entirety simply to better articulate the desired terms and to minimize back and forth between you and the vendor or other government entity. In the process of this back and forth, to the extent opposing counsel's changes are reasonable and compliant with the client's needs as well as state law, it is often preferable to accept such changes without argument. There is really no need to die on an unnecessary (or absurd) hill.

When you respond to proposed changes that you feel cannot be accepted, explaining the exact legal or factual rationale for your rejection (via

comments on the side) is usually very helpful. Half the battle in contractual negotiations is communicating each other's point of view and clarifying to the other party why a certain provision is acceptable, or otherwise. "Because I said so," although highly tempting to throw back, may not be effective.

From a documentary exchange standpoint, unless the agreement or its attachments require special encryption or other authentication-related steps by law prior to sending, it is generally appreciated by all concerned that the document is sent over in a fully accessible format. A Word document that allows insertion of comments and tracked changes is ideal, but in a time crunch, an editable PDF or Google Docs file may also be workable, depending on the type of software options available to you and your clients. A password-locked file or any cumbersome format that hides comments or—worse—entirely disallows changes or comments can be quite irksome and often creates unnecessary angst prior to a negotiation. If you are on the receiving end of such documents, you should request an unlocked file or the ability to insert your desired and attached terms.

Assuming that both sides have peacefully gone through one or more rounds of redlined changes, each accepting and rejecting the other's proposed terms, a documentary impasse may eventually be reached, and at that point, the first negotiation meeting or conference call has to be arranged. Quick accommodation of all reasonable scheduling requests from the other entity and one's own clients, who might desire to be present for the meeting, can go a long way toward setting the foundation for a productive discussion. I have found the post-lunch lull to be an ideal time to schedule meetings, as even the feistiest of attorneys is likely to be more accommodating on a full stomach. Sometimes clients wish to be a part of every negotiation, especially when a contract has a high-dollar value or is technical in nature, and at others times, they would rather you handled all aspects of the deal. Based primarily on your client's express direction, which should be confirmed in advance, you can determine the list of individuals who are necessary to include in the meeting invitation.

Negotiation stage

If an agreement has reached the negotiation stage, it is a promising development—but at the same time, it also means that the uphill battle has just begun. It is therefore imperative that one enters the meeting with an open mind and a complete grasp of every item that is to be discussed.

A negotiation may take place in person but in the current climate, it's more likely to happen via video call or conference call. If the items to be discussed are relatively few and straightforward, a conference call may suffice, but if there are numerous contentious issues (or the discussed changes are potentially complex with regard to phrasing), a video call with shared screen to view the contract is preferable. In all instances, going line by line over the redlined changes in the last disputed draft, as opposed to a generalized discussion, is usually my preferred approach as it ensures that all items of concern are adequately discussed. It also allows for an exchange of ideas in relation to each such item, sometimes revealing additional issues or options not previously considered by either party. If both sides cannot immediately come to a consensus on a certain term, it is best to move on to the next redlined change with the caveat that you'll return to the previously discussed term later in the meeting. Perhaps further into the meeting the parties might appreciate perspectives not considered earlier.

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With private entities or vendors especially, some frequently encountered areas of conflict that evade initial resolution through track changes, and necessitate discussion, involve:

- termination clauses (for cause and for convenience),
- recourse options for non-performance or deficient performance, including damages for breach,
- interest calculation,
- available days for payment,
- the vendor's ability to assign an agreement,
- confidentiality of documents, and
- the non-appropriation clause.

Termination clauses. These are disputed, of course, because vendors (and even other government entities when ILAs are involved) do not typically desire a mid-term termination, while our client might want the ability to terminate both for cause (for example, because goods or services were not delivered according to the agreement's provisions) or for convenience (for

example, when a change in the governing body triggers a change in policy). It is important to bear in mind that if federal grant money is intended to be used at any point to fund a procurement or to fund arrangements under an interlocal agreement, whether in whole or in part, these termination clauses are mandatory. Appendix II to 2 CFR Part 200 of the Code of Federal Regulations[2] requires that all federal grant-funded contracts in excess of $10,000 address termination for cause and for convenience by the non-federal entity, including the manner by which such will be effected and the basis for settlement. Many governmental procurements and ILAs end up utilizing federal grant monies, sometimes initially and sometimes midway through the term of an agreement, so this issue may need to be argued with opposing counsel at the outset with statutory backing.

On a separate note, if our client is the entity directly in receipt of grant monies from a state or federal agency, the other contracting entity may be *required* to agree to all applicable terms of that grant as part of the agreement.

Recourse options. In vendor-drafted agreements, a government entity's recourse options for non-performance or deficient performance are often limited and occasionally missing altogether. More often, a troubling provision is included that restricts the ability of a government client to terminate for cause or limits the amount of damages for which the vendor could be held liable in the event of a breach. This issue, if applicable to a negotiation, should be discussed in detail with our client prior to laying out the desired terms to opposing counsel. Potentially, our client might wish to retain the option to terminate the agreement or terminate along with a specified amount of liquidated damages only if adverse consequences of a breach cannot be easily quantified. If the aim is to reach an amenable resolution to such a debated contractual term, imposition of onerous amounts of damages on a vendor may not achieve such resolution and should be avoided, but at a bare minimum, the ability to terminate for cause ought to be retained.

Interest rates and days for payment. Privately drafted agreements often include high or varied interest rates for overdue payments, and a potential way to tackle them is to replace such terms with a provision whereby the calculation of interest is compliant with Chapter 2251 of the Texas Government Code. This curtails or avoids an argument over an exact interest rate at the time of negotiation.

Chapter 2251 also mandates the "net 30" payment term, as opposed to a lesser duration frequently found in private entity agreements. A 30-day allowance to pay is critical because local government bodies typically meet no more than two to three times each month. That, combined with mailing time for the check, may exceed a shorter-than-30-days' allowance, so a "net 30" term in the agreement is preferable.

Assignments. Private vendor agreements often contain a blanket provision that a vendor's performance can be assigned to another entity without restriction. This unrestricted assignment may be countered with state and federal debarment and restricting regulations that would prohibit agreements with certain companies which cannot be contracted with by law and/or have been expressly suspended or debarred under lists maintained by the State Comptroller and under federal compliance and procurement rules. A contract couldn't be sustained if such an entity were to take over as the assignee of the agreement. Therefore, notice and approval requirements need to be negotiated into any assignment terms, along with a requirement for a future amendment, should an approved assignment eventually take place.

Confidentiality of contract documents. I have found that it is frequently important to vendors to protect the whole agreement, its pricing attachments, and its trade-sensitive attachments from public disclosure. In such instances, it is helpful to evaluate with opposing counsel the exact items the vendor or private entity wants to be kept confidential and whether it is even practically possible, for example, because certain terms are already part of a Request for Proposal or a Texas DIR (Department of Information Resources) cooperative contract and previously made public. Because of our client's potential obligations under Chapter 552 of the Government Code, "to the extent allowed by the Texas Public Information Act and associated regulations" is a useful compromise to offer when the argument gets heated.

Non-appropriation clause. Surprisingly, this is perhaps the most argued provision by vendors' counsel. The idea that the governing body of a city or county[3] can fail to appropriate funds in the

The idea that the governing body of a city or county can fail to appropriate funds in the budget of any upcoming fiscal year (when an agreement term exceeds a year) and can terminate the agreement without incurring a breach is still incomprehensible to many private entities who are unfamiliar with government clients.

budget of any upcoming fiscal year (when an agreement term exceeds a year) and can terminate the agreement without incurring a breach is still incomprehensible to many private entities who are unfamiliar with government clients. Frequently, such vendors attempt to insert penalties and damages within a non-appropriation clause, essentially treating it as a breach. We must strongly argue against a deviation from legal requirements because the very basis of this clause and its mandatory inclusion is constitutional authority and statute. Art. XI §7 of the Texas Constitution requires the parties to "lawfully and reasonably contemplate when the contract is made that the obligation will be satisfied out of current revenues for the year, or out of some fund then within the immediate control of the governmental unit."[4] Moreover, "A contract which violates these constitutional provisions is void."[5]

In my view, the non-appropriation clause may need the most attention in a negotiation and could be the pivotal issue where you take a firm stand. Having said that, in the interest of reaching a deal, a possible olive branch to offer is a longer notice period preceding a termination for non-appropriation, perhaps the maximum period you feel the budget process allows for each year prior to the end of the government entity's fiscal year. This may afford the vendor a reasonable opportunity to find another (replacement) client before the contract terminates. Eventually, most vendors see reason and accept the term, but in the event there is some lingering resistance, I have found that reluctantly offering a (client preapproved) incentive to the vendor in another, perhaps less impactful, aspect of the contract just might be enough to sweeten and seal the deal.

Post-negotiation stage

If opposing counsel is even halfway reasonable, after learning the rationale behind our arguments, a livable compromise can generally be reached by both parties. At this point you or opposing counsel may offer to memorialize the discussed changes, leaving only the final review to be completed by both sides. Of course, if the other side refuses all reasonable requests and completely disregards statutory arguments, it would be prudent to advise our client of these developments, as well as the legality or otherwise of the contractual documents currently at hand, and await further direction.

Conclusion

Negotiations are rarely simple, but negotiation of government contracts requires knowledge of governing state and federal laws in relation to each contended provision—and a supremely calm mindset throughout.

Maybe, if all goes well, opposing counsel will eventually roar (or squeak): "My client *will* agree to this provision." ❇

Endnotes

[1] Tips on legal review of contractual terms are discussed further in "The civil approach to confronting a government contract," by Amy Davidson and Bushra F. Khan, published in *The Texas Prosecutor*, January–February 2023 issue, available at www.tdcaa.com/journal/the-civil-approach-to-confronting-a-government-contract.

[2] 2 CFR Part 200 of the Code of Federal Regulations is also referred to as Uniform Guidance for Federal Awards.

[3] See Art. XI §7 of the Texas Constitution and Texas Local Gov't Code §271.903.

[4] *McNeill v. City of Waco*, 33 S.W. 322, 324 (Tex. 1895), as cited in Tex. Att'y Gen. Op. No. GA-0652 (2008).

[5] *City-County Solid Waste Control Bd. v. Capital City Leasing, Inc.*, 813 S.W.2d 705, 707 (Tex. App.–Austin 1991, writ denied), as cited in Tex. Att'y Gen. Op. No. GA-0652 (2008).

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Trying cases involving child sexual abuse material

For those in our profession who have never handled a Possession or Promotion of Child Pornography case, consider yourself *very* blessed.

By J. Brett Smith
Criminal District Attorney in Grayson County

Unfortunately, the images and videos in these cases may never be fully erased from one's memory. Couple that fact with trying not to imagine your own children or grandchildren in the same scenario as abused children, and you have accomplished a major feat.

All that said, some of the most rewarding cases we have prosecuted have been CSAM cases—CSAM stands for child sexual abuse material. (I tend to use that term instead of "child pornography" to differentiate pornography, which is created between consenting adults, and images of children's sexual abuse.) We hate to receive and work on such cases—but we love stacking up counts and racking up time for those guilty of this crime. This article outlines some of what we have learned about CSAM cases.

Watching our language

To start with, and I already mentioned this, I advocate for changing the use of the term "child pornography" to "child sexual abuse material" (abbreviated as CSAM). I do use the term child pornography, but I'll sometimes use CSAM before a jury—and more law enforcement is calling this material CSAM. CSAM is a more accurate description of these images and videos, according to the National Center for Missing and Exploited Children (NCMEC). The children in CSAM are victims; they are not willing or consenting participants. Referring to CSAM as any type of pornography just seems to place it into a category that we personally find abhorrent.

Changes to the law

Know the law for these offenses committed on or after September 1, 2023. During the 88th Regular Session, the Texas Legislature passed and Governor Greg Abbott signed some very helpful changes to §43.26 (Possession or Promotion of Child Pornography). By now we have all watched or attended TDCAA's Legislative Update, which noted that three very different Senate bills changed the law—and two of them conflict with each other. I strongly suggest reading the 2023 Legislative Note following §43.26 in the most recent edition of TDCAA's *Annotated Criminal Laws of Texas* book. In essence, possession of fewer than 100 images of CSAM is a third-degree felony. Possession of 100–499 images is now a second-degree, and possession of 500 or more images is now a first-degree felony. Any video or film which visually depicts conduct constituting an offense under §22.011(a)(2) of the Penal Code (Sexual Assault of a Child) is now a first-degree felony. Of course, the courts will ultimately have to reconcile these conflicting punishment schemes, so stay tuned—but based on our experience, most suspects have a large cache of images and, sadly, many videos.

Art. 42A.054 of the Code of Criminal Procedure (Limitation on Judge-Ordered Community Supervision) has also been amended to add Subsection (16). The result is that a defendant found guilty of an offense under §43.26 cannot be sentenced to probation, nor can he receive deferred adjudication community supervision.[1] Government Code §508.145(d) also requires defendants convicted under §43.26 to serve at least half their sentences or 30 years, without consideration of good time, whichever is less. A good writ reduc-

tion policy would be to ensure someone—the State, the court, or the defense—puts a defendant's understanding of his parole eligibility on the record following a plea agreement.

Penal Code §3.03(b)(3)(A) allows the sentencing court to stack (run consecutively) offenses under §43.26. Section 3.03(b) states that if an accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is a conviction for a listed offense (including §42.26). This would include sentencing following a conviction at trial or through a plea agreement.

The images' origin

Know where the images and videos came from, how prosecutors got it, and how CSAM is identified. Throughout my time as a prosecutor, I have seen CSAM cases come from everywhere: suspects taking their computers into a repair shop and the shop owner discovering CSAM; civilian witnesses who observe images on a suspect's phone or computer; and law enforcement stumbling across CSAM during ancillary criminal investigations involving the review of electronic devices, particularly in child sexual assault investigations.

Most frequently a CSAM case will come from a NCMEC Cyber Tip. The National Center for Missing and Expoited Children (NCMEC) is a private nonprofit based out of Alexandria, Virginia, which was established by Congress in 1984.[2] A Cyber Tip will typically be generated by NCMEC from an electronic service provider (ESP) that reports suspected CSAM to NCMEC. In 2022 nearly 99 percent of Cyber Tipline reports were submitted by ESPs—Facebook, Google, Instagram, Snap-chat, Yahoo, Microsoft, etc. The CSAM is reviewed by NCMEC and if confirmed, a Cyber Tip is generated. That tip will generally describe and detail the images including its assigned title, and provide an Internet Protocol (IP) address. IP addresses are generally a unique number assigned by local internet service providers. It is important to note that IP numbers can and do change over time. That is, local internet providers may change the IP address assigned to a given customer, which is one reason a prompt investigation of all Cyber Tips is important.

Cyber Tips are generally sent to a regional law enforcement agency with an Internet Crimes Against Children (ICAC) Task Force in the geographic jurisdiction where the ISP address is located. Once law enforcement receives the tip, officers can legally obtain the name of the person and the address associated with the IP through a grand jury subpoena. If law enforcement is seizing any data or documents, a search warrant is required. This may provide sufficient probable cause for a warrant to search for and seize devices associated with the IP for images of CSAM. Be aware that because law enforcement may not be fully aware of how many devices a suspect possesses, once all computers, tablets, cellphones, or other devices are seized, additional probable cause must be established in secondary search warrants to permit inspection and analysis of the devices.

Another reason for prompt investigation is that suspects or people helping them can wipe or delete account information, perhaps even while suspects are incarcerated. Law enforcement should obtain and send a search warrant to the electronic service provider (ESP) that submitted the Cyber Tip. The Cyber Tip may contain only information about a brief moment in time, i.e., a CSAM image or video download, but the account contents may provide additional valuable investigative material.

Known images of CSAM are often identified through what is known as a Secure Hash Algorithm Version 1 (SHA1 or "hash value" for short).[3] This is a file encryption method that produces a digital signature or fingerprint of a file. Two files will not produce the same hash value unless every pixel in the image or video is identical. As a result, identification of CSAM through a SHA1 hash value can be extremely accurate, more so than DNA results. A simple demonstration of SHA1 is included below.

These two images differ by a single pixel (the green arrow is pointing to a tiny white dot in the right image), which is enough to change their SHA1 values (at the bottom of each image).

Be sure you can prove possession. We have learned the hard way that just because CSAM is found on a computer doesn't mean the State can prove a particular suspect possessed those images. Encourage law enforcement to conduct interviews of suspects to obtain admissions and determine who has access to the device(s). This would include reviewing search histories and being cognizant of methods commonly used to obtain and distribute CSAM, such as peer-to-peer networks, BIT TORRENT, cloud sharing, and other tools used in the possession and distribution of CSAM. Have law enforcement review ancillary documents, emails, and even benign photographs on the computer to link a suspect to a particular device.

Practice tips

If there are hundreds of images, be sure to select the "best" (meaning, the most awful or egregious), and charge an appropriate number of counts. For us, that is generally at least 10.

Always allege the image or video as both "actual or simulated." Many CSAM images and videos may be both, and it is often hard to determine what is real and what is simulated. And in the age of Artificial Intelligence (AI) and photo-editing software, one can only imagine what images or videos could be created.

Some images or videos will be very clear that the victim is a child, but some cases may require that a SANE nurse or pediatrician reviews the images to testify about Tanner Stages of physical development and other indications to prove beyond a reasonable doubt the victim depicted is, in fact, a child.

Be prepared to show the images or videos to the trier of fact to prove beyond a reasonable doubt the elements contained in §43.26. Prosecutors may need to show an image for only a few seconds or show just 10–15 seconds of a video, but the judge or jury must see the evidence.

Finally, if there are hundreds of images, be sure to select the "best" (meaning, the most awful or egregious), and charge an appropriate number of counts. For us, that is generally at least 10. When alleging multiple counts, be sure that after each charging paragraph, you end the paragraph by identifying each video or images charges with a unique file name, number, or the SHA1 Hash Value, e.g., Video IMG_0820_MP4. You need some type of identifier to distinguish each image or video to avoid a Motion to Quash for lack of specificity, as multiple photos may appear to be indistinguishable without a unique identifier.

You can introduce additional evidence at punishment, but keep in mind that showing too many images or videos during trial can argued as prejudicial.[4] One safer practice would be to simply recall the investigator during punishment and have him testify to the total number of CSAM images or videos recovered.

Our experience is that, on average, a prosecutor will have to review CSAM at least four times on each case: at intake, discovery with defense counsel, trial preparation, and the trial itself. Ensuring a good investigation and using strong charging practices should lead to a higher percentages of case resolutions or plea agreements—as well as you or your staff having to review the CSAM on fewer occasions.

Conclusion

While many studies have attempted to find a link between child pornography and pedophilia, several with mixed results, there does appear to be empirical data indicating suspects who view CSAM have engaged in contact sex crimes with children. At a very minimum, each time a CSAM video or image is circulated through the internet, the child portrayed in the image is, once again, victimized. The prosecution of these cases is very important. ❇

Endnotes

[1] Tex. Code Crim. Proc. Arts. 42A.102(b)(2)(A) and 42A.453(b).

[2] We strongly encourage you to review and digest the abundance of information on the NCMEC website regarding CSAM.

[3] Categorized as MD5 HASH or SHA 1 HASH, these are long alpha-numerical identifiers of unique images or videos.

[4] See *Pawlak v.State*, 420 S.W.3d 807 (Tex. Crim. App. 2013).

Mental health and juvenile justice

It is no secret that many of the youths involved in the juvenile justice system are also facing mental health concerns.

By Kimberley K. Harris
Assistant Criminal District Attorney in Bexar County

Indeed, multiple studies have confirmed that juvenile offenders are far more likely to be diagnosed with a mental health disorder than their similarly aged peers; it has been estimated that between 65 and 70 percent of youths in the juvenile justice system have at least one diagnosable mental health condition,[1] compared to slightly less than 20 percent of the general population of adolescents.[2] Additionally, a large majority of juvenile offenders have reported traumatic victimization and adverse childhood experiences such as child abuse, family violence, and serious illnesses.[3]

Given the rehabilitative focus of juvenile justice, these statistics can pose unique challenges for prosecutors working in this area of the law. Understanding the tools aimed at addressing the mental health needs of juvenile offenders will help prosecutors navigate this critical issue.

Focus on rehabilitation

It is not just the terminology of the juvenile system that differs from the adult criminal system (e.g., respondents instead of defendants and petitions instead of indictments); there are exclusive procedural requirements and unique restrictions placed on prosecutors working in this area.[4] One must understand the intended purpose of juvenile justice to successfully navigate this distinctive area of the law.

Although the criminal offenses alleged in the adult and juvenile systems are the same, the basis of Texas juvenile law is contained within Title 3 of the Family Code, not the Penal Code. The Juvenile Justice Code clearly states that its purpose is not just to provide for the protection of the public and public safety through promoting punishment for criminal acts, but also to "remove, where appropriate, the taint of criminality from children committing certain unlawful acts[;] to provide treatment, training, and rehabilitation that emphasizes accountability" for a child's conduct, and "to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within these parameters."[5] While the central duty of all prosecutors is "to see that justice is done,"[6] those handling juvenile cases have additional rehabilitative goals that must be recognized.

Addressing a juvenile's mental health issues

Chapter 55 is the part of the Juvenile Justice Code that specifically addresses proceedings for children with mental illness or intellectual disabilities, and this article goes into detail (below) regarding juvenile respondents who are found to lack responsibility, who are unfit to proceed, or who meet the requirements for court-ordered mental health services. But most juveniles with mental health problems do not fall into these categories, and juvenile prosecutors should be aware of options for aiding in these children's rehabilitation.

There are many ways that a prosecutor might become cognizant of a juvenile offender's mental health concerns. While defense attorneys and juvenile probation officers often raise these issues, observation of a respondent and his behavior during detention hearings and docket calls may also alert a prosecutor that mental health problems may be present. Mental health issues can also become apparent after a careful reading of the case file, particularly the offense report and the observations of police officers who were called to the scene.

One route is to ask for counseling to address a respondent's mental health issues as a condition of probation or a deferred contract. Prosecutors should familiarize themselves with the services their local juvenile probation department has for youth in the juvenile system. Individual and family counseling, substance abuse counseling, anger management, and treatment with a licensed sex offender treatment provider may be options a prosecutor can request as a condition of probation. For some juvenile offenders, particularly those with low-level offenses, a prosecutor might choose to make counseling a condition of a deferred prosecution contract, enabling youth to get the mental health services they need while avoiding adjudication in the juvenile system.

Another option, if a county has them, is juvenile mental health specialty courts. Bexar County has two such courts for juvenile offenders, the MIND (Males In Need of Direction) Court and the Crossroads Girls Mental Health Court. Having specialty courts aimed at addressing mental health issues is enormously helpful, as it allows juvenile offenders to get the mental health services they need.[7] Specialty courts redirect the focus of the juvenile system to address the root cause behind a youth's behavior while also redirecting and educating the child.[8] These specialty courts offer an alternative route to rehabilitation by prioritizing mental health treatment and diverting youth from the juvenile justice system and detention. Juvenile mental health courts are designed to provide a more individualized approach, connecting youth with mental health services under the supervision of a judge and prosecutor.[9] In a specialty court, a prosecutor represents the State's interests and holds the youth responsible for complying with the specialty docket's requirements. Prosecutors can recommend that a child be accepted into a specialty court, be promoted, graduate, or be terminated from the program and sent back to the standard juvenile justice system. Juvenile mental health courts provide another option for rehabilitating youth, with the understanding that a one-size-fits-all approach to justice is not appropriate for every respondent.

Having specialty courts aimed at addressing mental health issues is enormously helpful, as it allows juvenile offenders to get the mental health services they need.

Although mental health specialty courts can be useful, they do not exist in every jurisdiction. In smaller counties without such a specialty court, prosecutors should rely on the services offered by the local juvenile probation department and make participation in those services a condition of probation or a deferred contract. If warranted, prosecutors may also choose to non-suit some cases on the condition that a juvenile participate in mental health counseling.

Chapter 55 proceedings

For those juvenile offenders who face more severe mental health concerns, Chapter 55 of the Family Code provides a path for prosecutors. It explicitly deals with respondents in the juvenile justice system who have a mental illness, with the basic philosophy that children who are in the juvenile system should first be handled by the mental health system if they meet the criteria for treatment, as both society and the juveniles themselves will benefit from their swift treatment.[10] Mental illness is defined to have the same meaning as that in the Health and Safety Code: "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that substantially impairs a person's thought, perceptions of reality, emotional process, or judgment, or grossly impairs behavior as demonstrated by recent disturbed behavior."[11]

There are three types of proceedings under Chapter 55:

- proceedings for court-ordered mental health treatment,
- fitness to proceed cases, and
- lack of responsibility for conduct proceedings.

Court-ordered mental health treatment. Either the prosecutor or the defense attorney can file an application for court-ordered mental health services.[12] The initial step is determining whether probable cause exists to believe that a respondent has a mental illness. The juvenile court may consider a variety of evidence, including the motion itself, supporting documents, statements of counsel, witness testimony, and its own observation of the child.[13] Mental health concerns are frequently raised by defense counsel, but they may also be raised by the child's parents or even the child himself.

If the court determines that probable cause exists, juvenile proceedings are temporarily stayed and a forensic mental examination is ordered.[14] In a proceeding for court-ordered treatment, this examination includes expert opinion as to whether the respondent has a mental illness and whether s/he meets the criteria for court-ordered services as laid out in §55.05.[15] After receiv-

ing this information, the court may initiate a hearing for court-ordered mental health services, considering both the least-restrictive setting appropriate for treatment and the parent or guardian's willingness and ability to participate in the child's treatment.[16] Mental health services can be ordered if the court finds by clear and convincing evidence that the respondent has a mental illness and meets the requirements for court-ordered treatment.[17]

Temporary (i.e., less than 90 days) outpatient services can be ordered if the court finds that the child will experience substantial deterioration in his or her ability to function independently without the court-ordered services, that services are necessary to prevent a relapse that would likely result in serious harm to the child or others, and that the child has an inability to effectively and voluntarily participate in treatment.[18]

The requirements for temporary inpatient mental health services are more stringent: The court must find that the child is likely to cause serious harm to himself or others or is suffering from severe distress, is experiencing substantial deterioration in his ability to function independently, and is unable to make a rational and informed decision about mental health treatment.[19]

Extended inpatient and outpatient treatment lasting longer than 90 days has additional requirements: The condition must be expected to last for 90 days or longer and the child must have previously received court-ordered treatment.[20] On the other hand, if the court does not find that a respondent meets the requirements for court-ordered treatment, the temporary stay can be dissolved, and normal juvenile proceedings will continue.[21]

Fitness to proceed cases. Chapter 55 also deals with juveniles who may be unfit to proceed in court because of mental illness or intellectual disability. A respondent is unfit to proceed if s/he lacks the "capacity to understand the juvenile proceedings or to assist in [his or her] own defense" because of mental illness or intellectual disability.[22] Similar to incompetency in adult criminal cases, it is a due process violation to put such a person on trial in criminal or criminal-type proceedings.[23] A respondent who is found unfit cannot be subject to adjudication, disposition, modification of disposition, or transfer to adult criminal court until the incapacity is removed. Similar to proceedings for court-ordered treatment, either party can move to have a fitness evaluation.[24] If the court determines that there is probable cause to believe that the respondent is unfit, juvenile proceedings are stayed and a fitness examination by an expert is ordered.[25]

A fitness examination requires that the expert consider whether the respondent has a mental illness or intellectual disability, the child's capacity to understand the allegations against him, the range and nature of dispositions that may be imposed, the roles of the participants and the adversarial nature of the legal process, as well as the respondent's ability to display appropriate behavior in the courtroom, testify relevantly, and the capacity to rationally and reasonably engage with counsel.[26] An expert's report must also contain information about whether a respondent is likely to be restored to fitness.[27]

If, after receiving the fitness to proceed report, a court determines that fitness is not an issue, the temporary stay is dissolved, and normal juvenile proceedings may continue.[28] However, if the court determines that there is evidence a child is unfit to proceed, a fitness to proceed hearing will be held unless the prosecutor decides to nonsuit the case.

Unfitness to proceed must be proven by a preponderance of the evidence in a hearing separate from any other hearing.[29] The party alleging unfitness, typically the defense, bears this burden of proof. If a respondent is found fit, normal juvenile proceedings continue.[30]

However, if a child is found unfit to proceed, a 90-day evaluative period is required during which the respondent is placed in a private psychiatric facility, an outpatient treatment center, or a local mental health authority or center.[31] During this 90-day period, a respondent in an outpatient setting can receive restoration classes from the juvenile probation department to assist in restoring the child's fitness to proceed, including assisting his or her capacity to understand court proceedings and ability to assist in his or her own defense.[32] After 75 days, the facility is required to issue a report to the juvenile court stating its opinion as to whether the child is now fit to proceed.[33] If the report says the child is now fit, the court must find the child fit, dissolve the stay, and continue normal juvenile proceedings unless the child's attorney objects.[34] If there is an objection, another fitness to proceed hearing is held, and the court will continue either with normal juvenile proceedings if the child is found fit or commitment proceedings if s/he is found unfit.

A respondent who is found unfit cannot be subject to adjudication, disposition, modification of disposition, or transfer to adult criminal court until the incapacity is removed.

Lack of responsibility for conduct cases. Unlike proceedings for court-ordered mental health services and fitness to proceed questions, the affirmative defense of lack of responsibility is a trial issue to be decided during adjudication by either the jury or the court.[35] Although lack of responsibility is rarely raised and even more rarely successful, prosecutors working in juvenile courts should be aware of this potential defense. A child is not responsible for allegedly delinquent conduct if, at the time of the conduct, s/he "lacked substantial capacity either to appreciate the wrongfulness of [the] conduct or to conform [his or her] conduct to the requirements of law" as a result of either mental illness or an intellectual disability.[36] This definition is more expansive than the adult insanity defense, which includes only defendants who "as a result of severe mental disease or defect, did not know that [their] conduct was wrong" at the time of the offense.[37] Either the defense or the prosecution may move for a forensic examination to assist in determining whether a respondent lacks responsibility for his conduct, and the juvenile court is required to grant that motion.[38] The burden of proof is on the party claiming lack of responsibility, and it must be proven by a preponderance of the evidence.[39]

Once the issue of lack of responsibility is raised and evidence is produced, the court or the jury is required to state in its finding or verdict whether or not it found the child responsible for the conduct.[40] Similar to the insanity defense in adult proceedings, if a respondent is found to be not responsible for the alleged conduct due to a mental illness or intellectual disability, s/he is acquitted of those charges.[41]

Just as in fitness to proceed cases, if a child is found to lack responsibility, a 90-day evaluative period is required, during which the respondent will be placed in either a private psychiatric facility, an outpatient treatment center, or a local mental health authority or center, and evaluated to determine whether s/he is committable.[42] The facility is required to report back within 75 days as to whether the child has a mental illness or intellectual disability.[43] If the report concludes that the child has a mental illness or intellectual disability, a commitment hearing will be held.[44]

Just as in fitness to proceed cases, if a child is found to lack responsibility, a 90-day evaluative period is required, during which the respondent will be placed in either a private psychiatric facility, an outpatient treatment center, or a local mental health authority or center, and evaluated to determine whether s/he is committable.

If, however, the report concludes that the respondent does not have a mental illness or intellectual disability, the court must discharge the child from all proceedings for which s/he was found to lack responsibility.[45] There is a narrow exception for determinate sentence cases where the prosecutor objects to the report, in which case a special commitment hearing will be held during which the State must prove its case by clear and convincing evidence for treatment services to be ordered. Although rare, prosecutors should be aware of this option.

Conclusion

Mental health concerns continue to be a persistent problem for those involved in juvenile justice. Prosecutors who understand the tools aimed at addressing these issues, both in Chapter 55 and beyond, will be better able to serve the dual goals of the juvenile system: protecting the community and public safety while rehabilitating young offenders. ❇

Endnotes

[1] Jennie L. Shufelt & Joseph J. Cocozza, Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study, Research and Program Brief, Nat'l Ctr. for Mental Health and Juv. Just. (2006), www.njjn.org/uploads/digital-library/Youth-with-Mental-Health-Disorders-in-the-JJ-System_Shufelt-and-Cocozza-NCMHJJ-6.2006.pdf.

[2] Mental Health by the Numbers, Nat'l All. On Mental Illness (Apr. 2023), www.nami.org/mhstats.

[3] See. e.g. Michael T. Baglivio et. al, The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders, OJJDP J. of Juv. Just., Spring 2014, at 1, www.ojp.gov/pdffiles/246951.pdf.

[4] Sarah Bruchmiler & Hans Nielsen, "The Basics of Juvenile Law," *The Texas Prosecutor*, January–February 2017, at 27, www.tdcaa.com/journal/the-basics-of-juvenile-law.

[5] Tex. Fam. Code §51.01.

[6] Tex. Code Crim. Proc. Art. 2.01.

[7] A statewide list of mental health court programs is available at www.texasjcmh.gov/technical-assistance/mental-health-courts.

[8] Sarah Bruchmiler & Hans Nielsen, "Specialty Courts for Juvenile Offenders," *The Texas Prosecutor*, May–June 2018, at 20, www.tdcaa.com/journal/specialty-courts-for-juvenile-offenders.

[9] Patrick Gardner, An Overview of Juvenile Mental Health Courts, 30 ABA Child Law Prac. 97 (Sept. 2011), www.americanbar.org/content/dam/aba/administrative/child_law/clp/vol30/sept11.pdf.

[10] Robert Dawson, Texas Juvenile Law 333 (9th ed. 2018).

[11] Tex. Fam. Code §55.01; Tex. Health & Safety Code §571.003.

[12] Tex. Fam. Code §55.65.

[13] *Id*. §55.11.

[14] *Id*. §55.04.

[15] *Id*. §55.11(b).

[16] *Id*. §55.11(c).

[17] *Id*. §55.05; 55.65.

[18] *Id*. §55.05(b).

[19] *Id*. §55.05(a).

[20] *Id*. §55.05(c)-(d).

[21] *Id*. §55.11.

[22] *Id*. §55.31(a).

[23] *Dusky v. United States*, 362 U.S. 402 (1960).

[24] Id. §55.31(b). A juvenile court may, in its discretion, determine whether probable cause exists that a child is unfit sua sponte but is not required to do so. See *In re J.K.N.*, 115 S.W.3d 166, 168-69 (Tex. App.–Fort Worth 2003, no pet.).

[25] Tex. Fam. Code §55.31(c).

[26] *Id*. §55.31(d).

[27] *Id*. §55.31(e).

[28] *Id*. §55.31(f).

[29] *Id*. §55.32.

[30] *Id*. §55.32(e).

[31] *Id*. §55.33.

[32] *Id*. §55.33; 55.01.

[33] *Id*. §55.35.

[34] *Id*. §55.36.

[35] *Id*. §55.51(c).

[36] *Id*. §55.51(a).

[37] Tex. Penal Code § 8.01. The insanity defense in adult criminal cases is further limited by specifically excluding abnormalities that manifest "only as repeated criminal or otherwise antisocial conduct." Id. The juvenile definition for lack of responsibility contains no such limitations. See *W.D.A. v. State*, 835 S.W.2d 227 (Tex. App.–Waco 1992, no writ).

[38] Tex. Fam Code §55.51(b).

[39] Id. §55.51(d). See also *J.W. v. State*, No. 01-11-01067-CV (Tex. App.–Houston [1st Dist.] 2012, no pet.) stating, "The burden is on the juvenile to prove by a preponderance of the evidence that, at the time of the incident, he lacked the capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law."

[40] Tex. Fam Code §55.51(e).

[41] *Id*. §55.51(g).

[42] *Id*. §55.52.

[43] *Id*. §55.54(b).

[44] *Id*. §55.56.

[45] *Id*. §55.55.

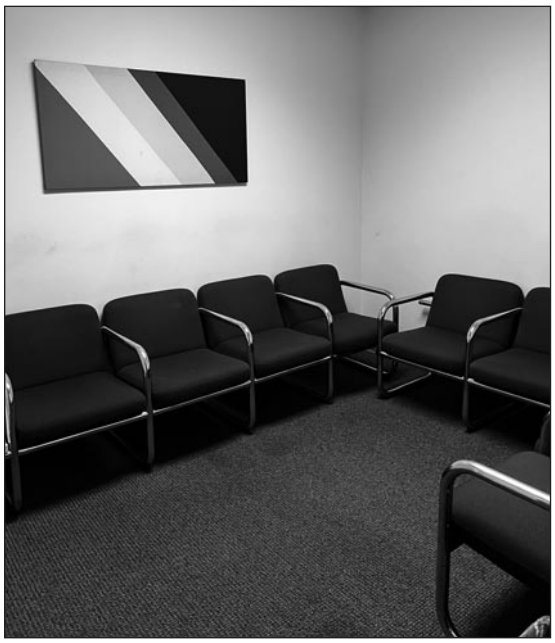
A welcoming place to wait

Jefferson County is the grateful recipient of two beautiful new victim-witness rooms.

By Leanne Winfrey
Office Manager, Criminal District Attorney's Office in Jefferson County

These rooms—originally built and furnished in the 1980s—received a fresh coat of paint, new furnishings, carpet, and beautiful artwork, all thanks to the Junior League of Beaumont.

Daisy Reyna, a Provisional Member of this local Junior League chapter and counselor at the child advocacy center, first suggested the remodel as her class's service project. When our elected Criminal District Attorney, Keith Giblin, learned that the Junior League had chosen to renovate the witness rooms in the courthouse, he was overcome with gratitude. One of the most traumatic aspects of being the victim of a violent crime is having to relive that experience in the courtroom and being forced to physically associate with one's assailant. A victim-witness waiting room is one essential tool to help minimize that trauma by providing a safe, comfortable space for victims and witnesses to wait prior to testifying.



ABOVE, the adult waiting room as it used to be; RIGHT, the redecorated room with modern black chairs, artwork, and lighting.

To that end, the Junior League began to plan its renovations to two rooms, one for adults and one for children. The project had an allotted budget of $500; however, it quickly exceeded budget, and all additional funds were donated by class members and others. Paige Reed, the project chair, coordinated closely with me, the office manager, regarding the renovations and what might best help create a safe and relaxing environment for victims. For the children's waiting room, for example, I helped identify items that could help children cope with stress and noted the need for books and movies in both Spanish and English so that all children in the community could be served.

After weeks of planning and designing, the Provisional Class of the Junior League descended on the courthouse and began working. Functioning as efficiently as a well-oiled machine, they completed the project in just two days. They thought of everything—the newly remodeled rooms check all the boxes.

The adult witness room was transformed from a stark white space with chairs and magazines (it looked a little like the waiting room in a doctor's office) into a peaceful and inviting room with warm new lighting, plants, and artwork. All the old 1980s blue chairs were replaced with sleek black cushioned armchairs.

The original room for child witnesses was a hodgepodge of worn-out items. (Everyone was delighted to see the old red stained sofa hauled to the dumpster!) The redecorated room uses a cheery color scheme of soft blues and cream with colorful artwork on one wall and a display of kid-friendly books on another. The Junior League provided a comfy new sofa and fresh pillows, books, toys, puzzles, stuffed animals, and a child-size table for kids to color and play (see the photos below). The group also donated "witness bags" children can carry with them into court. The bags include courtroom-appropriate items such as snacks, fidget toys, tissues, and a small stuffed animal.

On March 26, the community held a ribbon-cutting ceremony to show off the new rooms. Many were in attendance to see the transformations, including members of the Junior League, employees of the District Attorney's Office, various courthouse employees, and other community leaders. All were eager to applaud the Junior League for their hard work, especially the extra efforts they took to serve those most vulnerable in our community. District Attorney Giblin voiced his admiration for child victims and their bravery in coming forward to testify. In expressing his gratitude to the Junior League, Giblin commented that no one had identified this need before, and he believed God planted the seed for this idea. He praised the Junior League because they "could have chosen anywhere for their project, but chose to re-do a room where the most precious of our possessions are—[our] children."

The Jefferson County District Attorney's Office is thankful to the Junior League of Beaumont and their service to our community in renovating the victim-witness rooms in the courthouse. Job well done. ❇

LEFT, the children's old waiting room, complete with stained red velvet sofa, before any work was done. And ABOVE, with a new sofa, pillows, lighting, and bookshelves.

It all started with an anonymous letter

David Grotberg was a 19-year-old sophomore at Baylor University when he was killed while riding his bicycle in Waco.

By William Hix & Tara Avants
Assistant Criminal District Attorneys in McLennan County

A car struck him on October 6, 2016, and for years, his killer was unknown, leaving David's family with little hope of justice. But thanks to a determined investigation, thorough trial preparation, an anonymous letter to police, and a little providence, David's killer was convicted and sentenced to prison in February 2024.

The crash

Franklin Avenue is one of Waco's well-traveled roads. It cuts a straight line from a nearby suburb called Woodway to downtown Waco. The speed limit varies between 35 mph and 50 mph (though most locals will admit they don't follow it), and the lighting varies like the speed—in some spots visibility is fine at night, but in other places it is bad. Like many roads in other Texas towns, Franklin Avenue is seemingly always under construction. On October 6, 2016, Franklin's right lane was closed at the intersection of 32nd Street as the road approaches downtown Waco, and traffic was relatively light.

David and his girlfriend, Kaitlyn Morris, were biking back from a local movie theater on Franklin. As Kaitlyn rode along, she heard a loud noise behind her and turned to see David's body flying into the air; he had been struck by a speeding vehicle. Kaitlyn stopped her bike and ran as fast as she could to get to David. She immediately saw that he was already dead based on the extent of his head injuries.

Waco Police Department officers were only a few blocks away from the crash when the dispatch came over the radio. When they arrived on scene, officers found Kaitlyn in shock and covered in David's blood. They spoke with nearby witnesses, but they could only provide a vague description of the vehicle—a white or light-colored SUV—which had fled the scene.

Months later, Waco PD Detective John Clark had to inform the Grotberg family that there were no more leads to follow; the case had gone cold. The Grotbergs feared that they might never know who had killed their son.

The letter

Prosecutors and police officers know well that anonymous tips often amount to nothing. In the criminal justice and law enforcement world, actionable information coming in spontaneously is rare, and hoax phone calls and faulty information are the norm. In the fall of 2018, two years after David Grotberg's death, Detective Clark was skeptical when he heard that an anonymous letter had arrived at the police department naming a suspect in a fatality crash. The letter said that Tammy Blankenship had killed David on October 6, 2016.

Despite his skepticism, Detective Clark had a lead for the first time in two years. In addition to naming a suspect to investigate, the anonymous letter also provided several other helpful facts. The letter described how, on the evening of the hit-and-run, Blankenship had been drinking wine at a party for Midway ISD administrators, which was held at a home in Woodway. The letter also identified a key witness for the case—a female coworker—who would later testify in Blankenship's trial.

Armed with this new lead, Detective Clark began to gather information that would either corroborate or disprove the letter's claims. He and others in the department took four steps that became critical to prosecuting Blankenship:

1) Detective Clark obtained photos from October 2016 that a local auto repair shop had taken of the damage to Blankenship's vehicle (a silver Hyundai Accent). Blankenship had brought her car in for repair about a month after the hit-and-run. Photos showed that the damage was all on

the front passenger side and that the front windshield was caved inward, similar to what you would expect from striking a human body. There was also a thin, vertical indention on the right side of the front bumper akin to a bike tire frame.

2) Detective Clark located Blankenship's female co-worker, who was named in the letter, and interviewed her about what she remembered from the morning after David was killed. She saw Blankenship, her supervisor at the time, first thing on October 7, 2016, and Blankenship casually mentioned that she had been in a wreck the night before and was not sure what she had hit. Later that morning, Blankenship summoned this co-worker into her office where Blankenship was shaking and saying, "I killed a kid, I killed a kid," all while looking at a news article about a Baylor student killed in a hit-and-run the night before.

This co-worker also followed Blankenship while she drove her damaged car to the Walmart parking lot in Marlin (about 45 minutes away) and parked it in the back of the lot; she noted that the windshield appeared to be caved inward. She then drove Blankenship back to Waco where Blankenship asked her to drive two routes because Blankenship could not remember how she had gotten home the night before. The first route they traveled was from Woodway, down Franklin Avenue, toward downtown Waco—right past the crime scene. She recalled that Blankenship found a temporary stop sign laying on the ground near downtown Waco and claimed that this is what she had hit the night before.

3) Detective Clark interviewed Blankenship, and she made numerous admissions: She admitted to being at the party with the Midway administrators on October 6, having multiple glasses of wine, and driving home. She admitted to damaging her car on the way home from the party. At first, she told Detective Clark that she hit a stop sign near her apartment in downtown Waco. However, as the interview progressed, she admitted, "I thought I hit a homeless person," and then claimed she was not sure what she hit to cause the significant damage to her car. She admitted that she waited several weeks after the crash to report the insurance claim and have the vehicle repaired, saying she could not afford the deductible at the time.

4) Detective Clark obtained Blankenship's phone records which showed the cell towers that her phone pinged off of on October 6 and in the days after the crash. A Waco PD Crime Analyst, Brett Page, used computer software in the Criminal Intelligence Unit to create maps of Blankenship's cell phone activity. The map revealed that on the night of the crash, Blankenship's phone pinged off of a cell tower near the Midway Administrator party in Woodway at 9:46 p.m. At 9:50, the phone pinged off a cell tower very near the crime scene. This was significant because the 9-1-1 call reporting the crash came in at 9:53 p.m. Both the 9:46 and 9:50 calls on Blankenship's phone were incoming calls from the same phone number. Detective Clark traced that number back to one of Blankenship's male coworkers. The cell phone records from October 7 also corroborated that Blankenship took her car to Marlin the day after the crash and parked it there for about four hours.

Based on the totality of the evidence, Detective Clark applied for an arrest warrant for the felony offense of Failure to Stop and Render Aid in an Accident Involving Death.

Grand jury

Robbie Moody, an assistant U.S. attorney and former McLennan County prosecutor, was originally assigned to this case. He told us, "When the police arrested the defendant, it was clear that Blankenship had committed the crime, but the case was not ready for the courtroom. We needed to use tools like the grand jury process to shore up our understanding of the facts and eliminate as many weaknesses as possible for our case."

While McLennan County prosecutors were convinced that Blankenship had killed David Grotberg, they still had work to do before the case could be tried. Our office served grand jury subpoenas on the female coworker named in the letter, Blankenship's three adult daughters, and a male co-worker with whom Blankenship had an affair in 2016; this man was also at the party on October 6.

Prosecutors also used a grand jury subpoena for the insurance records and audio recording of Blankenship's claim to her car insurance carrier. In the audio recordings, Blankenship acknowledged that she was behind the wheel of her car and was the sole occupant of the vehicle at the time the damage occurred. She again claimed that she hit a stop sign but this time said that the stop sign went over the top of her vehicle. This

While McLennan County prosecutors were convinced that Blankenship had killed David Grotberg, they still had work to do before the case could be tried.

was different from her previous description in the interview with Detective Clark that the stop sign was laying down in the grass, popped up, and struck her windshield.

Blankenship's female coworker provided testimony consistent with what she had told Detective Clark during her interview, but taking her testimony before the grand jury memorialized both her own statements and her recollection what the defendant said. Blankenship's daughters testified that their mother was a heavy drinker and hardly ever went a night without a glass of wine (or three) in hand. Blankenship had told them that she hit a stop sign.

The male coworker corroborated that Blankenship was at the party on October 6 and acknowledged that he tried to call her twice on her way home, but he claimed to not remember why he called her. These were the incoming calls, the second of which caused her phone to ping off of the cell tower near the crime scene.

After the general summary of the case, the boarding group peppers the prosecutors with questions about the facts, evidence, and strategy. The questions helped us know what witnesses may be needed and what follow-up investigation should happen so that we could fill in as many pieces of the puzzle as possible for the jury.

Filing charges

Prosecutors then needed to decide what charges to present to the grand jury for indictment. We considered a charge of intoxication manslaughter, but the evidence of intoxication was circumstantial at best. There was evidence that Blankenship drank wine at the party and was unsure of which route she took home; however, based on her being known as a heavy drinker, it was unclear how high her alcohol tolerance was. The party's host described how Blankenship had been loud and was using profanity in front of the superintendent of the school district, but the witness did not know Blankenship well enough to determine if that behavior was out of the ordinary. The party's host also recalled receiving a text message from Blankenship the morning of October 7 apologizing for her inappropriate behavior and for drinking too much the night before. Ultimately, prosecutors decided that the charge of manslaughter was a better fit because it could encompass various forms of recklessness.

In 2020, the grand jury returned a two-count indictment for Failure to Stop and Render Aid in Accident Involving Death (a second-degree felony) and Manslaughter (also a second-degree felony). The acts of recklessness alleged in the Manslaughter count were by failing to keep a proper lookout, speeding, driving while intoxicated, failing to yield, and/or driving a motor vehicle into and against a bicycle operated by David Grotberg.

During the height of the COVID-19 pandemic, the case sat idle, along with hundreds of others, waiting for courtrooms to re-open. From 2021 to 2024, Blankenship was out on bond, and her case moved along the trial docket in the 54th District Court.

Getting outside help

Knowing this trial would present new obstacles, we sought help from experienced prosecutors both within and outside of our office. Fortunately, legendary former vehicular crimes prosecutor Richard Alpert had recently moved to Waco; he's now a professor at Baylor Law School. His expertise helped us to strategize and navigate anticipated defenses, such as a claim that the defendant committed a hit-and-run that night but did not hit David Grotberg, or relying on the eyewitness statements that described a vehicle slightly different from Blankenship's.

Our first assistant, Ryan Calvert, taught us how to "board" a case and prepare for trial using all perspectives, from experts in the field, such as Richard Alpert, to student interns, who often point out questions we have overlooked. Boarding is a part of our trial preparation where we gather a group and discuss the case.[1] We write on a large whiteboard the names of all witnesses, the criminal charges, pertinent dates and times, and the like. The trial prosecutors start by giving a summary of the case to the group, which is great practice for the prosecutor who will do the opening statement to have a test run. Will Hix, a coauthor of this article, planned to use a PowerPoint during his opening statement, so he presented that PowerPoint at the boarding and received feedback from the group about the slides. Based on the feedback, he removed some pictures and changed some wording to improve the presentation.

After the general summary of the case, the boarding group peppers the prosecutors with questions about the facts, evidence, and strategy. The questions helped us know what witnesses may be needed and what follow-up investigation should happen so that we could fill in as many pieces of the puzzle as possible for the jury. We also discussed potential defensive objections and developed areas of caselaw that we needed to research. Lastly, we developed a witness order that

allowed for the strongest presentation of the evidence, focusing on primacy and recency (starting strong and ending strong).

We had two separate boarding sessions for this case, about six months apart, to ensure that we allowed time for any follow-up investigation that needed to happen before trial. After the first boarding, we re-interviewed some witnesses to ask additional questions and took more pictures of the vehicle in the impound lot. However, some questions we were never able to answer, such as who wrote the anonymous letter and why Blankenship did not stop despite thinking that she had hit a homeless person.

In the second boarding, Richard Alpert stressed to us what would be our main strategy throughout the trial: to keep the focus on Blankenship. He advised us to concentrate the jury on her admissions, actions, and locations. This meant narrowing our witness lineup and reordering witnesses outside of the standard chronological format.

As with any cold case, the delay made it more difficult to follow up with any forensic investigations. We did not have an eyewitness who observed Blankenship behind the wheel of the car, so we used circumstantial evidence to build the case. The strongest evidence included the damage to the vehicle, Blankenship's statements in her interview with Detective Clark and to the insurance company, the female co-worker's testimony, and the maps of her cell phone pings. We knew the evidence pointed to the conclusion that she is the *only* one who could have been behind the wheel of the car that struck and killed David Grotberg.

The investigation took teamwork from the Waco PD detective, crime analyst, and the prosecutors who secured grand jury testimony and pushed the case onward toward trial. The State was now ready almost eight years after the crime occurred.

The trial

On Monday, January 29, 2024, we began jury selection with a questionnaire, distributed to 100 venirepersons, to address any media issues and to ask personal, intoxication-related questions, including previous life experience with hit-and-run cases. After half a day of individual questioning, 65 jurors entered the courtroom for voir dire. We questioned the panel and many jurors said that they could not be fair and impartial based on prior life experiences involving hit-and-run crimes. As the challenges for cause mounted, we held our breath because we were within just a few jurors of busting the panel. Fortunately, though, enough members were saved that the court empaneled 12 jurors, plus an alternate.

We called Blankenship's female co-worker during the first day of testimony. She testified that Blankenship, her supervisor at the time, told her that she had been in a wreck the night before and was not sure what she had hit. However, within the hour, Blankenship called this woman into her office and stated shakily, "I killed a kid, I killed a kid," while staring at a news article that included the words "Baylor student" and "hit and run." She testified that she did not call the police because she was in shock and did not realize that she needed to report this to law enforcement.

The State moved through its case-in-chief, and we were prepared to call our last few witnesses on Friday. However, a juror called in sick Friday morning and provided a positive COVID test. The remaining jurors were sent home and told to call in if they became ill over the weekend. We were nervous that the other jurors would also test positive and the trial would come to a halt, but we found some hope in that none of the remaining jurors wrote down the court's phone number when it was read aloud. On Monday morning, the remaining 11 jurors all arrived, and the alternate juror slid into the jury box to fill the vacancy.

We called Detective John Clark to the stand during the second week of trial. On cross-examination, the defense attorney sought to impeach the detective concerning an unrelated internal affairs matter for which Clark had been disciplined more than 20 years earlier. We had been informed mid-trial about this discipline (from a former colleague who'd been following the trial on Twitter) and had told defense counsel immediately. We also objected—strenuously—to the defense's line of questioning and argued that the law does not permit impeaching the detective by using a specific instance of conduct.[2] Despite our objections, the trial judge nevertheless permitted the defense to question Detective Clark about the 1999 incident. The defense then launched a vicious, personal attack on the officer, which lasted a full day of trial.

While the judge's ruling frustrated us and we were sensitive to the humiliation that Detective

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Clark was having to endure, we also sensed an opportunity. We felt we could use the ferocity of the defense's attack on Detective Clark to highlight how the defense was trying to distract the jury from looking to the defendant's own actions and statements. We decided to turn the defense's weapon against them in closing argument. We would hammer home this point: The defense sought to paint the detective as a liar, but they wholly ignored the numerous and blatant lies Blankenship told in her recorded interview. (Our plan to maintain focus on the defendant, as Mr. Alpert had suggested, later proved successful, as the first jury note requested to watch Blankenship's interview.)

In the middle of the trial's second week, the defense called Tim Lovett, an experienced expert witness in crash reconstruction. Lovett testified that based on the photos he had reviewed, the damage on Blankenship's car could not have been caused by striking a bicyclist. He provided the jury with measurements of the bike tire and the height of the bumper of Blankenship's vehicle, from a front facing picture taken at the impound lot in August 2023. Lovett told the jury that these measurements did not match or fit together.

We decided to turn the defense's weapon against them in closing argument. We would hammer home this point: The defense sought to paint the detective as a liar, but they wholly ignored the numerous and blatant lies Blankenship told in her recorded interview.

On cross, Lovett admitted that driving while intoxicated is reckless, which meant that he helped lock in one of our manner and means of committing manslaughter (if the jury believed Blankenship was intoxicated). We also highlighted information that had been presented to the jury but not provided to Lovett prior to his testimony at trial, including the female co-worker's testimony that she saw the vehicle's windshield caved in on October 7. Richard Alpert watched Lovett's testimony and helped us strategize about cross-examination during a short morning break. Following his sage advice regarding Lovett, an expert he had both directed and crossed many times, we narrowly focused our cross-examination to dilute Lovett's opinions so that the jury might disregard them. We decided to save a photo to present in the second closing argument depicting the side view of Blankenship's vehicle in the impound lot in August 2023, showing that the front right tire of the vehicle was completely flat—undermining Lovett's calculations of the height of the bumper. By holding this evidence back during cross, we sought to deprive the defense of an opportunity to explain it away.

The defense also called Blankenship's landlord, who testified that he saw the vehicle the morning of October 7 and did not notice any significant damage. His testimony contradicted the testimony of the female co-worker and the cell tower data from Blankenship's phone on October 7. The defendant exercised her right not to testify, and the defense rested its case.

In rebuttal, we called an auto glass repair technician who had been repairing windshields for almost 30 years. We sought to call him as an expert witness, and after a TRE 702 hearing, the court allowed his testimony over the defense's objection. He testified that he could not say what caused the damage to Blankenship's vehicle, but it was something heavy, and more importantly, it was not a stop sign that caused the damage. This expert was not a witness the police had ever spoken to, but his important testimony illustrated how prosecutors can strengthen their cases by getting beyond the four corners of the case file.

After deliberating for about six hours, the jury returned a guilty verdict on both the Manslaughter and Failure to Stop and Render Aid counts. On the Manslaughter count, the jury also made a finding that Blankenship used her vehicle as a deadly weapon.

Punishment

In punishment, the defendant was facing two to 20 years in prison on both counts, but she was also eligible for probation. In preparing our punishment case, we subpoenaed an Austin Police Department officer who stopped Blankenship in 2018—two years after David's death—and found her to be driving intoxicated one evening during a work conference. Even though that DWI case was ultimately dismissed as part of a plea agreement, the officer still provided powerful testimony that Blankenship was again driving intoxicated, even after killing David. Additionally, we presented evidence that Blankenship falsely accused that officer of harassing her in an attempt to escape accountability for her actions. That evidence was critical to show that, despite knowing that she had taken a young man's life, her behavior had not changed. It also showed that the only thing that mattered to Blankenship was Blankenship.

We also called a Midway ISD administrator who testified that when Blankenship was questioned about the DWI arrest upon returning to school, she lied about drinking alcohol that evening and claimed she was with an administra-

tor from another school district. The school district confronted her about this deception in a subsequent meeting and demoted her as a result.

Finally, we called several members of David Grotberg's family so the jury would know who David was and what Blankenship had stolen from them.

After we rested in punishment, the defense called two legendary Texas prosecutors to the stand: Kelly Siegler and Lisa Tanner. Both women described Blankenship's cooperation as a key witness in the David Temple murder prosecution in Harris County, which had been tried first by Siegler in 2007 and retried by Tanner in 2019.[3] Blankenship had been best friends with Temple's wife, who was eight months pregnant at the time she was killed. Siegler tearfully told jurors that Blankenship would make an excellent candidate for probation, and Tanner testified that Blankenship would likely be able to follow the rules of probation. This was surprising to us and truly a once-in-a-lifetime experience to cross-examine such formidable and famous prosecutors. We pointed out that the jury had far more information about the facts of Blankenship's criminal actions than the two former prosecutors did.

The jury ultimately rejected probation and sentenced Blankenship to 10 years in prison on both counts.

The lessons

"I get knocked down, but I get up again" seemed to be a theme for the duration of this case, with truth and justice prevailing in the end. This case traveled through three different DA office administrations, the COVID-19 pandemic (with the virus even threatening us during the trial), and various other obstacles. The successful prosecution of this case was the result of the persistence and determination of many prosecutors and staff at the McLennan County Criminal District Attorney's Office, Detective Clark and others at Waco PD, and the Grotberg family.

Richard Alpert was a tremendous help not only during the trial preparation but also during the trial. His guidance and decades of experience in vehicular crimes helped us to present our strongest case and stay focused despite the trial's unexpected hurdles.

We also owe gratitude to the author of the anonymous letter. While we have our hunches about who wrote it, the author may remain anonymous forever. Nonetheless, he or she provided the key to unlock the cold case, which is a reminder that justice has no expiration date, that we should never give up hope.

The biggest lesson we will apply to our future prosecutions is a simple one: Know a case's strengths as well as its weaknesses. Both of us come from competitive athletic backgrounds, so sports metaphors tend to be an easy way for us to communicate ideas to each other. We always need to know what our best play is when it looks like things are going sideways in a trial. What is the pitch that we know the other side cannot hit, and how many creative ways can we come up with to throw it early and often.

In a challenging prosecution, it is easy to panic about a case when a witness—or series of witnesses—do not go as well as you had hoped, as happened with the impeachment of our lead detective. Rather than let negative momentum start to build up against you, stay calm, and always know what your fastball is. ❇

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Endnotes

[1] Calvert notes that he learned the tactic of boarding cases from his friend and former boss, Brazos County District Attorney Jarvis Parsons.

[2] See T.R.Evid. 608(b).

[3] Read about the retrial of David Temple at www.fox26houston.com/news/david-temple-trial-sentenced-to-life-in-prison-for-murder-of-pregnant-wife.

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