The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

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

The nation's first criminal jury trial via Zoom

In March, like so many prosecutors across the country, we found ourselves in a courtroom one day and in our living rooms the next.

By Jaime Flores (left) and Afton Washbourne
Assistant County Attorneys in Travis County

Prosecutors in our office held our last jury trial in an actual courtroom in February, and a few weeks later, on March 16, we made our final appearances inside the Blackwell-Thurman Criminal Justice Center in downtown Austin. After morning dockets, where prosecutors asked defense attorneys to stand 6 feet away while we negotiated cases, we returned to our office to a series of socially distanced meetings called by our boss, County Attorney David Escamilla. He informed us that due to COVID-19 concerns, we would begin teleworking. We packed up and transported our laptops and monitors home, not knowing how long the shelter-in-place order would be in effect. Within a few weeks, our office had completely transitioned into working from home.

Our office was faced with a crisis in how we could move forward seeing justice done without putting ourselves, defendants, and court officers at risk. It was a whole new world. The immediate focus was addressing the jail population, so we first set systems in place to conduct online bond hearings and to plead cases for defendants in custody. Next, we started pleading cases via Zoom for out-of-custody defendants, followed by conducting contested pretrial hearings. Our office worked closely with judges, court staff, and the defense bar to utilize virtual capabilities to continue most of our daily courtroom activities—everything except the last frontier, conducting an actual jury trial.

That all changed on August 11 when we successfully tried to verdict the nation's first criminal jury trial via videoconferencing.

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New inductees to the Texas Prosecutors Society

This spring, the Foundation Board composed its invitation list for the 2020 class of the Texas Prosecutors Society (TPS).

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

The Society was established in 2011, and its purpose is to bring together those who have demonstrated enduring support for the profession of prosecution. We used the Texas Bar Foundation as a model, and nominees are asked to donate $2,500, or $250 over 10 years, to an endowment fund. The Society gathers each year in conjunction with the Elected Prosecutor Conference toward the end of the year for a celebratory cocktail reception.

Nominations for invitees are accepted by the Foundation Board, who also seek nominations from the TDCAA Board. Nominees must have a minimum of five years' service as a prosecutor or other criminal justice professional and a significant and sustained contribution to the advancement of the profession and criminal justice in Texas.

I am very humbled by the response to the invitations this year. I am proud to announce the 2020 class of the Texas Prosecutors Society (listed below). Congratulations to you all! ❇

Texas Prosecutors Society Class of 2020

Isidro Alaniz
Brian Baker
Art Bauereiss
Natalie Koehler Denbow
Jon English
Casey Garrett
Dan Gattis
Landon Lambert
Jo Ann Linzer
Laura Nodolf
John Rolater
Tiana Sanford
April Sikes
Kebharu Smith
Kerry Spears
Leslie Standerfer
Beth Toben
Dean Brad Toben
Jerry Varney
Hardy Wilkerson
Patrick Wilson

Texas District and County Attorneys Association

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2020 Annual award winners

With our Annual Criminal & Civil Law Conference moving online this year, we won't have a chance to congratulate several people within TDCAA's ranks for winning awards—not in person, anyway.

By Rob Kepple
TDCAA Executive Director in Austin

But I am listing them here to give them the recognition they deserve, even if we can't give them a round of applause and a plaque at our Annual Conference. Please join me in celebrating these folks for doing their jobs exceptionally well this year.

State Bar Criminal Justice Section Prosecutors of the Year

This award recognizes a prosecutor who has distinguished himself or herself in the profession. This year, the award went to not just one person but the whole team who prosecuted former Dallas police officer Amber Guyger for the murder of her neighbor, Botham Jean: **Jason Fine, Douglas Gladden, Jason Hermus, Thomas Le Noir, LaQuita Long**, **Bryan Mitchell**, and **Mischeka Nicholson**. See a photo, below, of the trial team flanking a collage of Botham Jean.

You may remember from all of the media coverage that this crime read more like a law school exam question than an actual case. An off-duty police officer, thinking that there was an intruder in her apartment, shoots him twice—only to discover that she had gone into the wrong apartment. In a trial that gripped the nation, the prosecutors showed focus and poise at every turn and secured justice for the victim and his family.

Lone Star Award

This award seeks to recognize someone in the ranks of prosecution, whether a lawyer, investigator, key personnel, or victim assistance coordinator (VAC), who has shown true dedication to the profession yet may not always get the recognition they deserve. The two people who are honored this year truly rose above at a critical time to protect victims of crime: VAC **Sally Madrid** and ADA **Sarah Moore**, both from the El Paso County District Attorney's Office. You may have read about them in my column in the May–June edition of this journal. Sally just happened to see a domestic violence victim whom she was working with in the courthouse hallway when there was no case setting. It turns out the defense attorney had subpoenaed the victim in a non-trial setting to take her phone from her and search it for evidence. Sally quickly alerted Sarah, who immediately sought court intervention. That intervention ended up in an Eighth Court of Appeals decision banning such use of a subpoena. Sally and Sarah's quick thinking will protect victims of crime well into the future!

Sally Madrid

Sarah Moore

Oscar Sherrell Award

This award, named after an investigator who helped TDCAA move into the computer age, recognizes service above and beyond to the association. We are thrilled that this year's recipient is **Lisa Peterson**, the longtime County Attorney in Nolan County. Lisa is completing her 30-year career at the end of 2020 and has been a true mainstay at TDCAA conferences and as support for county attorneys around the state for her entire tenure. We are surely sad to see her go—and we hope to hear from the next county attorney who is going to step up as the "queen of county road law."


Lisa Peterson

C. Chris Marshall Award

The C. Chris Marshall Award is named for an assistant CDA in Tarrant County who was a tremendous contributor to TDCAA training. It honors exceptional TDCAA faculty. This year, by virtue of a tie in the voting, the award goes to two great contributors to our work to bring you timely, relevant, and accessible courses: **Brian Baker**, First Assistant DA in Brazos County, and **Tiana Sanford**, ADA in Montgomery County.


Brian Baker


Tiana Sanford

Brian serves on TDCAA's Training Committee and has been a faculty member of the Advanced Trial Advocacy Course for years. He also has a reputation for always being available to assist prosecutors all over the state with any issue they face. And Tiana is the Training Committee Chair. She's been instrumental in diversity outreach and bias curriculum development, and she has been a great mentor to numerous young prosecutors.

Congratulations to all recipients of these much-deserved awards!

Another award winner

When our Civil Law Conference, which was scheduled for May, was cancelled, I didn't get to congratulate the winner of the Gerald Summerford Civil Practitioner of the Year Award. It is given by the Civil Section to recognize the outstanding civil practitioner.


Leslie Dippel

Here is my chance to congratulate 2020's winner, **Leslie Dippel**, the Director of the Civil Litigation Division of the Travis County Attorney's Office. Leslie is a trial specialist with deep experience in employment law. She has been a frequent TDCAA speaker and resource and a past chair of our Civil Committee. She is also on the State Bar Board of Directors, serving District 9. Thanks for all you do, Leslie, and congratulations on this honor!

An eye toward criminal justice reform

As discussions about criminal justice reform continue nationwide in the wake of **George Floyd**'s death at the hands of four Minneapolis police officers, some common themes are emerging. One seems to be more comprehensive discovery in criminal cases. Here in Texas with the Michael Morton Act, we can say "check" to that one.

A second major proposal, however, is one that I believe Texas prosecutors will be behind: a statewide database of police officer disciplinary records. Many jurisdictions now have their own such databases, but we are still at a disadvantage in identifying the cops who get into trouble, agree to resign in lieu of discipline, and show up at the next department ready to repeat the bad behavior. At one time, Austin police officer disciplinary findings were online and available to the public, which was an exercise in transparency. It was good, too, that defense attorneys could easily access potentially relevant and material impeachment evidence. The idea that the Texas Commission on Law Enforcement (TCOLE) be given the mandate and resources to create and maintain such a database for the integrity of criminal prosecutions seems intriguing. Stay tuned this upcoming legislative session; I wouldn't be surprised if we see some proposed bills along these lines.

'How to make meetings less terrible'

A weird thing happened this spring: We weren't together in offices, but we were suddenly having more meetings than ever before because, well, it

Four hints I took away from the podcast on making meetings less terrible: Have a timed agenda, decision points, and a small invite list–and feel free to end early if you are actually done with the discussion.

The NAPC's major function is to share information, particularly training ideas, and to support the nation's Traffic Safety Resource Prosecutors. I am happy to report that TDCAA is one of the most robust associations in the nation when it comes to the amount of training and number of publications we provide our prosecutors.

was easy to get together over Zoom. Sometimes it feels like I am in a Zoom meeting to plan when to have a Zoom meeting.

In an effort to find out how to hold an effective meeting, I found an excellent podcast on the subject: Freakonomics Radio Podcast Episode 389, which is titled: "How to Make Meetings Less Terrible." Americans hold 55 million meetings a day, and most are woefully unproductive. In true Freakonomics style, the podcast teaches about meetings by studying something unexpected—in this case, African wild dogs and their "rally events." The podcast will educate listeners on all the things that make most meetings, well, pretty terrible, and it will help transform meetings from a passive-aggressive time waster to a well-oiled, decision-making machine. Four hints I took away from the podcast: Have a timed agenda, decision points, and a small invite list—and feel free to end early if you are actually done with the discussion.

Implicit bias training and Texas lawyers

Many of you have received an email from the State Bar discussing the results of a long board meeting held on July 27 to discuss the social media comments of the State Bar President, **Larry McDougal**, regarding Black Lives Matter. Larry apologized for his comments, and the board announced a number of action items after listening to testimony from dozens of interested lawyers and citizens. Two involved implicit bias training, one requiring the board to complete such training by the end of the year, and the second to consider that the Bar mandate MCLE training on implicit bias for all lawyers.

To both of which I say, "Welcome to the party!" I am proud that our leaders and trainers recognized years ago that CLE on cognitive and implicit bias is essential for our profession. Two of our excellent speakers, **Jarvis Parsons**, DA in Brazos County, and **Bill Wirskye**, First Assistant CDA in Collin County, put together training tailored to prosecutors, and with financial support from the Texas District and County Attorneys Foundation, that course is now a consistent part of our menu, including sessions at our Prosecutors Trial Skills Courses for people just entering the profession.

A career change for a former TDCAA Research Attorney

Many of you recall **Markus Kypreos**, one of a long line of excellent research attorneys we have had here at TDCAA; he worked for us from 2004 to 2006. Markus is certainly an energetic person with lots of varied interests. He staked out quite a reputation while here as the guru of Texas gambling law, and he went on during his law practice in Fort Worth to become a frequent expert legal commentator on a variety of subjects. But as if to prove that there is life after law, Markus has now launched a venture that has captured quite a bit of attention in the Metroplex: Blackland Distillery, maker and purveyor of spirits. As with everything Markus does, excellence seems to be at the heart of it. You can read more here: www.fwweekly.com/2019/01/16/blackland-distillery-arrives.

A message from your NAPC president

Yes, that would be me! You may not have known, but there is a nationwide group of prosecutor associations—its full name is the National Association of Prosecutor Coordinators (NAPC). Almost every state has an association or governmental outfit that educates and assists its prosecutors, and I am proud to have been elected as the 2020–2021 NAPC president at our summer Zoom meeting. Our major function is to share information, particularly training ideas, and to support the nation's Traffic Safety Resource Prosecutors (including TDCAA's very own **W. Clay Abbott**). I am happy to report that TDCAA is one of the most robust associations in the nation when it comes to the amount of training and number of publications we provide our prosecutors.

Here is where I can be of particular help to you. Much like the master sergeant in the army, prosecutor coordinators aren't the leaders in their states (the elected prosecutors are) but we have the contacts and information that are the cornerstone of a membership organization. Let's say you need something from a district clerk in New York—a judgment and sentence perhaps—and the clerk really isn't responsive to you. If you tell me about your need, I can call my counterpart in New York, who will in turn reach out to the local prosecutor, and bingo. The document you need is on its way. Really, it works like that all the time—it really is about who you know sometimes! So over the next year of my presidency, I can keep Texas prosecutors and staff informed on national trends in prosecutor training, but I can also be of immediate help if you need something from one of our sister states. ❇

A tribute to Justice David Bridges

Only weeks ago, former prosecutor and Fifth District Court of Appeals Justice David Bridges was killed by a drunk driver.

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

In the midst of COVID and protests about George Floyd, it was a stark reminder that we are beset by criminal justice problems that we have been fighting for a century. It was also a personal reminder of the collateral effects of crime, a reminder why each of us—all of us—must continue to fight against senseless criminal activity that takes such a personal toll on loved ones and close friends.

As my heart hurts for my own friend and his dear family, I have thought about the frailty and humanity of the criminal justice system and ruefully perceive that none of us is immune to its insidious touch. David Bridges was taken too soon, but our memories of such a man will keep his legacy alive.

A giant of a man

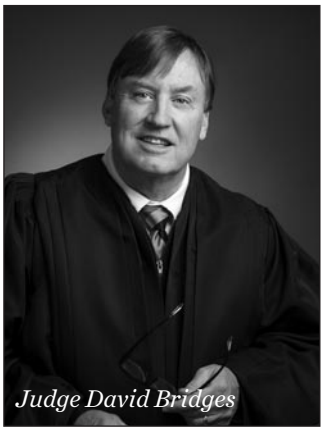
Fifth District Court of Appeals Justice David Bridges was a giant of a man. Both in stature and reputation, he towered above many others; he was respected by members of the bar, members of law enforcement, and members of his community. And he was my friend.

On Saturday, July 25, this man was struck down by someone we as prosecutors all fear and too often have to deal with: a drunk driver. At 9:30 that evening, David was driving home from giving a speech in Franklin County when he was hit by a motorist driving the wrong way on Interstate 30 in Royse City. David's car burst into flames after the impact, and he tragically died before first responders could arrive. The other driver, who is believed to have been impaired by both drugs and alcohol, survived the wreck, and she was arrested and booked into the Hunt County Jail on charges of intoxication manslaughter and possession of a controlled substance.

But David deserves to be remembered by how he lived, not how he died. To understand David is to know about his many passions in life, and he certainly wore a lot of hats.

He was a hard worker. Growing up in East Texas, he spent his summers working on a farm, became an Eagle Scout, and then joined the U.S. Army after high school. After serving honorably, he went to college and worked his way through school at a General Electric plant in Tyler. He then got a job as a petroleum landman securing oil and gas leases in the Appalachian Mountains to make money to go law school. While at Texas Tech Law School, he spent precious time volunteering with a local Presbyterian church to aid indigent families with legal matters.

He loved being a lawyer and a judge. He was an Assistant Criminal District Attorney in Smith County and Upshur County and tried many serious felony cases including murder, aggravated sexual assault of a child, and aggravated robbery. He was then hired by the State Bar of Texas and served as First Assistant and Chief of Litigation over the lawyer disciplinary division. In 1996, he was elected to the Fifth District Court of Appeals and, at his death, was the longest serving justice on the court. A legal expert, he was Board Certified in both Criminal Law and Criminal Appellate Law.



Judge David Bridges

He loved politics. I actually think he loved running for office because he got to spend so much time talking to people. And he was hard not to like. He ran against U.S. Congressman Ralph Hall—twice. The two rivals then became fast friends—David was even a pallbearer at Congressman Hall's funeral. He ran for Chief Justice

Continued on page 9 in the blue box

A new day, a new way?

A few weeks ago, I received an email from Tamra Frey, a victim assistance coordinator (VAC) in the DA's Office in Mason County, wondering if there are any guidelines for keeping crime victims informed during the COVID-19 pandemic where most prosecutor offices and courthouses are closed to the public.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

"We are doing Zoom meetings and have YouTube for victims to view," she wrote. "Personally, I am so missing the courtroom and my interaction with victims. Is there anything else to offer?"

I thought I would reach out to other VACs to see if I could gather ideas from other offices, and here's what a sampling of folks are doing elsewhere.

Mona L. Jimerson
Director of Victim Services
Criminal District Attorney's Office in Gregg County

Unfortunately, we all see far too many cases and sometimes they all run together. Each of our victims have had probably the worst (and probably most important) thing in their life happen to them, which is why they are our victims. We need to be showing them that it is important to us as well.

I had been feeling so bad when someone would call about a case, and I knew I *should* know which case they were affiliated with but could not pull it out of my brain. Then I had to ask them, "Who is your loved one?" and I did not want it to come across like their case was not important enough for me to remember it.

So we have made a list of every open case on file, and I also made a binder of all cases involving death. I included a few pieces of information, such as the case number, victim's name, contact people, phone numbers, and little notes about each case that reminds me which one it is. All of this information is in Odyssey, but while I am making small talk with victims on the phone and I can't remember, I can flip through the binder to nudge my memory.

We also started working on binders with all assault—family violence and child sex assault cases, and we are attempting to reach out to the victims more during this time. We just give them a call and tell them that due to COVID we are not able to have a jury trial but we wanted them to know that we have not forgotten them, that their case is very important to us. The binders have been a great tool because I can readily see the cases where there's a victim and reach out to him or her. I use that time to see how they are faring and if they have any thoughts or concerns I can assist with. Most have been very appreciative wondering what was going on. Some had heard the stories about people getting let out of jail because of COVID and were concerned that their offenders would be released. All in all, they have been very appreciative and some even happy to have someone to visit with for a moment.

If we are not reaching out to them, then victims can begin to feel as if they are lost or we do not care. They should know that we do care, and we are thinking about them even if we can't actually see them in trial yet.

COVID has taken a toll on many people in a host of different ways. By reaching out to each of our victims on a more regular basis, you never know whose lifeline you will become. We are working on building relationships that we will need when we finally are able to hit the ground running and the courts open.

Jane Adams
Victim Assistance Coordinator
County & District Attorney's Office
in Lamb County

Our office has been keeping victims and their families informed mostly by telephone or email. If we need to meet with victims, they are invited to our office wearing a mask and social distancing. Because we are not having jury trials, we have much less need to meet person-to-person with our victims. Those who had trials set but that were canceled because of COVID-19 deserve to know what is happening in their cases. We give them a quick phone call to explain, and most people understand. There have only been two bench trials scheduled since all the COVID restrictions.

Interactions in-person have changed a lot with people wearing masks. It is hard to judge a person's emotional state while they have their mouth and nose covered, and it is difficult to hear them speaking. I am so ready to get back to life in the courthouse before COVID!

Colleen Jordan
Assistant Director of the Victim Services Division, District Attorney's Office in Harris County

At one point early on we were all working from home; however, we currently have a small number of VACs working in the office on any given day. Our wonderful IT department created a computerized victim information management system (VIMS) for us, which was in the works prior to COVID, where each VAC has his or her own "dashboard" and can log into the system to view and track the cases each day. Once the VAC has called the victim (what we refer to as the "initial contact call"), the VAC enters the victim's email address and case notes into VIMS. The system will email the VIS, Crime Victims Compensation application, and other pertinent information, as well as applicable counseling resources, with just a few mouse clicks! Several of our VACs have county-issued laptops or are able to log into the county computer system remotely via their own home computer. All of our VACs are issued county cell phones also, so communicating with victims while working from home has not been an issue for us. Of course we utilize Zoom for meetings with victims, court accompaniments, and trainings. As far as court accompaniments, the court coordinator will give the victim access to the court's Zoom link at the time the case goes before the judge.

of the Court of Criminal Appeals a couple of years ago and was, at the time of his death, vying for the nomination to replace John Ratcliffe on the ballot for the Fourth Congressional District. In fact, he was on his way home from speaking to potential voters in Mount Vernon when he was killed.

He loved his family. He and his beautiful and fun wife, Sandy, have two daughters. Elizabeth, a former cheerleader, is the mother of two sons, and Alex, a former twirler at Rockwall High School, is making plans to attend grad school. David was so proud that Alex had just gotten engaged, and he was no doubt looking forward to walking her down the aisle.

And he loved God. He was a member and dedicated volunteer at the First Baptist Church of Rockwall and was beautifully, unabashedly, and always ready to talk about his faith in God. A friend told me that, just a week before David's death, they saw each other at the grocery store. They stood and talked about life and family for about 10 minutes and, at the end of the conversation, David unexpectedly asked my friend how he could pray for him. He didn't wait for a crisis to pray. He had a daily relationship with God that comforted both himself and those around him.

Yes, David Bridges was a giant of a man, a man struck down entirely too early by someone too selfish and self-absorbed to even understand the value of what she swiped from this earth. My comfort lies in the fact that David lived life fully on his own terms and with courage and integrity. Our state has lost one of the great ones. Rest in peace, my friend. ❇

There is also much more that our VIMS system is capable of doing; this is just a quick overview.

"Each of our victims have had probably the worst (and probably most important) thing in their life happen to them, which is why they are our victims. We need to be showing them that it is important to us as well."
–Mona Jimerson, Gregg County CDA's Office

Cynthia L. Jahn
Director of Victim Services
Criminal District Attorney's Office in Bexar County

We don't have any written procedures on how to do our jobs during this pandemic, but we have had several Zoom meetings with victim assistance personnel to keep in touch and make sure everyone is on the same page. Obviously, all our courts are shut down, but it really depends on the judges as to how much activity is taking place in their courtrooms and virtually. All courts have cancelled weekly dockets, but we have one or two district court judges who tend to call a few cases virtually each week. The county has at least one criminal district court judge in the office each week. They come in on a rotating basis. They can take care of minor hearings and pleas virtually. Misdemeanor courts are pretty much the same. As far as I know, there have been no trials of any kind.

Our advocates are staying in touch with victims by phone. They work primarily from home but come into the office only when they need to pick up and drop off files. They meet with their assigned prosecutors regularly, by phone or Zoom, and every now and then they set up Zoom meetings with victims. Although the courthouse is open, we are not allowing any non-staff personnel into the office. We are still mailing out VISes (Victim Impact Statements) and returning calls to our main phone line—nothing really innovative or special. Just treading water until we get through this mess. I have found that no one really wants to talk about what a horrific backlog this is causing in the court system. If we thought the system moved slowly before, wait until we open back up with thousands of cases pending in each court.

Seminar and Board Elections

Due to the COVID-19 pandemic and in the interest of keeping everyone safe, the 2020 TDCAA Key Personnel & Victim Assistance Coordinator Seminar has been cancelled.

Please continue to check www.tdcaa.com for information on upcoming training and for information on the Board elections for 2021.

PVAC recognition

Professional Victim Assistance Coordinator (PVAC) recognition is a voluntary program for Texas prosecutor offices designed to recognize professionalism in prosecutor-based victim assistance and acknowledge a minimum standard of training in the field. Applicants must provide victim assistance through a prosecutor's office and be or become a member of the Texas District and County Attorneys Association.

Applicants must either have three years' experience providing direct victim services for a prosecutor's office or five years' experience in the victim services field, one of which must be providing prosecutor-based victim assistance. Training recognized for CLE, TCOLE, social work, and/or licensed professional counselor educational credits are accepted under this program.

Training must include at least one workshop on the following topics:

- prosecutor victim assistance coordinator duties under Chapter 56 of the Code of Criminal Procedure.
- the rules and application process for Crime Victims' Compensation.
- the impact of crime on victims and survivors; or
- crisis intervention and support counseling.

Applicants must show that they have already received 45 total hours of training in victim services (which is equivalent to the number of hours in the National Victim Assistance Academy program created by the U.S. Department of Justice's Office for Victims of Crime).

An applicant with 10 years' experience in direct victim services (five of which must be in a prosecutor's office) may sign an affidavit stating that the training requirement has been met in lieu of providing copies of training receipts.

In addition to these experience and training requirements, five professional references are required from individuals not related to the applicant. One of the letters must be from the elected prosecutor in the jurisdiction where the applicant has been employed, and at least one of the letters must be from a local victim services agency in the community who has worked with the applicant for one year or longer. The remaining three letters can be from other victim services agencies, victims, law enforcement representatives, assistant prosecutors, or other criminal justice professionals who have knowledge of the

applicant's skills and abilities in the field of victim services.

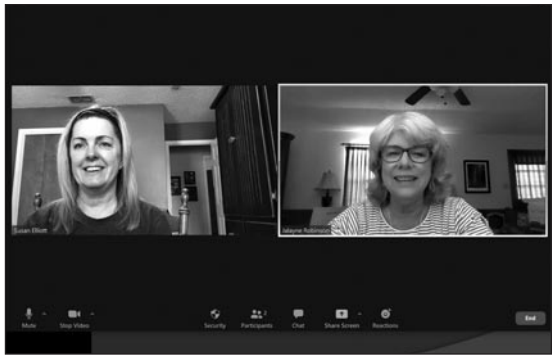
The deadline for PVAC applications, which can be found at www.tdcaa.com/resources/victim-services, is January 31, 2021. Find detailed requirements at the same link.

Victim services consultations by Zoom

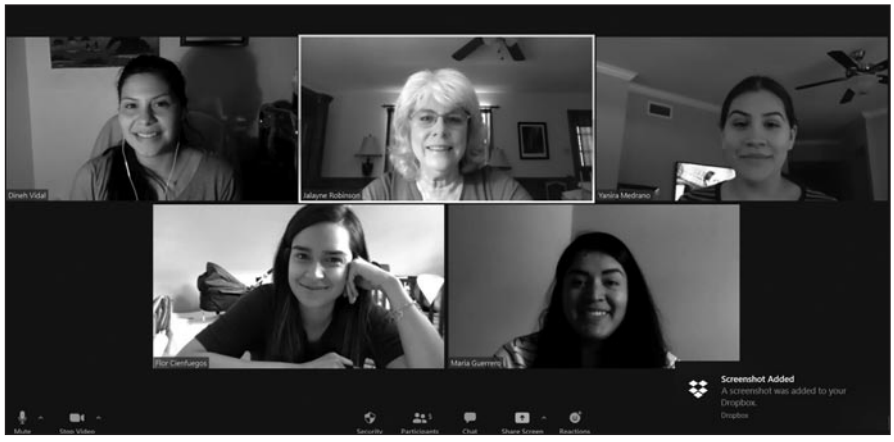
As TDCAA's Victim Services Director, my primary responsibility is to assist elected prosecutors of Texas, VACs, or other prosecutor office staff members in providing support services for crime victims in their jurisdictions. I am available to provide victim services training and technical assistance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

If you would like to schedule a Zoom victim services videoconference, please email me at Jalayne.Robinson@tdcaa.com. Many VACs across Texas are taking advantage of this free victim services training. Please let me know how I may be of assistance to you and your office! ❇

TOP PHOTO: Luke W. Davis, County Attorney and VAC in Menard County. ABOVE: From left, Amy Wallace, Chief Legal Assistant, and Jenny Mansfield, new VAC, in the C&DA's Office in Rains County.



AT LEFT, FROM TOP: Susan Elliott, ADA and VAC in the 50th Judicial District Attorney's Office; Maria Sanchez, new VAC in the DA's Office in Angelina County; Kiabeth Barrera, VAC in the CDA's Office in Deaf Smith County; and Dinah Vidal, Yanir Medrano, Flor Cienfuegos, and Maria Guerrero, new VACs in the DA's Office in Harris County.



When is a mistake *Brady* evidence?

Brady evidence can show up in the darnedest places.

By Clinton Morgan
Assistant District Attorney in Harris County

We can turn over what we have, and we can tell law enforcement agencies to do the same, but there's always a realm of unknowns beyond our control.

For instance, unbeknownst to prosecutors, shortly before Lesley Diamond's DWI trial, a report was misfiled at the lab where her blood was tested. This irregularity was unrelated to Diamond's case and did not implicate the integrity, skill, or knowledge of the analyst who tested Diamond's blood, but the analyst's supervisor removed her from casework shortly before she testified at Diamond's trial. The analyst believed she had been reassigned to document the misfiled report, but her supervisor later testified he lost faith in her abilities to do casework.

Is that *Brady* evidence that requires reversal if it is not disclosed?

In *Diamond v. State*,[1] the Court of Criminal Appeals provides a good example of how prosecutors and courts should approach situations like this. The focus should be on creating a record that establishes the facts at issue—including credibility determinations—and on the logical connection between those facts and the defendant's trial. After the trial court found the worst allegations not credible and the Court of Criminal Appeals found the remaining evidence immaterial, Diamond's DWI conviction was upheld.

Diamond's DWI and the analyst's self-reporting

The central characters here show contrasting examples of accepting responsibility for mistakes.

The facts of Diamond's intoxicated driving were well developed and not seriously controverted. When an officer tried to pull her over for speeding, she took a long time to stop and made several unsafe lane changes. She was unbalanced and disoriented. She had an open can of beer in the car. She had glassy eyes and slurred speech. She couldn't remember where she was coming from. She exhibited several clues on the sobriety field tests.

At the lab, Andrea Gooden analyzed Diamond's blood sample and found a BAC of .193. At no time was the accuracy of this result questioned. But around the time Gooden analyzed Diamond's blood, she took part in a chain of events that led to a report about a different blood sample being submitted in the wrong case. An officer had submitted a blood sample for a defendant named Hurtado, but he wrote the wrong incident number on it. Another analyst requested that the officer correct the form. Gooden, consistent with lab policy, analyzed the blood and set it aside.

A month later, the officer still had not corrected the form, but Gooden inadvertently signed a certificate of analysis for the Hurtado blood sample that still had the wrong incident number. Her supervisor, William Arnold, failed to notice this error and approved the report. The test results were entered into the lab's data management system under a case where there was no blood evidence.

A few weeks before Diamond's trial, Analyst Gooden noticed the error and reported it to her supervisor, Arnold. Arnold told her to stop casework and instead write a memo about the Hurtado incident. After she submitted her memo, Arnold told her she could not return to casework until others in the chain of command reviewed the memo. Gooden believed her reassignment was exclusively about documenting the Hurtado report.

Supervisor Arnold did not contact prosecutors about any of this. While Gooden was reassigned from casework, she testified at Diamond's trial.

A couple of weeks after trial, Analyst Gooden emailed her supervisor expressing concern that nothing had been done about the Hurtado report and about the fact she was still removed from lab work. Supervisor Arnold told her he was keeping her removed from lab work because he watched her testify at Diamond's trial and she needed to

work on her skill as an expert witness.

The next month, Gooden self-reported the Hurtado incident to the Texas Forensic Science Commission (TFSC). After this self-report, her supervisor wrote a memo claiming he had removed Gooden from lab work because of the incorrectly entered report and because he was concerned about her skills and knowledge base. The TFSC, as well as the City of Houston's Office of Inspector General (OIG), eventually issued reports on the Hurtado incident that faulted Supervisor Arnold, not Analyst Gooden. The TFSC specifically faulted him for withholding information from prosecutors and not properly documenting incidents at the lab.

Habeas proceedings and appeal

DWI defendant Diamond learned of the Hurtado incident well after her trial and petitioned for habeas relief. She alleged the State had withheld impeachment information about the analyst, Gooden, that the State failed to disclose the Hurtado incident, and that at the time of Gooden's testimony, she was suspended from lab work because of her supervisor's doubts about her competence.

Gooden and Arnold both testified at the habeas hearing, and the trial court received the OIG and TFSC reports. The trial court denied relief and issued 16 pages of findings and conclusions. It found that Analyst Gooden was not actually suspended from lab work at the time of her testimony, and Supervisor Arnold's post hoc explanation that he suspended Gooden over concern about her competence was not credible. The trial court found that there was no evidence of any lab errors in Diamond's case, and it also found evidence of the Hurtado incident was not material because it did not undermine Gooden's credibility or the veracity of her results.

After originally affirming the trial court, the Fourteenth Court granted rehearing and reversed.[2] To find a *Brady* violation, a court must find undisclosed evidence was favorable to the defendant and material to the result of the case. The Fourteenth Court found the Hurtado incident would have been admissible to undermine the analyst's qualifications. It did not matter whether Gooden was "suspended," "under suspension," or merely "removed from casework"—the Hurtado incident would have made for "painful cross examination." Finally, it held the evidence was material because Gooden's testimony was the only evidence that showed Diamond's BAC was .15 or greater, which was necessary for her conviction of Class A DWI.

Justice Donovan dissented. He argued that, deferring to the trial court's findings that Gooden's removal from casework was unrelated to her skills or knowledge, there was "no logical connection" between the Hurtado incident and Gooden's analysis or testimony here.[3]

Deference and relevance

In an opinion by Judge Newell, a unanimous Court of Criminal Appeals reversed the Fourteenth Court and affirmed the trial court's denial of relief. The opinion is based on deference to the trial court's findings and a focus on the logical relevance of the supposed *Brady* evidence.

Judge Newell began the analysis part of the opinion by focusing on deference. Generally, there are two types of post-conviction writs. Art. 11.07 writs are the vehicle defendants use to complain about felony convictions that resulted in prison sentences. In those writs, the trial court makes recommended findings, but the CCA is the ultimate factfinder.

In contrast, Art. 11.09 writs—filed after misdemeanor convictions that included jail sentences—and Art. 11.072 writs—filed after a conviction where the only punishment was probation—are litigated in the trial court. In those cases, the trial court is the ultimate factfinder, and appellate courts and even the CCA must defer to the trial court's findings. Diamond's case was a trial-court writ;[4] thus, the Fourteenth Court and CCA were not free to disregard the trial court's findings or credibility determinations that were supported by the record.

Once the CCA deferred to the trial court's determination that Supervisor Arnold was not credible when he said Analyst Gooden was suspended due to competence issues, the supposed *Brady* evidence looked a lot less material.[5] All that was left was that Gooden once accidentally certified in another case a report that someone else had mislabeled, but then she reported the error as soon as she realized it.

Giving deference to the trial court's findings, Judge Newell held this was not material. First, the record showed a proper chain of custody for Diamond's blood, and there was no evidence Gooden or anyone else made an error in this case.[6] Second, the Hurtado error did not undermine Gooden's credibility as an analyst. It was a "protocol error" caused by someone else mislabeling a sample. Judge Newell pointed out that

Once the CCA deferred to the trial court's determination that Supervisor Arnold was not credible when he said Analyst Gooden was suspended due to competence issues, the supposed Brady *evidence looked a lot less material.*

even in the Hurtado incident, no one questioned the accuracy of Gooden's analysis. The Hurtado error was "a one-time incident in an unrelated case" that did not implicate the work Gooden did in Diamond's case.

Based on the overwhelming evidence of Diamond's intoxication and the fact that the credible evidence did not undermine the analyst's testimony, the CCA held the supposed *Brady* evidence was not material and Diamond's conviction should stand.

Relevance and credibility are key

The clearest takeaway here is that the lab director could have saved the judicial system an enormous amount of time—days of writ hearings and years of appeals—by disclosing this minor incident in a timely manner. The prosecutor could have told defense counsel and the trial court prior to trial, and, as later rulings show, the trial court would have declared it irrelevant. But prosecutors don't always get every bit of information they need on every case.

When we get delayed disclosures that result in *Brady* claims, even the most minor issue can sound pretty bad. Here, Diamond's claim could be phrased: "The State withheld the fact that its expert witness was unqualified and had been suspended due to incompetence." The Fourteenth Court majority got a little caught up in that narrative.

Most Brady *claims, if phrased correctly, can sound bad. Here, Diamond's claim could be phrased: "The State withheld the fact that its expert witness was unqualified and had been suspended due to incompetence." The Fourteenth Court majority got a little caught up in that narrative.*

This case illustrates the importance of staying calm and focusing on the facts adduced at a hearing—if the trial court found the testimony supporting a fact isn't credible, it's not a fact. And it also shows the importance of focusing on the specific logical relevance of the facts. Here, the Fourteenth Court focused on the general fact that Analyst Gooden made an error, but the CCA focused on the specific nature of that error and how it related to this case.

Everybody makes mistakes. As law enforcement agencies get better at documenting those mistakes, and as our cases involve an increasing number of expert witnesses, claims like this will become more common. Defense lawyers will claim that the relationship between analyst mistakes and defendants is like that between bells and angels—every time an analyst makes a mistake, a defendant gets his wings. *Diamond* shows how the State can keep that from being so. ❇

Endnotes

[1] ____ S.W.3d ____, No. PD-1299-19, 2020 WL 3067582 (Tex. Crim. App. June 10, 2020).

[2] *Diamond v. State*, 561 S.W.3d 288 (Tex. App.–Houston [14th Dist.] 2018). The basis for rehearing is a peculiar side note to this case. Although Diamond's trial was for Class A DWI, based on her BAC of .15 or greater, the judgment incorrectly said she was convicted of Class B DWI. On original submission, the Fourteenth Court held the impeachment evidence about Analyst Gooden was immaterial because the evidence of intoxication was strong and Gooden's testimony was relevant only to the .15 element, which was not part of the judgment. Diamond filed a motion nunc pro tunc in the trial court to correct the judgment to show a conviction for Class A DWI, which the trial court granted. Diamond moved for rehearing in the Fourteenth Court, arguing that because her conviction was now for a Class A, she could show the impeachment evidence was material.

I was involved in this case for a hot minute. After a colleague won on original submission, I lost on Diamond's motion for rehearing, and then, for good measure, lost again on my own motion for rehearing. Another colleague won in the Court of Criminal Appeals. It does not bother me that the only result of years of litigation is that Diamond's criminal history now correctly shows the Class A conviction.

[3] *Id*. at 299-304 (Donovan, J., dissenting).

[4] The CCA's opinion describes the case as an 11.072 writ. *Diamond*, 2020 WL 3067582 at *7. But Diamond received a small jail sentence so this was actually an 11.09 writ. For purposes of deference, however, there is no difference.

[5] Judge Newell pointed out that the trial court's credibility determination was not just a personal feeling but had support in the record. The Texas Forensic Science Commission found Supervisor Arnold, not Analyst Gooden, negligent, and "all interviewees participating in the TFSC's investigation believed Gooden to be a competent analyst who was unfairly blamed for the reporting error in the Hurtado case." *Diamond*, 2020 WL 3067852 at *9.

[6] Judge Newell began the opinion: "Andrea Gooden was a laboratory technician who, as everyone seems to agree, properly analyzed Appellant's blood for alcohol content in this case." *Id*. at *1.

A roundup of notable quotables

"I didn't stutter. He has 230 charges in his arrest history. Fifteen convictions and two times to state prison at only [age] 26. He's a thug; he's a criminal. He's pure evil in the flesh. He's wild and he's out of control."

—Polk County (Florida) Sheriff Grady Judd at a news conference regarding the arrest of T.J. Wiggins, who was charged with three counts of murder for gunning down three men during a Friday night fishing trip. Wiggins' girlfriend, Mary Whitemore, and his younger brother, Robert Wiggins, were charged as accessories to the murders. The elder Wiggins' criminal history goes back to when he was 12 years old. www.mysanantonio.com/news/article/Pure-evil-in-the-flesh-Arrests-made-in-triple-15426023.php

Have a quote to share? Email it to the editor at Sarah.Halverson @tdcaa.com. All submissions will receive a TDCAA ball cap!

"It's a grand experiment. Whether or not it will comply with the Constitution still remains to be seen."

—Laurie Levenson, a professor at Loyola Law School and former federal prosecutor, on possibly the first criminal trial in the nation to occur entirely over Zoom—in Travis County. www.statesman.com/ZZ/news/20200811/texas-court-holds-jury-trial-in-traffic-crime-case-over-zoom

"I felt young and dumb and powerless. Taken advantage of, really. Your lawyer is supposed to help you, not hurt you."

—an unnamed woman who had hired San Antonio defense attorney Mark Henry Benavides to represent her in a possession of marijuana case. Instead, Benavides forced her to perform a sex act "or he would kill my case," she says. Benavides has since been disbarred and convicted of human trafficking for how he handled clients, and the Bexar County CDA's Office is dealing with the aftermath of his crimes. www.expressnews.com/news/local/article/I-thought-I-was-alone-victims-of-15420496.php

"Come back with a warrant."

—the words on a doormat at the front door of a Florida home that was under investigation for illegal drugs. Flagler County Sheriff's deputies did indeed get a warrant to search the premises and found fentanyl and drug paraphernalia inside. apnews.com/4f0e 228226 a0053a72cffd 9a49ad5dbf.

"Many people have strong opinions about law enforcement officers and criminals, but this incident clearly illustrates the potential goodness found in both."

—a statement from the Gwinnett County (Georgia) Sheriff's Office detailing how three inmates jumped to a deputy's aid when the deputy fell unconscious and hit his head. The deputy survived the fall thanks to the inmates' quick action. https://theeagle.com/news/national/three-inmates-didnt-hesitate-saved-deputys-life-in-georgia-jail/article_e4a1d662-668c-5406-a985-0d749eae7726.html#1

The nation's first criminal jury trial via Zoom (cont'd from the front cover)

Questions to consider

From the beginning, our office had been thinking about how we could possibly move forward with jury trials. Could we find a venue big enough to seat jurors 6 feet apart from each other during voir dire? Should we put up plexiglass in the courtrooms? Would everyone be required to wear masks? Or should we just keep waiting?

As the waiting dragged on into the summer, it became clear we needed to find a solution because no one was going to be back in the courtroom anytime soon. Our office was approached by one of our Justice Court judges, Nicholas Chu, who was interested in putting together a binding jury trial to be conducted entirely virtually. Judge Chu had been working with the Office of Court Administration to design a process that would accommodate a virtual jury trial, and he wanted us to participate. Our office was fully on board with conducting a virtual trial because we too wanted to test the waters—it's easy to argue why this is a good or bad idea, but you never really know until you do it.

The two of us began working with Judge Chu and a local defense attorney, Carl Guthrie, to comb the JP jury dockets looking for the perfect candidate. Mr. Guthrie had agreed to represent a *pro se* defendant *pro bono* so he too could test the capabilities of a Zoom jury trial. We identified several possible trials from cases that had been on the jury docket and were not able to be resolved through plea negotiations. Next, Mr. Guthrie began contacting defendants and offering his services if they would agree to participate in the virtual trial. Before long we had found our case: The defendant, Calli Kornblau, was a single mom and nurse who had been pulled over for speeding in a construction zone. She was adamant she had never seen the construction signs and never speeds. This case had everything we wanted in our test case: officer testimony, photographic evidence, bodycam evidence, and a little meat to the offense that needed to be explained in voir dire.

Throughout this process, the biggest question we faced was why all of the parties (State, defense, and court) were wasting valuable time on a Class C traffic ticket. We actually viewed it as the perfect opportunity. It was a low-stakes case, so even if we experienced massive technical failures that ended the trial prematurely, we would still be able to fully test the capabilities of a virtual trial without sacrificing justice for a victim or the safety of the community. Though typically, Class C cases are handled by new prosecutors in the office, our boss wanted seasoned prosecutors to handle this one and really test the limits of a groundbreaking next step in jury trials. Neither of us had tried a speeding ticket in almost 10 years, so we had to kick a little dust off, but the basics of a jury trial are all the same.

Throughout the summer, the two of us met weekly with Judge Chu and the defense attorney to discuss various logistical problems and how we would handle them. The first question was making sure we had a fair jury panel. Our district clerk began by sending letters to potential jurors inquiring about their Internet connection capabilities. The Office of Court Administration worked closely with the clerk to purchase iPads for jurors who did not have a device capable of connecting to the court. This would be the best way to assure we had a true sample of our community in the jury pool, not just those with the necessary technology. Jurors were polled to make sure they were willing to participate and fulfill their jury duty via Zoom. We were careful to draft admonishments to inform jurors that for the duration of the trial, they must remain alone, appear on video, pay attention, and refrain from using other technology to conduct research—basically, everything possible to make sure they acted as if they were in the courtroom.

Everyone admonished witnesses in the same way and swore in the jury and witnesses just as would happen in open court. The court was open to the public by broadcasting the entire proceeding on YouTube. Through it all, we still ended up with some interesting situations. There were technology crashes, freezing pictures, outside noises, and of course a cat made an appearance.

The trial begins

Our workday began at 8 a.m. with pretrial motions and hearings, followed by the tedious process of checking in jurors. Each juror from the 30-person panel logged in from home. The court staff met with them individually online to test their systems and connections. The technology

worked as you would expect, and five people were excused before we even began voir dire because their connection issues were too much to overcome.

Zoom limits the size of the viewing grid on screen, so the parties had agreed to separate voir dire into two different 15-person panels. This was perhaps the biggest challenge because voir dire is so dependent on the conversations within the panel. We knew the strike zone would likely extend into the second panel, which would have heard a completely different voir dire from the first panel. We tried to make both versions as similar as possible by screen-sharing a PowerPoint presentation so each panel experienced the same basic outline. Obviously, reading juror body language was hindered through a computer screen, and utilizing multiple screens was imperative to get the grid view as large as possible. There was also no way to virtually seat the jurors in a specific order on the screen, so we had to resort to labeling and addressing each juror with his or her number.

We had practiced voir dire multiple times within our office to figure out how to get jurors to mute and unmute themselves, how to alert jurors they were being questioned, and how to get group feedback and responses. While the basic structure of voir dire remained the same, this online method made the process so much harder. You lose direct connection through eye contact. You lose the ability to use your voice and body language together to convey what you're trying to say. You lose the flow of conversation while waiting for lagging streams to catch up or for jurors to unmute themselves. We also found ourselves a bit lost when making our peremptory strikes because the bulk of our strike zone was in our first panel and that voir dire had been conducted over an hour and a half earlier. Additionally, it was difficult to remember jurors who had been seated randomly on a computer screen. But in the end, a jury of six with one alternate was seated.

The court's decision to select an alternate was a smart move because a juror was lost within the first 30 seconds of starting the trial. His screen froze multiple times and after several minutes, the OCA technical team was unable to get him back online. He was excused, and the trial continued with the alternate.

The structure of the trial remained exactly as you would expect: The jury was sworn in; the complaint was read; both the State and defense gave opening statements, proceeded with evidence, and closed, and the judge sent the jurors into a breakout room to deliberate. The biggest difference, of course, was that the two of us conducted the trial from our own homes, locked away from our families so our young children wouldn't interrupt to say hi to the jury or ask for snacks, like they normally do when we're on Zoom calls.

The State called only one witness, but we admitted several pieces of evidence. We had prepared our witness for the trial through multiple test runs. He is a Travis County Sheriff's Deputy who was on-duty when we needed him, so we had to find a quiet location for him to set up his county-issued laptop. We also had to work with him on the technology—we couldn't hear him on our first test, and then his face was too small on the second test. We utilized our IT staff to maximize his Zoom capabilities so jurors would see him as clearly as possible. The defense made several objections about how the officer would present himself and what he would have at his disposal during the trial. The State wanted the officer to be able to refresh his memory with his citation, and the defense objected to him reading from it. The parties compromised by having the officer place the citation in a folder, so it would be obvious when he referred to it, giving us the opportunity to make the appropriate requests and admonitions.

In court, we all used the electronic Box (www.box.com) format to create separate folders for "offered evidence" and "admitted evidence." The court, defense, State, and witnesses all had access to the offered evidence folder and were given individualized logins to upload to it and view it. As we offered evidence, it could be uploaded in real time so witnesses could review and identify it, laying the foundation for admission. Once admitted, the court moved each piece of evidence to the admitted evidence folder. Jurors were given access to download that evidence to their devices during deliberations. During the trial, however, the parties utilized screen-sharing to publish evidence. As we were questioning witnesses, we could play a video or show a photo to the witnesses and jurors. The biggest limitation in the technology was the lag while playing the officer's bodycam video, which sometimes made the audio distorted and difficult to understand. However, those issues could be resolved by the jurors' ability to download the video.

Zoom limits the size of the viewing grid on screen, so the parties had agreed to separate voir dire into two different 15-person panels. This was perhaps the biggest challenge because voir dire is so dependent on the conversations within the panel.

In the real world, this would have been a very simple trial which would have required very little preparation. This trial, though, was a difficult and lengthy process for a Class C offense.

Throughout the trial the court used private breakout rooms for sidebar conversations at the virtual bench or during breaks so each side could communicate freely away from the other parties and away from the YouTube audience. After closing, jurors were sent to a private breakout room to view the evidence and deliberate. Approximately 20 minutes later, they returned a guilty verdict to the speeding charge but declined to find the defendant was in a construction zone with workers present. The judge offered the defendant two options typical for a speeding case without the construction zone enhancement: 1) a final conviction with a $1 fine, or 2) a 90-day deferral with a $50 fine. After conferring with her attorney, she chose the deferral. Ultimately, the sentence did not matter much to us.

Online vs. in-person

Zoom certainly presented challenges you wouldn't expect in your typical courtroom. At our homes, we had to spend time choosing backgrounds free of distractions, focusing on being heard and seen on camera, and making sure our thoughts were clearly conveyed in a gallery view. Because we were unable to sit next to each other at counsel table, the two of us had to communicate through our intraoffice Microsoft Teams connection. The defense team set up at their office, each attorney in his own space. Judge Chu appeared from his bench in his courtroom, and he was assisted by his office staff who were all connected from home. Some of the flair of trial was lost via Zoom—gone was the dramatic closing argument with soft voices and meaningful glances. We had to focus on what we were saying and how it would be heard by a juror with screen fatigue who was sitting on his couch.

The technology also forced us as attorneys to practice when to mute and unmute different people. As the person actually doing the voir dire, Afton had to learn how to both speak and have a conversation while managing the function of the technology all on her own. The week before trial, the court held a mock trial with attorneys for the State and defense and stand-ins for jurors and witnesses. We conducted a mock voir dire, opening statements, direct and cross examinations, and objections, and we practiced publishing evidence. This allowed the court to practice muting and unmuting parties and jurors, screen sharing, and moving parties and jurors in and out of breakout rooms. Everyone, from the presenting attorneys to the court, had to research all the capabilities of Zoom, including spotlight features, shutting down chat options, and sharing hosting capabilities. We feel like we could give a master class in Zoom presentation skills, beginning with the importance of good lighting.

During the trial, more than 1,000 viewers were watching us on YouTube. We didn't find out until after the trial that approximately 10,000 unique viewers tuned in throughout the day. Nervous isn't the correct word, but it did make us more aware of our demeanor and expressions. Having a constant closeup of your face for everyone to examine and judge did add to the stress, and of course, knowing you were always watched made itchy noses much more common. At the end of the trial, we felt more drained than we normally would at the end of a Class C trial.

In the real world, this would have been a very simple trial which would have required very little preparation. In JP court, prosecutors normally wouldn't find out which case they were trying until that morning. After a few minutes talking to the officer, we would have picked a jury and tried the case. The jury would have returned a verdict by lunchtime. This trial, though, was a difficult and lengthy process for a Class C offense. However, it was a necessary experiment in seeking justice during these uncertain times. With more than five million cases of COVID-19, more than 183,000 deaths in the United States, and no end in sight, those in the criminal justice system need to find new ways to protect the health of our community, as well as the constitutional rights of defendants. This trial was the first step in providing defendants their right to a jury trial and reducing docket backlogs.

That isn't to say that Zoom trials are something we should embrace without question. Our trial was simple, with minimal witnesses and evidence, but there were still streaming issues with playing a three-minute video. A case with hours of dash-cam video and body-worn camera footage would be exponentially more difficult. Judging the credibility of witnesses is much more difficult when you can't clearly hear their voices or read their body language. Some of this infor-

mation can be conveyed through video conferencing, but how much is lost through lagging streams, small screens, and distracted jurors?

Speaking of distractions, we should note that one juror had a cat that came in and out of view throughout the trial. That cat was certainly an unexpected star of our show and took everyone's attention. Other jurors were clearly bored and could be seen looking at different things in their homes. Everything you have seen in your office Zoom meetings also happened in this trial. Jurors were easily distracted and less focused as time went on. Keeping their attention for days of evidence would be difficult.

Conclusion

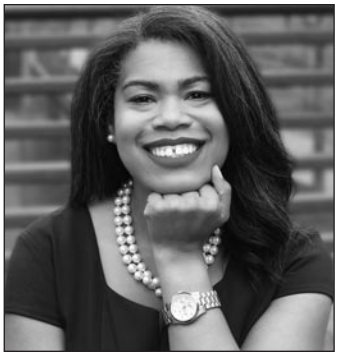
The pandemic has presented our profession the unique challenge of protecting a defendant's right not only to a speedy trial but also to a fair trial. Is this the way of the future? Perhaps it's too early to tell. This trial was certainly a grand experiment, searching for the answer to that question by trying something new and seeking a way to keep the wheels of justice turning.

In the post mortem of trial, everyone has mentioned they would be willing to try a Zoom jury trial again—the State has gotten mostly positive feedback about it while the defense attorney has had to weather some pretty bitter attacks about the need to protect a defendant's right to confront witnesses. It seems clear that trials, at least at the Class C level, will need to be virtual for quite some time. Judge Chu pointed out that jurors would be upset if they risked their lives to come to jury selection in person only to find out it was for a traffic ticket. So it is likely that Travis County will continue attempting jury trials virtually at least for these low-level offenses.

Bigger questions and pitfalls arise as to whether we could do more complicated misdemeanor or felony trials via Zoom. Nobody plans to tackle that question anytime soon, but neither is anyone completely shutting the door to the possibility of this new way of doing things. ❇

Courageous conversations about race

A few years ago, a friend posted an online birthday greeting to me: "Happy B-day, Tiana Sanford—the best baby prosecutor in Texas (I still love you *regardless* of your profession)! Luv Ya!"



By Tiana Jean Sanford
Assistant District Attorney in Montgomery County, Assistant Prosecutor Representative to the TDCAA Board of Directors, and TDCAA Training Committee Chair

This public posting was from a dear friend I met while in law school, a friend who knows my heart and my passions, a friend with whom I share many philosophies on life in general, and more specifically, criminal justice. She loves me "regardless" of my profession, the way you would love someone regardless of her lack of patience or an affinity for Nickelback. My being a prosecutor was framed as an impediment, not one of the reasons I was loved—actually, I was loved despite it. It didn't matter *how* I performed my role as a prosecutor; the mere fact that I serve as a prosecutor was enough.

Despite its intended meaning, I felt just as much love from this message as from the other birthday wishes I got that day, and I was not offended. In fact, I understood.

Reluctant to be a prosecutor

While it's common in prosecutor circles to hear, "I've always wanted to be a prosecutor!"; "I went to law school to become a prosecutor!"; and "My mom, dad, and sister are prosecutors!" that is not my story. I was reluctant to become a prosecutor. I was raised in a home where the importance of service, community, and justice was always stressed. My parents continuously reminded me that community is essential and should be built on four things: love, accountability, acceptance, and grace. We were called to live in service to our community, prioritizing all of its members' growth and wellbeing. I was told to be courageous and resolute in this pursuit, knowing that justice was vital to this call. At least twice a day, I walked by a red and white bumper sticker prominently displayed on the refrigerator. It read, "If you want peace, work for justice." I still see that same bumper sticker every day, now stuck to the refrigerator in my own kitchen.

With that type of background, it is not shocking that I proclaimed my desire to be a lawyer at an early age, as I wanted to become a voice for the voiceless. In my experience, communities without access to the law—whether in its drafting at the legislature, enforcement in communities, or interpretations in the courts—didn't have a voice, and this under-representation resulted in fewer resources and protections. I gravitated toward the public interest sector, and while I didn't know exactly what my career would entail, I knew I didn't want to be a prosecutor. I didn't see myself represented or hear my voice in the field. The professional prosecutors I saw were overwhelmingly white and male, and among them I heard dominant voices that did not reflect what I prioritized. On top of that, I saw that people who were disparately impacted by prosecutors' work overwhelmingly looked like me.

Despite my perception, I was encouraged by a law professor to intern at the Harris County District Attorney's Office, during which I discovered an incredible opportunity to serve and make a difference. Having now been a prosecutor for more than a decade, I can confidently state this work provides the opportunity to serve communities from a place of love, accountability, acceptance, and grace, all while courageously seeking justice.

A "twoness"

It's up to us prosecutors to see justice is done and ensure it is done equitably. For me, as a spiritual being having the human experience of being both black *and* a prosecutor, there is an additional layer of tension. W.E.B. Du Bois spoke of a "twoness" experienced by the "American Negro":

"One ever feels his twoness, an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose strength alone keeps it from being torn asunder." This is one of many voices that so insightfully reflects my experience as a black prosecutor. I am grateful for my work and cherish the opportunities to influence my community significantly, but still, there is a constant friction in my daily commitment to ensuring the justice disproportionately denied to the black community. It is distressing to see my mother, father, cousins, and loved ones reflected in the faces of those most marginalized by criminal justice. I feel an acute calling to persistently chip away at this marginalization.

By way of examples: A 2012 study found that offenders in Harris County who killed white victims were 2.5 times more likely to be sentenced to the death penalty than other offenders. This trend has also been seen in Delaware, North Carolina, Georgia, and Maryland.[1] Another report on race and wrongful convictions published by the National Registry of Exonerations reveals that innocent black people are more likely to be wrongfully convicted of crimes than innocent white people.[2]

The righteous conversation surrounding the impact of racial bias on offenders should be accompanied by an equally robust discussion of how racial bias impacts the crime victims we work with as well. Nationwide studies indicate the race of a crime victim results in disparities in criminal justice. One June 2018 study examined homicides reported between 1976 and 2009 and found that cases involving white victims were more likely to be cleared by arrest than those involving black victims.[3] Another study by the Georgetown Law Center reveals data indicating that adults view black girls as less innocent and more adult-like than their white peers. Compared to white girls of the same age, black girls were perceived to need less protection, support, and comfort.[4]

I have been a part of multiple conversations where black victims are deemed less sympathetic by how "strong," "mature" for their age, and "independent" they are. I have seen these observations used against their victimhood by the police, prosecutors, judges, and juries in the same way that these characteristics support culpability for defendants.

You see, if my black mother, black father, black cousins, and black loved ones were to ever be involved in the criminal justice system, it is likely they would be punished more harshly as offenders and receive less protection as victims.

As an agent in the criminal justice system, I have a professional duty to examine how race impacts my work. Still, my deep, *personal* commitment to examining race is highly influenced by my blackness. There is a duality associated with being a black prosecutor, which weighs more intensely now than at any other point in my career. This duality looks and feels different for everyone, but the concept of reconciling contradicting realities is not new.

Our professions do not define our identity. We are not merely *what* we do; we bring *who we are* to what we do. We prosecutors are primary decision-makers in a system that has irrevocable consequences on people's lives. When I walk into a room and see the relief on the faces of victims and defendants who see themselves reflected in this decision-making process, reflected in *me* being part of the decision-making process, the necessity for courageous conversations about race is reinforced.

Recent events

The recent response to the killing of George Floyd is yet another example of our communities desperately seeking dialogue pertaining to the acute dangers of racism and brutality against black people. Mr. Floyd's death, while currently the most widely publicized, is not even the latest instance of police violence against black bodies. His death happened while many of us were "running" for Ahmaud Arbery, processing how Breonna Taylor was killed in her own home, and feeling fury watching Amy Cooper, a white woman, use a bird-watching black man's race to call police to action.

I'm gutted, to say the least. Although I have fine-tuned my ability to mourn and be angry while channeling grief into action aimed to assuage these ills, this time is different. This time is harder. There has been less time to rebound between traumatic events, not to mention the depressing backdrop the pandemic is providing these tragedies. It not only intensifies emotions, but it also displays the stark contrasts of how our communities and leaders respond to civil disobedience—or choose to remain silent.

I have experienced varying degrees of difficulty in holding space for others to process these events. Being a part of these conversations can be exhausting, depending on the person and the

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tone of the conversation. I thirsted for more time to process the personal toll the most recent series of high-profile deaths was having on my life, but I had to balance my duties and check in with those whom I supervise. I also had several conversations with colleagues of all races who were themselves struggling and trying to process. I am part of an incredible leadership team, and together we began discussing how best to engage our office in these conversations.

Two thoughts came up more often than others during all of these conversations. The first was a hesitation to talk about race. The second was surprise and disappointment about our leaders' hesitation to acknowledge the global conversation about race.

Two thoughts came up more often than others during all of these conversations. The first was a hesitation to talk about race. The second was surprise and disappointment about our leaders' hesitation to acknowledge the global conversation about race.

You may fall into the category of someone interested in having these conversations, or you may be one who is actively resisting the discussion. There are several ways to resist: choosing to "not see color," saying that there is "no race but the human race," seeking to neutralize racism by saying things like, "Everyone experiences obstacles" in their lives, or claiming that focusing on race is in fact racist and that doing so will result in people seeing racism where it doesn't exist. Whether or not you welcome the opportunity to talk about race, rest assured that you are a part of the conversation, and these discussions are happening with or without you. The criminal justice system is at the center of the national conversation on race. While policing is at the forefront, the role of the prosecutor's office is no stranger to criticism in the analysis of racial injustice.

My own experiences

I see these injustices in my job every day, and sometimes, they're directed at me—*a prosecutor working to see justice done*. I recall speaking with a victim on the phone as a junior felony prosecutor. This was the initial call that we make to victims to introduce ourselves, build rapport, explain the criminal justice process, and forecast what will happen next. There was nothing that set this call apart from the multitude of other calls I made that morning. Later that afternoon, my victim assistance coordinator (VAC) came to my office, sat down, and told me that she had received a call from one particular victim. The victim had asked the VAC if I was black—she couldn't tell by our conversation but thought that I may be because of my name. My VAC inquired as to why the victim wanted to know, and the victim expressed concern that I might be black. She asked if I was a good attorney, where I went to law school, and whether I would do a good job on the case. I was black after all, so she had to make sure.

Around 2009, a guy called our office and threatened to kill President Obama and the prosecutor assigned to the JP court—and I was the prosecutor assigned to the JP court. I couldn't be sure why this man targeted me, though I was flattered to be in such great company—I volunteered for then-Senator Obama's campaign in Texas and New Mexico before coming to work at the DA's office—but the only apparent characteristic that President Obama and I shared was our blackness.

My elected District Attorney Brett Ligon warns me to never read the comments on media interviews I do for my cases, and he is right. I am often shocked at how many comments aren't relevant to the article but rather to me. One that stands out was an anonymous person questioning whether I was raised in a two-parent household; another comment implied that of course I wasn't. (Not that it matters, but I was.) I wonder what prompted the question: Was it that I was a prosecutor, a woman, or a black person? (I have an idea!) Due to the nature of some of these comments, Brett or our first assistant would contact the media and ask that some of them be removed. I wanted the posts to stay up—I think it's important for people to see them.

How can we believe that race isn't significant enough to talk about or downgrade its impact on our work, especially in the face of data including many personal accounts of black people involved in criminal justice?

The way forward

Unpacking racism is not easy, but the criminal justice system is not immune to racist influences on the founding of our systems. It continues to have a negatively disparate impact on the black community and other communities of color. These conversations are righteous and can't happen just once; they need to be ongoing. No matter where you are on your journey of race discussions, you can expect the following:

1) It will be hard.
2) It requires empathy.
3) It requires vulnerability.
4) It requires you to set aside your ego.

You may believe that having conversations about race and its influence on the way people move through life is not significant enough to offset the discomfort. Still, we don't have the luxury to shy

away. As prosecutors, we are regularly exposed to the uncomfortable. It's an unavoidable part of our job. And here's the hard truth: If you are not having these conversations, you walk around with a blind spot making you less effective at achieving the justice you seek.

Every day we are charged with painting justice's image. We apply facts to established law and form an opinion on whether a specific set of facts in a specific set of circumstances rises to the level of a criminal offense. We make these determinations through our lenses, and we are responsible for evaluating levels of culpability and what is "reasonable." We then recommend what we feel is an appropriate level of accountability. Knowing what we know about bias, are we working to control the potential for racial bias in determining what is "reasonable?" While reasonableness and the ordinary person is the standard, neither is explicitly defined. In fact, we encourage each other and our jurors to think about what "reasonable" and "ordinary" mean to them.

Are we also cognizant that those who report crime may have different interpretations of what aggressive or suspicious behavior looks like? Do we realize that officers who discern credibility of witnesses on scene have different interpretations of what fear looks like? Are we paying attention to the language we use surrounding the cases we handle? Are we working to control the potential for racism in our jury pools, or are we turning a blind eye? Even "objectivity" cannot escape the influence of racism just because we label it "objective."

Race impacts our profession and can influence the way we interact with victims and defendants. I encourage you to examine every space you access—and thereby have the potential to influence—and question whether it has been swayed by racism. Could it contribute to racism? Acknowledge the importance of this conversation and create spaces both at work and in your personal life where you can listen and contribute. Know these conversations will be easier when you have them with those you know and trust.

Taking action is essential and looks different for each one of us. You may also explore changing the language you use to speak about race, committing yourself to learning and thinking critically about history, or reading an article or a book written from a perspective different from your own. Examining and discussing race, especially as it pertains to criminal justice, is a muscle. Some of us have used that muscle more than others, so the degrees of soreness will vary. Whatever you do, resist the urge to quit because it's uncomfortable. As leaders within the system, it's incumbent upon us to have these crucial discussions, determine how we respond, examine how we can be a resource to stakeholders, and create opportunities for them to do the same.

It must be done

Maya Angelou wrote, "History, despite its wrenching pain, cannot be unlived; but if faced with courage, need not be lived again." Addressing racism and its historical influence on our communities may seem impossible at times. But as prosecutors and professionals in the criminal justice system, we are uniquely situated to navigate discomfort and be part of the solution. We must fully commit ourselves to act with courage. *Empathy* requires courage. *Vulnerability* requires courage. *Abandoning ego* requires courage. *Prioritizing justice over self* requires courage.

You are skilled in the art of communication. *You* recognize the importance of empathy. *You* are experienced in making tough calls. *You* are deeply committed to the concept of justice. No matter what seemingly insurmountable obstacle you encounter, keep going. Courage isn't foreign to you; it's the same courage you've mustered time and time again to answer ready when called to serve your community. Use it now to influence the spaces you occupy and commit yourself to strive for equitable justice. ❇

No matter where you are on your journey of race discussions, you can expect the following: It will be hard. It requires empathy. It requires vulnerability. It requires you to set aside your ego.

Endnotes

[1] S. Phillips, "Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era," 50 *Houston Law Review* 131 (2012; DPIC posted February 1, 2013).

[2] www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

[3] Fagan, Jeffrey and Geller, Amanda, Police, Race, and the Production of Capital Homicides (July 12, 2018). Columbia Public Law Research Paper No. 14-593, 23 *Berkeley J. Crim. L.* 262 (2018), Available at SSRN: https://ssrn.com/abstract=3202470.

[4] https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf.

Raising the voices of prosecutors of color

It did not start with George Floyd. Before him, there were Breonna Taylor, Atatiana Jefferson, Stephon Clark, Botham Jean, Philando Castille, Alton Sterling, Freddie Gray, Eric Garner, Akai Gurley, Tamir Rice, Michael Brown, Walter Scott, Michael Ramos, and others—the list goes on.

By Denise D. Hernandez
Assistant District Attorney in Travis County

The truth is this has been building up for a while.

Watching video footage of Mr. Floyd's strangulation by Minneapolis police officers was terrible for many of us—and downright devastating for black and brown communities. It hit prosecutors of color especially hard because we are part of the criminal justice system, and we watched agents of that system end the life of a black man in one of the worst ways imaginable. The whole incident magnified the lack of racial equity in criminal justice and even brought to the surface the collective trauma so many BIPOC (black, indigenous, and people of color) feel.

It was so devastating that it spurred a conversation—several conversations, in fact, between a handful of black prosecutors and the leadership of TDCAA. Was there a way that TDCAA, as a statewide organization serving all prosecutors, could facilitate a roundtable discussion for black prosecutors in Texas? Was there a way to create a safe, dedicated space to gather with other black prosecutors to talk through what they were feeling in the wake of Mr. Floyd's death?

In response, TDCAA leaders hosted a Zoom meeting for any black prosecutors who might want to join. The call was filled to capacity—Zoom caps all meetings at 100 participants—with several people spilling over onto a waitlist. The Zoom call lasted all evening and could've gone on longer if not for the late hour.

After that gathering, TDCAA's Diversity, Recruitment, and Retention (DRR) Committee met virtually to share our own experiences as BIPOC in the justice system, our inner conflicts, and solutions for going forward—which, we agreed, had to include uplifting diverse voices. Three committee members—Kenisha Day, ADA in Harris County; Alexandra Guio, ACDA in Dallas County; and myself (Denise Hernandez, ADA in Travis County)—volunteered to lead those efforts. Three articles bloomed from these conversations (all published in this issue of *The Texas Prosecutor* journal), and they mostly stem from questions we sent to colleagues across the state. From their overwhelming response, it is clear that the interior struggles we on the DRR Committee feel is mirrored in other BIPOC prosecutors, but the responses also illustrate the diversity of our perspectives and how each of us handles those struggles differently.

We publish these articles now to amplify these 23 voices speaking on topics that range from what they love about being a prosecutor, to how the brutality against marginalized communities has affected them. Our hope is that these voices might move you—move you emotionally, yes, but maybe also move you to action.

Here's what they have to say.

What inspired you to choose prosecution as a career?

Idris Akinpelu
Assistant Criminal District Attorney in Dallas County

Seeing certain injustices growing up in my low-income neighborhood and influences from high

school led me to this career. I was in the Law Magnet at Townview High School, and each magnet school had classes specifically set aside for immersion in our chosen field. In ours, we were able to intern at the Dallas County DA's Office. I worked in the 265th Judicial District Court for two years, and my mentor to this day is Judge Keith Dean, who was the presiding judge at the time.

Janie Korah
Assistant Criminal District Attorney in Galveston County

I grew up watching my parents help people. My dad is a priest, family and marriage counselor, and psychotherapist. My mom worked as an ICU nurse in a county hospital that treated gunshot wounds and drug overdoses in abundance. I would regularly hear about the casualties of family dysfunction and crime. I am a South-Asian, and our community glorified outward image rather than accountability, so instances of family violence, child abuse, and other crimes went unreported over concerns of "what the community would think." Prosecution embodied my desire to change that mindset, stand up for justice, and seek the truth.

Ashley Earl
Assistant District Attorney in Fort Bend County

I actually had no plans to be a prosecutor, but I got an internship at a county attorney's office while I was waiting for my bar results. On my first day I observed a DWI trial, and I was hooked! I knew advocacy was what I wanted to do from that experience. I also had a great mentor who really impressed upon me that justice didn't mean always getting convictions and jail time, but it meant always doing the right thing.

Beverly Armstrong
First Assistant Criminal District Attorney in Polk County

I credit my career in prosecution to Pamela Walker, who recently retired from her position as Misdemeanor Chief in Polk County. I was in private practice and adamant about not handling criminal cases. Pam encouraged me to apply for an open prosecutor position in her office, but I declined. A year or so later, Pam reached out again and asked if I would consider taking a temp position with her office during the military deployment of one of her prosecutors. I accepted, thinking I could do it temporarily and then I would expand my practice by hiring someone to handle the criminal cases.

However, my first day as a prosecutor sealed the deal—I knew immediately that this was the profession for me. My first day happened to be an ancillary docket day. I entered the courtroom and was immediately enthralled with discussing cases with defense attorneys. After court, I talked about cases with officers and reviewed cases for charges and recommendations. All of this on my first day! It was so fast-paced and exciting that before I knew it, it was time to go home. On the drive, I felt good about what I had accomplished and decided to pursue a career in prosecution. My plan was to apply to other counties once my temporary assignment ended, but the prosecutor who was deployed notified the office that he would not be returning, and I was offered a permanent position.

"My first day as a prosecutor sealed the deal–I knew immediately that this was the profession for me."
–Beverly Armstrong, First Assistant CDA in Polk County

Chandler Raine
Assistant District Attorney in Harris County

I knew I wanted to be a prosecutor halfway through my first summer internship at the Harris County District Attorney's Office. I remember watching the prosecutors I was assigned to as they not only provided a voice to

victims, but also worked hard to make sure defendants' due process rights were protected. TV will tell you that the defense protects liberty and the prosecutor attacks it. That summer internship in 2011 was the first time I realized that the ethical prosecutor fighting to see that justice is done is both the first line of defense for civil liberties—by following the law and never bending the rules—and often the last line of defense for the safety of the community. The two walk hand in hand only in this profession.

Elissa Wev
Assistant Criminal District Attorney in Dallas County

I started my legal career as a public defender in Dallas, a position I am proud to have held and one which has significantly shaped my views of our current criminal justice system. When it became apparent that opportunities to grow my skill set and advance would be limited (lawyers who work as public defenders are often passionate about their mission and thus tend to not leave the office very frequently), I looked to the DA's Office to further develop as an advocate and practitioner. Beyond my self-interest, I also identified a great need for prosecutors who understood the hardship placed on individuals facing criminal charges in the pretrial phase. I sought to provide a perspective through the lens of poverty-related issues with the hopes of better serving victims and defendants alike.

"I grew up in Los Angeles during an era when most prosecuting agencies took a "tough on crime" approach to protect the community at large from crime. Unfortunately for my brother and others similarly situated, harsh punishments took priority, with no opportunities for redemption or rehabilitation."
–Kenisha Day, Assistant DA in Harris County

Nicci Campbell
Assistant District Attorney in Harris County

I live my life by the quote, "Be the change you wish to see in the world," and this ideal has translated to my career. Our criminal justice system has dark, unjust, and racist roots, and my desire is to live in a nation where the system operates justly and fairly for its BIPOC citizens. I was inspired to be a prosecutor because I knew I'd have the ability to make these changes within my community and to—I hope—inspire others to do the same.

Kenisha Day
Assistant District Attorney in Harris County

My father went to prison when I was 7. Other family members followed. It wasn't until my younger brother went to prison that I felt called to become a prosecutor.

I grew up in Los Angeles during an era when most prosecuting agencies took a "tough on crime" approach to protect the community at large from crime. Unfortunately for my brother and others similarly situated, harsh punishments took priority, with no opportunities for redemption or rehabilitation. The community needs prosecutors who examine all aspects of a case, including the victim's thoughts and feelings regarding punishment, the defendant's family and educational background, the circumstances surrounding the offense, and the defendant's capacity for redemption and growth—not just the offense on its face. That's why I became a prosecutor, to advocate for the needs of all people regardless of their race, sexual orientation, or socio-economic status.

What are the greatest difficulties in being BIPOC within the criminal justice system?

Janie Korah
Assistant Criminal District Attorney in Galveston County

Sometimes it is difficult to hear officers and investigators use coarse language to describe defendants, witnesses, or their families. Certainly we all dislike crimes and the harm that criminals do, but phrasing occasionally reveals deeper underlying attitudes. As a prosecutor of color, an outnumbered minority, I hesitate to prod at sensitive topics like race, especially when it can be perceived as tangential to the task at hand. In a year with so much change, though, we should be encouraged to speak up about words that may fall short of being relevant for purposes of our case—but that are pertinent to shifting the culture of

criminal justice. It's incumbent upon us to recognize it and do better. For us and for our allies this means mustering up the courage to awkwardly interject, have uncomfortable conversations, share in learning moments, and—let's hope—grow together as a community.

Klarissa Diaz
Assistant Criminal District Attorney in Dallas County

One of the greatest difficulties in being a BIPOC in a profession within the criminal justice system is witnessing the lack of diversity within the legal representation of minority defendants. Statistically, African Americans and Latinos make up the majority of Texas prisoners, and it is difficult to see young minority offenders lumped into this category often due to life circumstance, poor choices, systematic racism, and socio-economic status. Some defendants are, unfortunately, represented by attorneys who are out of touch and uneducated regarding a client's socio-economic status, race, and life circumstance, which can ultimately lead to an unfavorable disposition of a case.

Additionally, internal conflict can be a difficulty in that I am required to put my feelings aside, remember the oath I took, and do what is in the interest of justice. As a Latina who comes from a family of immigrants, a prime current-event example of this internal conflict is evaluating a simple nonviolent misdemeanor case where the defendant is a DACA recipient and a conviction may result in deportation. However, as a prosecutor, I have the discretion to consider many factors including (but not limited to) criminal history, desires of the victim, immigration status, and any mitigating factors. Ultimately, my commitment is to the people of Dallas County and my oath as a prosecutor is to seek justice, and therefore, I put my feelings aside and complete the task before me.

Beverly Armstrong
First Assistant Criminal District Attorney in Polk County

I have great difficulty with being accused by other members of my community of harming men and women of my race due to the number of minorities incarcerated. It's as if I'm responsible for every African-American person who has been incarcerated. It is assumed that every term of incarceration is unjustified and that I, in my position, am responsible for this injustice to my people. Oftentimes, I have been asked how I sleep at night. My response is always the same: It is not fair nor is it reasonable for me or any minority prosecutor to take on that responsibility. I am responsible for the cases that I handle. In reviewing and handling cases, I work extremely hard to be fair and just with my recommendations. However, if a defendant in a case I am handling is sentenced to a term of incarceration, regardless of his or her race, it is because incarceration is a just resolution. I sleep very soundly at night.

Another difficulty is the lack of respect from others in the legal community. Over the course of my career, when other attorneys encountered me for the first time in the courtroom, they would assume I was the legal assistant or an intern. They were surprised to find out I was the prosecutor and now even more surprised to find out I'm the first assistant. My offers and recommendations have been questioned or challenged over the years. Even some judges perceive me as having a lack of knowledge or skill compared to my counterparts simply because of our racial differences. This is very disheartening.

Jessica V. Huynh
Assistant District Attorney in Travis County

I grapple with the internal dialogue of "Do I belong here?" With the legal professional predominantly composed of white men, I ask myself "What am I doing here? Am I being fully accepted by my colleagues? Or am I just a token minority to fill a quota? If I am a token minority, am I capitalizing on this opportunity to be a good prosecutor? And am I putting in the effort to work for my community with the opportunities I've been afforded?"

I recognize those questions come from a place of insecurity, but the fact is I rarely see prosecutors who look like me. Quieting that conversation and focusing on the task of seeking justice can be quite overwhelming and difficult at times. I'm thankful, however, to work for an office that sees the value of diversity and actively re-

"With the legal professional predominantly composed of white men, I ask myself "What am I doing here? Am I being fully accepted by my colleagues? Or am I just a token minority to fill a quota?" –Jessica V. Huynh, Assistant DA in Travis County

cruits people of color. Representation matters. It would be easier to eliminate the self-doubt inherent in being a minority prosecutor if there were more people of color in our profession.

Elissa Wev
Assistant Criminal District Attorney in Dallas County

The expectation, whether express or implied, to check identity at the door and maintain a neutral position is burdensome. This conflict, for me, a gay Latinx woman, arises most readily when dealing with defense counsel who are demonstrably racist or prejudiced against the race, sex, or gender identity of their clients. A defense attorney saying about his client, "He's illegal. Let's just get this hombre deported and move on," is both low-key racist and ethically troubling, especially when spoken by a white man.

When something like this happens, a familiar cycle ensues: visceral shock (more professional paralysis of reaction rather than clutch-my-pearls-ness), deflection to the merits of the case, and then finding an escape to disengage. Whatever the problematic comment or attitude coming from the defense attorney is, I'm deliberate in using respectful language to describe the client: "Oh, he's a non-citizen? Did you have his case reviewed by an immigration attorney to learn the complete consequences of accepting this plea? If he's indigent, the Public Defender's Office can help you out." And "Oh, your client is a transwoman? What are their chosen name and pronouns? We can amend the indictment with the right name so he or she isn't disrespected during the plea."

When I think on how my black colleagues endure and rise above these kinds of slights and aggressions on a much more regular basis than myself, I am left in awe.

"The criminal justice system does not necessarily lend itself to creativity and the acceptance of new things. It is about conformity, procedure, precedent, policy, etc. It is also subject to a lot of "group think" and attracts individuals with similar points of view and backgrounds."
–Scott Turner, Assistant DA in Ector County

Ty Stimpson
Assistant Criminal
District Attorney in Tarrant County

To me, the greatest difficulty about working in the criminal justice system is the history of institutional racism. Throughout history, the criminal justice system has not always been set up to be fair and impartial (e.g.., *Batson* challenges). Whether intentional or not, there were times in history when the criminal justice system could be perceived as a form of oppression toward BIPOC. Today, each of us work tirelessly to undo any previous mistakes and make sure that the criminal justice system is viewed as fair and impartial. We work day in and day out to ensure that justice is served and our communities remain safe.

There have been times when I have gone into a courtroom and, despite being dressed in a suit and tie and walking next to my colleagues, the bailiff assumed I was a defendant and he approached and communicated with me as such. There have also been times when I talk to jurors and they tell me, "I thought you were the defendant when I first walked in." I used to always wonder why people are predisposed to believe a black man in a courtroom is in trouble. Now, I choose to forgive their assumptions and focus on being the best prosecutor that I can. I, and many other BIPOC, work each day to change that stigma and do our part to make the criminal justice system the best it can be.

Jarvis Parsons
District Attorney in Brazos County

The hardest thing is feeling like there is a tension between being a prosecutor and being a black man in America. For me, it means that when you walk into a room and happen to see that the jury box may be majority of African-Americans, you are torn between thinking that is a good thing or not. For many years, I was the only African-American prosecutor in my office. You feel like other people wonder whose side you are on. That is the inherent problem—it feels like, as a black prosecutor, you have to pick a side.

There's a thing called "code-switching," where black people feel like they have to speak or act a different way when they're around a white crowd versus being around other black people. You feel like you can't bring all of you to a particular place. And in part, this is because as a black person, you are always aware of trying to make sure the door is open for the people behind you—for a younger black person to not have to deal with the same things.

Jaustin M. Ohueri
Assistant District Attorney in Travis County

I find the difficulties are similar to the difficulties with being a BIPOC in any predominately white setting. Our country as a whole is painfully uncomfortable with discussing race. The reality is, there is a not a day that goes by that I do not consider the issue of race, from self-examination of how I am treating a defense attorney or defendant; to evaluating perceptions of whether my race as an advocate will play a role in the litigation; to observations about leadership decisions and representation in the legal community.

With race playing such a significant role in my life, it is disappointing that our society is so inept at discussing it. In this profession, we should be able to discuss race as easily and boldly as we make appeals to the Constitution, moral clarity, and accountability.

Scott Turner
Assistant District Attorney in Ector County

I think the greatest difficulty of being a minority of any type in a profession within the criminal justice system is the mere fact that we are different. The criminal justice system does not necessarily lend itself to creativity and the acceptance of new things. It is about conformity, procedure, precedent, policy, etc. It is also subject to a lot of "group think" and attracts individuals with similar points of view and backgrounds. When those with a different point of view (because they have a different background) come into these professions, they are often directed (gently or otherwise) to alter their view instead of the establishment changing. It means the individual is forced to decide between remaining true to some personal beliefs or giving those up to conform with the majority.

Describe a time when you felt like you didn't know whether you could stay in prosecution, what caused you to feel that way, and what helped you to overcome that feeling.

Alexandra Guio
Assistant Criminal District Attorney in Dallas County

There was a case that I had to take to trial three times for reasons out of my control. I felt horrible for the victim, who had to testify three separate times, and I was extremely frustrated with a judge who failed to live up to ethical and judicial responsibilities. The third trial ended in a guilty verdict, and the jury sentenced the defendant to 99 years. Before the conclusion of this trial, I was overwhelmed emotionally and mentally as a prosecutor. But I overcame those feelings of despair because I had a great group of friends and coworkers who supported and encouraged me throughout this experience. In our line of work, I believe it's vital to have a close group of friends who work alongside you and support you when times get tough.

Denise D. Hernandez
Assistant District Attorney in Travis County

When Immigration and Customs Enforcement (ICE) began detaining young children, I felt extremely discouraged and torn about my role in the criminal justice system. As a Latina, many of my family members and friends were undocumented, and I felt morally conflicted. I was able to overcome that internal battle by discussing solutions with fellow Latinx prosecutors and mentors. After many thoughtful conversations, I realized that it's my job to create inclusive and equitable change. I have a duty to speak out when something is unjust. My seat at the prosecutor table allows me to do just that.

"Based on the facts of the case as I heard them in the courtroom, fighting the request for new trial was futile and counterproductive to the perception of justice in Dallas County. The then-DA's response was extremely disappointing to me, leading me to conclude that I could no longer serve as an assistant district attorney at that time." –John Creuzot, CDA in Dallas County

John Creuzot
Criminal District Attorney in Dallas County

I questioned my career in prosecution when I worked on the post-conviction litigation of a defendant named Randall Dale Adams. Mr. Adams had been sentenced to death, but the United States Supreme Court reversed his case, and his sentence was commuted to life in prison. In 1989, another ACDA and I represented the State in the post-conviction writ of habeas corpus proceeding. During the proceeding, it became obvious to me that Mr. Adams had not committed the offense; rather the State's star witness had actually committed the crime. *[Editor's note: The Adams case is the basis for the documentary* The Thin Blue Line.*]*

The elected DA had agreed with my co-counsel and I that the judge's recommendation for Mr. Adams' new trial was justified by the facts and the law pertaining to the case. But shortly thereafter, the DA made a public pronouncement that Mr. Adams *did not* deserve a new trial, and he directed his office to fight the effort—this, despite instructing my co-counsel to concur with the judge's findings. Based on the facts of the case as I heard them in the courtroom, fighting the request for new trial was futile and counterproductive to the perception of justice in Dallas County. The then-DA's response was extremely disappointing to me, leading me to conclude that I could no longer serve as an assistant district attorney at that time. Soon thereafter, I tendered my resignation and went into private practice as a criminal defense attorney.

Roughly 30 years of living a different professional life opened my eyes to the potential of our criminal justice system. Through the development and implementation of drug treatment courts, I formed a different opinion of how the system should work. Because of drug treatment courts, I came to see an entirely different side of and learned about forgiveness, redemption, and healing.

Ty Stimpson
Assistant Criminal District Attorney in Tarrant County

What inspired me to be a prosecutor was nearly the same reason I once was on the verge of resigning: I did not feel like I "fit in." My colleagues and I got along great, but as the days, months, and years went by, I realized I could not be more different than a lot of my colleagues.

I began to question why I was a prosecutor; I did not look like my colleagues, I did not have the same upbringing, and at times we had completely different views on cases. I started to ask myself, "Why am I even here?" Combine that with a former supervisor who I felt had implicit bias toward me, and it made my life miserable.

However, one day I was reminded what inspired me to be a prosecutor: I was leaving court when the mother of a black male defendant stopped me in the hallway and thanked me. I asked her why, and she said her son had caused her many trips to the courthouse over the years, and she often saw black men only on the wrong side of the table. She told me she lost faith in the criminal justice system, but seeing me gave her hope that a black man can be on the right side of the table. That stuck with me. I realized that being a prosecutor is not just about me, it is about the perception and the impact when people see BIPOC prosecutors having a positive role in the criminal justice system. Over time, some of my colleagues have become my good friends, I met my wife at the DA's Office, and my former supervisor is no longer a prosecutor. So I guess you can say it all worked out in the end.

LaQuita Long
Assistant Criminal District Attorney in Dallas County

When trying a particular case, my trial team and I faced many obstacles. The case was very racially divided and the law was very complex. At times I often felt that people were intentionally hindering our progress and deliberately making things as hard as possible to prosecute the case. My team and I knew we were doing the right thing in prosecuting it; therefore, we focused on that and worked extremely hard to fight for what we thought was the right thing to do when everyone was against us.

Paul Love
Assistant Criminal District Attorney in Galveston County

I was in court with a judge for whom I had a lot of respect. A well-known and respected defense attorney came to court with a client. The judge changed our standard plea agreement and gave the defendant something far less—over my objection. Dismayed, I talked to a senior prosecutor, who explained who the defense attorney was and why the judge gave the defense attorney a favorable plea agreement. I was not satisfied with the explanation, but I understood that justice did not mean the same for everyone. I would later see that factors that shouldn't matter sometimes could and would come into play depending on who was handling the case. It made me more aware to speak up if people discussed a case and were basing a decision on such factors.

Sade Mitchell
Assistant Criminal District Attorney in Bexar County

I never felt like I should not be a prosecutor until the murder of George Floyd. A few days after the murder, I sat in my car and I cried. I cried because I was sad. I cried because I was angry. I cried because I was tired. I cried because I was afraid. I cried because I did not know how I could go on working for a system that allowed this to happen, a system that allowed it to happen over and over again with no consequence. I still feel all of those emotions, but I was able to overcome the feeling of quitting prosecution because I know I belong in this profession. I know that abandoning the system is not going to solve the problem. I know that we need people on the inside to work toward a new system, and I want to be a part of the change from the inside the walls.

Scott Turner
Assistant District Attorney in Ector County

I have been practicing law since 1998 in Illinois and since 2016 in Texas and unfortunately, I ask myself why I do this more often than I care to admit. It usually happens when I am dealing with unreasonable victims, judges who ignore the law, or defense attorneys who do not want to talk to their clients.

However, what always brings me back is that love of catching the bad guy. I have always been a lover of comic books and have several of them framed in my office. While I am fan of heroes with superpowers, my favorites are the ones who do not have any powers at all—I am talking about Batman or Green Arrow. They are just ordinary humans (their great wealth exempted) who take on the criminals, at their own personal risk, to protect people who cannot do it for themselves. When I think about that, I remember why I started doing this work in the first place: It was to help people who did not have the knowledge, access, money, or strength to help themselves.

What is the best thing about being a prosecutor?

Paul Love
Assistant Criminal District Attorney in Galveston County

Like most prosecutors, doing justice for the community and getting justice for victims is the biggest reward. Additionally, a collateral reward is changing the perception of black people among law enforcement, judges, and even other prosecutors.

Another reward is changing the perception of black people themselves. There have been many times a black person walked up to me and said they respect the way I handled the case—on a few occasions it was the defendant's own family. They expressed having a different, more positive view of the criminal justice system. If people can see through my actions that the criminal justice system can be tough but fair and justice does mean something regardless of race, gender, and economic status, then by far that is the best thing.

Alexandra Guio
Assistant Criminal District Attorney in Dallas County

One of the best things about being a prosecutor is knowing I have the opportunity to be a positive role model for our profession. Many times, peo-

"I never felt like I should not be a prosecutor until the murder of George Floyd. A few days after the murder, I sat in my car and I cried. I cried because I was sad. I cried because I was angry. I cried because I was tired. I cried because I was afraid. I cried because I did not know how I could go on working for a system that allowed this to happen, a system that allowed it to happen over and over again with no consequence. I still feel all of those emotions, but I was able to overcome the feeling of quitting prosecution because I know I belong in this profession."
–Sade Mitchell, Assistant CDA in Bexar County

ple have a negative view of prosecutors or don't know what we do on a daily basis. It's amazing when I can build trust in my community by positively influencing the life of a victim, a defendant, or even a juror. Being a positive role model as a prosecutor is also a great way to influence and encourage the younger BIPOC generation to pursue a career in law.

Klarissa Diaz
Assistant Criminal District Attorney in Dallas County
The best thing about being a prosecutor is being able to help people. I am passionate about people, the Dallas County community, and the pursuit of justice. I appreciate having autonomy over my cases and being able to evaluate each case individually; I do not look at my cases as numbers in a system. Each case I evaluate is a person with individual liberties at stake, and that is not something I take for granted. I love utilizing my skills as a bilingual individual to reach more people and share a common ground with others.

However, my favorite thing about being a prosecutor is the deep friendships I have made and relationships I have cultivated. It is important to constantly educate yourself and surround yourself with diverse individuals—being around my peers and colleagues ensures that I never stop learning. The sense of camaraderie at the DA's office is unparalleled, and I thoroughly enjoy the people I work with.

"Everyone has a story. I love hearing the stories of witnesses and survivors of crime. Learning how the worst day of people's lives impacted them (and continues to impact them) and listening to the ways in which they cope gives me a sense of purpose and pride."
–Kenisha Day, Assistant DA in Harris County

Nicci Campbell
Assistant District Attorney in Harris County
The best thing about being a prosecutor is having the power to advocate for true justice amidst a system that has historically and systemically failed BIPOC individuals like myself. By taking the time to assess each set of facts and devise a fair and just resolution, especially through my unique lens as a black woman, I feel fulfilled knowing that I'm making positive changes in the system, one case at a time.

Jarvis Parsons
District Attorney in Brazos County
As the elected prosecutor, I get to see problems from a 30,000-foot level and have the power to try to solve them. I get to study implicit bias and have the freedom to go and speak about that all over the country. I get to implement a pretrial diversion program to help first-time offenders with drug cases. On domestic violence, I get to deliver a message to my office and the community that we are trying to protect women and children in this county. And I get to train the younger prosecutors to handle all these cases like this, to do justice and help victims.

Jessica V. Huynh
Assistant District Attorney in Travis County
Humanity. To me, the best part about being a prosecutor can range from listening and helping victims have a voice in the courtroom, to showing understanding and mercy to a defendant where it is due. Humans can be messy and complex, and that is never more often seen than in our cases. Justice is not one-size-fits-all. It takes many forms, all of which are fulfilling. Our community has entrusted us with the ability to make decisions that affect the course of peoples' lives in a profound way, and using our discretion to better our community is the best part of this job.

Kenisha Day
Assistant District Attorney in Harris County
Listening to witnesses recount an offense. Everyone has a story. I love hearing the stories of witnesses and survivors of crime. Learning how the worst day of people's lives impacted them (and continues to impact them) and listening to the ways in which they cope gives me a sense of purpose and pride. More often than not, these people want to see the accused person change, to receive some form of mental health or drug help as opposed to incarceration.

Sade Mitchell
Assistant Criminal District Attorney in Bexar County
For me, the best thing about being a prosecutor is being able to represent a wide range of people. Although there are times when I don't want people to know what I do, there are more times when I want to tell everyone how I play a small part in making the community a little safer.

How have current events impacted you as a prosecutor? What have you done to cope with their effects?

Idris Akinpelu
Assistant Criminal District Attorney in Dallas County
They affected me the same way as always. I've always been culturally and racially sensitive. I'm just glad it's now a mainstream issue. While I don't feel like it is intentional, I feel people from other walks of life have cultural blind spots, which may lead them to make unconscious racial and cultural decisions that disproportionally affect BIPOC. How I do my job will never change. I seek justice in every case.

LaQuita Long
Assistant Criminal District Attorney in Dallas County
The current events have disappointed me in those law enforcement officers who chose not to protect and serve members in their communities. Watching these events unfold solidified my career path as prosecutor because I have the ability to administer justice when an injustice occurs. Unfortunately, injustices can occur from various entities within the criminal justice system, so I try to train younger prosecutors on how to report behaviors that may cause them a concern. Outside of the workplace, I cope with all stressful events through prayer.

Ciara Parks
Assistant District Attorney in Travis County

The current events have forced me to accept the fact that racism is a part of American culture. This realization has been devastating to me. I would have thought that after all of this time things would be different in our country, that people would be different. I have learned that racism has not gone away but merely adapted into different forms, which make up systematic racism. I am a woman of faith, so I pray a lot for peace and guidance in this climate. I have also begun to educate myself as a person of color in this country. To really learn and stare this history in the face has been heartbreaking, but I am glad that I am educating myself and actually dealing with the feelings that I have so that I can move forward and educate my children and others in my sphere of influence.

Beverly Armstrong
First Assistant Criminal District Attorney in Polk County
First, I had to address the concerns raised by my 22-year-old son and 19-year-old daughter, who were strongly affected by what they were seeing. I had to remind them of our previous discussions regarding what they should and should not do when engaging with law enforcement. I explained to them my concerns regarding their safety should they attend marches and protests, and I encouraged them to express themselves in other ways. I've reached out to other minority prosecutors to address any concerns or issues they may be having. I've encouraged family, friends, and acquaintances to register to vote and exercise their right to vote. Most recently, I joined the National Black Prosecutors Association (www.blackprosecutors.org). I hope to become an active member and build relationships and connections with prosecutors who have experienced the issues that minority prosecutors face.

Erleigh Wiley
Criminal District Attorney in Kaufman County

Knowing that your community feels a lack of public trust in the institution of law enforcement and prosecution is difficult but understandable. Prosecutors may not be making arrests, but the public views prosecutors as "hand and glove" with the police. It makes me want to do my best to be available for my community. We are enforcing the law but allowing people to express their concerns that are real and legitimate.

If you want to know how people feel, you have to listen. I have fielded phone calls from concerned citizens, attended a protest rally, and listened to all citizens express concerns about our local monuments. Personally, I have turned off some of the media coverage and meditated and prayed more.

Continued on page 35 in the blue box

"Knowing that your community feels a lack of public trust in the institution of law enforcement and prosecution is difficult but understandable. Prosecutors may not be making arrests, but the public views prosecutors as "hand and glove" with the police."
–Erleigh Wiley, CDA in Kaufman County

What allies can do to help BIPOC

Anyone who has read the other articles in this issue—"Courageous conversations about race" on page 20 and "Raising the voices of prosecutors of color" on page 24—may feel moved to action.

We asked the same folks who answered our first batch of questions a couple of follow-ups on how their friends and coworkers can come alongside them in these trying times and use their own voices to advocate for justice. Here's what they had to say.

What are some specific things allies can do to help (either as a prosecutor or as a BIPOC in America in 2020)?

Idris Akinpelu
Assistant Criminal District Attorney in Dallas County
Share your experience and ask questions. People have to understand that we're all equal humans even if you don't agree with someone or don't know them. The best thing allies can do is use their voices and influence to make change, whether it's in the office, the law, or their individual community.

Paul Love
Assistant Criminal District Attorney in Galveston County
As elected officials and prosecutors, we should engage the community more in open dialogues to address concerns with the criminal justice system. Whether that is about encounters with police or how cases are prosecuted, the community needs to better understand how the system works. Also, lay out detailed measures we are taking to address certain issues.

LaQuita Long
Assistant Criminal District Attorney in Dallas County
At every speaking event in our communities, I stress the importance of voting and serving on juries. I explain that the community cannot complain about verdicts at trial if the community runs from serving on juries.

Erleigh Wiley
Criminal District Attorney in Kaufman County
Listen to people. It doesn't mean that minorities are in the right and you are in the wrong—it is just that people need to be heard; engage in self-examination about what you could do differently; and then be the change. We individually have our own silos of influence. So, either in your church, neighborhood, or just right in your extended family, let the people you influence know how you feel. This isn't about a winner (minorities) take all. This is another stage of awareness of inequality and that a more equalized world is a better place for us all to live in.

Denise D. Hernandez
Assistant District Attorney in Travis County
Show compassion and empathy for other experiences. That starts with listening to different perspectives and engaging in thoughtful conversations about race. It's OK to feel uncomfortable. Growth happens when we are pushed out of our comfort zones.

Chandler Raine
Assistant District Attorney in Harris County
Don't be afraid to call out racial inequality and injustice wherever you see it. It is so easy for a person, group, or society to simply claim "I am not" or "we are not" racist, while their actions lead to outcomes that are. It isn't enough to attack the obviously racist things we see and then feel as though the work is done. The softballs are the easy ones to swing at, and we have to also be willing to wrestle with the hard and difficult reality that systemic issues require systemic change.

Janie Korah
Assistant Criminal District Attorney in Galveston County
Listening. Many of us are privileged, myself included. We haven't lived a day in an overpoliced neighborhood, been the target of profiling, or witnessed injustice happening to a family member. Allyship means refocusing each day. As a prosecutor, it means not just opening up a case and asking, "How can I prove this charge?" but also asking, "What is going on here?" A case may very well be rock solid, but still, pause and ask yourself, "Am I OK with everything happening here?"

As an ally, it's vital that we speak up when we see something of concern.

Additionally, we should give positive reinforcement to officers doing a good job and encourage them to set an example for others. The cleaner the police work and investigations, the more citizens can trust law enforcement and the easier it will become to try our cases. When our officers aren't on trial, we can focus on the actual crime. Everyone can win.

Ty Stimpson
Assistant Criminal District Attorney in Tarrant County

I think the most important thing allies can do to help is to genuinely listen. Having courageous conversations is great, but listening is what is needed the most right now. I appreciate my friends and colleagues listening, reaching out, and expressing their disdain over a lot of recent events that are plaguing our country.

After listening, allies need to acknowledge the hurt that BIPOC may feel. You may not be able to empathize, but you can certainly sympathize. BIPOC love America just as much as nonminority Americans, but history has exposed that America has not always loved BIPOC. Acknowledging the hurt many BIPOC feel and acknowledging that the same "privilege" that exists for some does not exist for BIPOC is just as important as listening.

Third, decry bad behavior when you see it. It is not enough anymore to say, "I am not racist." As a society, we must not tolerate racism; we must openly decry racism and bad behavior. We must call it out for what it is—no more excusing it.

With regard to being a prosecutor, I would suggest simply looking around your offices to see if it reflects the makeup of your community. Do you have BIPOC in leadership positions? Do you recruit minority prosecutors when your office has an opening? Are you able to retain BIPOC prosecutors? If not, have the uncomfortable conversations about why BIPOC are not staying in the office.

Scott Turner
Assistant District Attorney in Ector County

I was born in 1972, and people of color have been losing their lives at the hands of law enforcement under suspicious circumstances since long before I was born. The only difference today is that technology has made it impossible for those officers to concoct a believable story that contradicts body-cam footage and witness statements. In a lot of ways it makes me feel good that this particular issue has gotten the attention it deserves.

That said, the selective treatment of minorities and people of color by law enforcement has always affected the way I reviewed police reports and handled cases. One of the good things that prosecutors can do is perform our "gatekeeper" function. There is a reason why prosecutors have the discretion to review cases and reject or dismiss ones that do not pass the "smell test."

Chandler Raine
Assistant District Attorney in Harris County

So many times as prosecutors we see things that are just wrong. We hear comments that bolster a system of discrimination. We see body-cam footage with inappropriate behavior. We watch as decisions are made that do not lead to equal outcomes. Recent events have been a stirring and tragic reminder that we cannot sit idly by.

I was struck by a cartoon that I saw several weeks ago, though. There were two men going up a mountain. One, a white man, had his hands on his knees catching his breath, having just climbed up a path called "Realizing There is Systemic Racism," and he states, "We made it." The other, a black man, pointing up to an even higher slope called "Racial Equality," told him, "We're only just beginning." Conversations are only as important as the action that they inspire. We can't let the dialogue be the end of this moment. ❇

Editor's note: The number of prosecutors who answered our questions was so great that we could not print all of their answers here. Visit our website to see the full version of this article with every answer from every respondent.

"Allies need to acknowledge the hurt that BIPOC may feel. You may not be able to empathize, but you can certainly sympathize. BIPOC love America just as much as non-minority Americans, but history has exposed that America has not always loved BIPOC. Acknowledging the hurt many BIPOC feel and acknowledging that the same 'privilege' that exists for some does not exist for BIPOC is just as important as listening."
–Ty Stimpson, Assistant CDA in Tarrant County

What can TDCAA—as an organization and as individual leaders within the organization—do to encourage diversity, inclusion, recruitment, and retention within the prosecutor community in Texas?

Nicci Campbell
Assistant District Attorney in Harris County
TDCAA is currently taking the right step by doing this article and giving a spotlight to BIPOC district and county attorneys to lift our voices and share our stories. To work on diversity, inclusion, and recruitment, TDCAA can open up more opportunities for BIPOC high school, undergraduate, and law students. By interacting more with the next generation via events, internship opportunities, and scholarships, more BIPOC students will be exposed to and potentially interested in becoming district and county attorneys upon licensure.

Idris Akinpelu
Assistant Criminal District Attorney in Dallas County
Help educate more people about the power we have in our profession to affect and seek justice. Also, we need paid internships at DA's offices so that people don't have to make a financial decision to try to experience what we do.

John Creuzot
Criminal District Attorney in Dallas County
Reach out to qualified graduates of law schools and encourage them to enter the public sector as prosecutors. In order to do that, be honest about the weaknesses, failings, and shortcomings—but also talk about the strengths of the criminal justice system. It's not all broken.

Ty Stimpson
Assistant Criminal District Attorney in Tarrant County
Continue doing what you are doing. I think TDCAA has done a great job lately of providing spaces for BIPOC to have conversations. I also think TDCAA has done well actively reaching out to local DA's offices and not only initiating the diversity conversation, but also—more importantly—serving as a continued resource to local offices as they navigate diversity, inclusion, recruitment, and retention within the Texas prosecutor community.

Alexandra Guio
Assistant Criminal District Attorney in Dallas County
I would like to see an event (virtual) that invites BIPOC prosecutors from across Texas where we could share stories and encouraging words with each other. I think this could build a sense of camaraderie and also create the possibility of mentorship that some prosecutors may not have in their offices.

Chandler Raine
Assistant District Attorney in Harris County
Over the last few years, TDCAA has focused its attention on implicit and explicit bias training. Continuing to teach on and discuss the topic is such an important step in the long road to racial injustice and inequality being a part of our history and no longer a part of our present. ❇

Editor's note: The number of answers we received to these questions was so great, they cannot all be printed here. To read every respondent's answers to both questions, please visit our website.

Deferred prosecution agreements and the Public Information Act

On April 3, 2020, the Texas Supreme Court left in place a decision by the Third Court of Appeals involving Deferred Prosecution Agreements and the Texas Public Information Act (PIA).

By Tim Labadie
Assistant County Attorney in Travis County

By so doing, the Court affirmed that Deferred Prosecution Agreements are excepted from disclosure under the Texas Public Information Act (PIA).[1]

This case, *Paxton v. Escamilla*,[2] was just one of many involving Deferred Prosecution Agreements, but it is the only one that required an appellate court's decision to resolve. A look at its history is important in understanding the significance of this recently decided case.

What is a DPA?

Deferred prosecution is one of the tools a prosecutor's office (including the Travis County Attorney's Office) uses in exercising broad discretion in determining which cases to prosecute. A DPA is an extra-judicial agreement between a person charged with a crime and the prosecutor to defer the prosecution of a criminal charge for an agreed period of time (usually 12 to 24 months), during which the defendant must fulfill specified conditions, such as no contact with a victim, counseling for a domestic violence offender, or drug treatment. After the DPA is signed by the defendant and the prosecutor, the criminal case is conditionally dismissed. If the defendant fulfills all conditions, the county attorney takes no further action (because the criminal case was dismissed). However, if the defendant fails to comply with any of the conditions of the agreement, the county attorney has the authority to refile the charges and prosecute the case.

Our office often uses deferred prosecution when prosecutors determine that it is possible a jury would render a not-guilty verdict. For example, in an assault–family violence case, the prosecutor may choose deferred prosecution to require the defendant to address his issues so as to break the cycle of violence and protect the victim and society. While our office has always involved the victim in fashioning a DPA, we have also consistently sought permission from the Attorney General to refrain from releasing these agreements to the public to protect the purpose and integrity of deferred prosecution, as these agreements often contain admissions by the defendant and agreements to plead.

History of disclosure

Historically, our office has asserted that DPAs are excepted from disclosure pursuant to §551.108(a)(2) of the PIA (in the Government Code), which excepts from disclosure information that deals with the detection, investigation, or prosecution of crime in relation to an investigation that did not result in conviction or deferred adjudication, because after a DPA is executed, the criminal case is dismissed. Another possible exception is in §552.108(a)(1), which excepts from disclosure information whose release would interfere with the detection, investigation, or prosecution of crime.

In 2013, several open record requests were made to release DPAs. Each time, our office sought a ruling from the Attorney General that the DPA was excepted from disclosure pursuant to §552.108(a)(2) (no conviction or deferred adjudication). In each case, the Attorney General ruled that the DPA had to be released, claiming that §552.108(a)(2) did not apply because there existed a possibility that the criminal charges could be refiled because the DPAs' terms had not yet expired. Consequently, the county attorney filed lawsuits to challenge these rulings.

All these lawsuits were settled, and we were permitted to withhold from disclosure the DPAs with the understanding that in the future, our office would assert the §552.108(a)(2) exception

(no conviction or deferred adjudication) only when the term of the DPA had expired, and we would assert the §552.108(a)(1) exception (interfere with the detection, investigation, or prosecution of crime) only when the DPA was still in effect. In turn, the Attorney General would rule that the DPAs were excepted from disclosure. Such was the practice of our office and the Attorney General's Office for about three years.

This change in the Attorney General's approach to the application of §552.108(a)(1) necessitated a change in how we needed to approach the issue–no longer could we rely on a single exception to the disclosure when asking the Attorney General for a ruling.

The winds shift

It all changed on September 19, 2016, when the Attorney General decided that the public release of a DPA whose term was unexpired cannot interfere with the detection, investigation, or prosecution of crime, and thus, is not excepted from disclosure by §552.108(a)(1).[3]

This decision stemmed from an open records request from April 11, 2016. The requestor, a victim of domestic violence, wanted the DPA for her ex-husband, who had allegedly assaulted her. Because the term of his DPA had not yet expired, we asserted, as we had done in the past, that release of this agreement would interfere with the detection, investigation, or prosecution of crime, and that the DPA was excepted from disclosure by §552.108(a)(1).[4] The Attorney General, as he had done in the past, agreed with us.

On July 12, 2016, though, another person (acting on behalf of the crime victim who made the April 11 request) made another request for the same DPA, as well as all investigative reports, statements, witness statements, court documents, filings, and any written documentation of the investigation and proceedings in the criminal case that was resolved by deferred prosecution. The County Attorney asked the Attorney General for a ruling that the information was excepted from disclosure by §552.108(a)(1), noting that the Attorney General had previously ruled that the DPA was excepted from disclosure. The Attorney General, rather than following his prior ruling concerning this specific DPA and his rulings since 2013, instead ruled that §552.108(a)(1) does not except a DPA from disclosure.[5] The Attorney General determined that because the prosecutor's office gives a copy of the DPA to the criminal defendant, its release to the general public would not interfere with the detection, investigation, or prosecution of crime. As to all the other information requested, the Attorney General ruled it was excepted from disclosure by §552.108(a)(1).

This change in the Attorney General's approach to the application of §552.108(a)(1) necessitated a change in how we needed to approach the issue—no longer could we rely on a single exception to the disclosure when asking the Attorney General for a ruling. However, in our lawsuit challenging this ruling, we were limited to raising that single exception, even though others may have applied.[6]

The County Attorney then filed suit to challenge this ruling. On April 27, 2017, while that lawsuit was pending, the person who initially requested the DPA made another open records request, this time asking for all DPAs made in assault–family violence cases between April 1, 2015 and April 27, 2017, implicating thousands of agreements. It is this open records request that is the subject of *Paxton v. Escamilla*.

The victim of domestic violence who made the April 27 request had the mistaken notion that our office does not inform victims of the conditions imposed upon the defendants by a DPA, and that DPAs are more concerned with the defendant than with crime victims. On the contrary, we have always involved victims in this process because it results in the dismissal of the criminal charge. Additionally, the victim is often the best person to determine whether the defendant has complied with some of the conditions, such as that he stay away from the victim's home or workplace and have no other contact with her.

Because the Attorney General's office had abandoned its practice of ruling that releasing to the public will interfere with the detection, investigation, or prosecution of crime (§552.108(a)(1)), the County Attorney now asserted exceptions based on §§552.108(a)(1), 552.108(a)(2), 552.103,[7] and 552.107,[8] so that if litigation ensued, we would not be limited to a single exception as the basis for challenging an Attorney General ruling, as we were in the prior lawsuit. In his letter ruling, the Attorney General, without explicitly saying so, divided the DPAs into two categories: those with expired terms and those with unexpired terms, and he determined that only those DPAs with expired terms are excepted from disclosure by §552.108(a)(2),[9] while DPAs with unexpired terms were not excepted from disclosure by §§552.108(a)(1), 552.103, or 552.107.[10] We filed suit to challenge the Attorney General's ruling concerning the DPAs with unexpired terms.

The lawsuits

The issues were presented to the trial court through competing motions for summary judgment. We showed that, as of April 27, 2017, the date our office received the open records request, there were 890 DPAs with unexpired terms, 845 of which were made in criminal cases that were never refiled. The other 45 agreements were made in criminal cases that were later refiled. At the time the motions for summary judgment were filed, 21 of those 45 refiled cases were subsequently dismissed, and 24 cases were still pending.[11]

After considering these motions, the trial court rendered judgment in favor of the County Attorney, declaring that:

1) the DPAs pertaining to dismissed criminal cases that were not refiled are excepted from public disclosure by §552.108(a)(2);

2) the DPAs pertaining to dismissed criminal cases that were refiled and then dismissed again are excepted from public disclosure by §552.108(a)(2); and

3) the DPAs pertaining to dismissed criminal cases that were refiled and that were still pending are excepted from public disclosure by §§552.108(a)(1), 552.103, and 552.107 of the Texas Government Code.

On appeal, the Austin Court of Appeals agreed with us and the trial court, holding that the DPAs made in cases where charges were not refiled and those made in cases where the charges were refiled but then dismissed are excepted from disclosure by §551.108(a)(2) because those criminal investigations resulted in something other than a conviction or deferred adjudication.[12] The Attorney General asserted that because there was a possibility that the charges could be refiled as long as the DPA was still in effect, one could not conclude that the investigation did not result in conviction or deferred adjudication. The Court, however, relying on its decision in *The City of Carrollton v. Paxton*,[13] stated, "A dismissal of criminal charges, even if conditional, constitutes the conclusion of an investigation by way of some action other than a conviction or deferred adjudication."[14]

The court of appeals also agreed that the release of the DPAs in cases that were refiled and still pending would interfere with the detection, investigation, or prosecution of crime and were thus excepted from disclosure by §552.108(a)(1).[15] This finding was based on evidence that the release of these DPAs would result in excessive publicity, due process violations, and endangering the prosecution. The Court also rejected the Attorney General's contention that our office, by giving a copy of the DPA to the defendant, made a voluntary disclosure of public information (information contained in a voluntary disclosure to one person must be made available to any person),[16] holding that the release of the DPA to the defendant is not voluntary but mandated by the Michael Morton Act.[17]

Having determined that all the DPAs with unexpired terms were excepted from disclosure by either §552.108(a)(1) or §552.108(a)(2), the Court did not reach the issues of whether the trial court correctly determined that the DPAs relating to cases that were refiled and still pending were excepted from disclosure by §§552.103 and 552.107 (that is, the DPAs are related to litigation to which the State is a party and their release to the public violates Rule 3.07 of the Disciplinary Rules,[18] respectively).

Going forward

The Third Court's decision—and the Texas Supreme Court's refusal to disturb that decision—allow prosecutors to continue to offer Deferred Prosecution Agreements to resolve criminal cases. Oftentimes a prosecutor will determine that there is a likelihood that guilt will be difficult to prove, so rather than run the risk that the defendant will have no accountability for his conduct, the prosecutor can turn to deferred prosecution. There are advantages to DPAs across the board: The advantage to the community and to crime victims is that there are conditions imposed on the defendant to address and change the offensive conduct and protect both the victim and society; to the prosecutor, that the defendant makes certain admissions and agreements to plead; and to the defendant, that he obtains help to modify illegal behavior and the criminal charge is dismissed, offering the possibility of expunction.

For deferred prosecution to work effectively, prosecutors must obtain from the defendant certain admissions and agreements, which, if made public, he would not likely make. Just as important to deferred prosecution is the disclosure to the victim, at least in assault–family violence cases, of the conditions imposed on the defendant. Before this litigation, disclosure of these conditions to the victim was verbal. But now, at-

Before this litigation, disclosure of these conditions to the victim was verbal. But now, attached to every deferred prosecution agreement is a "Deferred Prosecution Summary Sheet" that specifies the conditions the agreement imposes upon the defendant.

tached to every deferred prosecution agreement is a "Deferred Prosecution Summary Sheet" that specifies the conditions the agreement imposes upon the defendant. This summary sheet is signed by both the defendant and the prosecutor, and it is provided to the victims so they know the agreement's conditions. Because the summary sheet does not reveal the defendant's admissions or agreement to plead, those portions of the DPA are protected from disclosure by the PIA. ❇

Endnotes

[1] *Paxton v Escamill*a, 590 S.W.3d 617 (Tex. App.–Austin 2019, pet. denied).

[2] 590 S.W.3d 617 (Tex. App.–Austin 2019, pet. denied).

[3] Letter Ruling OR2016-21139. (September 16, 2016).

[4] Letter Ruling OR2016-10351 (May 6, 2016).

[5] Letter Ruling OR2016-21139.

[6] Tex. Gov't Code §552.326. The only exceptions to disclosure that the government can raise in a suit to challenge the ruling are those asserted in the request for a ruling, unless the exception is based on a requirement of federal law or one involving property or privacy interests.

[7] Section 552.103 excepts from disclosure information "relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party."

[8] Section 552.107 excepts from disclosure information "that … an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under … the Texas Disciplinary Rules of Professional Conduct."

[9] Letter Ruling OR2017-16049 (July 18, 2017).

[10] *Id*. at pp. 2-4.

[11] Some of the refiled cases resulted in a conviction or deferred adjudication. The DPAs relating to those cases were released to the requestor.

[12] *Paxton v Escamilla*, 590 S.W.3d at 622.

[13] 490 S.W.3d 187, 196 (Tex. App.–Austin 2016, pet. denied).

[14] *Paxton v. Escamilla*, 590 S.W.3d at 622.

[15] *Id*. at 623.

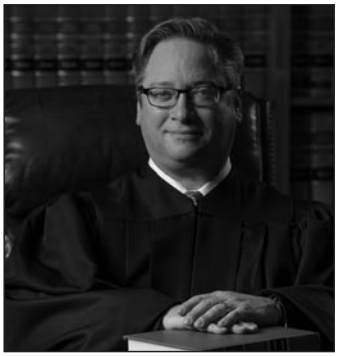
[16] See Tex. Gov't Code §552.007.

[17] *Paxton v. Escamilla*, 590 S.W.3d at 624, citing Tex. Code Crim. Proc. Art. 39.14(a).

[18] Tex. Disciplinary Rules Prof'l Conduct R. 3.07(a), reprinted in Tex. Gov't Code, Title 2, Subtitle G, App. A. This rule prohibits the County Attorney, in the course of representing the State of Texas, from making an extrajudicial statement that he would expect to be disseminated by means of public communication if the County Attorney knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicatory proceeding.

10 bite-size summaries of DWI-related cases

As I write this, I kind of feel like Steve Martin in the movie *The Jerk* explaining what a patron might win at the guess-your-weight booth.[1]



By the Honorable David Newell
Court of Criminal Appeals Judge in Austin

Normally, I cover terms of the Court of Criminal Appeals when doing caselaw updates, but here, I am really pulling highlights from a paper I wrote in anticipation of presenting at some regional conferences for the Center for the Judiciary, so I am covering March 2019 to May 2020. I make no guarantees that any of these cases are ones you want me to highlight or even that they might amuse you. I can promise only that I will make the summaries bite-sized. If you have ever eaten any of my cooking, you know to ingest at your own peril.[2]

10 **Don't ask the United States Supreme Court if implied-consent laws authorize the warrantless seizure of blood from an intoxicated and unconscious driver.** Stop me if you've heard this one before. The United States Supreme Court granted review on that very question but ended up not answering it. In *Mitchell v. Wisconsin*,[3] the Court recognized, albeit in a plurality, that while there is no *per se* exigency in the metabolization of alcohol into the bloodstream that justifies the warrantless seizure of an intoxicated driver's blood, an unconscious and intoxicated driver could present a medical emergency. That medical emergency, in addition to the dissipation of the alcohol in the unconscious driver's bloodstream and the inability to obtain a breath sample, combine to create exigent circumstances to seize and analyze the blood.

One of the swing votes in this case was Justice Thomas, who has always believed that probable cause to believe a driver is intoxicated, along with the dissipation of alcohol, amounts to exigent circumstances justifying a warrantless search and seizure.[4] So he agreed with the plurality on the issue of exigency. Three dissenters noted that the State had actually conceded that the seizure was not justified under a theory of exigent circumstances, and Justice Gorsuch dissented simply to observe that the Court was supposed to address the issue of implied consent, not exigency.

But if you are looking for closure, the Texas Court of Criminal Appeals later held in *State v. Ruiz*[5] that the implied-consent statute did not authorize the warrantless search and seizure of blood from an unconscious and intoxicated driver. There is obviously a lot more to these cases than this summary, so I commend them both to your reading.

9 **A police officer has reasonable suspicion to stop a truck if he runs the license plate and finds the registered owner has a revoked driver's license.** In *Kansas v. Glover*,[6] the United States Supreme Court considered a stop where a Kansas deputy sheriff ran the license plate on a pick-up and found out that the registered owner had his license revoked. The deputy pulled the truck over. The owner of the truck, Glover, turned out to also be the driver, but the deputy did not know that until after he had stopped the truck.

Writing for the majority, Justice Thomas noted that "reasonable suspicion" does not require "scientific certainty" even if it requires more than a "hunch." The bottom line is that the Court looked at inferences from the facts at hand and whether it was reasonable for the officer to infer that the owner of the truck was the one driving it.[7]

8 **If you're driving drunk, do not throw a lit cigarette out of the window because that's reasonable suspicion to stop, even if you don't start a fire.**[8] Michael Wood was driving while in-

toxicated and flicked a lit cigarette out of the driver's side window in front of a police officer. The officer stopped Wood and later arrested him for DWI. Wood argued that §365.012 of the Health and Safety Code, which deals with littering, makes disposing of lighted litter, including a cigarette, an offense only if a fire is ignited as a result. The trial court suppressed the evidence, but the Third Court of Appeals reversed. In *State v. Wood*,[9] the court of appeals held that the officer's observation of an object being discarded was enough to provide reasonable suspicion. The court of appeals also noted that Subsection 365.012(a) of the Health and Safety Code still allowed for punishment for littering even if the lighted trash doesn't start a fire, albeit for an offense with a lower punishment range.

Does weaving within one's lane of traffic, even if done safely, amount to reasonable suspicion to stop for failure to maintain a single lane? I would love to answer this question for you, but the issue is currently pending.

7 Does weaving within one's lane of traffic, even if done safely, amount to reasonable suspicion to stop for failure to maintain a single lane? I would love to answer this question for you, but the issue is currently pending. I will note two, count 'em two, cases you might want to be aware of from intermediate courts of appeals that have tackled the issue. In the first, police pulled over a U-Haul that was suspected of involvement in multiple burglaries. The officer had observed the rear tire of the vehicle straddling the lane divider shortly after rounding a curve. The trial court granted the motion to suppress because even though the driver's tires crossed the striped lines without signaling a lane change, there were no other vehicles in the vicinity. The Thirteenth Court of Appeals affirmed in *State v. Hardin*.[10] The court of appeals acknowledged the plurality opinion of the Court of Criminal Appeals in *Leming v. State*,[11] had observed that it is an offense for someone to leave the marked lane without signaling regardless of whether the action was safe, but did not follow it because it was not binding authority.

Conversely, in *State v. Meras*,[12] the Tenth Court of Appeals held that a stop for failing to maintain a single marked lane was a traffic offense justifying a traffic stop regardless of whether there was any evidence of unsafe driving. The court of appeals chose to follow the reasoning of the plurality in *Leming*. As you can see from above, *Hardin* has already been granted for review, so we'll see whose cuisine reigns supreme.[13]

6 If getting a search warrant for blood is doable, a warrantless blood draw might not be justified under exigent circumstances. Trooper David Kral was called out to a car wreck. Eyewitnesses identified Phillip Couch as having driven his Corvette recklessly into the wrong lane and hitting a truck head on. Couch had refused treatment at the scene. It took Trooper Kral[14] about 90 minutes from the time he was called to when he completed field sobriety tests. Kral then transported Couch to a hospital in New Braunfels, a drive that took about 45 minutes. (So we're at about 2 hours and 15 minutes now.) At the hospital, Kral began drafting a blood search warrant to draw Couch's blood, which took about 30 minutes (up to 2:45 now). When he could not reach a judge, Kral decided to take Couch's blood without a warrant based upon the Texas Transportation Code.[15] Kral got Couch's blood about three hours after he had been dispatched to the collision. The trial court suppressed the evidence because there was no showing of exigency.

The Third Court of Appeals affirmed in *State v. Couch*.[16] According to the court of appeals, the facts did not support a conclusion that the search would be "significantly undermined" by the time it would have taken to get a warrant. In particular, the court noted the availability of other officers to assist, procedures for obtaining a blood warrant via fax or in person, and no evidence indicating what time period would amount to a "significant delay."[17]

5 And speaking of exigency, does the State need to show exigent circumstances to justify a "suspicious place" arrest under Art. 14.03(a)(1)? Sean Michael McGuire drove while intoxicated and ran into a motorcycle, killing the driver. After the collision, McGuire pulled into a nearby gas station and waited for police after he called his mother and two other people he knew in law enforcement. He was arrested without a warrant, and his blood was later drawn without a warrant. The trial court suppressed the evidence on the basis that Art. 14.03(a)(1) did not authorize the "suspicious place" arrest in this case without a showing of exigency.

The First Court of Appeals agreed in *State v. McGuire*.[18] The court of appeals explained that Article 14.03(a)(1) requires a showing of:

1) probable cause;

2) a suspicious place; and

3) exigent circumstances that call for immediate action or detention by police.

Here, the State did not argue that the dissipation of alcohol established an exigency justifying the arrest. Further, there were no facts supporting exigent circumstances.[19]

4 A magistrate's terrible handwriting doesn't prevent good-faith reliance upon a blood search warrant even if the signature is illegible (but everyone, please try to write legibly). Police arrested Cesar Arellano for driving while intoxicated. The arresting officer submitted a sworn affidavit to the on-duty magistrate for a search and seizure warrant for blood. The magistrate signed the blank signature line form of the search warrant in cursive. Aside from the cursive signature, the magistrate's name was not typed or handwritten anywhere on the warrant. Arellano argued that the warrant was invalid because it failed to comply with Art. 18.04(5) of the Code of Criminal Procedure, which provides, among other things, that the magistrate's name is in clearly legible handwriting or in typewritten form. The trial court granted the motion to suppress after repeatedly asking the State which magistrate had signed the warrant, to no avail. The court of appeals affirmed.

The Court of Criminal Appeals reversed in *State v. Arellano*.[20] The Court recognized the deficiency in the warrant but held that the deficiency did not automatically preclude an application of the "good-faith" exception to the state exclusionary rule in Art. 38.23(b). The Court remanded the case to the court of appeals to consider whether the blood evidence should be suppressed.

3 Make sure the State "wheeled" the defendant with something other than his own extra-judicial statements. Bene Taylor's Volkswagen stalled out on the Southwest Freeway, demonstrating that driving a hooptee is not an adequate deterrent for driving while intoxicated. Tragically, this led to a collision. Taylor appeared intoxicated and later admitted to drinking "three beers" and driving. Taylor argued there was no evidence to establish the *corpus delicti* of the offense of driving because no evidence showed he was driving. The Fourteenth Court of Appeals disagreed in *Taylor v. State*.[21] The court noted that Taylor's car was stopped in the main lane of the Southwest Freeway, with Taylor observed standing alone outside the car near the front door.

In another recent case, Van Alstyne Police got a call from a motorist that a gray minivan was driving dangerously and going all over the median. The police found the van parked in a McDonald's parking lot moments after the caller indicated that the van had pulled into a McDonald's parking lot. Police found Robert Harrell in the driver's seat with his seatbelt on. Two other people were sitting in the back of the van. Spoiler alert: Harrell was intoxicated, and he admitted to driving the van. On appeal from his conviction, Harrell argued there was insufficient evidence establishing that he had operated a motor vehicle in a public place.

The Fifth Court of Appeals agreed and reversed. In *Harrell v. State*,[22] the court of appeals explained that the jury would have had to infer that Harrell was the person driving the van when the caller saw it on the highway based on the fact that he was sitting in the driver's seat with his seat belt fastened. This was not sufficient based on facts to support a finding beyond a reasonable doubt.

The Court of Criminal Appeals has granted review in *Harrell* but not in *Taylor*. But more importantly, look at the added value here! Two cases for the price of one free summary.

2 Cars are not deadly weapons *per se*, so the State must present evidence regarding the way the car was used to justify a deadly weapon finding. Donald Couthren was driving on a frontage road when Frank Elbrich stepped in front of the vehicle and was struck. Couthren stopped and helped the bloodied Elbrich into the car. Ordinarily a trip to the hospital would be in order, but instead, Couthren drove to his girlfriend's house to exchange vehicles.[23] At his girlfriend's house, an argument ensued,[24] and police were called. At this point, police observed Elbrich bloody and incoherent still in the passenger seat of Couthren's vehicle. Couthren admitted he struck the pedestrian but related that Elbrich was the one who stepped in front of him. Couthren later admitted to having consumed two "Four Loko" alcoholic beverages (thereby raising his loko level to eight). The State charged Couthren with felony driving while intoxicated and sought a deadly weapon finding based upon the use of the car. The court of appeals affirmed,

The facts in Couch *did not support a conclusion that the search would be "significantly undermined" by the time it would have taken to get a warrant. In particular, the court noted the availability of other officers to assist, procedures for obtaining a blood warrant via fax or in person, and no evidence indicating what time period would amount to a "significant delay."*

but the Court of Criminal Appeals reversed in part.

In *Couthren v. State*,[25] the Court held that the only evidence establishing the collision was Couthren's testimony that Elbrich stepped out in front of him; without more, the evidence did not establish how the car was used to cause serious bodily injury. Holding otherwise would effectively designate a motor vehicle a deadly weapon per se despite not being listed as such by the Legislature.[26]

1 An Art. 38.41 certificate of blood analysis signed by an assistant lab director, rather than the analyst, authorizes admission of a blood analysis report when the defendant failed to object 10 days prior to trial. After Andrew Williams killed a jogger with his car (by using it in a manner capable of causing death), the State charged him with failure to stop and render aid and manslaughter. The State told Williams and the trial court 50 days before trial that it would rely upon an Art. 38.41 certificate of analysis rather than live testimony from the analyst, but the assistant lab director signed the report rather than the analyst. When the State sought to introduce the report at trial, Williams objected that the failure to call the analyst to testify violated the Confrontation Clause.

In *Williams v. State*,[27] the Court of Criminal Appeals rejected this argument. The Court held that Williams had waived his Confrontation Clause complaint by failing to object at least 10 days prior to trial as the statute required. Even though the report failed to provide the information regarding the analyst required under the statute, the statute itself did not require the affidavit be sworn to by the analyst, so Williams's argument at trial was that the report had to be sworn to by the analyst rather than the assistant director. Even though it did not comply with the statute, having included the information regarding the assistant lab director substantially complied with the statute. Of course, Williams was never bound by the certificate and could have insisted that the State call the analyst to testify by objecting 10 days prior to trial. Consequently, there was no Confrontation Clause violation.

Conclusion

And thus concludes our sometimes careening adventure through some of the more significant cases and issues in DWI law over the last year, give or take a month or three. I hope you have found something in here that was helpful going forward and that the summaries were in the appropriate serving size. Most importantly, I hope this article whet your appetite to read these cases yourself so you can get the full dining experience. Bon appétit. ❇

Endnotes

[1] *The Jerk* (Universal 1979) (anything between the ashtrays and the thimbles, including the Chiclets but not the erasers).

[2] Editor's note: This article originally appeared in the Summer 2020 issue of *In Chambers* published by the Texas Center for the Judiciary and has been reprinted here with permission.

[3] 139 S.Ct. 2525 (June 27, 2019).

[4] See, e.g., *Missouri v. McNeely*, 569 U.S. 141, 178 (2013) (noting that exigent circumstances exist in every driving while intoxicated case because the body is metabolizing the alcohol).

[5] 581 S.W.3d 782 (Tex. Crim. App. Sept. 11, 2019).

[6] 140 S.Ct. 1183 (Apr. 6, 2020).

[7] This is consistent with the approach taken by the Court of Criminal Appeals in cases like *Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997) and *Derischweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011). I could explain these chases to you at length, but where's the fun in that?

[8] At the outset, it is important to note that this case does not involve Billy Joel. See, e.g, Joel, William, "We Didn't Start the Fire," *Storm Front* (Columbia 1989).

[9] 575 S.W.3d 929 (Tex. App.–Austin May 23, 2019, pet. ref'd).

[10] 2019 WL 3484428 (Tex. App.–Corpus Christi Aug. 1, 2019, pet. granted) (not designated for publication).

[11] 493 S.W.3d 552 (Tex. Crim. App. 2016) (plurality op.).

[12] 2020 WL 103805 (Tex. App.–Waco Jan. 8, 2020, pet. filed).

[13] "Iron Chef" (Fuji Television 1993–1999).

[14] I'm going to stop calling him "Trooper Kral" because it makes him sound like a Klingon.

[15] This occurred in 2012. The apocalypse did not, despite early Mayan predictions.

[16] 595 S.W.3d 748 (Tex. App.–Austin Aug. 29, 2019, pet. ref'd).

[17] There was also some indication from the trooper that the blood draw was necessary to prevent the destruction of evidence due to possible medical procedures, but the court of appeals held that the record did not support the officer's concern.

[18] 586 S.W.3d 451 (Tex. App.–Houston [1st Dist.] August 29, 2019, pet. granted).

[19] The State Prosecuting Attorney filed a petition for discretionary review, asking the Court to address whether the statute requires a showing of exigency. The Court of Criminal Appeals has granted it so the issue is currently pending.

[20] ___S.W.3d___, 2020 WL 2182258 (Tex. Crim. App. May 6, 2020).

[21] 572 S.W.3d 816 (Tex. App.–Houston [14th Dist.] April 9, 2019, pet. ref'd).

[22] 2019 WL 3955774 (Tex. App.–Dallas Aug. 22, 2019, pet. granted).

[23] Is this a sign of intoxicated thinking or non-intoxicated thinking?

[24] See footnote 7, supra.

[25] 571 S.W.3d 786 (Tex. Crim. App. April 17, 2019).

[26] This was a very close case, and I commend the dissenting opinion in the case to your consideration as well.

[27] 585 S.W.3d 478 (Tex. Crim. App. Oct. 9, 2019).

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It was a long road to justice

In 1991, Blas Tierrablanca murdered Brenda Smith in an Austin County motel room and then fled to his home country of Mexico.

By Brandy Robinson
First Assistant District Attorney in Austin County

The journey to bring him to justice took six prosecutors, six forensic experts, at least 16 city and county law enforcement officers, two state troopers, two Texas Rangers, at least six FBI agents, several border patrol agents, at least six members of the Department of Justice's Office of International Affairs, an unknown number of people at the United States and Mexican Embassies, and several members of Mexican law enforcement over a span of almost 30 years.

The day of the murder, Tierrablanca rode to a bar in Sealy with his friend, Chuy, in Chuy's gray Camaro. At the bar, Tierrablanca struck up a conversation with Brenda, a familiar local. When the group decided to leave, Tierrablanca borrowed Chuy's Camaro so he could take Brenda to a motel, and Chuy rode home with his girlfriend, Maria.

Once in the motel room, Tierrablanca stabbed Brenda in the chest and cut her throat several times. He tried to clean up in the shower but left bits of toilet paper scattered throughout the room. Tierrablanca took the motel's towels with him when he left in Chuy's car. The next morning, motel staff discovered Brenda's body and called the police.

1991: The investigation

The Sealy Police Department employed fewer than 10 officers in 1991, and they had no official investigator. Officer Brad Murray found Brenda's body curled against the motel room wall, covered in blood. Officer Joe Villarreal helped him investigate the case.

Motel staff told police that Brenda Smith had arrived with a Hispanic man in a gray Camaro the night before. After leaving the motel, Officer Murray learned that a night-shift officer had seen a gray Camaro at the motel around midnight and had written down the license plate number. Officers issued a BOLO on the Camaro.

That morning, Chuy had heard that Tierrablanca left the Camaro at a friend's house, so Maria took Chuy to pick it up. As Chuy drove home in the Camaro, police cruisers suddenly blocked him in. Chuy had no idea what was happening.

Both he and Maria gave the same story: Tierrablanca had borrowed the car to go to a motel with Brenda. When officers searched the vehicle, they found the motel towels, a pair of socks, and a piece of bloody toilet paper.

While Villarreal collected evidence from the car, Officer Murray went to the home in Sealy that Tierrablanca shared with his common-law wife, Josefina. Josefina told Officer Murray that Tierrablanca had come home late, left a red baseball cap, and fled. Murray took the cap and noticed apparent blood on its front.

Murray learned Tierrablanca drove to Bellville where he ditched the Camaro, and from there caught a ride to Rosenberg, then a bus heading to Corpus Christi, then south to McAllen. The last witness placed him on that bus, heading toward the Mexican border—mere hours ahead of the police.

The evidence

Officers Murray and Villarreal collected every scrap of evidence they found, meticulously bagging and tagging each item. Officer Villarreal then called in a young DPS forensic analyst, John Moran. Although some agencies could perform DNA comparisons in 1991, Sealy police relied on the DPS Crime Lab in Houston for all forensics, and DPS lacked DNA testing capability. The best that officers could hope to gain from analysis might be confirmation of human blood and blood type.

Analyst Moran tested dozens of items for the presence of human blood, but obviously he

couldn't test for DNA. At that point, Moran had a choice to make. He knew DNA testing lay on the horizon for DPS and that the technology would require a substantial sample. He also knew that performing blood typing on the evidence would destroy most of his samples. Moran opted not to perform blood typing. Instead, he painstakingly preserved the items that he deemed most valuable, documented them, and stored them at DPS for a future day when a suspect was arrested and a DNA comparison could be done. He had no way to know when—or if—that day would come.

Officers Murray and Villarreal staffed the case with District Attorney Travis Koehn and obtained a warrant and indictment for Blas Tierrablanca for first-degree murder.

1992: The lead

Officers had a suspect, but they also had a problem. How could they arrest Tierrablanca in Mexico? Without knowing the suspect's location and without Mexican jurisdiction, they couldn't.

A year passed before Officer Villarreal heard that a local hairdresser, Diane, had been speaking to Tierrablanca on the phone. Diane was a mutual friend to Tierrablanca and Josefina before the murder. After the murder, Josefina's daughters forbid their mother from talking to Tierrablanca, so Tierrablanca called Diane and had her relay messages to Josefina.

Officer Villarreal interviewed Diane and learned Tierrablanca had confessed to her. Diane cooperated with police and allowed Officer Villarreal to covertly record her calls with Tierrablanca while she attempted to convince him to return to Texas. During one recorded call, Tierrablanca even discussed committing the murder.

Eventually, Tierrablanca stopped answering Diane's calls, but not before giving up his location. He claimed he lived in Acuña, Mexico, just across the border from Del Rio, Texas. Officer Villarreal asked Del Rio law enforcement to keep a constant eye and ear out for any word of Blas Tierrablanca, but no word ever came.

1992: The warrant

After recording the calls between Tierrablanca and Diane, Officer Villarreal learned it was possible to request a warrant for Tierrablanca for the federal crime of Unlawful Flight to Avoid Prosecution (UFAP). Initiating a federal case allowed the U.S. government to use its FBI and U.S. Marshall resources to help locate Tierrablanca in Mexico. The Department of Justice's Office of International Affairs would then attempt extradition if Tierrablanca were ever caught.

District Attorney Travis Koehn and then-Assistant DA Joe Contreras prepared the packet required to obtain the UFAP warrant. The packet contained the Texas murder statute, witness statements, and affidavits from Officer Villarreal and DA Koehn summarizing the law and evidence. The UFAP was accepted, and the federal government issued a provisional arrest warrant for Tierrablanca.

By the end of 1992, Officer Villarreal had an indictment, a recorded confession, the suspect's location, and both a state and federal warrant. He had every reason to be hopeful.

By the end of 1992, Officer Villarreal had an indictment, a recorded confession, a location, and both a state and federal warrant. He had every reason to be hopeful. But by 2005, we were far less hopeful.

2005: The waiting game

But by 2005, we were far less hopeful.

In 2004, then-assistant DA Karli Kennell had supplemented the UFAP with reports and statements, but there had been no news.

Travis Koehn hired me in 2005. When I moved into Kennell's old office, then-assistant DA Dan Leedy pointed to a large file in one corner of a bookshelf, gave me a brief summary of the Tierrablanca case, and told me, "Never lose that file. You may be trying it one day."

I had my doubts. It was our oldest pending case, and I was the fifth prosecutor to handle it.

From 2005 to 2016, I—like the prosecutors before me—received routine calls from the DOJ regarding the file. The agents changed, but the questions never did: Did we want them to keep the case open? Did we still have enough evidence to prosecute?

Each year, I contacted Officer Villarreal, an experienced investigator in Sealy by then. He assured me we still had the evidence and key witnesses. However, he'd heard that Tierrablanca had fled to the interior of Mexico years ago. Each time the DOJ called, my answer was the same: Keep it open. We can still make the case.

2016-2017: The update

In 2016, my new contact at the DOJ asked us to update the UFAP packet. My legal assistant, Lisa Tobola, dug through decades-old paper files to find the original UFAP and scan it in. We reviewed the file, completed new affidavits, and submitted the updated UFAP.

The most terrifying part of the process came when my DOJ contact told me that the statute of limitations on our case may have already run. As

a new lawyer in 2005, I had assumed—wrongly—that because murder has no statute of limitations in Texas, any corresponding warrant or extradition would have no limitations. However, extradition works differently.

First, an extraditing country must consider whether the underlying crime constitutes an extraditable offense. Each country's list of extraditable offenses varies. Even if a crime is extraditable, the extraditing country may not extradite if its statute of limitations has run in its own country for that specific crime. For example, Mexico may extradite on murder charges, but the statute of limitations for murder in Mexico varies, depending on the law and facts. So, if the statute of limitations had already passed for Tierrablanca's crime if he had committed it in Mexico, then he could never have been extradited to the U.S. Lucky for us, the statute of limitations for our particular facts had not run.

If you seek extradition, be sure to contact the Department of International Affairs in the Justice Department to ask whether the crime in your case is considered an extraditable offense by the country to which the defendant fled. Also ask what statutes of limitations, if any, may apply to that charge in that country.

By 2017, the DOJ received our updated UFAP, and our regional FBI agents updated their provisional arrest warrant for Tierrablanca. The DOJ warned us to begin preparing our extradition packet in advance. As I understood it, the UFAP allowed authorities to help Mexico apprehend Tierrablanca, but an extradition required us to convince the Mexican embassy to actually give him to U.S. authorities for trial. The extradition request needed more evidence, and deadlines would come fast if Tierrablanca were ever caught.

We started creating an extradition packet.

2017: The apprehension

Ten minutes after I left for lunch one day, our office got the call that someone had a new lead on Tierrablanca's whereabouts in Mexico. When I returned and got the message, I told District Attorney Koehn, who immediately called our regional branch of the FBI. They coordinated with federal agents in Mexico, who confirmed they would assist with apprehension.

The federal agents asked if we wanted them to attempt an interview. We knew Tierrablanca's first contact with law enforcement was our best chance to get a statement, so we said yes. I sent the agents the legal requirements under CCP Art. 38.22 and a Spanish version of the Texas statutory interview warnings to make sure the interview was admissible.

We decided against asking them to request a DNA sample. We worried about the potential complications of needing federal agents to prove up an international chain of custody.

Agents found Tierrablanca hiding in a goat shed near Acuña, Mexico.

As soon as I received our copy of Tierrablanca's federal interview, I asked Investigator Villarreal to come listen to the recording with me for the first time. In it, Tierrablanca told the agents he had slit a woman's throat years ago at a Sealy motel and then fled in a gray car.

I paused the recording, and Villarreal and I looked at each other.

"That's it," he said. "We got him, Brandy. We finally got him."

Now, we just had to keep him.

As soon as I received our copy of Tierrablanca's federal interview, I asked Investigator Villarreal to come listen to the recording with me for the first time. In it, Tierrablanca told the agents he had slit a woman's throat years ago at a Sealy motel and then fled in a gray car. I paused the recording, and Villarreal and I looked at each other. "That's it," he said. "We got him, Brandy. We finally got him." Now, we just had to keep him.

2017–2018: The extradition

Although the Texas governor's office manages extraditions between the states, the DOJ's Office of International Affairs manages extraditions between countries. On September 8, 2017, we started coordinating the extradition process with the DOJ using the packet we'd already been preparing. We essentially had to show, beyond a reasonable doubt, that Blas Tierrablanca was guilty as charged. We also had to show we could have proven the case even without his arrest and without any evidence produced in Mexico, so we couldn't include Tierrablanca's confession.

Legal assistant Lisa Tobola had scanned in the entire 1991 case file, including handwritten and typed offense reports, photographs, the autopsy report, witness statements, and evidence lists. She also sent hairstylist Diane's recorded calls to a certified translator to have Spanish-to-English transcriptions and translations made. I selected evidence for the packet the same way I would choose evidence for trial. Tierrablanca had prior convictions for DWI, failure toidentify, and aggravated assault against a peace officer. We included those judgments.

The DOJ wanted a finished packet within the month, and they needed DA Koehn and Investigator Villarreal to sign new declarations. They also asked that we obtain a new sworn statement from Diane with additional information about

the murder and whether she could still identify Tierrablanca. Villarreal re-interviewed Diane, and she confirmed everything. By October 4, 2017, we submitted the final packet.

Last, we had to cover costs to translate the entire extradition packet into the language of the extraditing country, Mexico. After we submitted the packet, we waited to see if Tierrablanca would fight extradition. The DOJ warned me that the process could take years if he contested it. By February 2018, the DOJ gave us the good news: Tierrablanca decided not to fight, and Mexico approved the extradition.

2018: The return

Due to the invaluable efforts of the DOJ and FBI, Tierrablanca was due to set foot on U.S. soil again. We asked Texas Rangers to meet the federal agents at the airport to take custody of him.

Ranger Louis Owles and Spanish-speaking Ranger Noe Diaz brought Tierrablanca back to Austin County. During his custodial interview, Ranger Diaz told Tierrablanca they wanted to ask about something that took place in Sealy about 25 years ago.

"Twenty-six," Tierrablanca corrected him. Tierrablanca claimed Brenda was a prostitute. He said she wanted more money from him, and he had refused. He calmly said that Brenda threatened to call his wife and the cops on him, so he slit her throat and fled.

When we were preparing the extradition packet, we had asked Houston DPS forensic scientist Tanya Dean to find the file at the Houston lab. She did—on microfilm. It contained John Moran's 1991 lab report. Using that report, I made a checklist of physical evidence and located key items at Sealy PD and DPS for DNA testing. DA Koehn and I then consulted with Dean on what to test, even though we would not get results before the extradition packet deadline.

DPS still had viable samples of DNA from the victim, Brenda, and Chuy, the owner of the gray Camaro, which Moran had preserved. DPS tested those samples against the piece of toilet tissue, two socks, and the towel found in the Camaro that had all been positive for human blood. DPS also tested the human blood on the red baseball cap recovered from Tierrablanca's house.

The results excluded Chuy from every item. Brenda Smith's DNA matched the blood on Tierrablanca's red baseball cap and on the toilet paper and towel from the Camaro. A bloody DNA mixture on one sock came from Brenda and an unknown individual we believed would be Tierrablanca.

During Tierrablanca's confession to the Rangers, he voluntarily provided a DNA sample, and DPS could finally obtain test results decades in the making: Tierrablanca's DNA matched the sock that also contained Brenda Smith's blood.

March 2020: The road's end

Excellent police work, lab work, and commitment from witnesses led to success at trial. Officer Murray, Investigator Villarreal, Forensic Analyst Moran, Chuy, Maria, and Diane were still available and able to testify despite the years that had passed.

Although we had strong evidence, my second chair, Assistant DA Ben Nystrom, and I both felt enormous pressure since the weight of so many people's work ultimately rested on us. My main worry was how to counter the character attacks I expected the defense to raise about the victim. Montgomery County ADA Donna Berkey gave me great voir dire advice, suggesting that I remind the jury that every person, no matter how great or how small, deserves the same justice.

"There is no victim too small for justice," became our theme of the case.

The jury quickly found Tierrablanca guilty.

During punishment, Brenda's daughter testified. Jurors learned that her grandmother (Brenda's mother) feared she might see Tierrablanca on the street one day and not recognize him, so she kept his photo with her all her life hoping she could help police find him. Sadly, Brenda's mother died years before officers apprehended Tierrablanca and never got to see justice done for her daughter.

Tierrablanca confessed during the punishment phase that he had killed Brenda. He admitted fleeing, moving deeper into Mexico, and eventually coming back to Acuña. He'd re-married, raised children, and lived happily. Tierrablanca insisted he never believed he'd actually be caught.

After almost 30 years, the jury took just 40 minutes to determine where Tierrablanca's road would end: life in a Texas prison.

These days, justice system failures draw a lot of attention. But this case reminded me of the multitude of people who spend quiet lifetimes behind the scenes in law enforcement relentlessly seeking justice for every person, no matter how great or how small. ❇

Dual officeholding and common-law incompatibility

The chart on the following pages summarizes Attorney General opinions and caselaw on dual officeholding and common-law incompatibility.

By Monica Mendoza
TDCAA Research Attorney in Austin

Dual officeholding refers to certain limitations that prevent a person from holding two or more public offices at the same time. Common-law incompatibility refers to the prohibition against a person holding certain public offices at the same time because of a practical conflict of interest that might arise. This chart helps local officials understand in which circumstances they can agree to simultaneously serve in another public office.

Dual officeholding chart

Position 1	Position 2	Is it OK?	Authority
Alternate election judge	Appraisal Review Board member	Yes, in a municipal election when the election-judge appointment is limited to a single election	LO-96-081
Assistant Chief of Police	City administrator	No	GA-0536
Assistant DA	Municipal utility district, elected director	Yes; no salary	LO-88-19
Assistant DA	School district board of trustees, same county	Yes	LO-89-082
Board of trustees, ISD (specific circumstances)	City council (and other boards)	No	LO-92-005; see also *Thomas v. Abernathy County Line Independent School District*; 290 S.W. 152; JM-129; LO 90-52
Building inspector	Fire chief (same city)	Yes	*State ex rel. Beicker v. Mycue*, 481 S.W.2d 476
Chief appraiser, multiple counties	Tax assessor/collector, multiple districts	Yes	JM-499
Chief deputy, county tax assessor-collector	Court reporter, county court	Yes	JM-1083
Chief of police, elected	Constable, elected, precinct within same city	No	JM-422
Chief of police, ISD	City council member where the city is located within geographical limits of school district	Yes	GA-0688
Chief of police, municipal	Constable	Yes	KP-0122
City administrator	Assistant police chief	No	GA-536
City Attorney	Assistant County Attorney	Yes, but the city has to be in a different county	LO-89-058
City council member or commissioner	Library district board of trustees	No	KP-0125
City council member or commissioner	County-wide junior college trustee	No for a city located within boundaries of junior college district	LO-90-052

Position 1	Position 2	Is it OK?	Authority
City council member or commissioner	Junior college trustee not within county or city	Yes, if junior college owned no property and carried out no activities within jurisdiction within the city	LA-149
City council member or commissioner	Board of a county water district	No, if city will be contracting with water district	LO-90-18
City council member or commissioner	Deputy sheriff	No	LA-112
City council member or commissioner	Retiree receiving benefits from Teacher Retirement System	Yes	LO-93-41
City council member or commissioner	Water supply corporation board of directors	Yes, but only if s/he receives no compensation or other remuneration from water supply corporation	GA-0597
City councilmember	Member, school district board of trustees	No	LO-93-22
City councilmember	Member of the fire department	No	LO-97-034
City councilmember	Police officer (different city)	Yes	LO-93-27
City councilmember	Teacher at state college	Yes	LO-93-37
City councilmember	Chairman, board of directors of university research foundation (non-profit corporation; same city)	Yes	JM-1065
City councilmember	County commissioner	No	GA-15; LO 88-49
City councilmember	School trustee, state college	No	LO-93-22; *Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152
City councilmember	Volunteer fire department (same city)	Yes	JC-199; see Tex. Loc. Gov't Code §21.003 (adopted in response to JC-199).
City councilmember	Director of a flood control district	Yes	LO-96-064
City councilmember	School board trustee (same city)	No	JM-634; JC-403
City councilmember	Director of a county water authority	No	LO-92-68
City councilmember	County special district employee	Yes	JM-1266
City councilmember	School district employee	Yes	JM-118; MW-230; JM-1266
City councilmember	Director of a navigation district	Yes	JM-1266
City councilmember	Reserve police officer	No	JM-386
City councilmember	County auditor	No	JM-133
City councilmember	Fire chief (same city)	No	MW-432
City councilmember	Selective service board member	Yes	GA-57; allowed as long as selective service system is on standby (no draft)
City councilmember	Justice of the peace	No	JM-395
City finance director	Temporary municipal judge	Yes	GA-199
City manager	School board trustee member of an independent school district whose boundaries contain the municipality	Yes	GA-0766
City manager	Transit board	Yes	GA-538
City official	Political party precinct chair	Yes	JC-562
College board of trustees, member	County commissioner	No	KP-0119
Congressperson or other federal officer	Local officer or employee	No	Article XVI, §12, Texas Constitution
Constable	Commissioner of emergency services district	No	GA-1036

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Dual officeholding chart (cont'd)

Position 1	Position 2	Is it OK?	Authority
Constable	ISD Police Chief, located within same district	Yes	KP-0032
Constable	School board trustee	No	GA-0328
Constable	Bailiff	Yes	LO-92-73 (and salary is OK per LO-97-060)
Constable	Jailer	Yes	JM-485
Constable	School board	Yes	JM-519
Constable	Deputy sheriff	Yes	GA-402
Constable	Groundwater district board	No	GA-214; GA-0540
Constable	Municipal fire fighter	Yes	C-270
Constable, elected	Public school teacher	Yes	LO-94-077
Constable, elected or deputy	Sheriff's deputy, weight-enforcement officer	Yes	KP-0189
County attorney	Board of directors, county hospital	No	LO-97-100
County attorney	City attorney, same county	Yes, so long as not subject to Professional Prosecutor Act	JC-0054
County attorney	Assistant county attorney of neighboring county	Yes	GA-350
County attorney	School district board of trustees, same county	No; automatic resignation	LO-95-029
County attorney	Special prosecutor, another county	Yes, no salary	JM-763
County attorney, elected	City prosecutor, same county	Yes	LO-96-148
County attorney, elected	Professor, part time, state university	Yes	LO-90-039
County clerk	Director of river authority	Yes	GA-250
County commissioner	Employee in sheriff's department (or any compensated county employee)	No	GA-0645
County commissioner	School board trustee	No	DM-311
County commissioner	Teacher	Yes; may receive salary for both	*County of Maverick v. Ruiz*, 897 S.W.2nd 843 (Tex. App.–San Antonio 1995)
County commissioner	Board of trustees, community college (same county)	No	JM-129
County commissioner	Reserve deputy sheriff	Yes	LO-97-081
County commissioner	Municipal judge	Yes	GA-348
County court at law judge	Trustee, independent school district	No	JM-213
County elections administrator	911 addressing agent	Yes	GA-0939
County EMS employee	Municipal justice of the peace	Yes	GA-569
County hospital district board member	County treasurer	Yes	GA-1075
County judge	Member, school district trustee	No	KP-0228
County judge	Administrator, county EMS, same county	No	LO-94-46
County judge	Director, river authority	No	JM-594
County judge	Practicing attorney, same county	Gray area	JC-0033; see also Govt. Code §82.064 and Code of Prof. Resp. Rule 1.06
County judge	Records management officer, same county	Yes	
County judge	Texas Board of Criminal Justice	No	LO-90-062
County judge, candidate	Mayor	Depends	LO-95-052
County sheriff	Member, board of trustees of a school district	Yes, most likely	JM-553
County sheriff	School board trustee	No	KP-0054 (but see GA-0328)
County tax assessor-collector	Trustee, independent school district	No; automatic resignation	GA-0328
Dept. of Public Safety officer	Governing bodies; any "public office"	No	LO-92-004
Deputy constable	Assistant city fire chief	Yes	JM-588

Position 1	Position 2	Authority	Authority
Deputy district clerk	Deputy county clerk	Yes	DM-156
Deputy sheriff	School trustee	Yes	MW-415
Director of a municipal utility	Member of planning and zoning commission	No	O-3308 (1941)
District attorney	Teaching position, state university	Yes	JC-339
District clerk	Reserve deputy sheriff	Yes	LO-93-96
District judge	School district board of trustees, same district	No; automatic resignation	LO-98-035
Election clerk	Off-duty school district employee	Yes	LO-98-094
Former district judge, sitting by assignment (and available for assignment)	Teaching position, state university	Yes	JM-862
Investigator, DA's office	Trustee, independent school district	Yes, no salary	LO-98-109
Justice of the peace	City tax assessor	Yes	LO-95-001
Justice of the peace	School board trustee	Yes	*State v. Martin*, 51 S.W.2d 815 (Tex. Civ. App.–San Antonio 1932, no writ)
Justice of the peace	City council	No; automatic resignation	O-3522; *Turner v. Trinity Indep. Sch. Dist. Bd. of Trustees*, 700 S.W.2d 1 (Tex. App.–Houston [14th Dist.] 1983, no writ)
Justice of the peace	Deputy sheriff or deputy constable, unpaid	No, unless another county	JM-395
Justice of the peace	Jailer	No	LO-92-35
Justice of the peace	Juvenile law master, same county	Yes	JM-1047
Justice of the peace	Public school teacher	Probably yes	LO-96-078
Justice of the peace, appointed	Municipal judge, part time, city within JP's precinct	Yes	See Attorney General publication "Traps for the Unwary," part IV
Local public official, elected	Employee of state legislator	Yes; salary allowed in some cases	JM-819, overruling in part JM-422, reinstating LO-2055 LO-98-039
Marshal	Constable	No	*Torno v. Hochstetler*, 221 S.W. 623
Mayor	Water supply corporation board of directors	Yes, but only if s/he receives no compensation or other remuneration from water supply corporation	GA-0597
Mayor	Hospital district director	No	JC-363
Municipal county judge, part-time, compensated	Member, board of commissioners, drainage district	No	GA-0841
Municipal employee	Member, city commission, elected	No, but need not resign to run	LO 97-034
Municipal judge	County Attorney	No	LO-98-044
Municipal judge	Director, Gulf Coast Waste Disposal Authority	No	JC-0095, LO-98-124
Municipal judge	Junior college trustee	Yes	JC-0216
Municipal judge	Board of directors river authority	No	LO-97-027
Municipal judge	Municipal judge, another district	Usually no; never if elected to both	DM-428
Municipal police officer	City council, different city (uncompensated)	Yes	LO-95-048
Peace officer	Commission from more than one agency	Case-by-case	GA-0214
Police chief	School trustee	Yes	GA-393
Police officer	City council, another jurisdiction	Yes	LO-93-27
Police officer	Police officer, another city	No	LO-92-36

Continued on page 54

Dual officeholding chart (cont'd)

Position 1	Position 2	Is it OK?	Authority
Police officer	Municipal judge (different city)	Legally yes, but no	LO-93-59, but see State Commission on Judicial Conduct PS-2000-1
Police officer	Part-time security officers	Yes	DM-212
Police officer	County road and bridge dept. employee	Yes	JM-862
Polygraph examiner for district attorney's office	Municipal judge	Unclear	GA-551
Public junior college district teacher	House member	No	LA-4
School board of trustees whose powers have been suspended by the Texas Education Commissioner	City Council member within school district	Yes	KP-0014
School board trustee	County hospital board	No	KP-0023
School board trustee	City planning and zoning commission	No, most likely	KP-0114
School board trustee	Appraisal District Board	No	JM-1157
School board trustee	Groundwater Conservation District	Yes	Tex. Water Code §36.051(d)
School board trustee	Principal of disciplinary alternative education program	Yes, but could change depending on whether the participating school district had supervisory authority over the disciplinary alternative education program campus	GA-0738
School board trustee	County clerk	Yes	GA-468
School board trustee	County or precinct chair of political party	Yes	JC-537
School board trustee	Groundwater conservation district	No	JC-557
School board trustee	County treasurer	Yes	JC-490
School board trustee	Teacher	No	LO-97-034; LO-90-045; LO-89-057; LO-89-002; LA-114
School district board trustee	Volunteer teacher	No	JC-371
School trustee	Water improvement district board	No	GA-224
School trustee	County improvement district board	No	GA-307
School trustee, state college	City council	No	LO-93-22, *Thomas v. Abernathy ISD*, 290 S.W. 152
School trustee, college district	Municipal utility director	No	GA-32
Secretary, district attorney's office	Court reporter (occasional), same county	Yes	JM-163
Sheriff	Volunteer fire fighter	Yes	LO-93-54
Sheriff	School trustee	No	GA-328
State Board of Education member	Teacher	Yes	JM-203
State conservation district director	Employee of a conservation and reclamation district	Yes	DM-27
State employee	Candidate for elected county office	Yes, but only if the salary of the employee is not completely paid for by federal funds (see Federal Hatch Act)	GA-1026
State employee	Elected county office	Yes	GA-1026
State junior college trustee	Texas college and university system coordinating board	No. Junior college board is subordinate to coordinating board.	JM-97

Position 1	Position 2	Is it OK?	Authority
State legislator	Employee of municipal management district	No	GA-386
State legislator	Independent contractor for municipal management district	Yes	GA-386
State legislator	President of municipal management district, non-temporary and salaried employee	No	KP-0227
State legislator	Independent contractor for county government	Yes	LO-95-022
State representative	Assistant County Attorney	No	JC-0430
State Supreme Court justice	Board of directors, State Justice Institute	No	DM-49
Statutory county court judge, visiting	Director of Judicial Support Services of Bexar County	Yes, but left to the discretion of the Texas Commission on Judicial Conduct	GA-0840
Utility district board of directors	Board of trustee, college of district	Likely no, but unclear	GA-0786
Water district general manager	City manager	Yes	GA-0849

Conveying and conserving office culture during COVID-19

David, a new misdemeanor prosecutor, slams a stack of files onto the copier. His face is flushed, his eyes narrowed, and his breathing hard.

By Mike Holley
First Assistant District Attorney in Montgomery County

David is generally a calm person, but he's obviously angry about something. Victoria, a felony prosecutor, notices his demeanor and asks what's wrong. David replies, "I just got into an argument in docket with the defense attorney in the Jones case. He insulted and embarrassed me in front of the judge. I'm going to pull my offer in the Jones case right now."

Victoria ponders this for a moment and replies, "I get it. I know that defense attorney, and based on how he's treated me in the past, I suspect your reaction is perfectly reasonable. This reminds me of what my first investigator told me when I got here. Hector said that as much as we might like to, we don't punish defendants for their attorney's behavior. If the offer you made was a fair one, perhaps you should leave it on the table?"

What is culture?

What happened between David and Victoria is an example of conveying an office's culture to another person. Organizational culture can be defined in a number of ways, but in its simplest terms, "it's the way we do things and the way we treat people and each other."[1]

There is some mystery in culture. The culture of a particular district attorney's or county attorney's office can sometimes be hard to precisely describe,[2] and culture can also change. Some organizational cultures are good, others are bad, and most are a bit of both. Significantly, culture informs and guides behavior in ways that transcend formal organization or office policies.

The consequences of culture are not abstract. Organizations with a healthy culture tend to have healthy employees. Negative culture leads to disengaged employees, and disengaged employees lead to other problems. For example, a study by the Queens School of Business and the Gallup organization found that disengaged workers had 37 percent higher absenteeism, 49 percent more accidents, 18 percent lower productivity, and 60 percent more errors and defects. The study also found that negative culture corresponded to much higher turnover; conversely, cultures with highly engaged employees received 100 percent more job applications than those with disengaged employees.[3]

Aspects of an organization's culture vary in importance. The office dress code, for example, can be a neutral thing (though dress often conveys something about who we are). Office hours or the style of office furniture are other examples. Some aspects of office culture are more meaningful. A body of research shows that there are some broad cultural characteristics of effective organizations, namely:

- caring for, being interested in, and maintaining responsibility for colleagues as friends;
- providing support for one another, including offering kindness and compassion when others are struggling;
- avoiding blame and forgiving mistakes;
- inspiring one another at work;
- emphasizing the meaningfulness of the work; and
- treating one another with respect, gratitude, trust, and integrity.[4]

In our profession, culture is particularly important. Prosecutors make thousands—maybe tens of thousands—of significant decisions in any

given year. Many of these decisions are difficult, and there is no textbook answer to most of them. Prosecutors' decisions tend to be better when guided not just by an individual's sense of right and wrong, but also by the culture of their office which, in turn, reflects the experience and wisdom of colleagues both present and past. If that culture is not healthy, those decisions suffer. When the prosecutor's decisions suffer, real citizens suffer.

More specifically still, each county or district attorney's office has its own culture. The Galveston County Criminal District Attorneys' Office is an excellent organization. The 112th District Attorney's Office based in Fort Stockton is also an excellent organization. Galveston County has a population of 350,000. The 112th District covers five counties in West Texas with a combined population of 41,000.[5] Galveston County enjoys a significant number of tourists and all of their associated community contributions and accompanying challenges. The 112th District has far fewer tourists (and 100 percent less ocean) but boasts a large number of visiting oil-field workers and all of their community contributions and accompanying challenges.

The two offices serve vastly different communities, and those communities have different values. The two offices also have significantly different histories. The offices are both skillfully led, though in different ways. Both offices have some values that all prosecutors share, but each has unique values. In short, both offices have different cultures, and those respective cultures are what allow those organizations to not only survive, but to thrive and excel.

More caught than taught

So culture is important. But how is culture conveyed from one generation of employees to the next? And how is it preserved within an office? A look at culture in the home may help us here.

Transmitting culture is something that happens in homes all across the world in the context of parenting. Some have said parenting children is more "caught than taught." By that, they mean that while a parent can formally sit down and explain an idea or convey some value, a child learns primarily from observing how parents, siblings, and others speak, act, and live.

A closely related idea is that culture happens incidentally, not intentionally. Culture conveyance is more likely to happen at the water cooler than the classroom—it happens in unexpected, unscheduled moments. The example between David and Victoria at the beginning of this article is the way culture is most often conveyed and preserved, not from (yet another) email from senior management.[6]

Conveying—and preserving—culture depends heavily on people being near one another for extensive periods of time in different settings. To go back to the educating children example: It is very challenging to fully convey and imprint all the lessons a child needs if you aren't around him or her very often. It's possible, but difficult.

Culture in a time of COVID

If it's true that culture is important and that culture is most often transmitted when people are around one another, we have a problem. The current pandemic works to keep us physically apart.[7] So what can we do to maintain and convey our office's culture?

First, we can concede that there will be some losses in transferring and preserving culture. Forgive yourself in advance for this loss. It won't help, but you'll feel better. Many things are not ideal about remote work, and this is one.

Second, we can identify those aspects of our culture that should be preserved. For example, always having a second prosecutor at counsel table during a trial may be an important aspect of our office culture that we want to maintain for good reasons.

Some things may have to be modified. Perhaps your office has a tradition of sending off departing employees with a plaque, or you throw baby showers for expecting employees. This may have to be done remotely now or perhaps in smaller, social-distanced groups, but it will still be done.

Other practices may need to be dropped entirely. You will have to identify which ones are "grandma's ham." As the story goes, a husband sees his wife cut off both ends of a ham. Curious as to why she is wasting good ham, the husband her about it. The wife responds, "I don't know; that's just the way Mom did it." So the wife approaches her mother to ask, only to be told, "I'm not sure; that's just the way your grandma did it." When wife and Mom approach Grandma to ask, Grandma says, "Oh, I did that because my pan was too small to hold a full ham." Some of the things we do as part of our culture fit in this category, and the current pandemic gives us a good

Prosecutors' decisions tend to be better when guided not just by an individual's sense of right and wrong, but also by the culture of their office which, in turn, reflects the experience and wisdom of colleagues both present and past. If that culture is not healthy, those decisions suffer. When the prosecutor's decisions suffer, real citizens suffer.

opportunity to jettison those practices when we recognize them.

Third, we can make explicit the implicit. That is to say, there are things about our respective cultures that are normally understood but unstated. Now, we have to clearly say what matters and what does not. We have to state plainly what is important about the way we do things and the way we treat one another. We have to assert explicitly what our office is *about* and what justice means to us as an organization. Equally important, we have to call out affronts to our culture when we see them. It may be true that culture is more caught than taught, but the taught piece is still important, perhaps more important than ever.

One valuable tool to make the implicit explicit—perhaps the single most important tool to convey culture—is to tell stories. Every office has stories. Often those stories are told because they are funny or because they were significant in the history of the office, but the stories themselves convey more meaning than what we might think. Stories, whether in an office or a family, uniquely convey and conserve culture. Tell them.

Fourth, we can do things to increase the chances that culture will be "caught." Here are some examples premised on putting a few people together in a socially distanced environment.

"New blood" will require new onboarding procedures. Right now, many offices are taking the "work to the people," but for new employees, we need to bring the "people to the work" in some sense. There is no adequate substitute for bringing employees into the office as much as can be safely accomplished.

Mix employees. Put less experienced and more experienced employees who normally don't work with one another together whenever you can. This can be for training events, working on a case, fun outside-the-office events, etc. Don't limit this to attorneys—after all, legal staff and investigators are the most likely employees to carry the office culture from one year to the next.

"Board" cases. One of the most effective tools used by prosecutors in this state occurs at the Brazos County District Attorney's Office. In Brazos County, the DA has a number of "war rooms" that consist of a big whiteboard, table, video screen, and several seats. When a trial approaches, a collection of individuals—including trial counsel, investigators, legal staff, the first assistant, and the elected district attorney—"board" cases.[8] This boarding process consists of a presentation of the facts, debates about possible defenses, brainstorming demonstrative exhibits, positing various trial themes, and the like. It's an exciting, dynamic process where everyone is free to share opinions. The process is useful for preparing a case for trial, yes, but the process may be even more valuable in conveying a whole host of cultural values about both the office and the community the office serves.

Book clubs. The idea here is to get a group of employees together to read a book or watch a movie that will serve their joint professional development. The book or movie is itself simply a springboard to broader discussions about the profession and the office. This could be done in small in-person groups or larger groups remotely. (There are a few examples of books or movies to use in the endnotes.[9])

The point of these examples is to put people together in intentional ways to make up for the "accidental" encounters that, pre-COVID, occurred at the coffeemaker. Think of this as an experiment where you pour different, random chemicals into a test tube and turn on the Bunsen burner. Sometimes interesting and unexpected things happen.[10]

Hiring, culture, and COVID

Conveying an organization's culture is especially important for new employees, and new employees present special challenges to the organization. The starting point is to say that hiring has to continue. District and county attorney offices are going to continue to operate, and people will continue to transition into and out of our offices.[11]

We might begin by confessing that experience is at a particular premium right now. A person who has experience as a county or district attorney, admin, or investigator does not require that initial process of learning the culture of the profession. With that said, we do not want to miss all the value that comes to our office and to the greater profession by avoiding "new blood."

"New blood," however, will require new onboarding procedures. Right now, many offices are taking the "work to the people," but for new employees, we need to bring the "people to the work" in some sense. There is no adequate substitute for bringing employees into the office as much as can be safely accomplished. On a related note, hiring completely through a remote process has many advantages, but before making an offer, at least one face-to-face would seem to be a nonnegotiable.

The process we use to hire new employees will be more meaningful than ever. The way we

treat potential employees during the hiring process is communicating our culture to them: Are we polite?[12] Professional?[13] Do we take our work seriously but not ourselves? Are we looking for fair-minded team players or hotshot advocates? Or both?

Once hired, whether experienced or not, the onboarding process has to change. Perhaps in the past we could rely on a prosecutor getting paired with a chief and learning the ropes that way. Now, perhaps, the new prosecutor spends a couple of days following the elected prosecutor around as he or she performs his or her duties. (Too radical?) Or perhaps we create a robust checklist for new employees that introduces them to every member of the organization and key persons in important outside agencies so that the "stories get told." In the past, in instances where we expected new employees to perform tasks on their own (for example, the initial call to victims), now a more senior person may need to oversee this work. The normal leader "check-ins" and "one-on-ones"[14] may need to increase in pace and length. Written expectations gain more importance in this environment, as do evaluations and coaching sessions. Perhaps most importantly (and perhaps most controversially), employee feedback as to how things are going becomes more valuable than ever. Feedback can tell us if our efforts to convey culture are working or not.

One last thought about culture and hiring. Don't be afraid to pass on hiring a person who clearly will fight against your office's culture. New hires may help transform the culture in positive ways, but there is a difference between transforming and resisting. Vacancies are difficult, but hiring the wrong person is devastating. By way of example, during our hiring process, we use an ethical hypothetical that I call the "Kobayashi Maru."[15] (This is a "Star Trek" reference. It's an unwinnable tactical stimulation used with cadets at the Starfleet Academy.) There is no way to "pass" the hypo, but you can fail it. A candidate "fails" the hypo when an irreconcilable divide emerges between our office's view of fairness and integrity and the candidate's views of those issues. When these moments arise, we know that no matter how talented the person may be, we have to pass. We pass because we know this person won't fit in with our culture, and preserving our culture means we can wait.

A strong word of caution here: Be sure your desire to convey and preserve your organizational culture is done in the greater service of the profession—seeking those high values to which we all aspire. Sometimes we mistake preserving culture for an unstated desire to hire people who look and sound like us. We are comfortable with the familiar, so we are often drawn to people who have the same background, ethnicity, religious beliefs, political leanings, age, gender, etc. That may be natural, but that would be a mistake. When we substitute authentic culture for a superficial "like me" bias, then we are doing no favors for our organization, our profession, our communities, or for promising candidates, and we will all be the poorer for it.

Final comments

There is a sense in the greater culture of our country that prosecutors and those who assist them are struggling to find their identity. Some of this struggle is exciting, and some of this struggle is concerning. Either way, "fondly do we hope—fervently do we pray" that who we are now and who we will become in the future will be the best State of Texas can offer to her citizens. ❇

One last thought about culture and hiring. Don't be afraid to pass on hiring a person who clearly will fight against your office's culture. New hires may help transform the culture in positive ways, but there is a difference between transforming and resisting.

Endnotes

[1] "Coronavirus is Testing Corporate Cultures & That Isn't Necessarily a Bad Thing." (June 10, 2020). Retrieved August 13, 2020, from www.historyfactory.com/insights/coronavirus-is-testing-corporate-cultures-that-isnt-necessarily-a-bad-thing/.

[2] My friend Donna Berkey describes culture as "what you feel when you walk down the halls."

[3] Cameron, E. (May 08, 2017). "Proof That Positive Work Cultures Are More Productive." Retrieved August 13, 2020, from https://hbr.org/2015/12/proof-that-positive-work-cultures-are-more-productive.

[4] Bright, D.S., Cameron, K.S. & Caza, A. "The Amplifying and Buffering Effects of Virtuousness in Downsized Organizations." *J Bus Ethics* 64, 249–269 (2006). https://doi.org/10.1007/s10551-005-5904-4; Kim Cameron, C. (September 01, 1970); "Effects of Positive Practices on Organizational Effectiveness." Kim Cameron, Carlos Mora, Trevor Leutscher, Margaret Calarco, 2011. Retrieved August 13, 2020, from https://journals.sagepub.com/doi/abs/10.1177/0021886310395514.

[5] The five counties are Sutton, Crockett, Reagan, Upton, and Pecos. Fantastic sunsets out there–even better people.

[6] Noah Richardson, our gifted and highly professional IT Operations Specialist, is very close to disconnecting my email entirely. I do not blame him.

[7] Apart from the pandemic, we sometimes find ourselves separated by virtue of our work or, as was the case for the Harris County District Attorney's Office, forced apart by other events like Hurricane Harvey.

[8] "Boarding" likely comes from "murder board," which was originally a Pentagon term for a "scrubbing" (or "aggressive review") of a proposed course of action. Having been through a few in the Army, generally the person getting "murdered" is you, the presenter. Or at least your plan. It doesn't *have* to be mean, although that can be fun. Not for the presenter, but for others.

[9] The best book I know for this purpose is *The Best Story Wins: And Other Advice to New Prosecutors* by John Bobo. My friend Sunni Mitchell of the Fort Bend District Attorney's Office highly recommends *Getting Life: An Innocent Man's 25-Year Journey From Prison to Peace: A Memoir* by Michael Morton. *Emotional Survival for Law Enforcement: A Guide for Officers and Their Families* by Kevin Gilmartin is another good choice.

For leaders and developing leaders, I recommend *The Ideal Team Player* by Patrick Lencioni and *Extreme Ownership* by Jocko Willink and Leif Babin (if you can get past all the Navy stuff–kidding!). If you would like other book recommendations, please email me at mike.holley@mctx.org. I have found, though, that people are more likely to watch something lately than read something (which I get). To that end, consider these movies and TV series: "Murder on a Sunday Morning," "Gideon's Army," "Judgment at Nuremberg," "Unbelievable," "Athlete A," "The Wire," "The Accused," "The Pharmacist," "How to Fix a Drug Scandal," "The People v. O.J. Simpson," "Anatomy of a Murder," "Fear City," and "Night Falls on Manhattan." Please note that a number of these shows are on Netflix. You can use my Netflix username and password, which are [redacted by editor].

[10] And also, horrific explosions.

[11] The nature of our profession is that we have some excellent men and women come work with us and then go on to other endeavors. This is some speculation on my part (based on conversations with TDCAA staff), but it appears that a significant number of prosecutors serve for about three years before transitioning other jobs. Those "former prosecutors" in the defense bar and the judiciary (and in the legal profession generally) are vital to the overall health of the justice system. Strong and effective defense attorneys, in particular, represent the prosecutor's best hope in maintaining a fair criminal justice system.

[12] In the past, we made our hiring process something akin to those rites of passage where young people are stung by bullet ants or flailed with whips. I think we believed that we were assessing mental toughness, but I'm afraid all we did was to frustrate, embarrass, and insult a number of young lawyers, most of whom we didn't hire. We've changed our approach since then.

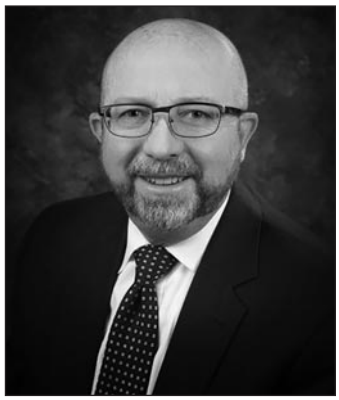
[13] We sometimes hear of candidates who have submitted resumes or have even done initial interviews with other counties, but who have heard nothing in response. I understand that there may be reasons for this, but I'm not sure this reflects well upon us as a profession. Even a form letter or email would be better than nothing.

[14] Knight, R. (November 21, 2016). "How to Make Your One-on-Ones with Employees More Productive." Retrieved August 13, 2020, from https://hbr.org/2016/08/how-to-make-your-one-on-ones-with-employees-more-productive.

[15] I'm the only one who calls it this. The other people on the hiring committee do not call it this because the other people I work with are adult humans with jobs and whatnot. And speaking of adults, I want to especially thank our Chief of Appellate, Brent Chapell, who does all that he can to help my writing not overly embarrass this office. Thank you, Brent.

Herd immunity? Don't bet on it

Imagine, if you will, a true nightmare during business hours. No, not the one where you walk into court only to discover you forgot to wear shoes.



By C. Scott Brumley
County Attorney in Potter County

I mean the kind that makes you do quick research to see how long unemployment benefits last. In this nightmare scenario, a district judge comes to you, the elected prosecutor, seeking an investigation and prosecution of his opponent in a party primary election.

That was the alleged foundation of a recent case decided by the U.S. Court of Appeals for the Fifth Circuit, and the court's analysis offers key lessons for prosecutors about their potential liabilities in civil lawsuits.

One glaring reason the case is noteworthy relates to the moment in which we live. Criticism of law enforcement, culminating in calls to abolish or defund police departments, is cacophonous at the time of this writing. In recent years, as many of us know, that blitz has not confined itself to decrying police practices. Prosecutors have weathered substantial reproach as well (some deserved; some, less so). Often, the *cri de coeur* demands abrogation of the most substantial protection prosecutors have against legal retaliation based on their work: prosecutorial immunity. Significantly, those calls do not come solely from the political left or activist groups.[1] Given the tenor and fervor of the debate, courts can anticipate more cases urging the demise of the doctrine. While the dispute will rage on, the current reality confronting a Texas prosecutor on this topic is delineated to an extent in *Wooten v. Roach*.[2] Before analyzing the Fifth Circuit's opinion in *Wooten*, however, it is useful to understand some legal background.

The legal basics

Like other governmental actors, prosecutors are potentially subject to liability in a cause of action under what often is referred to simply as "§1983" if they violate federal constitutional or statutory law. That statute provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ...[3]

Section 1983, by its express language, does not extend any defenses or immunities to prosecutors who may be sued under its framework. But that has not prevented courts from grappling with the possibility that the statute could be seen to impose an unrestrained regimen of liability. "Despite the broad terms" of §1983, the U.S. Supreme Court has explained, "this Court has long recognized that the statute was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits."[4] Proceeding from that basis, the Supreme Court held 44 years ago that prosecutors are absolutely immune from damages claims under §1983.[5] Texas courts afford the same immunity in state law claims and follow federal authority in applying it.[6]

Although the immunity is absolute, its reach is not. Absolute immunity is available only for acts that are "intimately associated with the judicial phase of the criminal process."[7] In identifying those acts, courts use a "functional approach," focusing on the task performed, not the title of the person who performed it.[8] Phrased a bit differently, Fifth Circuit jurisprudence casts

the inquiry as asking whether the prosecutor claiming immunity was acting "as an advocate of the State before a neutral and detached judicial body."[9] Synchronizing this view with the Supreme Court's precedent, then, means that conduct that is "intimately associated with the judicial phase of the criminal process" includes all actions "which occur in the prosecutor's role as an advocate for the State."[10] Meanwhile, the absolute nature of the immunity means that covered conduct is immune without regard to the wrongful nature or excessiveness of the conduct.[11] The immunity will not be stripped because the prosecutor's action "was done in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the clear absence of all jurisdiction."[12]

Perhaps the most difficult line to draw in deciphering whether prosecutorial immunity applies is participation in an investigation.

Policy justifications for the immunity should be reasonably clear to most prosecutors. Absent immunity, the threat of civil suits would undermine performance of a prosecutor's duties, risk causing liability-conscious timidity in prosecutorial judgment, and cause diversion of energy and attention away from the pressing duty of enforcing the criminal law. Moreover, the frequency of criminal defendants bringing retaliatory suits would impose "unique and intolerable burdens on a prosecutor responsible for hundreds of indictments and trials."[13]

Again, the immunity is far-reaching when the function at issue arises from advocacy for the State. So, initiation of prosecution, presenting the State's case, and carrying it through the judicial process are covered.[14] Pretrial court appearances in support of taking criminal action against a suspect are immune, as is appearing in court to present evidence in support of a search warrant application.[15] Likewise, violation of a prosecutor's obligations under *Brady* are immune.[16] Even the knowing use of perjured testimony is seen as covered (though it absolutely should be avoided).[17]

This aspect of immunity raises a pair of caveats of particular concern. First, prosecutorial immunity is an immunity only from civil damages. Prosecutors are not shielded by immunity from suits for prospective relief (i.e., injunctive or declaratory claims).[18] Second, other means remain viable to ensure that criminal defendants receive fair treatment in the judicial process and to deter dishonest prosecutors.[19] This facet returns the analysis back to *Imbler*, where the court emphasized:

> ... that the immunity of prosecutors from liability in suits under §1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. §242, the criminal analog of §1983. The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.[20]

Similarly, it must be remembered that despite that breadth, absolute immunity does not protect everything a prosecutor does. Courts have identified a number of functions performed by prosecutors that are not covered by prosecutorial immunity. Examples include:

- planning and executing a raid;[21]
- participating in a search of property and a resulting seizure of animals;[22]
- acting as the complaining witness in a criminal case by swearing to an affidavit for a search warrant;[23]
- making statements in a press conference about a case;[24]
- making office employment decisions;[25] and
- advising police during the investigative phase of a criminal case.[26]

Perhaps the most difficult line to draw in deciphering whether prosecutorial immunity applies is participation in an investigation. To be sure, the evaluation of evidence assembled by police and the appropriate preparation of that evidence for its presentation at trial or before a grand jury is entitled to absolute immunity.[27] Similarly, decisions about which witnesses to call, as well as out-of-court efforts to control the presentation of witnesses' testimony, are covered.[28] Though courts have shied away from using the point at which probable cause is judicially recognized as the bright line for determin-

ing applicability of prosecutorial immunity,[29] it remains a significant factor to be considered in evaluating investigative activity.[30] That certainly is worth remembering when thinking about lacing up the gumshoes. As the Fifth Circuit has cautioned, "When a prosecutor makes an investigative decision comparable to that of a police officer—such as whether to order a search and seizure—the prosecutor is not entitled to absolute immunity. Instead, he is given the same immunity a police officer would have: qualified immunity."[31] With that context in mind, we return to *Wooten*.

Wooten's alleged facts

To say that *Wooten* was not a conventional immunity case would be something of an understatement. The namesake plaintiff was a former district judge who alleged that several officials—ranging from a division chief prosecutor up to the former elected District Attorney and former Attorney General (now Governor) Greg Abbott—had violated the federal Constitution by investigating and prosecuting her, purportedly because she had unseated an incumbent judge and made rulings with which the officials disagreed. The intrigue launched in earnest, according to the plaintiff, the day after she prevailed against an incumbent judge in the party primary election. One could be forgiven for seeing the case as something from the mind of John Grisham.

In her complaint, the plaintiff alleged that the unseated incumbent judge went to the District Attorney's Office (DAO) to demand that the office investigate the plaintiff and "find a crime." Purportedly, the prosecutors landed on a theory that the plaintiff had accepted bribes from campaign contributors, which had been channeled through her media consultant. Fairly soon after the investigation began, the DAO requested assistance from the Attorney General's Office, which sent in an Assistant Attorney General (AAG) who was experienced in prosecuting election law violations. The AAG was "deputized," then later appointed attorney *pro tem* for the investigation.

Several grand juries participated, the third of which allegedly informed the presiding district judge that the case was unfounded. Meanwhile, the plaintiff met with the AAG, who, she alleged, tried to intimidate her. Ultimately, a grand jury indicted the plaintiff. After the indictment, the AAG allegedly offered to dismiss the indictment if the plaintiff would resign, agree not to run for public office again, and plead guilty to a misdemeanor violation of the Election Code. She refused. The plaintiff then was "re-indicted" on nine counts related to bribery, money laundering, tampering with records, and organized criminal activity. Subsequently, she was convicted, along with her contributors, while her media consultant took a plea deal. But, as you may guess, the saga did not end there.

The Court of Criminal Appeals ultimately reversed the convictions of the campaign contributors based on insufficient evidence. Based on those reversals, the plaintiff filed an application for habeas relief, which was granted by a state district court. She then sued the county, the elected District Attorney (DA), the Assistant District Attorney (ADA) who originally handled the investigation, the AAG, and then-Attorney General Abbott. Motions to dismiss based on prosecutorial immunity were largely denied by the federal district court. The trial court declined to rule on the defendants' dismissal motions based on qualified immunity, instead granting the plaintiff an opportunity to amend her complaint to address qualified immunity. Before the plaintiff filed an amended complaint, notices of appeal were filed by the individual defendants. The "very next day," the plaintiff filed her amended complaint. Apparently rejecting the defendants' argument that filing of the notices of appeal divested the trial court of jurisdiction, the trial court judge then issued a second order that dismissed the plaintiff's claims of supervisory liability and failure to intervene against the ADA; dismissed the malicious prosecution and procedural due process claims against the ADA and the DA; dismissed all claims against Abbott; dismissed the supervisory liability, failure to intervene, malicious prosecution, and procedural due process claims against the AAG; and denied dismissal as to all remaining claims.

The Fifth Circuit's decision

As a jurisdictional matter, the Fifth Circuit concluded that the defendants' filing of their notices of appeal did, in fact, divest the district court of jurisdiction to entertain the amended complaint. That being so, appellate issues concerning the trial court's rulings in the second order (after the filing of the notices of appeal) were dismissed.

The Fifth Circuit honed in on the "relatively narrow" issues of whether the defendants were entitled to absolute prosecutorial immunity for their alleged acts. What followed was a mixed bag for the defendants: The court concluded that immunity shielded some defendants but not all.

Simply put, only the trial court's initial order was considered. Consequently, the Fifth Circuit honed in on the "relatively narrow" issues of whether the defendants were entitled to absolute prosecutorial immunity for their alleged acts. What followed was a mixed bag for the defendants: The court concluded that immunity shielded some defendants but not all.

In its initial order, the trial court had determined that the ADA and the DA were not entitled to prosecutorial immunity. It did so based on the investigatory distinction discussed earlier, reasoning that the ADA and DA "were acting as investigators searching for probable cause, as opposed to acting as prosecutors with probable cause preparing for prosecution." Agreeing as to the ADA, the Fifth Circuit found significance in the allegations that the ADA led the DAO's investigation, using the grand jury for an extended period without initiation by a separate law enforcement agency. Also notable to the appellate court was that, after a year of grand jury investigation, the ADA conceded that he needed more time to investigate before he could secure an indictment. In other words, said the Fifth Circuit, "he did not yet have probable cause." Moreover, the document appointing the AAG as *pro tem* explicitly indicated that the DAO would "render ... non-prosecutorial support, investigative aid, and other assistance."[32] As a result, the Fifth Circuit concluded, the ADA was not entitled to dismissal based on prosecutorial immunity.

The DA, on the other hand, fared better. While the plaintiff had alleged that the DA led the DAO during the time in question, had employed the ADA, and was aware of another DAO investigation into the plaintiff and another judge, she did not specifically allege that the DA was involved in supervising the investigation at issue. Instead, the plaintiff's supervisory liability allegations were conclusory and failed to show that the DA was performing an investigative rather than prosecutorial function in supervising the office. Here, the Fifth Circuit found key guidance in *Van de Kamp v. Goldstein*. There, in the view of the Fifth Circuit, the Supreme Court had drawn a distinction between a supervisory prosecutor's administrative obligations "directly connected with the conduct of a trial" and those "concerning, for example, workplace hiring, payroll administration," and others unconnected with the judicial process.[33] Essentially, the former category is protected by absolute immunity, while the latter isn't. Given the focus of the plaintiff's allegations on the DA's leadership resulting in purportedly wrongful prosecution practices (which were largely conclusory), the Fifth Circuit held that the DA was entitled to prosecutorial immunity.

Similar results were obtained for the AAG and Abbott. As to the AAG, the court noted that the only allegation concerning appearance before any of the grand juries occurred after the plaintiff's refusal of the plea offer, at which time the AAG secured a "re-indictment" of the plaintiff. "Appearing before a grand jury to present evidence and obtain an indictment is the function of an advocate for the State to which prosecutorial immunity attaches," said the Court.[34] Also ineffective were the plaintiff's allegations concerning a related FBI investigation and the plea offer. The supposed withholding of several pages of the FBI's report fell victim to the rule that failure to disclose exculpatory evidence is shielded by absolute immunity. Finally, plea bargaining activities also are intimately associated with the judicial phase of the criminal process. Because the AAG's acts were found to be prosecutorial, rather than investigative, Abbott's alleged failure to supervise or intervene in the case also was covered by absolute immunity.

For those keeping score at home, then, every defendant except the ADA was dismissed based on absolute prosecutorial immunity. The ADA's alleged role in leading a grand jury investigation prevented successful assertion of absolute immunity, so the claims against him were remanded to the trial court. There, he still may assert qualified immunity. Results of that aspect of the case bear watching, as they are not preordained.

For those keeping score at home, then, every defendant except the ADA was dismissed based on absolute prosecutorial immunity. The ADA's alleged role in leading a grand jury investigation prevented successful assertion of absolute immunity, so the claims against him were remanded to the trial court. There, he still may assert qualified immunity. Results of that aspect of the case bear watching, as they are not preordained.

The lessons

Ultimately, *Wooten* wasn't so much a development in prosecutorial immunity law as a useful illustration. The fight in the Fifth Circuit, as should concern prosecutors, was about absolute immunity. Why is absolute immunity such a big deal? Just ask the *Wooten* parties who now are out of the case without having to go back and assert qualified immunity in the trial court. In simplistic terms, qualified immunity is OK. Absolute immunity is better—a lot better. Of course, disgruntled criminal defendants are likely to vehemently disagree.

Arguably the most important point *Wooten* demonstrates is that prosecutors should invest

careful thought before becoming an active participant in an investigation. What *Wooten* and other prosecutorial immunity cases depict is a judicial landscape in which following the orthodox series of steps in a criminal case leads to substantially greater comfort with affording absolute immunity than in cases where prosecutors take on roles typically filled by police officers and other non-prosecutorial participants. Similarly, grand juries are not entirely talismanic. While the normal presentation of facts adduced by law enforcement to a grand jury is almost certainly covered by prosecutorial immunity, leading the grand jury on an investigatory expedition is not.

In the same vein, the case shows that who initiates an investigation is an important decision point. Reviewing and assessing evidence compiled by a law enforcement agency rests on solid prosecutorial ground. Conversely, prosecutor-led investigations at times may be necessary, but they also can entail forfeiture of the most formidable protection from damages a prosecutor has.

Wooten also shows how difficult it remains to successfully plead a supervisory liability case against elected prosecutors. In practical terms, the disposition regarding the DA suggests that an elected prosecutor's decisions, policies, and acts focusing on how the office prosecutes cases (such as pretrial and trial advocacy, *Brady* training, and the like) generally will be protected by prosecutorial immunity. Whether to fire an investigator or deciding to buy coffee from a different vendor will not be. That doesn't mean immune decisions bear no consequences. But it does mean, significantly, that those consequences won't be meted out in the form of civil damages liability. For now, at least. ❇

Endnotes

[1] See, e.g., David Rittgers, Connick v. Thompson: An Immunity That Admits of (Almost) No Liabilities, Cato Inst. Sup. Ct. Rev. 2011, at 203-36; Frederic Block, Let's Put an End to Prosecutorial Immunity, *The Marshall Project*, Mar. 13, 2018, available at www .themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity (commentary of federal district judge); Evan Bernick, It's Time to End Prosecutorial Immunity, *HuffPost*, Aug. 12, 2015, available at https://www.huffpost.com/entry/its-time-to-end-prosecuto_b_7979276; see also *The Federalist Society*, Prosecutorial Immunity, Criminal Law Procedure Practice Group Teleforum, Jan. 4, 2018, available at https://fedsoc.org/events/prosecutorial-immunity.

[2] No. 19-40315, 2020 WL 3638385 (5th Cir., July 6, 2020).

[3] 42 U.S.C. §1983.

[4] *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012).

[5] *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

[6] See *Hesse v. Howell*, No. 07-16-00453-CV, 2018 WL 2750005, at *6 (Tex. App.–Amarillo June 7, 2018, pet. denied) (mem. op.); *Lesher v. Coyel*, 435 S.W.3d 423, 430 (Tex. App.–Dallas 2014, pet. denied); *Charleston v. Allen*, 420 S.W.3d 134, 136-37 (Tex. App.–Texarkana 2012, no pet.); *Clawson v. Wharton County*, 941 S.W.2d 267, 272 (Tex. App.–Corpus Christi 1996, writ denied).

[7] *Van de Kamp v. Goldstein*, 555 U.S. 335, 342-43 (2009); *Imbler*, 424 U.S. at 430.

[8] *Van de Kamp*, 555 U.S. at 342; *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

[9] *Loupe v. O'Bannon*, 824 F.3d 534, 540 (5th Cir. 2016).

[10] *Cousin v. Small*, 325 F.3d 627, 632 (5th Cir. 2003).

[11] *Cousin*, 325 F.3d at 635; *Parkinson v. Cozzolino*, 238 F.3d 145, 159 (2d Cir. 2001).

[12] *Kerr v. Lyford*, 171 F.3d 330, 337 (5th Cir. 1999).

[13] *Imbler*, 424 U.S. at 424-25; *Lampton v. Diaz*, 639 F.3d 223, 228 (5th Cir. 2011).

[14] *Van de Kamp*, 555 U.S. at 342-43; *Boyd v. Biggers*, 31 F.3d 279, 285 (5th Cir. 1994); *Graves v. Hampton*, 1 F.3d 315, 318 (5th Cir. 1993).

[15] *Burns v. Reed*, 500 U.S. 478, 492 (1991); *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997).

[16] *Cousin*, 325 F.3d at 635-36; see also *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011).

[17] *Boyd*, 31 F.3d at 285.

[18] See *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980) (absolute immunity does not bar injunctive claims under §1983); *Johnson v. Kegans*, 870 F.2d 992, 998 (5th Cir.), cert. denied, 492

U.S. 921 (1989) (same); see also *Guild v. Securus Techs., Inc.*, No. 1:14-CV-366-LY, 2015 WL 10818584, at *9 (W.D. Tex. Feb. 4, 2015) (noting absolute immunity does not apply to claims for prospective relief).

[19] *Lampton*, 639 F.3d at 223.

[20] 424 U.S. at 428 (internal citations omitted); see also Tex. Disciplinary R. Prof'l Conduct 3.04(b) (lawyer shall not counsel or assist witness to testify falsely), 3.09(a) (prosecutor shall refrain from prosecuting or threatening to prosecute charge knowing it is unsupported by probable cause).

[21] *Buckley*, 509 U.S. at 274.

[22] *Hoog-Watson v. Guadalupe County, Tex.*, 591 F.3d 431, 439 (5th Cir. 2009).

[23] *Kalina*, 522 U.S. at 129-30.

[24] *Buckley*, 509 U.S. at 277; *Oden v. Reader*, 935 S.W.2d 470, 475 (Tex. App.–Tyler 1996, no writ).

[25] See *Forrester v. White*, 484 U.S. 219, 229-230 (1988) (under functional approach, judge not entitled to absolute immunity from sex discrimination claim by probation officer demoted and fired by judge).

[26] *Burns*, 500 U.S. at 493; *Loupe*, 824 F.3d at 539.

[27] *Buckley*, 509 U.S. at 273.

[28] *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 276-77 (5th Cir. 2001).

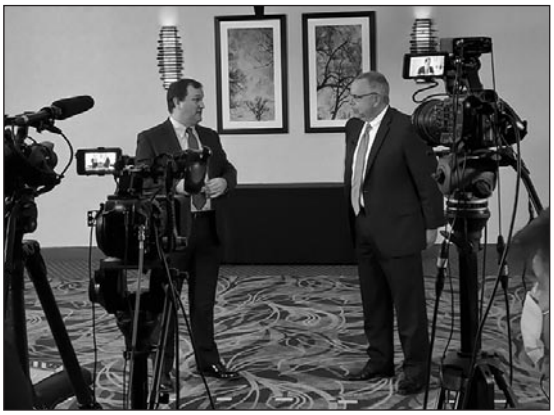
[29] See *Spivey v. Robertson*, 197 F.3d 772, 775-76 (5th Cir. 1999) ("The starting point must be earlier than the formal onset of judicial proceedings, at least encompassing preparatory moments"), cert. denied, 530 U.S. 1229 (2000).

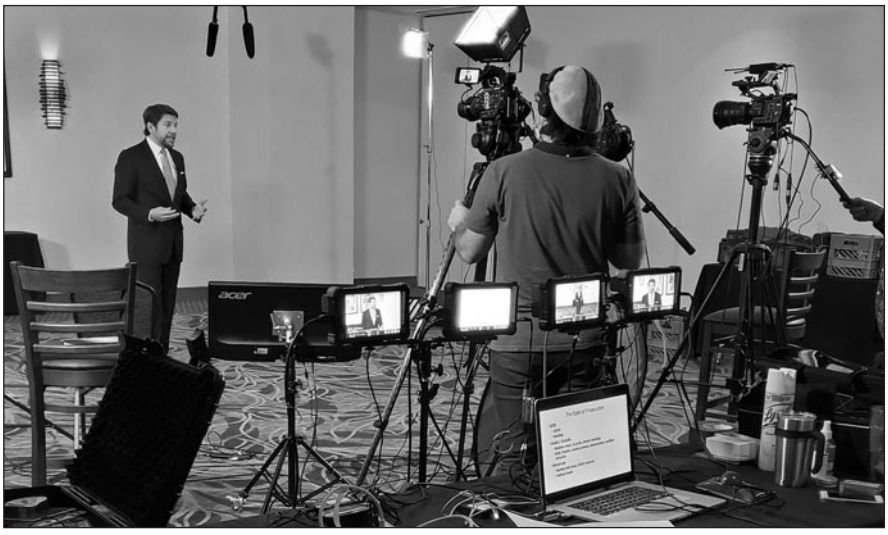
[30] See *Buckley*, 509 U.S. at 274 (prosecutor "neither is, nor should he consider himself to be, an advocate before he has probable cause to have anyone arrested").

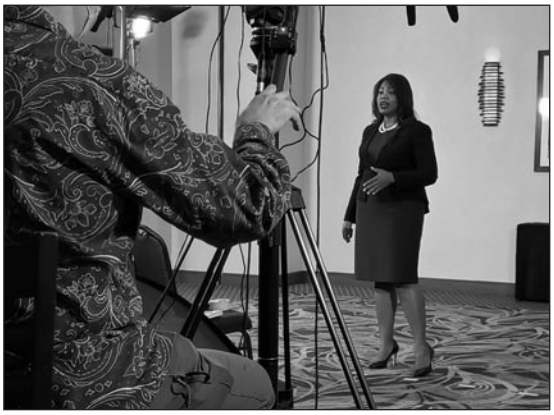
[31] *Singleton v. Cannizzaro*, 956 F.3d 773, 781 (5th Cir. 2020) (internal punctuation & citations omitted).

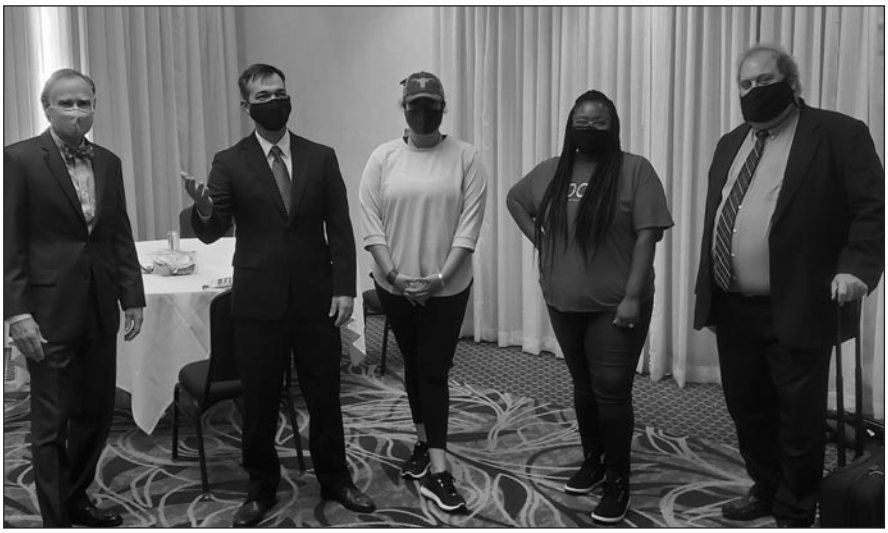
[32] 2020 WL 3638385, at *8.

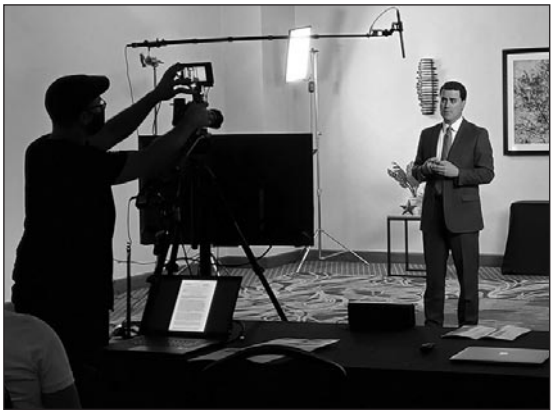
Photos from filming the Annual











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