The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

Applying forfeiture by wrongdoing after a child victim's suicide

Fourteen-year-old Clarisa S. took her own life on June 6, 2018. The previous day, she had been subpoenaed to testify at the trial of her stepfather, Manuel Gonzalez, who was charged with sexually abusing her from the time she was 8 until she was 12.

By Sterling Harmon
Appellate Chief, Criminal District Attorney's Office in McLennan County

The news of Clarisa's suicide stunned our office. Our lead trial counsel, Hilary LaBorde, hadn't anticipated any problems getting her ready for trial when the time came. "I couldn't have been more wrong," Hilary remembers now. "Our pre-indictment meeting would be the only time I would see her—and I would end up being the only prosecutor to ever talk to her. She had no trouble talking about her abuse with me, and afterwards we looked up pictures on our travel bucket lists: Italy for her and Tahiti for me—she'd been a lot of places."

In the wake of Clarisa's death, a team from the McLennan County Criminal District Attorney's Office resolved that it would not be the end of Clarisa's story; rather, there would be an accounting for her death and the years of victimization she had suffered. Sydney Tuggle, who served as lead counsel at Gonzalez' eventual trial, voiced our thoughts:

> "Clarisa was more than a victim. She was a young girl who faced incredible hardships and fought to have her voice heard. After she watched her mother be served her subpoena to appear at trial, Clarisa hid her nerves and showed our investigator the new designs she had just decided about her room, hopeful for her future. The next day, she snuck away from her mother and shot herself in the heart.

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Mandatory *Brady* training

The Foundation has been pleased to support the production of TDCAA's Mandatory *Brady* Training.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

Offered online for free with the support of the Court of Criminal Appeals and the Foundation, this course is some of our best work yet. As you know by now, new prosecutors must take the training within 180 days of taking the job, and everyone must take a refresher course within four years. That means that for those who last took the course in 2018, you must complete the refresher before the end of 2022. So, if you haven't already taken the course or need the refresher, it is available on our website at www.tdcaa.com/training/mandatory-brady-training-2022. ❇

Recent gifts to the Foundation*

Gordon Armstrong *in memory of Richard Brainerd*
Knox Fitzpatrick
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Lance Long
Audrey Louis
Jennifer Meriwether
Suzy Morton
Beth Toben
John Wakefield III

* gifts received between August 6 and October 7, 2022

About *The Texas Prosecutor*

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Annual Conference wrap-up

Nearly 1,000 Texas prosecutor office personnel gathered in Corpus Christi in the third week of September for the 2022 edition of our Annual Criminal and Civil Law Conference.

By Rob Kepple
TDCAA Executive Director in Austin

It was another great event. I want to thank our training team, **Brian Klas, W. Clay Abbott, Gregg Cox, Andie Peters, LaToya Scott,** and **Amber Styers**, for really coming through with great training and a smooth conference. Of course, the whole staff has a major role in this event, and I want to thank them all!

The fan favorite at the conference? **Jonathan Shapiro**, the former federal prosecutor turned Hollywood scriptwriter, who delivered a fascinating keynote on the art of storytelling. Now we finally know who wrote the famous "The Speech" clip from the TV show *The Practice* about what it means to be a prosecutor. (Search YouTube for "The Practice" and "the speech.")

A special recognition

During our opening ceremonies, the Chairman of TDCAA's Board and the County Attorney in Uvalde County, **John Dodson**, took a moment to recognize some real superheroes: the victim assistance coordinators (VACs) and other prosecutor office personnel who, when the call came, went to Uvalde to assist law enforcement and victims after the horrific day in May when a shooter killed 19 children and two teachers at Robb Elementary School. I know that our profession is stronger for all that you did. Thank you.

TDCAA award winners

The TDCAA Board of Directors and the Nominations Committee worked hard over the spring and summer to identify folks within our membership who shined in this past year. And there were so many notable people that they decided to give multiple awards!

State Bar Criminal Justice Section Prosecutors of the Year. This is an award whose winner is, by tradition, nominated and chosen through TDCAA and approved by the Criminal Justice Section of the State Bar. The award is for prosecutors who have shown leadership and excellence in shaping public policy. In 2022, the award went to two people:

Brian Middleton, District Attorney in Fort Bend County, who won for spearheading an amicus effort in *Stephens v. State*.[1] (He is pictured below on the left with **Kenda Culpepper**, CDA in Rockwall County.) This case finally put to rest contentions by the Attorney General (AG) and others that the legislature could give the AG original criminal jurisdiction. The short story is that separation of powers prohibits such a delegation of power away from district and county attorneys. The case ended a couple of decades of discussion over this topic and some very contentious days at the capitol. Brian, thanks for

your great leadership and vision. (And if you want TDCAA's latest update on the state of prosecution in Texas in the wake of *Stephens*, check out "Texas Prosecution 101"—you can search for it on our website.)

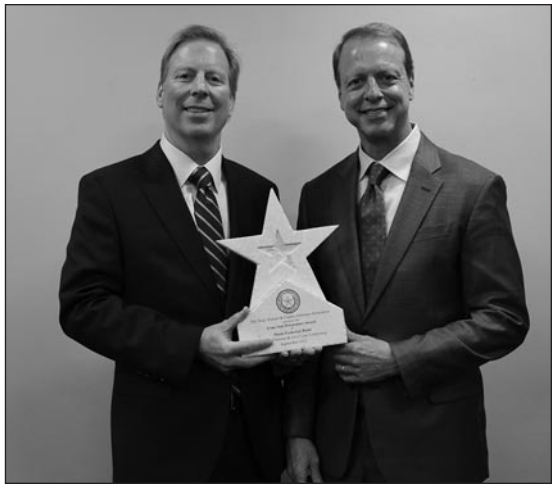
The second Prosecutor of the Year Award goes to **C. Scott Brumley**, County Attorney in Potter County. (He is pictured below on the left with **Kenda Culpepper**, CDA in Rockwall County.) Scott has been a champion of Texas prosecutors on many fronts in his career. He is a recognized expert when it comes to the Public Information Act, liabilities and immunity, and prosecutor ethics. Indeed, he is a go-to expert for many of you on these issues, and he generously donates his time and expertise at many TDCAA training events.

It is in the area of ethics that he wins this award. He is the chair of the TDCAA Rule 3.09 Committee, and he has represented prosecutors at the State Bar Committee on Disciplinary Rules and Referenda regarding proposed changes to Rule 3.09, which tracks American Bar Association Model Rule 3.8. The protracted fight-slash-negotiation isn't over yet, but Scott's leadership in this area had been resolute and forceful. You are well-represented!

Oscar Sherrell Award. This award recognizes someone who has stood out in service to the association. This year's winner is **Zack Wavrusa**, Assistant County & District Attorney in Rusk County. Zack has been an engine of productivity for this journal, *The Texas Prosecutor*, and a real go-to guy for speaking and writing on behalf of the association. He has never let us down, going so far as to film an online training segment from a hospital bed rather than cancel! Now that is dedication. Well-deserved, Zack. He is pictured below on the right with John Dodson, TDCAA Board Chair and CA in Uvalde County.

Lone Star Prosecutor Awards. This award recognizes the efforts of prosecutors who demonstrate excellence through trial, advocacy, appellate advocacy, or other innovative work that may go unnoticed around the state but that advances justice in the community. Again, we had two winners this year.

The first is **Mark Pratt**, District Attorney in Hill County. (He is pictured below on the left with Greg Willis, CDA in Collin County.) Mark has represented the people of Hill County the old-fashioned way: by trying cases. A lot of cases. And winning and winning. People often don't recognize the dedication it takes to continue to represent the community in criminal court over decades, and to do it well without fanfare. Thanks, Mark!



Scott Brumley is a recognized expert when it comes to the Public Information Act, liabilities and immunity, and prosecutor ethics. Indeed, he is a go-to expert for many of you on these issues, and he generously donates his time and expertise at many TDCAA training events.

The second winner is **Sharen Wilson**, Criminal District Attorney in Tarrant County. (She is pictured below at right with **Brian Klas**, TDCAA Training Director.) She retires at the end of this term but has quietly been an agent of change in her office. She created a number of new focused units, including those for conviction integrity, human trafficking, intimate partner violence, elder financial fraud, law enforcement incidents, first responders diversion court, digital forensics and technology services, and a mental health crossover court. Under her watch, Tarrant County became the first to have a dedicated auto crimes prosecutor. And who can forget her introduction of the popular Facebook and Twitter star, Brady the courthouse comfort dog? Congratulations, Sharen, on a great run!

C. Chris Marshall Award. This award recognizes a person who has made significant contributions to TDCAA's training efforts. This year's winner is **Jen Falk**, Assistant Criminal District Attorney in Dallas County. (She is pictured below at right with Brian Klas, TDCAA Training Director.) Jen has been all over training for TDCAA this last year and has brought together great presentations on self-care and advocacy. Thanks, Jen, for your energy!

We did not know we needed an Amy ...

... until we had an Amy. I am talking about **Amy Befeld**, of course. Having started in the capitol as a staffer, Amy worked the last couple years in the legislative services department of the Texas Association of Counties. Part of her responsibilities was to be the liaison with TDCAA. All I can say is, "Wow." Amy was an amazing help to prosecutors during the last legislative session and afterward, and she has been an absolute joy to work with. (She's pictured below at right with Shannon Edmonds, TDCAA Director of Government Relations, receiving a plaque at the TDCAA Board dinner at the Annual Conference.) She is now moving on to a position with Texans for Lawsuit Reform, but we wanted to recognize her with a small token of our appreciation before she left for greener pastures. We wish her the best in her new endeavor and look forward to seeing her around the capitol.

But don't worry, we are not being abandoned by our friends at TAC! They have kindly assigned **Megan Molleur** to be our new liaison. We first met Megan when she served as our grant administrator at the Court of Criminal Appeals. She then moved to TAC last session to work for the counties on federal issues, and now TDCAA has been added to her portfolio for next session. We have a feeling her expertise in budget matters is going to come in handy this session. Welcome aboard, Megan!

TDCAA 2023 Long Range Plan

"If you don't know where you are going, any direction is OK." This is a riff on a conversation between Alice and the Cheshire Cat in *Alice in Wonderland*, and it serves as fair warning to an

organization that doesn't focus on its mission. To avoid "mission creep" and disconnecting with the needs of our membership, the association operates on a series of five-year plans dating back to 1987. We complete a five-year plan at the end of 2022 (reported on in the May–June 2022 edition of this journal). This year our Secretary/ Treasurer, **Bill Helwig**, Criminal District Attorney in Yoakum County, chaired a committee that fashioned a new plan to begin in 2023, which the TDCAA Board of Directors approved. The plan identifies several goals and action plans in support of those goals. Here are the highlights of this plan:

1 **More regional meetings.** We enjoyed regional meetings by Zoom during the height of the pandemic, and they reminded us of how much we liked live regional meetings, including timely training and fellowship, on a rotating basis. We will look to re-establish that.

2 **Perform a needs assessment.** TDCAA has surveyed members in the past on what they need from us. We have tried NOT to deluge you with surveys because we hate them too, but perhaps it is time to dust off a survey and make sure we are doing what you need us to.

3 **Review the TDCAA bylaws.** The bylaws have not been updated in quite some time, so a committee will be appointed to review TDCAA governance and report back.

4 **Explore the need and possible support for a Domestic Violence Resource Prosecutor (DVRP).** Akin to the popular Traffic Resource Safety Prosecutor program supported by the National Highway Safety Administration, of which our very own **W. Clay Abbott** is a member, there is a growing national movement to develop a national DVRP program. We will explore if we need that in Texas, and if so, how that would work and how it would be funded.

5 **Explore expanding resources for civil attorneys in prosecutor offices.** Just one example is open records work, which is becoming more and more burdensome. We will review our training and support in civil representation.

6 **Facilitate relationships between law schools in the recruitment of new prosecutors.** Recruitment and retention continues to be an issue for our profession. Can TDCAA play a role here?

7 **Explore expanding the Prosecutor Management Institute (PMI).** Our PMI training has been extremely popular and sought-after, but we have yet to keep up with demand. We need to devote resources to produce refresher courses, regional courses, systematic training for new managers, and expand topics to include hiring and evaluating employees. We also need to explore online content for continued management education.

8 **Evaluate the need for more interdisciplinary and regional training, and develop that training if needed and feasible.** Short regional courses can provide a lot of "bang for the buck," but topics and speakers must be developed.

9 **Continue to develop timely, relevant, and accessible online training.** In the last year, TDCAA has added the position of Assistant Training Director, staffed by **Gregg Cox**, devoted only to online training.

We are looking forward to the next five years! There is a lot of work ahead, but it is great to have the direction mapped out.

Thanks to those who have served

Being an elected prosecutor is both challenging and rewarding. At the end of each election cycle, some folks will be hanging up their spurs, and it is important that we say "thanks" for their willingness to push that rock up the hill! I want to personally thank the folks who are leaving office this year: **Thomas Aaberg**, County Attorney in Wise County; **Kevin Dutton**, First Judicial District Attorney; **Lee Hon**, Criminal District Attorney in Polk County; **Bruce James**, County Attorney in McCullough County; **Barry Johnson**, Criminal District Attorney in McLennan County; **Wes Mau**, Criminal District Attorney in Hays County; **Brian Risinger**, Criminal District Attorney in Madison County; **Sharen Wilson**, Criminal District Attorney in Tarrant County; and **Bob Wortham**, Criminal District Attorney in Jefferson County. Thanks for y'all's service to Texas. ❇

We are looking forward to the next five years! There is a lot of work ahead, but it is great to have the direction mapped out.

Endnote

[1] Nos. PD-1032-20 and -1033-20 (Tex. Crim. App. December 15, 2021). Read our summaries of the case at www.tdcaa.com/case-summaries/december-17-2021 and www.tdcaa.com/case-summaries/september-30-2022.

Putting Michael Lynn Riley to death

As a very inexperienced and naïve victim assistance coordinator (VAC) in 1991, I learned that helping survivors in a capital murder case can be an extremely sensitive and years-long task.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

I am sharing my experience now so that other VACs and prosecutors who read this article might know what to expect if and when you are called upon to walk survivors of a deceased capital murder victim through the execution process.

During one of my very first weeks on the job, I received a voicemail from Kitty, the sister of the deceased victim, in the capital murder case against Michael Lynn Riley. Kitty did not leave a phone number and I had no idea how to return her call. I asked our office manager how to contact her, and she said, "Go look in the office file closet, up on the wall on the right, and you will see a piece of paper taped to the wall with her name, address, and phone number." I thought this was quite weird, but I went to the file closet and found the paper on the wall. It said State vs. Michael Lynn Riley, and below that name there were two other people listed, along with their addresses and phone numbers. You see, the case had been going on for so long at that point (since 1986) and computer criminal database systems were so primitive—with no way to enter victim contact information—that this was the only way our office had to make sure everyone remembered and had access to the survivors' names and addresses. A very manual system back in those days, to say the least!

I returned Kitty's call and was very quickly introduced to some horrific details of a crime that was unimaginable to me. I listened to an incredibly sad and emotional woman on the other end of the line. I was told of the years of hurt and suffering she and her family had endured and how the two baby girls of the deceased were growing up without their mother. I learned that Brandy was 4 and Jennifer was only 1½ when their mother was killed.

Kitty told me that on February 1, 1986, 27-year-old Michael Lynn Riley went into the Shop-A-Minit convenience store in Quitman, which is in Wood County, and stabbed and killed her sister, the 23-year-old clerk, Wynona Lynn Harris. Riley stabbed her 31 times with a butcher knife and robbed the store of $1,110 (part of the money was later recovered in his overalls). Kitty told me Wynona knew Michael Lynn Riley because he lived near the convenience store and would frequent the store regularly. In small town Quitman in those days, everyone knew everyone, and people were very trusting of each other. It is not surprising that Wynona Harris would have welcomed Riley into the store and trusted he was just there shopping like any other day he had dropped in.

Riley was not a stranger to law enforcement. He had been arrested eight times with prior felony convictions and two prior prison sentences. In March 1977, he was sentenced to prison for two years and was released in 1978. In 1980 he received a nine-year sentence for burglary of a building, was paroled in 1983, and discharged from his sentence in July 1985. Seven months later he committed capital murder by robbing and killing Wynona Harris, and the State decided to seek the death penalty.[1]

My telephone call that day with Kitty would be the first of many conversations and meetings I would have with the Harris family over the next 18 years.

Riley's trials

At the first trial in November 1986, Michael Lynn Riley was convicted by a jury and sentenced to death. Automatic appeals began and on November 10, 1993, the Texas Court of Criminal Appeals reversed his conviction and sentence for improperly excluding a potential juror because of her opposition to the death penalty, and the Court remanded the case back to district court.[2] With notification of this reversal, then-Wood County Criminal District Attorney Marcus D. Taylor decided to retry the case.

During the summer of 1995, literally hundreds of potential jurors were summoned for jury selection. The prosecution and defense were charged with selecting the most favorable people to hear a capital murder death penalty case. In such a case, the voir dire line of questioning is more intense than a regular voir dire. Potential jurors are questioned about their true feelings about the death penalty. It was weeks (I believe six weeks) of questioning people one at a time until 12 jurors were selected. On September 6, 1995, those jurors handed down a guilty verdict and after a separate punishment hearing, a death sentence was announced two days later.[3] Little did we know at the time that it would be another 14 years before the execution would take place.

The Harris family attended the trial but of course the victims' two little daughters were still young and did not attend. I remember sitting with the family as they watched our DA Marcus Taylor demonstrate by using a mannequin how many strikes it would take to stab someone 31 times. As Mr. Taylor told the story of the murder, it was as if you were in the Shop-a-Minit. He was a great storyteller. I remember preparing the family for the details that would be presented during the trial and holding their hands as the details unfolded.

Keeping up with the family

Looking back on this case and of my career in the DA's office, it is rewarding to remember the victim sensitivity Mr. Taylor expressed. He always relayed updates on this case to me, which enabled me to inform the Harris family of each hearing, motion, bench warrant, writ, etc. I still appreciate that Mr. Taylor could face the case head-on and was open to any questions the family might have had along the way.

Through the years, I discovered the Harris family really needed to hear from someone in our office every now and then. They needed reassurance that our prosecution team would continue to fight for justice. The family was great at keeping in touch with us when their phone numbers or addresses changed. Many times, I would be notified by our receptionist that Mr. Harris was at our front counter, just dropping by to talk to someone. If our DA was available, Mr. Taylor was always good to take a few minutes and update Mr. Harris with the latest on the case.

Mr. Taylor retired in December 2006 before Michael Lynn Riley was executed.

Execution date is set

In March 2009, our district court judge set an execution date of May 19. In the weeks to come, our office received notification from the Texas Department of Criminal Justice (TDCJ) that authorities there would like to send a packet of execution-related information to Wynona Harris's kin. TDCJ asked if our office would assist in locating all the family members. With the notification in hand, and because I had never assisted a family through an execution, I phoned TDCJ's Victim Services to check on the process. I also spoke to TDCJ's Correctional Institution Division director.

During these phone calls, I was educated on what to expect so I could relay this information to the family. I learned that the packet of information would include notification of the execution date, a brochure outlining procedures, and a list to be completed and returned for the witnesses and support persons. At this point, I was relieved I had stayed in contact with the Harris family because it was not hard at all to contact them. I began calling the family members one-by-one explaining that an execution date had been set and that TDCJ would like to mail them a packet of information. I made sure to ask how to contact Wynona Harris's two daughters because I knew they would be grown by now. I found their phone numbers and called them. These calls were only the start of many very emotional phone calls with Brandy and Jennifer.

Once the family received the packet of information, they requested an in-person meeting with me for assistance in completing the execution witness and support person list. We also worked on what Brandy and Jennifer might want to share at the press conference that would fol-

I remember sitting with the family as they watched our DA Marcus Taylor demonstrate by using a mannequin how many strikes it would take to stab someone 31 times. As Mr. Taylor told the story of the murder, it was as if you were in the Shop-a-Minit.

low the execution. They were both young and nervous, so I composed a few things for them to potentially say at the press conference. The execution and support person list was submitted to TDCJ's Correctional Institutional Division director for final approval.

The in-person meetings prior to the execution date helped our office understand how nice it would be if the county could offer assistance for victims and witnesses and an escort to the execution. The Harris family was a little nervous about driving alone to the prison unit in Huntsville. I put on my thinking cap and suggested that our office rent a van, and I offered to escort the family to Huntsville, about a 3½-hour drive from Quitman, to be a victim services support person during the process. The next question our DA, Jim Wheeler, had for me was how the county would pay for the rental van. The Wood County Crime Victim Services fund would provide for this expense. (More about this fund in the sidebar, below.) With approval from the DA and an accepted offer to transport the Harris family to the execution, I reserved the van.

In execution rules set out by the Texas Board of Criminal Justice,[4] an execution viewing is limited to five witnesses if there is one victim, including close friends and surviving relatives, plus one bona-fide pastor or comparable religious official. The survivors choose whom they wish to participate in the viewing. If there are multiple victims, this number is increased to six. The family with the capital murder conviction has priority over the witness spots, with the remaining spots going to the other families. There are three support person slots per execution. In the Michael Lynn Riley execution, Wynona Harris was the only victim so five witnesses and three support persons were allowed.

In addition, there are five media spots available between the two very tiny standing-room only viewing rooms adjacent to the Texas execu-

Background of Wood County's victim services fund

In 2000, while attending TDCAA's Key Personnel-Victim Assistance Coordinator Conference, I heard a presentation from a VAC in the Smith County Criminal District Attorney's Office about that county creating a fund for victim-related expenses. When I got back to our office, I advocated establishing such a fund in Wood County. I had worked in the DA's office for 10 years at that point and understood the need for funds to pay for various victim-related expenses that the office budget might not otherwise cover. For example, during trial, some victims might not have presentable clothing to wear to testify. I remember numerous times bringing clothing from home (my own or my little girl's clothes) so victims would have something appropriate to wear in court. I realized a victim services fund could help with these type of expenses—along with food for victims during trial, cemetery markers, and other special needs when no other resources were available.

In July 2001, the Wood County Commissioners Court passed a resolution to create a fund entitled "Wood County Crime Victim Services" (as authorized by §61.003 of the Government Code and §81.032 of the Local Government Code) where Wood County could receive funds and donations for victim assistance. The fund was designated as one of those to which jurors could donate their fees; other donors could also give money to the fund and receive an IRS tax deduction for such a donation. Restrictive donations of $2,500 or less were directed to the Wood County Treasurer for receipt. Donations over $2,500 required the commissioners court to accept them before a receipt was issued. Over the years, the fund received donations from local clubs, organizations, and churches. It was so helpful.

tion chamber in Huntsville. One is for victim witnesses and the other viewing room is for offender witnesses. TDCJ reserves two of the media spots for the Associated Press and *The Huntsville Item* newspaper.[5]

The Harris family invited former DA Marcus Taylor to view the execution along with Mr. Harris, Wynona's husband; Wynona's two daughters; and one daughter's husband. To me, the Harris family's selection of Mr. Taylor was such a special gesture and true acknowledgment of his years of dedication in seeking justice for Wynona Lynn Harris.

I was selected by the family as a victim support person and would remain in the support room in the Huntsville Unit during the execution, as would Wood County Sheriff Bill Wansley. Sheriff Wansley was in law enforcement for many years in Quitman and was very familiar with Michael Lynn Riley. The victim support room is a separate room away from the execution viewing rooms, and it's where victim witnesses and support persons are taken before going into the execution viewing room. TDCJ Victim Services Division staff accompanied the witnesses and support persons during the entire process, answering our questions and giving instructions.

TDCJ officials told us that Michael Lynn Riley's family and witnesses would arrive at a different time, and TDCJ had careful procedures in place to keep victim and offender witnesses separated. Riley's witnesses also had a separate execution viewing room and offender waiting room. We were never face-to-face with any of them.

Execution day

On the morning of May 19, 2009, the Harris family met at the Wood County Justice Center, and we set out for Huntsville in the rented minivan. Not long after we began our drive, I observed that no one was talking. Not a word. Silence. The further we drove, the more I began to realize their silence was screaming out that this was probably the hardest thing they had ever faced. It was heartbreaking. Absolutely the most solemn day of my life, but I felt honored they trusted me to support them during this time.

Execution witnesses and support personnel meet the afternoon of the execution with representatives from TDCJ's Victim Services and are advised on what to expect. We were shown a video and given strict instructions for the day. For example, TDCJ has rules about modest dress along with closed-toe shoes, and they are very serious about enforcing them, too! The video and TDCJ representatives were very thorough and answered our questions. Executions take place at 6:00 p.m. on the execution date. We were advised that there are no guarantees the execution would take place because legal issues sometimes arise, and a stay could be granted at the last minute.

As 6 o'clock drew near, the family and Mr. Taylor were escorted to the execution room. Out the window of the victim support room (at a separate time from when the victim family and Mr. Taylor were escorted), I could see Michael Lynn Riley's family members being escorted to their execution viewing room. The entire experience was very heart-wrenching. I had compassion for the family of Wynona Harris, but I also felt compassion for the family of Michael Lynn Riley—it was a real tug at my emotions. I could not imagine being in either of these family's shoes. Michael Lynn Riley's choices and actions caused so many people so much pain.

Twenty-three years after the murder, Michael Lynn Riley was put to death by lethal injection. He was pronounced dead at 6:18 p.m.

After the execution but before the family returned to the support room, information was relayed back to us in the support room of Riley's final meal request and his final words. His final meal was two fried chicken quarters, two fried pork chops, a bowl of peaches, an order of French fries, and a salad. His final words were: "I know I hurt you very bad. I want you to know I'm sorry. I hope one day you can move on and, if not, I understand." Riley also apologized to his mother (who was not present) for being "not the big son that you wanted me to be." He then reminded friends who were watching that for years he has said he was ready to die. "To the fellows on the row, stay strong. Fleetwood is out of here," he said, referring to his Death Row nickname.

Debriefing

Following the execution, the family was offered a time for debriefing. I can honestly say I was amazed at how well the family members handled their emotions. Again, a lot of silence and no outbursts. At that time, the family knew the next step was the press conference, so they held it together very well.

Not long after we began our drive, I observed no one was talking. Not a word. Silence. The further we drove, the more I began to realize their silence was screaming out that this was probably the hardest thing they had ever faced. It was heartbreaking.

Sharing this experience here has caused many of my feelings to resurface. I hope this article will be a reference if and when you are called upon to assist survivors through the execution process.

Press conference

After an execution and debriefing, time is set aside for a press conference. Led by prison officials, the family, myself, and Mr. Taylor walked across the street to the press conference. Reporters Michael Graczyk from the Associated Press and David Chenault from KMOO, the Wood County radio station, were present. At the press conference, Wynona's older daughter, Brandy Oaks, said she accepted Riley's apology. "This is a difficult day and there are no winners on either side," she said. "Her [Wynona's] spirit will live on in our hearts and in our lives."

Her other daughter, Jennifer Bevill, remarked, "I think being here was something I needed. It's the last chapter in the book. I can close it. It's over for me, emotionally, I guess. It's strange: It's almost like I never had her to begin with." Jennifer, after all, was only 1½ years old when her mother was killed. She said she had prayed "for forgiveness and love and mercy—forgiveness for this person that has done this to our family. In the long run, Jesus Christ is our shoulder to cry on when you don't have anybody."

Retired Wood County DA Marcus Tylor said, "For those people that may think death penalty cases don't get proper examination, this is certainly evidence that's not true. Michael Riley was locked up longer than the murder victim lived."

In conclusion

Sharing this experience here has caused many of my feelings to resurface. I hope this article will be a reference if and when you are called upon to assist survivors through the execution process. As one of the most difficult job duties during my career, I can honestly reflect back with a sense of pride that I was selected by the Wood County DA's Office to be the victim assistance coordinator for 23 years and that I was there to assist the Harris family when they really needed someone. We had other capital cases during my career at the DA's office, but this was the only case where the State sought the death penalty.

If you have an execution pending, please reach out to the Texas Department of Criminal Justice's Victim Services Division by phone at 800/848-4284 or by email at victim.svc@tdcj.texas.gov for assistance. ❇

Endnotes

[1] I relied on https://murderpedia.org/male.R/r1/riley-michael-lynn.htm and www.clarkprosecutor.org/html/death/US/riley1164.htm to refresh my memory about some of the details of this case.

[2] *Riley v. State*, 889 S.W.2d 290 (Tex. Crim. App. 1993).

[3] *Riley v. Cockrell*, 339 F.3d 308 (5th Cir. 2003).

[4] www.tdcj.texas.gov/faq/victim_viewing_execution.html.

[5] Some of these rules may have changed since I was in Huntsville for Mr. Riley's execution. See e.g., www.texastribune.org/2014/06/05/tdcjs-execution-narrow-witness-policy-leaves.

New tools in impaired driving prosecutions (and some old ones)

About a year ago I announced a new prosecutor training in trying impaired driving cases.

By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

We had not had been in court in a while. We had whole Misdemeanor Divisions who had not conducted a jury trial. We were a bit rusty. Funny what difference a year makes. Looks like there's plenty of trial work now.

But changes keep coming. Despite all the bars being closed during the pandemic and shutdown, fatal impaired driving cases have increased. In fact, intoxication manslaughter charges have been piling up. To help with those, TDCAA will soon roll out a two-hour-plus online CLE course called "Prosecuting Intoxication Manslaughter Cases: A Panel Discussion." I brought in three of the best vehicular crimes prosecutors in the country for a multi-hour chat about how to try these difficult cases, from crash to appeals. Lucky for me they are all from Texas, which is no real surprise. (That's the four of us in the photo below, with me on the left, then Jessica Frazier, an ACDA in Comal County; Andrew James, an ACDA in Dallas County; and Alison Baimbridge, an ADA in Fort Bend County.) They all agreed to coach any prosecutor facing these cases for the first time—or the first time in a while—through the snares and pitfalls they will face. I think it will be a real help, and it's help you can get at your desk or in your PJs, and because it's online, you have all the time you need to rewind the video and take notes.

It supplements but does not replace TDCAA's excellent *Intoxication Manslaughter* publication. As a matter of fact, I would recommend having that book open right beside you when you watch the new video. The online training also complements TDCAA's Advanced Trial Advocacy Course, which will be held at the Baylor Law School in Waco in late July. The case study for the 2023 course will be an intoxication manslaugh-

ter. Please watch for that brochure in the mail (sometime in the spring of 2023) and apply if you think the program would help.

Help for officers too

While we are digging ourselves out, I have also noticed our police agencies are having to do the same. The great COVID resignation and retirement has hit every profession and business in America, but it is hard to argue it has hit any industry harder than law enforcement. First responder fatigue, current anti-police public sentiment, and numerous other factors have caused a flood of retirements and early departures. Agencies are starting to catch back up, and I've noticed while I'm on the road, my peace officer audiences are looking very young. I am used to most of the room being younger than me, but it is a bit shocking that most are younger than my son. (When I started all the officers seemed so old—my, how things change!) I bet you have noticed this too.

The first tool I have for helping on both training content and establishing relationships is regional DWI training. I don't teach one of these courses unless local prosecutors commit to host and attend. I do not take applications from law enforcement–I work for Texas prosecutors, and I don't come to your jurisdiction to teach if you don't ask me to.

Departments that are short on officers have made changes. There are fewer dedicated DWI officers, and more officers must step up and fill that experience gap. DPS troopers, our rural mainstays for DWI arrests, have some extra demands of their time, and they are still spending time away from their regular stations. Office of Court Administration records show that DWI arrests continue to decline. But DWI expertise may be on an even greater decline. Prosecutors from every size of jurisdiction in every part of the state have let me know they need help getting new officers (and officers returning to DWI) up to speed.

To that end, I am offering a new course with my regional DWI training. It has been several years since I have done so. The new course will be offered to local prosecutors who apply to host one of the 24 schools I will teach between January and June 2023. It is named "Guarding Texas Highways: Revisiting Impaired Driving Investigation & Prosecution." It is, like most of my other regional courses, designed to be attended by prosecutors and officers together. It will focus on four areas:

1) the traffic stop,
2) conversation with the suspect,
3) using and defending SFSTs, and
4) getting and presenting breath and blood evidence.

The course is a return to fundamentals. It is not, however, a basic course. While it should provide new officers and prosecutors with a basic framework, it will also provide experienced prosecutors and officers not only a refresher, but also a rethinking. I expect it to be good.

This course will be offered with the courses I have previously offered. The "Worst Case Scenario" program, which targets intoxication assault and manslaughter cases, will continue as an entry-level training for first responding officers, new officers, and experienced ones. It quickly presents the core investigative and prosecutorial functions necessary in the impaired driving crash. If crash investigations are the major need of a jurisdiction or area, this course may be the solution.

TDCAA will also continue to offer "Effective Courtroom Testimony." Students would benefit greatly by attending this course more than once, and it is still in high demand in both smaller jurisdictions and big ones.

Finally, TDCAA's "Rolling Stoned" course will be reworked as a second-generation version called "Investigating and Prosecuting the Drug-Impaired Driver." This course will focus on marijuana, prescription drugs, and multi-substance cases. But unlike ARIDE, the 16-hour Advanced Roadside Impaired Driving Enforcement course taught by Drug Recognition Experts (DREs), it is meant as a joint presentation for both officers and prosecutors.

Getting officers and prosecutors together

While I hope the content of these courses makes a difference, they make a difference in another way: They bring officers and prosecutors into the same room to learn new ways about doing their difficult jobs, but also—equally importantly—they learn about each other. A couple of police training agencies have conducted surveys among officers and "discovered" that prosecutors don't know what DREs are and never, ever prosecute DWI offenses. These "discoveries" are not true, but they make a real clear point: Police and prosecutors need to be in the same room. (Now if your office doesn't know what a DRE is or never prosecutes DWIs, give me a call and let's fix those things.)

The first tool I have for helping on both training content and establishing relationships is regional DWI training. I don't teach one of these courses unless local prosecutors commit to host and attend. I do not take applications from law enforcement—I work for Texas prosecutors, and

I don't come to your jurisdiction to teach if you don't ask me to. I also request that you tell me which course you want. I have been to 80 Texas counties. That is not bad, but if I have missed yours, let's fix that. I can do about 24 programs in a given year, and that means that smaller offices must join forces to attend at a central location. If you have an interest, please email Kaylene .Braden@tdcaa.com, and Kaylene can send you a bunch more information.

The last assistance I can offer for helping new officers, making better DWI cases, and improving officer-prosecutor relationships is the final tip at my "Effective Courtroom Testimony" course: "Meet with your officer after trial." This is the best advice I can give, and it is also the hardest.

Every prosecutor who has been at this a while has come back from a courtroom griping about an officer's mistakes on the street or in the courtroom. But far too seldom does that prosecutor actually do anything to fix the problem. There is value in assessing what went wrong and how it could be corrected or improved, but if that information is never delivered to the officer who made those mistakes, blame for the next disaster belongs, in part, to the prosecutor who did nothing. Every person who has prosecuted more than a year or two has rejected a case for poor investigate technique, said nothing to the investigating officer, then been unjustifiably surprised to see a case down the road with the very same problems. I've done this too. Officer training is at its best during one-on-one conversations between officers and prosecutors. In addition, every such conversation makes it really clear a prosecutor cares. That too pays a career-long dividend for the officer and prosecutor.

Our lack of courage, tact, effort, and intelligence to correct mistakes does not "see that justice is done." (Remember when I mentioned that this is the hardest advice I give? Now you see why.) This communication between prosecutors and officers must be intelligent. It must be made with preparation, skill, tact, humility, and empathy. Let's face it, the communication should absolutely be both ways, but beginning to make this happen means we prosecutors quit doing the same thing over and over hoping for a different result. That is the definition of insanity.

We owe it to our officers. We owe it to the people of the state of Texas. We owe it to the prosecutors who will be replacing us. So help me get this difficult ball rolling in your county by holding a regional DWI school! ❇

Jefferson v. State presents problems for the State and defense counsel alike

I recently learned that you can sigh in relief and groan in bewilderment at the same time.

By Britt Houston Lindsey
Chief Appellate Prosecutor in Taylor County

It happened when I was forwarded an email chain between three of my appellate prosecutor brethren in different jurisdictions. The topic was a recent opinion out of the Court of Criminal Appeals, *Jefferson v. State*,[1] about which they were deeply dismayed and concerned. I sighed in relief that somebody else saw the same problems that I did, and I groaned in bewilderment because I was lead counsel on the appeal.

The primary holding interpreting Code of Criminal Procedure Art. 28.10(c) is straightforward enough, but hidden in the weeds is some troubling interpretation of the ineffective assistance standard under *Strickland v. Washington*[2] that should concern prosecutors and defense counsel alike. Ineffective assistance claims are serious and damaging to both our hard-worked cases and the reputations of the defense attorneys who try them, and prosecutors want to see those claims carefully scrutinized not merely to protect convictions but out of simple fairness and integrity to the process.

Background

The victim, C.N.M., was a 15-year-old runaway. The defendant, Harold Gene Jefferson, was indicted on two counts, with two priors alleged in each: sexual assault of a child and indecency with a child by contact. Based on additional outcry from the child shortly before trial, the trial prosecutor filed a motion to amend the indictment pursuant to Code of Criminal Procedure Art. 28.10 to add two more counts of sexual assault of a child that arose out of the same incident on the same date. Article 28.10, "Amendment of Indictment or Information," states that:

> (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the defendant's request, the court shall allow the defen-

dant not less than 10 days, or a shorter period if he requests, to respond to the amended indictment or information.

(b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.

(c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the defendant's substantial rights are prejudiced.

The trial prosecutor relied on *Duran v. State*,[3] which held that amending an indictment to add additional counts of the same statutory offense is allowed under Art. 28.10(c), citing *Flowers v. State*.[4] There was no caselaw directly to the contrary. Jefferson's attorney requested and received the 10-day trial postponement he was entitled to under Art. 28.10(a). Jefferson was convicted of all four counts, receiving 35 and 25 years on the original two counts and 45 years on each of the amended counts.

Because there was some authority for the amendment, and also authority that defense counsel may strategically decide not to oppose an amendment to avoid unnecessary delay, trial counsel was not ineffective in not objecting to the amended indictment.

Jefferson's appellate counsel filed a motion for new trial but did not argue that the indictment was improperly amended or that trial counsel was ineffective for not objecting to the indictment. Rather, the argument was chiefly that Jefferson's trial counsel did not seek to admit medical records and expert testimony regarding Jefferson's impotence and prescription for erectile dysfunction (ED), and that trial counsel did not adequately inform him of the amended indictment, which led "to a loss of trust, loss of confidence, and an inability to properly communicate" between the two. At the hearing on the motion for new trial, after lengthy questioning on why he chose not to pursue a Viagra defense, Jefferson's trial counsel was asked why he did not object to the amended indictment, and he responded that he *did* object. No follow-up questions were asked.

On appeal, Jefferson argued that the judgment was rendered void by the amended indictment under *Nix v. State*;[5] he also included four discrete arguments that his trial counsel was ineffective. One through three dealt with trial counsel's alleged failure to investigate, present, and secure an expert to present a defense on erectile dysfunction. The fourth error dealt with trial counsel's alleged failure to object to the indictment, arguing that the timing between the filing of the motion to amend and its grant by the court showed a lack of notice that trial counsel should have objected to.

As to the void judgment argument, the court of appeals observed "an indictment that is improperly amended under Art. 28.10 is not void but, rather, is only voidable, and a defendant waives any error to an amended indictment by failing to object to it at trial,"[6] which Jefferson did not do. The court of appeals further held that the trial court did not abuse its discretion in denying the motion for new trial based on Jefferson's argument that trial counsel should have presented evidence of his erectile dysfunction, noting that there was a factual dispute as to whether he actually told trial counsel that he had ED. Additionally, his medical records contained a diagnosis of antisocial personality disorder, which trial counsel testified would have been devastating at trial.

As to Jefferson's fourth ineffective assistance argument, the court of appeals noted that under Art. 28.10(c), an indictment may not be amended over the defendant's objection as to form or substance if the amended indictment charges the defendant with an additional or different offense or prejudices his substantial rights, and that the Court of Criminal Appeals held in *Flowers v. State*[7] that an amended indictment charges a defendant with a different offense if the amendment changes the statutory offense. The Court further noted that at least one court of appeals had interpreted *Flowers* to say that an amended indictment does not allege an additional offense if it adds another count of the same charged offense: the aforementioned *Duran* case. Because there was some authority for the amendment, and also authority that defense counsel may strategically decide not to oppose an amendment to avoid unnecessary delay,[8] trial counsel was not ineffective in not objecting to the amended indictment (forcing the State to return to grand jury would have delayed the trial by weeks or months while his client sat in jail).

As the judges saw it

Jefferson petitioned the Court of Criminal Appeals on two issues:

1) that the trial court erred in allowing the amendment of the indictment to add additional counts, and

2) that his trial counsel was ineffective for failing to object to the amended indictment.

As to the first issue, the State responded that Jefferson did not raise that issue in the trial court and that his argument in the court of appeals was that the judgment was void. Writing for a unanimous court, Presiding Judge Keller agreed that "it is true that Appellant's claim does not appear in the trial record. But Appellant did claim on appeal that counsel was ineffective for failing to preserve error with respect to the new counts in the amended indictment, and the court of appeals addressed that claim in part by relying upon an unpublished court-of-appeals opinion construing Art. 28.10. Whether the court of appeals's reliance upon that opinion was correct is directly relevant to its resolution of Appellant's ineffective-assistance claim." The Court ultimately held that Art. 28.10 does not allow the indictment to be amended to add additional counts, and that "if Duran held that *Flowers* authorized additional counts of the same statutory offense, it read too much into *Flowers*."

On the ineffective assistance issue, the State noted that the court has been unequivocal that "we have repeatedly declined to find counsel ineffective for failing to take a specific action on an unsettled issue"[9] and that "legal advice which only later proves to be incorrect does not normally fall below the objective standard of reasonableness under *Strickland*."[10] Here, the *Duran* opinion appeared to support the amendment of the indictment, there were no court of appeals opinions to the contrary, and no caselaw from the Court directly addressed the same issue. The Court disagreed and said that Jefferson's trial counsel could not have reasonably relied on *Duran* because it was an unpublished case: "An attorney's failure to raise a claim is not deficient if the law is unsettled, but an unpublished court-of-appeals opinion in a criminal case does not constitute precedent, so it cannot create an uncertainty when the law is otherwise clear." The Court did not address the court of appeals's finding that trial counsel may have had a strategic reason for not objecting (i.e., delaying a seemingly inevitable indictment while the client sat in jail) for an unusual reason. The Court stated that trial counsel's statement that he did object to the indictment seemed to be at odds with the court of appeals's finding that he may have had a strategy for not objecting, and it remanded back to the court of appeals for further proceedings, saying, "We think more explanation is required to resolve this apparent inconsistency than what was given by the court of appeals." The court of appeals's finding that there was caselaw supporting an attorney's strategic decision to not object to avoid delay on a seemingly inevitable indictment when the client was awaiting trial in jail was not addressed.

The takeaway

The primary holding of the case is that Art. 28.10(c) doesn't allow the amendment of an indictment to add additional counts. That's not surprising, and it's not controversial; that's exactly the sort of question we expect the Court to resolve for us, and it did so succinctly and cogently.

But the Court's ineffective assistance analysis is deeply troubling, and it also affects prosecutors in our trials and appeals. To be blunt, the Court's holding that defense counsel couldn't have relied on an unpublished court of appeals opinion is not the law, or at least it wasn't at the time of trial. The law at the time of trial was the Court's pronouncement in *Ex parte Roemer*,[11] which held that trial counsel is not ineffective in relying on an unpublished case:

> Similarly, in this case, the applicant was encouraged to plead guilty to felony DWI when he was charged with only a Class A misdemeanor DWI. This is the basis for the applicant's ineffective-assistance claim. His attorney states that he "intensively researched" the issue of whether the prior conviction could be used to enhance the offense to a felony. *He determined that the enhancement was proper based on an unpublished memorandum opinion by the First District Court of Appeals, Louviere v. State*.[12] On facts similar to the applicant's case, *Louviere* allowed the use of a past involuntary manslaughter conviction for enhancement purposes based on the determination in *Gowans v. State*,[13] that, although involuntary manslaughter under former Penal Code §19.05(a)(2) was modified into intoxication manslaughter, "the offense remained substantively the same."

To be blunt, the Court's holding that defense counsel couldn't have relied on an unpublished court of appeals opinion is not the law, or at least it wasn't at the time of trial.

However, the issue in *Gowans* was whether criminally negligent homicide was a lesser-included offense of intoxication manslaughter. The court's conclusion was simply that, when involuntary manslaughter under former Penal Code §19.05(a)(2) was modified into intoxication manslaughter, the offense still did not require proof of a culpable mental state for conviction. *Rather than advise his client that the enhancement was proper under* Louviere*, the applicant's attorney could have argued that* Louviere *was incorrect because it not only mischaracterized* Gowans*'s statement that the offense remained substantively the same as the court's "holding," but also took the statement totally out of context. However, because counsel's decision was based on existing caselaw, it was not ineffective assistance for counsel to advise the applicant to accept the plea.*[14]

The Court's opinion at the time of Jefferson's trial was unanimous: Counsel is not ineffective when he makes a strategic decision based on unpublished caselaw, even if he could have made an argument to the contrary.

There were dissenting opinions in *Rohmer*, but the dissents agreed that trial counsel was not ineffective when he relied on an unpublished case, even though he could have argued that the unpublished case mischaracterized published caselaw. The Court's opinion at the time of Jefferson's trial was unanimous: Counsel is not ineffective when he makes a strategic decision based on unpublished caselaw, even if he could have made an argument to the contrary. Presiding Judge Keller wrote that *Duran* could have been distinguished because in that case the language of the indictment could have been split into two counts at the time of grand jury, but there are two problems with that. One, "could have been" is just another way of saying "wasn't," and that distinction didn't make any difference to the defendant in that case who was indicted for one count and sentenced for two. Second, the Court's opinion in *Rohmer* didn't hold counsel ineffective for not arguing that the case could have been distinguished or was being used out of context, even though he could have. We don't expect trial lawyers to know how the Court will rule in the future.

Rohmer makes sense, for a number of reasons. The value of an opinion isn't just its use as precedent, it's in the reasoning of the judges who wrote it; as the Court has said, "a defendant will have difficulty in establishing that his counsel provided constitutionally deficient legal advice when that advice is precisely in accord with many of the justices of our state's intermediate appellate courts."[15] That's right in line with the standard of *Strickland*, which warns explicitly against second-guessing defense attorneys with 20/20 hindsight.[16] We also don't find lawyers ineffective when it's a point on which reasonable lawyers could disagree,[17] and reasonable lawyers did exactly that here. The reasoning in *Duran* that supported the amendment is clearly erroneous now that the Court has disavowed it, but it was found reasonable by the three court of appeals justices that issued it, plus the trial prosecutor, the trial court judge, the three justices in the Eastland Court of Appeals, and State's appellate counsel. Now that the case is on remand, the Eastland Court is put in the uncomfortable position of having to decide whether Jefferson's trial counsel was constitutionally ineffective in reaching the same conclusion that it did.

Another problem is the remand back to Eastland for further explanation of what Jefferson's trial counsel meant when he said that he "did object" to the amended indictment when no such objection appears in the record. What the court of appeals is being asked to do here isn't clear, because the U.S. Supreme Court has repeatedly held that *Strickland* says we don't look at what trial counsel subjectively thought, only what he did and whether it was objectively reasonable: "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."[18] The reasonable explanation is that trial counsel meant that he objected to proceeding on the date set and requested the additional 10 days he was entitled to by statute,[19] and if an objectively reasonable explanation exists, the reviewing court is required to accept it under *Strickland*.[20] A court of appeals can't explain his subjective intent; only the attorney can do that, and only in the context of an 11.07 writ of habeas corpus, which is why the Court has repeatedly said that statute is the better vehicle for an ineffective assistance claim.[21]

Judge Yeary's concurrence lamented that Jefferson's petition didn't pursue his void judgment claim, in which he saw some merit and which "might even have mooted his ineffective assistance of counsel claim." That would have been the preferable claim and outcome to be sure. The Court was rightly concerned here with the defendant's rights and an interpretation of the Code of

Criminal Procedure that the judges found lacking, and one can't criticize that well-placed concern. Unfortunately, the result seems to have pulled the rug out from under defendant's trial counsel, who appears to have been only following the law as it existed at the time of trial. Let's hope those equities can be balanced in the opinions to come. ❇

Endnotes

[1] *Jefferson v. State*, No. PD-0677-21, –- S.W.3d –-,2022 WL 2961846, 2022 Tex. Crim. App. LEXIS 469 (Tex. Crim. App. July 27, 2022).

[2] 466 U.S. 668 (1984).

[3] No. 07-07-0110-CR, 2008 Tex. App. LEXIS 2160 (Tex. App.–Amarillo Mar. 26, 2008, pet. ref'd) (mem. op).

[4] 815 S.W.2d 724, 725-727 (Tex. Crim. App. 1991) (per curiam).

[5] 65 S.W.3d 664 (Tex. Crim. App. 2001).

[6] *Jefferson v. State*, No. 11-18-00184-CR, 2021 Tex. App. LEXIS 4843, at *6-7 (Tex. App.–Eastland June 17, 2021) (mem. op.) (citing *Trevino v. State*, 470 S.W.3d 660, 663 (Tex. App.–Houston [14th Dist.] 2015, pet. ref'd); *Woodard v. State*, 322 S.W.3d 648, 657 (Tex. Crim. App. 2010)).

[7] 815 S.W.2d at 728.

[8] *Stewart v. State*, No. 05-95-01056-CR, 1997 Tex. App. LEXIS 2103, 1997 WL 196357, at *4 (Tex. App.–Dallas Apr. 23, 1997, no pet.) (not designated for publication).

[9] *State v. Bennett*, 415 S.W.3d 867, 869 (Tex. Crim. App. 2013) (refusing to find trial counsel ineffective when statute of limitations question is unsettled).

[10] *Ex parte Chandler*, 182 S.W.3d 350, 359 (Tex. Crim. App. 2005).

[11] 215 S.W.3d 887 (Tex. Crim. App. 2007).

[12] No. 01-02-00504-CR, 2003 Tex. App. LEXIS 1583 (Tex. App.–Houston [1st Dist.] February 20, 2003) (not designated for publication), 2003 Tex. App. LEXIS 1583.

[13] 995 S.W.2d 787, 792 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd).

[14] *Ex parte Roemer*, 215 S.W.3d at 891 (italics added).

[15] *Chandler*, 182 S.W.3d at 358.

[16] "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689.

[17] "When a legal proposition or a strategic course of conduct is one on which reasonable lawyers could disagree, an error that occurs despite the lawyer's informed judgment should not be gauged by hindsight or second-guessed." *Chandler*, 182 S.W.3d at 354.

[18] *Harrington v. Richter*, 562 U.S. 86, 110 (2011).

[19] At least one case shows "objection to the indictment amendment" being used when what was meant was a demand for 10 days to prepare. "Failure to Object to Indictment Amendment: McAfee claims that trial counsel's failure to object to the State's motion to amend the indictment constitutes ineffective assistance of counsel. *Specifically, he claims that in waiving the 10-day period, counsel did not have time to adequately prepare his defense." McAfee v. State*, No. 01-03-01041-CR, 2004 WL 2966361, 2004 Tex. App. LEXIS 11722, at *9 (Tex. App.–Houston [1st Dist.] Dec. 23, 2004, no pet.) (mem. op.) (italics added).

[20] "Surmounting *Strickland*'s high bar is never an easy task"; a reviewing court is "required not simply to 'give the attorneys the benefit of the doubt,' but to affirmatively entertain the range of possible 'reasons… counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

[21] "The better procedural mechanism for pursuing a claim of ineffective assistance is almost always through writ of habeas corpus proceedings." *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003); see also *Trevino v. Thaler*, 569 U.S. 413 (2013) (observing that it is "'virtually impossible' for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim" on direct review).

Photos from our Annual Conference

Photos from our KP-VAC Conference

ABOVE: Donelle Keen, a paralegal in the Milam County District Attorney's Office (shown at left, with Katie Quinney, TDCAA KP–VS Board Chair on the right), was honored with the Oscar Sherell Award. It recognizes outstanding service to TDCAA. TOP RIGHT: The KP–VS Board members were so kind to work the registration desk at the conference. With more than 300 attendees pre-registered, we needed all the help we could get, and we couldn't have done it without them! MIDDLE RIGHT: To celebrate Shirley Bruner, a victim assistance coordinator (VAC) in Kaufman County (near the center holding her plaque), who was recognized as this year's Suzanne McDaniel Award winner, more than a dozen colleagues from the office came to the conference. This award honors a VAC who gives outstanding service to crime victims. BOTTOM RIGHT: Three VACs earned their Professional Victim Assistance Coordinator (PVAC) certificates (from left to right): Liliana Mendoza, Maria Mahoney, and Irma Moreno, all from the DA's Office in Harris County. They are pictured with Katie Quinney KP–VS Board Chair. Congratulations to all of these winners!

Applying forfeiture by wrongdoing after a child victim's suicide (cont'd from front cover)

> "When her case came up for trial again, I asked our elected DA to let us keep her fight going. I knew that the odds of using her statements in trial were slim, but we came up with the idea of trying to get them in under the legal theory of forfeiture by wrongdoing. She deserved to be heard, and she deserved for us to fight."

Under the regular rules of court, evidence must be presented by witnesses with knowledge. To bring Gonzalez to account, we would need to find an exception to those rules to tell Clarisa's story for her, without violating either the hearsay rule or the defendant's confrontation rights. We were confident that we could admit the statements Clarisa made as part of her sexual assault medical exam, as Rule 803(4) and its case interpretations hold that such statements are both an exception to the hearsay rule and non-testimonial and therefore not subject to a Confrontation Clause objection.

But we would need more than this to convince a jury that the sort of abuse Clarisa suffered was even possible, much less that it had actually happened. This is a challenge in every child sex abuse case, where jurors don't want to believe such atrocious acts can be done to a child. Typically, we counter these tendencies by showing that the victim has been consistent in sharing her account from outcry, to forensic interview, to medical examination, to her trial testimony. But if we could tell Clarisa's story only once, through the medical exam, we couldn't show her story's consistency over time.

The trial team intuitively understood that Clarisa's suicide was a result of the abuse she suffered over many years. But proving it would require a compelling case for admitting her previous statements under forfeiture by wrongdoing. If we could convince the trial court that the doctrine applied to this situation, we would be allowed to present all of Clarisa's statements at trial. It would be vital to gaining a conviction.

Forfeiture by wrongdoing

As the Supreme Court of the United States explained in *Giles v. California*,[1] forfeiture by wrongdoing is a common-law doctrine going back as far as *Lord Morley's Case* in 1666. The doctrine permits the introduction of statements of a witness who has been detained or kept away from trial by the defendant's means or procurement. Because the doctrine was already established at the time of our nation's founding, the Supreme Court has recognized it as an exception to a defendant's Sixth Amendment right to confront witnesses. It is codified in Texas as Code of Criminal Procedure Article 38.49.

In making its determination under Article 38.49, the trial court considers "evidence and statements related to a party [who] has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness." Under *Giles*, the exception applies only "when the defendant engaged in conduct *designed* to prevent the witness from testifying" and that the defendant *intended* to prevent the witness from testifying. The doctrine can apply even when the defendant has multiple reasons for harming the witness, as long as one of those reasons is to prevent the witness from testifying. Also, the statute specifically says that the statements do not have to pass a reliability test to be admitted, unlike, say, the outcry statements of a child sexual abuse victim under Article 38.072. To persuade the trial court that the doctrine applied, we would have to show by a preponderance of evidence that Gonzalez had "procured" Clarisa's unavailability and that his conduct was designed and intended to do just that.

Our research found forfeiture by wrongdoing had been applied to cases of domestic violence where the victim was unavailable because of the defendant's intimidation, murder cases where part of the defendant's motivation was to silence the victim, and drug trafficking cases where informants had been murdered to prevent their testimony. But we found nothing where the doctrine had been applied to a witness's suicide. The problem we faced was proving that Gonzalez's intentional actions had caused Clarisa's suicide. While our gut told us that Gonzalez was responsible for her death, we realized that forging that final link in the chain of causation would require a powerful case with strong, specific facts.

Our boss, McLennan County Criminal District Attorney Barry Johnson, approved our attempt to admit Clarisa's statements, but if the attempt was not successful, we were still going to trial with our other evidence. In short, our attitude was, "We might get our butt kicked, but this is one butt-kicking we're willing to take."

The hearing

Marshalling and evaluating the evidence for the hearing were the trial team, Sydney Tuggle and Will Hix, and the appellate team, Gabe Price and myself. We had the typical child sexual assault evidence (outcry statement, medical exam, forensic interview) to show the abuse Clarisa suffered, but to show Gonzalez's intent and how he kept her off the witness stand, we needed more. To meet this end, we had Clarisa's mom, her therapist, and the expert testimony of psychologist Dr. William Carter.

Gabe Price explains the analytical challenges we faced: "When we started looking at the different options for proving the case without the victim, we had to see the case from a different perspective: Trying to think *why* the victim was no longer available became the focus. This case was not just about reading a record from a hearing or trial—it took a more holistic approach from the trial prosecutors working with us to answer the 'why.' Our discussions always returned to the defendant's grooming behavior with this particular victim and what he did to try to hide his crime. The threats Gonzalez made to keep Clarisa from coming forward in the first place were the type of threats that would still be with her when the reality of testifying drew closer. Then everything started to make sense."

Gonzalez's intent during the offense was to keep Clarisa from telling people what he was doing. Like many sexual predators, he threatened her with what he would do to her and her family if she told anyone about the abuse. Although the threats were made during the timeframe of the offense, the effect of those threats stayed with Clarisa. We learned from her mother and therapist how much Gonzalez's threats were still at the forefront of her mind. Dr. Carter was able to educate us (and later, the judge) about the effect Gonzalez's actions had on Clarisa's mental state. In the end, our theory for applying the doctrine of forfeiture by wrongdoing came down to a simple statement: The defendant's threats were intended to keep the victim from telling people what he did to her, and his actions succeeded in the most tragic way imaginable.

Three weeks before trial, we filed our Motion for Determination of Forfeiture by Wrongdoing, which was heard a week later. The presiding judge was Ralph Strother, who had extensive experience on the bench. At the hearing, I made an opening statement generally addressing the doctrine and presenting an outline of what we intended to show. We felt this was necessary because the doctrine isn't used every day and even a seasoned jurist might require a "refresher course."

By this time, prosecutor Hilary LaBorde had left the office, and the assigned trial team of Sydney Tuggle and Will Hix presented our witnesses.

Dr. Soo Battle, a board-certified pediatrician, had done Clarisa's sexual assault medical exam. From her written report, Dr. Battle testified that Clarisa was a seventh-grader who lived with her mother and half-brother, Gonzalez's son. Gonzalez had lived in the home until about four weeks before the examination, when the abuse was reported. When Gonzalez moved out, he had taken a number of firearms.

Clarisa told Dr. Battle that Gonzalez was "raping me" and "doing stuff that I didn't like sexually." The abuse started when she was 8 years old, and Gonzalez told Clarisa that he would hurt her if she didn't "do it." Around the time that the sexual abuse started, Clarisa began taking melatonin for sleep difficulties. She also needed counseling to deal with nightmares she was having about the abuse. Clarisa's depression had also manifested in self-harm by cutting, which started when Gonzalez began hitting her. Dr. Battle testified that these symptoms were typically associated with sexual abuse.

In addition to the sexual abuse, Gonzalez would punish Clarisa by taking away her phone, spanking her with a belt, hitting her, and cutting her on her knees. Dr. Battle documented the cutting scars. Clarisa also told Dr. Battle that she was afraid that Gonzalez might try to kill her.

Therapist Britni Hosick testified about her sessions with Clarisa after the outcry. From their first meeting, Clarisa was anxious but reluctant to discuss the source of her anxiety. Eventually,

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she revealed her concern that Gonzalez, having been freed on bond, might hurt her, her mother, or her little brother. Clarisa was also anxious about an upcoming court date and having to face her stepfather in court.

Heydi McKinney conducted Clarisa's forensic interview. Clarisa had been reluctant to talk about what happened to her. She told McKinney that Gonzalez yelled at her a lot and that she was scared of him both for herself and other members of the family. Gonzalez told Clarisa not to tell her mother. McKinney deduced that Clarisa's reluctance to discuss the abuse was because of Gonzalez's threats not to tell anyone.

Clarisa's mother, Clara, testified about the dynamics of her five-year marriage to Gonzalez. He was over-protective of their son, but he picked on Clarisa. Clara did not believe her daughter when she first told her of the abuse, but she later witnessed the abuse first-hand when she walked into Clarisa's room and saw that "this man was on her."

Clarisa's mother, Clara, testified about the dynamics of her five-year marriage to Gonzalez. He was over-protective of their son, but he picked on Clarisa. Clara did not believe her daughter when she first told her of the abuse, but she later witnessed the abuse first-hand when she walked into Clarisa's room and saw that "this man was on her."

Clara testified that Gonzalez had hit Clarisa to keep her from telling anyone about the abuse. She had seen the bruises on Clarisa's legs, and her daughter had begged not to have to testify. She was terrified to face Gonzalez in court because of what he had done to her.

Dr. Carter, a psychologist with expertise in child sexual abuse, testified that suicidal ideation and self-abuse, such as cutting, were "quite common and directly tied to the pain associated with sexual abuse." Perpetrators often seek to keep their victims under their control. An abuser might take advantage of an imbalance in the relationship between an adult and a child—as well as make direct threats—to ensure that the abuse is never disclosed.

Dr. Carter opined that when Clarisa was subpoenaed, "All the facts that she is living under, the helplessness she is living with, the gloom and doom she experiences, those things are coming to fruition, and she would see that now we're not talking in abstract, we're talking in reality, and the weight of that burden can be such that she thinks, 'I can't do it. I can't go there.'" This was the inflection point that prompted Clarisa to take her own life. Based on the continuous sexual abuse as well as the repeated emotional and physical abuse, it could be strongly inferred that Gonzalez's intention was that Clarisa never disclose what happened to her. To Dr. Carter, there was "little question that he ... had every intention of buying her silence."

The case was complicated by a bizarre twist that the defense tried to finagle into a continuance. After breaking up with Gonzalez, Clara began a relationship with a man known as Gio Michell. Clara and her new paramour were living together with Clarisa and her younger brother at the time of Clarisa's death. But it turned out that Gio Michell was living a double life, and he died in a shoot-out with federal agents about a year later. This all happened at the same residence. Before the hearing, defense counsel filed a motion for continuance, insinuating that Clarisa's suicide was linked to Michell's shady activities.

Gabe Price presented our closing arguments. We asserted that the FBI raid and Michell's death were irrelevant, there being no evidence that Michell ever did anything to Clarisa that caused her suicide. The issue was Gonzalez's actions that terrorized the girl for four years. The Supreme Court had noted in *Giles* that in domestic violence cases, continued abuse demonstrated an intent to keep the victim quiet, and that such abuse didn't have to be after the fact to support a finding of forfeiture by wrongdoing. Gonzalez's continuous abuse and threats were of course intended to keep Clarisa quiet. That Clarisa chose to take her own life because of what her stepfather did to her should not be to his benefit—that is why forfeiture by wrongdoing exists. The State had met its burden of proof not merely by a preponderance, but definitively, that Gonzalez intended to keep Clarisa quiet. "I don't see how anyone looking at this and the facts of this case—where somebody is served a subpoena to testify on June 5, and the next day kills herself—you can't say those aren't linked," Gabe argued. "Of course they are. And they're linked directly to that man right there."

The defense re-urged its motion for continuance, arguing that "there is information that we believe at this time that could potentially be exculpatory or favorable to the defendant. ... I don't know what's going on right now with the FBI investigation, that there is something that is going to be favorable toward the defendant in this case."

Defense counsel then argued that the caselaw did not address this specific situation. In the cases "where it wasn't the initial action, such as

murder, that kept someone from testifying, there was some sort of precipitating event after that." There was no evidence showing that Gonzalez had any contact with Clarisa from the time he moved out of the house until she committed suicide. Going off the caselaw and the testimony, "there is not enough evidence at all to show that any wrongdoing, if any, by the defendant was done with the intent to prevent her from testifying at trial," defense counsel argued.

In response, Gabe Price clarified that "the caselaw is not murder cases. The caselaw is when that victim is unable to be in that chair for any reason because the defendant committed wrongful acts. ... We don't have to show HOW she was unavailable. All it is, is he intended for her to be unavailable and procured that." Gonzalez's actions had put Clarisa in a state of learned helplessness, and she ended up taking her own life and becoming unavailable for trial. "This is not a hard call at all," Gabe continued. "This is not a monumental case. This absolutely fits within the construct of forfeiture by wrongdoing."

Judge Strother was "persuaded that the State's motion has merit," found that Gonzalez's wrongdoing had procured Clarisa's unavailability as a witness, and barred objection to the admissibility of evidence and statements based on her unavailability. He denied the defense's request for a continuance and, to top it off, *sua sponte* found Gonzalez's bond insufficient.

While the court's ruling was gratifying, we weren't surprised by it. The team's hard work in research, preparation, and presentation made us feel that this was the right call. We also realized that we had only gotten a ruling; we hadn't won anything yet. In effect, we had been given permission to go to trial with the tools we would ordinarily have.

Going to trial

At trial, we presented much of the same testimony, along with significant physical evidence. Clarisa had told the forensic interviewer, Heydi McKinney, that Gonzalez used penis rings and that he kept a supply of hand towels in a nightstand to wipe his semen off of her. Investigators testified to finding these items exactly how Clarisa described them and exactly where she said they would be. The jury also heard about Clarisa's DNA being found on one of the penis rings.

To show that Clarisa was a real person and not just a collection of statements, the trial team prepared an enlarged photograph of her to provide a touchstone for the jurors. Playing Clarisa's forensic interview was one of the harder moments during the trial, as the jury got to hear her voice, see her face and her shy mannerisms, and hear her laugh.

The defense case was essentially that Clarisa had fabricated the whole thing. Gonzalez took the stand and testified that his stepdaughter had hated him from the time he started dating her mother. He denied the abuse and claimed to have no idea why Clarisa would say such things about him. Asked why Clarisa's DNA would be found on his penis rings, Gonzales didn't know: "I'm not a forensic," he said. Defense counsel also tried to introduce testimony relating to the Gio Michell incident, but the judge sustained our relevance objections.

The jury returned guilty verdicts and assessed maximum punishments of life and 20 years on the two counts of continuous sexual abuse of a child and indecency with a child by contact. Judge Strother stacked the punishments. Afterward, our prosecutors spoke with the jurors. Sydney Tuggle recalled: "Not a single person made it through without crying. Jurors were moved by Clarisa's life and death, and I still keep in touch with many of them today. One juror is the manager of a local restaurant and paid for the entire jury to come eat or drink on him. I still see him from time to time with my family on holidays, and after every initial hug, there's a moment of silence while we remember Clarisa. I still see her smile and hear her laugh, talking about her dreams."

The appeal

On appeal, the major issue was (of course) forfeiture by wrongdoing and whether it was properly applied in a case where the defendant's actions were attenuated by an act of suicide. Gonzalez relied on *Brown v. State*,[2] where the Court of Criminal Appeals agreed with the appellant that the State had failed to prove by a preponderance of the evidence that he procured the victim's unavailability at his trial for family violence assault. The Court noted that there was no evidence that Brown did anything to influence the victim not to appear at trial and that any connection between

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his acts and the victim's failure to appear at trial was "pure speculation."

To counter this argument, we emphasized the specifics of the evidence we had presented at the hearing. It was undisputed that Clarisa took her life one day after being subpoenaed to testify. The testimony revealed that Gonzalez had sexually, physically, mentally, and psychologically abused the child victim on a daily basis for four years. The abuse was not limited to reprehensible sexual acts; it included beating, cutting, and threats. These threats were specific that he would hurt or kill Clarisa, her mother, and her brother if she ever told anyone about the abuse. And the threats were credible; Clarisa had personally experienced the cuttings and the beatings, and she knew that her stepfather kept guns.

To counter the defense's argument, we emphasized the specifics of the evidence we had presented at the hearing. It was undisputed that Clarisa took her life one day after being subpoenaed to testify.

Clarisa related the abuse and threats to her mother, counselor, doctor, and forensic interviewer. The veracity of her revelations was apparent not only in her literal words, but also in their effect on her mental state. She was depressed and anxious, and she had trouble sleeping. Her fear of Gonzalez was such that the local police made it a routine to flash their headlights through her window when they drove by to let her know they were keeping her safe.

Dr. Carter's testimony showed the strong link between sexual abuse and suicide and depression in children. He also testified to the many purposes of Gonzalez's abuse and threats: One was to keep the sexual abuse a secret so it could continue; another was control over his victim to facilitate the ongoing abuse. Obviously and definitionally, Gonzalez used these means to ensure that the abuse was never revealed. He was so effective that Clarisa opted to take her own life rather than tell her story in court.

The Tenth Court of Appeals in Waco agreed that our case was different from *Brown* and that the connection between Gonzalez's acts and Clarisa's failure to appear at trial was more than "pure speculation."[3] The evidence was sufficient to show by a preponderance of the evidence that Gonzalez wrongfully procured Clarisa's unavailability to testify and that he intended to and did procure her unavailability as a witness; the State was not required to prove that that was the sole intent behind his actions; and the trial court did not abuse its discretion when it admitted Clarisa's out-of-court statements.

Conclusion

The Tenth Court found no abuse of discretion by the trial court in applying the forfeiture by wrongdoing doctrine, following established precedent under *Giles* and CCP Article 38.49. And though not binding as precedent,[4] the Tenth Court's opinion provides a template for applying the doctrine to a situation where a victim has been driven to suicide by a perpetrator's actions. I pray that no one should ever have to deal with a such a situation, but prosecutors now have this opinion in their toolbox if needed.

The members of the trial team were kind enough to share their reflections on this case. Will Hix considered that "of all the prosecutorial efforts I have been a part of, this one was the most impactful on me. This result that we were able to achieve is the kind that can sustain you through a job that never seems to get any easier." Sydney Tuggle regards Clarisa as "more than a victim. She changed so many lives with her life. And for her, I and so many others will be forever grateful and forever changed." Although she is no longer with our office, Hilary LaBorde shared her hope that "Will and Sydney—and everyone involved in prosecuting Clarisa's abuser without her—are and remain so proud of themselves for fighting for her and always remember this victory." ❇

Endnotes

[1] 554 U.S. 353 (2008).

[2] 618 S.W.3d 352 (Tex. Crim. App. 2021).

[3] *Gonzalez v. State*, No. 10-19-00293-CR, 2022 WL 118342 (Tex. App.–Waco Jan. 12, 2022, pet. ref'd) (not for publication).

Gunshot residue: Not the smoking gun TV makes it out to be

If you have been a prosecutor for more than a minute, you have surely heard of the "'CSI' effect." It is the tendency of jurors to have unrealistic expectations of forensic science in a criminal trial because of what they see on TV (especially "CSI" and its iterations).

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

The modern prosecutor must consider this effect in everything from grand jury presentment, to voir dire, to closing arguments.

But what if I told you that even prosecutors and law enforcement are influenced by the "CSI" effect? Yes. Prosecutors and peace officers are just as likely as jurors to have unrealistic expectations about forensic evidence collected during criminal investigations. The effect in law enforcement and prosecution is arguably more harmful because we all know just enough about forensic sciences to think of ourselves as immune.

In my experience, gunshot residue (GSR) testing is a good example of this phenomenon at work. People in our profession can sometimes have overblown expectations about what, if anything, GSR testing can add to our cases. We have a responsibility as prosecutors and law enforcement officers to know what GSR testing is, how it can help resolve fact issues in a criminal investigation, and how to use that evidence effectively at trial.

What is GSR?

Firearms use an explosion to propel projectiles toward their intended targets. During the discharge of a firearm, escaping gases from the weapon deposit residue on the skin of the shooter's hands, on his or her clothing, and on other objects in close proximity. Included in this gaseous cloud are particles composed mostly of primer residue. Primer compositions may vary with different types of ammunition and manufacturers, but the most common constituents of primers are lead styphnate, barium nitrate, and antimony sulfide. It is unlikely that the presence of these articles would be visible to the naked eye. Their detection requires law enforcement to take swabs from the area of interest (usually a suspect's hands) and submit those swabs to a lab for forensic testing.

What can GSR analysis do for you?

The strength of a GSR test comes from its ability to associate an individual with a firearm discharge when that person has not otherwise been associated with a weapon. Analysis and characterization of the residue for the trace elements (lead, barium, and antimony) may indicate if a suspect has fired, handled, or been in close proximity to a weapon when it was fired. In some instances, analysis of inanimate objects, such as clothing or vehicles, can yield helpful information for an investigation, as particles can transfer from a surface to a person or vice versa.

The DPS Customer Service Handbook cites four instances where GSR is particularly useful:

1) to support or refute a statement or witness information;

2) to answer lingering questions after other laboratory analysis has been performed;

3) when DNA, fingerprint examination, or firearm analyses have not indicated one suspect over another; and

4) when firearms analysis has identified which gun was used to shoot the victim but no fingerprint was recovered from the gun.

Unfortunately, the circumstances in which GSR analysis can be informative are pretty limited. Prosecutors may want or expect GSR to tell us many more things that the science simply cannot. For example, a GSR test does *not* indicate the distance from which a firearm is fired. Distance determinations are possible, but a GSR test is not the method that DPS will use for such a determination. A GSR test is similarly unhelpful when performed on a shooting victim because the victim has obviously been associated with a firearm.

A GSR test is also unhelpful in making a suicide vs. homicide determination. This is because more gunshot residue escapes the barrel of the firearm than near the grip, meaning that someone who is shot by a firearm may have substantially more GSR particles on himself, including on his hands. The majority of homicide and suicide victims will have gunshot residue on their hands, and a very small percentage of both homicide and suicide victims have no gunshot residue on their hands. For this reason, neither the presence nor absence of gunshot residue will provide a definitive interpretation of either a homicide or a suicide.

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GSR and the Fourth Amendment

For purposes of the Fourth Amendment, there isn't anything unique about searches for GSR. If you find yourself fighting the suppression of GSR evidence, there are a couple of helpful cases, depending on the circumstances.

When officers seek a warrant to obtain GSR evidence, the preferred practice is to say so with particularity in the warrant and affidavit. If this practice was not followed, hope is not necessarily lost. The Court of Criminal Appeals has held that the specificity required for a valid search warrant is flexible and will vary according to the crime being investigated, the item being searched, and the types of items being sought.[1] To determine whether a search and seizure falls within the warrant's scope, we follow a common sense and practical approach rather than an overly technical one.[2] A warrant that fails to describe "the items to be seized at all" is "plainly invalid."[3] A warrant's description of items to be seized is sufficiently particular, however, if the officer executing the warrant will reasonably know what items are to be seized.[4] A warrant that does not specifically list "gunshot residue" as an item to be seized is not necessarily invalid. When the warrant lists items such as "firearms, firearm magazines, other ammunition storage devices, and ammunition itself," courts have found this language to be sufficiently particular to authorize the search and seizure of GSR evidence.[5]

It is also possible for a warrantless search for GSR to be proper under the right circumstances. In an unpublished opinion, the Fourth Court of Appeals held that the threat of rain coupled with the fragile nature of gunshot residue itself was sufficient to trigger the exigent circumstances exception to the Fourth Amendment's warrant requirement.[6] The Department of Public Safety's requirement that swabs be taken within four hours of a weapon's discharge definitely increases the likelihood of exigent circumstances arising, especially in rural jurisdictions where the manpower and tools to get a warrant quickly are not always available.

DPS criteria for GSR testing

Despite what crime scene investigators might do on TV, DPS labs won't even test for gunshot residue except in certain instances. DPS testing is limited to cases involving crimes against a person, specifically, homicides, aggravated assaults, aggravated robbery, and "questioned death or death investigation cases" as appropriate for GSR testing. A questioned death is where there is a question whether someone's death was a suicide; in those instances, DPS will not run the victim's kit, but the lab would potentially analyze any suspects or elimination samples if doing so might lead to helpful conclusions. Cases involving deadly conduct are assessed on a case-by-case basis.

If the DPS lab determines that a GSR analysis will not yield results with useful interpretations, the evidence will be returned to the law enforcement agency, and a "Closed Without Analysis" report will be issued to explain the laboratory's decision. DPS will generally return GSR kits without analysis on cases of suicide, discharging a firearm in city limits, and felon in possession of a firearm, absent some documented extenuating circumstances. If DPS makes this determination

based on its policies and procedures, it requires a written request from the prosecutor or a valid court order for testing to be performed. If this request results in the laboratory confirming the presence of GSR, the report will state that no interpretation can be provided by the laboratory.

How GSR analysis is performed

Before testing can take place, swabs of the suspect's hands must be collected within four hours of the incident in question, before the suspect's hands are bagged. (Law enforcement will sometimes place bags over a suspect's hands to prevent the loss or contamination of evidence, such as blood or skin cells trapped underneath a suspect's fingernails, until it can be properly collected, but gunshot residue will likely be wiped away by the bag's contact with the suspect's hands.) After the swabs are collected, law enforcement should submit them to the appropriate DPS crime lab along with a copy of the Gunshot Residue Kit Information Form (LAB-211). At a minimum, this form needs to detail the date and time of the incident, the date and time the GSR kit was collected from the subject, whether the subject was shot, and whether the subject had a firearm on his or her person when detained.

DPS testing for GSR is done by Scanning Electron Microscopy–Energy Dispersive Spectrometry (SEM-EDS). SEM-EDS testing has become the preferred method of analysis over techniques like atomic absorption because SEM-EDS provides increased specificity and allows the analysis to be conducted without chemicals.[7] SEM-EDS analysis has been used in GSR analysis since the 1970s, and it allows for the identification of GSR particles based on morphology and composition. There are two types of particles that this test will reveal: characteristic and indicative.

Characteristic particles are three-component particles made of lead, barium, and antimony. Indicative particles are two-component particles composed of lead and barium, lead and antimony, and barium and antimony. The DPS Customer Service Handbook lists a variety of sources for both characteristic and indicative particles that go well beyond firearms. These sources range from the unsurprising (think fireworks and flare guns), to shocking (recycled brown butcher paper and car radio components). If you are working on a case involving GSR, you would be wise to evaluate the list of "GSR particle contributors" in the DPS handbook to see if any of them might apply to your case. If they do, talk to the forensic scientist who performed the examination because these non-GSR materials often contain additional elements that are inconsistent with GSR identification.

What does the difference between characteristic and indicative particles mean in terms of the conclusions a DPS forensic scientist can reach? According to DPS, the presence of characteristic particles is consistent with the person having recently 1) fired a weapon, 2) been in immediate proximity of a weapon as it is being fired, or 3) come into contact with a surface containing gunshot primer residue particles. The presence of indicative particles is consistent with any of the following:

- particles originating from an environmental source;
- characteristic particles being deposited but later removed;
- a weapon or ammunition that does not consistently produce characteristic particles but only indicative particles; and
- a person coming in contact with a surface that had indicative particles.

GSR testimony

The major difficulty with GSR testimony lies in the fact that while forensic scientists can report that the particles came from a fired weapon, they cannot describe how they were deposited on the person or item. Similarly, forensic scientists cannot identify the person who discharged a firearm in the commission of a criminal act. As mentioned earlier, a positive GSR finding is most probative in cases where a suspect denies proximity to a discharged firearm because GSR is not common to the average person's daily environment.[8] A negative finding does not rule out the possibility that the subject was not in the vicinity of a recently discharged firearm; it indicates only that no evidence of primer residue was found on the items tested.[9]

A defense attorney may raise questions at trial as to why GSR was not collected and later argue that negative results would have exonerated his client. Do not let this potential argument serve as the sole reason in requesting a GSR examination that falls outside of DPS's protocols—there is a good chance that the results raise more questions than they answer. To counter this type of claim,

Continued in the lavender box on page 31

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Five useful things to say to vulnerable witnesses

Every case is different. Every witness is unique. Still, certain emotions commonly weave throughout criminal cases, especially those where someone has been physically or sexually abused.

By Brandy Robinson
First Assistant District Attorney in Austin County

Perhaps one of the strongest emotional reactions that survivors feel is guilt.

When an abuse survivor blames herself for the abuse, the idea of testifying naturally becomes more difficult. Many survivors see testifying as confessing their darkest secrets to a room full of strangers rather than an empowering opportunity to take control. Although prosecutors lack the power to eliminate a victim's shame and anxiety on the road to recovery, the following sayings may help us to at least ease their path along the way and help them navigate the difficult journey through trial.

1 **"My job is to ask the right questions. The only job you have is to tell the truth."** They say it takes hearing something at least three times to retain it. If any phrase is worth repeating thrice, it would be this one.

Witnesses typically enter the criminal justice system uncertain about their role. They may worry that they will have to volunteer lengthy opinions about right or wrong or speak at length about what the offender's fate should be. We can help reduce that stress by conveying, early and often, that truthfully answering questions is a witness's only responsibility. The outcome of the case is not.

Prosecutors should also stress that our job is to ask the questions that give the witness the best chance to describe what happened, not to make the witness decide the offender's fate. When describing how direct and cross examinations work, we can remind the witness that no matter who is asking the questions, the witness's job never changes. If a witness is worried that the defense may create a false impression, we can assure her that we will have a chance to ask more questions afterward to clear up any misunderstandings. I sometimes tell a witness not to worry if I decide *not* to go back into a topic after cross-examination—it may be that I believe the witness did so well in covering those areas that there is no need to repeat them.

When we repeatedly discuss the truth in witness preparation, we are not just setting behavioral expectations; we are also offering the comfort that there are no wrong answers about what happened, as long as they are true answers. This encourages the witness to give the prosecutor more—and more accurate—information without the witness worrying about how it may affect the case. If we are truly seeing justice done, one of the most important things we can do is to affirm that the witness has done the right thing by telling the truth—warts and all.

2 **"You are one piece of a puzzle. If a jury finds someone 'not guilty,' it doesn't mean they didn't believe you. It just means that they didn't think they had enough pieces of the puzzle."** In voir dire examples, some prosecutors use puzzle pieces to explain reasonable doubt to jurors. The concept of putting a puzzle together to

prove a case can also be helpful to explain a witness's role at trial. We can tell witnesses that we prosecutors look at all the pieces and then use witnesses to put that puzzle together for the jurors. We hope at the trial's end that the jury can see the big picture of what happened, but sometimes that can be hard for a jury to see. The puzzle example may help to create manageable expectations for survivors by readying the witness for the possibility of an acquittal without giving her a feeling of impending doom.

Many survivors suffer from anxiety that the entire case rests on their shoulders. They greatly fear that if a jury acquits the defendant, it means the jury did not believe them. With this type of survivor, the idea that each witness is only one piece of the puzzle can help lessen that concern and soften the blow of a potential loss.

Some survivors suffer from the opposite concern—they worry that law enforcement has not taken their case seriously enough. For these folks, care should be taken in using the puzzle approach, because we want to avoid minimizing their experiences. However, the puzzle example might still be useful to explain why plea bargains are offered. Sometimes, through no one's fault, prosecutor may have only two or three pieces of a puzzle in a case. The fewer pieces we have, the more difficult it is to show the jury what happened, which makes it harder to win at trial, even when we believe a witness.

The puzzle approach can also help a witness disassociate from some of the self-blame that he or she might feel about testifying in the first place. Survivors, especially children, often internalize a lot of guilt and feel responsible for any negative impacts that followed their outcry. Discussing witnesses as pieces of a greater puzzle all working together to tell the truth may help a vulnerable witness to feel supported.

3 "There is no wrong way to feel about what happened." Many witnesses have a set notion of what they are *supposed* to feel about a traumatic event. This notion may come from popular media, family or peer pressure, or the witness's own conflicting thoughts about what has happened and her role in it.

I once spoke with an elderly woman who was sexually assaulted by a stranger at gunpoint. At times during the long assault, the defendant seemed remorseful, spoke politely to her, or acted "considerate" by allowing her to rest. This only intensified her later shame.

there may be circumstances where a prosecutor must designate a forensic scientist from DPS to explain the limits of GSR testing to the jury and how the facts of the case before them was not appropriate for GSR testing.

Conclusion

Being an effective prosecutor requires us to know what tools are available to us and the extent of those tools' usefulness. The forensic sciences are some of the many tools at our disposal, and it is important to know how much information they can reveal to utilize them effectively. For that reason, prosecutors who find themselves working on a shooting case should familiarize themselves with the limits of GSR analysis and the testing policies and procedures of the crime lab. Don't fall into the trap of relying on what you think you know when it comes to the forensic analysis of GSR particles. The science behind GSR analysis has its limitations, and prosecutors would be wise not to let the "'CSI' effect" convince us that answers can be provided to questions that are beyond those limitations. ❇

Endnotes

[1] *Gonzales v. State*, 577 S.W.2d 226, 228-29 (Tex. Crim. App. 1979).

[2] *State v. Elrod*, 538 S.W.3d 551, 556 (Tex. Crim. App. 2017) (magistrate may use logic and common sense to make inferences based on facts in affidavit).

[3] *Groh v. Ramirez*, 540 U.S 551, 557-58 (204).

[4] *Balderas v. State*, 629 S.W.3d 610, 614 (Tex. App.–Houston [1st Dist.] 2021, no pet.); *Harmel v. State*, 597 S.W.3d 943, 962-63 (Tex. App.–Austin 2020, no pet.).

[5] See *Gonzalez v. State*, 616 S.W.3d 585, 594 (Tex. Crim. App. 2020), *cert. denied*, *Gonzalez v. State*, No. 21-5327, – S.Ct. –, 2021 U.S. LEXIS 5435, 2021 WL 5043646, at *1 (Nov. 1, 2021).

[6] *Johnson v. State*, No. 04-13-00766-CR, 2014 Tex. App. LEXIS 13701, at *10 (Tex. App.–San Antonio, Dec. 23, 2014).

[7] https://leb.fbi.gov/articles/featured-articles/the-current-status-of-gsr-examinations.

[8] *Id*.

[9] *Id*.

Abusers who use threats, coercion, or emotional manipulation rather than brute force often cause their victims to experience powerful feelings of guilt or complicity. This problem is particularly pronounced with children who may still feel some affection for an abuser who has groomed them. Unfortunately, when a witness feels some emotion that she believes is inappropriate, testifying may amplify that internal conflict. It can make a witness feel like a fraud for not feeling what everyone, including possibly the witness herself, thinks she should feel.

Let the witness know that there is no one "right" way to feel about what happened and that her feelings may change over time. Also, remind the witness that if she is feeling something, there is a good chance other people who have been in similar situations have felt the exact same thing. Telling a witness that there is no right or wrong way to feel can free the witness to be more honest with you, which is one of our primary goals.

As prosecutors, our job is not to counsel witnesses on how to deal with their feelings long-term. But we do need to make testifying as painless as possible. Part of that job is often accomplished by saying something as simple as, "I talk to a lot of people who have been through similar things, and it is normal to feel many different things. There is no wrong way to feel about this."

Abusers who use threats, coercion, or emotional manipulation rather than brute force often cause their victims to experience powerful feelings of guilt or complicity. This problem is particularly pronounced with children who may still feel some affection for an abuser who has groomed them.

4 **"You are not alone."** Many survivors of abuse feel like outsiders hiding a secret past that no one could ever understand. Although public knowledge of abuse has grown over the years, many survivors still have little to no idea how common it is. It can be tremendously helpful for those people to hear that their feelings and experiences are more common than they think. If a victim is feeling isolated, it can help to explain that many of the people that she sees every day, including her peers, may have experienced similar events and never talked about it.

Prosecutors can tell crime victims that because of the nature of our jobs, we talk to many people who have been through similar experiences, and often those people wait months, years, or even a lifetime to talk about what happened to them. We can also explain that some of those people who were scared to talk eventually realized that telling someone else could be a positive thing. Then we can remind them about counselors, mental health advocates, or other resources that are available to process the emotional aftermath that speaking about abuse can bring.

5 **"You did the right thing."** Whether it is long-term abuse or a one-time incident, those who have been abused often spend days or even years second-guessing their decisions during traumatic events. Much like some survivors need to hear that there is "no wrong way to feel," sometimes they need to hear that there was "no wrong way to act."

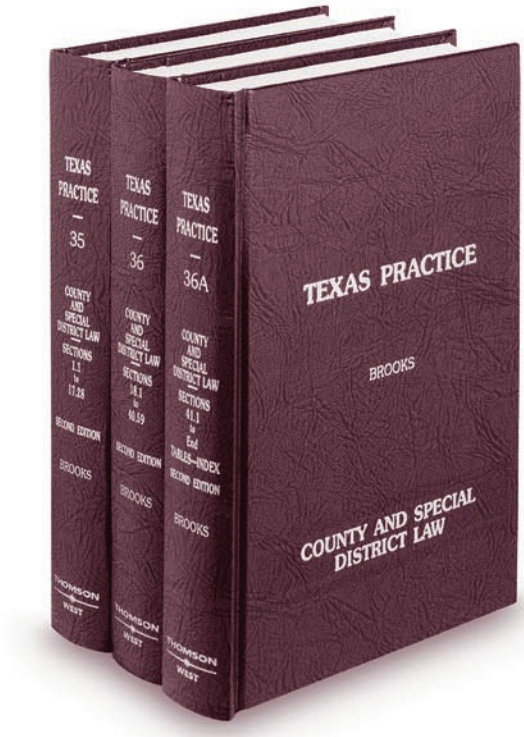
The elderly rape survivor I previously described told me that one of her greatest shames was that she did not physically fight her attacker. Instead, she prayed aloud throughout her assault. I told her that her faith may have saved her life. When her abuser was caught, he confessed that hearing the woman's prayers had deeply affected him and may have kept him from harming her even worse.

We all have unpredictable instincts that kick in during times of great stress and danger. Sometimes a person needs to hear that our instincts are there to protect us, and any instinct that saved your life was the right one. That thought can also provide the comfort that some people need to encourage them to be completely honest about the facts of the case. Giving survivors the confidence to know that prosecutors will not judge them for their actions during abuse, no matter what those actions were, can help to open that door to an honest discussion of events.

No matter what events have occurred, remind the survivor that when it comes to the court process, being honest is always the right thing to do.

Conclusion

Each crime victim is different, and the approaches listed here may not work well or be appropriate for every person. But they can be useful tools when dealing with sensitive subjects. The only job a witness has is to tell the truth, but that can be so much easier said than done. We owe it to these survivors to prepare a safe environment for their journey through trial that encourages them to tell their stories truthfully. ❇



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A change regarding Investigator scholarships

It is with a heavy heart that we on the Investigator Board are making this announcement:

By Bob Bianchi
DA Investigator in Victoria County & Member of the TDCAA Investigator Board

As of January 2023, we will no longer be sponsoring the semiannual Investigator College Scholarship to children of TDCAA members.

Unfortunately, the process for running the scholarship awards as a nonprofit entity has become logistically impossible for us to continue. Therefore, in the best interest of our college-bound children, we as a board have voted to discontinue the scholarship program and disperse the remaining funds to worthy applicants.

Our grand finale will be done a little differently from in the past. During the third week of January 2023, we will give away eight college scholarships (yes, you read that correctly: eight!) to the children of our beloved TDCAA family. That means the children of any *paid* TDCAA member who is a prosecutor, investigator, victim assistance coordinator, or key personnel can take advantage of this opportunity. Each of the scholarships will be a little over $1,000. The scholarship essay and application can be found on www.tdcaa.com under Announcements. There you will also find the eligibility and the application requirements.

The deadline for all essays and applications is Friday, December 30, 2022. After the applications are received, the scholarship committee will determine the eight winners, and we will announce them the week of Monday, January 16, 2023. This is a great opportunity, so pass this information on to your children and get those applications in.

The Investigator Board would like to send out our warmest thanks to everyone who ever assisted with the silent auction each year. We would also like to thank TDCAA members who always graciously donated auction items and those who bid on those items, most of the time well above the regular retail price. It was the silent auction funds, along with a percentage of the TDCAA-branded clothing and merchandise sold at conferences, that made our scholarships possible. It was always our hope over the years that these scholarships would help our families with some of the financial burden associated with going to college. ❇

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