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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

Pushing boulders at the Texas capitol

In Greek mythology, Sisyphus is a character who spends his whole life rolling a large boulder up a hill, only to get close to the top and have it roll back to the bottom. Sometimes trying to pass an important bill at the Texas Legislature can feel the same way.

By Eric Carcerano
Assistant District Attorney in Chambers County

Four legislative sessions can seem like forever, but unlike that accursed king of Greek lore, we finally reached the top of the mountain and pushed our rock over the peak. Here's how it happened.

On March 5, 1996, the unidentified body of a teenage girl was found under the Trinity River Bridge in Chambers County. She had been sexually assaulted and strangled. Her description matched no missing person reports from Chambers County or nearby areas in Baytown. The body was sent to the morgue in Jefferson County, where it was eventually identified as the body of 13-year-old Krystal Jean Baker of Texas City in Galveston County. Krystal had been living there with her grandmother and had run away in the past, but she had always come back. By the time her grandmother realized she was missing again, Krystal was the Jane Doe in the morgue. Analysts at the lab were able to recover biological materials from her dress and under her fingernails, but the technology at the time could not detect the presence of semen on the dress, and law enforcement officials could not develop a suspect. From there the case went cold.

More than seven years later and hundreds of miles away, on August 30, 2003, Katie Sepich, a graduate student at New Mexico State University, was walking home from a party. She was locked out of her house and tried to climb in a window so she wouldn't wake up her roommate. The next morning, her partially clothed, burned body was found at an abandoned city dump site. State police and prosecutors recovered her assailant's DNA, but they found no match. Katie's parents, Dave and Jayann Sepich, began a campaign to find her killer, buying billboards in New Mexico and El Paso to bring him to justice.

During the Christmas holidays in 2003, I was visiting my family in El Paso. I saw one of the billboards and asked my brother about the story, and he told me about Katie

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Thanks to Rusty Hardin

The Foundation exists as a way for those who love the profession of prosecution to support and grow the ability of our association to serve you.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

This vision is nothing less than an ever-increasing ability to support Texas prosecutors so that when it is time to stand up and announce, "The State is ready," you know that you are.

There is not a more enthusiastic supporter of our profession than former Harris County Assistant District Attorney and current defense attorney Rusty Hardin. No doubt many of us have prosecuted with Rusty, and many of you have opposed Rusty in the courtroom.

Either way, you should know that at TDCAA's 2005 Board dinner in conjunction with the Annual Update in Corpus Christi, we first discussed the creation of an educational foundation to support the mission of TDCAA. Rusty was so enthusiastic about the idea that he asked for a pen. He insisted that he be the first person to donate to the new Foundation, and on that evening's dinner menu wrote his pledge for the first $10,000 donation. Of his own money. I kept that dinner menu, and sure enough, Rusty was the first donor when the Foundation launched the next year.

It seemed only fitting that we honor and recognize him at this year's Board dinner, again in conjunction with an Annual conference in Corpus Christi—and yes, that's a framed copy of that dinner-menu pledge from so many years ago in the photo at right! Rusty's enthusiasm has not waned over the years—he is still the biggest personal donor to the foundation by far.

Thank you Rusty, on behalf of all of us! ❇

Rusty Hardin (at right with his framed menu) and I at the Board dinner in Corpus Christi.

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About *The Texas Prosecutor*

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Got a favorite podcast?

If you do, I want to hear about it. What do you like about it? What makes it interesting to you?

By Rob Kepple
TDCAA Executive Director in Austin

Here's why I'm asking: The association operates on a series of five-year, long-range plans. The plans address governance, training, resources, and technology. One of the action items from the 2016 plan is for TDCAA to develop distance learning opportunities for prosecutors and staff. The goal is not to replace existing face-to-face trainings, as those continue to be very valuable. Instead, we need to supplement and complement the training that already exists with distance training that is timely, relevant, and accessible.

One idea on the table is to create a bank of short videos on our website that assist criminal and civil practitioners in all aspects of your jobs. Never done a motion to revoke probation? Go watch the 10-minute clip on how it's done. Never impeached someone with a prior inconsistent statement? There's a five-minute clip on the TDCAA website on just that topic. The list of topics valuable to civil and criminal practitioners would be endless.

Others have offered another intriguing idea. Why doesn't TDCAA produce a podcast? Many of y'all already listen to podcasts at work or on your daily commutes, so why not package case summaries, important legislative updates, and other timely information in an audio format?

The training committee and TDCAA leadership will be discussing options for distance learning in earnest this year. As we explore this idea, we need your help. Please email me at Robert.Kepple@tdcaa.com with your favorite podcasts and what you like about them. If TDCAA offers a podcast in the future, what would you like to hear about?

And please suggest any catchy intro music you think would be good.

The 2019 Annual conference

I want to thank the dozens of presenters and staff for once again hitting it out of the park at our Annual Criminal and Civil Law Update in Corpus Christi. The quality of the training was outstanding. Thanks to TDCAA's training team, **Brian Klas, LaToya Scott**, and **Andie Peters**, and the rest of the staff, for putting together another high-quality conference. I knew it was going well when the last presenter, **George Brauchler**, a district attorney from Colorado, finished before a still-packed room at 12:15 p.m. on Friday—and he couldn't leave for another 30 minutes for all the questions.

A highlight of the Annual conference for me is the recognition of some outstanding prosecutors and staff. Not all the association awards are presented at the Annual, but we honored four outstanding people on our opening day.

Jarvis Parsons
District Attorney in Brazos County

The State Bar Prosecutor of the Year Award is reserved for a prosecutor who improves the quality of justice through his leadership and/or efforts to shape public policy. This award, although designated by the State Bar as a "practitioner of the year award," contemplates that a prosecutor may also be recognized for a body of work or activities that may span more than a single year. It is reserved for someone with devotion to the profession and who aspires to be a true example of a "minister of justice." It can recognize all efforts to improve the criminal jurisprudence of the state, whether it be through developing novel theories of prosecution through trial and appellate advocacy, creating and implementing innovative investigation and prosecution techniques, affecting positive change at the Texas Legislature, making significant contributions to the profession of prosecution through training and

support of other prosecutors, or spearheading new programs and services in the community at large.

Jarvis Parsons was honored this year, and he is richly deserving of the recognition. Jarvis has been a true engine of innovation and change since he was elected DA in 2012. Besides being active in TDCAA training and leadership, he ably represents the profession as part of the Texas Forensic Science Commission and as a board member of the Texas Council on Family Violence. Jarvis is an innovator: He created the Cut It Out program to educate hair stylists on the signs of domestic abuse, and he has worked with a number of prosecutors and other professionals to develop TDCAA's groundbreaking training on cognitive and implicit bias. At home, Jarvis continues to try cases and serves his community in a number of ways, including as a board member of the local Children's Advocacy Center and the sexual assault resource center. I feel a little tired just writing about all that Jarvis has accomplished in service of the profession. Congratulations to a very deserving prosecutor!

Jarvis Parsons & Rob Kepple

Bobby Bland
District Attorney in Ector County

The Lone Star Prosecutor of the Year Award is intended to recognize the efforts of a prosecutor, including a civil practitioner, who demonstrates excellence through trial advocacy, appellate advocacy, or other government representation that a person in a district or county attorney office may perform. This award is designed for those whose work may otherwise go largely unnoticed but who significantly advances justice in his community or the state.

Bobby Bland was presented with the 2019 Lone Star Prosecutor Award at the Annual Update by John Dodson, Secretary-Treasurer of the TDCAA Board. For years, Bobby has been a quiet workhorse for the profession, leading the Foundation's efforts to grow, and even spending weeks at the capitol mired in legislative meetings and negotiations on important issues such as the journalist shield law (at one point compelling us to send his wife flowers because he was trapped in the capitol for about a week!). But perhaps his most impressive yet largely unrecognized work has been this year, by providing closure to more than 60 victims of Samuel Little, one of the most prolific serial killers in U.S. history. From the very beginning, Bobby's focus has been on "the big picture of justice," not simply justice for the victim and her family from Ector County. His efforts with law enforcement officials and victims from all over the nation have allowed 60-plus unsolved murders to be solved and the victims' families to receive some closure.

Soon enough, the whole country will get to see Bobby's work! Keep an eye for an upcoming episode of "60 Minutes" for a story on Samuel Little. Bobby (and others) were interviewed for it in early October, and we can't wait to see how well he represents Ector County and Texas on the national stage.

John Dodson & Bobby Bland

Cyndi Jahn
Director of Victim Assistance in Bexar County

The Oscar Sherrell Award is given for service to the association. It is awarded by each section (attorneys, investigators, and key personnel) and the TDCAA staff, and it recognizes those enthusiastic folks who excel in work for TDCAA. It may commemorate a specific activity that has benefited or improved TDCAA or may recognize a body of work that has improved the service that TDCAA provides to the profession.

Perhaps Bobby Bland's most impressive yet largely unrecognized work has been this year, by providing closure to more than 60 victims of Samuel Little, one of the most prolific serial killers in U.S. history. From the very beginning, Bobby's focus has been on "the big picture of justice," not simply justice for the victim and her family from Ector County.

When it comes to the development of TDCAA services for crime victims and witnesses, Cyndi has been a powerful and energetic voice for victim assistance coordinators and key personnel.

This year we were delighted to recognize **Cyndi Jahn** as a winner of the 2019 Oscar Sherrell Award. Cyndi has worked in the Bexar County DA's Office since 1991 and has served as the director of victim assistance since 1999. When it comes to the development of TDCAA services for crime victims and witnesses, Cyndi has been a powerful and energetic voice for victim assistance coordinators and key personnel. We here at TDCAA World Headquarters have come to rely on Cyndi anytime we need help on difficult victim issues, and she has never said no.

Thank you, Cyndi, on behalf of all of us here at TDCAA—and the association at large!

Cyndi Jahn & Rob Kepple

Sheri Culberson
Assistant District Attorney in Montgomery County

Tiana Sanford & Sheri Culberson

The C. Chris Marshall Distinguished Faculty Award recognizes outstanding service as a teacher and trainer for Texas prosecutors and staff. This award can go to any prosecutor, staff member, or allied professional who has demonstrated a sustained commitment to training and educating those in the profession, whether it be through teaching, publications, one-on-one technical assistance, or a combination.

Sheri Culberson is this year's C. Chris Marshall Award winner. (Tiana Sanford, Chair of TDCAA's training committee, presented it to her.) Sheri has a passion for training. TDCAA is fortunate to have some of the best trainers in prosecution, but Sheri holds a special place among them. No matter the assignment, she always answers the call. The combination of her skills as a presenter and experience as a prosecutor make her an effective trainer on subjects as varied as plea bargaining, domestic violence, evidence collection, crimes against children, and good old trial advocacy. She is among a select group of trainers who have continually delivered to further TDCAA's training mission. These folks elevate the profession of prosecution by being part of it, and that's true of Sheri too. ❇

Taking down Goliath by debunking sexual assault myths

The story of David and Goliath takes us into the middle of an intense battle over 3,000 years ago.[1]

By Jarvis Parsons
District Attorney in Brazos County and TDCAA President, and
Jessica Escue
Domestic Violence and Sexual Assault Assistant District Attorney in Brazos County

Goliath, the Philistines' greatest warrior, challenged the army of Israel to single combat, a practice in the ancient world where two opposing groups chose one person to represent each side in a duel. If Goliath won, all of Israel would be enslaved. Beating Goliath would be no small task. Estimates of his height ranged from 6-foot-9 to almost 10 feet tall. His armor weighed 5,000 shekels (125 pounds) and the tip of his spear weighed 600 shekels (15 pounds). For 40 days, Goliath taunted, mocked, and ridiculed the Israelite army,[2] and for 40 days, the Israelite army did nothing.

This is where David comes in. He was told by his father to bring food to his brothers, who were in the Israelite army. While there, David heard Goliath's insults and accepted his challenge to fight. He was ridiculed even by his own family, who questioned his motives and told him to go home.[3] David persisted, though, and King Saul gave him a coat of armor, helmet, and sword.[4] But David decided to discard King Saul's armor and use his own weapons, which he had used while tending sheep in the wilderness to fight off wolves and bears: a sling and five smooth stones.

While Goliath expected a duel where both participants had similar weapons, David's experience and training had prepared him to fight in an unconventional way. You likely know the rest of the story: David, the underdog, hit Goliath in the head with a stone and slayed him, and the Israelites won their war against the Philistines.

We have all heard portions of this story before, and we have all had "Goliath-sized" problems in our lives. Some we have vanquished, and some are still out there taunting us. If David had confronted Goliath on Goliath's terms, I believe the battle would've turned out differently. One of our most challenging problems as prosecutors is adult sexual assault. While we could spend our time speaking about the #MeToo movement or infamous perpetrators like Harvey Weinstein, that may give the impression that sexual assault is an East Coast or West Coast problem, as opposed to a Texas problem. I want to concentrate on Texas, where more than six million adults have experienced some form of sexual assault in their lifetimes.

Sexual assault victims are more likely to suffer from chronic and mental health conditions such as depression, anxiety, and post-traumatic stress disorder (PTSD).[5] Economically, the state spends millions of dollars annually on sexual assault victims in medical costs, lost work productivity, and mental health care.[6] These are staggering impacts by any measuring stick. However, it is only the tip of the iceberg when considering that only 9.2 percent of victims report sexual assault to the police,[7] so there are many survivors who suffer in silence.

In reported adult sexual assault cases, many hurdles hinder successful prosecution. The victim may not have fought back in the way that we usually see in Hollywood movies. In some cases the victim doesn't remember certain things about the assault. And if the victim has consumed alcohol, then her story may be discounted and determined to be incredible. Many times, these cases come to us from law enforcement officers

labeled as "he said/she said" cases, and "all we have" is the victim's word that a crime occurred.

Sound familiar? It's as if we have fallen for Goliath's trick of fighting on the criminals' terms.

Enter science

How do we overcome many of the issues in sexual assault cases? The reality is that sexual assault prosecution shares the same solution that prosecutors have used for years to tackle other "unwinnable" cases: scientific research.[8]

Like these earlier difficulties with intoxication offenses and domestic violence, many of the "problems" in sexual assault cases are myths that can be countered by science.

Decades ago, for example, intoxication offenses could be prosecuted only if a defendant "looked drunk." As a result, such crimes often went unprosecuted until tragedies happened. In response, law enforcement, prosecutors, and advocates banded together to research how alcohol affects the body and trained officers on the streets to look for signs of intoxication through field sobriety tests. We further train chemists testing a suspect's blood about blood alcohol concentration (BAC), which shows that the defendant is impaired. Through this training, these witnesses could convey to juries that a defendant who did not "look drunk" could still be an impaired driver. In fact, we use the fact that a defendant does not "look" intoxicated—when his BAC says otherwise—as offensive evidence! That's because a defendant who does not look drunk but has a high BAC likely has significant trouble with alcohol.

Similarly, years ago, an uncooperative or recanting victim could doom a family violence case, as myths surrounding victim behavior were abundant. We combatted this issue by training law enforcement, advocates, and experts on the dynamics of victim behavior, and we used the victim's recantation and desire to protect the defendant as offensive evidence of the abuse—rather than these issues dooming a case.

Like these earlier difficulties with intoxication offenses and domestic violence, many of the "problems" in sexual assault cases are myths that can be countered by science. The problem is, most law enforcement, prosecutors, and the general public are unaware of the research, instead assuming that "problems" in sexual assault cases mean they cannot be proven or—even worse—that the assault did not happen.

So how do we turn the tide and bring the science of sexual assaults to our courtrooms? How do we prosecute and see justice done in "unwinnable" cases? The first step is to educate ourselves. Just as flight attendants tell plane passengers to put on your own oxygen mask in an emergency before helping someone else with his or hers, we must first understand the science ourselves before we can teach others, such as law enforcement and jurors.

Step 1: Educating yourself

How do you educate yourself on victim behavior and dynamics of sexual assault? Well, you are on the right track by reading this article! There is a lot of research in the area of trauma and memory, behavior of trauma victims, how alcohol affects memory, and other areas critical in sexual assault prosecution. It is important to seek out this information. Conferences, other prosecutors, sexual assault advocates, and counselors can all be excellent resources and sounding boards for questions regarding victim behavior.[9] In researching this issue ourselves, we have reached out to the Texas A&M University College of Nursing, our local rape crisis center, and area forensic nurses. Once we explained our issue, each was more than willing to sit down with us, share research, and walk us through some of the more complicated scientific information. After learning some of it, we asked Dr. Nancy Downing, a forensic nurse and researcher at Texas A&M College of Nursing, to present at a "lunch and learn" at our office; she discussed myths about sexual assault survivors and how research explains the "unexplainable" behavior of many victims.

Step 2: Educating investigators

It is important that once prosecutors understand the behavior and evidence in sexual assault cases, that we teach it to local officers, investigators, staff, advocates, and others who collect information about the sexual assault from the survivors. Without this information, these fact-gatherers might miss important clues and evidence. In this vein, sexual assault cases are a lot like domestic violence strangulation cases: The evidence may be there (through a victim's symptoms and behavior), but if the officer does not ask the right questions or document what's important, the evidence could be lost forever. It is critical that our fact-gatherers understand how trauma and alcohol may affect memory and behavior and that they respond appropriately to the victim's situation.

Step 3: Educating jurors

The ultimate goal, of course, is to impart this information to jurors in a way that they can understand. We can do this through finding and developing an expert witness who knows the research and dynamics of victim behavior. Brazos County is lucky that the Texas A&M College of Nursing has several researchers who are willing to testify about scientific research regarding memory, trauma, alcohol, and victim behavior in sexual assault cases. However, experts can also be developed through advocates at your county's sexual assault advocacy center, victim advocates at the police department, and local counselors who work with sexual assault victims. In fact, the University of Texas's Institute on Domestic Violence and Sexual Assault (IDVSA) equips and trains expert witnesses to testify about victim behavior in both sexual assault and domestic violence cases.[10] In addition, the IDVSA provides consultation services too. Several years ago, a counselor with the local women's shelter and I attended the conference, and I have consistently used her ever since as an expert in domestic violence and sexual assault cases.

Now that we know how to proceed, let's tackle three myths that are prevalent in sexual assault cases.

Myth 1: She should've fought back.

The notion of fighting off a rapist—or *not* fighting off a rapist—is possibly the main question that prosecutors, law enforcement, and jurors have when evaluating cases. A deeper dive into how the brain reacts to traumatic situations sheds some light into how some victims will react.

First, note that in a sexual assault, the victim is at a significant disadvantage: She is only *reacting* to what is happening. Perpetrators have the benefit of planning their actions and picking the time, place, and manner of the assault. Understanding that distinction is important.

Second, there is a common misperception that humans will either try to fight their attacker or run away and escape a sexual assault.[11] In fact, there are multiple ways that human beings react to threats. Research has shown that human beings respond to a potential attack in at least four different ways: fight, flight, freeze, or faint. Because fight and flight are well known, we will focus on the last two.

Freezing. Freezing is a natural human response to a threat where senses are heightened and a person becomes very still. It is an initial reaction to a threat.[12] Scientists posit that for thousands of years, freezing has allowed potential prey to escape a predator's detection and focuses the prey's attention on its senses while scanning the environment for a threat.[13] A great example of this concept is if you are lying in bed at night and you hear a sudden noise. Many people would just become very still, listening to see if they can pick up additional clues about the noise and whether it is threatening or not.[14] It's important to note that "freezing" is not a planned reaction. This is an automatic response to a threatening situation.

Fainting. Fainting, or tonic immobility (TI), is an involuntary response to situations involving intense fear coupled with an inability to escape. TI is likened to a catatonic state with an inability to vocalize and can include other symptoms, such as feeling cold, extremity tremors, muscle soreness, and confusion following the assault.[15] Researchers have recognized this phenomenon in sexual assault survivors since the 1970s.[16] Most studies on tonic immobility in humans have focused on sexual assault victims because sexual assault has been described as one of the most traumatic experiences a person can experience. Tonic immobility has been found in sexual assault victims at a significantly higher level than other types of trauma, and it is described routinely in medical forensic exams.[17] Tonic immobility can often mean victims go through more guilt and shame because they feel like the only acceptable responses to sexual assault are fight and flight.[18] While some in the legal system may misinterpret this reaction as passive consent to the assault, they may be missing a very normal and expected human reaction to an overwhelming threat that is documented in the scientific literature.

Myth 2: Victims should remember everything.

The second myth that is extremely common is that a "real" sexual assault victim would not have unexplained gaps in her memory. However, research tells us that this is not necessarily true with a victim who has been through a traumatic experience.[19] In fact, memory gaps or profound attention to certain details can be key evidence in showing that a victim has been through trauma.

When not in a traumatic situation, our brains record memories in the form of stories or

A great example of the "freezing" concept is if you are lying in bed at night and you hear a sudden noise. Many people would just become very still, listening to see if they can pick up additional clues about the noise and whether it is threatening or not.

events.[20] They usually have a beginning, a middle, and an end. These stories will often include facts and details that are important in the narrative and to the conclusion, or feelings about the event, but they will exclude details that the brain does not consider important enough to encode in long-term memory. For example, you likely can remember a defendant's testimony in a major case you tried but not what you ate for lunch that day. In fact, you likely cannot remember mundane details that occurred even in the last couple of days, such as the number of people you talked to on the phone yesterday.

When we understand how encoding works outside a traumatic experience, it can make sense that prior to a sexual assault, a victim is likely not encoding facts in her long-term memory that do not seem significant at the time.[21] This is why a victim may not remember how many drinks she had before the assault, who was at a party she attended, or other details that her brain did not commit to long-term memory.

When properly understood, this "weakness" of a victim's lack of memory can actually be a strength in trial because it can show that the victim's behavior and memory are what you would expect from a victim of trauma.

However, once a person's brain perceives a threat or danger, the brain tends to respond on instinct rather than a thought-out process,[22] and it's meant to maximize the likelihood of survival. You likely have seen yourselves "react" to a threat if you have ever had near-miss with a car that has pulled out in front of you. Instead of thinking through a logical response, drivers often instinctually slam on the brakes, swerve to avoid the threat, or both. This reaction is done automatically and cannot be easily controlled.[23]

Once the threat response in the brain has been initialized, the brain becomes hyper-focused on the current threat. With robberies and assaults with weapons, it could be the weapon. The brain will not focus on what it feels are "peripheral details" not central to survival.[24] One of the common "peripheral details" is the time or duration an assault occurred. Because that information is not central to survival, a victim often cannot accurately recall it if pressed by an investigating officer.[25]

After a traumatic incident, the brain will start to encode into long-term memory the events, but it will not be in the same "story" format. Instead, the brain will remember flashes of events either before or during the assault, which could help the victim's brain quickly recall the perceived danger in the future. Things like smells, sounds, feelings, or particular details will be encoded in the brain so that the body can respond or avoid the threat in the future. This is why, for example, individuals with PTSD will often react instinctively to sounds or smells that seem innocuous to other people. It may actually take a couple of days for the brain to really sort through the memories of the traumatic event to properly understand what occurred and reflect on it.[26]

Once we understand how the brain works in this situation, it is not at all surprising that when a victim of a sexual assault is interviewed, she will not remember peripheral details of the assault. Instead, the brain will have focused on details critical to physically and emotionally surviving the trauma. When properly understood, this "weakness" of a victim's lack of memory can actually be a strength in trial because it can show that the victim's behavior and memory are what we would expect from a victim of trauma.

Myth 3: She was intoxicated, so we cannot trust her memory.

One of the most common myths associated with sexual assault is that we cannot put stock into a victim's memory because of her level of intoxication. It is true that alcohol can have an effect on memory. Research shows that alcohol affects the long-term encoding in the brain, specifically, the transfer of memories from short-term to long-term memory.[27] Consequently, studies show that an intoxicated individual will likely have a more difficult time accurately reporting contextual details of an event.[28] However, these same studies also show that alcohol does not create false memories. In fact, the details that an intoxicated individual could recall were just as accurate as her sober compatriots, especially when individuals were allowed to answer "I don't know" or "I don't remember" in response to questions.

What are the implications for sexual assault prosecutions? First, it's important to make sure up front that investigating officers allow a victim of trauma—intoxicated or not at the time of the assault—to answer "I don't know" to their questions. Second, it is also important to allow a victim time to process the memory and to understand that she will likely remember more once the brain is allowed to sort through the traumatic experience. Third, studies have shown that a victim's flashbulb memories are accurate, even if the victim was intoxicated at the time of the offense. Officers should ask open-ended questions and recognize that questions such as "How long

did such-and-such take?" will likely produce inaccurate information because of how memory is stored in the brain.

Appreciating how the brain responds in traumatic situations is essential for prosecutors. First, it helps to dispel a cognitive bias against sexual assault victims who don't react in ways we might expect. Prosecutors are not superhuman. We are just as susceptible to myths and stereotypes as the average person. As a former intake prosecutor, I found it easy to reject cases on the basis that if it was "truly" sexual assault, the victim would've put up a fight or run away. I wish I would've known this information when I started prosecuting—I would've had more empathy for the victims' cases that came across my desk. Equally important is finding a medical professional who can put this information in front of a jury to explain the victim's actions. Explaining myth versus reality in a sexual assault case can go a long way in humanizing a victim. It doesn't mean these cases aren't hard, and it doesn't mean you can take every single sexual assault case that comes across your desk. Understanding these stereotypes allows prosecutors to separate fact from fiction and therefore better evaluate cases and fight for justice in our own communities.

David chose to not engage in hand-to-hand combat with Goliath, and we shouldn't either. Rather, the best way to fight for sexual assault victims is to counter the myths with facts and research. We must use the "stones" all around us to educate ourselves, investigators, and juries as to the realities of sexual assault. It's not easy and it doesn't mean we can take every case, but the fight is definitely worth it. ❇

Endnotes

[1] 1 Samuel 17.

[2] 1 Samuel 17:16.

[3] 1 Samuel 17:28. "When Eliab, David's oldest brother, heard him speaking with the men, he burned with anger at him and asked, 'Why have you come down here? And with whom did you leave those few sheep in the wilderness? I know how conceited you are and how wicked your heart is; you came down only to watch the battle.'"

[4] 1 Samuel 17:38-40. "Then Saul dressed David in his own tunic. He put a coat of armor on him and a bronze helmet on his head. David fastened on his sword over the tunic and tried walking around because he was not used to them."

[5] Health and Well-Being: The Texas Statewide Prevalence Study on Sexual Assault, Final Report, August 2015. https://sites.utexas.edu/idvsa/files/2019/03/TX-SA-Prevalence-Study-Final-Report.pdf.

[6] *Id*.

[7] *Id*.

[8] Lisak, D. & Markel, D.W. (January 2016). Using science to increase effectiveness of sexual assault investigations. *The Police Chief*, 83, 22-25.

[9] For an excellent conference covering the issues surrounding sexual assault, see the National Conference on Crimes Against Women at http://conferencecaw.org.

[10] For more information see https://sites.utexas.edu/idvsa/training-programs/expert-witness-training.

[11] Downing, N., Valentine, J., Gaffney, D., The Neurobiology of Traumatic Stress Responses After Sexual Assault, Medical Response to Adult Sexual Assault, Second Edition: A Resource for Clinicians and Related Professionals, p. 242, 2019.

[12] Bracha HS. Freeze, Flight, Fight, Fright, Faint: Adaptionist Perspectives On The Acute Stress Response Spectrum. *CNS Spectr.* 2004; 9(9): 679-685.

[13] Downing, et al., p. 242.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*. at 243. Also see Traumatic events and tonic immobility, A. Bados, L. Toribio, E. Garcia-Grau; *Span. J. Psychol.*, 2008.

[18] Lexington J. An Examination of the Relationship Between Tonic Immobility and the Psychophysiology, Behaviors and Perceptions in Response to a Hypothetical Date Rape Scenario. Philadelphia, PA: Temple University; 2007.

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There is a common misperception that humans will either try to fight their attacker or run away and escape a sexual assault. In fact, there are multiple ways that human beings react to threats. Research has shown that human beings respond in at least four different ways: fight, flight, freeze, or faint.

Unconscious drivers and blood draws

A drunk driver. A wreck. A suspect unconscious in the hospital.

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

In this familiar situation, a blood test is the crucial piece of evidence proving the suspect was intoxicated. But with the increasing restrictions on warrantless blood draws, can police order a blood draw in such a circumstance? The Court of Criminal Appeals and Supreme Court of the United States have both wrestled with different factors of this situation.

Implied consent

Section 724.014 of the Transportation Code provides the answer to this situation on its face. Under the implied consent rule, a driver consents to provide a blood sample if he is arrested for DWI.[1] While a conscious person must be given the opportunity to withdraw his consent, a person who is unconscious or unable to refuse is deemed not to have withdrawn his consent.[2] This statute would seem to solve the problem. No other factors of a warrantless search have to be considered because it is a consent draw.

But the key to consent is voluntariness. If the State relies on consent to justify a warrantless search, it must prove that the consent was freely and voluntarily given.[3] That means that it must have been free from any coercion, mental defect, or other factors that prevented the subject from making a choice. Additionally, to be voluntary, consent must be able to be revoked.[4] This is the crucial factor that the Court of Criminal Appeals's decision in *State v. Ruiz* turned on.

In *Ruiz*, the defendant fled the scene of a car wreck and was later found unresponsive in a nearby field.[5] Suspecting DWI, the police arrested an unconscious Ruiz at the hospital, read the DIC-24 over him, and ordered a warrantless blood draw under §724.014. The State argued that Ruiz consented by choosing to drive over a public roadway and never withdrew that consent. It pointed out that prior caselaw held that consent must not be as a result of pressures "brought to bear by law enforcement"[6] and law enforcement was not responsible for Ruiz's condition, so his consent was voluntary.

The CCA took a different tack. The consideration of pressure by law enforcement is only one factor in determining voluntariness; the "characteristics of the accused" must also be considered.[7] In other words, a subject's mental condition—such as mental illness, intoxication, or unfamiliarity with the law—is also considered, including whether he is conscious. Because Ruiz was unconscious during his entire encounter with law enforcement, he never had an opportunity to make a choice. He could not consent or limit or revoke his implied consent. Thus, §724.014 did not provide a voluntary consent to justify Ruiz's blood draw.[8]

At this point, §724.014 appears to be a dead letter. Implied consent cannot provide a justification for a warrantless blood draw if the subject is unconscious or otherwise incapable of withdrawing consent. But does that mean that officers are out of options for getting a blood sample from an unconscious suspect? Fortunately, the CCA left open another option: exigent circumstances.

Exigent circumstances

The *Ruiz* court remanded the case to the lower court to consider whether exigent circumstances could justify the blood draw.[9] This was prompted by a recent Supreme Court case, *Mitchell v. Wisconsin*. In *Mitchell*, the defendant was seen getting in a van very drunk and driving away, then found nearby stumbling, slurring his words, and unable to stand without officer assistance.[10] Mitchell gave a preliminary breath test and registered 0.24 blood alcohol concentration (BAC). He was arrested, but on the way to jail, his condition got worse and he was taken to a hospital. Similar to Texas's implied consent law, Mitchell's blood was drawn after the officer read a state-

ment to his unconscious body giving him the opportunity to refuse blood testing. His blood test came back at 0.22, and he was ultimately convicted of two intoxication-related offenses.

The Supreme Court never directly decided whether an implied consent statute provided an adequate exception to the Fourth Amendment to justify the blood draw. Instead, it focused on exigent circumstances and applied the *McNeely* rule. In *Missouri v. McNeely*, the Supreme Court held that exigent circumstances may justify a warrantless blood draw, but the mere dissipation of alcohol alone was not exigent enough.[11] Where, then, does an unconscious subject fall along the line of exigency?

A warrantless search is allowed under the exigency exception if there is: 1) a compelling need for action and 2) no time to secure a warrant.[12] The *Mitchell* court concluded that there is unquestionably a compelling need for action where there is an unconscious suspect of a potential DWI-related case. Indeed, it found in no uncertain terms that "BAC tests are needed for enforcing laws that save lives."[13] Because highway safety is critical and it is served by passing and enforcing laws that limit driving with a high BAC, these tests are "crucial links in a chain on which vital interests hang." Because a breath test is impossible where a subject is unconscious, a blood test is the only means of ascertaining BAC in such a case. And because drivers who are drunk enough to pass out at the wheel or soon afterwards are an even greater risk, it would be a perverse incentive to allow a subject to avoid a blood test simply by getting so drunk he passed out.[14]

The first factor, that of a compelling need for action, is thus satisfied in an unconscious driver case. But the second factor (no time to get a warrant) cannot be avoided. The fact that alcohol dissipates in the blood over time is not enough on its own to justify the search, but it should still be considered.[15] As the Supreme Court noted, not only is a driver's unconsciousness part of a delay, but "it is [also] itself a medical emergency."[16] An unconscious person will be taken to the hospital, where he will have to be evaluated and treated. This obviously adds to the delay to allow blood alcohol to dissipate naturally, but the possibility of treatment means that the subject might be given medication or treatment that affects the blood alcohol level. Thus, an unconscious driver is an exigent circumstance that justifies a warrantless blood draw.

[19] Wilson, C., Lonsway, K., Achambault, J., (2016). Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, *End Violence Against Women International,* 22.

[20] D'Argembeau, A. et al. (2014). Brains creating stories of selves: The neural basis of autobiographical reasoning. *Social Cognitive and Affective Neuroscience,* 9 (5), 646-652.

[21] Wilson, C., et al., at 7.

[22] Schwabe, L., Joëls, M., Roozendaal, B., Wolf, O.T., & Oitzl, M.S. (2012). Stress effects on memory: An update and integration. *Neuroscience & Biobehavioral Reviews*, 36 (7), 1740-1749.

[23] Wilson, C., et al., at 11-14.

[24] Hopper, J. & Lisak, D. (December 9, 2014). Why rape and trauma survivors have fragmented and incomplete memories, Time.com.

[25] Wilson, C., et al., at 27.

[26] Wilson, C., et al., at 28-29.

[27] Flowe, H. D., Takarangi, M. K., Humphries, J. E., & Wright, D. S. (2016). Alcohol and remembering a hypothetical sexual assault: Can people who were under the influence of alcohol during the event provide accurate testimony? *Memory*, 24(8), 1042-1061.

[28] Weafer, J., Gallo, D. A., & De Wit, H. (2016). Acute effects of alcohol on encoding and consolidation of memory for emotional stimuli, *Journal of Studies on Alcohol and Drugs*, 77(1), 86-94.

The Supreme Court considered and rejected Mitchell's argument that improving technology reduced the exigency of the situation. Even with prompt communication, obtaining a warrant can still take time. "[W]ith better technology, the time required has shrunk, but it has not disappeared."[17] In an emergency scenario caused by an unconscious driver, having to take the time to observe the formalities of a warrant application could pull the police away from other vital tasks that could have collateral costs. This is why the exigent circumstances rule exists.

Going forward

The Supreme Court laid as close to a bright-line rule as it gets these days, holding that an unconscious driver meets both the factors of the exigent circumstances test. But the Court also left a sliver of an opening by holding that the police "may almost always" use a warrantless blood draw with an unconscious driver,[18] giving a defendant the chance to prove that the emergency requirements usually involved in an unconscious driver situation did not apply in *his* case—perhaps there were more than enough police to handle every task and a judge was immediately on hand to review a warrant application. Prosecutors relying on exigent circumstances in any situation should always have an officer testify about why there was not sufficient time to wait for a warrant. But the broad language of *Mitchell* should ensure that in *Ruiz* and the vast majority of future unconscious driver cases, exigent circumstances apply and a warrantless blood draw may still be done, even with the downfall of that section of the implied consent law. ❇

The Mitchell *court concluded that there is unquestionably a compelling need for action where there is an unconscious suspect of a potential DWI-related case.*

Endnotes

[1] Tex. Transp. Code §724.011.

[2] Tex. Transp. Code §724.014.

[3] *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

[4] *State v. Villareal*, 475 S.W.3d 784, 795 (Tex. Crim. App. 2014).

[5] *State v. Ruiz*, No. PD-0176-18, slip op. at 2 (Tex. Crim. App. Sep. 11, 2019).

[6] *Fienen v. State*, 390 S.W.3d 328, 333 (Tex. Crim. App. 2012).

[7] *Ruiz*, slip op. at 6, citing *Schneckloth v. Bustamonte*, 412 U.S. 213, 226 (1973).

[8] Id. at 7.

[9] *Id*.

[10] *Mitchell v. Wisconsin*, 139 S.Ct. 2525, 2531 (June 27, 2019).

[11] *Missouri v. McNeely*, 569 U.S. 141, 152-56 (2013).

[12] *Id*. at 149.

[13] *Mitchell*, 139 S.Ct. at 2535.

[14] *Id*. at 2536.

[15] *Id*.

[16] *Id*. at 2537.

[17] *Id*. at 2538.

[18] *Id*.

New training videos on jury selection

As a brand-new misdemeanor prosecutor, I was all ready for trial.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

I got sent to JP court my first hour in the office, and mock trial in law school had prepared me to direct-examine a witness, object, respond, lay predicate, and argue. No panic—a Class C bench trial was something I could do.

A week later, I had a jury trial with the chief, and I remember thinking, "Why has no one taught me a thing about jury selection?" Two weeks and two trials later, there I was, selecting a jury. I was bad. I got better, but it happened mostly by learning from my mistakes.

Many years ago, I was asked to create training videos on jury selection in DWI cases. I had seen a couple of pretty bad examples, and the overwhelming logistics of such a project led me to say it could not be done. But the Texas Department of Transportation gave us the money, TDCAA gave us support, and great Texas prosecutors volunteered to help. The team that has made most of the DWI training videos on our website agreed to produce the videos and gave me a discount on the usual fee. I am very pleased to say I was wrong: It actually IS possible to create videos on DWI voir dire from scratch. We actually did it!

And now you can watch them. Go to www.tdcaa.com/resources/dwi, and you will find two half-hour training videos named "Jury Selection in DWI Prosecution" and "Special Issues in Jury Selection in DWI Prosecution." I hope they provide new and experienced prosecutors something I did not have: training and modeling of how to pick a jury.

Now a cautionary note: Do not use these videos as a script. Like closing argument, jury selection is effective only if it is authentic. To be authentic, a trial attorney must know himself and be true to his own style. What you see in the videos will work only if you internalize it and present in your own way. Another important thing I learned in trying cases is that I could never be my trial heroes—I had to do what they did but stay true to my personality. To show how different prosecutors approach jury selection individually, I gathered eight very good DWI prosecutors with eight very different styles. No one on the planet can do everything all eight do as well as they do it, but my guess is that anyone watching the videos will have several "hey, I can do that!" moments. That is by design.

"Jury Selection in DWI Prosecution"

The first video, "Jury Selection in DWI Prosecution," covers issues that are central to almost every DWI case. We made an effort to show both content and technique.

Content includes introducing yourself, walking through the selection process with the panelists, asking them why DWI matters, and of course the big one: educating the jury on intoxication. When it comes to intoxication, DWI jury selection is very difficult. Jurors know about this crime, and that is both good and bad. They need to be encouraged to remember what they already know. Prosecutors do that in several ways: by asking the question, "How do you know if someone is intoxicated?", using "Mom's sobriety tests," and introducing the "red bouncing ball" scenarios, and all of these are demonstrated. (If you don't recognize what these methods are, then this video is definitely for you.)

The bad side of jurors' experience with DWI is also explored. Prosecutors must help the jury understand that "intoxicated" does not necessarily mean "drunk." Empowering the jury's common sense while teaching the legal definition of "intoxication" is a difficult dance that is demonstrated in several ways in this video. There is probably more in the video than a court's time limitations may allow, but our hope is that offering several examples will give the individual pros-

One of the best and worst parts of a DWI prosecution is that our witnesses are peace officers. If a juror can never trust a police officer, then she will likely never convict in a DWI trial. Exploring jurors' attitudes and experiences with police is not easy, but here again, we demonstrate scaled questions and positive and negative looping to find out where jurors stand on this issue.

ecutor at least one idea he or she can adopt, improve on, and execute.

Several techniques are also demonstrated. Getting panelists to open up is paramount in jury selection. No prosecutor is so persuasive that he can change all the long-held opinions of every member of the panel—this was certainly my biggest weakness early on in selecting juries—but the last three segments show various styles of interaction with the jurors. Both videos demonstrate the use of "scaled questions"—and again, if that term is unfamiliar, then you need this video. Getting answers that can justify and avoid strikes for cause is demonstrated. The technique of "looping" bad answers to find more suspect jurors is included, as well as the equally important technique of letting jurors correct other jurors. Being persuasive without being argumentative is hard, and watching it done by prosecutors who do it well may help avoid a bunch of trial and error.

Although the video is basic in its scope, my hope is that skilled trial attorneys will also benefit by finding ideas to steal. Watching this video should have the same net effect as our constantly watching each other. I am so jealous I never used Dallas County ACDA Lauren Black's "SFSTs as Olympic judges" bit. (Watch for it—it is simply brilliant.) Once a trial attorney has nothing left to learn, he really has nothing left to offer his community.

"Special Issues in Jury Selection in DWI Prosecution"

The second video contains many extensions of what was contained in the first, with the major difference being that the subject matter in this video is case-specific. For example, educating the jury on search warrants when a case included a warrant is very different from the discussion in a case where there is no warrant. And if the subject gave consent to a breath or blood test, that whole warrant discussion is unnecessary.

Both warrant situations are demonstrated in this video. Commitment or *Standefer* questions are demonstrated and discussed at length. Every time I see a case reversed on this issue, it tells me we all need constant reminders of what constitutes a commitment question. (Again, if you have no idea what I'm talking about, you need to watch these videos.)

We go back to intoxication and address a common issue in DWI: Does the defendant's blood alcohol concentration (BAC) match what is seen on the officer's video? So often we try cases where the clues are subtle while the BAC is not, or conversely where the clues are abundant but a delayed test is close to or below .08. Prosecutors in these cases must prepare a jury for this glaring issue. Again, we provide a couple of approaches: The "Lily and Bubba" and the "sick child with or without a fever" scenarios are both demonstrated. If you don't know already, you'll have to watch the videos to find out what those examples entail.

One of the best and worst parts of a DWI prosecution is that our witnesses are peace officers. If a juror can never trust a police officer, then she will likely never convict in a DWI trial. Exploring jurors' attitudes and experiences with police is not easy, but here again, we demonstrate scaled questions and positive and negative looping to find out where jurors stand on this issue.

Finally, not every DWI is alcohol-related, so we also demonstrate a drugged-driving jury selection. While in some ways it is similar to alcohol, in many other ways it is totally unique.

How to use these videos

First, go to the website and just watch them—watch them with other prosecutors. One of the great strengths of prosecution is the team aspect of what we do. If I had been alone in improving my trial skills, my growth would've had a much flatter slope. Needless to say, I am a big believer in prosecutors, training, and group learning. No one person has all the answers, not even me. This project would have failed without a great team in front of and behind the cameras. Watch it the same way we made it—with a group and with plenty of time to pause and discuss. Chiefs and mentors, please don't just sit your people down at a computer to view these videos. They are a great tool for experienced attorneys to use in addition to the training they are already doing. Watch them with your team and any other prosecutors you are tasked with teaching what you know.

Final thoughts

Prosecuting in 2019 is not easy—you need all the help you can get. Diverse juries and diverse prosecution teams improve all our chances. I cannot possibly express my gratitude enough to the folks who worked so hard on this project. Busy trial at-

torneys gave their most precious gift, their time, and the folks behind the camera all gave some monster days. Many and varied voices made these videos what they are. See the box below for who deserves much thanks.

So much of my early instruction on jury selection was just plain wrong. Advice about the "kind of people" who made good or bad jurors did far more harm than good to my cases and my ability to do justice. More importantly, the advice made me a worse prosecutor, not better.

You won't find a single bit of that kind of advice in these videos. Instead, you'll find skills to get a jury talking. When our community talks and we listen, we can see that justice is done. As Andrew James, an ADA in Montgomery County, so artfully expressed in this project, "God gave us one mouth and two ears so we would listen twice as much as we talk." Listening is the skill I had to learn to get better at jury selection. Trust what jurors tell you— make your strikes based on that and not anything you see on a jury information sheet.

I hope that viewing these training videos gives you the questions and skills you need to procure the information you need to choose the right jury on your next DWI case. ❇

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Recent gifts to our Foundation*

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Jose Aliseda, Jr.
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* gifts received between August 2 and October 4, 2019

Photos from our Prosecutor Trial Skills Course in July

Photos from our Advanced Trial Advocacy Course in August

Photos from our Annual Update

Pushing boulders at the Texas capitol (cont'd)

Sepich. He said that authorities had DNA but nothing to compare it to. As a prosecutor, I was intrigued, but I didn't realize how important this little piece of information would be to us years down the road in Chambers County and later in Austin at the capitol.

Katie's mother, Jayann, eventually went to the New Mexico legislature and helped pass a law[1] mandating the collection of DNA from felony arrestees in New Mexico that would help catch Katie's killer, Gabriel Avila. Avila was not a suspect until December 2006, when his DNA was taken after an arrest on an unrelated burglary and subsequently matched to that found on Katie's body. Avila had been arrested several times between Katie's murder and his eventual arrest for it, including an arrest just three months after Katie was killed (but before the DNA collection law was enacted). In May 2007, Avila was sentenced to 69 years in prison without the possibility of parole. Susana Martinez was the Doña Ana County District Attorney who prosecuted Gabriel Avila for the murder of Katie Sepich. Martinez would later be elected governor of New Mexico.

Back in Texas, an evidence officer from the Chambers County Sheriff's Office had read up on new technology in the DNA field and, on a hunch, decided to resubmit evidence from the Krystal Jean Baker case in January 2010. As it turns out, the officer's hunch was correct, and the presence of semen was detected. From this semen a DNA profile was developed, but there was still no suspect in Krystal's murder. In September 2010, I got a call from that evidence officer, who brought me up to speed on the Krystal Jean Baker case and informed me that despite the potential lead, there was still more work to do.

A week later, my phone rang again. It was a phone call I will never forget. Texas Ranger Joe Haralson was on the other line. He said, "We found your guy. We are on the way to get him now. I need you to get me a search warrant for his DNA." Kevin Edison Smith had been arrested in Livonia, Louisiana, on a traffic stop for a minor drug possession case—in Texas the offense would have been a Class A misdemeanor. The State of Louisiana took a cheek swab of his DNA and placed it into CODIS. As it turns out, Louisiana had a very aggressive DNA collection statute, which mandated the collection of DNA from all persons arrested for a felony offense as well as certain enumerated misdemeanors for placement into CODIS.[2] Smith's cheek swab matched the DNA from Krystal's dress in the 1996 cold case. On the day Baker was murdered in 1996, Smith was rained out at work and picked up Baker at a convenience store not far from her home. Smith had traveled all around the country between the time of Baker's murder and when he was finally arrested for it. After the CODIS hit, when he was finally confronted with the evidence from the dress, Smith confessed to murdering Krystal Jean Baker. In April 2012, he was tried for capital murder, convicted, and sentenced to life in the Texas Department of Criminal Justice.[3]

Taking DNA samples

In 2001, Texas became the first state in the nation to pass a law allowing a DNA sample to be taken from a suspect of a crime prior to conviction.[4] The law allowed DNA to be taken at the time of indictment for those arrested for certain violent crimes (but not all felonies). Other states soon did the same. In 2003, Louisiana passed a law allowing DNA to be taken at the time of arrest for all felonies,[5] and many other states have followed suit. Today, every state that borders Texas takes DNA from felony suspects at arrest.[6] The United States Supreme Court upheld the legality of arrestee DNA statutes in *Maryland v. King*, holding that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold a suspect for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.[7] Despite being one of the early leaders in passing a DNA collection law, Texas fell behind as other states began to pass more aggressive statutes.

Three trips to the legislature

Chambers County District Attorney Cheryl Lieck made the decision to take the issue of arrestee DNA to the Texas Legislature and bring Texas up to speed in the area of DNA collection. Despite having been to most of TDCAA's Legislative Updates over the years and having read all the legislative reports on the TDCAA website, our knowledge of the actual legislative process was closer to "Schoolhouse Rock."[8] We had this vision

of filing a bill, getting lauded at the capitol, and standing behind the governor as he signed it into law. I quickly learned that if you are planning what color tie to wear when having your photo taken as the governor signs your bill into law, you better check those dreams at the big wooden door because the capitol can be a cold and lonely place.

During the 2013 legislative session, Cheryl asked a state representative to file House Bill 1038,[9] which would've required the taking of a DNA sample from all persons arrested for any offense above a Class B misdemeanor at the time of booking for placement into CODIS. The bill would have made Texas one of the most aggressive states in the country as far as arrestee DNA collection. To us, the bill made sense and brought Texas up to the standards of other states. But as it was our first real trip to the legislature, we were flying a little bit blind. Like I said, the capitol is a cold and lonely place. For starters, House Bill 1038 had a $22 million fiscal note attached to it. In layman's terms, that means it would cost the state $22 million to implement the new statute. Even in good financial times that is a high price tag for any legislation, but for an economy just starting to recover from years of recession, it was a nonstarter. HB 1038 was voted out of the House Homeland Security and Public Safety Committee but died in the House Calendars Committee, which is the final step before a bill makes it to the House floor for a vote.

After the 2015 session we decided to learn more about the legislative process. If you want to learn about it yourself, the best place to start is the TDCAA office.

Our efforts in 2015 ended much the same. House Bill 3740[10] was doomed by the same combination of factors that derailed our efforts in 2013. Even though House Bill 3740 required that DNA be taken only from persons arrested for Class A misdemeanors and above, the fiscal note had now ballooned to $38 million. Bills that are that expensive have no chance of passing. And unlike the previous session, this bill was sent to an entirely different committee, where it received a hostile reception in the House Criminal Jurisprudence Committee. The criminal defense bar, privacy advocates, and budget watchers all lined up against the bill, and these factions found an ear on the committee. The bill never came up for a vote and died in that committee, making even less progress than the previous attempt.

After the 2015 session we decided to learn more about the legislative process. If you want to learn about it yourself, the best place to start is the TDCAA office. After the 2015 session, it was obvious to us that this legislation had its detractors and the organized opposition to the bill that emerged during the 2015 session was never going to go away. This legislation was not going to pass on policy alone—we were going to have to do a lot more work.

We showed up in Austin on the first day of the 2017 session for attempt No. 3. The first day of the session is like move-in day on a college campus. We had already made arrangements to have Shannon Edmonds, TDCAA's Director of Governmental Relations, take us around and introduce us to some people whose help we would need to pass our bill. While we were sitting in our representative's office, in an interesting little bit of coincidence, the executive director of the state's largest peace officers organization dropped in. And he had come to talk about DNA legislation. To us it seemed liked serendipity—2017 had to be our year!

In the early days of that session, we made many trips to Austin. We spent those first weeks looking at the makeup of the various committees we would have to navigate to get House Bill 3513[11] through the legislature. We looked at deadlines. We tried to figure out who might support our bill and who might oppose it. And then we waited. Deadlines to file bills and have them heard at various stages of the session are very rigid, and missing a deadline will kill a bill. As March turns to April, if your bill is not making progress, the chances of getting it passed are pretty slim. Despite all the work we did early in the session, April was quickly coming to a close and our bill had seen no action.

All of that changed on April 18 when we finally got word that House Bill 3513 would be heard in the House Criminal Jurisprudence Committee the following week. On the day we got notice of our hearing, I was driving home and discussing the bill on the phone with my brother, who was a biology teacher. I was trying to get some insight from someone who knew a little about DNA but wasn't a lawyer. I was actually trying to convince my brother to come to Austin to testify when he said, "You need Jayann Sepich." It did not immediately dawn on me who Jayann Sepich was until my brother reminded me, "Her daughter was murdered. Don't you remember the billboards?" He told me that she had gone to the New Mexico legislature and passed a DNA statute similar to our bill. (What neither of us knew at that time is that she had testified in al-

most every state in the country and had helped pass DNA statutes in several of them.)

After that tip from my brother, I looked up Jayann Sepich online and called her. The conversation went something like: "Ms. Sepich, my name is Eric Carcerano. You don't know me, but I'm a prosecutor in Texas and we are trying to pass a DNA statute here and we need your help in Austin." And just like that, she came! She brought her vast knowledge of other states' DNA laws with her and also connected us to her extensive network of people who had worked on DNA legislation, including advocates and crime victims who lived in Austin and who all had compelling stories to tell. We spent two solid days before our hearing talking to committee members and anyone else who would listen about our bill, and we felt pretty confident going into the hearing. Because it was so late in the session, we had already started sizing up the Calendars Committee, which would be the next hurdle to clear if the bill was voted out of the Criminal Jurisprudence Committee. We were sure 2017 was our year.

One thing we learned that day is that people at the capitol will tell you one thing in a closed-door meeting and vote differently in a public hearing. Despite thinking that we had votes to spare, House Bill 3513 was voted out of committee by the slimmest 5–4 margin, and we were on to the Calendars Committee. We had done some preliminary work in Calendars and were somewhat certain we had the votes to get to the House floor, but by then it was very late in the session and various procedural maneuvers were used by our bill's opponents to run out the clock on House Bill 3513. It just wasn't meant to be during the 2017 session.

I wonder if Sisyphus ever saw the top of the mountain? During the 2017 session, the summit was in sight for us, but at the end of every session the boulder rolled back down the mountain, and we had to start at the bottom again.

Fourth session is the charm

Our work on the 2019 session began the day after the 2017 session ended. During the interim, we talked to anyone who would listen about our bill. We received a lot of phone calls from other prosecutors who wanted to help. We had also finally built a large network of supporters who would help us work in other parts of the state. We contacted all the large prosecutor offices to make sure they were all on board. We contacted the Governor's Office, the Lieutenant Governor's Office, and various important offices in the House and Senate and set up meetings, and we attended committee hearings on interim charges.

On the way to an interim committee hearing where I was supposed to testify in May 2018, I hit a deer in Columbus and didn't make it to the hearing. But interestingly, I heard from several people at the capitol that day. They knew we weren't giving up. Throughout the summer and fall of 2018, we were constantly working, talking to people, and meeting with people about our bill in preparation for our next attempt to push our boulder up the mountain.

Days at the legislature can be exhausting. But after a couple of sessions, you realize that the rules of the legislature are a lot like those from *All I Really Need To Know I Learned In Kindergarten*.[12] Be honest. Be respectful of people's time and of people's opinions and positions on a subject. Agree to disagree. Clean up your own mess. Visit every member on the committee, even those you know are going to vote against you. Committee members talk to each other, and staffers talk to each other. Over the course of an entire session, there is a lot of give and take in the committees, and members often bond over different issues. If a committee member who is on the fence about an issue finds out that you disrespected one of his fellow members, it may be the difference between a bill getting voted out or dying in committee.

Because of the cost associated with swabbing all persons arrested for felonies in a state as large as Texas, this bill was always going to be an expensive proposition. We had to make a tactical decision whether we would put forth a bill that tested all felonies or just certain enumerated felonies to get the most bang for our buck. To reduce the cost of the bill, we would have to exclude most state jail felonies, with the exception of burglary and theft, felony DWI, and crimes under the Health & Safety Code. That left us with most of the violent felonies and a mix of other crimes, such as the 11 felony offenses for which the law as it existed then already allowed DNA collection after indictment.

On the first day of the 2019 session, we learned that we had another ally in the House of Representatives. Rookie State Representative Reggie Smith (R–Van Alstyne) had also decided to take on the cause of DNA collection and filed House Bill 1399. That day I went to Representa-

We had this vision of filing a bill, getting lauded at the capitol, and standing behind the governor as he signed it into law. I quickly learned that if you are planning what color tie to wear when having your photo taken as the governor signs your bill into law, you better check those dreams at the big wooden door because the capitol can be a cold and lonely place.

I looked up Jayann Sepich online and called her. The conversation went something like: "Ms. Sepich, my name is Eric Carcerano. You don't know me, but I'm a prosecutor in Texas and we are trying to pass a DNA statute here and we need your help in Austin." And just like that, she came!

tive Smith's office, sat down with a legal pad, and went through most of the Penal Code with him. We chose 14 additional offenses along with the offenses already listed in the statute, and drafted a bill that would allow a swab for DNA upon arrest for any of them. I still have the original handwritten copy of the list—I carried it with me throughout the session. As copies of the list began to make their way around the capitol, I think it legitimized the work that we were doing on this bill when I pulled out the original.

I stayed at the same hotel for days at a time. One day when I was checking in, there was a new girl at the front desk and she asked me if I had stayed there before and I said yes, six out of the last eight nights. Eventually they got to know me, and they could tell when I had had a particularly rough day because they would give me a room upgrade or even complimentary drinks at the bar. That's another thing you should always do during the session: Develop a routine. And take time to learn the layout of the capitol—especially the locations of the important offices, parking, bathrooms, and secret staircases. Realize that Austin traffic is bad on a normal day and it is murder during the session. Give yourself (literally) an extra hour to get somewhere if you have to drive and park. Don't expect an Uber driver to drop you off right at the door of the capitol. You might still have to walk two blocks, and you might get stuck behind several hundred fourth graders on a field trip going through the metal detectors. The capitol can throw you a lot of curveballs.

We spent the first few weeks of the session visiting old friends and trying to make new ones. Committee assignments change from session to session, so as soon as the new committee assignments were posted, we spent several days speaking with all of the members of the House Criminal Jurisprudence Committee. Just when I thought I was starting to develop a strong relationship with its members, the capitol threw me a curveball: House Bill 1399[13] was sent to the House Homeland Security and Public Safety Committee instead of Criminal Jurisprudence. So almost two months into the session, it was like we were starting from scratch. We had learned from three previous sessions that the committee stage is where the legislature culls most of the herd. Of the thousands of bills that get filed every year, only a few get committee hearings and even fewer of those bills are voted out of committee. The vast majority die without ever coming up for a committee vote.

So we went back to work. We had Jayann Sepich back for another session, and we also had a large network of individuals from Austin and around the state who helped us. Thanks to our hard work behind the scenes, on April 3, 2019, HB 1399 was heard in committee and unanimously voted out that same day. The next big obstacle was the Calendars Committee. By the time a bill gets to the Calendars Committee, you must have your message honed to a razor's edge because there is very little room for error at this point. Our message was simple: This bill will save lives. We worked Calendars relentlessly and on April 23, HB 1399 was placed on the General State Calendar to be debated on the floor of the Texas House of Representatives. By this time, I had visited every member of the Texas House of Representatives. (Every. Single. One!) Some members remembered the bill from previous sessions and were glad that we were still coming back to pass this important legislation. As a courtesy, I even visited the offices of the members I knew were adamantly opposed.

When the bill was called for debate on the House floor, our opponents tried to use several procedural maneuvers to derail it before the debate even started. But our sponsors overcame the points of order and the debate was on. Opponents argued that the bill was an invasion of privacy and a government overreach, but our supporters held steady. The initial floor vote was 91–50 in favor of the bill, setting up another dramatic vote the next day. (Why another vote? Well, the constitution requires all bills to be "read" three times before passage by each chamber. The "first reading" is when the bill is referred to a committee, but then a bill must be approved by the full House or Senate on "second reading" and again on "third reading." Nothing can ever be easy at the capitol!) Again our opponents tried to pull out all the stops to defeat us. One even went so far as to call our bill "crap" on the House floor. But despite that colorful opposition, the bill passed by the narrow margin of 77–68. We were on to the Senate, where our local senator, Sen. Brandon Creighton, would have to help us push this boulder to the top.

When April turns to May at the capitol, things turn up to a fever pitch. As much work gets done in the last 20 days of the session as in the first 120 days combined. We anticipated that our

bill would be referred to the Senate Criminal Justice Committee, so we did a lot of work on that committee in early May, but the capitol threw us another curveball: The bill was referred to the Senate State Affairs Committee instead. Given the makeup of that committee—which included our bill's sponsor—we actually felt pretty good about our chances.

Committee hearings in the Senate are much different from committee hearings in the House. House committees hear dozens of bills at a time with multiple witnesses, and hearings can last all night. The Senate hears from whom they want to when they want to, so you better have your best people lined up and ready to go. Because of circumstances beyond anyone's control, Jayann Sepich was not available to testify at the Senate, so we needed to bring in a big gun to replace her. The day before the hearing, we got the biggest gun we could find: Susana Martinez, the former Governor of New Mexico and the person who prosecuted Katie Sepich's killer. Governor Martinez got on a plane and headed to Austin to testify at our hearing in the Senate, which helped those senators finally realize the importance and enormity of this bill. The chairwoman of the committee, Senator Joan Huffman (R-Houston), vowed to pass it and find money to pay for it. She was true to her word, and the bill passed the Senate 26–5 and was on to the Governor's desk.

Which still left the matter of whether he would sign the bill. We had been given all indications that he would, but that did not make the wait any easier. But on June 14, 2019, on a Friday afternoon, I got the email that I felt like I had been waiting for my whole life. House Bill 1399, the Krystal Jean Baker Act, had been signed into law by the governor. The confluence of events that had been weaving their way through my life and the lives of many others had finally drawn to a close.

What the new law says

Pursuant to House Bill 1399, a DNA sample now must be collected for placement into CODIS immediately after fingerprinting and at the same location as fingerprinting occurs when a defendant is arrested for any of the felonies listed in Texas Government Code §411.1471. Most states that have passed similar DNA collection statutes have seen dramatic results. For example, since enacting its DNA collection law in 2014, Nevada has placed 61,000 samples in CODIS. These samples have matched to more than 100 sexual assaults, 500 burglaries, 62 robberies, and nine murders including cold cases that date back decades![14] A study done by the city of Chicago showed that if eight defendants had their DNA taken at arrest, 30 murders and 22 rapes could have been prevented.[15] Every day our news stories are filled with more and more cold cases, some that go back years, which are being solved with DNA collection.

The DPS website contains a wealth of information concerning the implementation of House Bill 1399 and what procedures should be followed for DNA collection at booking. The following procedures are required for DNA collection at booking:

1) develop a point of contact between Texas DPS CODIS and the collecting agency;

2) determine which people are being arrested for a qualifying felony offense;

3) check the arrestee's criminal history to determine if his or her DNA sample is already on file;

4) during the fingerprinting process, use a LiveScan to print out a copy of the CR-45 Ten-Prints that are collected at the time of booking. The copy of these fingerprints needs to be included with the DNA kit;

5) escort the arrestee to an isolated area, such as a medical room or infirmary, to collect the DNA sample using a CODIS Buccal Swab Collection Kit;

6) place the kit in the mail as soon as possible; and

7) keep record of this collection.

There are many more details on the DPS website, and there is also a really good page for frequently asked questions.[16] Included in the FAQs is the question that has come up the most during the early stages of implementation, which is what to do if a suspect refuses to provide a sample. The official word from DPS is, "The law requires that eligible individuals give a sample. Each agency should develop a policy, in conjunction with its legal department, to determine to what extent the use of force should be employed as means of fulfilling the responsibility to enforce the law." Also, anyone who may be handling a CODIS case should familiarize himself with the DPS Crime Lab Service Manual.[17] DNA information can be found on pages 114–119.

Unlike our friend Sisyphus, we have finally pushed our boulder over the top of the mountain.

We chose 14 additional offenses along with the offenses already listed in the statute, and drafted a bill that would allow a swab for DNA upon arrest for any of them. I still have the original handwritten copy of the list–I carried it with me throughout the session.

Even though our work may never be done, we can finally rest.

Conclusion

When the Chambers County District Attorney's Office first decided to take on this project, we had no idea that it would dominate years of our lives like it did, but we are happy that we took on the task. On September 1, 2019, the State of Texas officially began swabbing people arrested for 25 enumerated felonies for placement into CODIS.[18]

By our count, it took four sessions, 23 trips to Austin, 12,052 miles, 51 nights at the Wyndham Garden Inn, and one (dead) deer. And about that picture with the Governor ... ❇

When April turns to May at the capitol, things turn up to a fever pitch. As much work gets done in the last 20 days of the session as in the first 120 days combined.

From the left. Chambers County Sheriff Brian Hawthorne; Theresa Bastian, whose sister was murdered in 1986 at age 13 in Washington and who waited 27 years until her sister's murder was solved by a CODIS hit; State Representative Reggie Smith; Chambers County Assistant District Attorney Eric C. Carcerano; Senator Brandon Creighton; Governor Greg Abbott; Chambers County District Attorney Cheryl Swope Lieck; Jayann Sepich; Ashley E. Spence of Austin, who was the victim of an assault in Arizona while in college. Her assailant was apprehended by a CODIS hit in California; and Susana Martinez, former governor of New Mexico.

Endnotes

[1] N.M. Stat. Ann. §§ 29-3-10, 29-16-10 (West 2013), SB 365 (2011), SB 216 (2006).

[2] La. Rev. Stat. §15:609.

[3] http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=10658f91-3eff-4970-adcb-e96f5df1088a&coa=coa01&DT=Opinion&MediaID=a5e9b072-9c62-4300-beec-8b0abc47025e.

[4] https://capitol.texas.gov/tlodocs/77R/billtext/html/SB00638F.htm.

[5] La. Rev. Stat. Ann. §§15:609, 603, 614 (West 2012), SB 678 (2010), HB 346 (2009), SB 346 (2003), HB 1377 (1997).

[6] Ark. Code Ann. §§12- 12-1006, 1019, 1105 (West 2012) HB 1563 (2011), HB 1473 (2009); 74 Okla. Stat. Ann. §150.27a; N.M. Stat. Ann. §§29- 3-10, 29-16-10 (West 2013), SB 365 (2011), SB 216 (2006).

[7] 133 S.Ct. 1958 (2013).

[8] http://www.schoolhouserock.tv/Bill.html.

[9] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=83R&Bill=HB1038.

[10] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=HB3740.

[11] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=85R&Bill=HB3513.

[12] *All I Really Need To Know I Learned in Kindergarten*, Robert Fulghum. New York: Villard Books, 1988.

[13] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB1399.

[14] https://www.rgj.com/story/news/2018/01/28/briannas-law-has-matched-more-than-1-000-dna-samples-crimes/1062349001.

[15] http://www.dnasaves.org/files/ChicagoPreventableCrimes.pdf.

[16] https://www.dps.texas.gov/CrimeLaboratory/CODIS/codisfaq.htm.

[17] https://txdpslabs.qualtraxcloud.com/ShowDocument.aspx?ID=67475.

[18] See Tex. Gov't. Code §411.1471.

How to write a history of your office

Let me tell you a story.

By Vincent Giardino
Assistant Criminal District Attorney in Tarrant County

County Attorney J.D. McLean had a problem with illegal game rooms in Tarrant County. He heard about the gambling from folks in the community every time he was out to dinner with his wife, and he knew if he did not crack down on it, voters would find someone who would. But nothing scared J.D., so he not only started a series of raids on the game rooms, but he also insisted that he get to break through the windows and be the first guy the gamblers saw coming into the room. He seized thousands of dollars, made lots of arrests, and quickly earned a reputation as tough on gambling.

One week in February, J.D. had a weekend off but knew a raid was going down while the Stock Show was in town—which is sure to attract a lot of attention from important people. Taking part could raise his statewide profile, and J.D. was becoming an ambitious man. He invited his brother and his wife to come watch the raid, which was upstairs from a bar along Main Street. The raid went smoothly, and the County Attorney went back to his car to check on his wife (and who knows, maybe see if there were some cameras around watching), then he returned inside—and was promptly shot in the throat by the game room owner, a one-armed degenerate named Thomason who was tired of having his establishments shut down. J.D.'s wife heard the shot and ran to him, but he died in her arms.

Thomason ran out the back door, fatally shot a pursuing officer, stole the dying officer's gun, and ran to a lumber yard. An angry crowd surrounded the yard, and someone called to light the wood on fire to flush out the bad guy, but officers bravely ventured in to capture the assassin after a brief shootout. Achieving the high profile he desired, J.D.'s death got nationwide coverage and led to state-wide changes to liquor and gambling laws. The man was Jefferson Davis McLean (his father was a confederate veteran) and the year was 1906. He was replaced as County Attorney by Robert E. Lee Roy (naming people after famous Confederates was a bit of a common theme), and the laws passed after McLean's death outlawed women and certain music in Texas saloons.

Here is another story. Imagine the media circus today if the pastor of the biggest mega-church in Texas was accused of setting his own downtown church on fire—but he is acquitted by a local jury. Then, a few years later, that same pastor murders an unarmed man in his office in front of several witnesses and claims self-defense. He keeps preaching, now to ever-larger crowds, about the inalienable right to self-defense and about the growing conspiracy of people he thinks are out to get him. After months of tampering with the jury pool and making parishioners pay for his expensive defense team, he claims moments before jury selection that he cannot get a fair trial because the city of Fort Worth and the Catholic Church are conspiring against him. The trial is moved to Travis County, where he is again acquitted. He returns to Tarrant County triumphant and continues to spread the gospel. The pastor was J. Frank Norris, and the year was 1927.

Having lived in Tarrant County my entire life, I am embarrassed I never knew I sometimes have drinks at the spot where a prosecutor died in the line of duty. I never knew one of the first pastors of our largest Baptist church was an accused arsonist and murderer—and that both events occurred where I get tacos. We had a criminal district attorney who hired the first female assistant prosecutor in the state, another who hired the first African-American assistant in the entire South, one accused of being bought by the mob, one who brought pre-trial diversion programs to Texas in the 1960s, and another who opened his files to defense attorneys 50 years before the Michael Morton Act. Very few people in my office knew any of this.

We have a fascinating history, and now we have a book to share it with everyone else.

Writing a history book

The assignment started slowly enough. Sharen Wilson, our elected Criminal District Attorney, told me about a year ago that the office was turning 100 in 2019, and she would like to have some fun historical facts. I had done some light historical research before, such as making posters showing the history of every judge on each bench and helping police departments track down the stories of fallen officers. Wilson and I imagined some neat bullet points to share with the office and the community, such as how many CDAs we have had, their names, and maybe some interesting cases. I had a few irons in the fire but told her I should be able to have some stuff to her by mid-December. At that point, we did not know the actual anniversary of the office, so I was a little concerned about getting the information quickly so we did not miss any big dates. It turns out we had plenty of time—our birthday was October 19, 1919.

I went to a conference the next week (non-TDCAA, so it was kind of dull) and found myself in a hotel room at 5:30 p.m. with nothing to do. I planned to poke around online to see what I could find and then take a walk—but I didn't get up from the desk until I stumbled across the room to fall into bed at 2 a.m., having researched and written eight pages of material. The project was really hard to put down after that, and I worked on it all that weekend. Over the next nine months, a request for bullet points turned into a 100-plus-page book with around 80 photos, some of which have never been printed before, 221 footnotes, and a dozen personal interviews.

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I do not wish a rushed book on anyone who is not super-excited about the project and does not have a love of late nights and strong coffee. However, for anyone interested in researching the history of their office—and I've heard from a couple of you—I am here to help you get started with some advice and resources.

Good resources

The best news is no one has to start from scratch. I guarantee that someone in your community has at least a partial list of former elected prosecutors, even if it is only in their heads. That leads to the best resource: the retired attorneys, secretaries, and investigators, plus close-to-retired folks in and around your office or defense bar. Invite them to sit down for a cup of coffee, and interview them like you would a witness for a case. You will not only get a ton of intelligence for your later research, but you will also hear details never before put in print (and some stuff you cannot put in print). Getting a basic list of elected officials and about what year they started will give you a framework to start filling in the gaps. Do not be shy—asking a retired person to share some old war stories is the easiest conversation starter ever, and it will be the most fun you have ever had in a witness meeting.

Another resource I did not realize I needed was local history authors. Just as I can guarantee there is someone in your office who is excited to share old stories, there is also someone on your local history board, who teaches history at a nearby college, or who just keeps a blog about historical events in the community. If some light Googling does not yield names, reach out to the closest college, ask for the email addresses of history professors, and invite them for a cup of coffee—they cannot help themselves and will have already looked some things up that can help you.

Once you have some names, you can start diving into old newspapers. If you have not played around with historical research before, it is not as library- or microfilm-intensive as it used to be. There are amazing newspaper resources online whose search fields work just like a Google search: Type a name you want to research, put quotes around "district attorney," and you will get narrowed results with the words you wanted highlighted on the page. One of the best databases online is NewsBank, usually available through your local library or community college, where hundreds of thousands of newspapers have been digitally scanned and are searchable almost like a PDF. Another amazing resource available for free is the Portal to Texas History from the University of North Texas. Similar to NewsBank, it lets you type in a name or event, and you can read about it in the papers as far back as 1813. Also consider checking the Texas State Historical Association, which has a stunning amount of local history written by people from your town.

As addicting as getting these results will be, know that there is a lot to click through. There were trials or other events I "watched" unfold by basically opening and reading every paper for a couple of days straight before jury selection and every day during the case to get all the details. It will make you miss good journalism and trial coverage. Since papers were once the only way to get

news and journalism was a lot more in-depth, larger papers had beat reporters on the payroll in numerous cities. These reporters had relationships with locals and mined for details. If I wanted to find stories about something in Tarrant County, sometimes the best reporting was in the *Dallas Morning News* or even some papers out of Houston. Checking multiple sources is rewarding, but labor intensive.

While you are checking the papers, enjoy the funny advertisements showing the latest cure-all medicine (and compare it to the promises made then those made by CBD oil retailers today), comic strips from the 1930s (I have some new favorites), and even stories that make you think you accidentally pulled up a current newspaper. For instance, the Bexar County DA (his name was, appropriately enough, D.A. McAskill) announced a crack-down on illegal voting—in 1904.

Here are some of the other perennial stories you will see rinsed and repeated every few years starting in the 1800s:

- High turnover in prosecutor's offices is blamed on the low salary, so DA's offices can only seem to get baby lawyers fresh out of law school. They train the newbies, then the scamps run off to become defense attorneys.
- Letters to the editor complain police have much better things to do than enforce certain laws the writer disagrees with, but then other letter writers complain the DA is not doing enough about the exact same issue and, by the way, they are not getting long enough sentences.
- The media talk about new bad guys as what terrifies the community slowly changes—from drunken cowboys to mobsters to drug dealers to serial killers to child predators. Many times there is frustration when someone got off easy on an earlier case only to commit new crimes later on.
- Murder always gets the biggest headlines, and wealthy people accused of murder is like catnip to journalists.

Collecting these stories is a great deal of fun, but remember your reader and your subject. Staying factual is priority one, but never forget you are telling forgotten stories about fascinating people, not just playing journalist yourself. Once you have marinated in these details long enough, you will have become one the few people on the planet who knows these people best—so do them justice and bring out their personalities. For instance, one of the most fascinating people I found was Doug Crouch. He was the Tarrant County CDA twice, from 1959 to 1966 and from 1971 to 1972. He played fast and loose with the rules, loved to push boundaries, and really loved to be the center of attention. He called a defense attorney into his office and sucker-punched the guy in the face during a disagreement over a case, but he also hired the first African-American prosecutor in the South (not just in Texas, the first one South of Kansas City), hired an African-American receptionist, and publicly fought the commissioners to desegregate the courthouse. His receptionist was not getting the respect he thought she deserved so he installed a locked door only she could open—if you wanted access to see the CDA, you had to be nice to Ms. Dearleace Johnson first. Crouch created the first diversion program in the state after reading an article about one in Michigan and appointed himself "judge" of the "Court of No Record," where he called defendants up to the bench to see him and threatened to bring the hammer down unless they cleaned up their act. But he also got cross-ways with organized crime and an assassin came to his house and got into a shoot-out with an office investigator posted there as security. Crouch declined to talk about why the mob was after him and rejected calls to step aside from the case. He was going to prosecute his would-be assassin himself, but when the shooter was mysteriously murdered a few months after indictment, Crouch assigned himself the investigation of catching that murderer as well. All the while his picture was in the paper almost every day and he eventually called a press conference to complain about all of the extra media coverage—which is kind of rich, right? He also published a fictional book about a DA who tangled with a criminal mastermind. Who wouldn't love to have a drink with this guy! (But alas, Mr. Crouch is deceased.)

Other things to remember

The best advice I received was from local historian Quentin McGown, who never lectures or publishes history newer than 25 years old. He told me to talk to people to get context but to recognize that more recent history is hard to write about in-depth. Our book tapers off greatly after about 1985 and becomes a lot more like a news report. This is true of the study of history in general—we do not fully appreciate the impact of events until decades after they occur. Let the new stories simmer a few more years for the next person to write about.

Continued in the orange box on page 31

The best news is no one has to start from scratch. I guarantee that someone in your community has at least a partial list of former elected prosecutors, even if it is only in their heads. That leads to the best resource: the retired attorneys, secretaries, and investigators, plus close-to-retired folks in and around your office or defense bar.

Strategies to reduce domestic violence homicides

Domestic violence homicides are so predictable as to be preventable.[1]

By Carvana Cloud
Assistant District Attorney in Harris County

That is an assertion as shocking as it is hopeful for prosecutors trying to stem the tide of domestic violence and homicides in their jurisdictions. The research is clear: A non-fatal strangulation is often the last step before domestic violence turns deadly, usually in a fatal shooting.[2] Plus, strangulation is a high lethality crime, and the presence of strangulation in a domestic abuse situation increases the chances of homicide sevenfold.[3] Extensive academic work shows statistically predictable links between strangulations that escalate into homicides, officer shootings,[4] and even mass shootings.[5]

After learning that Harris County has the highest number of domestic violence homicides of any Texas county, District Attorney Kim Ogg issued a mandate to lower the rates of domestic violence and homicides. That initiative began with bringing different community stakeholders to the table, then training law enforcement officers and prosecutors about collecting evidence while simultaneously reaching out to victims in new ways. Our initiatives were funded by grants and they do require resources, but they can be scaled down for smaller jurisdictions or duplicated by large offices.

Strangulation task force

Our first step was to create a "strangulation task force" of experts and community stakeholders to get everyone in the same room and on the same page. Depending on the community, those stakeholders can include law enforcement, forensic nurses, EMS providers, hospitals, health departments, churches, and community groups that offer counseling, and other service providers, such as battered women's shelters.

The group began meeting monthly in 2017 and concluded that first responders in our community had never been trained to look for or record all the signs of strangulation when filing paperwork in a felony case. Because only about half of women who have been strangled have easily observable marks around their necks, many cases that could have been filed as felony DV assault–strangulation had been filed as misdemeanor assaults or not filed at all. Police had not been trained to look for raspiness in the throat, a sore throat, ringing in the ears, or whether the victim lost consciousness, "saw stars," or blacked out for even a second.

Once first responders and prosecutors were trained about observable signs of strangulation besides red marks on a person's neck, felony filings in domestic violence cases rose by almost 1,000 to an unprecedented 7,809 in 2017. Of those, about 1,400 were non-fatal strangulation cases (the remaining were domestic violence incidents charged as felonies). Since the task force began meeting, the DA's office has filed an average of about 50 percent more cases a month than we did before 2017.

In addition to increased awareness, the task force also developed a supplement for officers to record some of the signs of strangulation. The purpose of the form is two-fold: It not only reminds officers on the scene to look for other signs, ask victims more questions, and document exactly what happened during a call; but it is also important evidence when it comes to filing charges, getting protective orders, and prosecuting suspects even if a victim later recants. (If you'd like a copy, please call me at 713/274-5588, and I can email it to you.)

Effective May 4, 2018, our office mandated the use of this supplement before prosecutors

can accept strangulation charges against an intimate partner or family member. The supplement includes open-ended questions; checkboxes for signs, symptoms, and injuries; and a diagram of the victim's neck at different angles. Using it has drastically enhanced the investigation of nonfatal strangulation cases. Officers are identifying the symptoms of strangulation without visible injuries and are talking to paramedics about the signs on the scene. As a result, Harris County prosecutors now have sufficient evidence to prosecute stranglers and maximize offender accountability, which decreases recidivism.

Because the majority of strangulation cases will not have external injuries readily apparent to most people, prosecutors are often left with insufficient evidence to meet their burden of proof. However, if investigators offer strangulation victims a forensic medical exam as soon as possible after the incident, a trained medical professional can identify signs and symptoms not easily noticed by law enforcement on the scene. Funding for these key personnel can be challenging, so interagency partnerships may be necessary in some jurisdictions. Those signs include petechiae, or ruptured capillaries, the smallest blood vessels in the body. The presence of petechiae suggests a particularly vigorous struggle between the victim and assailant; petechiae may be found around the eyes, on the face, on the neck, and above the area of constriction. Sometimes it may be found only under the eyelids.[6] At the same time, the absence of petechiae does not mean that strangulation didn't occur. Like many other visible injuries consistent with strangulation, these ruptured blood vessels can often be overlooked.

Additionally, by getting prosecutors and social workers involved on the front end of a nonfatal strangulation incident, victims can be offered services and help from community-based advocates in obtaining protective orders, navigating the court process, and learning about the cycle of violence and the effects of violence on themselves and their family unit.

A task force led by a district attorney's office, even in a smaller jurisdiction, can coordinate services such as medical forensic treatment, crisis counseling, and shelter or alternative housing placement. Those kinds of relationships pay off to restore victims' well-being and decrease the time it takes to triage victims for services. Most importantly to many law enforcement partners, their work at the scene becomes a force multi-

Save your research. I ended up with a lot of footnotes, but I lost a lot of hair trying to relocate about a dozen articles I did not save. Don't be like me—start saving the newspaper, date, and page of every article early.

I could have tinkered with the book until 2020, but the week after I finally put it to bed, I met a few members of the defense bar with amazing stories and pictures I definitely would have included. That will never stop. I heard from another author to think of writing as collaborative with the reader. You only learn what you should have known by pretending to know some small part of it first. I am going to bear this in mind when I get an email that starts: "Dear Mr. Giardino: Decent book, but you left out ..."

If you are writing something for the office, your book may be a bit hagiographic. Like the recent slate of movies about rock stars and bands that don't *quite* go into all the salacious and embarrassing personal details, your book should not touch rumors such as affairs or other family issues. However, you will uncover some things the office is not necessarily proud of, such as racism, ties to organized crime, and police scandals. Don't shy away from these. The headlines are out there, and it is important to talk about such things. You will be proud of how far your office has come, as well as prosecution as a profession.

Lastly, you need a few people helping you. Get a good editor who is willing to join you on interviews, help with research, and provide fresh eyes when yours are tired (thank you, Amy Bearden). Also, get an experienced writer to read your stuff who is willing to savagely tear your prose apart (thank you, Dr. Selcer).

One of the themes of our book is that history does not repeat itself, but it certainly rhymes. Crimes may change, but society will always produce violent people, thieves, and victims, while legislators will always seek to reform the same laws over and over when they find themselves in the cross-hairs. But through these rhymes our laws evolve, based on the mistakes and successes of our predecessors. We are reckless if we ignore the past. It is important for every community to know where they came from to fully appreciate where they need to go next.

And it is a ton of fun. Happy writing! ❇

plier for aggressive and innovative prosecution strategies, such as early case evaluation, expanded offender containment options, intensive supervision, and increased conviction rates.

Domestic Assault Response Team (DART)

DART, our Domestic Assault Response Team, is a mobile victim services partnership with the Houston Police Department (HPD). The grant-funded pilot program, which operates on weekends, is a crisis intervention model to support victims of high-risk domestic violence cases.

"High risk" crime scenes involve:

1) strangulation,
2) continuous domestic abuse, and
3) non-fatal, weapons-involved offenses committed against an intimate partner or family member.

Even though Harris County filed 12,000 felony and misdemeanor domestic violence cases in 2018, we know through local research with our area partners that 50 to 60 percent of women who seek shelter do not contact law enforcement.

Each DART team consists of one victim assistant and one law enforcement officer who is specially trained in safety, crisis intervention, and the dynamics of domestic violence. Those teams respond to high-risk domestic violence scenes within minutes of a 911 call. In Harris County, they are supported by other officers, advocates, and forensic nurses. Just working from 7 p.m. to 3 a.m. every Friday, Saturday, and Sunday, this team went to more than 700 scenes in the first eight months of 2019, and more than 200 charges were filed.

Of those charges, 50 were "to-be warrants," which means a charge was filed so police could later arrest a suspect who left the scene before officers arrived. In the past, police officers routinely just filed a report to follow up. That meant there had to be more investigation, another incident, or escalation of the violence before the suspect was arrested—there was no warrant. Often, that left the victim alone at the scene waiting for an abuser to come back. Now, DART immediately goes into action, and prosecutors are available to draft arrest warrants.

Because DART stands on the shoulders of the advances made by the strangulation task force, it further improves the first response to victims and helps officers gather better evidence to prosecute these crimes. HPD provides on-scene crisis intervention and victim stabilization; then, crisis counselors from our office's Family Criminal Law Division follow up with victims within 48 hours of the call to the scene for advocacy, permanent protective orders, a determination of appropriate bond conditions, and further investigation of the criminal case.

Even a smaller jurisdiction with just one or two of these kinds of teams could dramatically affect prosecutions and outcomes in domestic violence cases. To make the most of more limited resources, smaller cities may want to focus on incidents where strangulation is alleged. That way, investigators can put their efforts into collecting evidence on suspects who are statistically more likely to kill or be involved in a shooting.

Cultural outreach

Even though Harris County filed 12,000 felony and misdemeanor domestic violence cases in 2018, we know through local research with our area partners that 50 to 60 percent of women who seek shelter do not contact law enforcement. In response, our office developed and implemented new programs to educate and reach out to all communities in our jurisdiction. We do so through the grant-funded Cultural Outreach Program (COP), which provides victim services to specific immigrant and minority communities. COP places family violence social workers in community agencies to offer protective orders, criminal justice education, crisis intervention, and safety planning. The community agencies include Daya, Boat People SOS, Mexican Consulate, Casa Juan Diego, An-Nisa Hope Center, Houston Area Women's Center, Harris County Constable Precinct 7, and Northwest Assistance Ministries.

The program allows our office's Family Criminal Law Division to extend its reach throughout the county, particularly to underserved communities that are plagued with domestic violence. Because communities across Harris County have different cultural norms about household violence, asking for help, and calling police, this program can reach people who ordinarily would be hesitant to report domestic violence directly to police. Across Texas, other counties with different vulnerable populations and agencies may be open to a similar kind of partnership. Involving women's shelters, social workers, churches, community centers, and food banks could all be a good places to start with outreach.

Conclusion

Strangulation is often the highest predictor of future fatality, as well as an indicator of lethality to

law enforcement and even involvement in mass shootings. Harris County's internal case research proves that victims who experience non-fatal strangulation by an intimate partner are at the highest risk for escalating violence or homicide. Through a targeted, intentional approach, we have implemented a strangulation strategy across law enforcement jurisdictions, and we are designing protocols for response by medical and advocacy personnel to improve safety, reduce deaths, and increase accountability.

These programs take initiative and effort, but they can likely be replicated in some form in almost any jurisdiction in Texas. ❇

Endnotes

[1] Diane Rosenfeld, "Law Enforcement Sends Mixed Signals," *Chicago Tribune*, July 30, 1994, 19. See also: Diane L. Rosenfeld (2008), "Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women," 43 *Harv. C.R.-C.L. L. Rev*. 257, *Harvard Civil Rights-Civil Liberties Law Review*; Family Violence Prevention Fund, "Domestic Violence is a Serious, Widespread Social Problem in America: The Facts," available at www.endabuse.org/resources/facts.

[2] Rachel Louise Snyder, "Which domestic abusers will go on to commit murder? This one act offers a clue," *The Washington Post*, November 16, 2017; www .washingtonpost.com/outlook/which-domestic-abusers-will-go-onto-commit-murder-this-one-act-offers-a-clue/2017/11/16/80881ebcc978-11e7-aa96-54417592cf72_story.html.

[3] Kelsey McKay, "A Closer Look at Strangulation Cases," *The Texas Prosecutor*, Volume 44, Number 1, January–February 2014.

[4] https://www.usatoday.com/story/news/nation/2018/04/09/domesticabusers-dangerous-women-and-lethal-cops/479241002. National studies indicate that 30 to 50 percent of perpetrators who kill police officers have a documented public record of intimate partner strangulation. In 2017, more officers were shot responding to domestic violence than any other type of firearm-related fatality, according to the National Law Enforcement Officers Memorial Fund.

[5] Snyder, *Id*. Examples include the gunman in the Sutherland Springs mass shooting in November 2017, who was earlier convicted of domestic violence while stationed at Holloman Air Force Base in New Mexico. The Orlando Pulse nightclub shooter strangled both of his wives but was never charged with or prosecuted for strangulation. The man who fatally shot three of his coworkers and injured 14 others in Kansas in February 2016 had been charged only with misdemeanor domestic violence for strangling his ex-partner. And the shooter who killed five people and injured six at the Fort Lauderdale Airport in January 2017 had been previously charged with a misdemeanor after strangling his ex-partner.

[6] Strack and McClane (1999), "How to Improve Your Investigation and Prosecution of Strangulation Cases," at 5, available at www.ncdsv.org/images/strangulation_article.pdf.

Overcoming obstacles with teenage crime victims

Teenagers! (Imagine that word in a flustered, frustrated tone.) Amiright?

By Hilary Wright
Assistant Criminal District Attorney in Dallas County

They can be arrogant, impatient, and disrespectful. They are children in nearly adult bodies. They can make stupid choices and have absolutely no concept of consequences. All of these things can certainly be true.

But they are something else too: a vulnerable victim population.

Teenagers make for high-risk crime victims, and this group can be under-served in the criminal justice system. That's because some people (potential jurors, for instance) might say teenagers shouldn't be considered victims of sexual assault in cases in which they "consented" to a sexual encounter. Others simply don't believe teenagers, even if one is telling the truth about being the victim of a horrible crime.

In this article, I lay out some of the common problems prosecutors face in dealing with teenage victims, some solutions to those problems, and a few things to consider in your next case where a teen is involved. I handled exclusively human trafficking and child exploitation cases in Dallas County from 2015 to 2017 before I returned to a felony trial court. During that time, I prosecuted 109 of these cases to disposition, and 84 percent of that caseload involved crimes against teenage victims. And while teenagers can be victims of any type of crime, this article will focus on sexual assault, domestic sex trafficking, and online exploitation.

Decision-making and appreciating consequences

More and more studies of the human brain and its stages of development show that the brain maturation period extends from age 10 through 24.[1] Additionally, the brain goes through a "rewiring" process that continues until a person is around 25 years old.[2] The prefrontal cortex, specifically, has been found to develop late.[3] This part of the brain handles important aspects of being an adult, such as controlling impulses, delaying gratification, modulating intense emotions, foreseeing and weighing possible consequences of behavior, inhibiting inappropriate behavior, strategizing and planning, organizing thoughts, and solving problems.[4] An underdeveloped prefrontal cortex, such as that in a teenager, can cause a person to be driven more by emotion than rational thought. There is a remarkable lack of impulse control in the teen brain, which means a teenager may be unable to appreciate consequences to the degree we would expect in an adult. It may lead to a potentially more vulnerable victim, but it can also inform how the teenager responds to law enforcement's intervention in that teen's life and prosecution of any crime where that teenager is a victim or witness.

While you may be able to help another adult understand this concept, it's unlikely you can convince a teenager that she has an underdeveloped brain. For example, I dealt with a younger teen who had shared naked photos of herself online with a stranger. He convinced her to run away with him to another state so they could be together. She found a different stranger (also online) to give her a ride to the bus station. That second man pretended to be a teen online to get her to trust him and said his "father" was going to pick her up. When he pulled up to her house, she ran out without shoes and got in his car. The man who picked her up sexually assaulted her. He then spoke on the phone with the man who was manipulating her into running away to him. He sexually assaulted her while the out-of-state man

listened on the phone, and then put her on a bus. The girl's parents didn't find out until she was several states away and finally got scared enough to call them. Clearly, she did not make wise decisions, let alone foresee any consequences—she didn't even put shoes on before leaving the house!

This doesn't mean teenagers shouldn't be held responsible for their actions. When a 17-year-old makes the decision to rob someone at gunpoint, he or she will face prosecution for an aggravated robbery charge despite his or her ability to truly comprehend a life sentence.

There is no pill to give a teen victim to make her brain magically and instantly mature. Even going through all the stages of a criminal case might not be enough to prevent a teen from making the same mistakes. Teens are vulnerable to drug use, peer pressure, and irrational decision-making. They are also prone to ignoring counsel from the very adults who care about them most.

Lack of cooperation with adults

Teenagers not trusting adults becomes our problem when that adult is a stranger with a badge or other state actor and is asking the teenager questions in a room with light so unflattering you don't even want to take a selfie. When it comes to victims of domestic sex trafficking, teenagers are often groomed to believe that police are the enemy. The trafficker will have convinced the teen not to trust law enforcement. Teenagers will lie to get out of trouble, and when the police are involved, there is trouble.

Interviewing a teenager is no small feat. Teenagers' responses range from "I dunno" and "I don't care" to "Whatever" and a shrug. They do not always appreciate the importance of what is at stake in a criminal case, which can be scary when someone may go to prison for life. They often weren't focusing on the same things that adults might focus on during the crime and thus cannot give details. They will regurgitate the facts as they heard them from someone else and have no filter for the truth. The opposite can also occur, where they filter what another person told them and put it into their own words with no concept that accuracy is vital to the process.

Corroboration is key for teenaged victims. What do their text messages reveal? What were they posting on Instagram? What did they say to each other before and after on Kik? What pictures were taken around the time of the offense? Did school records reveal that something in the teenager's behavior changed? Did attendance or grades drop off around the time of the alleged crime? In a domestic sex trafficking case, recovering the teen often happens during a sting operation where the john is actually a police detective and the teen is caught at the scene of a prostitution date. Because a teenager cannot book a motel room, the registration information is important. So is interviewing the hotel staff. What other traffic has been through the room while the teen was inside? Who else is involved and for how long? When an online predator is involved or a teen is sexually assaulted, there will be digital evidence to comb through. It can confirm a teen victim's story.

Interviewing a teenager well after the crime has been committed can be as hard, if not harder, than during the initial investigation. Sometimes we run into the "I'm over it" victim. By now he has likely talked to the police, a service provider, an advocate, a counselor, a parent or guardian (maybe), a friend (maybe), and the prosecutor at least once. There comes a point when they, like many witnesses, just don't want to deal with it anymore. I have sat across from many a scowling teen who refused to speak to me, no matter what his mom, teacher, or counselor said to convince him otherwise. In one case, a young man developed a relationship with an adult male—a convicted sex offender—whom he met online. The teenager invited that man into his bedroom at night, and the man bought him alcohol and cigarettes. The teen told a school friend about their relationship, and that friend told her mother. Even sitting across from him in the school counselor's office, the teen victim refused to cooperate with me. He felt that he was old enough to make his own decisions about his sex life. Who was I to punish someone he invited into his bed? It was only through corroborating evidence that we were able to prepare a case well enough for the defendant to plead guilty (again—it was *not* this perpetrator's first rodeo with a teenage victim).

Developing a relationship takes time and patience. Don't forget that this isn't just a surly teenager, but a teenaged victim of a terrible crime. This type of victim is not going to trust a prosecutor at first and may never trust one; a victim advocate may run into the same issues in trying to develop a relationship with this category of victim. And in trafficking cases, there is a bond between a teen and a trafficker that goes beyond

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a romantic or employer-employee relationship. The manipulation that it takes to convince someone to perform sex acts with a stranger for money must be compelling. It can help to point out the manipulation or deceit to the victim to try and weaken that bond during an interview, but you may not see results right away. If the teen has been told you are the enemy, it will take some work to convince her otherwise.

Helping the victim understand that based on the evidence, she will not get into any legal trouble, may help open a dialogue, though the teen will certainly have to live with past decisions and try to move forward. Make sure she knows that she is not in legal trouble for those decisions, and the purpose of the prosecution is to hold responsible the adult for *his* decisions.[5]

Sometimes all it takes is treating the teen like an adult with regard to the subject matter. It can help form the bond needed to work together on a case.

We just want the truth—good, bad, or ugly. Sometimes using foul language in response to a victim's foul language, when appropriate, can ease the tension in the room. It can turn the prosecutor into more of a relatable person in the teen's eyes. We are adults, yes, but we aren't the teenager's parents, so easing into the conversation about sex and money, prostitution, or sharing nude pictures online comes from a different place. Sometimes all it takes is treating the teen like an adult with regard to the subject matter. It can help form the bond needed to work together on a case.

Limited access to the teen

You may find that a teenager has run away and there is no way to contact her. Teens caught up in domestic sex trafficking can become wards of the state who are moved from one residential treatment center (RTC) to another. They might not be in school and they might have been moved out of state to live with a relative. An uncooperative witness can sometimes become unavailable too, which presents a major issue if you need the victim to prove a case.

If Child Protective Services (CPS) is involved in the teen's life, there may be an issue of custody—the victim may be placed in a state-run home hours away. Caseworkers are primarily focused on what is best for the child, and if a teen in their custody says, "I don't wanna talk to that prosecutor," then sometimes that's the end of it. I've driven to the other end of Texas to visit with teens in CPS housing units, and until I sat down in the room with them, I had no indication that they would even say hello to me. Making the effort is important to show both the teen and the guardian that you care. Giving the caseworker multiple ways to reach you can also help. What if on a Sunday morning the victim decides she wants to talk to me? Well, her caseworker will have my email, my work cell number, and permission from me to text or call at any time of day or night. It's important to establish boundaries with teen victims too. It's OK, even necessary, for a prosecutor or victim advocate to be clear about when it's appropriate to call or text, and it might be different for each prosecutor. The important part is your willingness to respond.

Sometimes access to a teen means getting permission from the parent or guardian to speak with the child. After an offense occurs, some adults want to cut off all communication, whether it's to protect the teenager's mental health, to refuse to cooperate with an investigation into a known offender, or something else. This can be a case-ending scenario. Plus, getting permission every time you want to speak to a teen victim can be a struggle. It is a good idea to have written permission in place[6] for you to communicate with the teen about the case or just to check in. Teens with phones may want to reach out when they are ready. This could be at 4 o'clock in the morning. You do not want to delay your reply until you get that permission if you can avoid it. Make sure parameters are set out, such as time of day when it's acceptable to call, and work within the household rules about a teen's phone use. I have had cases where the parents work the same hours I do, and the schools required permission to pull the teen out of class. We were able to arrange permission ahead of time and in writing so that all I had to do to talk to the teen was alert the parent earlier in the week about what day I would come by. Then the teen wasn't surprised when we came around.

Rarely do teen witnesses have cars, let alone driver's licenses, so it's up to us to make the trip to see them. Plus, it can be a burden on any family to stop what they are doing and drive the victim to the courthouse for meetings. Working within the family schedule can show not just the teen but also her parents or guardian that you are considerate of what the prosecution is doing to the family.

Often, teens have troubles of their own to sort out. Occasionally I'll reach out to speak to a victim and find out that she's been detained in a juvenile justice facility for a new offense or run-

away charge. This situation comes with a slew of issues, the least of which is now there are two defense attorneys to deal with.

Meet them where they are

We shouldn't put lipstick on a pig. Meet a teenager where she is. Is a particular teen a well-known liar? So was the Boy Who Cried Wolf, and that last time, there was an actual wolf—the boy was telling the truth. Is the teen addicted to a controlled substance? That could explain a lot of behaviors and may be how the perpetrator was able to commit the crime in the first place. Did the victim go back into the sex trade after this case was filed? Don't hide from it. I cannot imagine a teenager who ran away from home and was living in different motels rooms, using drugs, and having sex for money who would then be able to go back to school and sit through math class. What does she talk to her peers about now? If she didn't have a good support system in the first place and no help after law enforcement got involved, she probably doesn't feel like she has many other options.

Is the teen a chronic runaway? Is CPS constantly involved in the victim's household? Does the teen shoplift all of the time? Is he or she sexually active or promiscuous? Accept the truth about these victims and move forward. Most people—teen victims, teen witnesses, and jurors—can tell if someone is not being genuine with them. Meet a teen where he or she is.

General bias against teens

We must confront bias from two fronts: our own bias as prosecutors and any bias potential jurors might have. While some prosecutors cannot handle these types of cases due to the nature of the crime, others *shouldn't* handle them. We all strive to come into a case with an open mind, but that would be impossible if we start off unable to believe the victim. Some prosecutors will look at a case where the victim initially lied about the facts and toss out the case immediately. "Credibility issues? Not touching that one!" But owning the fact that the victim lied and understanding his or her motivation for lying can separate a good prosecutor from a great one. I'm not saying that we should sponsor the testimony of a witness who will lie on the witness stand, or that all cases are solid enough to prosecute. There is a difference between a hard case and an un-prosecutable one when it comes to crimes against teens.

It is important to create a judgment-free environment for teenaged victims. Teens live in a world where judgment is all around—the last place they need to feel it is from the police officer, victim advocate, or prosecutor handling their criminal case. There will be plenty of judgment from the defense side, so knowing the victim and the case's pitfalls will be important to quell any biases defense counsel might have that are unsupported by the facts. No one likes to be cross-examined. Preparing a teenage witness for this high-stress, emotional event will be important. His or her credibility may be at issue, and the teen may feel attacked. Making him or her aware of this potential attack, practicing taking a breath, and being calm will be key.

With juries, preparation is important to adequately ascertain biases that people have against teenagers as witnesses or victims. Taking time to discuss how teenagers are generally perceived and whether those perceptions are fair is vital to laying the foundation for a teen's upcoming testimony. I've had some success using a questionnaire before calling the panel into the courtroom. If the potential juror is thinking about an issue in advance, it can help get the conversation going once the subject is brought out during voir dire. Ultimately, it must be confronted face-to-face, and the biases must be exposed.

One of the first questions I ask a panel is, "Who has teenagers at home?" Find the panelists who have teenage children, and have them answer some questions in front of the panel: Do we trust teenagers to drive a car? To vote? Do they still require guidance at that age? Why? Can you tell when your teenager lies to you? What is their motivation? (That is, do they lie to get *into* trouble or *out of* trouble?) Remember, we aren't trying to change anyone's mind during voir dire—this line of questioning is about exposing any bias and striking biased jurors for cause on the issue of pre-judging witness credibility or requiring more or a certain type of evidence. Exposing these biases can help find others on the panel who feel the same way. It can also locate solid jurors who will shed light on why this bias exists and whether there is any support for it in reality.

Remember that we were all teenagers once. We weren't all liars. We weren't all uncooperative. If you were the victim of a crime at age 16, you would have wanted the adults in whom you

Continued in the orange box on page 39

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Voir dire on punishment

"Punishment should fit the *crime*. Punishment should fit the *criminal*. Punishment should fit the *community*."[1]

By Ryan C. Calvert
Assistant District Attorney in Brazos County

In the prosecution of violent, sexual, or dangerous crimes, the difference between justice and injustice often depends on a defendant's punishment. As prosecutors, all of us have seen or tried cases where defendants took lives, destroyed innocence, or permanently damaged victims but received lenient, even trivial, sentences. Why does this happen? How can jurors' ideas of justice differ so wildly from our own?

The answer lies in what jurors are, and more importantly, what they *are not*, focused on in sentencing. In determining punishment, jurors must consider three (often conflicting) interests: The defendant, the victim, and the community all are impacted by a jury's decision on punishment. How jurors prioritize those considerations largely determines the sentence they give. For example, jurors who are most concerned with the defendant's best interests and rehabilitation will punish differently from those most concerned with protecting future potential victims.

Consequently, prosecutors must clearly know two things before a trial starts: 1) what punishment equals justice in the case, and 2) why that punishment is appropriate. Armed with that knowledge, prosecutors can make voir dire a key component of securing a just and appropriate sentence. Voir dire can be the foundation of the prosecutor's punishment argument through the introduction of the themes and rationales for sentencing that jurors will hear in closing. Additionally, with a clear plan of what punishment we will seek and why, prosecutors can identify and eliminate jurors for whom our arguments will not resonate. Finally, through careful selection of hypothetical examples in voir dire, prosecutors can give jurors perspective on what justice looks like.

Failure is a great teacher

One of the first child molesters I ever tried had repeatedly sexually abused a young relative. The acts of abuse were unspeakable, and they occurred when the victim was between 10 and 13 years old. If ever a case screamed for a life sentence, this was it.

In closing argument, I begged jurors with everything I had to send the defendant to prison forever. A couple of hours later, jurors delivered their verdict: six years. Basically, the minimum possible sentence. That trial has always stuck with me. For years I believed the *jurors* failed the victim. Looking back now, though, it's clear that the victim and the community were let down by the prosecutor. *Me*.

In that trial, the defense never disputed guilt. Instead, the defense called a psychologist to testify about how the defendant was not a "true pedophile." The expert testified that, despite the abuse of his relative, the defendant was very unlikely to ever abuse a child again. At closing, the defense's argument focused entirely on how the defendant was remorseful for his conduct, that prison offered virtually no chance at rehabilitation for the defendant, and that, because the defendant was not a true pedophile, there was nothing to fear from him in the future. The defense lawyer was a great voice for the defendant in the deliberation room.

I spent my time talking to jurors about how the defense lawyer was wrong. Wrong about whether the defendant was remorseful. Wrong about whether the defendant was a pedophile. Wrong about whether prison would teach this defendant not to abuse children again. In short, I was a voice *against* the defendant in the jury room. *What I should have been was a voice for the victim and for the community*, beginning in voir dire. During jury selection, I should have had jurors talking about the importance of giving jus-

tice to a victim and protecting the community. I should have identified and eliminated jurors unwilling to punish for the reasons I felt were important. I should have made those themes of justice for the victim and protection of future victims the core of my entire trial presentation. I didn't. Instead, I took the defense's bait and made voir dire and my closing all about the defendant. That was my failure. That failure led to injustice.

Everybody *but* the defendant

Fans of the TV show "The Walking Dead" might remember that before any stranger could be admitted into the show's group of heroes, he had to answer three questions:

- "How many walkers (zombies) have you killed?"
- "How many people have you killed?"and
- "Why?"

The *rationale* for a newcomer's actions determined whether he was worthy of inclusion into the group. Apply that principle to voir dire. Jurors' rationales for punishment largely determine their verdict. Defense lawyers typically seek to focus jurors entirely on the *defendant himself*. The defense will cite an unstable childhood, drug or alcohol addiction, mental health issues, or a defendant's own family as reasons for leniency. Moreover, the defense lawyer will make arguments such as:

"Prison will only make *him* worse";
"Don't throw *his* life away";
"*He* needs help, not incarceration"; and
"Give *him* a chance."

In other words, *it's all about the defendant*. Jurors with whom these arguments resonate seek to "fix" the defendant through their sentence. And in some cases, those are absolutely valid positions. On many drug, property, or even low-level violent crimes, rehabilitation and treatment should be *everyone's* chief concern.

In many cases, though, justice requires that a punishment's focus be on everyone *but* the defendant. This is particularly true with violent crimes or crimes where a defendant's behavior or history show that he is a continuing threat to the community. To illustrate this point, consider the following scenario:

> Imagine you looked out your window and saw a man walking down the street. You then watch as he does all of the things that this defendant has done. You then see the man continue walking down the street. In the distance, you see other

confided to help you, listen to you, and believe you. Similarly, if your teenage child is the victim of a crime, you would expect the same thing. Go into cases with teenage victims with that same perspective.

Conclusion

There is no best way to handle the issues that we face in these cases. Every teen is different, so we deal with them on a case-by-case basis. Thinking outside the box, being creative, and educating others on how to handle or approach teenaged victims can benefit everyone in the process. If not for the opportunity in jury selection to lower the expectations of the jury about the behaviors of teenaged victims and developing a good relationship with those victims before trial, the outcomes of many of my cases would have been different. However, when you can get a jury, parent, teacher, or fellow prosecutor to understand that the issues that come with investigating and prosecuting cases involving teens are surmountable, everyone can work together to make sure that justice is done. ❇

Endnotes

[1] Maturation of the Adolescent Brain, *Neuropsychiatric Disease and Treatment*, 20 3:9 p. 450.

[2] Gavin L., MacKay A.P., Brown K., et al.; Centers for Disease Control and Prevention (CDC). Sexual and reproductive health of persons aged 10–24 years – United States, 2002–2007. *MMWR Surveill. Summ.* 2009; 58(6):1–58.

[3] Maturation of the Adolescent Brain, Neuropsychiatric Disease and Treatment 20 3:9 p. 453.

[4] *Id.*

[5] If this teen was also a recruiter, it is best to distinguish that behavior from the "not in trouble" language. Do not lie to a teen if he or she is going to get in legal trouble for something he or she did.

[6] It may be wise to write that the permission is revocable by the parent and in what ways that can be done, because, you know, we're lawyers, too.

"Why do we punish?" That question is perhaps the most important one a prosecutor can ask jurors during voir dire on punishment. Ultimately, jurors' philosophies about why we punish criminals determine what justice looks like in a particular case.

> people he will soon encounter. You do not know their names, but you clearly see them there. And the man is walking towards them. Those people in the distance have not seen the man do the things that you have seen him do. There is no way for them to realize the threat the man poses. If you were the only person in the world with the power to stop that man from reaching those strangers in the distance, do you not have a duty to do so? Are those people not worthy of protection, even if we do not yet know their names? Is it responsible to allow the man, whom you have seen do horrible things to others, reach those people? Is it fair to wait and see if he harms them as well before taking action?

I use this exercise sometimes during closing argument at punishment with dangerous defendants. I want to know ahead of time that jurors share my concern for those strangers in the distance. The only way for me to know that is to have a conversation with them during voir dire about why we punish criminals.

Why do we punish?

"Why do we punish?" That question is perhaps the most important one a prosecutor can ask jurors during voir dire on punishment. Ultimately, jurors' philosophies about why we punish criminals determine what justice looks like in a particular case. With their punishment verdict, jurors communicate what they feel is most important: rehabilitating the defendant, retribution for the victim, protection of the community, etc. Most often, the punishment phase of a jury trial comes down to a philosophical battle. On one side is the defense, which is seeking to persuade jurors to focus on "fixing" the defendant. On the other side, prosecutors try to convince jurors that the value of a victim's suffering and the safety of the community outweigh the defendant's needs.

Frequently, defense lawyers—and even prosecutors—ask jurors this question: "What is most important to you in sentencing: punishment, rehabilitation, or deterrence?" While this question does give some insight into a juror's priorities and can be a useful starting point, it does not reveal much about how a juror really thinks or feels. For that, a prosecutor must ask jurors, "Why?" Once some jurors explain their rationales for punishment, the prosecutor can then take those responses and challenge other jurors with them, asking for their reactions. This process of "looping" responses throughout the jury panel tends to foster a good discussion among panel members. Through this discussion, prosecutors can better gauge which jurors will be receptive to the arguments that the prosecutor already knows she wants to make in closing. Additionally, during the discussion, jurors themselves will say things that the prosecutor can directly incorporate into closing arguments. Nothing resonates with jurors like their own words!

Defense lawyers often argue to jurors in punishment that sentencing a defendant will not undo the damage done to a victim. So, the argument goes, jurors should focus on what possibly *can* be fixed: the defendant. To head off that argument, consider how asking the following questions in voir dire might foster a useful discussion for prosecutors:

- "Should punishment take a victim into consideration?"
- "Why?" (Or "Why not?")
- "After all, the verdict can't change what happened to a victim. So why should a victim even be a consideration?"

Spend a few minutes thinking about jurors' likely responses to questions like these. Do those responses sound anything like a closing argument that you would like to give during punishment? If so, then you can ask these questions at voir dire—and at the same time begin your closing argument at punishment—through the words of the jurors themselves.

Can you imagine jurors responding to these questions in ways you don't like? Wouldn't you like to know whether people hold those kinds of beliefs before you allow them onto a jury? Jurors' initial responses to philosophical questions about punishment are a great indicator of what arguments will (and will not) resonate with them throughout trial. As such, they can be valuable tools in exercising strikes during voir dire.

How do you think jurors will likely respond to questions like these?

- "In sentencing, is the safety of the community a factor? Why?"
- "Do you agree with the premise that the best predictor of future behavior is past behavior? Why?

In a case where a defendant has a great deal of criminal history or has displayed extreme violence or predatory behavior, prosecutors want ju-

rors who will be more concerned about future victims than about the defendant. Before the trial starts, prosecutors know that they will eventually argue to jurors that the reason for punishing the defendant must be to protect future potential victims. Wouldn't any prosecutor like to know how jurors feel about that rationale during voir dire?

Note that Texas courts give attorneys wide latitude to question jurors about their philosophies on punishment. In *Davis v. State*, the Court of Criminal Appeals noted that questions about "jurors' general philosophical outlook," including what factors they feel should be considered in punishment, are appropriate in voir dire and are not improper commitment questions.[2]

Mitigation

Some defendants have a long history of crimes against victims but also have mitigating factors such as a difficult childhood or substance abuse. In such cases, prosecutors need not wait until the punishment phase to address those issues. Consider the following questions to jurors in voir dire:

"Has anyone here ever had their home or car broken into?"

Jurors raise hands.

"Juror No. 1, how did that experience make you feel?"

"Violated."

"Did that experience affect your family?"

"Yes, my kids were scared."

"Would you or your family have been less affected if the person who broke into your house had experienced a rough childhood?"

"No."

"Would your sense of security be any less violated if the person who broke into your house had a problem with drugs?"

"No."

"Now can we agree that things like counseling or rehab are important and often useful?"

"Of course."

"But ultimately, whose responsibility is it to address personal issues and change behavior?"

"The person making the choices."

"So, do you think there is a point at which the needs of the community must outweigh the best interests of a defendant?"

"Yes."

"How do you determine when that point has been reached?"

The prosecutor can then loop jurors' responses around the panel, getting a broad cross-section of opinions. Thus, she uses voir dire to plant the seeds of her argument in jurors' minds and establish her themes that:

1) the defendant is accountable for his own actions,

2) the defendant's life circumstances do not diminish the impact on his victims, and

3) the defendant has reached a point where punishment must be about the community rather than him.

In the process, she identifies jurors who disagree and can better use her strikes.

Get outside the box

The most fun thing about voir dire is that there are no rules of evidence, no "relevance" objections. Prosecutors are bound only by the limits of their own creativity in coming up with methods to explore jurors' philosophies and establish a case's themes and arguments.

Several years ago, my good friend and our first assistant, Brian Baker, was trying an intoxication assault case where the victim was a police officer. The defendant was driving at an outrageous speed when she slammed into a police car as the officer responded to citizen complaints about the defendant's driving. The officer, while eventually making close to a full recovery, had to medically retire from police work. However, the defendant was a very young woman with no criminal history. Brian felt strongly that the facts justified a prison sentence, but he knew that many jurors would struggle with incarcerating a young woman with no previous run-ins with the law.

During voir dire, the first question Brian asked jurors was whether they believed in spanking children as punishment. For those jurors who were in favor of spanking, Brian asked them to explain why. Further, Brian had jurors describe how spanking a child was harder on the parent than on the child, but it nevertheless had to be done to address bad behavior. Some jurors were against spanking, favoring "time out" or taking away a child's possessions as punishment. Brian struck those jurors. The remaining jurors were well-positioned to receive Brian's argument that, while sending the defendant to prison might be difficult, the severity of her behavior required a severe response. The brilliance of Brian's approach was that the questions he asked during

The most fun thing about voir dire is that there are no rules of evidence, no "relevance" objections. Prosecutors are bound only by the limits of their own creativity in coming up with methods to explore jurors' philosophies and establish a case's themes and arguments.

With a clear understanding of the punishment we're seeking, the reasons that punishment is appropriate, and what potential struggles jurors may face in imposing it, prosecutors can create voir dire discussions tailored to overcoming case-specific issues and achieving case-specific goals.

voir dire and the answers they elicited paralleled beautifully with the arguments he made during punishment. That parallel was deliberate and well-planned. In the end, the jury sentenced the defendant to six years in prison with a finding of a deadly weapon.

With a clear understanding of the punishment we're seeking, the reasons that punishment is appropriate, and what potential struggles jurors may face in imposing it, prosecutors can create voir dire discussions tailored to overcoming case-specific issues and achieving case-specific goals. Get creative. While preparing for voir dire, put yourself inside the minds of jurors. Spend time thinking about how they will react to certain questions and topics. Craft examples for voir dire that will fit seamlessly into closing argument at punishment, as well as at guilt-innocence. Voir dire is an extension of your argument for justice. Justice cannot happen unless the punishment fits the crime, the criminal, and the community.

Order and priorities

How familiar does this scenario sound to you?

Judge: "Counsel, you have five minutes remaining in voir dire."

Prosecutor: "Thank you, Judge. Now, ladies and gentlemen, in these last few minutes, I want to talk with you about punishment."

Frequently, prosecutors place punishment last in the order of topics they need to cover during voir dire. After all, punishment comes at the end of the trial, right? But if we're being honest with ourselves, how many felony cases are we trying where guilt is the *real* issue in dispute? In the majority of felony cases, both the State and the defense know before trial that the defendant will likely be convicted. The reason most felony cases go to trial is because the parties cannot agree on *punishment*.

Suppose a prosecutor is trying a sexual assault case where the defendant's DNA was recovered from the victim and the defendant confessed to police. The defendant, however, wants probation while the prosecutor has offered eight years in prison. Now imagine that, during voir dire, the prosecutor spends nearly all of his allotted time discussing the elements of sexual assault, legal definitions, and consent.

Did that voir dire address the true issue in the case? No! The battle is really over punishment. Yet, after voir dire, jurors are no better equipped to impose the sentence the prosecutor seeks than they were when they first arrived at the courthouse, nor does the prosecutor have any clearer picture of who the right jurors are for that particular case.

Now imagine how the outcome of the case would change if the prosecutor began voir dire talking about punishment and spent the bulk of his time on that topic.

There is no prescribed order in which prosecutors must cover topics during voir dire. To be sure, there is a way to lose nearly every case on guilt, and prosecutors must craft voir dire presentations that address issues that might result in an acquittal. Convictions should never be taken for granted. That being said, every prosecutor knows when punishment will be the primary battleground in an instance. When we are faced with such a case, an effective strategy is often to lead off with punishment during voir dire. Doing so ensures that the prosecutor will have adequate time to cover this critical issue. Additionally, talking about punishment immediately during voir dire reinforces to jurors that they do not know *anything* about the case. As a result, jurors have an easier time keeping their minds open to full punishment ranges.

Just as the content of your voir dire is an opportunity for creativity, so is the order in which you discuss topics. Spend time tailoring both the content and order of discussion to address those issues that can lead to an unjust result.

Protect State's jurors

When prosecutors try violent or sexual felonies, an absolutely critical component of voir dire is qualifying the panel on the full range of punishment. Consider the offense of aggravated robbery. The punishment range extends from five years' probation on one end, all the way to life in prison on the other. Understandably, jurors frequently struggle to accept a punishment range so broad. Some, typically "State's" jurors, feel that probation is a slap on the wrist and may not be appropriate for a violent offense. Others, frequently "defense" jurors, think that penalties such as life in prison should be reserved for homicide cases rather than "mere" robberies.

Any jurors who cannot consider part of an available punishment range are challengeable for cause.[3] Thus, if a defense lawyer can commit jurors that they will not consider probation under any circumstances, those jurors are disqualified. If a prosecutor fails to qualify a jury panel on the

full range of punishment, an effective defense lawyer can easily eliminate most of the strongest jurors for the State on punishment, thereby essentially winning the case for the defense in voir dire.

So how can a prosecutor shield strong jurors from defense challenges for cause on punishment?

Consider a plumber who comes to your house because your faucet leaks. Would it make sense if the plumber walked into the house to fix the faucet and the only tool he brought was a hammer? Instead, the plumber brings an entire truck full of tools. On any given job, the plumber uses very few of his tools; nevertheless, he has all of his tools available so he can address any issues that an individual job requires.

A jury's decision on punishment is no different. The huge punishment ranges are merely the tools that jurors have at their disposal. Every tool is not appropriate on every case, but the availability of so many tools allows jurors to tailor the punishment to the unique circumstances of each case. On aggravated robbery, for example, suppose a 17-year-old cheerleader and honor student who has never been in trouble decides to shoplift a candy bar from Wal-Mart. As the youth tries to leave with the candy, she is confronted by a store clerk. The shoplifter panics and grabs a baseball bat off of a nearby sporting-goods rack and brandishes it, telling the clerk to stay away. Then the shoplifter drops the bat, drops the candy bar, and runs from the store in tears. What crime did the young woman commit? Aggravated robbery.

Or, suppose that same 17-year-old shoplifter had a friend with her. Upon seeing her companion shoplift and then threaten the clerk with the baseball bat, suppose the friend yelled, "Let's go!", picked up the candy bar, and then drove the shoplifter away from the scene. What crime did the friend commit? Aggravated robbery.[4]

Contrast that with a 35-year-old man with multiple prior convictions who decides to commit a robbery. He arms himself with a gun, enters a convenience store, puts his gun to the clerk's head, and steals the money. Like the shoplifter and her friend in the examples above, this man committed aggravated robbery. The circumstances of the scenarios, however, are radically different.

Because there are infinite potential factual scenarios that fall under the definition of aggravated robbery, the Legislature has created a punishment range extending from five years' probation to life in prison. Thus, jurors can impose a sentence appropriate to each unique case. For a juror to qualify to serve, the law merely requires jurors keep their minds open to the possibility that the minimum or maximum punishments may be appropriate, depending entirely on the facts and evidence. Sometimes defense lawyers ask jurors if they can "envision a set of circumstances" in which they could consider probation. However, the law does not require jurors to think of a specific scenario in which they would give probation.[5] Rather, the law simply requires jurors to be open-minded to the possibility that such a scenario might exist.

When qualifying a panel on the punishment range, give jurors hypothetical factual scenarios which, like the aggravated robbery examples above, illustrate why the range of punishment is so broad. Note that, in voir dire, a prosecutor cannot *commit* jurors to a particular outcome based on a specific set of facts.[6] For example, a prosecutor cannot ask jurors whether they feel certain factual scenarios would justify a probation or prison sentence. Nor can prosecutors use specific hypotheticals as examples of when certain sentences would be appropriate—at least not in voir dire.[7] Such comments would amount to improper commitment questions under *Standefer*.[8]

What a prosecutor *can* do, however, is use hypotheticals to illustrate the law.[9] Here, the law is a very broad punishment range. Thus, a prosecutor can provide hypotheticals like the ones above to show to jurors why the punishment range is so broad, without actually telling jurors that one example is a probation case, whereas the other example is a prison case.

After outlining those hypotheticals, I always have the following exchange with jurors:

"Juror No. 1, as we sit here right now, what do you know about the facts of this case?"

"Nothing."

"Exactly. And that's on purpose. All the law requires of you is that, prior to knowing the facts of the case, you keep your mind open to the possibility that you might hear facts that justify the minimum punishment, and you might hear facts that justify the maximum punishment. Is that fair?"

"Yes."

"So can you promise the Court that you will follow the law and keep your mind open to both ends of the

When prosecutors try violent or sexual felonies, an absolutely critical component of voir dire is qualifying the panel on the full range of punishment.

Some defendants' punishment ranges are enhanced with prior convictions. I have seen prosecutors tell jurors in voir dire that the punishment range can be enhanced, but not tell jurors why, for fear of saying something improper. But this approach confuses jurors and also allows the defense lawyer to take ownership of the issue during voir dire.

punishment range until you hear the facts of this particular case?"

"Yes."

"Juror No. 2, can you make that promise to keep your mind open to both ends of the punishment range until you start hearing the facts?"

"Yes."

"Juror No. 3?" And so on.

It often helps to point out to jurors that, for purposes of this discussion, you are *not* talking about this particular defendant. After all, some jurors may be looking at your defendant and thinking, "That doesn't look like a 17-year-old cheerleader to me." But to qualify under the law, jurors need only keep their minds open to the full range for the offense involved in general, not as it pertains to a specific defendant or factual scenario.

To illustrate this point, consider a home-invasion aggravated robbery case I recently tried. During voir dire, the defense lawyer asked jurors whether they could consider probation on an aggravated robbery case, even if the crime occurred in a victim's home. The Court properly sustained our objection that the question was an attempt to improperly commit jurors under *Standefer*. After all, jurors are completely free to decide that probation is not appropriate if a robbery occurred inside the victim's home. That decision would be based upon the *facts of the case*. As long as jurors are open-minded to the notion that probation can be appropriate in *some* aggravated robberies, then they are qualified.

Enhancements

Some defendants' punishment ranges are enhanced with prior convictions. I have seen prosecutors tell jurors in voir dire that the punishment range can be enhanced, but not tell jurors *why*, for fear of saying something improper. But this approach confuses jurors and also allows the defense lawyer to take ownership of the issue during voir dire. Texas courts have long held that prosecutors can explain the enhancement process to jurors as part of qualifying the jury panel on the punishment range.[10]

When trying enhanced defendants, remember to qualify jurors on the unenhanced punishment range, as well as the enhanced range. Potentially, jurors could find one or more enhancement paragraphs "not true," so they must be qualified on every potential punishment range that could apply in the case.

Also discuss whether jurors feel that enhancing punishment ranges based on prior convictions are fair. Some people believe punishing a defendant more harshly due to prior convictions for which he has already served his sentence is unfair. Such jurors potentially could be struck for cause if they cannot consider any part of an enhanced punishment range. Even if such jurors insist they could consider enhanced punishment ranges, they would likely not be good jurors on a case where prosecutors are seeking an enhanced punishment.

Hypotheticals for perspective

Earlier, I pointed out that *Standefer* prohibits prosecutors from overtly using hypothetical scenarios as examples of a "probation case" or a "prison case" during voir dire. During closing arguments, however, we absolutely can. Thus, when preparing to qualify a jury panel on the punishment range in voir dire, prosecutors should give serious thought to which hypothetical scenarios they will to use to illustrate the need for a wide punishment range. These hypotheticals can be used as measuring sticks for jurors during closing argument.

Remember, as prosecutors, we see crimes every day. We know the difference between a probation case, a 15-year case, and a life case. We know those things because our jobs give us perspective that jurors do not have. Jurors do not evaluate crimes every day, and this is probably the only time in their lives where they will be asked to decide another person's fate. That is a scary and intimidating prospect for most people. To help them, they need a guide. As noted above, the law allows prosecutors to use hypothetical scenarios in voir dire to illustrate why the punishment range is so wide. Closing argument, though, is an opportunity to complete the discussion begun in voir dire.

Consider an agg robbery trial where a defendant with prior convictions for assault and burglary of a motor vehicle robbed a convenience store at gunpoint. During argument, the defense lawyer points out that the defendant has never been convicted of a felony, is a young man, is sorry for what he did, and deserves a chance on probation. The prosecutor might respond with something like this:

"In voir dire we talked about why proba-

> tion is even a possibility in an aggravated robbery case. A 17-year-old who has never been in trouble, who did not plan to commit a robbery, who did not arm himself with a weapon ahead of time, and who really didn't hurt anyone—that is what a probation case looks like on an aggravated robbery. Contrast that with this defendant, who ..."

During voir dire, the prosecutor technically did not use that hypothetical as an example of a probation case. But jurors nevertheless will remember it that way. Coming back to that scenario during closing argument allows the prosecutor to paint a stark contrast between that example of a probation case and what the defendant did. By giving jurors perspective with scenarios that fall *below* the defendant's case on the punishment range, a prosecutor better equips them to render justice for what the defendant did. That process, though, is far more effective if the foundation was laid in voir dire. As I stated in the first article in this series ("Always be closing"), voir dire is the leading edge of your closing argument.

Justice

A prosecutor's legal and ethical duty is to *see that justice is done*. As my good friend, W. Clay Abbott from TDCAA, likes to say, "Texas prosecutors don't roam around the fields with a butterfly net *seeking* justice. We *do* justice. We go out, hunt it down, and tack it to the wall." Past generations of prosecutors equated "justice" with the harshest possible sentence on every case. The current generation of prosecutors understands better that justice might mean a dismissal, a diversion, probation, or short terms of incarceration. It might mean using every resource available to help a defendant.

Sometimes, though, justice requires prosecutors to do everything in our power to separate violent or dangerous offenders from the community, from future victims. We rightly hear the word "injustice" applied when a defendant is wrongly or excessively incarcerated. Injustice also occurs, though, when offenders are not held accountable, when predators are permitted to prey on innocents, and when victims suffer because the law let them down.

Voir dire is, without a doubt, the most important phase of a jury trial. It truly is the lens through which jurors will see everything that happens for the rest of the trial. By planning and executing an effective voir dire tailored to the facts and issues of a particular case, prosecutors go a long way toward making sure that offenders are held accountable, that punishments fit the crime, the criminal, and the community, and that justice is done. ❇

Endnotes

[1] I recently helped conduct a Criminal Law training for students at the Baylor Law School where I heard my friend, Beth Toben, a prosecutor in the Limestone County and District Attorney's Office say this. I thought it was brilliant.

[2] *Davis v. State*, 349 S.W.3d 517 (Tex. Crim. App. 2011).

[3] *Cardenas v. State*, 325 S.W.3d 179 (Tex. Crim. App. 2010).

[4] Using the Law of Parties is a useful tool in making any factual scenario less egregious.

[5] *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999).

[6] *Standefer v. State,* 59 S.W.3d 177, 181 (Tex. Crim. App.2001).

[7] However, in closing argument, the prosecutor may absolutely come back to these hypotheticals and use them as examples of what a probation case looks like, etc.

[8] For a more in-depth look at *Standefer*, see Rusk County ADA Zack Wavrusa's excellent article on the topic in the May–June 2019 edition of *The Texas Prosecutor*.

[9] *Riddle v. State,* 888 S.W.2d 1, 6 (Tex.Crim.App.1994).

[10] *Frausto v. State*, 642 S.W.2d 506 (Tex. Crim. App. 1982).

By giving jurors perspective with scenarios that fall below the defendant's case on the punishment range, a prosecutor better equips them to render justice for what the defendant did.

Educating crime victims about parole

Soon after his appointment as presiding officer in 2015, Texas Board of Pardons and Paroles Chairman David Gutierrez began looking at ways to improve operations within the agency.

By Libby Hamilton
Victim Liaison, Texas Board of Pardons and Paroles

Having previously served as the liaison between the Board and the Texas Department of Criminal Justice Victim Services Division (VSD), he noted the need for someone to do that job full-time. One of his initiatives was creating a position dedicated to the Victim Liaison Program; that employee's sole focus is ensuring that victims and survivors receive quality and consistent services from the Board. Thanks to a Victims of Crime Act grant, I was able to join the Board as the victim liaison in February 2017.

I am writing to educate people in prosecutor's offices—both attorneys and victim assistance coordinators (VACs)—how I can help them understand the parole process and how you, in turn, can assist crime victims.

Victims' interactions with parole

I want to first discuss some of the steps we've taken to improve a survivor's experience when they choose to be involved in the parole review process. Chairman Gutierrez wanted someone on staff to concentrate specifically on victims' interactions with the *Board*. There are often misconceptions about what it will be like to for a crime victim to speak with parole commissioners and board members, which can lead to anxiety and a more difficult experience. The most common questions we get are, "Will the offender be there?" and "Will I have to testify in a courthouse?" We felt that if we could *show* victims a Board office and what a Board interview looks like, it could help them feel more prepared and at ease prior to their conversation with the lead voter. This idea led to the production of a 10-minute video that can be found on our website at www.tdcj.texas.gov/bpp/VictimLiaison/VictimLiaisonVideo.html. In addition to what crime victims can expect when speaking to the board, it covers the parole review process, factors the voters consider when making parole decisions, and other valuable information.

We provide direct services as well. One is accompanying survivors to parole hearings, which allows me to assist and support victims while also observing commissioners and board members to see how they interact with those we serve. I then have concrete examples to provide when training our 21 voters one-on-one regarding best practices when working with victims.

For prosecutors and staff

You may be wondering, "Why do *we* need to know this? We work in the district attorney's office!" This is important information for victim services providers in prosecutor offices too. For example, we were recently contacted by the Fort Bend County District Attorney's Office and TDCAA's Training Director with inquiries about training. Such opportunities are very exciting for me, as there is often quite a long time between a defendant's sentencing and his parole eligibility date (PED), and I'd love the chance to bridge the gap between DA's offices and the Board of Pardons and Paroles. The Fort Bend County DA's Office asked me a few questions, including:

- How do a prosecutor's actions affect an offender's parole eligibility?
- What makes a difference to the Board? and
- What do victim assistance coordinators (VACs) need to know when trying to prepare survivors for an offender's potential release on parole?

In response to the request, I went to Fort Bend County (Richmond), along with our Director of Institutional Parole Operations Tracy Long, Parole Commissioner Marsha Moberley, and Board Administrator Jessica Dillard, to speak with 50 assistant district attorneys and VACs about these very topics. Between the four of us, we could provide a comprehensive look at the parole review process and an overview of Board operations, describe parole hearings from a victim's perspective, discuss prosecutorial protests, and note the potential consequences of plea bargains on an offender's parole eligibility. We then facilitated a very engaging Q&A session.

One common question from prosecutors is, "What does the Board look at when making parole decisions?" Several factors are taken into consideration, including the severity of the offense, the offender's criminal history, his adjustment during previous periods of probation or parole, his current institutional adjustment, and letters of protest and support. Prosecutors sometimes want to submit documents to protest an offender's release on parole, and they will ask what they should include. Keep in mind that the voters already have access to information about the offense—they are also interested in receiving personalized feedback on a particular case and offender. Consider telling voters what your involvement was, why you are protesting release, and what is compelling about this specific situation or offender.

Another important topic of the day was plea bargaining. Believe it or not, I recently received an email from a victim's family member asking that we "educate and advocate for changes that will protect and bring more satisfaction to victims in the long run." He wanted to ensure that victims were given all relevant facts about sentencing and parole when prosecutors were telling them about a potential plea offer.

To elaborate a little on this subject, the parole eligibility date is not the only thing potentially affected by a plea deal. A plea can limit the special conditions the Board can impose when the offender is released on parole and can change the number of years the Board can deny or "set off" an offender until his next parole review. For example, in an intoxication manslaughter case without a deadly weapon finding, the offender will become parole-eligible as soon as his good time plus calendar time equals one-quarter of his sentence. However, if the judgment includes a deadly weapon, the offender will have to serve *half* of the sentence prior to becoming eligible and will *not* receive good conduct time. The percentage of a sentence that must be served to reach parole eligibility varies according to the date of the offense and by statute. For more specifics on this topic, look for a publication entitled *Parole in Texas* on the Board's website. In the appendix is the entire Parole and Mandatory Supervision Eligibility Chart. It is in the process of being updated, but it can be found at www.tdcj.texas.gov/bpp/publications/PIT_2017_Eng.pdf.

Demystifying the process

The most beneficial thing we can do for victims and survivors is to tell them what they can expect next and be honest in the process. Nobody wants to be the bearer of bad news, but if crime victims are blind-sided—for example, by an offender's parole eligibility coming right after conviction—they can feel even more victimized. If we can bridge the gap in awareness and education, we can increase victims' trust in the entire criminal justice system.

What I ask of you, those in prosecutor offices, is to please make sure victims know that down the road, whether it's a few weeks or several years post-conviction, there will be plenty of people ready, willing, and able to assist them *if they choose to be involved* in the parole review process. Our frequently asked questions for victims can be found at www.tdcj.texas.gov/bpp/VictimLiaison/VictimFAQ.html.

If you would like additional information about training or any of the topics discussed in this article, please feel free to contact me directly at libby.hamilton@tdcj.texas.gov or 512/406-5833. Thank you all for the work you do. ❇

"The Board of Pardons and Parole's presentation was eye-opening. Their speakers are highly knowledgeable and insightful. Specifically, their discussion of the decision process and the resources available is invaluable to our prosecutors and victim advocates."
–Brian Middleton, District Attorney in Fort Bend County

Obscure sources of Texas law, legal interpretation—and beyond!

If you live in the city like I do, you're lucky on a dark night if you can make out much more than the moon, a few planets, and a handful of stars.

By Douglas Norman
Assistant District Attorney in Nueces County

But travel into the country, especially to one of the "dark sky parks" scattered around Texas, and you can easily make out the Milky Way and the millions of stars actually out there.

Like the night sky in the city, sources of law may generally seem to be pretty evident. As criminal practitioners, we are all familiar with the Penal Code, the Code of Criminal Procedure, the Rules of Evidence, and basic caselaw research through the Texas and federal appellate court systems. But if you dare to venture down the deserted country road of obscure legal research, you will find a wealth of lesser-known sources and smaller and softer lights, some of which are easy to find and access—others less so. Like stars in a dark sky park, they are there in the background waiting to be found behind the glaring brightness of the better-known sources.

This article is not intended to be a comprehensive listing of these obscure sources, but rather a taste of what's out there. With that understanding, the following sources may prove helpful, interesting, or just plain nerdy, depending upon your needs and disposition.

Texas Legislature Online

http://www.capitol.state.tx.us

This site has a search engine to access bills by legislative session and bill number. Once in the file, you can obtain bill analyses and recordings of committee hearings. Unfortunately, it covers legislation only from 1989 onward.

Texas Legislative Reference Library

https://lrl.texas.gov/legis/billSearch/index.cfm

The Legislative Archive System provides easy access to online resources linked to a particular bill number. Results include links to scanned bill files, bill analyses, bill histories, and other documents. This collection covers legislation as far back as 1871. It can also show you, by legislative session back through 1995, which House and Senate bills amended each Texas code. The "index to sections affected" tool can be found at https://lrl.texas.gov/legis/ISAF/lrlhome.cfm.

Compiling Texas Legislative History (Texas Legislative Reference Library)

http://www.lrl.state.tx.us/legis/legintent/LegIntentBrochure.pdf

This is a really helpful brochure for those who, like me, do a legislative history only once in a blue moon. Staff at the legislative reference library are also very helpful in providing additional materials that may be in a bill file and answering questions about how to obtain materials online.

Penal Code Collection

https://lrl.texas.gov/collections/PenalCodeIntro.cfm

This guide has information on legislative intent research for the Texas Penal Code as enacted in 1973. That enactment was the culmination of a substantial revision by the Texas Penal Code Revision Project, a collaborative effort by the Texas Bar Association and Texas Legislative Council from 1965 to 1973. It was the first full recodification since the Code's previous enactment in 1856.

Code of Criminal Procedure Collection

https://lrl.texas.gov/collections/CriminalProcedureIntro.cfm

This guide includes sources for legislative intent research for the Texas Code of Criminal Procedure as enacted in 1965. The legislation, introduced as SB 107 during the 59th Legislature, marked the culmination of six years of study by the State Bar Committee for Revision of the Code of Criminal Procedure and Penal Code. Finally passed after four years of legislative effort over two sessions, the Code represented the first full-scale revision of criminal procedure in more than 100 years.

Texas Practice Commentaries in the 1974 Penal Code

When the 1974 Penal Code was adopted, the original publication in the "Black Statutes" included commentary by Seth S. Searcy III and James R. Patterson, which followed each section of the new code with an explanation of the intention of the committee that had drafted it and presented it to the Texas Legislature. It is frequently cited and generally accepted as a legitimate source of legislative history. It also includes the source of the law, which is often the Model Penal Code or McKinney's New York Penal Code.[1]

The only real problem is getting your hands on an original 1974 edition of Vernon's Texas Penal Code, which is becoming rarer and harder to find by the year. If your office has one, by all means keep it! If your office doesn't, see if you can find it in your county or local college library.

Old Texas Laws (Texas State Law Library)

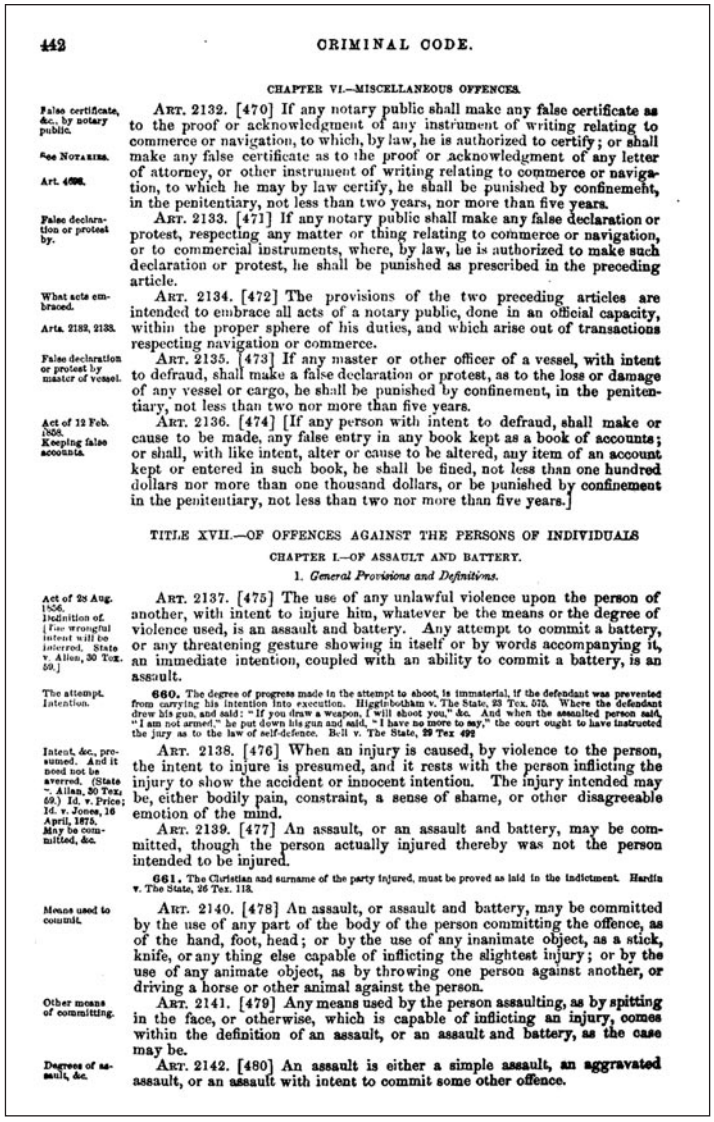
http://www.sll.texas.gov/library-resources/collections/historical-texas-statutes-(1879-1925)

This resource, maintained by the Texas State Law Library, includes Texas Penal Codes and Codes of Criminal Procedure back to 1856. (By comparison, Westlaw historical statutes go back only to 1987.) Old law is not only of historical interest, but it can also provide a valuable resource to interpret current law with a view to the way the same or similar offenses and concepts were set out in prior law. For example, in a recent case involving the statute of limitations for intoxication manslaughter, it was extremely helpful to trace the relevant Penal Code and limitations provisions in question back to early Texas law to show how the statutes had evolved, which in turn cast light on how the present statute should be interpreted.

Older Texas laws (Paschal's Digest)

https://lrl.texas.gov/collections/Paschal.cfm

A Digest of the Laws of Texas is an unofficial compilation of Texas laws first published by George W. Paschal in 1866. The most successful of the early compilations of Texas statutes, this work is commonly referred to as Paschal's Digest. The Fifth Edition, published in 1875, significantly influenced the development of the 1879 Revised Statues of Texas. It amounts to a compilation of statutes and annotations of cases applying them, according to the best efforts of the author. The excerpt concerning Assault and Battery, below, offers a taste of what you will find in this resource.



442 CRIMINAL CODE.

CHAPTER VI.—MISCELLANEOUS OFFENCES.

False certificate, &c., by notary public. See NOTARIES. Art. 4698.

ART. 2132. [470] If any notary public shall make any false certificate as to the proof or acknowledgment of any instrument of writing relating to commerce or navigation, to which, by law, he is authorized to certify; or shall make any false certificate as to the proof or acknowledgment of any letter of attorney, or other instrument of writing relating to commerce or navigation, to which he may by law certify, he shall be punished by confinement, in the penitentiary, not less than two years, nor more than five years.

False declaration or protest by.

ART. 2133. [471] If any notary public shall make any false declaration or protest, respecting any matter or thing relating to commerce or navigation, or to commercial instruments, where, by law, he is authorized to make such declaration or protest, he shall be punished as prescribed in the preceding article.

What acts embraced. Arts. 2132, 2133.

ART. 2134. [472] The provisions of the two preceding articles are intended to embrace all acts of a notary public, done in an official capacity, within the proper sphere of his duties, and which arise out of transactions respecting navigation or commerce.

False declaration or protest by master of vessel.

ART. 2135. [473] If any master or other officer of a vessel, with intent to defraud, shall make a false declaration or protest, as to the loss or damage of any vessel or cargo, he shall be punished by confinement, in the penitentiary, not less than two nor more than five years.

Act of 12 Feb. 1858. Keeping false accounts.

ART. 2136. [474] [If any person with intent to defraud, shall make or cause to be made, any false entry in any book kept as a book of accounts; or shall, with like intent, alter or cause to be altered, any item of an account kept or entered in such book, he shall be fined, not less than one hundred dollars nor more than one thousand dollars, or be punished by confinement in the penitentiary, not less than two nor more than five years.]

TITLE XVII.—OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS

CHAPTER I.—OF ASSAULT AND BATTERY.

1. *General Provisions and Definitions.*

Act of 28 Aug. 1856. Definition of. [The wrongful intent will be inferred. State v. Allen, 20 Tex. 59.]

ART. 2137. [475] The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.

The attempt. Intention.

660. The degree of progress made in the attempt to shoot, is immaterial, if the defendant was prevented from carrying his intention into execution. Higginbotham v. The State, 23 Tex. 575. Where the defendant drew his gun, and said: "If you draw a weapon, I will shoot you," &c. And when the assailed person said, "I am not armed," he put down his gun and said, "I have no more to say," the court ought to have instructed the jury as to the law of self-defence. Bell v. The State, 29 Tex 492

Intent, &c., presumed. And it need not be averred. (State v. Allan, 20 Tex. 59.) Id. v. Price; Id. v. Jones, 16 April, 1875. May be committed, &c.

ART. 2138. [476] When an injury is caused, by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended may be, either bodily pain, constraint, a sense of shame, or other disagreeable emotion of the mind.

ART. 2139. [477] An assault, or an assault and battery, may be committed, though the person actually injured thereby was not the person intended to be injured.

661. The Christian and surname of the party injured, must be proved as laid in the indictment. Hardin v. The State, 26 Tex. 118.

Means used to commit.

ART. 2140. [478] An assault, or assault and battery, may be committed by the use of any part of the body of the person committing the offence, as of the hand, foot, head; or by the use of any inanimate object, as a stick, knife, or any thing else capable of inflicting the slightest injury; or by the use of any animate object, as by throwing one person against another, or driving a horse or other animal against the person.

Other means of committing.

ART. 2141. [479] Any means used by the person assaulting, as by spitting in the face, or otherwise, which is capable of inflicting an injury, comes within the definition of an assault, or an assault and battery, as the case may be.

Degrees of assault, &c.

ART. 2142. [480] An assault is either a simple assault, an aggravated assault, or an assault with intent to commit some other offence.

Texas Crimes, written by Diane Burch Beckham and published by TDCAA

https://www.tdcaa.com/product/texas-crimes-preorder-2019-21

Transitioning to current Texas Penal Laws, this is the only single-volume source for all 2,000 crimes found outside the Penal Code. It lists each code alphabetically, includes a separate cite for each crime statute, describes the criminal conduct, and gives the punishment range.

When you find an ambiguity in a statute or rule, or an interesting question that seems to be an issue of first impression in Texas, sources like these may be especially valuable.

Government agency publications and handbooks

Texas Driver Handbook

https://www.dps.texas.gov/internetforms/Forms/DL-7.pdf

The Texas Driver Handbook is one of many such government manuals and publications maintained online, usually as a PDF.

Traffic Safety Facts

https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812780

This online publication of the National Highway Traffic Safety Administration provides helpful data concerning the percentage of alcohol-related fatal crashes, which proved useful in a recent appeal involving probable cause to obtain a blood warrant after a fatal crash.

Municipal codes

https://www.sll.texas.gov/law-legislation/municipal-laws-and-ordinances

The State Law Library has a link to other sources which maintain databases for the municipal codes of all of the major Texas cities.

Building codes

https://www.sll.texas.gov/law-legislation/building-codes

The State Law Library also has a link to various building codes that have been adopted or incorporated by state or local authorities.

"Court Rules" volumes of the Southwestern Reporter (obscure and superseded court rules)

For example, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, Southwestern Reporter, Texas Cases, Vol. 617-618 S.W.2d, p. XXXVII et seq. Tucked away in this volume of S.W.2d is a little-known set of rules that briefly governed criminal appeals until it was superseded by the Texas Rules of Appellate Procedure. Whenever a volume in the Southwestern Reporter system contains a "Court Rules" tab on the spine, it indicates adoption, amendment, or some other change to court rules. Most of these can be found as well in Westlaw, Lexis, or other publications commonly available, but some of the more obscure rules may not be so easy to find. If you have the date when the rule or amendment was adopted and you have access to the bound volumes of the Southwestern Reporter, you should be able to find the text in question.

Secondary authorities and learned treatises

LaFave on Search and Seizure, Criminal Procedure, and Defenses; Model Penal Code; Sutherland on Statutory Construction; McCormick on Evidence

In addition to better-known resources such as the Texas Practice Series (including the criminal volumes written by George Dix and Robert O. Dawson) and Texas Jurisprudence, there are a number of other texts and treatises that tend to be given some weight by Texas courts. As with everything else in this article, the list is not meant to be exhaustive, but merely illustrative. When you find an ambiguity in a statute or rule, or an interesting question that seems to be an issue of first impression in Texas, sources like these may be especially valuable.

Dictionaries

In addition to traditional law and common lay dictionaries, grammar and usage dictionaries may also be consulted when something more structural than a mere definition of terms is needed.[2]

Law: *Black's Law Dictionary* and *Ballentine's Law Dictionary.*

Lay: *Webster's Third New International Dictionary, Webster's Encyclopedic Unabridged Dictionary of the English Language, Webster's Ninth New Collegiate Dictionary, Webster's New Twentieth Century Dictionary*; online at http://www.merriam-webster.com/dictionary.

Grammar and usage: *The American Heritage Book of English Usage* and *The Oxford Dictionary of American Usage and Style.*

Classic and historical works

These and other online collections include a wealth of legal history and thought. In The

Avalon Collection at Yale at https://avalon.law.yale.edu/default.asp, you can find Blackstone's Commentaries on the Laws of England and The Federalist Papers. The Gutenberg Collection at https://www.gutenberg.org/wiki/United_States_Law_(Bookshelf) contains the Magna Carta and Oliver Wendell Holmes's *The Common Law*.

The Bible

Although it may be controversial to cite the Bible for anything directly, it does contain a wealth of information that has shaped our culture and in some cases the origin of certain legal concepts, including "The Rule."

Chapter 13 of the Book of Daniel tells the story of Susanna, a beautiful young wife, who was accused by two elders, who themselves lusted after her, of committing adultery in her private garden with a young man who ran off. The crowd who gathered to judge this matter believed the elders over Susanna and were about to stone her to death, when Daniel showed up and instructed them as follows:

"Separate these two [witnesses] far from one another, and I will examine them."

After they were separated from each other, he called one of them and said: "Now, then, if you were a witness, tell me under what tree you saw them together."

"Under a mastic tree," he answered.

Putting him to one side, he ordered the other one to be brought. "Now, then, tell me under what tree you surprised them together."

"Under an oak," he said.

Susanna was thereupon acquitted of the charges, and the two witnesses were themselves stoned to death for perjury. If nothing else, the story of Susanna's acquittal provides a colorful way of showing the longstanding value of the rule for sequestering witnesses and of effective cross-examination.

Texas State Law Library

https://www.sll.texas.gov

The State Law Library serves the legal research needs of the Texas Supreme Court, the Court of Criminal Appeals, the Office of the Attorney General, other state agencies and commissions, and the citizens of the state. It is a public law library with many additional resources too numerous to list in this article.

Links to other libraries

https://lrl.texas.gov/genInfo/otherLibraries.cfm

This link lists other libraries, including many general and law-related online libraries throughout Texas.

Conclusion

I'm sure that there remains a great deal out there that I have missed. My telescope can only focus on so much of the universe of sources at one time—and there's so much more out there. The adventure is in finding it! ❇

Endnotes

[1] It is a generally accepted rule of statutory construction that when the Legislature adopts a "foreign" statute, it also adopts the construction of that statute by the foreign jurisdictions occurring prior to the Texas enactment. *State v. Moreno*, 807 S.W.2d 327, 332 (Tex. Crim. App. 1991).

[2] See *Ex parte Hood*, 211 S.W.3d 767, 774 (Tex. Crim. App. 2007) (citing *The American Heritage Book of English Usage* to explain the structure of adverbial prepositional phrases in a statute).

Although it may be controversial to cite the Bible for anything directly, it does contain a wealth of information that has shaped our culture and in some cases the origin of certain legal concepts, including "The Rule."

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