The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

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

Two perspectives on the same COVID-era trial

Amy Ray—singer, songwriter, and one-half of the Indigo Girls—once said, "Your perspective probably depends on where you live."

By Elisha Bird (at left)
First Assistant District Attorney, and
Alex Hunn
Assistant District Attorney, both in Brown County

When it comes to jury trials in the age of COVID-19, we agree. Not just where you live geographically, but perspective also depends on who the judge is, which defense attorney is involved, what you are used to in a trial, and ultimately, whether you got the outcome you wanted.

Recently, the two of us prepared for the first COVID-19-era jury trial in our area. Our perspectives were quite different, even though we sat next to each other (less than the socially appropriate 6 feet apart, actually) for the entire trial.

Alex came in as a young, full-of-energy prosecutor who, because of the pandemic, has spent half of his career practicing through Zoom. Elisha was dragged kicking and screaming into trial as a reluctant co-counsel who had practiced primarily in the pre-COVID-19 world. Alex's satisfaction with the trial process comes from his knowledge that he tackled an important case in a world of unknowns and on-the-fly adaptation, and he emerged with a great outcome for our victim. Elisha's concerns about the trial process were framed from the perspective of having litigated appeals and habeas writs for years and having developed trial skills in a world where observation of the faces of witnesses, victims, and jurors formed a critical component of the process.

Ultimately, the balance of our perspectives led to a fantastic outcome for a woman who faced great danger by coming to court to confront her abuser.

From Alex's perspective

"No way do I want to be the first prosecutor in my jurisdiction to do a jury trial in the age of COVID!" That's definitely

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A time for leadership

I want to thank the Foundation's leaders for their steadfast vision during these rough times.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

They didn't flinch when it came time to invest in TDCAA's ability to deliver online training and provided the resources needed to get the job done quickly. Indeed, that swift action lives up to the vision for the formation of the Foundation to begin with: It's meant to be a resource when it is needed.

I like the fact that our Foundation's leadership is a mixture of current prosecutors and former prosecutors, some of whom are practicing defense attorneys. I am a firm believer in the concept of "the loyal opposition," and I love that we can put aside differences we may have on different cases or laws and focus on the value of a well-trained and professional cadre of Texas prosecutors. And the fact that our former prosecutors want to stay involved with TDCAA is a tribute to all of you who answer "ready" for the State.

A Texas Legal Legend

I was happy to see that the Litigation Section of the State Bar has named **Rusty Hardin** as a Texas Legal Legend. This is a remarkable event for Rusty. I mention it here because Rusty is a former prosecutor who is a great friend of the profession. As you might recall, Rusty was the very first person to donate to the Foundation, and he continues to donate every year. Here is what the Bar had to say about Rusty:

"This honor is reserved for those attorneys who, after decades of practice, have shown a commitment not only for their profession, but also for giving back to their local communities.

"Mr. Hardin began his career more than 45 years ago, serving as a high-level prosecutor in the Harris County District Attorney's office. He entered private practice in 1991, and since then has tried over 100 jury trials in areas ranging from commercial litigation to criminal defense. He's previously held several leadership positions on committees for the State Bar of Texas, as well as on the faculty of numerous public and professional organizations, and he is frequently invited to speak to national and regional bar associations and business groups."

Here is a video interview of Rusty and the award presentation that is worth watching: www.rustyhardin.com/state-bar-of-texas-legal-legends-award-2020. Congratulations Rusty, on behalf of all of us in prosecution!

Mike "Machine Gun" Hinton

We are tremendously saddened by the passing of our good friend and TDCAF Board member **Mike Hinton**. Mike was such a positive, energetic, and enthusiastic person. He truly loved being in the criminal courthouse and loved the profession of prosecution. I can't write a better remembrance of Mike than Murray Newman has—Murray is a onetime ADA in Harris County, practicing defense attorney, prolific blogger, and Texas Prosecutors Society member. Here is what he wrote about Mike: http://harriscountycriminaljustice.blogspot.com/2020/10/mike-hinton.html.

What hits home in Murray's description is feeling like family around Mike. Agreed. ❇

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About *The Texas Prosecutor*

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Annual Conference in review

I am proud to report that when the Annual Criminal and Civil Law Conference launched in September, 881 people were pre-registered.

By Rob Kepple
TDCAA Executive Director in Austin

And attendees jumped right in, with hundreds completing different sections of the course. As a reminder, you have until December 31 to complete the tracks, and there is a maximum of 18 MCLE hours available.

We have been very pleased with the response to the course—reviews have been overwhelmingly positive. People continue to favor live training, of course, but we delivered a quality conference when in-person training is not an option.

We learned a few things in the process. We are lucky that we have such a great faculty. I think the speakers learned that they actually need to bring extra energy to a recorded talk—there isn't an audience to "draw" energy from. We also learned that a curated and recorded online presentation is preferable to a live Zoom meeting, which comes with a host of technical issues. Lastly, our training team's instinct to focus on excellent audio quality, with video quality a close second, has paid off. Attendees have found that the sessions are easy to digest with minimal technical issues.

The only real moment of panic: I got a call the Wednesday of the Annual's first day online from **Henry Garza**, the DA in Bell County. Henry asked me where check-in was for the conference! I was alarmed that members may have misunderstood what was happening and traveled to South Padre. Henry told me to relax—he knew the conference was online, and he actually *was* in South Padre! He wasn't about to miss out on attending the conference at its intended location. Well played, Henry!

Thank you, Kenda Culpepper

This has been a challenging year, and I want to take a moment to thank this year's TDCAA President and CDA in Rockwall County, **Kenda Culpepper**, for her rock-solid leadership. (That's her in the photo at right; John Dodson, County Attorney in Uvalde County and Board President-Elect, is presenting her with the 2020 President's Plaque.) Kenda's strong suit is communication, and that is precisely what was badly needed as things changed on what seemed a daily basis. In true "timely, relevant, and accessible" fashion, Kenda organized our regional directors to conduct regular Zoom meetings to share information, policies, and practices. But as far as her other presidential duties, Kenda never missed a beat. She penned a terrific article in the July–August 2020 edition of this journal about taking action after a mass shooting. She organized a number of contributions from Texas prosecutors to our neighbors in Louisiana affected by recent hurricanes. She kept the Board on track as we pivoted our training to online offerings. And finally, she kept her eye on the looming legislative session and began preparations for what will be one of the most challenging sessions we've seen.

Thanks, Kenda! It has been great to try to keep up with you!

Thanks to our retiring elected prosecutors

In this 2020 election season, at least 40 district and county attorneys will be elected or appointed. I want to thank those who ran for the office of elected prosecutor, served the people of Texas, and will be leaving at the end of this year (see the pink box below). It is safe to say that prosecution is one of the hardest and most rewarding professions, and TDCAA is proud to have served you all. Fair winds in your future endeavors!

Rod Anderson, County Attorney in Brazos County
Michael Bagley, 63rd Judicial District Attorney (Val Verde, Kinney, and Terrell Counties)
Charles Bailey, 76th Judicial District Attorney (Titus and Camp Counties)
Kristen Barnebey, County & District Attorney in Aransas County
Joe Warner Bell, County Attorney in Trinity County
Bobby Bland, District Attorney in Ector County
Mary Anne Bramblett, County Attorney in Hudspeth County
Roy Cordes, County Attorney in Fort Bend County
Will Dixon, Criminal District Attorney in Navarro County
Chad Elkins, County Attorney in Reagan County
David Escamilla, County Attorney in Travis County
Omar Escobar, 229th Judicial District Attorney (Starr, Duval, and Jim Hogg Counties)
Jaime Esparza, 34th Judicial District Attorney (El Paso, Hudspeth, and Culberson Counties)
Denise Fortenberry, County Attorney in Matagorda County
Stuart Fryer, County & District Attorney in Lavaca County
David Green, 69th Judicial District Attorney (Dallam, Hartley, Moore, and Sherman Counties)
Mark Hall, District Attorney in Henderson County
Gloria Hernandez, County Attorney in Maverick County
Laura Garza Jimenez, County Attorney in Nueces County
Jon King, County Attorney in Dallam County
Hope Knight, District Attorney in Leon County
Becky Lange, County Attorney in Llano County
Joel Littlefield, County Attorney in Hunt County
Nicole Lostracco, District Attorney in Nacogdoches County
Timothy Mason, Criminal District Attorney in Andrews County
Michael Milner, County Attorney in Hutchinson County
Scott Monroe, 198th Judicial District Attorney (Kerr and Bandera Counties)
Margaret Moore, District Attorney in Travis County
Lisa Peterson, County Attorney in Nolan County
Logan Pickett, District Attorney in Liberty County
Joe Rose, County Attorney in Coleman County
Vince Ryan, County Attorney in Harris County
Don Schnebly, District Attorney in Parker County
David Sheffield, District Attorney in Hardin County
Stephen Shires, District Attorney in Shelby County
Kenneth Slimp, County Attorney in Runnels County
Ana Smith, County Attorney in Val Verde County
Gene Stump, County Attorney in Franklin County
David Wallace, County Attorney in Sutton County
Patrick Wilson, County & District Attorney in Ellis County
Sandy Wilson, 83rd Judicial District Attorney (Pecos, Brewster, Jeff Davis, and Presidio Counties)

Goodbye to Jaime Esparza

I want to take a moment to thank one retiring prosecutor who has meant so very much to this association and to me. I first met Jaime at the Harris County DA's Office in the 1980s. Jaime had a good reputation as a tough trial lawyer, and folks were sad to see him leave Houston to return to his hometown of El Paso. In 1991 he was elected as the District Attorney for the 34th Judicial District covering El Paso, Culberson, and Hudspeth Counties. He became a strong leader of Texas prosecutors, served as TDCAA President, was instrumental in establishing the Border Prosecution Unit, and became a leader in the fight to modernize investigation and prosecution in domestic violence cases.

What is remarkable about Jaime is his ability to solve problems. Time and time again we would have an issue—for instance, funding for the assistant prosecutor longevity pay program—and Jaime would engineer a solution and see it through. His instincts for how to approach legislative issues that greatly impact prosecutors' work borders on uncanny, and he will be sorely missed.

Finally, Jaime always has shown his love for this profession and for seeking justice. He works at doing the right thing, and he puts a lot of

thought into it. I will never forget how he summed up a career seeking to do the right thing: "It's just that easy, and it's just that hard." Jaime, you will be missed!

Jaime Esparza always has shown his love for this profession and for seeking justice. He works at doing the right thing, and he puts a lot of thought into it. I will never forget how he summed up a career seeking to do the right thing: "It's just that easy, and it's just that hard."

Mental Health Law for Prosecutors

By now you have a copy of *Mental Health Law for Prosecutors* on your desk. This publication, funded by the Court of Criminal Appeals, was written by four Harris County experts on the subject: **Bradford Crockard, Jeff Matovich, Gilbert Sawtelle,** and **Erica Robinson Winsor**. This book focuses on the duties and responsibilities of prosecutors when it appears a suspect or defendant has mental health issues, with a focus on the technical aspects that are important to prosecutors. I want to thank our authors for their hard work on behalf of the prosecutors of Texas and for putting their names on the front of the book. My guess is that you soon will be getting calls for advice from all over the state!

The ACLU Justice Lab

A very interesting legal experiment is underway. We know that this is the age of the advocacy group, and there are dozens of organizations with different agendas for reform. But the ACLU Justice Lab, with a detailed action plan, is different. The ACLU has announced an initiative to swamp a state with lawsuits brought by for-profit law firms and university legal clinics relating to allegations of racially motivated policing. The theory: "By focusing intensive efforts on a single state, the initiative aims to establish a litigation blueprint for altering police conduct across the country." The ACLU is looking for 100 law firms, 25 law school clinics, and 1,000 plaintiffs to join.

The lucky winner? Louisiana. Right now, the ACLU is soliciting clients and law firms to participate, and it is an impressive list so far. Are they looking to win cases at the trial level to force change? Not necessarily: "Whether the legal actions result in wins, settlements, or losses, the sheer magnitude of cases will function to incentivize police districts and individual officers to alter their conduct (be it through hiring, training, action, or discipline)—because if they don't, the lawsuits will necessarily continue in full force."

The ACLU is up-front about the ultimate goal in the appellate process here: to advance a case on law enforcement qualified immunity to the Supreme Court. This bears watching. You can get more information at www.laaclu.org/en/campaigns/justice-lab-putting-racist-policing-trial.

Precedent on witnesses in masks

As we get back to trying cases, there is a debate about witnesses testifying while wearing face coverings. We have seen the defense object based on Sixth Amendment Confrontation Clause grounds, and there is at least one case that says witnesses can't wear a disguise.[1]

But I am not so sure that applies in every case, and there is some precedent you should know about if the issue comes up in court. Just ask **Vic Wisner**, a former Harris County ADA who tried a theft case in **Judge Ted Poe**'s court back in the 1980s. A baggage handler at the airport had stolen a valuable set of pearl-handled revolvers from a man by the name of **Clayton Moore**. Also missing from Mr. Moore's luggage were the guns' holsters and a Lone Ranger costume—because Mr. Moore, an actor, had portrayed the Lone Ranger on television and in movies in the 1940s and '50s. Needless to say, the Colt 45s and Buscadera double-gun rig—which were custom-made for Mr. Moore and his movie persona—were extremely valuable.

When the trial day came, Mr. Moore came to court—fully decked out as his masked persona, the Lone Ranger. Mr. Moore pleaded with Vic that he be allowed to appear in his disguise, as he had in public appearances following his days on the famous TV show. As the trial opened, Vic made his request in open court. As Vic tells the story, Judge Poe made his pronouncement with flair: "I shall *not* be the man who unmasks the Lone Ranger!" And Mr. Moore testified in full costume, and the thief was found guilty and sentenced to 10 years in prison.

So there seems to be precedent for some witnesses—heroes and superheroes, I am thinking—to wear their masks on the stand. You can read more about it at https://hpou.org/hpd-history-the-lone-ranger-finds-truth-and-justice-in-houston-thanks-to-two-detectives-operating-with-speed-of-light. ❇

Endnote

[1] *Romero v. State*, 173 S.W.3d 502 (Tex. Crim. App. 2005).

A year of change and improvements

I have been honored to serve as the 2020 President of the Texas District and County Attorneys Association.

By Kenda Culpepper
TDCAA President & Criminal District Attorney in Rockwall County

Not the year I expected—not the year I would have preferred—but a body of work during a year of innovation that I am proud of nonetheless.

Who would have guessed how our lives would change in the span of a couple of weeks last March? Who would have thought a year ago that kids would be out of school for much of the year, that in-person meetings and events would be cancelled, and that there would be no sports, no movies, and limited access to restaurants? For a period of time, we couldn't go into the courtroom, into the jail, or even into our own offices. It has been a stark reminder that our world can change in an instant.

I am proud, however, that Texas prosecutors responded to this crisis by figuring out new ways to do our jobs, and I am proud we did it together.

When I rolled out my presidential theme of communication and collaboration in January, I had no idea how important it would become. At our first TDCAA Board meeting, I re-introduced the idea of elected prosecutors having regional meetings to discuss issues common to geographical jurisdictions. When COVID hit, though, we had to learn how to work with each other in a different way. Region 6 Director Greg Willis asked if he could do his regional meeting by Zoom, and the other regional directors quickly adopted the idea. These meetings were scheduled all over the state, and some regions met every week to keep up with ever-evolving issues. TDCAA Executive Director Rob Kepple and I tried to attend every forum, and we often participated in multiple events in a single day. They became the central way elected prosecutors communicated with one another, and they were important because, quite frankly, we had to find new ways to practice criminal law. It was in these meetings that we figured out how to have grand juries, effectively conduct remote hearings and work from home, deal with the fears of our colleagues and with jail populations, and interpret the myriad different orders from the Governor, the Texas Supreme Court, and our own local jurisdictions. Out of the chaos of COVID, we found new and effective ways to communicate and collaborate.

But TDCAA's communication went beyond Zoom meetings. Shannon Edmonds's weekly updates synthesized information and innovations gleaned from the regional meetings and elsewhere and gave them an even larger statewide audience. TDCAA also made great use of our website and The Texas Prosecutor journal to keep prosecutors and staff abreast of information. I have been incredibly proud of the work TDCAA has done as a resource throughout Texas.

But prosecutors were not just talking to each other—we were also collaborating with agencies throughout the state to solve COVID- related problems and in response to issues such as human trafficking, mass violence, and child abuse. We have met with the Department of Public Safety, the Federal Bureau of Investigation, and other law enforcement agencies; the Governor's Office, the Attorney General's Office; the Texas Association of Counties; the State Bar; the Office of Court Administration; the Court of Criminal Appeals; and many others.

A good example of unexpected collaboration found root in the State Bar Presidential Task Force on the Resumption of Jury Trials. Along with Judge Alfonso Charles, Presiding Judge of the 10th Administrative Judicial Region, and Grant Scheiner, President of the Texas Criminal Defense Lawyers Association, I was appointed by State Bar President Larry McDougal to co-chair this task force. About 20 leaders in prosecution, the judiciary, and the defense bar from across the state met by Zoom every week to discuss how to most safely conduct a constitutionally sound jury trial during the COVID pandemic. As you might imagine, it was a rough start bringing together

people with such divergent ideas and motivations, but over nine weeks, the task force found feasible solutions and made valuable recommendations to the Texas Supreme Court and the Office of Court Administration. Most of those recommendations have been formally mandated for both criminal and civil jury trials—and the task force's work continues. As more and more jury trials gear back up across Texas, we will in- termittently meet to discuss and make recom- mendations on issues and problems that arise.

While we watched our world change around us and struggled to meet new challenges, TDCAA continued to meet member expectations in other, more traditional ways as well. The Board of Directors, Foundation Board, and affiliate groups continued to meet and discuss the business of our organization. The Legislative Committee has already begun talking about the next Legislative session—what it will look like, what issues we will see, and how we will effectively communicate with legislators on issues important to Texas prosecutors. The Training Committee has met multiple times by Zoom to plan cutting-edge, informative courses. Additionally, the Civil, Key Personnel & Victim Services, In- vestigator, Publications, Editorial, Diversity, Finance, and Nominations Committees have all come together to serve prosecutors and staff in creative and important ways. They are all superstars in my book.

As hard as the last nine months have been, it has caused us to push forward and break molds, to stretch our own comfort levels. We have had to learn to be open to new and better ways to make sure that justice is done.

And speaking of superstars, let's talk about the TDCAA staff. Until you are in a position to work with these individuals every day, you don't realize what a well-oiled machine Executive Director Rob Kepple is running. A perfect example is the conferences that had to be created when no one could gather in a traditional live setting. Luckily, TDCAA was ahead of the curve because we had already created a virtual platform for the online *Brady* training, but Training Director Brian Klas and his crew ramped up existing capabilities to an entirely different level for 2020's Annual Conference. Those of you who watched that first-class course know that this group has created a template for the future, and, as we have come to expect, they have taken TDCAA to a higher plane than ever before with outstanding training opportunities.

So, as hard as the last nine months have been, it has caused us to push forward and break molds, to stretch our own comfort levels. We have had to learn to be open to new and better ways to make sure that justice is done.

Because COVID was not the only national event to rock our worlds as prosecutors. After the death of George Floyd at the hands of a Minneapolis police officer, black prosecutors in particular were unfairly targeted merely because they were prosecutors. TDCAA and the Diversity, Recruitment, and Retention Committee responded by giving these individuals space to talk together about their shared experiences, why they had become prosecutors, and why they had entered this honorable profes- sion to protect everyone in our communities. It also reminded us all, though, that in order to see that justice is done, we must constantly re-eval- uate what justice is. We must always feel safe to look deep within ourselves to determine what is right and what is wrong. And we must listen, col- laborate, and communicate.

I look forward to the day these crises are over, but I also look forward to continuing some of the productive changes we have implemented. I hope that some places, such as West Texas, where parties have traditionally traveled hundreds of miles to attend a five-minute plea or announcement setting, will continue to use remote hearings. I hope that some witnesses can appear virtually instead of leaving their labs or offices. And I hope that we can continue to meet by videoconference when an in-person meeting is too cumbersome or time-consuming. While I have hated not seeing people face-to-face, I have actually met so many prosecutors during the virtual meetings whom I had never met before. Many prosecutors don't or can't attend live events because of budgetary, time, or distance restrictions. Perhaps we have found a new way to virtually meet some prosecutors and staff where they are and to serve them where we are most needed.

I must say, though, that I so very much look forward to the world going back to normal. While I have appreciated the opportunities to virtually meet so many prosecutors across the state, nothing can take the place of seeing each other face-to-face at a live conference. These are times when we can talk and network with one another; when we can ask questions one-on-one and informally vet new ideas; and when we can share stories and experiences. And while TDCAA will continue to explore ways to provide virtual training and embrace that different people learn differently, I can't wait to be able to meet again in person.

Again, I have been so honored to serve as your TDCAA President this year. Stay safe and healthy, and I will look forward—so very much forward—to seeing you again next year. ❇

A new notification system from TDCJ

Lately, I have been fielding a lot of questions regarding a relatively new IVSS portal offered by the Texas Department of Criminal Justice.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

We at TDCAA felt it might be helpful to our membership to reprint information directly from the Texas Crime Victim Clearinghouse's newsletter, *The Victim's Informer* (the September–October 2019 issue) to offer some helpful suggestions.

The Texas Department of Criminal Justice Victim Services Division (TDCJ-VSD) announced about a year ago that it implemented the Integrated Victim Services System (IVSS) to manage victim notification and resource information. IVSS is a free, automated service that provides crime victims, criminal justice professionals, and victim advocates with vital information and notification 24 hours a day, 365 days a year. By registering with the system, you can obtain information about offenders in TDCJ custody, on parole, and on mandatory supervision, as well as about changes in offender status, such as release dates.

The self-service web portal is available at **https://ivss.tdcj.texas.gov**, and it allows users to manage personal information directly. Updates to the information you've requested are made in real time and are available to view immediately. Search for limited offender information, register for notifications, see past notifications, and manage your preferences for receiving information through this portal. The portal is accessible through any device with Internet capabilities, including desktop and laptop computers, mobile phones, and tablets.

Notifications about an offender are available by letter, email, and text message. Some notifications are also available by automated phone call or personal phone call. The system processes offender status changes 24 hours a day, which may prompt notifications to generate at all hours. You may choose to receive certain types of information in different ways—for example, urgent notifications by text message and all others by email. The options for receiving notifications are flexible and can be customized to your needs and preferences.

It is important to note that portal accounts are an option and are not required to receive offender notifications from TDCJ-VSD. You must have an email address to set up a portal account; however, you do not have to receive email notifications if you do not want them. A portal user guide is available at https://ivss.tdcj.texas.gov/portal-user-guide.

Prosecutors and their staff may use the IVSS system to enter VIS Activity Reports, register for parole notifications, submit HB 104 information to the TDCJ-VSD, request TDCJ to publish an event you are hosting, request training from TDCJ Victim Services staff, request Victim Impact Panels, and monitor this information from a dashboard.

VACs' role with IVSS

If you are a victim assistance coordinator (VAC) in a prosecutor's office, please provide crime victims a referral to IVSS or assist them in registering with IVSS after a defendant has been convicted. One way VACs may offer IVSS referral information is to have the TDCJ-VSD publication "Your Rights, Your Voice, Your Participation" available for handout. I carried a number of these brochures tucked away in my portfolio to hand out in the courtroom immediately after sentencing. These brochures may be given to each of the family members present at sentencing. If the family is not present, you can compose a post-conviction letter and mail the brochure to crime victims. You can find these brochures at www.tdcj.texas.gov/documents/Your_Rights_Your_Voice_Your_Participation_English.pdf.

Prosecutors, too, can be updated on custody status, expected release dates, and parole eligibility dates; see TDCJ inmate numbers; and look up information on what unit or facility an inmate is assigned to.

Prosecutor registration with IVSS

Prosecutors, too, can register with IVSS to be updated on inmates' custody status, expected release dates, and parole eligibility dates; to see TDCJ inmate numbers; and to look up information on what unit or facility an inmate is assigned to. For example, prosecutors can keep track of an especially dangerous inmate and receive advance notification when an offender enters the parole review process. Advance parole review status notification allows prosecutors to weigh in by submitting a written parole protest letter.

Additional portal features

Offender search. Use the offender search page to look for TDCJ-incarcerated or paroled offenders. Search by name, State Identification Number, or TDCJ number. Offender information includes the expected release date, age, unit, or parole office the offender is currently incarcerated in or reporting to, offender status (e.g., in custody, on supervision), and actual release date, if the offender was released.

My Dashboard. My Dashboard provides a list of offenders for whom you are registered, notifications that were sent regarding those offenders, and providers to which you have subscribed (more about subscribing to providers in the next section, "Texas Victim Resource Directory"). The "My Registrations" section allows you to modify your notification preferences. The "My Recent Notifications" section lists notifications already sent to you. You can open a notification to see what was reported and to stop phone calls in case you have forgotten your personal identification number.

Texas Victim Resource Directory. The Texas Victim Resource Directory is a compilation of nonprofit and governmental agencies that provide services to crime victims free of charge. The directory is searchable by crime type, services provided, organization type, geographic location, or organization name. You can make your search as broad or as limited as you need, but keep in mind that searching by multiple parameters will limit the number of results. Results are organized by local resources and statewide resources. You have the option of subscribing to a provider, which will save the organization's information on your dashboard. The "My Providers" section of the dashboard is a convenient place to compile the contact information for all of the service providers a victim is in contact with. The directory can be used by crime victims seeking assistance or by victim advocates and criminal justice professionals looking to connect a victim to resources. It is mobile-friendly so you may search with your cell phone on-scene or in your office, depending on the situation.

HB 104 Submission Forms. House Bill 104, passed during the regular session of the 85th Texas Legislature, created Code of Criminal Procedure Art. 2.023, which requires notification to a victim of serious felony offenses found in CCP Art. 42A.054, that his or her assailant has been charged with a new serious felony offense under Art. 42A.054. This notification requires collaboration between the TDCJ Victim Services Division and prosecutor offices.

On or before the 10th day after the defendant is indicted on a subsequent offense as described above, prosecutors must notify the TDCJ Victim Services Division of the offense charged in the indictment. The IVSS portal has an online submission form to comply with this legislation. Please note that the 86th Texas Legislature passed House Bill 2758, which expanded CCP Art 42A.054 to include Continuous Trafficking of Persons and Aggravated Promotion of Prostitution. Other HB 104-eligible offenses can be found at www.tdcj.texas.gov/documents/HB104_Eligible_Offenses.pdf.

Existing registrants. Individuals who were already receiving offender notifications from TDCJ VSD prior to IVSS will continue to receive notifications based on their prior preferences. Existing registrants who have an email address on file with VSD and an incarcerated or supervised offender, were sent an invitation code by email in June to create a portal account.

Before IVSS, registration for offender notification by TDCJ-VSD was done by victims and criminal justice professionals phoning TDCJ-VSD or when Victim Impact Statements and Confidential Information Sheets were included in offenders pen packets.

New registrants. Victims, criminal justice professionals, and victim advocates who were not previously registered for notification can create a portal account through the Sign In—Register form.

IVSS provides an additional tool for crime victims to access their rights to notification, to information, to be heard, and to participate in the criminal justice system. If you have questions re-

garding portal accounts, please contact the TDCJ-VSD office for assistance at 800/848-4284.

New app for DV victims

Hidalgo County Criminal District Attorney Ricardo Rodriguez, Jr. reports that his office is the first in the nation to unveil a new app that will provide more protection for victims of domestic violence.

Launched on October 1 during Domestic Violence Awareness Month, the Victim Initiated Notification (VIN) app allows victims of domestic violence to automatically send video clips, audio recordings, and their GPS location to law enforcement; victims can either send the images manually or, after 30 seconds, the app will automatically send an alert to the closest law agency. (Victims must first register with local law enforcement officials, who could then respond to an emergency.) When victims are in a crisis situation, they can use the app to send an alert to local authorities and emergency contacts. The app will livestream video of the victim's surroundings and GPS location, and it will also display a safety map for the victim, giving locations of supermarkets, coffee shops, or even police substations where the victim can run for safety.

Rodriguez reported that the Rio Grande Valley has experienced a significant uptick in domestic violence since shelter-in-place orders were imposed due to COVID-19. At least 1,200 cases of domestic abuse have been reported, the most ever at this point in the calendar year. Five people—four women and one man—have died as a result of domestic violence, and two McAllen police officers were killed while responding to a domestic abuse call in July. In addition, 213 people have been housed in a local shelter for victims of domestic abuse so far this year.

The app's pilot program, which runs through December 31, is paid for by a grant from the Texas Governor's Office, which administers the state's Violence Against Women's Act funding. The Texas Council on Family Violence, an Austin-based non-profit organization, joined Justice Alert Technologies with Hidalgo County to create the app.

More information on the VIN app is at www.safevictim.com, and a news article on it can be accessed at www.borderreport.com/health/new-domestic-violence-alert-app-being-piloted-in-south-texas-border-county.

Zoom consultations

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

If you would like to schedule a Zoom videoconference, please email me at Jalayne.Robinson@tdcaa.com. Many VACs across Texas are taking advantage of this free training! There are a couple of photos below of some of my recent calls.

Here is a Zoom FAQ link to review before we start: https://support.zoom.us/hc/en-us/articles/206175806-Top-Questions?zcid=1231.

Also, please check your system requirements for Zoom: an internet connection (broadband wired or wireless 3G or 4G/LTE); speakers and a microphone, either built-in, USB plug-in, or wireless Bluetooth; a webcam or HD webcam, built-in or USB plug-in, or an HD cam or camcorder with video capture card.

Please let me know how I may be of assistance to you and your office. ❇

BELOW: HaLeigh Cook, VAC in the Angelina County DA's Office. BOTTOM PHOTO: Ebonie Daniels, VAC in the Wichita County CDA's Office.

A warrant authorizes blood draws *and* analysis

"Get a warrant." We hear it all the time. If the police don't have consent or exigent circumstances, the Fourth Amendment requires them to get a warrant before conducting a search.

By Douglas Gladden (at left) and Joshua Vanderslice
Assistant Criminal District Attorneys in Dallas County

But when is a warrant not enough? If you've prosecuted a DWI case in the last two years, you've probably had to deal with this question. "Sure, the police had a search warrant to *draw* my client's blood," the defense attorney says, "but they didn't have a search warrant to *analyze* it!"

Depending on where you live, your judge has most likely replied with either, "Nice try. Motion to suppress denied,"[1] or "I hadn't thought of that. Even though the police had a warrant, this was a warrantless search. Motion to suppress granted."[2]

Which response is correct? On September 16, in *Crider v. State*, the Court of Criminal Appeals held that the correct response is, "Nice try."[3] When the police have a search warrant to draw a DWI suspect's blood, the Court held, the subsequent chemical test is a reasonable search under the Fourth Amendment.[4]

Crider and "the *Martinez* issue"

Robert Crider was arrested for DWI after police, responding to a 911 call reporting an erratic driver, encountered him and observed signs of intoxication.[5] The arresting officer got a search warrant to draw Crider's blood, and subsequent analysis showed he had a BAC of .19. The warrant, however, "did not explicitly authorize ... chemical testing" of the blood.[6] Crider asked the trial court to suppress the results of the analysis, arguing that it was a warrantless search because it wasn't expressly authorized by the search warrant.

To understand where Crider came up with that argument, recall *State v. Martinez*.[7] If you've read *Martinez* or even if you just read the fine article about *Martinez* that appeared in this journal last year,[8] you know the actual holding in the case: "We hold that there is an expectation of privacy in blood that is drawn for medical purposes."[9]

But in getting there, Judge Walker also wrote some unfortunate dicta: "When the State itself extracts blood from a DWI suspect, and when the State conducts the subsequent blood alcohol analysis, two discrete 'searches' have occurred for Fourth Amendment purposes."[10]

Seizing on this "two discrete searches" comment, Crider's attorney argued that two separate searches require two separate search warrants. The trial court, though, denied Crider's motion to suppress, and a jury convicted the defendant.[11] On appeal, Crider argued that, under *Martinez*, the trial court should have granted his motion to suppress because the State had only one warrant.[12]

While Crider's appeal was pending, this argument spread across Texas faster than a coronavirus in a convention hall.[13] In Corpus Christi, for example, defendant Richard Hyland argued that a "re-test" of his blood, performed nearly 19 months after his blood was drawn, was a separate search that required a separate search warrant.[14] Meanwhile, in Dallas, defendant Kristin Staton argued that a search warrant that commanded a peace officer to "search for, seize, and maintain as evidence ... blood" did not authorize testing that blood.[15] When the trial judge granted Staton's motion to suppress, it opened the floodgates in Dallas.[16]

The courts of appeals don't buy it

About the time the Dallas trial judges began declaring war on DWI search warrants, however, the San Antonio Court of Appeals decided *Crider*, holding that *Martinez* did not require a second warrant after all.[17] *Martinez*, the San Antonio court noted, dealt with a warrantless analysis of blood that had been drawn without a warrant for medical purposes.[18] "Here, in contrast," the court said, "the police obtained Crider's blood sample pursuant to a valid search warrant."[19] And because "common sense dictates that blood drawn for a specific purpose will be analyzed for that purpose and no other," the court "reasonably ... assume[d] that where the police seek and obtain a blood draw warrant in search of evidence of intoxication, the blood drawn pursuant to that warrant will be tested and analyzed for that purpose."[20] Thus, the search warrant authorized both the drawing and testing of Crider's blood.

The Corpus Christi Court of Appeals quickly followed suit in *Hyland* and—distinguishing "warrantless" search cases such as *Martinez*—held that a search warrant that instructs an officer to "search for, seize, and maintain as evidence ... blood" also authorizes testing that blood.[21] Earlier this year, in *Staton*, the Dallas Court of Appeals agreed.[22] So did the Fort Worth Court of Appeals and the First Court of Appeals in Houston.[23]

The Court of Criminal Appeals shuts down the argument

Meanwhile, Crider had taken his case to the Court of Criminal Appeals. He again argued that blood analysis is a separate search that must be "expressly" authorized by a search warrant.[24] The State responded with a five-fold argument:

1) *Martinez* doesn't control because there was no warrant in that case;

2) a search warrant authorizing a DWI blood draw "necessarily authorize[s] ... BAC testing" and therefore the test is a "reasonable" search;

3) analysis isn't a "search" because a DWI arrestee doesn't have a reasonable expectation of privacy in his BAC;

4) a valid blood search warrant diminishes any expectation of privacy the suspect may have in his BAC; and

5) *Martinez* was wrong.[25]

The Court of Criminal Appeals, in an 8-1 decision, affirmed the lower court's ruling. The majority opinion, by Judge Yeary, adopted the State's second argument and held that when a neutral magistrate has approved a search warrant for a blood draw based on probable cause to believe the suspect has committed DWI, the magistrate has "necessarily also made a finding of probable cause that justifies chemical testing of that same blood."[26] That's all that the Fourth Amendment requires, the Court held, so the analysis of Crider's blood was "reasonable."[27]

The Court also agreed with the courts of appeals that *Martinez* is distinguishable, reminding everyone that in *Martinez*, "it was not the State that extracted the blood in the first instance. Instead, the State obtained the already-extracted blood sample from a treating hospital and, without a magistrate's finding of probable cause, had that blood sample tested for intoxicants."[28] But when the State seizes the blood with a valid search warrant, the Court said, a magistrate has already found probable cause "to justify its seizure *for the explicit purpose of determining its evidentiary value to prove the offense* of driving while intoxicated."[29]

Crider—and the Texas Criminal Defense Lawyers Association—had made an alternative argument that a search warrant that didn't expressly authorize testing was an unconstitutional "general warrant."[30] Not so, the Court held: The warrant authorized testing for BAC; it didn't authorize any other testing (such as genetic testing) that wasn't supported by the magistrate's probable cause determination.[31]

While Crider's appeal was pending, this argument spread across Texas faster than a coronavirus in a convention hall.

What it means and what's still unanswered

The Court held that, under the Fourth Amendment, a search warrant that authorizes a blood draw based on probable cause also authorizes chemical testing of the blood so long as the testing is supported by the same probable cause. Unfortunately, the Court's holding isn't the final word.

First, the Court waffled on *why* the warrant justifies the blood analysis. While the Court had focused on the fact that the magistrate "necessarily ... made a finding of probable cause that justifies the chemical testing," it also noted in a footnote that high courts in several other states have held that the search warrant itself "necessarily authorizes" the blood test.[32] The Court concluded that this doctrinal distinction "is of no moment" because either way, there is a bright-line rule that chemical testing, when based on a

warrant justifying a blood draw for that very purpose, is "reasonable" under the Fourth Amendment.[33]

Second, this bright-line rule may be dimmer than we think. If a blood warrant is based on probable cause to believe the suspect is intoxicated on alcohol, can the police analyze the blood for other substances, such as marijuana or cocaine? Or, reverse that: If the warrant is based on probable cause to believe the suspect is high on marijuana, can the police analyze the blood for alcohol? The majority opinion could be read to support either answer to this question.[34]

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Third, *Crider* does not address consent. Consent cases will still turn on the voluntariness and scope of the consent, which the State must prove at the suppression hearing by clear and convincing evidence.[35] If you intend to rely on consent, focus on the language in the DIC-24 that specifically informs the arrestee that his or her blood will be tested for intoxicants.[36]

Finally, the Court's opinion is based only on the Fourth Amendment. Searches and seizures in Texas, however, are also subject to statutory requirements in the Code of Criminal Procedure.[37] For example, police ordinarily have three days to execute a warrant after it issues, and that period can be shortened by the issuing magistrate.[38] In DWI cases, where probable cause is especially time-sensitive, the magistrate may shorten the execution period to mere hours. If the analysis of the blood is a "search" authorized by the warrant, must the analysis be performed within the prescribed execution period?[39] The Dallas Court of Appeals has said "no"—under the Code of Criminal Procedure, the warrant is "executed" when the blood is drawn, not when it is analyzed.[40] The Court of Criminal Appeals may yet have to weigh in on that.[41]

So stay tuned. Despite *Crider*, we'll still be facing arguments that "the warrant wasn't enough." ❇

Endnotes

[1] See, e.g., *Crider v. State*, No. 04-18-00856-CR, 2019 WL 4178633 (Tex. App.–San Antonio Sept. 4, 2019), aff'd, – S.W.3d – (Tex. Crim. App. 2020); *Hyland v. State*, 595 S.W.3d 256 (Tex. App.–Corpus Christi 2019, no pet.); *Jacobson v. State*, 603 S.W.3d 485 (Tex. App.–Fort Worth 2020, pet. filed); *Hunt v. State*, No. 02-19-00264-CR, 2020 WL 3987995 (Tex. App.–Fort Worth Jun. 4, 2020, no pet. h.) (mem. op., not designated for publication); *Davis v. State*, – S.W.3d –, No. 01-19-00756-CR, 2020 WL 4354712 (Tex. App.–Houston [1st Dist.] Jul 30, 2020, no pet. h.).

[2] See, e.g., *State v. Staton*, 599 S.W.3d 614 (Tex. App.–Dallas 2020, pet. ref'd); *State v. Bocanegra*, No. 05-19-01148-CR, 2020 WL 3496353 (Tex. App.–Dallas Jun. 29, 2020, no pet.) (mem. op., not designated for publication); *State v. Jones*, – S.W.3d –, No. 05-19-00927-CR, 2020 WL 3867201 (Tex. App.–Dallas Jul. 9, 2020, no pet. h.); *State v. Giordano*, No. 05-19-00926-CR, 2020 WL 6110815 (Tex. App.–Dallas Oct. 16, 2020, no pet. h.) (mem. op., not designated for publication). Notice a pattern here?

[3] *Crider v. State*, – S.W.3d –, No. PD-1079-19, 2020 WL 5540130 (Tex. Crim. App. Sept. 16, 2020).

[4] *Crider*, 2020 WL 5540130 at *2.

[5] *Id*. at *1.

[6] *Id*.

[7] *State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019).

[8] See Clinton Morgan, "*Martinez v. State* is narrower than you may think," *The Texas Prosecutor*, Vol. 49, No. 3 (May–June 2019) at 8–10.

[9] *Martinez*, 570 S.W.3d at 291.

[10] *Id*. at 285 (citing *State v. Huse*, 491 S.W.3d 833, 840 (Tex. Crim. App. 2016).

[11] *Crider*, 2019 WL 4178633, at *3.

[12] *Crider*, 2020 WL 5540130, at *1–2.

[13] But seriously, wear a mask.

[14] *Hyland*, 595 S.W.3d at 261.

[15] *Staton*, 599 S.W.3d at 616.

[16] See *Bocanegra*, 2020 WL 3496353, *Giordano*, 2020 WL 6110815, and *Jones*, – S.W.3d –, 2020 WL 3867201 for just a few examples.

[17] *Crider*, 2019 WL 4178633 at *2–3.

[18] *Id*. at *2.

[19] *Id*.

[20] *Id*. (cleaned up).

[21] *Hyland*, 595 S.W.3d at 260–61.

[22] *Staton*, 599 S.W.3d at 617–18.

[23] *Jacobson*, 603 S.W.3d at 491–92; *Davis v. State*, 2020 WL 4354712, at *5.

[24] Appellant's Br. on the Merits, No. PD-1070-19, 2020 WL 1325510.

[25] State's Br. on the Merits, No. PD-1070-19, 2020 WL 1575737.

[26] *Crider*, 2020 WL 5540130, at *2.

[27] *Id*. *2–3.

[28] *Id*. at *3.

[29] *Id*. (emphasis added).

[30] See Appellant's Br. on the Merits, 2020 WL 1325510, & TCDLA amicus brief, No. PD-1070-19.

[31] *Crider*, 2020 WL 5540130, at *3.

[32] *Id*. at *2, fn.1 (citing *State v. Martines*, 355 P.3d 1111, 1115 (Wa. 2015); *State v. Frescoln*, 911 N.W.2d 450, 456 (Iowa Ct. App. 2017)).

[33] *Id*. at *2. Judge Newell, in a concurring opinion joined by three other judges, would have explicitly based the ruling on the magistrate's probable-cause determination to avoid the risk that the search warrant could become a general warrant given the right "type of evidence at issues and the probable cause supporting the seizure." *Crider*, 2020 WL 5540130, at *4 (Newell, J., concurring).

[34] This problem is best addressed in the search warrant affidavit. Our blood warrant affidavits in Dallas, which our warrants incorporate by reference, specifically mention that the purpose of the blood draw is to obtain a sample to test for alcohol and other intoxicating substances. So long as the affidavit contains sufficient facts for the magistrate to conclude that the suspect may be intoxicated by either alcohol or drugs, any analysis within that scope should be admissible given *Crider*'s focus on the magistrate's probable cause determination. If a DWI defendant invokes *Crider* to argue that the State cannot test for other drugs after a low BAC result, point out that such a test does not dispel the probable cause found by the magistrate.

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

[36] A complication is that consent can be revoked. *State v. Villareal*, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014). In *State v. Randall*, 930 N.W.2d 223 (Wis. 2019), the Wisconsin Supreme Court held that the State could analyze a consenting arrestee's blood notwithstanding her attempt to revoke consent between the draw and the analysis. But be careful relying on Randall. First, due to the unique politics and internal operating procedures of the Wisconsin Supreme Court, there is no majority opinion. Second, the outcome in Randall depended on the premise that a DWI arrestee has no further expectation of privacy against blood-alcohol testing once the specimen is legally drawn for law enforcement purposes. 930 N.W.2d at 233, 238 (opinion of Kelly, J.), 243–45 (Roggensack, C.J., concurring). In *Crider*, by contrast, the Court of Criminal Appeals reiterated that DWI arrestees retain an expectation of privacy in blood drawn for law enforcement purposes. 2020 WL 5540130, at *1.

[37] See Tex. Code Crim. Proc. Ch. 18.

[38] Tex. Code Crim. Proc. arts. 18.06, 18.07(a)(3).

[39] See Tex. Code Crim. Proc. art. 18.07(a)(3).

[40] *Jones*, – S.W.3d –, 2020 WL 3867201, at *2.

[41] Until that happens, make the argument that prevailed in Jones. See Section 3 of the State's Reply Brief, available at https://tinyurl.com/y68dw7eo. In short, "execution" as used in the warrant statutes means the seizure of the item named in the warrant, which in the case of a blood-draw warrant is the blood draw. No statute sets a deadline for the analysis, and a timely draw preserves in perpetuity the probable cause to believe the specimen contains evidence of DWI.

Two perspectives on the same COVID-era trial (cont'd from front cover)

what I thought. But on August 10, I did just that. Though there were plenty of novel challenges, the biggest surprise of all for me was that, on balance, it went pretty well.

In the past six months, most of us have become familiar with the rules. Most courts, mine included, shifted the entire docket to Zoom. We wear masks to buy groceries, stay 6 feet apart from other people, and avoid crowds. Applying these rules to jury trial seemed daunting.

Despite our best efforts to pick a more innocuous test case, we wound up trying an assault-family violence that was enhanced to a third-degree felony because of a previous conviction, plus a separate retaliation case that had been joined for trial. Both cases also had a repeat offender enhancement, so the defendant was facing up to 20 years in prison.

Originally, the defendant had severely beaten his girlfriend in 2018. Our case came from an incident in 2019 when, the day after being placed on probation for the 2018 assault, the defendant beat her even more severely for speaking out. He further threatened that if he wound up in jail for it, he would kill her.

Before the current case was on the trial docket, the defendant's misdemeanor probation was revoked for the maximum sentence, one year in county jail. As soon as he was indicted in late 2019 for the latter assault, the victim began calling our office repeatedly to ask if he was getting out and pleading with us to keep him locked up for fear of her safety. In the months of back-and-forth correspondence with the victim, I assured her that our office would not be offering probation and that, if need be, I would get it to trial fast enough to keep him from getting a chance at bond in the interim. At the time, the trial was set in March, and the defendant was to stay in the county jail until July 18. Plenty of time.

As it turned out, jury trials were canceled for March. Then they were canceled for April, May, and June. Despite facing as much as 20 years, the defendant refused even a generous seven-year plea offer. At that point, trial was the only option.

I cannot say for certain why this particular defendant and defense attorney were agreeable with going forward as the test case, but a few factors do come to mind. Citing the danger to the victim, I had won a significant bond increase to $20,000 in each of the two cases. The defendant refused to admit any guilt or take any pleas, holding firm to his belief that he was defending himself against the victim—against all evidence and in spite of a holding to the contrary at the revocation hearing. Put simply, the defendant thought he would win and didn't want to wait in jail for this whole COVID-19 thing to blow over.

The defendant wanted a trial, and I was prepared to give him one; the only remaining question was how? I never seriously considered a Zoom trial—for every practical, technological, and appellate issue an in-person trial would present, a remote trial would present even more. Beyond our trusting 12 jurors to figure out the technology, it seemed impossible to protect the defendant's rights without his appearing in person.

By that point, I am thankful that the pieces had begun to line up to make an in-person jury trial possible. Brown County was fairly average in terms of COVID-19 exposure in rural areas, and precautions were taken. Plexiglass shields surrounded the bench, the jury box, and the clerk's desk. Voir dire would be conducted at the Mims Auditorium, a roomy venue at Howard Payne University, blocks away from the courthouse, so potential jurors could stay socially distant.

The one-man tech department at our courthouse, Matt Krischke, set up cameras at the witness chair, bench, and gallery. These cameras, in conjunction with the webcams on counsels' tablets, broadcasted via Zoom into the county courtroom, which was set aside to allow viewers to watch the proceedings remotely.

The technology held up through the trial without issue. If there is a single piece of wisdom I gained from the experience, it's that you ought to make friends with your tech person. When in the heat of trial and not focused on technology, you will rely on that person to troubleshoot the many problems that can—and will—crop up.

The case itself, while not ideal, was reasonably suited to the challenge. I needed only six witnesses, and most were local law enforcement. The defense attorney was flexible about adjusting the usual procedure. It was a strong case on the merits, with good medical records and pictures of the victim's severe injuries.

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Including voir dire, the trial took four days. On Thursday afternoon, after deliberating just under an hour, the jury returned a guilty verdict. After a brief punishment hearing, the judge pronounced his sentence: 18 years. The verdict was as good as I could have asked for in normal times, let alone COVID-19 times.

Overall, the trial went better than I had expected. Compared to the myriad, unpredictable issues that can crop up in any trial, the ones in this case turned out to be manageable. Nothing but a jury trial could have resolved this case while also protecting the victim. Despite the difficulties of actually trying the case and the appellate litigation to come, I am confident that taking it to trial was the right choice. Nothing prevented us from reaching a good verdict.

Beyond simply resolving this case, being able to take cases to trial again has made the rest of the docket start moving again. While the one I tried remains an appellate concern, all the others it has helped move to plea present no such risk.

It will likely be well into 2021 before trials can go back to the way they used to be. While caution is surely due, trials are not impossible or infeasible. If your case is anything like this one, it's worth the extra work to try.

Elisha's perspective

Contrary to how it seemed from outside our office, at heart, I was not opposed to resuming jury trials. But the initial process of restarting trials involved significant discussion between myself, our district judge, and our elected district attorney, and those conversations wound up changing my perspective drastically.

Initially, I was excited to pick back up and go forward. I began strategizing the perfect case to present in the new formats we were considering. My primary concerns were finding a case without a victim (or with low risk to the victim) and ensuring that the COVID-19 modifications would not result in having a conviction overturned on appeal. My enthusiasm dropped when I realized that many of our concerns about procedures were summarily dismissed in these discussions. My hackles rose even more when I learned that we could be forced to accept these new procedures even over significant objections. I was concerned that we would be forced to try two serious felony cases, essentially blindfolded with both hands tied behind our backs.

Ultimately, I believe we did go to trial severely handicapped in several ways, but I also believe that it is a testament to the commitment of our office, my co-counsel, Alex, and some final accommodations granted by the trial judge that led to such a great outcome. At the time of writing this, our office has now successfully completed a second jury trial too. The hard work is paying off—but, from my perspective, it has been a very bumpy ride.

When we were discussing trial modifications to account for COVID-19, several suggestions were straight out of a prosecutor's nightmares. We were able to modify, change, or in some cases prevent those suggestions from being implemented. For example:

Socially distancing the defendant. The first, and by far the worst, COVID-19 trial modification we dealt with was socially distancing the defendant and the defense attorney. At the outset, plans were floated to have the defendant seated 6 feet away from his attorney in a plexiglass box.

When we asked how the defendant could adequately communicate with his counsel during trial, the suggestion was made that he be given a little flag to raise—à la Pancho's Mexican Buffet's "Raise the flag for a taste of Mexico!"—whenever he wanted to speak to his attorney. While I can only assume (and hope) that this suggestion was made in jest, the tenor of the conversation and the fact that this was the only solution being entertained for a while suggested otherwise.

It is easy to poke fun at the solutions proposed for this problem. However, the trial court was in an unwinnable situation: For safety purposes, social distancing was necessary, but for constitutional purposes, interaction had to be allowed. Ultimately, the court chose to resolve this conflict by requiring defense counsel and the State to put on the record that we voluntarily chose to sit next to the people at our counsel table and that we waived all liability the county may face if we contracted COVID-19. While I question the validity of such a waiver, I went along with this procedure because every other idea would have resulted in what seemed like almost certain reversal for violation of the defendant's constitutional right to communicate with his attorney.

Voir dire in an auditorium. Voir dire was the biggest area where we were handicapped. Being blindfolded is an accurate analogy given how difficult it was to observe jurors during the process.

When we were discussing trial modifications to account for COVID-19, several suggestions were straight out of a prosecutor's nightmares. We were able to modify, change, or in some cases prevent those suggestions from being implemented.

We were spread out so far across an auditorium that just seeing the jurors in the back was a challenge. Attempting to evaluate facial expressions behind a mask was excruciating as well. Jurors were required to wear masks at all times unless they were speaking. Masks prevented us from drawing on nonverbal facial expressions to cue follow-up questions or to make striking decisions.

Finding COVID-19 accommodations that did not deter jurors from speaking during voir dire was also a challenge. Each jury panel has its own character—some are talkative, some are crazy, and some are extremely quiet. The initial suggestion was to have jurors stand up, climb over other jurors to get to an aisle, walk to the front of the auditorium, and speak into a microphone. Our concern was if we had a panel that tended toward the quieter side, then this process would cause reluctant jurors to remain silent instead of engaging with us.

We prosecutors proposed a reasonable alternative that worked fairly well. Each attorney used a lapel microphone, and the attorneys were allowed to move into the well and aisles of the auditorium to get closer to jurors—as long as we ultimately kept 6 feet of space between us. The trial judge also allowed jurors to remove their masks while speaking. To assist the court reporter, get more feedback from other jurors, and help my co-counsel take notes, I repeated each panelist's answer into the lapel mic.

(That process worked far better than the method we used for the second jury trial, where the trial court changed the procedure with only a few minutes' notice. During this second trial, jurors were required to wear their masks at all times, even when speaking. Two people had been designated to walk around with a mic on a boom arm. A protective covering on the microphone had to be replaced every time someone spoke into it. The attorneys were stationed on the auditorium stage with a podium that they were instructed to remain behind. This process was agonizingly painful to watch and extended the time needed for voir dire dramatically. Even worse, because of the masks, jurors' comments were frequently unintelligible, even with the microphone. I spent most of the voir dire leaning over to another prosecutor asking, "What did they say?" Given a choice between these two options, I prefer the first method. While it had its drawbacks, it functioned far better than the second.)

The judge's office, staff, district clerk staff, and bailiffs all had to make a lot of adjustments as well. While we helped them sort through some of them, the only issue directly relevant to us was the number of jurors who appeared. The district clerk's office summoned more jurors than it typically would. After some people were dismissed during the COVID-19 screening process, we wound up with far fewer panelists than we usually would have, even despite the large number of summons.

Amy Ray's quote comes to mind again here, that perspective probably depends a lot on where you live. If a judge will allow people to remove their masks while speaking, the odds of being able to adequately communicate with jurors will go up. Also, for rural jurisdictions, there are ways to intelligently exercise strikes even without having all of the normal tools of voir dire at one's disposal. Our district attorney has lived and practiced in this jurisdiction for over 20 years, and I have lived and practiced here for 12. Between the two of us, we were able to identify numerous jurors either through personal knowledge or reputation. Although we aren't always able to recognize so many people, we have been lucky for these first two trials.

One alteration to a typical voir dire in the first trial also helped us identify several jurors with significant issues. I wrote a special section of questions to ask jurors if any of them would have trouble responding to questions in the unusual environment and built-in methods for jurors to respond without having to speak. To my surprise, we got a lot of responses and feedback with critical information.

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Monitoring the courtroom. Adaptation to the trial differences was far less drastic than rethinking most of our voir dire strategies. However, there were some noticeable bumps here as

well. We were able to use our regular courtroom to keep us on familiar ground. Many of the adjustments we made were specific to our courtroom, but a few things have some universal application.

The first thing Alex and I realized suddenly as the trial was beginning was that we had no ability to monitor the courtroom to make sure no witnesses intentionally or inadvertently violated The Rule. Because the trial was being streamed into a completely different courtroom, neither one of us could watch the audience. We ultimately had to send our victim-witness coordinator, Stephanie Crosson, down to that other courtroom for the duration of the trial to monitor who came in and out.

Objections. Objections also looked far different in our plexiglass-filled courtroom. Approaching the bench was pointless—if we spoke loudly enough for the judge to hear us, all of the jurors heard the entire conversation as well. Every bench conference thus involved us trooping through the courtroom to the judge's chambers. We wound up with fewer objections than usual because of this process, probably in part because the defense attorneys in both of our trials have very laid-back styles and typically do not object much.

Although there were no negative repercussions outside of feeling ridiculous and going more slowly than usual, this area concerns me for the future. How will trials with defense attorneys who are more aggressive in style affect the pace of evidence and our ability to present it effectively? Will fewer objections lead to more ineffective assistance claims?

Quarantining jurors. We never had to deal with a juror being quarantined because of COVID-19 exposure. However, just a few days before the trial, we realized a large risk that was never fully addressed. If a juror becomes aware that he or she has been exposed to COVID-19 and should quarantine, what should happen to the trial? Does everyone need to quarantine? Do we excuse the one juror and continue the trial? Is there a conflict between the standards for determining when a juror becomes disabled under Article 36.29 of the Code of Criminal Procedure and the current quarantining protocols?

We did not have to deal with this issue, but we did convince the trial judge that an alternate was critical in case the issue arose. We probably could have convinced the judge that two alternates would be a good idea if we could have found room to socially distance them.

The lack of a record. Given our successful trial record during COVID-19, the unanswered question now looming is how creative appellate attorneys will attack what we did. Throughout the entire process of getting ready for an in-person trial, this was my primary concern. I did not doubt Alex's abilities to flex through all of the accommodations we were making, but we flexed and adapted with very little caselaw to guide us or the trial judge.

In anticipation of an appeal, I asked repeatedly to have a record made—if not of the entirety of the informal meetings or dress rehearsals held by the trial judge, then at least a summary of what was discussed once we went on the record. Defense counsel was always notified of the informal meetings and participated in several of them. Many of the accommodations that were made were at defense counsel's specific request or with no objection from the defense. However, almost none of that ever made it on the record despite our office attempting to create a record as often as possible.

Conclusion

It is too soon yet to know what effect any of these bumps will have on the appeals. We hope they won't matter, but it's certainly true that your perspective depends not only on where you live but also on what issues are raised by the defendant's appellate attorney.

The two of us certainly have different perspectives on how this trial went. Neither perspective is wrong, and in this brave new world of coronavirus-modified trials, we need both. Our strength as prosecutors will come from balancing the unqualified optimism of our young attorneys with the cautious planning of our experienced attorneys. Elisha needs Alex to remind her how successful this trial was, and Alex needs Elisha's reminder of the risks we face on the next trial and the appeal in this case. ❇

Although there were no negative repercussions outside of feeling ridiculous and going more slowly than usual, the area of objections concerns me for the future. How will trials with defense attorneys who are more aggressive in style affect the pace of evidence and our ability to present it effectively? Will fewer objections lead to more ineffective assistance claims?

Hate crime enhancements

We're the good guys. (Just ask us—we'll tell you all about it!)

By Jason Bennyhoff
Assistant District Attorney in Fort Bend County

Part of a prosecutor's duty to seek justice includes rooting out injustice, such as those based on bias or prejudice against vulnerable members of our society.

The legislature has explicitly recognized that duty by making available punishment enhancements where offenses are committed based on a defendant's bias or prejudice against protected classes. This article provides a primer on the availability and applicability of these enhancements.

What's the rule?

The Texas Code of Criminal Procedure empowers the State to seek an affirmative finding that an offense was committed because of bias or prejudice.[1] This affirmative finding can apply not only to offenses against persons but also to certain property crimes.[2] Where the factfinder makes an affirmative finding that an offense was committed because of bias or prejudice, the punishment for the offense is enhanced.[3]

Affirmative findings that an offense was committed based on bias or prejudice may be made in offenses under Title 5 of the Texas Penal Code (Offenses Against the Person) and the following property crimes: Arson (§28.02); Criminal Mischief (§28.03); and Graffiti (§28.08).[4] It should be noted, however, that §12.47(a) specifically excludes injury to a disabled individual under §22.04 from a hate crime enhancement.

What classes are protected?

Bias or prejudice enhancements can be sought where the defendant selected a person or his or her property to victimize based on the defendant's bias against "a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference, or by status as a peace officer or judge."[5] The Code of Criminal Procedure defines "sexual preference" to include "a preference for heterosexuality, homosexuality, or bisexuality."[6]

The Code of Criminal Procedure does not explicitly require that the victim of the offense be a member of the protected class, but rather that the defendant's actions were motivated by his bias or prejudice against a protected class.[7] As such, it is conceivable that the State could seek (and a factfinder could make) an affirmative finding that an offense was committed based on bias or prejudice where the victim was not a member of a protected class, but that the defendant nonetheless targeted the victim based on his bias or prejudice against a protected class (for instance, in a scenario where a defendant targeted a racial justice activist based on the defendant's bias against the racial classes on whose behalf the victim was advocating, or where the defendant perceived the victim to be a member of a particular race but was incorrect[8]).

What's the burden of proof?

The judge or jury must find beyond a reasonable doubt that the offense was committed based on bias or prejudice.[9] When seeking an affirmative finding of bias or prejudice, prosecutors must establish facts sufficient to support the verdict in this regard beyond a reasonable doubt because anything that increases the defendant's criminal liability must be proven beyond a reasonable doubt and explicitly decided by the factfinder in its verdict under the *Apprendi* doctrine.[10]

Prosecutors also must prove a causal nexus between the defendant's bias or prejudice against the protected class and the commission of the offense.[11] This causal relationship may be proven up by circumstantial evidence, such as racial epithets aimed at the victim.[12]

Enhancements

The affirmative finding that an offense was committed based on bias or prejudice is to be made at the guilt-innocence phase of trial.[13]

With the exception of Class A misdemeanors and first-degree felonies, if the factfinder makes an affirmative finding that the offense was committed because of bias or prejudice under Art. 42.014 of the Code of Criminal Procedure, the punishment for the offense is increased to the punishment for the next higher category of offense (for example, a second-degree felony punishment range would be increased to a first-degree felony punishment range).[14] The sentencing judge may also require a defendant to attend an educational program designed to further tolerance and acceptance of others.[15]

In the case of a Class A misdemeanor, the minimum punishment is increased to 180 days' confinement in the county jail.[16]

Oddly, this statute does not mandate an increased punishment range or mandatory minimum imprisonment for first-degree felonies.[17] Consequently, the prosecutor might well be better off not seeking a hate crime enhancement for a first-degree felony, even if the prosecution has the facts to prove one up, because it will necessarily create another point of contention at trial and another element that must be proven beyond a reasonable doubt, without the benefit of an enhanced punishment.

Additionally, the Penal Code allows prosecutors to seek assistance from the Attorney General's Office in investigating or prosecuting offenses committed because of bias or prejudice.[18]

Conclusion

It is incumbent on us prosecutors to do justice and seek to create a more just and equitable nation. We do this every day as we seek just results in our cases and seek to protect the vulnerable members of our society. Enhancements based on bias or prejudice are a valuable tool in a prosecutor's pursuit of justice, and I hope this article provides useful information regarding how and when to seek such enhancements. Please feel free to contact me if I can be of any assistance. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 42.014(a).

[2] *Id*. (allowing affirmative finding that offense was committed because of bias or prejudice where the victim's property was selected for damage based on the defendant's bias).

[3] Tex. Pen. Code §12.47.

[4] Tex. Code Crim. Proc. Art. 42.014(a).

[5] *Id*.

[6] Tex. Crim. Code Proc. Art. 42.014(c).

[7] Tex. Code Crim. Proc. Art. 42.014(a).

[8] See *Martinez v. State*, 980 S.W.2d 662, 666 (Tex. App.–San Antonio 1998, pet. ref'd) (evidence was sufficient to support finding that offense was committed against victim based on defendant's bias or prejudice against African-American race where defendant associated victim with that race even though victim was not actually African-American), habeas corpus relief granted by No. AP-76,332, 2010 WL 1697556 (Tex. Crim. App. Apr. 28, 2010) (mem. op., not designated for publication) (remanded for new punishment trial on grounds hate crimes enhancement was not submitted to the jury in violation of *Apprendi*).

[9] *Id*.; *Ex parte Boyd*, 58 S.W.3d 134 (Tex. Crim. App. 2001).

[10] *Id*.; *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[11] Tex. Code Crim. Proc. Art. 42.014(a), mandating that the finding shall be entered where the trier of fact determines beyond a reasonable doubt that the defendant intentionally selected the victim or the victim's property because of the defendant's bias or prejudice; see *Jaynes v. State*, 216 S.W.3d 839, 846 (Tex. App.–Corpus Christi-Edinburg 2006, no pet.) (the State must prove a causal connection between the defendant's infliction of injury and his bias or prejudice in order for the hate crime enhancement to apply).

[12] *Jaynes*, 216 S.W.3d at 846.

[13] *Id*.

[14] Tex. Pen. Code §12.47(a).

[15] Tex. Code Crim. Proc. Art. 42.014(b).

[16] *Id*.

[17] *Id*.

[18] Tex. Pen. Code §12.47(b)–although such assistance is generally available even without a specific statute like this.

Oddly, this statute does not mandate an increased punishment range or mandatory minimum imprisonment for first-degree felonies. Consequently, the prosecutor might well be better off not seeking a hate crime enhancement for a first-degree felony.

How to spend discretionary funds

The time has come for an update on the laws governing expenditures of hot check and asset forfeiture funds.

By Monica Mendoza
TDCAA Research Attorney in Austin

The last update was in 2013,[1] and while the hot check provisions have essentially remained the same, several things with discretionary funds have changed. Below is a brief review of the rules governing hot check funds and a highlight of some of the most important asset forfeiture fund changes.

Hot checks

There are no significant changes to report regarding hot check fund administration. Code of Criminal Procedure Art. 102.007 provides that a county attorney, district attorney, or criminal district attorney whose office collects and processes hot checks and sight orders may collect a reimbursement fee from any person who is a party to the offense not exceeding:

- $10 if the face amount of the check or sight order does not exceed $10;
- $15 if the face amount of the check or sight order is greater than $10 but does not exceed $100;
- $30 if the face amount of the check or sight order is greater than $100 but does not exceed $300;
- $50 if the face amount of the check or sight order is greater than $300 but does not exceed $500; and
- $75 if the face amount of the check or sight order is greater than $500.[2]

The reimbursement fees must be deposited in the country treasury in a special fund to be administered by the attorney for the State. Expenditures from this fund are at the sole discretion of that attorney and may be used only to defray the salaries and expenses of the prosecutor's office, but in no event may the attorney supplement his or her own salary from this fund.[3]

In addition to collecting a reimbursement fee, the attorney may collect a processing fee (a maximum of $30)[4] for the benefit of the check holder. However, keep in mind that while a processing fee may be collected, the attorney for the State may not charge a processing fee to a drawer or indorser if a reimbursement fee has been collected under Code of Criminal Procedure Art. 102.007(e). If a processing fee has been collected and the holder later receives a reimbursement fee collected under Art. §102.007(e), the holder must immediately refund the fee previously collected from the drawer or indorser.[5]

The rules governing expenditures of hot checks have not changed since our last update. The elected prosecutor still retains sole administrative discretion over the hot check fund and need not get commissioners court approval before making expenditures.[6] However, that is not to say the fund is free from all county oversight. The fund is still subject to audits by the county auditor,[7] and all interest that accrues on the account must be severed from the principal for the benefit of the county.[8] Any overages in a hot check fund go first to the defendant who paid it; then it escheats to the State if the defendant can't be found.[9]

Most hot check expenditures guidelines come from Attorney General opinions, but prosecutors still proceed at their own risk when abiding by those opinions. They are purely advisory, and while they may be helpful, they have no legal force or effect. For a quick review on determining how to spend hot check funds, see the chart on the opposite page.

Asset forfeiture funds

The legislature made several changes in 2013 to provide additional guidance on how proceeds or property received under Code of Criminal Procedure's Chapter 59 can be used. The main purpose behind these additional subsections was to elim-

Hot check fund expenditures

Can I use hot check fund proceeds to ...	Yes or no	Authority
Defray the salaries and expenses of the prosecutor's office?	Yes	JM-313 (1985)
Pay for employee parking as additional employee compensation?	Yes	JM-313 (1985)
Pay State Bar dues for assistants as additional employee compensation?	Yes	JM-313 (1985)
Make an employee a notary public if the office needs one?	Yes	JM-313 (1985)
Pay CLE costs if the program is substantially related to the office's "official business?"	Yes	JM-313 (1985)
Pay college tuition on courses to train the employee for a different position or additional duties that are part of the office's official business?	Yes	JM-313 (1985)
Reimburse for official business travel?	Yes	JM-313 (1985)
Pay to conduct a formal educational or training program at a retreat?	Yes	JM-313 (1985)
Pay for computerized security devices?	Yes	JM-313 (1985)
Pay for office furniture, carpet, office supplies, and equipment?	Yes	JM-313 (1985)
Hire an investigator without commissioners court approval if the salary is paid entirely by the fund?	Yes	JM-738 (1987)
Pay salary supplements without the commissioners court reducing an employee's salary to offset the hot check increase?	Yes	JM-313 (1985)
Pay assistants' employment taxes on salary supplements?	Yes	JC-0397 (2001)
Sponsor a children's book related to the attorney's official business?	Yes, if no other law prohibits it	GA-0475 (2016)
Pay for general college education?	No	JM-313 (1985)
Supplement the salary of the elected prosecutor?	No	JM-313 (1985)
Reimburse restitution to a merchant out of the hot check fund?	No	JC-0168 (2000)
Pay a multi-year contract such as a car loan?	No	GA-053 (20030

inate the need for frequent requests for Attorney General opinions about expenditures.

One of those major changes was adding Art. 59.06(d-4), which governs expenditures for prosecutors. Under Art. 59.06(d-4), attorneys representing the State may use proceeds or property "for an official purpose of an attorney's office." Comparably, the legislature also added Art. 59.06(d-3), which governs how law enforcement agencies may use proceeds received under Chapter 59. Under Art. 59.06(d-3), any expenditure is considered to be for "law enforcement purposes" if it is made for an activity of a law enforcement agency relating to the criminal and civil enforcement of state law. While these two provisions may look similar, they are not identical. For the purpose of this article and the chart on page 25, we will focus of some of the most important asset forfeiture fund uses related to prosecutors only.

Under Art. 59.06(d-4), an expenditure for "an official purpose of" a prosecuting attorney's office is for an activity that relates to the preservation, enforcement, or administration of state laws, including equipment, supplies, prosecution- and training-related travel expenses, conferences and training expenses, investigative costs, crime prevention and treatment programs, facility costs, legal fees, and State Bar and legal association dues.

Despite the long list of examples in this new

Despite the long list of examples in this new subsection, they are still only general lists. Nothing in (d-4) prohibits expenditures not listed in those subsections.

subsection, they are still only general lists. Nothing in (d-4) prohibits expenditures not listed in those subsections; the subsections merely say that the listed items within *are* a permissible expenditure. As long as an elected prosecutor's expenditure of forfeited funds "relates to the preservation, enforcement, or administration" of a state law, "the fact that a particular expenditure is omitted from the examples listed in Art. 59.06(d-4) is not dispositive."[10]

Perhaps the only true substantive change can be found in subsection (d-4)(7), which explicitly authorizes expenditures for "facility costs, including building purchases." This would seem to overrule the conclusion of Attorney General Opinion GA-0613 (2008), which said that a district attorney could not use asset forfeiture funds to help purchase a juvenile detention facility for a county. With the inclusion of "building purchases" in (d-4)(7), an expenditure like that may now be acceptable because such a facility is related to administration of the Juvenile Justice Act.

Finally, in 2019, the legislature added Article 59.06(t), which requires property and proceeds obtained in connection with certain human smuggling, human trafficking, and prostitution offenses to be used to provide services to victims of those offenses, either directly or through a contract with a local nonprofit. For more specific examples of permissible and impermissible uses of these funds, see the full chart on the opposite page.

Conclusion

With the addition of the changes in 2013 and no significant changes to the hot check fund administration, determining how to spend hot check or asset forfeiture funds should be a bit easier. Remember that you can always call the association at 512/474-2436 with questions you may have. We are here to help! ❇

Endnotes

[1] Former TDCAA Research Attorney Markus Kypreos wrote the original article on asset forfeiture and hot check funds in 2005; Sean Johnson and Lauren Owens brought you updates in 2008 and 2013, respectively.

[2] Tex. Code Crim. Proc. Art. 102.007(c).

[3] Tex. Code Crim. Proc. Art. 102.007(f).

[4] Tex. Bus. & Com. Code §3.506.

[5] Tex. Bus. & Com. Code §3.506(c).

[6] Op. Tex. Att'y Gen. JM-0313 (1985).

[7] Op. Tex. Att'y Gen. GA-0053 (2003); Tex. Loc. Gov't Code §115.032.

[8] Op. Tex. Att'y Gen. JC-0062 (1999); Tex. Loc. Gov't Code §113.021(c).

[9] Tex. Loc. Gov't Code §114.002.

[10] Op. Tex. Att'y Gen. KP-0200 (2018).

Asset forfeiture expenditure chart

Can I use asset forfeiture funds proceeds ...	Yes or no	Authority
To maintain, repair, use, and operate property for official purposes?	Yes	CCP Art. 59.06(b)
To pay bonuses or increase salaries in the prosecutor office?	Maybe	CCP Art. 59.06(d-1)(7); JM-1253 (1990) said this was allowed, but payment must be contingent upon commissioners court approval. Bonuses are prohibited unless approved as part of a salary before services are rendered. Tex. Const. Art. III, §53
To contribute to political campaigns; donate to an entity (other than one described in CCP Art. 56.06(d-2)); pay for judicial training or education; pay travel expenses related to attendance at training or education seminars if the expenses violate generally applicable restrictions established by the commissioners court; buy alcoholic beverages; spend money not approved by commissioners court if the official is a "lame duck"; or increase salary, expenses, or allowances without commissioners court approval?	No	CCP Art. 59.06(d-1)
To donate to an entity that assists in detection, investigation, or prosecution of a crime or abuse; provides mental health, drug, or rehabilitation services or services for victims or witnesses or crime; or provides training or education related to the above duties?	Yes	CCP Art. 59.06(d-2)
For equipment, including vehicles, computers, visual aid equipment for litigation, firearms, body armor, furniture, software, and uniforms?	Yes	CCP Art. 59.06(d-4)(1)
To pay for supplies, including office supplies, legal library supplies and access fees, mobile phone and data account fees for employees, and Internet services?	Yes	CCP Art. 59.06(d-4)(2)
To pay for prosecution- and training-related travel expenses, including payment for hotel rooms, airfare, meals, rental of and fuel for a motor vehicle, and parking?	Yes	CCP Art. 59.06(d-4)(3)
To pay for conferences and training expenses, including fees and materials?	Yes	CCP Art. 59.06(d-4)(4)
To pay for investigative costs, including payments to informants and lab expenses?	Yes	CCP Art. 59.06(d-4)(5)
To pay for crime prevention and treatment programs?	Yes	CCP Art. 59.06(d-4)(6)
To pay for facility costs, including building purchase, lease payments, remodeling and renovating, maintenance, and utilities?	Yes	CCP Art. 59.06(d-4)(7)
To pay for legal fees, including court costs, witness fees, and related costs, including travel and security, audit costs, and professional fees?	Yes	CCP Art. 59.06(d-4)(8)
To pay for State Bar and legal association dues?	Yes	CCP Art. 59.06(d-4)(9)
To pay for the district attorney's legal defense?	No	GA-0755; but see Gov't Code §41.012 (may use forfeiture funds to purchase liability insurance)
To purchase property insurance protecting real property that is subject of an appeal from a forfeiture judgment?	Yes	KP-0200 (2018)
To use property and proceeds obtained in connection with certain human smuggling, human trafficking, and prostitution offenses to provide services to victims of those offenses, either directly or through a contract with a local nonprofit?	Yes	CCP Art. 59.06(t)

Starting out ahead with an opening statement

There are millions of ways to draft an opening statement—there is no single right way to do it. It is the State's first opportunity to tell the story of our case.

By Hilary Wright
Assistant Criminal District Attorney in Dallas County

For example, a prosecutor could open a murder trial with the following:

"In October of 2018, Amanda was dropping her boyfriend off at his house when an SUV pulled up and three men jumped out. One of the men, the defendant, pointed a gun at her boyfriend and demanded his money and phone. Scared, he handed over the items and bolted toward his house.

"Afraid for her own safety, Amanda floored the accelerator and took off down the street, but not before the defendant raised his gun over the roof of her car and fired a warning shot as she drove away. That bullet travelled down the street and straight into Victor, an innocent man standing in his neighbor's front yard. Victor never uttered a word as his body slumped to the ground and his blood spilled out onto the cool pavement. The neighbor ran to get Victor's wife, who left their young children in the house and ran across the street to hold her dying husband.

"As the tragic end of Victor's life unfolded, the defendant was hunting yet another victim to rob. Several neighborhoods away, the defendant and his friend spotted Clyde waiting for his withdrawal at a drive-up ATM. They approached Clyde, guns drawn, and demanded his phone and the cash—which Clyde needed to pay for his child's daycare. When they ran off, Clyde drove after them—all he could think of was getting his money back. He came to his senses when people in the defendant's SUV began shooting at him.

"Later, the defendant confessed to his violent acts, but nothing could save Victor's life or undo the tragedy that befell his young family. When this trial concludes, I will ask you for justice, and you will know that the just verdict is finding the defendant guilty."

This example is from one of my jury trials that involved four crime scenes, four crime victims, and one deceased person. I had to figure out how to make this jumbled mess of facts cohesive for the jury—some of the crimes were unfolding at the same time, and there were so many players involved. I employed a few tactics that I've learned from colleagues over the years to craft a cohesive roadmap to give the jurors the best guide to their inevitable guilty verdict. I share these techniques now with my fellow Texas prosecutors.

What the law says

The Code of Criminal Procedure lays out what is expected in an opening statement: "The State's attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the State in support thereof."[1] It is not required that we make an opening statement, and if the prosecution waives it, the defense cannot give one at that time either.[2] (Waiving the opening statement might be a strategy prosecutors employ to keep the jury from hearing the defendant's side of the story before testimony begins.) It is a statement of facts, not an argument, but that doesn't mean that what prosecutors say cannot be persuasive.[3]

Provide a roadmap

The opportunity for an opening statement is a gift to the prosecutor. This is the moment to tell jurors what happened and why they will find the defendant guilty at the end of the trial. At this point all jurors think they know generally what the case is about from the issues discussed in voir dire. The jury is expectant after hours of jury selection, and they are ready to know what really happened. The State gets to go first, and opening statement is one of at least three times that jurors will hear the facts of the case (the second is in testimony, and the third in closing arguments). Don't ever be afraid to get up and give the jurors what they want: a preview of the State's case.

In any given case, there may be different characters, different crime scenes, and different legal issues that will arise, but we don't need to give jurors every detail or provide a list of witnesses during opening statement. Moreover, what prosecutors say in opening statement does not need to track in a timeline with the witness lineup. This part of the trial lays out the structure of a case, to act as a guide for the jurors to follow. When the testimony begins, jurors should be able to fill in the gaps with the details to get the full picture by the end of the trial.

You will note in the example from that murder trial, I did not use more than three names of the people who were involved in my case. I did not discuss who would or would not be testifying and in what order. Opening statement was not the time for details about what the medical examiner found or how all of the evidence was pieced together by the detective. The place for that is testimony. The jurors will hear that evidence from the witnesses and slide the information neatly into the space left open for them as they follow the plots on the map.

Tell a story

The No. 1 piece of advice that I got from my mentors (and continue to pass down to younger prosecutors) is to tell a story with the opening statement. We live in a world where there is an expectation, whether conscious or not, to be entertained by something we are watching. More than that, though, is the way our brains have been trained to process information. It is easier for people to understand and recall information if it is told in a story. A trial might last for a week. If prosecutors want the jurors to recall anything, we want them to remember that the evidence syncs up with what *we* said in opening statement.

There are different ways to present a story, and it should be tailored to the case. Some cases are heavy on legal issues, while others will come down to factual disputes. I like to craft my opening statement like I'm going to tell my mom about the case. I don't want to weigh her down with legal issues—she was a kindergarten teacher after all, but she loves old Western movies and a good mystery too.

In the murder trial example, I started out by introducing Amanda so that the jury would understand the everyday task she was doing—dropping her boyfriend off at home after grocery shopping—when they were ambushed. I didn't have to point out that their afternoon started out mundanely or that the crime could have happened to any one of us—jurors got that from the facts themselves. The story takes them down to the innocent man talking with his neighbor, another mundane and everyday task. My words are telling the story, but the facts are screaming, *"This could have been you!"*

Jurors will go numb and space out if a prosecutor stands in front of them and gives a monologue listing the witnesses and what each one will say. What to avoid: "First, you will hear from Willie Witness, who will tell you blah blah. Next, you will hear from Violet Victim who will say this part. Then you will hear from Eddie Expert, who will tell you yada yada." Snooze! The jury will have already forgotten the names of the witnesses and have no idea the role they played in what happened. If the fact pattern is convoluted, the evidence will be heavily dependent on experts, or the victim is known to the community, remember that you can use evidence (such as photos) during opening statement.[4] Doing so can keep the jurors' attention and help you get through a rough explanation of the case. A timeline, diagram from an expert, or the photo of a well-known or especially sympathetic victim can hold the focus of even the sleepiest of jurors.

Keep it simple

It is important in this phase of trial not to get too bogged down in the details. Remember that it is OK to let some things come out in testimony. You are presenting an *outline* of the case in opening statements, not arguing the minutiae. You do not need to use everyone's names in this story—in fact, sometimes it is better to describe the witnesses by their relationships to the main charac-

The opportunity for an opening statement is a gift to the prosecutor. This is the moment to tell the jurors what happened and why they will find the defendant guilty at the end of the trial.

ter or by their roles in the story. In a kidnapping case, there may be the defendant, Dexter, and the victim, Vicky, but other important characters, such as The Witness, The Wife, or a Second Victim, don't need personalization yet. Simplifying tells the story without the jury worrying about remembering the names and identities of witnesses and how they relate to the story. Let them focus on the facts, not the names.

In my murder trial opening, the name of Amanda's boyfriend was irrelevant at that point because I wanted jurors to focus on Amanda and the man who shot the gun at her (the defendant). It's that action, that bullet, that killed Victor, and I wanted the jury to mentally follow that bullet down the street. Jurors learned the boyfriend's name later and that he was a victim of robbery, but in the opening statement, he was just a supporting actor and did not feature in the murder itself.

With regard to the length of an opening statement, the judge is the time-keeper. He or she will tell the State how long opening statement can be. Cases with multiple counts or indictments and death penalty cases may get longer time limits than other cases. Keep in mind, though, that the industry standard for a movie trailer is two minutes and 30 seconds[5]—that might be a good gauge for our own opening statements. Telling the story in our sample case took less than five minutes to lay it all out, and a concise delivery makes it easier for the jury to recall. The roadmap is set and the jurors know exactly what to expect. Of course, I cannot take all the credit, as the case itself is a compelling story, and it's memorable because it is true and tragic.

Which brings up another good thing to remember. Prosecutors may forget the importance of an opening statement when they are set to try yet another DWI case and the facts are "plain vanilla"[6]—just like the trial from last week and the one from the week before. We prosecutors may be dulled by the monotony of the testimony about how many clues there were in the Walk-and-Turn test, but remember that the citizens of the community who are sitting on the jury are not jaded like we are. This is the only DWI case they might ever hear about. They may have never stepped foot in a courtroom before. If we can give them a memorable roadmap for where the testimony will lead them, then we already have a leg up before the officer takes the stand.

Jurors will go numb and space out if a prosecutor stands in front of them and gives a monologue listing the witnesses and what each one will say. What to avoid: "First, you will hear from Willie Witness, who will tell you blah blah. Next, you will hear from Violet Victim who will say this part. Then you will hear from Eddie Expert, who will tell you yada yada." Snooze!

Conclusion

Opening statements can be a powerful part of a jury trial. The State goes first—an advantage in itself[7]—and we lay the foundation for how the entire trial will unfold. When the testimony or evidence syncs up with the roadmap we give in opening, there is a mental click with the jurors that the information is true because they have heard it before: from the prosecution during opening statement.

Now that we've set the tone for the trial, let's call our first witness. ❇

Endnotes

[1] Tex. Code Crim. Proc. Art. 36.01(a)3.

[2] "If a prosecutor waives opening statement at the beginning of trial, the defendant does not have the right to make an opening statement right then." *Moore v. State*, 868 S.W.2d 787 (Tex. Crim. App. 1993). The defendant can still give his at the opening of his case after the State rests; see Code Crim. Proc. Art. 36.01(b).

[3] "Opening argument is not really an argument–it's more like a guidepost or pathway." *U.S. v. Dinitz*, 424 U.S. 600 (1976).

[4] No statute or rule prohibits a party from using physical evidence or demonstrations during opening statement. See *Fisher v. State*, 220 S.W.3d 599 (Tex. App.–Texarkana 2007, no pet.)(State's use of photos of victims during opening statement harmless when photos were later admitted at trial).

[5] The Motion Picture Association of America mandates a time limit of two minutes and 30 seconds for a theatrical trailer. Yes, I Googled it.

[6] Which happens to be my favorite flavor.

[7] You may have studied the "primacy effect" if you took a psychology class before law school. The primacy effect, in psychology and sociology, is a cognitive bias that results in a subject recalling information presented earlier better than information presented later on.

~~A frog~~ Everything is a deadly weapon

There is a long-running thread on the TDCAA user forums entitled "A Frog is a Deadly Weapon."[1]

By Benjamin I. Kaminar
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Over the years, prosecutors from around the nation have collected and shared cases and stories with unusual weapons. In the end, dozens of pages memorialize defendants' violent creativity. Of course, the more creative the defendant, the greater the effort for the prosecutor to prove a case at trial.

In this article, we'll look at what a deadly weapon is, themes and techniques for proving deadly weapons at both voir dire and trial, and some of the effects of a deadly weapon finding.

What is a deadly weapon?

The Penal Code defines a deadly weapon as:

1) a firearm,

2) anything manifestly designed, made, or adapted for inflicting death or serious bodily injury, or

3) anything that in the manner of its use or intended use is capable of causing serious bodily injury or death.[2]

Firearms could be the subject of an entire article in their own right, and indeed, they are the subject of an excellent talk that Bill Wirskye, First Assistant Criminal District Attorney in Collin County, gives at many TDCAA seminars.

Items manifestly designed or adapted for causing serious bodily injury or death cover basically any sort of weapon. Pipe bombs, swords, land mines, and prison shanks are all examples of objects designed or adapted for causing serious bodily injury or death. When you look at these items, they instantly prompt the thought, "Yep, that could kill you."

The third category includes pretty much any object in existence that doesn't already fall into one of the first two groups. The key with this category is that the manner of use or intended use refers to the *defendant's* use or intended use, not the manufacturer's intended use. This covers improvised weapons (such as frogs shot out of potato guns) rather than designed weapons. Hammers, rocks, pipes, bricks, the defendant's own hands and feet, and motor vehicles (one of the most popular) can all fall into this category. Of course, a weapon may qualify under more than one criterion. A handgun is a firearm, but it is also both designed for causing death or serious bodily injury and capable of causing them.

Death may not require much explanation, but what is serious bodily injury? It is bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.[3] All of those are fact-specific, and the individual case will have to be tailored to the injuries. For instance, an assault that causes the total loss of an eye, as happened in the example of the frog and the potato gun, may not require expert testimony or evidence (although it certainly wouldn't hurt to have it).[4] On the other hand, a stab wound that cuts an artery or injures internal organs may need expert testimony regarding the risk of death or the unseen, long-term effects of such internal wounds.

When it comes to proving that something is capable of causing serious bodily injury or death, the logic can be a bit circular. The simplest way to show that it was capable of causing that degree of injury is to show that it actually *did* cause serious bodily injury or death. After all, it's hard to argue a lightsaber isn't a deadly weapon when there's a severed arm on the cantina floor.[5] In many cases, though, we'll be dealing with cases where the defendant didn't actually succeed in causing serious bodily injury, or perhaps he only exhibited a deadly weapon as part of a threat. For these situations, prosecutors must show the jury just how that weapon could have caused serious bodily injury, and for that, the State should start laying the groundwork during voir dire.

Voir dire and trial

As we all learned as far back as baby prosecutor school, proving our case at trial begins during voir dire as we prosecutors educate future jurors. While we can throw a definition up on a slide, rattle off a couple of examples, and move on, crowdsourcing our examples from the panel can be far more engaging (and interesting). One technique I've used in the past is to walk the panel through the three categories of deadly weapons and ask for examples of each along the way. Asking for types of firearms usually prompts responses such as Glocks, AR-15s, and shotguns. Firearms is a good category to start with because it's so well-defined and easy to understand. From there, we discuss the items manifestly made or designed for causing serious bodily injury. Examples that may frequently pop up are knives, swords, and bows and arrows (especially if hunters are on the panel). This is a good time to get the panel thinking about things that can be specifically adapted into weapons. A prison guard or jailer might be called upon and asked about weapons made in prisons and jails.

To reinforce the point, you can use a couple more examples of you and co-counsel creatively murdering each other with everyday objects before crowdsourcing from the panel a bit more. By the end of this part of voir dire, the panel should understand that anything can be a deadly weapon, depending on how it is used.

When it comes to the third category, though, I like to provide the first example with what we in my office call the "fluffy pillow" voir dire. This method works best with an actual pillow as a demonstrative. Hold it up and ask if it's a deadly weapon; most of your panel will say no. "What if I swing it and hit my co-counsel with it?" (Bonus points if you actually hit her with it.) The answer should still be no. "Now what if my co-counsel takes the pillow away, holds it over my face, and suffocates me?" (Again, bonus points if she actually takes the pillow and holds it over your face for a moment.) By now, everyone should be on board with how even a fluffy pillow can be a deadly weapon. To reinforce the point, you can use a couple more examples of you and co-counsel creatively murdering each other with everyday objects before crowdsourcing from the panel a bit more. By the end of this part of voir dire, the panel should understand that anything can be a deadly weapon, depending on how it is used.[6]

However, just because prosecutors educated the panel on this topic doesn't mean our work is done. We still have to show how this particular deadly weapon in this particular case could have caused serious bodily injury. This is much simpler if the weapon actually *did* cause serious bodily injury. It's the cases where it caused only bodily injury or where the weapon was merely exhibited that are more challenging.

Our office recently tried a case of aggravated assault with a deadly weapon based on a threat to harm a city public works employee with a water meter key. The defendant followed through on his threat by swinging the key and then throwing it at the employee (he missed). "Just what is a water meter key?" you may be asking yourself right now. A water meter key is a long piece of metal the thickness of rebar with another short piece welded on one end to form a T-handle; it has a notch or prongs at the other end. It's used to turn a residential water meter on or off, and it is not the first thing that comes to mind when you think "deadly weapon." At trial, we brought in the water meter key that was recovered from the defendant and had the detective testify about its size and weight. After that, he was asked if he had seen injuries from similar objects during his years as a police officer and to describe what injuries he had seen. Finally, he testified that in his opinion,[7] the water meter key could have caused serious bodily injury or death. Ultimately, the jury agreed that the water meter key could have caused serious bodily injury and found the defendant guilty. However, our office would not have been successful if we hadn't done a thorough job of educating the jury during voir dire and then having the detective give specific examples of injuries caused by similar objects during his career.

One word of caution, though. It's not enough that in some scenario, the object could theoretically cause serious bodily injury. Someone actually has to be put in danger. This question often arises in cases of evading arrest with a vehicle that allege the vehicle as a deadly weapon. The Court of Criminal Appeals has held that "a deadly weapon finding is appropriate on a sufficient showing of actual danger, such as evidence that another motorist was on the highway at the same time and place as the defendant when the defendant drove in a dangerous manner."[8] The simple test is to ask who was put in danger by the defendant. If you can't point to a person or vehicle (if we're talking about an evading scenario) that was endangered, you may have trouble with a deadly weapon finding.

Deadly weapon findings

Deadly weapons can be an issue in one of two ways. First, the offense could include a deadly weapon allegation as an element of the offense. For example, a deadly weapon allegation is one way an assault becomes an aggravated assault or a robbery becomes an aggravated robbery. In these situations, prosecutors don't need to submit a deadly weapon finding as a special issue; it is encompassed by the jury charge and verdict on the offense. The Court of Criminal Appeals has

held that "if the indictment by allegation specifically places the issue before the trier of fact (i.e., '... by stabbing him with a knife, a deadly weapon ...'), then an affirmative finding is de facto made when the defendant is found guilty 'as charged in the indictment.'"[9]

In offenses where a deadly weapon allegation is not an element of the offense, prosecutors still have the option of seeking an affirmative finding. In these situations, they must give notice of intent to seek such finding, much like they would a punishment enhancement. While a written notice of intent may be sufficient, just like with punishment enhancements, the best practice is a deadly weapon paragraph in the indictment, just like with punishment enhancements. The jury charge should then include instructions on the special issue and a verdict form for it.

The effects of a deadly weapon finding upon a defendant can be severe. First, Code of Criminal Procedure Art. 42A.054 restricts a judge from granting community supervision to a defendant found guilty of an offense with a deadly weapon finding. By extension, this means a judge cannot grant shock probation, either. (That restriction, however, does not apply to deferred adjudication.) If sentenced to incarceration, a defendant with a deadly weapon finding must serve the lesser of one-half of the sentence or 30 years before being eligible for parole. There is a specific jury instruction about parole that must be included in the punishment charge that can be found in Art. 37.07 §4.

Finally, a deadly weapon finding can have some unusual effects on state jail felonies. Most state jail felonies are punishable under Penal Code §12.35(a), which provides for the familiar range of 180 days to two years. If the state jail offense has a deadly weapon finding, or if the defendant has ever previously been finally convicted of a felony with a deadly weapon finding, then the state jail offense is punishable under §12.35(c) as an aggravated state jail felony. An aggravated state jail felony is functionally identical to a third-degree felony; it receives the same punishment range as a third-degree felony, it may be enhanced as if it were a third-degree felony, and it may be used to enhance future felonies as if it were a third-degree felony. Section 12.42, the enhancement provision for first-, second-, and third-degree felonies, specifically refers to felonies "other than a felony punishable under §12.35(a)" while §12.425, the state jail enhancement provision, refers specifically to "state jail felon[ies] punishable under §12.35(a)." Many times, judgments for state jail offenses won't be specific as to which subsection was applicable; in these cases, prosecutors may need to double-check if there was a deadly weapon finding to determine how to properly classify the prior conviction. This can be especially important and catch a prosecutor off-guard when enhancing a non-aggravated state jail with two prior state jail felonies. An overlooked deadly weapon finding on one of the two enhancing state jail convictions will disqualify it from being used to enhance under §12.425. Some of the most frequent culprits here are older convictions for Evading Arrest or Detention with a Vehicle. Not too long ago, that offense was a state jail, rather than third-degree, felony and would often carry a deadly weapon finding.

Conclusion

While a pencil may not be dangerous in most hands, in some it can be deadly.[10] By carefully preparing cases and educating jury panels (or letting panel members educate each other), prosecutors can be just as creative in proving up a deadly weapon finding as some defendants are in wielding deadly weapons. ❇

Endnotes

[1] It is 42 pages long at the time of this writing: http://tdcaa.infopop.net/eve/forums/a/tpc/f/157098965/m/6063090757/p/1.

[2] Tex. Penal Code §1.07(a)(17).

[3] Tex. Penal Code §1.07(a)(46).

[4] "While expert testimony as to the extent and effects of the injuries regarding their disfiguring or impairing quality has been found sufficient, such testimony is not necessary where the injuries and their effects are obvious." *Taylor v. State*, 71 S.W.3d 792, 795 (Tex.App.–Texarkana 2002).

[5] *Star Wars*, Lucasfilm, 1977.

[6] Even a comfy chair, per Monty Python's Spanish Inquisition.

[7] Offered as a lay opinion based on his direct perceptions of the water meter key under Tex. Rule of Evidence 701.

[8] *Drichas v. State*, 175 S.W.3d 795 (Tex. Crim. App. 2005).

[9] *Polk v. State*, 693 S.W.2d 391 (Tex. Crim. App. 1985).

[10] *John Wick: Chapter 2*, Lionsgate, 2017.

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