The official journal of the Texas District and County Attorneys Association

The Texas Prosecutor

September–October 2018 • Volume 48, Number 5

"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

Going the extra mile(s)

In the summer of 2017, Grimes County law enforcement officers first heard the name Matthew Michael Foster.

By Marc Cody Payne (at left) and John Wren (right)
DA Investigators in Grimes County

A 4-year-old girl, Lacey Davis,[1] had outcried that 26-year-old Foster had sexually assaulted her while he lived with her and her parents. Foster had penetrated the child digitally and with a foreign object. As we dug into this case and found more of Foster's sexual perversions, a vast history of abuse came to light, and we realized he was one of most vile and dangerous predators we have ever encountered.

Grimes County Sheriff's Investigator Kindale Pittman was the original case agent. He collected evidence and contacted witnesses, who told him that Matthew Foster had previously been accused of sexual abuse when he lived in Montana. During an interview with Pittman, Foster admitted that he was attracted to 4-year-old Lacey, but he denied touching her or sexually abusing her in any way. Foster maintained that he could control his urges by having sex with his dog.

Uncovering FosterŐs past

When Matthew Foster's file arrived in our office, multiple investigative duties were divided between myself, John Wren, and the co-author of this article, Marc Cody Payne. We'll start with my investigation, where I was first tasked with securing a certified criminal judgment from the State of Montana. In 2006, as a juvenile, Foster had been convicted of sexually assaulting a 9-year-old girl. Investigator Pittman with the sheriff's office had already tried, without success, to obtain the same document. Getting the judgment from Montana took persistence, a court order, and a great amount of follow-up, but finally, we received the record. My involvement with the case ended there—or so I thought.

Six months later, I was assisting then-First Assistant District Attorney Jo Ann Linzer in a trial for continuous sexual abuse involving a father and his child. It was a delayed outcry case with only the victim's testimony as evidence. However, 10 years prior, this defendant had been previously convicted of sexual abuse of his girlfriend's daughter, and we had succeeded in getting the victim of the first conviction to testify in this current trial. Her gut-wrenching testimony, as she tearfully described the abuse and the toll it had taken on her life, helped garner a 60-year prison sentence for her abuser. This experience taught

Continued on page 16

Texas District and County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701 • www.tdcaa.com

About *The Texas Prosecutor*

Published bimonthly by TDCAA through legislative appropriation to the Texas Court of Criminal Appeals. Subscriptions are free to Texas prosecutors, staff, and TDCAA members.

Table of Contents

Thank you, Criminal Justice Section!

The Criminal Justice Section of the State Bar is an active group of criminal justice lawyers from the three segments of our bar: the judiciary, defense, and prosecution.

By Rob Kepple
TDCAF and TDCAA Executive Director in Austin

The section boasts over 3,100 members, and its mission is to promote excellence in the practice of criminal law by embracing ethics, professionalism, education, training, and fellowship. (You can find out more about the Section and how to join here: https://www.txbarcjs.org.) Criminal justice needs a place where we can all come together in the spirit of "the loyal opposition," and you should consider joining.

The section is keen on supporting projects that enhance lawyers' knowledge of their ethical obligations. In that spirit, I am honored to announce that the Section has become the major sponsor of our 2018 online *Brady* training video, which will be available on the TDCAA website soon. As you know, in 2014 every prosecutor was required to take one hour of *Brady* training. Back then, the Criminal Justice Section funded the *Brady* training video that most of you have seen, plus the one-hour ethics roundtable video (both still available on our website). All that training was made available free for all prosecutors—and indeed any lawyer who wanted to view it and get State Bar ethics credit. It has been a tremendous benefit to prosecutors.

Under Court of Criminal Appeals rules, those prosecutors who took the course back in 2014 will need to complete a refresher course by the end of 2018. Thanks to the Section and support from the Court of Criminal Appeals, we will be offering a new course for free. The course will cover not only *Brady* but also prosecutor duties related to exculpatory and mitigating evidence under the Michael Morton Act and Rule 3.09 of the Texas Disciplinary Rules of Professional Conduct. This year's course will be more interactive and dynamic than the 2014 course, and it will feature different perspectives on our obligations, including form the defense bar, the bench, and from Michael Morton himself.

Thanks, Criminal Justice Section—we could not do it without you! ❇

Recent gifts to the Foundation*

Isidro Alaniz
Richard Alpert
Traci Bennett
Ronald Birdsong
Grant Brenna
Terese Buess
Celeste Byrom
Kenda Culpepper
Justin Cunningham
Yolanda de Leon
David Finney
Larry Gist
Dale Hanna
Lynn Hardaway
John Hubert
Michael Jarrett
Micheal Jimerson
Rob Kepple in memory of Angel F. Esparza
Audrey Louis
Doug Lowe
Lyn McClellan in honor of Mac Secrest
Lyn McClellan in honor of Ken Sparks
Amanda Navarette
Keith Orsburn
Jarvis Parsons
B.J. Shepherd
Paul Watkins
Greg Willis

* gifts received between June 1 and August 3, 2018

TDCAA leadership transition

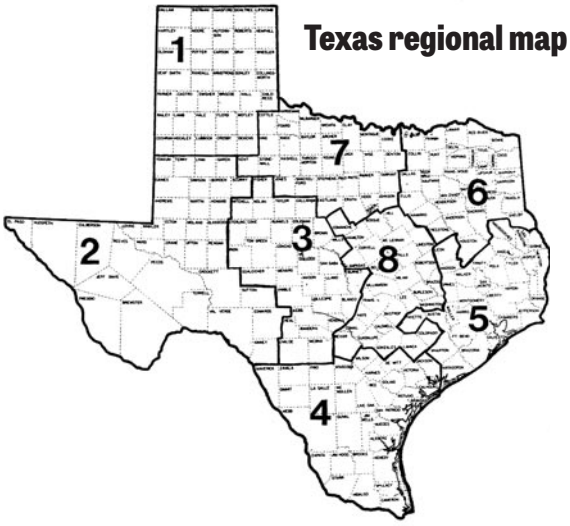
I am proud that our association is truly member-driven.

By Rob Kepple
TDCAA Executive Director in Austin

Your board of directors, made up of an executive committee, at-large members, regional directors, and a few *ad hoc* positions, meet quarterly and otherwise as needed to keep us on track. Following our long-range plan, we use committees to develop the training and services you need.

Board elections are held in conjunction with the Elected Prosecutor Conference and will happen this year at 5 o'clock p.m. on Wednesday, November 28, at the Embassy Suites in San Marcos, for terms that begin on January 1, 2019. The positions that are up this time are as follows (with the current officeholder in parentheses): Secretary/Treasurer (**Kenda Culpepper**, CDA in Rockwall County); Criminal District Attorney at-Large (**Greg Willis**, CDA in Collin County); County Attorney at-Large (**Teresa Todd**, CA in Jeff Davis County); Region 1 Director (**Landon Lambert**, CA in Donley County); Region 2 Director (**Dusty Gallivan**, CA in Ector County); Region 4 Director (**Steve Tyler**, CDA in Victoria County); and Region 7 Director (**Kriste Burnett**, DA in Palo Pinto County). A map of the TDCAA regions is below.

Texas regional map



If you have an interest in one of these positions, just call a board member or me here at TDCAA (512/474-2436) for more information.

Brumley chairs Risk Management Pool

Congratulations to **C. Scott Brumley**, CA in Potter County, for his selection as the Chair of the Texas Association of Counties Risk Management Pool. The risk pool, which currently enjoins the membership of 85 percent of Texas counties, is an invaluable resource to help our counties protect against market fluctuations in the cost of insurance. It is also a great source of protection for many elected and assistant prosecutors who from time to time face lawsuits stemming from your work.

If you haven't thought about your coverage in case you are sued, these are the folks who likely cover you. You may wish to talk with your office or county human resources department for more information. And it is very important if you are a district attorney that you know who represents you in court when you are sued—and who will be footing the bill. In many circumstances, your absolute immunity allows you to exit a lawsuit early in the process, but there is still a legal bill for that!

Prosecutor exceptionalism and immunity

Speaking of prosecutorial immunity, recently the Seventh Court of Appeals issued a nice opinion discussing and reaffirming prosecutorial immunity. In *Hesse v. Howell*,[1] the appellate court affirmed the dismissal of a lawsuit against an assistant DA who was prosecuting a criminal contempt action against a defense lawyer. It is an important opinion in these times because more than one criminal justice reform outfit has suggested that prosecutorial immunity be stripped away as a way to control "bad" prosecutors.

The Amarillo court cites the seminal case regarding prosecutorial immunity, *Imbler v. Pachtman*.[2] The facts of that case vividly illustrate why immunity is vital to the work of prosecutors and why any diminution of those protections would be a huge mistake. Pachtman prosecuted Imbler for capital murder and obtained a conviction and a death sentence. After the trial, Pachtman discovered evidence that corroborated the defendant's alibi and undercut the conviction. He did what prosecutors do: He notified the right people and cooperated with the defense in the habeas process that ultimately reversed the conviction. Indeed, in one brief, Imbler's attorney lauded Pachtman's work as "in the highest tradition of law enforcement and justice."

Then, in the ultimate display of ingratitude, Imbler sued Pachtman and loaded up the lawsuit with all sorts of allegations of prosecutorial misconduct. But the United States Supreme Court made it clear that prosecutors must be free to take courageous action without the fear of civil lawsuits. The Court opined that unfounded litigation would cause a deflection of the prosecutor's energy from public duties and would cause the prosecutor to shade decisions instead of exercising the independent judgment required by public trust. And in Imbler's case, what kind of message would it send to a prosecutor who found exculpatory evidence after trial and immediately disclosed it?

I suggest you keep the facts of *Imbler v. Pachtman* in mind the next time someone argues that prosecutorial immunity should be undermined. The job of the independent prosecutor is truly exceptional, and that independence is essential if we are to do justice, including protecting innocent defendants.

The job of the independent prosecutor is truly exceptional, and that independence is essential if we are to do justice, including protecting innocent defendants.

Recruitment, law schools, and prosecutors

The TDCAA Diversity, Recruitment and Retention Committee, chaired by **Sharen Wilson** (CDA in Tarrant County), has been discussing how we can better position our profession in law schools. After all, your offices offer something unique to new lawyers: the chance to be a minister of justice. Even more appealing to some newly minted lawyers is that you give them the chance to actually try cases and develop courtroom skills, something that Big Law can't do anymore.

To get the word out about how great prosecution is as a profession, we will be spending time getting to know the career services folks at all the Texas law schools and the various affinity groups who may be interested in knowing more about prosecution.

One school is not waiting for us to come to it: Baylor School of Law. **Brad Toben**, dean of the school, is justifiably proud of Baylor's robust trial skills program, so much so that the school is reaching out to prosecutor offices to trumpet its students and the skills they are developing. Its first outreach event is a reception to be held Thursday night at TDCAA's Annual Criminal and Civil Law Seminar in Galveston. This is a great idea and a way for you to connect with talented new lawyers. I hope everyone has a chance to stop by!

Criminal defense versus social justice

We all follow different criminal justice-related Twitter feeds and blogs. I was recently introduced to a blogger who describes himself as a lawyer representing indigent offenders on appeal. You can read his blog at https://appellatesquawk.wordpress.com. It is healthy to read differing views on the criminal justice system, and this blogger brings some entertaining twists to the online chatter.

Take, for instance, his recent post on criminal defense versus social justice. The blogger bemoans a memo from his HR department that announced that the office was branding itself as a "social justice organization" dedicated to the interests of "the most vulnerable." He chafes at this, because although there are times when he believes his clients are innocent, most often they hardly qualify as vulnerable. Indeed, most of the time his office is defending clients *against* justice. He offers this entertaining example of how this new office mantra might play out in court:

> **Defense counsel:** I move to preclude any testimony about my client's prior record, pursuant to *People v. Rodriguez*.
> **Court:** What does *Rodriguez* say?
> **Defense counsel:** How should I know? The point is, my client belongs to a marginalized, powerless, historically underrepresented group.
> **Prosecutor:** So does the victim.
> **Defense counsel:** Oh, yeah? What supposedly powerless group does your so-

called victim belong to?
Prosecutor: Dead people.
Defense counsel: Oh. OK, you win.

Scott Durfee is The Man

For many years, Texas prosecutors have enjoyed and benefited from the many ethics and civil law-related presentations by **Scott Durfee**, an assistant in the Harris County DA's Office. Scott is a great teacher, and we all enjoy his mild-mannered and self-effacing style.

So who would expect that in his spare time Scott mixes it up in the dog-eat-dog world of poker? The World Series of Poker, to be exact. Scott has played for many years on the circuit, and according to the authoritative Hendon Mob Poker database, Scott is ranked 3,123 in all-time poker winnings for Texas players. That puts him on the list with the legendary **Amarillo Slim**, the 1972 WSOP winner, and **ŇTexas DollyÓ Doyle Brunson**, two-time WSOP winner. Indeed, Scott has made it "to the cash" in WSOP tournaments five times in the last couple years, and he finished eighth a couple years ago in the Oklahoma event.

For me, here's the best part: Scott's poker persona. You've seen the tournaments on TV: All the players have a "thing" that they do. Scott chooses to respect the traditions of Vegas by going as a member of the Rat Pack (think Frank Sinatra and Sammy Davis, Jr.), complete with black suit, white shirt, and skinny black tie, as in the photo at right. Classic Scott Durfee!

Death By Injection

It has been awhile since we have had Death By Injection at a TDCAA event so you may not know them, but the *Houston Chronicle* newspaper recently published a feature about what **David Mitcham**, an ADA in Harris County, has dubbed the "preeminent lawyer band in Harris County, at least in the latter part of the 20th Century": Death By Injection. It's a band made up of people who at one time or another put people in prison. (You can read the article at www.houstonchronicle.com/entertainment/music/article/Death-By-Injection-the-band-of-lawyers-that-12957291.php.) It has been around since the 1980s, and most members, both former and current, were at one time prosecutors: David Mitcham and **Scott Durfee** (ADAs in Harris County), **Bill Delmore** (ADA in Montgomery County), **Don Clemmer** (ADA in Travis County), **Brian Johnson** (Assistant Attorney General in Austin), **Dick Bax, Glenn Gotschall, Clay Rawlings, R.K. Hansen**, and **Doug OŐBrien** (former ADAs in Harris County) and retired Houston homicide detective **Hal Kennedy**. The *Chronicle* article is a great read about musicians who were wise not to give up their day jobs but who are wildly entertaining. (I don't think I am offending them; they say worse about themselves in the article!)

By the way, you can get their album, *Down at the Courthouse*, on iTunes. I am listening to it as I write this column. The album title was apparently inspired by Scott Durfee getting hit by a bus as he crossed the street in front of the courthouse. (You can't make this stuff up.)

And the band's name? They have tried to ditch the name a few times—the name was not picked by the band but apparently given to them by someone who opined that listening to them was like death by injection. They candidly admit that the name has contributed to the band's continued success and notoriety—I talked to the *Chronicle* reporter shortly after the article came out and asked if she would have written the story because of their musical talent if they had a boring name. "Nahhh," was her reply. I've been reminded how fun it is to have "DBI" at a TDCAA event, and we will be entering into negotiations with the band's booking agent soon (David, I think that is you).

Congrats to Kenda Culpepper

Congratulations to **Kenda Culpepper** (CDA in Rockwall County) on her selection as the chair of the Criminal Justice Section of the State Bar. This is a terrific honor and a great thing for our profession. You can read more about the Section's activities in TDCAF News on page 4. ❇

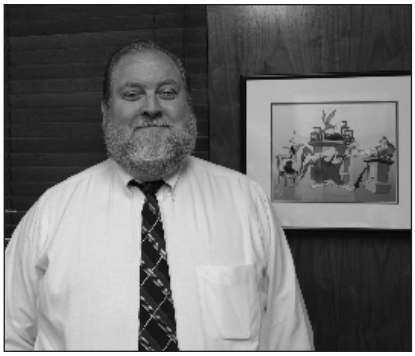
Endnotes

[1] No. 07-16-00453-CV (Tex. App.–Amarillo, June 7, 2018).

[2] 424 U.S. 409 (1976).

Help for jury selection is on the way!

During the Prosecutor Trial Skills Course (affectionately known as Baby School—well, affectionately to everyone but the attendees) and the Advanced Trial Advocacy Course where we used a drugged driving death case as our example, I heard many students say they struggle with jury selection.



By W. Clay Abbott
TDCAA DWI Resource Prosecutor in Austin

While the instruction on jury selection at both schools was superb, this complaint was not new to us. TDCAA's training evaluations and course evaluations make it clear that prosecutors feel like they could use a hand on voir dire. This need is understandable, as most seasoned trial attorneys admit that most cases are won and lost in jury selection—which is absolutely true in DWI and intoxication crash cases.

So what is a poor DWI Resource Prosecutor—me—to do? I'm glad you asked! We are trying something new.

Training on jury selection

First, next year's video training (a continuing Texas Department of Transportation [TxDOT] grant project) will take on jury selection as its subject. About a year from now, check our website for two 20-minute videos on voir dire.

In the meantime, we will offer regional DWI training under the TxDOT grant specifically on jury selection. This is new for us, and we are excited!

Since 2004, TDCAA has engaged in what started as a radical concept: training prosecutors and officers on DWI issues in the same classroom at the same time. There were many prophets of doom, mostly out of state, who assured me our endeavor would fail miserably. It did not. In fact, that model is now copied across the country. The limitation of it has always been that prosecutor-specific topics, such as jury selection, got the short straw. No more!

Since 2004, TDCAA has engaged in what started as a radical concept: training prosecutors and officers on DWI issues in the same classroom at the same time. There were many prophets of doom, mostly out of state, who assured me our endeavor would fail miserably. It did not. In fact, that model is now copied across the country.

The regional DWI training for 2018–'19 will have two major parts. The first is a three-city, simultaneous, prosecutor-only program on **December 7, 2018,** in Richmond, Rockwall, and San Antonio. (Mark your calendars and watch the TDCAA website, www.tdcaa.com, for details and online registration right before our Annual Update in mid-September.) We recognize that jury selection in DWI and impaired-driving crash cases is not easy. In very few trials will most members of your panel have committed the charged offense or underlying offense. Even if they don't have that experience, there is a good bet that a friend or family member has, and they'll likely speak up about how close to home this offense hits. (Let's face it: You may have a child molester on the panel in an indecency case, but he will certainly not be telling the rest of the jury about it.) All prosecutors who have tried DWI cases have a story about the great case they lost. Invariably, the blame falls on jury selection. Interviewing 30 to 100 people for a thankless, low-paying job with serious consequences in ridiculously limited time periods is probably the hardest thing prosecutors do. The goal of this program is not that a couple speakers turn every attendee into a great advocate. No pumpkins will be turned into carriages either. Instead, attendees will hear some new ideas, methods, strategies, questions, examples, and tactics.

A word of warning: If you are hoping that we'll tell you the profile of the perfect DWI juror, you will be disappointed. This course isn't about swapping one canned voir dire for another—rather, it is about getting your panel talking and learning to listen to jurors' answers. If picking your jury from their juror information

sheets is your current strategy, this class is essential for you!

This one-day, three-city training will be a great launching point for the upcoming video project, too. I encourage both new and experienced prosecutors to attend. My hope is the program will be equal parts legal training, modeling actual jury selection, and open discussion among a wide range of prosecutors on strategy, questioning tactics, and style. Please consider joining us on December 7 in the city closest to you.

More officer-prosecutor training

The second part is continued local training using the courses we presented across the state in 2017 and 2018. We will continue to offer both Effective Courtroom Testimony and Rolling Stoned: Investigating and Prosecuting the Drugged Driver, but we will pick only 15 to 20 cities in 2018 and 2019 for these programs. No areas in DWI seem to be as difficult as effectively presenting evidence of alcohol *and* drugs or just drugs. Both of these schools provide a great opportunity for prosecutors and officers to work together in their own region of the state. Despite the early naysayers, this collaborative learning remains one of the best things about TDCAA's regional DWI training.

Applications for the local police-prosecutor programs are on our website now (you must apply for me to travel to your jurisdiction to train on these topics). You can also find me or Kaylene Braden at the Annual, as we will have applications in hand (or at least on a nearby clipboard). Applications must be in by October 13 to be considered. In 2020, we will probably drop both curricula for a while, so get in while it lasts.

A last word

The good news about both the three-city jury selection training and the regional programs for police and prosecutors is that they are local and free. The bad news about the jury selection training is that we can go only to Richmond, Rockwall, and San Antonio, and we cannot reimburse attendees for travel. But did I mention there is no registration fee? And that all of these programs are single-day schools? Sounds like perfect road trip potential to me. ❇

Photos from our Advanced Course

Upcoming training for prosecutor staff and VACs

TDCAA's Key Personnel & Victim Assistance Coordinator Seminar will be held November 7–9 at the Inn of the Hills in Kerrville.

By Jalayne Robinson, LMSW
TDCAA Victim Services Director

TDCAA's Key Personnel-Victim Services Board, along with TDCAA's Training Director Brian Klas, have put together outstanding training topics for this seminar. They include a block on Presumptive Eligibility Certification from the Texas Attorney General's Office and talks on protective orders, essential skills for victim assistance coordinators (VACs), bond forfeiture, witness coordination, and understanding intake, just to name a few.

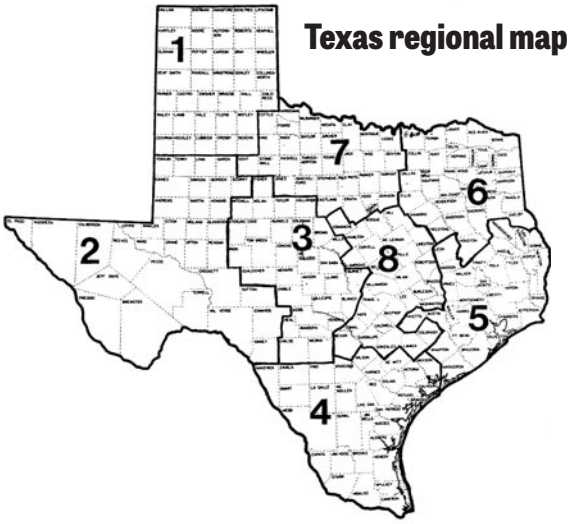
Don't miss this opportunity to network with other key personnel and victim service coordinators from prosecutor offices across the state and learn from others who are top in their field. Visit https://www.tdcaa.com/training/2018-key-personnel-victim-assistance-coordinator-seminar for registration and hotel information.

Board elections

Elections for the West (Regions 1 & 2) and North Central (Regions 3 & 7) Areas for the 2019 Key Personnel & Victim Services Board will be held on Thursday, November 8, at 1:15 p.m. (during the Key Personnel & Victim Assistance Coordinator Seminar at the Inn of the Hills in Kerrville). See the map at right to identify your region.

The Board assists in preparing and developing operational procedures, standards, training, and educational programs. Regional representatives serve as a point of contact for their region. To be eligible to serve on the board, each candidate must have the permission of the elected prosecutor, attend the elections at the KP-VAC Seminar, and pay TDCAA membership dues prior to the meeting.

If you are interested in training and want to give input on speakers and topics at TDCAA conferences for KP and VACs, please consider running for the board. If you have any questions, please email me at Jalayne.Robinson@tdcaa.com.



In-office visits

I am available for in-office support to your victim services program. We at TDCAA realize the majority of VACs in prosecutor offices across Texas are the only people in their office responsible for the victim services program and for compiling information to send to crime victims as required by Chapter 56 of the Code of Criminal Procedure. We realize VACs may not have anyone locally to turn to for advice and at times could use assistance or moral support.

CLOCKWISE FROM ABOVE LEFT: Brown County District Attorney VAC Kirsten Steele; from left to right, Newton County CDA Courtney Ponthier, TDCAA Victim Services Director Jalayne Robinson, and VAC Jessica Adaway; in Coleman County (left to right): Legal Assistants and VACs Casey Rush and Sarah Pinckney; and (left to right): DA Lucy Wilke and DA Scott Monroe in Kerr County.

My travels have recently taken me to Brown, Kerr, Newton, and Coleman Counties to assist VACs, prosecutors, and staff with in-office consultations for their prosecutor-based victim services projects. Thanks to each of these offices! (See some photos on this page of the people I worked with.) I thoroughly enjoy my job and my travels across Texas. I realize how nice it is to have someone to turn to when victim-services-related questions surface.

Please email me at Jalayne.Robinson@tdcaa.com for inquiries, support, or to schedule an in-office consultation or group presentation. ❇

CCA clarifies the requirements for EOCA as a gang member

In little more than a year, the Court of Criminal Appeals has released three opinions explaining what the State must plead and prove in a prosecution for Engaging in Organized Criminal Activity (EOCA).

By Clinton Morgan
Assistant District Attorney in Harris County

Considering the complexity of the statute, this level of attention was probably needed.

Penal Code §71.02 makes it an offense if, "with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the [defendant] commits or conspires to commit" one of many listed offenses. In 2017, in *Villa v. State*,[1] the Court of Criminal Appeals decided what sort of evidence is needed to prove membership in a street gang. Earlier this year in *O'Brien v. State*,[2] the Court explained that a jury need not be unanimous on which underlying offense the defendant committed.

Most recently in *Zuniga v. State*,[3] the Court discussed what evidence is needed to prove that a defendant committed an offense "as a member of a criminal street gang." Spoiler: The statute means exactly what it says.

Ricardo Zuniga was (is?) a member of the Barrio Aztecas gang. The Barrio Aztecas claim "the entire El Paso region" as their territory and demand a cut from other gangs that sell narcotics in that area.[4] If a rival gang member fails to pay this extortion money, "the Barrio Aztecas implement several forms of discipline, which may include killing that member."[5]

On June 21, 2009, the Vargas brothers (Jesus and Jose) were murdered outside a bar in Socorro, near El Paso. The Vargases were confirmed members of the Barrio Campestre Locos gang, and the bar was a known hangout of the Barrio Aztecas. Witnesses said that a group of Barrio Aztecas members, including Zuniga, beat the brothers and then shot them.[6] One witness said that Zuniga was the shooter. Zuniga fled to Mexico.

When he was arrested three years later, Zuniga was charged with one count of capital murder (murdering two people in a single criminal episode) and two counts of engaging in organized criminal activity. The engaging indictments alleged that Zuniga, "as a member of a criminal street gang … commit[ed] the criminal offense of murder."

In addition to eyewitness testimony about the murders, the State put on evidence regarding how law enforcement classifies individuals as gang members. Zuniga had been classified as a Barrio Aztecas member since 2004. The State also put on a gang expert who testified about the Barrio Aztecas. This witness said that the Vargas murders were consistent with Barrio Aztecas activities. The jury convicted Zuniga of all three charges. He got life without parole for the capital murder, and two 60-year sentences for the engaging charges.

On appeal to the Eighth Court, Zuniga raised 11 points of error, including challenging the sufficiency of the evidence to support all three convictions. The Eighth Court held that the evidence was sufficient to support the capital murder conviction. However, the engaging convictions were another matter.

Citing a 2002 Court of Criminal Appeals case, *Hart v. State*,[7] the Eighth Court said there were two mental-state requirements for engaging in organized criminal activity: the mental state for the underlying offense (in this case, murder) and an intent to establish, maintain, or partici-

pate as a member of a criminal street gang. The Eighth Court explained: "The State must prove not only that the defendant *is* a member of a criminal street gang … [but] the evidence must [also] support a finding that the defendant intended to establish, maintain, or participate *as a member* of a criminal street gang."[8] Despite evidence that 1) Zuniga was a member of Barrio Aztecas, 2) others involved in the murders were members of Barrio Aztecas, 3) the victims were members of a rival gang, 4) the murders occurred at a Barrio Aztecas hangout, 5) shortly before the murder Zuniga had told another gang member involved in the murder that he had to "do his job," and 6) the murders were consistent with Barrio Aztecas activity, the Eighth Court held the evidence was insufficient to prove that Zuniga intended to commit the murders *as a member of a gang*.

A unanimous Court of Criminal Appeals disagreed. Writing for the Court, Judge Alcala explained that the Eighth Court had misinterpreted the intent requirement for engaging in organized criminal activity. Engaging can be charged in two different ways, either 1) "with the intent to establish, maintain, or participate in a combination or in the profits of a combination," or 2) "as a member of a criminal street gang." The grammatical structure of the statute indicates that the intent requirement from the "combination" theory of liability does not extend to the "street gang" theory of liability.[9]

Where the Eighth Court had gone astray was its reliance on *Hart*. That case had been charged under the "combination" theory of liability; thus, there actually were two mental state requirements. However, for a defendant charged under the "street gang" theory, as Zuniga was, the statute did not require proof of a particular intent beyond what was required to prove the underlying offense. To convict a defendant charged with engaging "as a member of a criminal street gang," the State's evidence must show merely "a connection or nexus between the defendant's commission of the underlying offense and his gang membership."[10] That is, the evidence must prove that he committed the offense *as* a gang member, not just that he was a gang member who happened to commit an offense.

The difference between the Eighth Court's interpretation and the CCA's interpretation is significant. The evidence in this case plainly showed a gang murder. If that evidence was not sufficient to show intent to act as a gang member, it seems unlikely anything short of an explicit declaration would suffice (e.g., "I heard the defendant say, 'Gentlemen, these Barrio Campestre Locos miscreants have deprived us Barrio Aztecas of our fair earnings. Let us assail them!'"). There are an awful lot of gang crimes where it would be impossible for the State to obtain such evidence.

The rest of the CCA's opinion goes on to recount the exact same evidence discussed in the Eighth Court's opinion. That evidence was sufficient to support the conviction under the correct statutory interpretation. Under the CCA's interpretation, when gang-bangers commit crimes as part of their gang lifestyle, they can be prosecuted for engaging in organized criminal activity. Their precise motive—to make money, to expand territory, to avenge insults, to have fun—is not an element and will not factor into a sufficiency review. All the State needs to show is that the defendant committed the underlying offense "pursuant to his role or capacity as a gang member."[11] ❇

Most recently in Zuniga v. State, *the Court discussed what evidence is needed to prove that a defendant committed an offense "as a member of a criminal street gang." Spoiler: The statute means exactly what it says.*

Endnotes

[1] 514 S.W.3d 227 (Tex. Crim. App. 2017).

[2] 544 S.W.3d 376 (Tex. Crim. App. 2018).

[3] ___ S.W.3d ___, No. PD-0174-17, 2018 WL 2711145 (Tex. Crim. App. June 6, 2018).

[4] *Id*. at *6.

[5] *Zuniga v. State*, No. 08-14-00153-CR, 2016 WL 5121992 (Tex. App.–El Paso Sept. 21, 2016) (mem. op. not designated for publication) *rev'd in part,* No. PD-0174-17 (Tex. Crim. App. June 6, 2018).

[6] The appellate opinions are vague on the details of the beating, but the lower court's opinion goes into some detail of the autopsy. Both brothers sustained multiple blunt force injuries and non-lethal stab wounds prior to being shot. Jesus was stabbed in the ear with an icepick, "part of which was still embedded in his head."

[7] 89 S.W.3d 61 (Tex. Crim. App. 2002).

[8] *Zuniga*, 2016 WL 5121992 at *12 (emphasis added, brackets removed).

[9] To determine if the intent requirement from one part of a statute extends to a latter part of a statute, one easy method is to remove the intervening words and see if the resulting phrase

Photos from Prosecutor Trials Skills

A roundup of notable quotables

"No one reported Jayden as missing. No one was looking for Jayden. Jayden had no advocate other than us. Somebody took a beautiful, innocent child and discarded him in the ocean like he was a piece of trash."

—Bryan Gaines, the supervisory senior resident agent at the FBI office in Texas City. Agent Gaines was talking about 4-year-old Jayden Alexander Lopez, whose body washed ashore in Galveston in October 2017. Investigators had called him Little Jacob because no one had come forward to claim him. He was finally identified in late June after investigators released a photo of the boy's body. Jayden's mother and her girlfriend are now in custody. https://www.chron.com/neighborhood/galveston/news/article/Galveston-police-to-reveal-no-

"Rather than community-based treatment services, we've invested in criminal justice-based services. I have to put many of my clients in jail to get them services. That shouldn't be the case."

—Elizabeth Henneke, a lawyer and executive director of Lone Star Justice, in a *Houston Chronicle* newspaper article about the impact of substance abuse on criminal justice and state agencies. https://www.chron.com/news/politics/texas/article/Lawmakers-get-a-les-

"I'm here because I want to follow this through. This individual murdered my brother, and I need to see him go to the Lord. I need to physically see him take his last breath and go to the Lord."

—Bexar County Criminal District Attorney Nico LaHood, in a Netflix series called *I Am a Killer*, the second episode of which explores the case against Mauriceo Brown and Kenneth Foster Jr., who were convicted of murdering LaHood's brother, Michael, in 1996. LaHood was explaining what was going through his head when he attended Brown's execution in 2006. (Foster's death sentence was commuted to life in prison in 2007.) https://www.expressnews .com/news/local/politics/article/LaHood-opens-up-about-brother-s-murder-in-13136441.php

"I didn't really want to just give up immediately. I was raised tougher than that, raised in Texas. We're born fighters."

—U.S. cyclist Lawson Craddock, who finished the Tour de France in last place in late July. On the race's first day, he suffered a bad crash, fracturing his scapula and receiving a gash on his eyebrow that required stitches to close. He continued riding for the next 22 days (over 2,000 miles), often behind the peloton, and finished in 145th place, winning thousands of fans along the way. https://www.npr.org/2018/07/30/633936189/lawson-craddocks-

"It took at least six years off my life."

—Wade Vielock, Bee County resident, relaying the story of how his 6-year-old son found a "substantially sized" (but harmless) indigo snake in the toilet. https://www.texasobserver.org/strangest-

Have one to share? Email it to the editor at Sarah.Wolf@tdcaa.com. All contributions will get a free TDCAA ball cap!

"In a 5–4 decision, the Supreme Court votes for Justice Kennedy to retire."

—Jon English, prosecutor with the Special Prosecution Unit, on Facebook

Going the extra mile(s) (cont'd)

me the value of having live witness testimony, which could not be duplicated by merely introducing a judgment. I was determined, whenever possible, to provide the same type of live testimony in future trials involving sexual abuse of a child.

While Jo Ann and I waited through jury deliberation, she told me about the egregious nature of the Matthew Foster case. Foster had rejected the plea offer and the case was set for trial, and she asked for my help with preparation because of our previous success in the continuous sexual abuse case, and because of my experience handling sex offender registration while working at the Grimes County Sheriff's Office. Jo Ann wanted every piece of evidence she could get her hands on for the Foster trial.

With this goal in mind, I first read through the file and reviewed Matthew Foster's criminal history. My initial focus was his 2006 conviction out of Montana, and I wanted to locate the victim and have her testify in little Lacey's case.

The first hurdle was obtaining her name. Through several phone calls and emails back and forth with the Flathead County (Montana) Attorney's Office and Sheriff's Office, I got my hands on the offense report with her identifying information. In the report, the victim, Angel Sanders, described a similar modus operandi to what Foster did to Lacey: He had used a foreign object in the sexual assault. Also in the narrative was a vague reference to a separate incident with Matthew Foster from 2004. Our case had now gone from one victim to possibly three. My resolve to track down this crucial evidence for the prosecution increased even more.

Using the TLO database, I located a phone number for Angel's mother. We spoke by phone, and I told her about our case in Grimes County, Texas. She then shared with me her daughter's phone number. I knew a cold call like this would be tough, but a phone call rather than an in-person visit was necessary because Angel lived out of state. Tact would be of paramount importance.

I called Angel, who was now living in Springfield, Missouri. When I told her what Foster had done to 4-year-old Lacey here, she choked up and I could hear her crying. I explained what Angel's role could be in our trial and told her she could be part of making sure Foster went to prison for a long time. I listened with patience and compassion and answered every question she asked. Ms. Sanders told me she would be eight months pregnant by the time of our August trial setting, but she was still willing to travel to Texas and testify. I was grateful for Angel trusting in me enough to share her story by phone and trusting in our office enough to be part of our trial.

The people you meet are trying to determine your interest and intentions as much as you're trying to determine theirs. They want to know: "Do you see me? Are you listening to me? Do I matter to you?" When your actions and interactions validate them as human beings and allow them to see that you recognize their value and care about their experiences, you're on the right path to making a connection.

Sex offender registration

A review of Matthew Foster's conviction information convinced me he had a duty to register as a sex offender in Texas. I spoke to ADA Linzer about it, and she asked me to check into it, but she thought his duty to register had already expired. Whether Foster had to register became my next priority.

To determine if Foster had a duty to register, I reviewed the Texas Department of Public Safety's out-of-state list of substantially similar sex offenses. Sexual assault in Montana was listed as an offense requiring lifetime sex offender registration in Texas. However, because Foster was a juvenile at the time of that offense, his duty to register would expire 10 years after the discharge from his sentence.

That meant I needed to know Foster's date of discharge to determine if his duty to register in Texas was still applicable. It wasn't easy, but after several calls and emails, I located a helpful clerk at the Pine Hills Youth Correctional Facility in Miles City, Montana. This clerk helped me determine that Foster was released on his 18th birthday in December 2008. This was great news! Foster was required to register through December 2018, which meant our office would now have a failure to register case on him as well.

His ex-girlfriend

Around the same time, I received anonymous information that I should find and interview Cindy Reed, who was Matthew Foster's girlfriend at the time of his arrest. I was told Cindy lives in San Antonio and that the only way to reach her was via Facebook Messenger. I messaged Cindy and told her I wanted to meet and talk. She quickly and bluntly responded that she had no desire to speak with me. She said she had already provided information to an investigator and did not want to do so again. Fortunately, Cindy contacted another witness from our criminal case

the same day, and that person in turn spoke with Investigator Pittman of the sheriff's office. Pittman verified my identity and my involvement in preparing for trial, and Ms. Reed then agreed to talk with me.

As I traveled to San Antonio to meet her, I did not know what she would tell me—I hoped this trip would be worth the time. We met at a Starbucks near her apartment where she felt safe. I began by getting to know Cindy and letting her get comfortable talking with me. Then I explained where the case stood and why I believed the information she had to offer was important to the trial. I learned that a defense investigator had contacted Cindy, which is why she was initially leery of meeting with me.

When I felt a rapport had been built, I asked how she first met and became involved with Matthew Foster. Cindy met him in Montana and brought him back to Texas. She became his girlfriend, and they lived together for a while. She told me Foster trusted her and would share with her all of his "demons." She later realized Foster was dangerous and she feared him.

By the end of our conversation, Cindy Reed was willing to testify that while still in Montana, she had seen Foster become aroused watching little girls in bathing suits play on a trampoline and that Foster admitted to having molested around a dozen girls. She also disclosed that Foster confided in her he was having sex with his dog to control his urges toward children. Most importantly, Foster had admitted to being sexually attracted to Lacey Davis and her 5-year-old sister, Amy. Ms. Reed also voluntarily gave us the original letters Foster had written to her from the Grimes County Jail. I never could have imagined that the six-hour round trip would have provided us with such valuable evidence.

Finding more victims

When I returned from San Antonio, I went back to the vaguely referenced 2004 incident in the Montana offense report. It took quite a bit of digging to locate additional details. We discovered that in 2004, Foster lured two 4-year-old twin girls away from their yard. The girls' mother realized her daughters were missing and quickly began searching for them. She found Foster with the girls inside an abandoned trailer. He had led them there from the other side of the neighborhood. The twins outcried to their mother that Foster had taken them to a back bedroom and tried to pull their pants open to look in them. In 2006, while he was interviewed during the Angel Sanders sexual assault investigation, Foster acknowledged this 2004 incident with the twins happened, even correcting the interviewing detective on details.

Continuing to work through the file documentation, I reviewed a newspaper article that said Foster was charged with another sexual assault in Montana from 2006. ADA Linzer had originally found the article through a Google search and had added it to the file. Foster had not been prosecuted for the crime.

To identify the victim of this crime, I needed to find the police report. By this point, I had built a good working relationship with the law enforcement officials in Flathead County and had shared with them the facts of our case and our goals for trial. They wanted to help keep Foster off the streets, too, which made obtaining the offense report a much simpler process. The report said Foster had sexually assaulted 12-year-old Mary Leal in a shower at knifepoint. Both Foster and Leal were in a foster care-type facility at the time of the offense. The report mentioned Foster's recurring modus operandi: Mary also reported Foster using a foreign object in the sexual assault.

Using the TLO database again, I found a phone number for Mary Leal in Montana. I dialed it, and a woman answered. I identified myself and verified I was speaking to Ms. Leal. After a brief explanation of the reason for my call, I could hear the horror and shock in her voice. The mere mention of Foster's name reopened a wound within her, and it was evident in her speech.

As I was just a voice on the phone, I wanted to be careful and not ask too many invasive questions. I asked Mary if she would allow me to ask just one thing, and she agreed. "Did the sexual assault you reported against Matthew Foster in 2006 happen?" I asked. For as long as I live, I will remember her resolve when she responded, "Absolutely."

I told Mary that she could verify my identity by calling our office, so she would feel more comfortable speaking with me, and I explained how much her testimony could help our case. Mary expressed a desire to help, but she also told me she was not sure about traveling to

We are a small county with minimal resources and a small budget. However, using our combined years of experience, creating relationships with victims, witnesses, and law enforcement officials across state lines, and digging just a little deeper, we were able to help our prosecuting attorney put together the strongest possible case.

Texas and having to relive the assault. She was a struggling single mother and did not need the stress. I told her to process our conversation and that we would talk the following week. We ended the call, and I knew it was not going to be easy to persuade Mary to come to Texas and testify.

The next week came, and I could not get in touch with Mary; she neither answered my calls nor responded to my texts. She was avoiding me. At this point, District Attorney Andria Bender had taken the lead on prosecuting the case, and we discussed at length whether it was worth expending the money and resources for me to travel to Montana to convince Mary to testify. Although we are not a wealthy county and have little budget for travel, we knew we needed Mary Leal's help. She was an important part of this case, and we would find a way to fund the trip.

On July 5, I flew into Kalispell, Montana. That evening, I knocked on the door of Mary Leal's residence. (A Flathead County sheriff's detective had graciously verified the residence for me in advance of my arrival.) Mary opened the door and I stood before her in dress clothes, boots, a gun belt, and a straw cowboy hat. The shock in her face was apparent, but she knew exactly who I was. "You're John Wren," she said. "I never thought you'd actually come." When she invited me into her home, I knew my DA and I had made the right decision. We visited for over an hour. I placed a photo of Lacey Davis, the 4-year-old Grimes County girl Matthew Foster had assaulted, on the coffee table in front of her. Mary has a daughter the same age, so my hope was that she would make a personal connection with Lacey.

Mary told me she had been in trouble with the law, and she had tried burying the pain with alcohol and drugs. She had also contemplated suicide. It was a heartbreaking and common story coming from a victim of sexual abuse.

We talked through the details of her sexual assault at Foster's hands. She still knew the exact date it happened. We talked through the effect it had on her life. Mary told me she had been in trouble with the law, and she had tried burying the pain with alcohol and drugs. She had also contemplated suicide. It was a heartbreaking and common story coming from a victim of sexual abuse. I explained to Mary her potential role in our trial, so she could understand how her testimony would help. I told her we hoped it might also give her some measure of justice, as Foster was never punished for assaulting her.

Ms. Leal apologized for ignoring my attempts to communicate with her. She told me she was willing to testify remotely if that were possible. (Mary still was not sure about traveling to Texas.) I told her we knew what we were asking of her was no small matter. We ended the conversation with her saying she would think about it and call later that evening. That phone call never came, though, and I went to bed utterly discouraged.

The following day happened to be Mary's birthday. It had come up during our conversation at her home. I picked up a small flower arrangement and a card for her—I wanted her to know that no matter what, we cared. Throughout the day, I attempted to reach her without success. I went back by the house when it was late enough for her to be home from work, but she was not there.

I tried again to reach Ms. Leal by phone. She responded after a bit and said she was celebrating her birthday with family across town. By text, Mary then committed to travel to Texas and testify in person, as long as her daughter could come too. I placed the flowers and card under her carport so she'd get them when she arrived home. I texted her a photo of the gift, along with a note wishing her a happy birthday. From that point forward, our communication was greatly improved.

Much can be said about the value of making a human connection with a victim or witness. There is no textbook technique to establish and maintain these connections, but one thing I have found is that they often require our being better listeners than speakers. I certainly do not claim to be an expert, but in my opinion it basically comes down to this: The people you meet are trying to determine your interest and intentions as much as you're trying to determine theirs. They want to know: "Do you see me? Are you listening to me? Do I matter to you?" When your actions and interactions validate them as human beings and allow them to see that you recognize their value and care about their experiences, you're on the right path to making a connection.

Before leaving Kalispell, I obtained a copy of the interview video from the Flathead County Sheriff's Office, the one where Foster admitted to the 2004 incident with the twin girls. My mission in Montana was accomplished, so I headed back to Texas, knowing all of this effort, extra

time, and work was absolutely worth it.

Digging through digital evidence

I'm Cody Payne (the co-author of this article), and my duty was going through the digital evidence collected during the initial investigation of Matthew Foster. I was overwhelmed at finding more than 100,000 photos and videos that were downloaded from his computer's hard drive. Unfortunately, only a small portion of the content had ever been reviewed prior to its arrival at our office.

Over two weeks, with more than 50 hours invested, I sifted through the images and videos one by one. The graphic nature of the pornography was disgusting—bestiality involving dogs was prevalent. Some things you just can't un-see! (Unfortunately, Texas's new statute banning sex with animals had not yet gone into effect, and it was unclear in the photos whether Foster was the human actor with the dogs, so we were unable to charge him with bestiality.) The task took a lot of patience, and I had to get up and walk away at times to maintain my sanity. After more than a week of cataloging the data in all of those photos and videos, I found four images believed to be child pornography. I just needed verification.

I also discovered two phones that had been collected from Foster but not analyzed. I enlisted the assistance of Grimes County Sheriff's Deputy Amber Lossow, who wrote search warrants for them. Our county doesn't have the ability to analyze phone contents, so they were taken to the Brazos County Sheriff's Office to be downloaded. Reviewing the data from the devices, I located a dozen more images of child pornography.

I learned from Internet Crimes Against Children (ICAC) Task Force Agent Matthew Picken that I could apply for access to the National Center of Missing and Exploited Children Law Enforcement Services photograph database. After obtaining a login for the NCMEC portal, you can enter an image hash value to confirm if the file or image has been worked by another law enforcement agency. If the image has been previously worked, then NCMEC will provide you with contact information for the associated case agent. This is an incredible tool for helping determine if a questionable image is child pornography. In our case, 12 of the 14 images uploaded were found in the database as previously submitted by law enforcement. Sadly, the victims depicted in the photos remain unknown.

Of course, the images of children and animals being sexually abused made me sick to my stomach, but the hundreds of photos of children who were clothed, smiling, and playing sickened me almost as much. This is who Matthew Foster is: a pedophile and a predator to every child he would ever lay eyes on. I was shocked at how unsettling this seemingly benign evidence was and would surely be to a jury.

Foster takes a plea

By this point, our office was two weeks away from trial. All the subpoenas were served, the motions were filed, and the notices had been given. We were ready. The evidence against Foster was overwhelming. We just needed our young victim, Lacey, to take the stand and tell the jury what happened.

District Attorney Andria Bender met with the victim, now age 6, several times preparing for trial. After the meetings, Bender and Lacey's mother discussed the trial and the girl's testimony, and neither believed it would best serve the child to be forced to testify. We made a difficult judgment call to not put Lacey on the stand, and Foster's defense attorney was contacted.

Matthew Michael Foster accepted a plea agreement and pled guilty to aggravated sexual assault of a child. He was sentenced to 30 years' confinement in the Texas Department of Criminal Justice, and his conviction requires lifetime registration as a sex offender. Our office put a pedophile behind bars without our victim going through the trauma of trial. Our victim's family attended the plea and were extremely happy with the results.

Perhaps someone reading about this outcome might believe our investigative efforts were wasted. They were not! The prior victims agreeing to testify and finding the images of child pornography were the leverage we needed for Matthew Foster to plead guilty after more than a year in jail (and after having turned down our first plea offer). This statement is not an assumption—it is based on Matthew Foster's own words, recorded on a jail call to his mother, after agreeing to accept 30 years in prison.

We are a small county with minimal resources and a small budget. However, using our combined years of experience; creating relationships with victims, witnesses, and law enforcement officials across state lines; and digging just

The prior victims agreeing to testify and finding the images of child pornography were the leverage we needed for Matthew Foster to plead guilty after more than a year in jail (and after having turned down our first plea offer). This statement is not an assumption–it is based on Matthew Foster's own words, recorded on a jail call to his mother.

HIPAA in the county and district attorney's world

Mention the Health Insurance Portability and Accountability Act of 1996,[1] otherwise known as HIPAA, to someone in law enforcement or a county or district attorney's office and you'll likely receive one of a few responses:

By Lisa L. Dahm, LLM-Health
Assistant County Attorney and Privacy Officer in Harris County

"[expletive deleted]," "I don't have to worry about HIPAA because it doesn't apply to me," or "I can't ever get the medical records I need without a fight!" It's often accompanied by changes in a person's physical appearance: redness of the face and neck, clenched fists, increased and rapid heart rate, and an unwavering glare. You can't help but wonder which of these responses is correct.

Whether you're in law enforcement or in a prosecutor's office, I hope this article will help dispel common misunderstandings about HIPAA and clarify its actual requirements when it comes to making sure everyone can effectively do his or her own job. While I initially thought I could limit this article to HIPAA only, there are several Texas laws that must also be included and addressed, especially because one of the most frequent questions I hear from Texas prosecutors is, "What must my office do to comply with HIPAA?"

It's been my experience that it's easier to learn something when you see how it applies in the real world, so this article presents a fairly straightforward hypothetical about health information and then analyzes the issues it presents under HIPAA's Privacy Rule and several relevant Texas confidentiality statutes. It concludes with a "final answer" for each issue as to whether and how health information can be disclosed, plus what the requestor's office must do to comply with HIPAA and with Texas law.

The hypothetical

An assistant district attorney (ADA) is preparing his burglary case against a defendant. He issues a subpoena to the county hospital requesting the defendant's medical records; she had cut her arm on the glass door of a house she had broken into (allegedly to burgle) as she tried to flee from the homeowner. The homeowner heard someone breaking into her house and immediately called the police. The homeowner then chased the defendant into the backyard, tackled her to the ground, and held her until police arrived. The defendant was taken to the county hospital for treatment for her injuries and was then taken to the county jail.

The ADA also sends a subpoena for the homeowner's medical records to the hospital where she was treated for cuts and bruises she sustained during her fight with the defendant.

Important questions about the case:

- May the ADA get the defendant's medical records from the county hospital?
- May the ADA get the homeowner's medical records from the other hospital?
- If the ADA obtains copies of the medical records he's requested, must he protect the confidentiality of those records or take any special precautions with respect to handling or disposing of them?

The defendantŐs medical records. When the defendant was taken to the county hospital, she was treated like any member of the general public who presents for treatment: She was registered as a patient in the emergency room and received treatment for her injuries, and that

treatment was recorded in detail in her medical record. She was then discharged back to the police for transport to the county jail.

When the county hospital receives a request for the defendant's health information, the county hospital has an obligation (as a covered entity under both HIPAA and Texas law) to protect it. HIPAA applies only to "covered entities": 1) health plans, 2) healthcare clearinghouses, and 3) healthcare providers that transmit health information electronically in connection with HIPAA-defined transactions.[2] Under Texas Health & Safety Code Chapter 181, aka "Texas's HIPAA," the term "covered entity" is broader, covering not just those individuals and entities, but also any individual or entity that comes into possession of health information. Therefore, the county hospital must determine 1) whether HIPAA's Privacy Rule or Texas law will control the release of this individual's records in this situation, and 2) whether that law requires or permits the county hospital to produce the requested medical records to the ADA in accordance with a subpoena, or whether the county hospital must obtain the defendant's permission first.

It's important to understand that, unlike most federal laws, HIPAA does not always pre-empt state law. HIPAA will pre-empt a provision of state law only when the state law is both contrary to and less stringent than HIPAA.[3] Texas has a number of very specific statutes that deal with health information, and in several cases, Texas law is both contrary to and more stringent than HIPAA's Privacy Rule, so the county hospital must examine both HIPAA's Privacy Rule and the appropriate Texas law to determine which will control in this situation. For a comprehensive pre-emption analysis of Texas law that is routinely updated, see the Texas AG Pre-emption Analysis.[4]

HIPAA's Privacy Rule does not specifically address "releasing an individual's medical records to an ADA pursuant to and in accordance with a subpoena." However, HIPAA's Privacy Rule includes several potential exceptions that might apply so that a "covered entity," such as a hospital, need not obtain an individual's authorization before releasing that person's medical records to an ADA:

1) disclosures for judicial and administrative proceedings;[5]

2) disclosures for law enforcement purposes;[6] and

3) disclosures to avert a serious threat to health or safety.[7]

Of these three potential exceptions, the one most likely to apply in this particular situation is the judicial and administrative proceeding exception. Covered entities may disclose protected health information (usually referred to as PHI) "in the course of any judicial or administrative proceeding," in response to a court order or to a subpoena that is not accompanied by a court order *if* the covered entity "receives satisfactory assurance" that the subject of the PHI has been given notice of the request or that the requestor has made reasonable efforts to secure a qualified protective order for the PHI.[8] The covered entity may also release the records pursuant to the ADA's subpoena without receiving satisfactory assurance if the covered entity asks the defendant to authorize the release or the covered entity obtains a qualified protective order that includes the required elements.[9]

Confidentiality of hospital medical records is governed under Texas Health & Safety Code §241.151 *et seq*., and Texas Health & Safety Code §241.153(20) specifically addresses when a hospital can release an individual's medical records to an ADA. Texas Health & Safety Code §241.153(20) provides not only that a hospital may release a patient's records if the disclosure is "related to a judicial proceeding in which the patient is a party and the disclosure is requested under a subpoena issued under … the Texas Code of Criminal Procedure," but also that the hospital may disclose those records without obtaining the patient's authorization.[10]

According to the Texas AG Preemption Analysis, Texas Health & Safety Code §241.153(20) is related but not contrary to HIPAA's Privacy Rule so it is not pre-empted.[11] In this hypothetical situation, the county hospital can—and *must*—comply with both laws. Applying the judicial and administrative proceeding exception of HIPAA's Privacy Rule, the county hospital need not obtain authorization from the defendant, although it might seek one from her or notify her that the ADA has requested her records. Under Texas law, too, the county hospital can release the requested medical records to the ADA without having to obtain an authorization from the defendant, provided that the ADA's subpoena is signed by the clerk of the criminal district court in which the defendant

In reality, while the county hospital is permitted *to release the requested medical records solely because the ADA's subpoena is valid, it is important to note that 1) such a disclosure is not mandated, it's only allowed; and 2) occasionally, Texas hospitals will also require the ADA to provide a "HIPAA letter" or a "HIPAA affidavit" in addition to a subpoena before they will release the requested medical records.*

will be tried.[12]

In reality, however, while the county hospital is *permitted* to release the requested medical records solely because the ADA's subpoena is valid, it is important to note that 1) such a disclosure is not mandated, it's only allowed;[13] and 2) occasionally, Texas hospitals will also require the ADA to provide a "HIPAA letter" or a "HIPAA affidavit" in addition to a subpoena before they will release the requested medical records. The HIPAA letter or affidavit sets forth the conditions that must be met under HIPAA's Privacy Rule's law enforcement purposes exception before the covered entity can release an individual's PHI without first obtaining the individual's authorization to law enforcement.[14] The subpoena must specify that the information being requested is "relevant and material to a legitimate law enforcement inquiry," that the subpoena is limited in scope and that "[d]e-identified information could not reasonably be used." Covered entities that require HIPAA letters or affidavits in addition to valid subpoenas are in essence ensuring that their disclosure could be found proper under two exceptions to HIPAA's Privacy Rule.

The ADA will need to contact the homeowner directly and ask her to execute a "valid" HIPAA Authorization that will allow the hospital to release her medical records to him.

The homeownerŐs medical records. While the ADA can obtain the defendant's medical records without her written authorization under both HIPAA's Privacy Rule and Texas law, the hospital at which the homeowner was treated will not be able to provide her medical records to the ADA until the homeowner authorizes their disclosure. In the ADA's case against the defendant, the homeowner is a victim, not a party, so the exception allowed under Texas Health & Safety Code §241.153(20) does not apply to her.

HIPAA's Privacy Rule's disclosure to law enforcement for law enforcement purposes exception does not apply either because it allows a covered entity to disclose only information that will be used to identify and/or locate a "suspect, fugitive, material witness, or missing person,"[15] not a victim like the homeowner. Even if the homeowner is a "material witness," as in our hypothetical, the exception does not apply because the ADA already has her identity and knows where she lives. Therefore, HIPAA's Privacy Rule prohibits the hospital from disclosing the homeowner's entire medical record or even just the portion that documented her treatment for injuries she sustained during the fight with the defendant. HIPAA limits the information that can be disclosed for identification and location purposes solely to the individual's name, address, date and place of birth, Social Security number, blood type and Rh factor, type of injury, and any distinguishing physical characteristics (such as height, weight, gender, race, hair and eye color, facial hair, scars, and tattoos).[16]

Additionally, HIPAA's Privacy Rule's judicial and administrative proceedings disclosure exception would apply only if the homeowner is notified of the request and a protective order is obtained for her records. Thus, the ADA will need to contact the homeowner directly and ask her to execute a valid HIPAA Authorization that will allow the hospital to release her medical records to him. Such authorization must include the following core elements:

1) a detailed description of the information that is being requested;

2) the name of the individual or entity that has possession of the information;

3) the name of the individual or entity to which the information is to be disclosed;

4) the purpose for which the information is to be disclosed;

5) an expiration date or event; and

6) the individual's signature and date signed or, if signed by someone other than the individual, the signature of that individual, the date she signed, and a description of the authority of that individual to act on behalf of the individual.

A valid HIPAA Authorization must also include three statements:

1) that the individual has the right to revoke her authorization at any time;

2) that signing the authorization was not a condition of the individual's obtaining treatment, payment, enrollment, or eligibility for benefits; and

3) that if the authorized recipient of the individual's PHI re-discloses that information, the individual cannot hold the covered entity liable for the re-disclosure.[17]

Many covered entities prefer (or require) the requestor to use the covered entity's HIPAA Authorization. In some cases, the reason for this requirement is because the employees responsible for confirming an authorization is "valid," as required by HIPAA's Privacy Rule, are unfamiliar with forms other than those on which they have received training.

The ADAŐs duties to these medical records. Neither the ADA nor his office is a "covered entity" under HIPAA, so neither the ADA nor the prosecutor's office needs to comply with HIPAA's Privacy Rule. However, the office *is* a covered entity under Texas law;[18] thus, it must comply with Texas Health & Safety Code Chapter 181. Texas Health & Safety Code Chapter 181, also known as "Texas's HIPAA," contains significantly fewer provisions than HIPAA's Privacy Rule, and there are three major differences between the two:

1) the definition of "covered entity" (defined above),
2) the training that is required, and
3) permitted uses and disclosures.

Texas's HIPAA's "covered entity" is defined as any person who handles PHI, including a business associate, healthcare payer, governmental unit, information or computer management entity, school, health researcher, healthcare facility, clinic, healthcare provider, or person who maintains an Internet site.[19] Texas's definition is far broader than HIPAA's.

As far as required training goes, the prosecutor's office must provide training "regarding the state and federal law concerning protected health information as necessary and appropriate for the employees to carry out the employees' duties."[20] Note that HIPAA's Privacy Rule requires training of the covered entity's entire workforce, whereas Texas's HIPAA requires training only the entity's employees.[21] Neither HIPAA's Privacy Rule nor Texas Health & Safety Code Chapter 181 specify how frequently training must be conducted, only that it be provided "as necessary and appropriate" for individuals to carry out their duties for the covered entity, but most covered entities conduct HIPAA Privacy training annually.[22] Prosecutors who need training on HIPAA or Texas's HIPAA have a couple of options.[23]

The office must also have each employee sign a statement that he or she has attended the training and must maintain all of the signed statements "until the sixth anniversary of the date [each] statement is signed."[24]

Unlike HIPAA's Privacy Rule, which describes in some detail what a covered entity can do with PHI and how the covered entity must do it, the primary focus of Texas's HIPAA is on what the covered entity is *prohibited from doing* with PHI.[25] Under Texas's HIPAA, the prosecutor's office's sole affirmative obligation to the individuals whose PHI is obtained by and stored in the office is to notify them that their PHI is subject to electronic disclosure.[26] Nonetheless, the fact that the prosecutor office is required to conduct training that addresses both state and federal law could be interpreted to mean that Texas covered entities are expected to protect the PHI in their possession. The Texas Attorney General is responsible for enforcing Texas Health & Safety Code Chapter 181 and has the power to seek injunctive relief and impose civil penalties against a Texas covered entity for a violation of the law. In addition, §181.202 provides that "a covered entity that is licensed by an agency of this state is subject to investigation and disciplinary proceedings, including probation or suspension by the licensing agency." While the likely intent of the Texas Legislature was that §181.202 would apply only to covered entities that were licensed healthcare individuals and entities, the section could also be interpreted to include attorneys who use and/or access PHI. While state attorneys general can enforce HIPAA, it is not common—only four have ever done it, and Texas's AG has never taken any such action.

Evaluating and adopting the relevant administrative requirements in HIPAA's Privacy Rule[27] would certainly help the prosecutor's office demonstrate it had taken "reasonable steps" to protect the PHI in its possession.

Discovery in criminal cases

Many prosecutors reading this article may wonder what, if anything, they must do to protect the health information they obtain given their discovery obligations under the Michael Morton Act.[28] The good news is, provided that the ADA has properly obtained that information in accordance with HIPAA's Privacy Rule and with Texas law, and provided that the prosecutor's office has implemented "reasonable steps" to protect the health information in its possession, health information need not be treated any differently from any other documents, papers, or written or recorded statements related to the criminal case during discovery.

The ADA is not a covered entity under HIPAA's Privacy Rule, so the prosecutor is free to disclose health information without regard to HIPAA's Privacy Rule. The ADA is a covered en-

Covered entities rightly fear being held liable for those penalties, so they take extra care to ensure that every disclosure is proper, which occasionally makes even the simplest release take longer than it should.

tity only under Texas's HIPAA, and Texas's HIPAA does not prohibit the ADA from re-disclosing health information, only from selling it, using the health information for marketing purposes, or re-identifying the individual from the health information.[29] Because disclosing the health information in accordance with the Michael Morton Act is not one of the prohibited disclosures under Texas's HIPAA, prosecutors should not be concerned about potential enforcement activities, either under HIPAA or under Texas's HIPAA, with respect to their providing health information to the defense during discovery in accordance with the Michael Morton Act.

Conclusion

HIPAA's Privacy Rule, and to an extent Texas law, requires covered entities to protect the health information in their possession, and these laws subject those covered entities to significant civil and criminal penalties[30] if they fail. Covered entities rightly fear being held liable for those penalties, so they take extra care to ensure that every disclosure is proper, which occasionally makes even the simplest release take longer than it should.

Law enforcement and prosecutors should recognize they're more likely to receive the health information they request when they 1) convey their identity and the fact that they have the authority to obtain the information, 2) describe their reason for needing the information (i.e., describe the purpose of the disclosure), 3) ensure that the facts and circumstances of their request meet the criteria of an authorized disclosure, and 4) make their request in a professional and respectful manner. And when law enforcement and prosecutors come into possession of health information, they must recognize that Texas law imposes an obligation on their employers to properly train employees and take "reasonable steps" to protect and safeguard that information. ❇

Endnotes

Please note: The views and opinions expressed in this paper are those of the author and do not necessarily reflect the official policy or position of Harris County.

[1] Pub. L. No. 104-191, 110 Stat. 1396 (1996).

[2] See 42 U.S.C. §1320d-1(a). See also 45 C.F.R. §160.103.

[3] See 45 C.F.R. §160.200 *et seq*.

[4] Find it at https://www.texasattorneygeneral.gov/files/agency/hipaa.pdf.

[5] 45 C.F.R. §164.512(e).

[6] 45 C.F.R. §164.512(f). Disclosures that are allowed for law enforcement purposes are to be made to a law enforcement official 1) pursuant to laws that require reporting of certain types of wounds or injuries; 2) pursuant to court orders, court-ordered warrants, or a subpoena or summons signed by a judicial officer; 3) provided the information disclosed is limited and will be used only to locate and/or identify a suspect, fugitive, material witness, or missing person; 4) when the individual is suspected to be a victim of a crime; 5) to advise law enforcement that a decedent might have died as a result of criminal conduct; 6) to report a good faith belief that a crime was committed on the covered entity's premises; or 7) to report a real or suspected crime in an emergency.

[7] 45 C.F.R. §164.512(j). Disclosures that are allowed to avert a serious threat to health or safety may be made to "prevent or lessen a serious and imminent threat to the health or safety of a person or the public" or "[i]s necessary for law enforcement authorities to identify or apprehend an individual."

[8] 45 C.F.R. §164.512(e)(1).

[9] 45 C.F.R. §164.512(e)(1)(vi).

[10] Texas Health & Safety Code §241.153(20).

[11] Texas AG Preemption Analysis, supra note 6, at 225.

[12] Tex. Code Crim. Proc. Art. 24.03. Because the defendant is the individual on trial, she is a "party to the judicial proceeding" as required for the county hospital to release her records to the ADA under Texas Health & Safety Code §241.153(20).

[13] Texas Health & Safety Code §241.153.

[14] See 45 C.F.R. §164.512(f)(1)(ii)(C).

[15] See 45 C.F.R. §164.512(f)(2).

[16] *Id*.

[17] 45 C.F.R. §164.508(c)(1)–(2).

[18] Texas Health & Safety Code §181.001(b)(2)(B).

[19] *Id*.

[20] Texas Health & Safety Code §181.101(a).

[21] See 45 CFR §164.530(b)(1); Texas Health & Safety Code §181.101(a).

[22] See Daniel J. Solove, HIPAA Training Requirements, Frequently Asked Questions, Teach Privacy, available at https://teachprivacy.com/hipaa-training-requirements/ (last visited July 31, 2018).

[23] This article's author has recorded two different videos accredited for MCLE hours through the Texas Bar. One is a 45-minute video on HIPAA only; it's available at http://www.harriscountycao.org/ hipaa-training-program. The other is a 75-minute video at http://www.harriscountycao.org/hipaa-181-training; it covers both HIPAA and Texas's HIPAA. Each one has a link to YouTube in case the video can't be viewed through the Harris County website. There's also a form at the bottom of each page that viewers can complete to receive MCLE hours.

[24] Texas Health & Safety Code §181.101. HIPAA's Privacy Rule requires those statements be maintained for a minimum of "six years from the date [the statement is signed]." 45 CFR §164.530(j)(2).

[25] See Texas Health & Safety Code, Chapter 181, Subchapter D. A covered entity cannot 1) re-identify or attempt to re-identify an individual based on his or her PHI unless the covered entity obtains the individual's consent or authorization; 2) use PHI for marketing purposes; or 3) sell PHI for direct remuneration. A covered entity is also prohibited from electronically disclosing an individual's PHI without first obtaining his or her authorization unless the disclosure is for purposes of treatment, payment, or healthcare operations. Note that legal offices are not "custodians" of the records they receive for case preparation, so they are not bound by the authorization requirement. In the electronic service

Cold cases are no match for collaboration

In January 2017, just after new Travis County District Attorney Margaret Moore and her administration took office, we were asked to attend a meeting with the family of a victim from one of the worst homicide cases in Travis County history.

By Keith Henneke
Assistant District Attorney, and
Mindy Montford,
First Assistant District Attorney, in Travis County

Commonly referred to as the Yogurt Shop Murders, the 1991 crime involved four teenage girls who were sexually assaulted and murdered in a frozen yogurt shop where two of the girls worked part-time. The perpetrators started a fire before fleeing the store; much of the physical evidence was destroyed when firefighters doused the scene to extinguish the flames. Eight years passed before any suspects were named.

In 1999, the Austin Police Department arrested four men for committing the horrific crimes. A long road of litigation and appellate rulings ensued, resulting in capital murder convictions for two of them and the dismissal of charges against the other two. In 2006 and 2007, the Court of Criminal Appeals reversed and remanded the capital-murder cases back to Travis County for new trials based upon the admissibility of a defendant's confession against a co-defendant. As the prosecution team geared up for the retrials, prosecutors decided to retest certain items taken from the original crime scene using DNA technology that had been previously unavailable to law enforcement. The lab was able to develop a profile using YSTR technology on a vaginal swab taken from one of the victims. The profile did not match any of the original defendants. Law enforcement tested everyone who had worked the crime scene as well as various friends and family of the victims and excluded everyone who submitted a comparison sample.

In 2008, the prosecution was left with little choice but to dismiss the murder cases against the two defendants pending further investigation. The families of the victims were faced with years of unanswered questions and a fear that their daughters' killers would never face justice.

By January 2017, when Margaret Moore took office, the victims' families were understandably frustrated, confused, and fed up with the criminal justice system. With a just-elected district attorney, the families wanted answers and assurance that the new administration would continue investigating the cases and fully prosecute the killers. They were afraid the cases would be brushed aside and forgotten. What struck First Assistant Mindy Montford the most about this meeting was the families' palpable and raw emotion, as if the crimes had occurred a month ago, not 25 years before. To them, time had stood still, and the clock would not restart until they had justice for their daughters. District Attorney Moore did not waver in her response to the families, telling them, "This is an ongoing investigation, and we will not let up in our efforts to prosecute this case."

Immediately following the meeting, Ms. Moore formed a trial team to work alongside the detectives from the Austin Police Department's (APD's) Cold Case Unit, who had already been re-examining the Yogurt Shop Case. Prosecutors and detectives began meeting regularly to go through the evidence. The DA's Office set aside office space for the newly formed "Yogurt Shop

Team" as a "war room" to store evidence and house the detectives. (As of this writing, we are waiting on additional forensic evidence in the Yogurt Shop Case and exploring all leads.)

The benefits of collaboration with the Cold Case Unit were quickly realized, and our office decided to do the same thing with other unsolved cases. The Cold Case Unit was established by APD in 2000, but cases were staffed with prosecutors only intermittently, not as part of an organized effort between the agencies. One of the goals under our new administration was to expand communication and work more closely with law enforcement in the initial stages of criminal investigations. DA Moore began designating prosecutors to assist police officers in each patrol region of the city, and she also began meeting regularly with the Travis County Sheriff, County Attorney, and APD Chief to keep the lines of communication open and better coordinate joint law enforcement efforts. Our office also established two on-call rotation lists where experienced prosecutors were made available to law enforcement on a 24-7 basis for legal assistance. Offering to collaborate with APD on pending cold case investigations was yet another way to improve our office's working relationship with law enforcement.


Debra Sue Reiding

In 2018, the cold case collaboration effort was in full swing and was placed under the direct supervision of First Assistant District Attorney Mindy Montford, one of the co-authors of this article. More than 20 prosecutors have volunteered to assist detectives with their ongoing investigations, and Montford works regularly with the Cold Case Unit to oversee the assignment of individual prosecutors and supervise the cases' eventual prosecution. It was important to this administration that the police, victims' families, and the community know how seriously we take these cases. We felt the need to give them the utmost attention by placing them under the direct supervision of the top of the office organization. Montford says it is probably one of the most rewarding aspects of her job.

Success stories so far

The decision to put together this unit and work closely with detectives on specific cases has proven very helpful in moving the cases forward. Before the creation of the unit, detectives would work the cases and bring them to the DA's Office on an *ad hoc* basis when they thought their investigation was complete, but that could be frustrating if the prosecutor did not think there was enough evidence to move forward. Now, prosecutors collaborate from the beginning, and that close cooperation has yielded some impressive results so far.

One of the first cases handled under the new partnership was the 1979 rape and murder of 18-year-old Debra Sue Reiding (she went by Debbie). Assistant District Attorneys Keith Henneke (this article's other co-author) and Brandy Gann were assigned to the case, and they worked with APD detectives for several months. Back when Debbie was first killed, detectives believed her former coworker Michael Galvan was involved in her murder, but they lacked evidence to charge him with the crime. We brainstormed different potential sources of evidence, assisted with search and arrest warrants, and obtained records via grand jury subpoena, among other things.

Advances in DNA technology ended up cracking the case, leading investigators back to Galvan, and in May 2018, a grand jury returned a capital murder indictment against him. We continue the conversation about the case, though—about the holes in the investigation and what information we need to move forward to trial. For example, one of the big difficulties with all cold cases, especially one as old as the Galvan case, is that they happened so long ago that witnesses, both law enforcement and civilian, have moved out of the area, changed their names, and passed away. Businesses have closed. Just because a fact was known and easily proven 40 years ago does not mean it will be so today. In the Galvan case, in addition to trying to solve the crime, we reminded the detectives that the information they already know will have to be re-established by admissible evidence or testimony, which can require some legal creativity, and we helped them come up with different ways of obtaining that same information with current evidence and testimony.

ADA Henneke describes working on the Galvan case as one of the most interesting and fulfilling assignments he's had in his legal career.

Before the creation of the unit, detectives would work the cases and bring them to the DA's Office on an ad hoc *basis when they thought their investigation was complete, but that could be frustrating if the prosecutor did not think there was enough evidence to move forward. Now, prosecutors collaborate from the beginning, and that close cooperation has yielded some impressive results so far.*

In fact, all of the volunteer prosecutors are impressed by the dedication of the APD detectives who are working on solving crimes 10, 20, and even 40 years after they were committed, and of course such devotion means the world to those whose lives were irreparably changed by these horrible events.

Not all cold cases are decades old. For law enforcement purposes, a murder case or a case involving a missing person that has not developed sufficient evidence to charge a suspect can be considered a cold case. For example, Robert Morales was found stabbed to death in 2014. Detectives originally arrested David Diaz in 2015 for the murder, but the charges were later dropped due to insufficient evidence. The case was assigned to the Cold Case Unit for additional investigation, and in 2017, new witnesses who actually saw the murder and identified David Diaz as the suspect were located. Assistant District Attorney Amy Meredith stepped up to the plate and assisted the Cold Case Unit with the follow-up investigation and prosecution of Diaz. The case is now pending trial in district court.

Prosecutors and detectives will continue working together to help bring closure to other families. The Cold Case Unit currently has more than 200 unsolved murder and missing person cases under investigation, with the oldest case dating back to 1967. Sgt. Ron Lara, who supervises the unit within APD, says, "The collaborative efforts between the Austin Cold Case Unit and the new leadership under the Travis County District Attorney's Office have taken us in a successful direction, offering a renewed hope to all victims and their families. I am very proud to work with the men and women in our unit who are so committed and dedicated to solving the most challenging cases."

TOP PHOTO: Members of the APD Cold Case Unit with Mark Nunn (second from right), a representative of Debra Sue Reiding's family. ABOVE: Prosecutors and police collaborating in a room at the DA's Office. LEFT: Cold Case Unit detectives are pictured with the members of the DA's Office who are volunteering their time with the unit.

Getting evidence from cars

Several exceptions to the warrant requirement—including the appositely named "vehicle exception," consent, plain view, and search incident to arrest—may allow search of a vehicle without a warrant.

By Diane Beckham
TDCAA Senior Staff Counsel
Excerpted from Warrants *(TDCAA © 2018), an updated edition available for purchase at www.tdcaa.com.*

While courts generally prefer that all searches be accomplished with a warrant, the U.S. Constitution mandates only that searches be accomplished reasonably. From this principle, courts have established several exceptions to the warrant requirement for specific situations in which courts have found that requiring officers to obtain a warrant would be unnecessary.

Vehicle exception

Sometimes known as the "automobile exception" or the "*Carroll* doctrine" from the name of the case that first established the exception,[1] this exception revolves around the idea that drivers and occupants of cars have a diminished right of privacy in vehicles, making searches without a warrant reasonable when officers have probable cause to search.

While the amount or level of probable cause is the same as required for a warrant, the Court stopped short of requiring a warrant to search a vehicle because of the exigent circumstances presented by the mobility of the place to be searched (the vehicle). In other words, a suspect could quickly move a vehicle out of the area if the police had to wait for a warrant. *Carroll* established a two-prong test as a predicate to the warrantless search:

1) probable cause and
2) exigent circumstances.

Time, difficulty of application in complex circumstances, and caselaw eroded *Carroll*'s second prong and today, the rule is: If a car is readily mobile and probable cause exists to believe it contains contraband, searching it without a warrant is reasonable under the Fourth Amendment (as long as officers do not make an unauthorized entry into a house or curtilage to search it).[2]

Probable cause must not focus on a specific container within the vehicle but on the vehicle itself as a large container. If the initial probable cause is that contraband is only in a specific container within a vehicle, then a search only of that container is justified.[3] If contraband is found during this initially limited search, officers should consider whether it establishes probable cause to continue searching the vehicle. Conversely, if the probable cause is that the contraband is somewhere in the vehicle but its exact location is unknown, a warrantless search of the entire vehicle is permitted with the only limitation being the capacity of a container or cavity to contain the evidence sought.[4]

Time limits

For some of the warrantless exceptions discussed in this article, officers should be aware of one other issue that has recently received great attention from the courts: the amount of time an officer can detain a vehicle on the road. The rule is that once the original justification for a stop has been completed, the detention must come to an end unless there is reason to suspect an occupant in the vehicle is committing an offense independent of the initial reason for the stop. To continue investigating a suspect, an officer must have developed a reasonable suspicion or probable cause that further criminal activity is afoot.[5]

Courts have not established a set amount of time beyond which an officer cannot detain a suspect during a temporary detention.[6] Instead, courts look to whether the detention went beyond the time reasonably required for a diligent officer to accomplish the objective purpose of

the stop.

In the vehicle realm, one recent line of cases on this issue involves K9 sniff cases. If a traffic stop is concluded (e.g., the officer has written a warning or citation and given it to the driver), without evidence to support reasonable suspicion of other criminal conduct, an officer cannot wait for a K9 unit to come and inspect the car.[7] Any continued detention will be presumptively unreasonable without different information to justify the ongoing detention. For instance, if an officer has a reasonable suspicion of drug activity, he can prolong the traffic stop to wait for a K9 and can use the K9 to build probable cause to search the vehicle.[8]

In general, the safest course of action is to presume the Court's reasoning in Rodriguez *applies to any activity–not just dog sniffs–that delays conclusion of the traffic stop after the purpose of the initial stop has been resolved.*

In general, the safest course of action is to presume the Court's reasoning in *Rodriguez* applies to any activity—not just dog sniffs—that delays conclusion of the traffic stop after the purpose of the initial stop has been resolved.

Consent

An individual who has a reasonable expectation of privacy in a place to be searched may waive that right and permit law enforcement officials to conduct the search without a warrant (or probable cause).[9] Before evidence obtained under the consent exception may be admitted in court, the State must establish:

1) the authority of the consenting person;[10]
2) a voluntary, informed waiver, free of coercion;[11] and
3) the scope of the consent to search.[12]

If an officer's request for consent to search addresses a specified area, consent is presumed to be limited to that area. If the limits of a search are not specified, the courts will define the scope by what they believe a reasonable citizen would have understood under the circumstances.[13] While not required, the best method to establish the pre- requisites for a consent search is to get them in writing.

In vehicles, the driver is typically the party who can consent to a search. Specific facts can change this presumption, but in most cases a driver's consent will trump a passenger's refusal, and a driver's refusal will trump a passenger's consent.[14] If a person flees from his vehicle, he loses standing to object to its search.[15] The scope of a consent search can be the entire vehicle, including opening containers in the vehicle if the officer's request and the suspect's consent do not limit the scope of the search.[16]

Plain view

Experience teaches that more evidence is seized without a warrant—often under circumstances in which seizing officers were not expecting to find it—than pursuant to any other procedure authorizing lawful searches and seizures. When justifying these seizures, officers and prosecutors rely on authority of an exception to the warrant preference known as the plain view doctrine.

This exception comes into play when officers inadvertently discover evidence, thereby disposing of the need to search for it.[17] The plain view exception has two requirements: 1) the seizing officer must have a legitimate presence in the place where he is when he first views the evidence; and 2) the item seized must be immediately recognizable or readily apparent as probably being contraband, stolen property, or otherwise useful evidence of a crime.[18]

Search incident to arrest

If an officer has lawfully placed an individual under full custodial arrest, the officer may search the suspect, the area within the suspect's immediate control or reach, and containers within the control or reach of the suspect.[19] The only prerequisite is that the suspect be arrested lawfully, whether with a warrant or without. "Arrest" in this exception means full custody, not just detention or citation for a traffic offense.[20]

The scope of a search incident to arrest includes anything within the suspect's area of possible reach or within his immediate control, including an area from which the suspect might get a weapon or destroy evidence.[21] The suspect's wingspan follows him as he moves, so if officers move the suspect to a new location, officers may search areas within the suspect's new area of wingspan.[22] When searching a vehicle pursuant to this exception, the officer must believe that the vehicle may contain a weapon or evidence of the incident arrest.[23] If while performing a search incident to arrest an officer finds evidence of another offense, it may justify an additional or more thorough search.[24]

Inventories

Inventories are not searches. Unfortunately, the courts often use the term "inventory search,"

Chart of Vehicle Searches

Method	Notes
Consent (no warrant)	Requirements for warrantless exception: 1) expectation of privacy by the person consenting; 2) consent must be voluntarily given; and 3) scope of consent must encompass place searched [*Schneckloth v. Bustamonte*, 412 U.S. 218 (1974); see also *U.S. v. Mendoza-Gonzales*, 318 F.3d 663 (5th Cir. 2003) (consent to search 18-wheeler trailer included opening sealed boxes, without driver limiting scope)].
Automobile exception (no warrant)	• Requirements for warrantless exception: 1) probable cause that contraband is in vehicle; and 2) vehicle is readily mobile [*Carroll v. U.S.*, 267 U.S. 132 (1925)]. • Scope of search includes the trunk and any containers reasonably corresponding to the size of contraband sought [*U.S. v. Ross*, 456 U.S. 798 (1982)], including passengers' belongings [*Wyoming v. Houghton*, 526 U.S. 295 (1999)]. • "*Carroll* doctrine" also allows officers to tow a car to the station and search it later [*Chambers v. Maroney*, 399 U.S. 42 (1970)] but does not allow warrantless entry of home or curtilage to search a vehicle. *Collins v. Virginia*, 201 L.Ed.2d 9 (2018).
Search incident to arrest (no warrant)	• Requirements for warrantless exception: 1) lawful arrest pursuant to warrant or valid warrantless arrest exception (see CCP Ch. 14); and 2) full custodial arrest of person to be searched [*Chimel v. California*, 395 U.S. 752 (1969)]. • Scope of search includes anything within the defendant's area of possible reach or immediate control [*Arizona v. Gant*, 556 U.S. 332 (2009)] or when reasonable to believe evidence of the offense may be found in the vehicle [*Gant*, 556 U.S. at 354; *State v. Sanchez*, 538 S.W.3d 545 (Tex. Crim. App. 2017) (evidence of offense includes offenses for which there is probable cause, even if no formal arrest yet)].
Inventory (no warrant)	• Requirements for warrantless exception: 1) Property inventoried must lawfully be in police custody; 2) department must have established inventory procedures; 3) officer must follow established procedures; and 4) inventory must not be subterfuge for search [*South Dakota v. Opperman*, 428 U.S. 364 (1976)]. • Search of locked vehicles permissible; closed container search permissible under federal law but questionable in Texas [*Autran v. State*, 887 S.W.2d 31 (Tex. Crim. App. 1994)]. • Inventory exception includes impounding a vehicle to ensure its protection if the driver is arrested. [*Colorado v. Bertine*, 479 U.S. 367, 375 (1987)].
Plain view (no warrant)	Requirements for warrantless exception: 1) viewing officer must have lawful vantage point when he first sees the evidence; 2) item must be immediately recognizable as contraband or evidence of a crime; and 3) officer must have lawful right of access to the evidence [*Minnesota v. Dickerson*, 508 U.S. 366 (1993)].
Administrative search (no warrant)	Under Occupations Code §2302.0015, officers may perform inspections of junked motor vehicles and parts if: 1) officer is authorized to enforce these administrative rules and regulations, and 2) officer limits search to procedures necessary to enforce regulations.
Court order for "black box" [Trans. Code §547.615]	Application for court order to seize Airbag & Electronic Control Module (ACM) must: 1) allege offense committed; 2) describe the car and include the VIN; and 3) list specific targets of search, such as speed the vehicle was traveling and braking information for five seconds before algorithm enabled, driver's safety belt status, and ignition cycles of the vehicle [see Ch. 3: DWI in the *Warrants* manual].
Warrant for car itself as evidence [CCP Art. 18.02(a)(10)]	Use (a)(10) warrant when officers seek to disassemble a car and view parts of it (e.g., brake system in an intoxication manslaughter case).
Warrant for the car as contraband subject to forfeiture under CCP	• Affidavit must include: 1) detail qualifying the offense as one covered by Ch. 59; 2) describe item

but it is an oxymoron. By definition, a search in the Fourth Amendment context is a quest for evidence of an offense. An inventory is an administrative procedure designed to identify the presence of property of value for the mutual protection of the owner and others who may have temporary custody of the property.[25] The key difference here is temporary custody. Evidence of an offense is seldom returned to the individual from whom it is taken; inventoried property is usually intended to be returned after temporary custody for official purposes.

Inventories are not searches. Unfortunately, the courts often use the term "inventory search," but it is an oxymoron.

If the courts determine that an inventory was used as a subterfuge for an otherwise unjustified search, any evidence found will be suppressed. One of the ways to defeat this subterfuge claim is to demonstrate the existence of established procedures and guidelines for inventories under the circumstances related to the case in issue.[26]

Warrants

In some situations, no warrantless exception will apply to justify a search of a vehicle. For example, the second prerequisite for applicability of the vehicle exception is that the vehicle be "mobile," the remnant of the original exigency requirement established by *Carroll*. If the vehicle has been destroyed in a collision, for example, it is no longer mobile, and prudence would suggest a search warrant, notwithstanding certain probable cause.

Another example involving a vehicle search warrant would be when there is potential damage required to search the vehicle, such as removing a part of it (such as a brake system to investigate an intoxication manslaughter or a panel to search for drugs) that would make it advisable for a magistrate to review the decision to disassemble the vehicle.

Depending on the justification for the search, a variety of subsections of Code of Criminal Procedure Art. 18.02(a) can be used to obtain a warrant to search for and seize vehicles or items contained in that vehicle. For instance:

- A search for certain types of contraband (such as an illegal weapon or drugs) that officers have probable cause to believe can be found in the suspect's vehicle can be subject to a warrant issued under Art. 18.02(a)(1)–(9).
- A search of a vehicle may be justified via a warrant under Art.18.02(a)(10) if officers have probable cause to believe a weapon used in an underlying offense can be found in the suspect's car, along with blood, clothing, and shoes, or if they need to seize the car's "black box" to get driving data captured at the time of a crash.
- A warrant to seize a vehicle for forfeiture may be issued under Art.18.02(a)(12) when officers have probable cause to believe the vehicle was used in the commission of an offense for which asset forfeiture is available, such as a drug transaction.
- A search of premises for specific contraband under a warrant issued under Art.18.02(a)(1)–(9) can also include language in the warrant to search vehicles on the premises if it is reasonable to believe the item sought might be inside a vehicle.

Remember, the "vehicle exception" requires probable cause as a predicate. That same probable cause can always be reduced to writing in an affidavit for a search warrant. Doing so routinely, however, sets precedent for ignoring a valuable tool granted to law enforcement by the United States Supreme Court with warrantless exceptions that may apply.

Things inside the vehicle

As discussed above, a number of valid exceptions to the warrant requirement may justify seizing a vehicle and holding it until officers have finished searching all justified places or components of the car. But the better practice is obtaining a warrant when officers hold a vehicle for a protracted period, especially when officers intend to probe, test, examine, and even disassemble the vehicle (as in an impaired driving case). In this situation, it is recommended that officers seek a warrant under Art.18.02(a)(1)–(9) or (a)(10) for searching the car.

Search object: contraband within the vehicle [Art. 18.02(a)(1)Ð(9)]. Officers may develop probable cause to believe a certain car will contain narcotics. For instance, officers may want to search for packaged drugs by:

- removing the gas tank;
- removing the rims from the tires; or
- tearing the panels off the car to search in hidden spaces.

While a warrantless exception (such as the vehicle exception) may justify searching certain parts of the car during a lawful stop, as the level of intrusiveness into the vehicle increases, officers may want to consider a warrant to gain access

to parts that cannot be viewed in plain sight.[27] A warrant under Art.18.02(a)(7) could be used to search for drugs, for example.[28]

Similarly, a warrant under other subsections of Art.18.02(a) could be used to search for other contraband described in (a)(1)–(9).

Search object: non-contraband within a vehicle [Art. 18.02(a)(10)]. Other items that officers may want to seize from a vehicle are not illegal to possess—for instance, a vehicle's brake system or black box data recorder (to investigate an intoxicated driving crime). In those instances, officers should instead use Art.18.02(a)(10) (for "mere evidence") to seize potential evidence from a vehicle that is not contraband.[29]

Subsection (a)(10) warrants serve a unique purpose in criminal case investigations: to find evidence after a crime has been committed and discovered. When investigators can establish a probability that relevant evidence is located at or in a Fourth Amendment-covered site (such as a vehicle), a warrant issued under subsection (a)(10) can be the ideal tool for an officer to go in and remove critical evidence that tends to prove a crime was committed and/or that a particular person has committed a crime.

Art.18.02(a)(10) warrants can be used in vehicle search situations to obtain things such as:

- parts from within a vehicle (such as a brake system or black box recorder) as part of a "vehicle autopsy" to establish evidence to show the suspect was driving while intoxicated when he crashed into another car;
- blood or gunshot residue that might be transferred from a weapon or found on a steering wheel or other locations in the passenger compartment of a car touched by a suspect as evidence that the suspect committed a murder; and
- blood from a DWI suspect.

Note that some items in a vehicle—such as a GPS system or even the car's stereo system if it can also operate as a computer—might be seized under an 18.02(a)(10) warrant, but searching the contents for digital evidence may also require a court order under Code of Criminal Procedure Art. 18.20 (renumbered as Chapter 18A effective Jan. 1, 2019). Note that warrants issued under Art.18.02(a)(10) and (a)(12) have limitations on which magistrates may sign them.[30]

Vehicles subject to forfeiture

Code of Criminal Procedure Chapter 59 allows criminal assets to be seized and forfeited in Texas under limited circumstances, and warrants for items subject to forfeiture can be seized under Art.18.02(a)(12) warrants. All forfeited property must first fall within the definition of "contraband" as defined in Art.59.01.

A vehicle may be subject to a warrant under Subsection (a)(12) under scenarios including the following:

- as property used (or intended to be used) to commit an offense named in Chapter 59 (including any first- or second-degree felony and certain sex-related or property crimes);
- as property acquired with proceeds of crime (if the vehicle was bought with money from drug trafficking, for instance);
- as property used or intended to be used to facilitate sex crimes, trafficking, or smuggling.

Under most circumstances, property that may be classified as contraband under Chapter 59 will be seized incident to the arrest of an offender whose use of the property is what causes it to receive the "contraband" classification in the first place. However, if the vehicle is not in control of the offender at the time of arrest, as in the Art.18.02(a)(10) example above, a warrant pursuant to Art.18.02(a)(12) should be used to seize the vehicle.

Note that warrants issued under Art.18.02(a)(12) have the same limitations as subsection (a)(10) warrants regarding which magistrates may sign them.

Searches of premises that includes a vehicle

The courts have been clear that merely including places or things within affidavit and search warrant descriptions does not automatically bring them within the authorized scope of the search.[31] For example, just because the affidavit language includes "vehicles" to be found on the premises, not all vehicles found there at the time the warrant is executed may be legitimately searched. Officers must first determine whether in fact the vehicles are within the control of the suspected party and whether it is reasonable that the party may have secreted within these vehicles the specific evidence authorized as the object of the search. Seldom, if ever, will the probable cause explanation in the affidavit make it likely that all vehicles driven by individuals who have no

Not all vehicles found there at the time the warrant is executed may be legitimately searched. Officers must first determine whether in fact the vehicles are within the control of the suspected party and whether it is reasonable that the party may have secreted within these vehicles the specific evidence authorized as the object of the search.

control over the premises, but happen to be there at the time the warrant is executed, contain the object of the search.

A final word on vehicles: If the suspected party is known to control and operate particular vehicles, one or more of those vehicles will probably be found on the premises to be searched, and the object of the search is small enough to be contained within such vehicles, then go ahead and describe those vehicles specifically as if they were structures within the target perimeter. While the usual parking places for the suspected party's vehicles may be on or within the perimeter of the described premises—and therefore included within the catch-all phrase for curtilage—sometimes they will not be there at the time officers go to execute the search warrant.

Also, if the place to be searched is in a multifamily complex, such as an apartment, townhome, or condominium, the suspected party's vehicle may be located in a common parking area substantially separate and distanced from the residential premises to be searched. Specifically describing these vehicles insures that they come within the warrant's authorized scope regardless of where they are at the time the warrant is executed. Again, the probable cause information should establish that each described vehicle is operated and controlled by the suspected party and is just as likely a repository for the object of the search as any other location on the premises. ❇

Endnotes

[1] *Carroll v. United States*, 267 U.S. 132 (1925).

[2] *Pennsylvania v. Labron*, 518 U.S. 938 (1996); *Maryland v. Dyson*, 527 U.S. 465 (1999); *State v. Guzman*, 959 S.W.2d 631 (Tex. Crim. App. 1998); see also *Collins v. Virginia*, 201 L.Ed.2d 9 (2018) (automobile exception does not allow warrantless entry into house or curtilage to search vehicle); *Byrd v. United States*, 138 S.Ct. 1518 (2018) (someone in otherwise lawful possession and control of rental car has reasonable expectation of privacy in it, even if rental agreement does not list him as authorized driver).

[3] *California v. Acevedo*, 500 U.S. 565 (1991).

[4] *United States v. Ross*, 456 U.S. 798 (1982) (the right to search an automobile contains with it the right to open any container found as a result of that search just as the right to search a room within a house contains implicit authority to open and search all drawers and containers in the room); *Wyoming v. Houghton*, 526 U.S. 295 (1999); see also *United States v. Drayton*, 536 U.S. 194 (2002) (*Carroll* applies only to luggage that is in a car).

[5] *Rodriguez v. United States*, 135 S.Ct. 1609 (2015); *Fisher v. State*, 481 S.W.3d 403 (Tex. App.–Texarkana, pet. ref'd).

[6] *Ohio v. Robinette*, 519 U.S. 33 (1996); *United States v. Sharpe*, 470 U.S. 675 (1985); see also *Edmond v. State*, 116 S.W.3d 110 (Tex. App.–Houston [14th Dist.] 2002, pet. ref'd) (detention reasonable for period of time no longer than required to ask two questions: whether defendant was carrying drugs and for consent to search); *Leach v. State*, 35 S.W.3d 232, 234-36 (Tex. App.–Austin 2000, no pet.); *United States v. Brigham*, 382 F.3d 500, 511 (5th Cir. 2004) (en banc) ("There is … no constitutional stopwatch on traffic stops. Instead, the relevant question in assessing whether a detention extends beyond a reasonable duration is 'whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly,'" quoting *Sharpe*, 470 U.S. at 686).

[7] *Rodriguez*, 135 S.Ct. 1609.

[8] *Ramirez-Tamayo v. State*, 537 S.W.3d 29 (Tex. Crim. App. 2017).

[9] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[10] *United States v. Matlock*, 415 U.S. 164 (1973); *Frazier v. Cupp*, 394 U.S. 731 (1969).

[11] *Allridge v. State*, 850 S.W.2d 471 (Tex. Crim. App. 1991); *Meeks v. State*, 692 S.W.2d 504, 509 (Tex. Crim. App. 1985).

[12] *Florida v. Jimeno*, 500 U.S. 248 (1991) (extent of a consensual search may be limited as to time, space, or geography by the consenting individual); *Simpson v. State*, 29 S.W.3d 324, 330 (Tex. App.–Houston [14th Dist.] 2000, pet. ref'd) (suspect must make request to limit consent to exclude any specific parts of the car).

[13] *Jimeno*, 500 U.S. at 251; *United States v. Mendoza-Gonzalez*, 318 F.3d 663 (5th Cir. 2003) (consent to search back of truck's trailer included authority for officer to open and examine contents of closed cardboard boxes).

[14] *State v. Copeland*, 399 S.W.3d 159 (Tex. Crim. App. 2013).

[15] *Matthews v. State*, 431 S.W.3d 596 (Tex. Crim. App. 2014).

[16] *Florida v. Jimeno*, 500 U.S. at 252; *Simpson*, 29 S.W. 3d at 330

Continued in the pink column on page 38

Atkins litigation in the wake of *Ex parte Moore*

Texas has a new legal standard to apply when an individual challenges his death sentence as being cruel and unusual punishment due to an alleged intellectual disability (abbreviated as ID).

By Josh Reiss
Assistant District Attorney in Harris County, and
Lisa Smith
Assistant Criminal District Attorney in Collin County

In *Ex parte Bobby James Moore* (*Moore II*), a case on remand from the United States Supreme Court, the Court of Criminal Appeals determined that the American Psychiatric Association's (APA's) most recent diagnostic framework of ID would control these Eighth Amendment challenges.[1] This framework is contained within the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).[2] The Court of Criminal Appeals also held that a court could rely on the ID framework advanced by the American Association on Intellectual and Developmental Disabilities (AAIDD) in the 11th edition of its definition manual (AAIDD-11).

However, the DSM-5 controls when there is a conflict between the two clinical standards.[3] Although the DSM-5 and AAIDD-11 are quite similar, they do possess important distinctions. The authors compose this article as a primer on these similarities and differences.[4]

The issue of who qualifies as intellectually disabled is clinically and legally complicated. In the context of the death penalty, the issue has confounded the legal system ever since the United States Supreme Court determined (in 2002) in *Atkins v. Virginia* that "evolving standards of decency" preclude execution of persons with ID.[5] In reaching this conclusion, the Supreme Court purposefully opted not to provide any procedural or definitional guide regarding who fell within the *Atkins* ambit and instead left the matter to the proverbial laboratory of the states.[6] However, in *Moore*, the Supreme Court intervened when it believed the *Atkins* procedures and definitions put in place by the Court of Criminal Appeals created an "unacceptable risk" that an intellectually disabled person might be executed.[7]

MooreŐs procedural history

In 1980, Moore was convicted of capital murder and sentenced to death.[8] In 2001, following a grant of federal habeas corpus relief for ineffective assistance of counsel, he was again convicted of capital murder and sentenced to death.[9] During his retrial, Moore did not raise an ID defense. However, following his 2001 conviction, Moore filed a writ of habeas corpus alleging that he is ID and could not be executed. Applying the *Atkins* test it set forth in *Ex parte Briseno*,[10] the Court of Criminal Appeals determined in 2015 that Moore did not meet his burden of proving that he is ID, and the Court denied habeas corpus relief (*Moore I*).[11]

The United States Supreme Court vacated and remanded *Moore I*, concluding that *Briseno* was based on superseded and unsupported medical standards, the application of which created

Getting evidence from cars (cont'd)

(Tex. App.–Houston [14th Dist.] 2000, pet. ref'd); *Vargas v. State*, 18 S.W.3d 247 (Tex. App.–Waco, pet. 2000, pet. ref'd); *Torres v. State*, 482 S.W.3d 629 (Tex. App.–Houston [14th Dist.] 2016, pet. ref'd).

[17] *Horton v. California*, 496 U.S. 128 (1990).

[18] *Hicks*, 480 U.S. 321; *Joseph v. State*, 807 S.W.2d 303 (Tex. Crim. App. 1991).

[19] *Chimel v. California*, 395 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981); *Thornton v. United States*, 541 U.S. 615 (2004).

[20] *Knowles v. Iowa*, 525 U.S. 113 (1998).

[21] *Arizona v. Gant*, 556 U.S. 332 (2009).

[22] *Washington v. Chrisman*, 455 U.S. 1, 7 (1982).

[23] *Arizona v. Gant*, 556 U.S. 332 (2009).

[24] *State v. Sanchez*, 538 S.W.3d 545 (Tex. Crim. App. 2017).

[25] *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Colorado v. Bertine*, 479 U.S. 367 (1987); *Stephen v. State*, 677 S.W.2d 42 (Tex. Crim. App. 1984).

[26] *Florida v. Wells*, 495 U.S. 1 (1990).

[27] See *Acosta v. State*, 752 S.W.2d 706, 709 (Tex. App.–Corpus Christi 1988, pet. ref'd) (a warrant to search a vehicle will allow for the search of every part of the vehicle that might contain the object of the search).

[28] See *Clapp v. State*, 669 S.W.2d 812, 815 (Tex. App.–Fort Worth 1984, no pet.) (based on reasoning in *U.S. v. Ross*, in a warrant-based search, the right to search an automobile contains with it the right to open any container found as a result of that search that might contain the item sought).

[29] See *Zarychta v. State*, 44 S.W.3d 155, 166 (Tex. App.–Houston [14th Dist.] 2001, pet ref'd) (in a search for blood and gunpowder residue under a mere evidence warrant, the scope of the search is limited to those areas of the vehicle the suspect might have touched after the murder, including an ashtray or other containers or objects within the passenger compartment).

[30] Tex. Code Crim. Proc. Art. 18.01(c), (h) & (i).

an "unacceptable risk" that a person with ID will be executed in violation of the Eighth Amendment.[12] The Supreme Court was particularly critical of two aspects of the Court of Criminal Appeals' *Moore I* opinion. Understanding these criticisms explains the Court of Criminal Appeals' *Moore II* decision to adopt the DSM-5 as the new *Atkins* standard.

First, in *Moore I*, the Court of Criminal Appeals applied the definition of ID from its 2004 opinion in *Briseno*. *Briseno* adopted the then-current criteria from the American Association on Mental Retardation's 1992 definition manual (AAMR-9).[13] However, that definition had changed by the time *Moore I* reached the Court of Criminal Appeals in 2015.[14] The Supreme Court determined that the Court of Criminal Appeals improperly applied the 1992 AAMR-9 definition because it disregarded "current medical standards" contained within the most recent versions of the DSM-5 and AAIDD-11. The Supreme Court held that these current clinical manuals supply "the best available description of how mental disorders are expressed and can be recognized by a trained clinician."[15]

Second, the Supreme Court unanimously rejected the Court of Criminal Appeals' application of judicially created "factors" set forth in *Briseno* to assess Moore's *Atkins* claim.[16] Among the *Briseno* factors the Court of Criminal Appeals considered in *Moore I* were:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and,
- If so, did they act in accordance with that determination?[17]

These "factors" had been the subject of extensive clinical criticism for being based on lay stereotypes of the intellectually disabled.[18] The Supreme Court concluded the *Briseno* factors ran afoul of the Eighth Amendment because they were "nonclinical" and an "outlier" among the states.[19]

Interpreted collectively and conservatively, *Atkins* and *Moore* recognize that legal and clinical determinations of ID are distinct. Clinicians may, and often do, disagree as to whether or not an individual is intellectually disabled. The Supreme Court becomes concerned when procedures and definitions to assess ID claims create an "unacceptable risk" that a person with ID would be executed, rather than a general "risk" inherent in differing clinical opinions. Under-

scoring this point, the Supreme Court used the word "unacceptable" three times in *Moore*—hardly an accident. Therefore, the "risk" of executing an intellectually disabled person becomes an "unacceptable risk" under the Eighth Amendment when a court's *Atkins* analysis deviates from current clinical practice.[20]

Agreement between the DSM-5 and AAIDD-11

The definition and diagnostic criteria of ID in the DSM-5 and the AAIDD-11 are similar in four areas:

1) clinical criteria,
2) importance of clinical judgment,
3) comorbidities, and
4) examination of adaptive functioning during incarceration.

We will discuss each of these in more detail below.

Clinical criteria. The DSM-5 and AAIDD-11 agree that ID is characterized by significant deficits in 1) intellectual and 2) adaptive functioning 3) during a defined developmental time period. A significant deficit is recognized as performance approximately two deviations below the population average while taking into account margins for measurement error and other factors that may affect test scores, including practice effects and overly high scores due to out-of-date test norms.[21] An individual must satisfy each of the three prongs to meet the ID definition. According to the DSM-5:

> Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following criteria must be met:
>
> A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation and independent living, across multiple environments, such as home, school, work, and community.
>
> C. Onset of intellectual and adaptive deficits during the developmental period.[22]

The AAIDD-11 presents a similar, three-prong construct:

> Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18.[23]

The adaptive functioning second prong focuses on deficits, not strengths.[24] For example, a person with significant deficits in intellectual functioning may be otherwise mature in social interactions and act appropriately in terms of personal care. However, if he possesses significant deficits in learning academic skills such as reading, writing, arithmetic, or money management, a clinician may determine he is intellectually disabled.[25] In short, strengths cannot outweigh or balance out the deficits.

Importance of clinical judgment. *Atkins* recognizes the importance of clinical judgment to an ID determination: "To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."[26]

Clinical judgment is recognized as "a special type of judgment rooted in a high level of clinical expertise and experience. It emerges directly from extensive data and is based on training, experiences, and specific knowledge of the person and his or her environment."[27] Clinicians are expected to conduct a thorough review of (or at least attempt to review) all relevant clinical information; consider, validate, and weigh all the information; and rule out an alternative diagnosis.[28] In a treatise published by the AAIDD, three scholars advocate that the level of expertise required for an *Atkins* evaluation transcends basic legal competence:

> It is recommended that to achieve the level of competence required for ethical

Clinicians may, and often do, disagree as to whether or not an individual is intellectually disabled. The Supreme Court becomes concerned when procedures and definitions to assess ID claims create an "unacceptable risk" that a person with ID would be executed, rather than a general "risk" inherent in differing clinical opinions.

> participation in *Atkins* assessments, practitioners must become well versed in the fields of *both* intellectual disability *and* forensic mental health assessment. … Experts in *Atkins* cases should, ideally, have previous experience conducting forensic evaluations with people who may have ID, as well as prior experience providing expert testimony regarding ID in other types of noncapital cases. … The heightened ethical responsibilities that come with practicing in a forensic role, especially in death penalty cases, require experts to maintain a highly specialized area of expertise that is generally not possessed simply by holding an advanced clinical degree and licensure to practice independently.[29]

Comorbidities. The DSM-5 and AAIDD-11 recognize that it is not unusual for persons with ID to also possess other mental or physical ailments such as attention deficit/hyper activity disorder (ADD/ADHD), autism spectrum disorder, and bipolar disorder.[30] When this occurs, the coexisting ailment is to be regarded as a "comorbidity," the presence of which does not *per se* exclude a clinical determination of ID.[31] Clinicians are to note comorbidities when they exist.[32]

Examination of adaptive functioning during incarceration. Clinicians and courts often confront the problem of how to assess second-prong adaptive functioning in an individual who has been incarcerated for an extended period of time. For example, Moore has been in continuous incarceration since Jimmy Carter was President of the United States.

Assessments of adaptive functioning measure an individual's everyday ability to function in a typical environment—but there is nothing typical about being incarcerated. Therefore, both the DSM-5 and AAIDD-11 caution against overreliance of adaptive functioning evidence from the controlled prison setting. While both

Is intellectual disability a "trait" or a "state?"

Whether intellectual disability (ID) is a mental defect or a disability is an area of debate. Here are both sides of the argument.

ID is a trait.

- So says the American Psychiatric Association (APA), which publishes the DSM-5.
- ID may be hereditary, and it is regarded as a neurodevelopmental, brain-based disorder.
- The DSM-5 categorizes ID by its level of severity (mild, moderate, severe, and profound).
- The severity classification is determined by an assessment of a person's adaptive functioning.
- The DSM-5 does *not* advance or suggest a support system for a person with an intellectual disability.
- "Age of onset" of ID occurs during the developmental period, meaning that there is flexibility for someone to show that his particular brain development extended beyond age 18.
- To meet diagnostic criteria for ID, a person's deficits in adaptive functioning must be directly related to his intellectual impairments.

ID is a state.

- So says the American Association on Intellectual and Developmental Disabilities (AAIDD), formerly the American Association on Mental Retardation (AARM), which publishes the AAIDD-11.
- ID is a state of being and a limitation in typical human functioning (a "disability"), not a mental defect ("retardation").
- The AAIDD-11 does not categorize ID by severity level.
- The focus is on the supports necessary for a person with an ID to participate in normative human functioning (that is, what supports would help an intellectually disabled person interact with his environment).
- "Age of onset" of ID occurs before age 18 (a hard age cutoff) for neurological and public policy reasons.
- There is no requirement that a person's diagnosis with ID be directly related to his deficits in adaptive functioning.

standards acknowledge that adaptive functioning during incarceration can be examined, it should be corroborated with information from outside a prison setting and reviewed with a heightened level of clinical judgment.[33]

Disagreement between the DSM-5 and AAIDD-11

The dissent in *Moore II* regards a conflict between the DSM-5 and AAIDD-11 as "highly unlikely."[34] The authors of this article do not share this view. The definition and diagnostic criteria of ID in the DSM-5 and the AAIDD-11 are dissimilar in at least three areas:

1) whether ID is a "trait" or a "state" (we will define these in a moment),

2) the appropriate cutoff for the age of onset, and

3) whether deficits in adaptive functioning must be "directly related" to deficits in intellectual functioning.

The last dissimilarity—direct relatedness—is almost certain to generate clinical and legal disagreement in *Atkins* litigation.

ŇTraitÓ versus Ňstate.Ó A profound difference between the APA and AAIDD rests in their respective views as to whether ID is a "trait" or a "state."[35] Understanding this distinction helps explain the differences regarding age of onset and direct relatedness. (See the sidebar on the opposite page for an at-a-glance explanation of the two arguments.)

The DSM-5 treats ID as a trait that may be hereditary. It is regarded as a neurodevelopmental, brain-based disorder among a group of other brain-based disorders that typically manifest during development, including autism spectrum disorder and attention deficit/hyperactivity disorder.[36] In fact, the technical title of ID in the DSM-5 is "Intellectual Disability (Intellectual Developmental Disorder)."[37] Even though it is regarded as a brain-based disorder, the APA maintained the phrase "intellectual disability" because that term is used to acquire services under federal law and is commonly used by other professions and the lay public.[38]

The DSM-5 categorizes ID by its level of severity (mild, moderate, severe, or profound), and severity is determined by an assessment of adaptive functioning. To facilitate this severity classification, the DSM-5 provides examples of conceptual, social, and practical deficits. For example, a school-age child with mild ID may express significant deficits in adaptive functioning by being immature in social interactions, having difficulty perceiving peers' social cues, and expressing immature communication.[39] Importantly, the DSM-5 does not advance or suggest a support system for this hypothetical school-age child with ID, or any person with ID. The focus is on classification of the trait.[40]

By contrast, the AAIDD-11 treats ID as a state of being (a "state"). Its construct is premised on ID not as a mental defect ("retardation") but as a limitation in typical human functioning ("disability").[41]

Unlike the DSM-5, the AAIDD-11 does not categorize ID by severity level. Instead its focus is on the "pattern and intensity of supports necessary for a person to participate in activities linked to normative human functioning"[42]—put differently, the individualized supports necessary to help a person with ID interact with his environment. Examples of an individualized support structure can include providing a less-distracting section of a classroom for taking a test, instruction using a calculator for money management, use of sensory aids, and teaching a person how to use the local health club.[43]

A profound difference between the APA and AAIDD rests in their respective views as to whether ID is a "trait" or a "state." Understanding this distinction helps explain the differences regarding age of onset and direct relatedness.

Cutoff for age of onset. The "trait" versus "state" dichotomy is reflected in differences between the DSM-5 and AAIDD-11 regarding the age-of-onset prong. Age of onset can become a contested matter in *Atkins* litigation.[44]

The DSM-5 requires a showing of intellectual and adaptive deficits "during the developmental period."[45] "Developmental period" is undefined, although the manual notes that onset during the developmental period "refers to the recognition that intellectual and adaptive deficits are present during childhood or adolescence."[46] Consistent with its view that ID is a neurodevelopmental, brain-based disorder (i.e., a trait), this definition provides some flexibility for an individual to demonstrate that his particular brain development extended beyond age 18.[47]

By contrast, the AAIDD maintains that 18 is an appropriate cutoff age for neurological and public policy reasons (i.e., a "state"). Among the public policy reasons cited is that an age-18 cutoff is consistent with the diagnostic practices of Asia and Europe.[48]

In *Moore*, the Supreme Court made clear that all intellectually disabled individuals are *per*

In Moore*, the Supreme Court made clear that all intellectually disabled individuals are* per se *excluded from the death penalty. As such, age of onset at age 19 or 20 must be permissible.*

se excluded from the death penalty.[49] As such, age of onset at age 19 or 20 must be permissible. By selecting the DSM-5 standard, the Court of Criminal Appeals avoided the "unacceptable risk" posed by the AAIDD-11's hard age cutoff.

Direct relatedness between intellectual and adaptive functioning. The difference between the DSM-5 and AAIDD-11 that is likely to cause the most conflict in *Atkins* litigation relates to whether significant deficits in intellectual and adaptive functioning are "directly related."

The DSM-5 requires: "To meet the diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be *directly related* to the intellectual impairments described in Criterion A."[50] By contrast, the AAIDD-11 possesses no relatedness requirement.[51]

The absence of a relatedness inquiry from the AAIDD-11 makes sense when ID is a state—a construct to identify the "intensity of supports necessary for a person to participate in activities linked to normative human functioning."[52] Under this approach it should not matter if the deficits are "directly related" because the individual needs support services. However, when ID is viewed as a "trait," as in the DSM-5, the reasons for why there are significant deficits in adaptive functioning do matter so as to properly classify the individual as having an intellectual disability, a different condition, or both.

In adopting the DSM-5 in *Moore II,* the Court of Criminal Appeals implicitly held that it views ID as a trait rather than a state. The Court explained that there is "logic of requiring that adaptive deficits be related to deficient intellectual functioning."[53] Unfortunately, the Court did not explain what "directly related" means.

The APA provided the following helpful explanation in its amicus brief to the Supreme Court in *Moore*:

> The current diagnostic criteria require a connection between the deficits in intellectual functioning, but that connection need only exclude the obvious limits imposed by other ailments. The most obvious of those include physical disabilities that impair sensory abilities (e.g., blindness or deafness). Whether a deficit in adaptive functioning is 'related' to intellectual impairments is a clinical judgment and cannot be reduced to a layperson's 'just so' stories.[54]

The APA's use of the words and phrases "connection," "obvious limits imposed by other ailments," and "clinical judgment" require explanation. The APA chose the word "connection," not "causation." There is no requirement that the significant deficits in intellectual functioning caused a person's significant deficits in adaptive functioning. The "directly related" inquiry is an examination of correlation, not causation.[55]

The phrase "obvious limits imposed by other ailments" is noteworthy. An "ailment" is a physical or mental disorder.[56] While the APA recognizes that the "most obvious" physical disabilities of blindness or deafness could affect adaptive functioning, other ailments also unquestionably pose "obvious limits," including attention deficit/hyper activity disorder, autism spectrum disorder, bipolar disorder, and traumatic brain injury.

Ultimately, "clinical judgment" is the keystone in the "directly related" arch. The scope of judgment that is professionally required of the forensic clinician testifying or providing a report in an *Atkins* proceeding is clear:

> The task of determining the cause(s) of what may be an adaptive deficit is different [from] determining the cause of [ID]. Some behaviors or patterns of behavior could be related to intellectual difficulties, personality traits, both, or a combination of those and other factors. For example, a person might drop out of school after repeated failure to succeed no matter how hard he tried. Or a person might drop out to pursue a criminal lifestyle. Both could be true for the same person.
>
> Recognizing that deficits in adaptive functioning may arise from multiple sources, forensic clinicians in *Atkins* cases should neither assume that adaptive deficits are invariably related to intellectual impairments nor exclude intellectual impairment as an etiological factor in the presence of other contributing factors. We recommend forensic clinicians consider and be prepared to explain the role of any intellectual impairment in the observed deficiency in adaptive functioning. Review of the trajectory of adaptive deficits over time

may inform this differential.[57]

In essence, a clinician offering an expert opinion in *Atkins* litigation needs to be able to show her work. She must explain in detail why significant deficits in adaptive functioning can be explained by significant deficits in intellectual functioning and not by the presence of a different physical or neurological ailment.

Conclusion

Atkins claims almost exclusively rely on consideration of competing expert opinions. Because *Moore* requires consistency with "current medical standards," ID experts—for the prosecution and defense—must be expected to detail with specificity what they examined, the weight they accorded the evidence, and how they exercised clinical judgment to arrive at their professional conclusions.[58] The DSM-5, AAIDD-11, and *Moore* require nothing less. As such, it is absolutely appropriate for a court to assess the merits of an *Atkins* claim through an analysis as to whether an expert exercised clinical judgment in accord with prevailing clinical and professional norms.[59] ❇

Endnotes

[1] *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018).

[2] For a primer on the changes between the fourth edition of the DSM to the fifth, read this article from the November-December 2013 issue of this journal: www.tdcaa.com/journal/significant-changes-dsm-iv-dsm-5.

[3] *Ex parte Moore*, at 560 n. 50.

[4] Applying the DSM-5 standard, the Court of Criminal Appeals determined that Moore is not intellectually disabled. Moore is challenging this decision in the United States Supreme Court. The authors believe that Moore is unlikely to contest the DSM-5 as the appropriate standard to review his claim and will instead argue that the Court of Criminal Appeals erred as it interpreted the DSM-5 and applied it to his specific case. While the outcome of this litigation is unclear, the authors are confident that the DSM-5 will remain the new legal standard in Texas.

[5] *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

[6] *Id*. at 317 ("To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright* with regard to insanity, we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences").

[7] *Moore v. Texas*, 137 S.Ct. 1039 (2017).

[8] *Moore v. State*, 700 S.W.2d 193 (Tex. Crim. App. 1985).

[9] *Moore v. State*, No. AP-74,059, 2004 WL 231323, at *1 (Tex. Crim. App. Jan. 14, 2004) (not designated for publication).

[10] 135 S.W. 3d 1, 4-8 (Tex. Crim. App. 2004).

[11] *Ex parte Moore*, 470 S.W.3d 481, 514-28 (Tex. Crim. App. 2015).

[12] 137 S.Ct. at 1048-53.

[13] The AAMR subsequently changed its name to the AAIDD.

[14] 137 S.Ct. at 1055.

[15] *Id*. at 1049-53.

[16] *Id*. at 1051-52; 1060.

[17] *Briseno*, 135 S.W.3d at 8.

[18] See, e.g., "The *Briseno* Factors," in *The Death Penalty and Intellectual Disability*, 219 (Edward A. Polloway ed., 2015) ("Few if any intellectual disability scholars, representative bodies, or specialists consider that the *Briseno* factors provide a valid diagnostic framework").

[19] 137 S.Ct. 1051-53.

[20] *Id*. at 1049-53.

[21] DSM-5 at 37.

[22] DSM-5 at 33.

[23] AAIDD-11 at 5.

[24] AAIDD–11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM–5, at 33, 38 (inquiry should focus on "deficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to satisfy criteria).

[25] DSM-5 at 34.

Atkins claims almost exclusively rely on consideration of competing expert opinions. Because Moore requires consistency with "current medical standards," ID experts–for the prosecution and defense–must be expected to detail with specificity what they examined, the weight they accorded the evidence, and how they exercised clinical judgment to arrive at their professional conclusions.

[26] 536 U.S. at 317. ("Mental retardation" was the clinically correct term at the time *Atkins* was issued).

[27] AAIDD-11 at 85.

[28] DSM-5 at 37; AAIDD-11 at 90; Denis W. Keyes & David Freeman, Retrospective Diagnosis and Malingering, in *The Death Penalty and Intellectual Disability,* 263, 263-64 (Edward A. Polloway ed., 2015); John H. Blume & Karen L. Salekin, Analysis of *Atkins* Cases, in *The Death Penalty and Intellectual Disability*, 37, 49 (Edward A. Polloway ed., 2015).

[29] Gilbert S. Macvaugh, Mark D. Cunningham & Marc J. Tasse, Professional Issues in Atkins Assessments, in *The Death Penalty and Intellectual Disability,* 325, 333-34 (Edward A. Polloway ed., 2015) (emphasis in original).

[30] DSM-5 at 40; AAIDD-11 at 58-63.

[31] DSM-5 at 40.

[32] DSM-5 at 39-40.

[33] DSM-5 at 38; AAIDD-11 at 46. See also Leigh D. Hagan, Eric Y. Drogin, & Thomas J. Guilmette, Assessing Adaptive Functioning in Death Penalty cases after *Hall* and DSM-5, 44 *J. Am. Acad. Psychiatry & L.*, 96, 102-03 (2016) ("Being in a controlled prison environment does not diminish the rich information available for a comprehensive assessment of adaptive functioning. Although prison life differs in many ways from circumstances in the larger community, both settings require adaptive behavior").

[34] 548 S.W.3d at 582 (Alcala, Richardson, Walker, JJ. dissenting).

[35] James C. Harris and Stephen Greenspan, "Definition and Nature of Intellectual Disability," in *Handbook of Evidence-Based Practices in Intellectual and Developmental Disabilities,* 11, 16-17 (N.N. Singh (ed.).

[36] DSM-5 at 31-33.

[37] *Id*. at 33.

[38] *Id*.

[39] *Id*. at 34.

[40] *Id*. at 40-41.

[41] AAIDD-11 at 13-19.

[42] *Id*. at 109-122; 151-66.

[43] *Id*. at 116.

[44] *Van Tran v. Colson*, 764 F.3d 594, 612-19 (6th Cir. 2014).

[45] DSM-5 at 33.

[46] *Id*. at 38.

[47] Stephen Greenspan, George W. Woods & Harvey N. Switzky, Age of Onset and the Developmental Period Criterion, in *The Death Penalty and Intellectual Disability*, 77, 78 (Edward A. Polloway ed., 2015).

[48] AAIDD-11 at 28.

[49] 137 S Ct. at 1051.

[50] DSM-5 at 38 (emphasis added).

[51] AAIDD-11 at 43.

[52] *Id*. at 109.

[53] 548 S.W.3d at 560.

[54] Brief for American Psychological Association, American Psychiatric Association, American Academy of Psychiatry and the Law, National Association of Social Workers & National Association of Social Workers Texas Chapter as Amici Curiae Supporting Petitioner, *Moore v. Texas*, 137 S.Ct. 1039 (2017) (No. 15-797), 2016 WL 4151451, at *9.

[55] Marc J. Tasse, Ruth Luckasson, & Robert L. Schalock, The Relation Between Intellectual Functioning and Adaptive Behavior in the Diagnosis of Intellectual Disability, 54 *Intell. & Dev. Disabilities,* 381, 387 (2016).

[56] American Heritage Dictionary, 28 (4th ed. 2002).

[57] Gilbert S. Macvaugh & Mark D. Cunningham, *Atkins v. Virginia*: Implications and Recommendations for Forensic Practice, 37 *J. of Psychiatry & L.*, 131, 170-71 (2009).

Help! I got a grievance letter! What do I do?

The May-June 2018 issue of this journal featured an excellent article on the changes to the attorney grievance process.

By Ann Montgomery
First Assistant County & District Attorney in Ellis County

Having worked for the Chief Disciplinary Counsel's (CDC) Office for almost eight years (a very long time ago, during the "good ol' days" that were mentioned in the article), I was amazed at the number of telephone calls we fielded from attorneys who had received a complaint letter and did not know what to do about it. While I know it is easy to get busy, I hope everyone reading this article has also read (or will read) the earlier one.[1] Before receiving that letter from the CDC's Office (and inevitably, at least half of us will receive that letter over the course of our careers), it is good to have at least a working knowledge of the process.

Brief overview

Any person can file a complaint with the CDC. There is no privity requirement that the person have an attorney-client relationship to file a complaint. The CDC has 30 days to classify the complaint as an inquiry, complaint, or discretional referral. Usually, at this point in the process, the CDC reviews the document from the complainant and using the "four corners" test, meaning that if the facts alleged within the four corners of the complaint are true, was a disciplinary rule violated?

If a disciplinary rule was *not* violated, the grievance is dismissed as an inquiry and the complainant and respondent are notified in writing. With that letter, the respondent also gets a copy of the grievance. Also note that the complainant has the ability to appeal the adverse decision to the Board of Disciplinary Appeals (BODA).

If a disciplinary rule *was* allegedly violated, the CDC upgrades the document to a complaint and sends this information to the attorney for a response. If you receive this notice, you *must* respond to the complaint, though just because you are asked to respond does not mean that you committed professional misconduct. The CDC will then investigate the claim and can schedule an investigatory hearing.

If a grievance is determined to be a discretionary referral, the CDC will notify the complainant and respondent of the referral to the State Bar's Client Attorney Assistance Program (CAAP). Referrals to CAAP are usually for minor misconduct cases. Within 15 days, the CDC will determine whether the grievance should be dismissed as an inquiry or proceed as a complaint, and CAAP will notify the CDC the outcome of the referral within 60 days

After an investigation and hearing, the results could be a sanction negotiated with the respondent, the CDC's dismissing the complaint, or a finding of "just cause." If the CDC determines that "just cause" exists, the attorney can choose the type of adversary hearing. Once given notice, the attorney must elect to proceed with an evidentiary panel or a trial in district court. If the attorney fails to make the election in writing within 20 days, the matter will proceed through the evidentiary panel process.[2]

An evidentiary hearing

An evidentiary hearing is before a different panel of the grievance committee than the one that previously heard the complaint. The CDC will serve on the respondent no more than 60 days after receipt of election a petition brought by the

Texas Attorney Grievance System by the numbers

	2016–'17	2015–'16
Attorney elected an evidentiary panel	273	214
Attorney defaulted into an evidentiary panel	259	257
Attorney elected a trial in district court	50	44

	2017–'18	2016–'17
Active attorneys	102,044	99,636
Grievances filed	7,640	7,559
Classified as complaints	2,357	2,125
Classified as inquiries	5,096	5,243
Total number of complaints resolved	490	545
Total number of disciplines (final sanctions)	332	342
Disbarments	21	20
Resignations	23	28
Suspensions	116	126
Public reprimands	25	30
Private reprimands	70	89
Grievance Referral Program	77	49
Areas of Law		
Criminal	2,592	2,691
Family	1,482	1,493
Civil	1,398	1,490
Personal injury	564	618
Immigration	375	334
Probate/Wills	345	359
Other	330	304
Bankruptcy	73	77
Rule Violations Alleged		
Communication	1,328	1,214
Neglect	1,083	891
Declining or terminating representation	703	689
Integrity	768	605
Safeguard property	544	472
Conflicts	210	157
Tribunals	257	208
Fees	145	123
Non-clients	141	76
Confidentiality	59	41
Law firms	25	21
Advertising and solicitation	10	16

Commission for Lawyer Discipline (CFLD). The petition will include the name of the respondent, allegations necessary to establish venue, a description of the acts and conduct that gave rise to the alleged misconduct, a list of the specific rule allegedly violated, a demand for judgment that the respondent be disciplined, and any other matter that is required. The respondent is required to file a responsive pleading either admitting or denying each specific allegation (think federal court pleading) no later than 5 o'clock p.m. on the first Monday following the expiration of 20 days after service of the petition. If the respondent fails to file an answer, a default judgment can be taken against him.

Prior to a hearing, both sides may obtain written discovery from the other party. There is also subpoena power available to both the CFLD and respondent. At the hearing, the burden of proof is on the CFLD to prove the allegations in the petition by a preponderance of the evidence, and the evidentiary panel chair will conduct the hearing generally in accordance with the Texas Rules of Evidence. However, evidence is admitted at the discretion of the chair. Once the hearing is completed and the parties notified of the decision, any appeal is to BODA within 30 days.

Going to trial

If the attorney chooses district court trial, a private reprimand is no longer an available option for a sanction. As in the evidentiary panel process, the CFLD files a disciplinary petition with the Texas Supreme Court containing the same information as in the evidentiary petition. Upon receipt, the Supreme Court will appoint an active district judge who does not reside in the administrative judicial district in which the respondent resides to preside over the case. Once the CDC receives the appointment of the presiding judge, the disciplinary petition will be filed with the district clerk of the county of alleged venue. The case will then proceed as any other civil case with the issuance of citation, an answer, discovery, and a trial. Both parties have the right to a jury trial, though the complainant does not have a right to demand one. Disciplinary actions are civil in nature and the Texas Rules of Civil Procedure apply. The burden of proof is on the CFLD to prove the allegations in the petition by a preponderance of the evidence. Either the judge or the jury will determine whether the respondent's conduct constitutes

professional misconduct. If misconduct is found, the court determines an appropriate sanction.

Grievance system statistics

When reviewing the statistics published by the State Bar of Texas for the last five years (see the sidebar on the opposite page), I would point out the following trend. Overall, the number of grievances filed and the number of grievances dismissed as inquiries has decreased, even though the number of licensed Texas attorneys has increased. However, the number of grievances classified as a complaint, requiring a response from the attorney, has *increased*. The number of provisions in the Disciplinary Rules of Professional Conduct relating to integrity, tribunals, and non-clients have increased dramatically—and, yes, those rules are potentially related to prosecutors. Take heart in noting that more than half of the grievances received are not classified as complaints, and out of those classified as complaints, less than a fourth of those result in the attorney being disciplined.

Potential rule violations for prosecutors

Grievances against prosecutors are becoming more common in Texas.[3] Civil practitioners in prosecutor's offices need to become familiar with the conflict of interest rules.[4] At our civil conferences, we discuss them repeatedly, as a typical day for a civil practitioner is replete with conflict questions.

For both the criminal and civil attorneys, read over Section III of the disciplinary rules. This section relates to the integrity and tribunal rules that have increased in the last year. Rule 3.09 relates to the special responsibilities of a prosecutor. Remember, there is a difference between ethical misconduct versus *Brady* error, but there is also some overlap. The disciplinary rules require a showing that the prosecutor had actual knowledge of the evidence that was suppressed.[5]

I got the dreaded letterŃ what do I do now?

First, breathe and try not to have an anxiety attack or otherwise freak out. You will experience myriad emotions when you read the grievance. Your first instinct will be to fire off a response telling the committee about all of the good things you have done and all of the experience you have and everything the complainant said are vicious lies. As with any correspondence when you may be upset, put it aside for 24 hours and come back to it.

The letter from the CDC and grievance will not specify which rules you allegedly violated, so you will need to be calm and methodical when reviewing the complaint to ascertain which rules require a response. Further, it will be difficult to remain objective about something so serious that could take away your livelihood, so talk to another trusted attorney who will be honest about the issues in the grievance. Read the disciplinary rules and research any cases related to those potential rule violations. Additionally, research prior discipline for those violations to see what discipline you could be facing. You can find prior disciplines in the back of the *Texas Bar Journal*, or you can use this link to assess the State Bar of Texas website for recent disciplines: https://www.texasbar.com/AM/Template.cfm?Section=Media_Resources&Template=/CM/HTMLDisplay.cfm&ContentID=29541. The new rules include more instruction to the tribunal as to the appropriate sanction for each rule violation as well as the respondent attorney's mental state. Additionally, the tribunal now can consider aggravating and mitigating circumstances.[6]

Next, calculate your response deadline. The response is the opportunity to tell your side of the story, and it is due 30 days after receipt of the notice from the CDC.[7] Failure to file a response could result in additional disciplinary rule violations,[8] which makes cooperation essential.

Be candid. Answers to the allegations should be honest, written in a professional tone, and responsive to the allegations. Answers should include enough detail to demonstrate you have committed no misconduct.[9] If you have documentation, provide it to the CDC. If you do not provide the documentation voluntarily, with the new rules, the CDC has subpoena authority.[10] But respondent attorneys do not have the same ability to subpoena records.

Consult or hire counsel who works in the grievance system.[11] It is very difficult to remain objective during this process when you're going through so many emotions, so consult with an attorney who specializes in grievances. That attorney will be able to read the complaint and your response, and he may see other things that

Be candid. Answers to the allegations should be honest, written in a professional tone, and responsive to the allegations. Answers should include enough detail to demonstrate you have committed no misconduct.

need addressing. Further, the attorney can tell you objectively what the grievance committee will be looking for in the response.

A word on expunctions

Lastly—as if the rest of this article has not made you question why you entered into the profession—what if the records you need to defend against a grievance have been expunged? There are a few ways to handle this issue. On the front end (say, in the midst of a contentious case), if you sense that a future grievance may be filed against you, make a note in the file and let your office's expunction attorney know. Under the expunction statutes, the State can argue that the files are necessary to be maintained for a civil case. If the court makes that finding, then the expunction order can expressly maintain the files for that purpose.[12]

If the attorney chooses district court trial, a private reprimand is no longer an available option for a sanction.

On the back end, after a grievance is filed and you have received your notice to respond, you can argue that the defendant made the allegations material in the expunged file and therefore a matter of public record subject to discovery proceedings.[13] Spoliation is the improper loss or destruction of relevant evidence.[14] A party that does not reasonably preserve discoverable evidence can impair the opposing party's ability to present its claims or defenses. In the case of an expunction, the defendant would be requesting the State to destroy all of its files in his case, thereby hindering a later ability to respond to a civil claim.[15]

Conclusion

I hope this article has given you some practical advice and pointers to consider if you receive notice of a grievance from the CDC. I would encourage you to get involved in the process and apply to be on a grievance committee. Each member serves for a specified term, and when the term has expired, the State Bar Directors in your area will be seeking new members to fill those vacancies, so polish off the résumé and go to the Bar's website, www.texasbar.com, to locate the directors in your area. The best time to send your résumé is in January or February. ❇

Endnotes

[1] Read it here: https://www.tdcaa.com/journal/changes-attorney-grievance-process.

[2] Tex. Disciplinary R. Prof'l Conduct 2.15.

[3] Laura Bayouth Popps, Prosecutorial Misconduct and the Role of Discipline, *Texas Bar Journal*, July 2017.

[4] Tex. Disciplinary R. Prof'l Conduct 1.06, 1.07, 1.08, and 1.12.

[5] Tex. Disciplinary R. Prof'l Conduct 3.09(d).

[6] Tex. Disciplinary R. Prof'l Conduct 15.09.

[7] Tex. Disciplinary R. Prof'l Conduct 2.10(B).

[8] Tex. Disciplinary R. Prof'l Conduct 8.01(b) or 8.04(a)(8).

[9] *TYLA Pocket Guide: Grievance and Malpractice 101* (2013).

[10] Tex. Disciplinary R. Prof'l Conduct P 2.12.

[11] "He who represents himself has a fool for a client." Abraham Lincoln.

[12] Tex. Code Crim. Proc. Art. 55.02 §4(a-2)(2).

[13] *W.V. v. State*, 669 S.W.2d 376 (Tex. App.–Dallas 1984, no writ).

[14] See *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 13 (Tex. 2014); *Wal-Mart Stores v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003); *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 225 (Tex. App.–Amarillo 2003, no pet.); see also *Miner Dederick Constr., LLP v. Gulf Chem & Metallurgical Corp.*, 403 S.W.3d 451, 467 (Tex. App.–Houston [1st Dist.] 2013, pet. denied).

[15] *Brookshire Bros.*, 438 S.W.3d at 16; see *Johnson*, 106 S.W.3d 721.

Proving up judgments

We all deal with "frequent flyers"—you know, those individuals who move in and out of the criminal justice system on a regular basis, seemingly for most of their adult lives.

By Larry L. Melton
DA Investigator, and
Wesley LeRouax
Assistant District Attorney, in Montgomery County

Maybe on probation here or parole there, but always back on the streets in a short time, ready to offend again. Much time and money is spent on these miscreants, not to mention the impact they have on their communities.

One of the tools prosecutors use to keep repeat offenders incarcerated longer is enhancing a sentence with a defendant's prior convictions. Prosecutors must prove that certified judgments (proof of these prior convictions) belong to the defendant sitting in the courtroom, and fingerprints are a common way—though not the only way—of establishing that link. Oftentimes that one judgment from the 1970s can be the difference between a defendant facing two to 20 years in prison and 25 to life.

To get the judgments in front of the jury, we simply have to prove them relevant to the defendant for the judge to admit them. Once an expert testifies to the link between the defendant and the judgments, if the defense objects, prosecutors need only say, "Your Honor, that goes to the weight, not the admissibility, of the evidence." The jury eventually has to believe the enhancement allegations beyond a reasonable doubt.

This article addresses how to establish the link between certified judgments and the defendant in court, both with and without fingerprints.

With Ţngerprints

When a defendant is arrested in Texas, it is normal procedure for his fingerprints to be taken sometime around booking. These fingerprints are transmitted to the Texas Department of Public Safety (DPS), where they are analyzed for electronic filing. If it is the first time DPS has received a defendant's prints, that person is issued a unique State Identification (SID) number, which is assigned to him for the rest of his life. The SID is also listed on the fingerprint card as the DPS number. (Both numbers are the same.) Once a person has an SID number, he can be tracked throughout the criminal justice system, and the SID number is verified by fingerprints. No matter what alias or other false identifiers that person might provide in the future, his fingerprints will lead to his SID number and proper identifiers.

Some counties, such as Harris County (Houston), certify electronically using eGov. If you are fortunate enough to receive judgments with the fingerprints captured electronically, count your blessings. In most cases (though there are always exceptions), these prints exhibit better quality and resolution.

Each fingerprint submission is assigned a Tracking Number (TRN). If you have a subject's TRN number, you can locate the specific electronic representation of the fingerprint card taken at booking. These cards (and prints) are filed in the CJIS Fingerprint Database maintained by DPS's fingerprint division.

So, to summarize, having a defendant's unique SID number can lead to a repository where his previous arrests are documented by a fingerprint card. Each card will have its own TRN number, each related to a specific arrest.

But what about making an identification when a legible fingerprint is missing from a judgment? Frankly, using alternate identification is not always successful. As many readers of this article know, judgments from days of old (and sometimes days of young) don't always contain a plethora of information about the defendant himself, other than his name, cause number, date of the judgment, and date of the offense.

From a juror's perspective, hearing the testimony of a victim who had her car stolen–the one she had nicknamed and bought with her first paycheck out of college–has a vastly greater impact than simply seeing a judgment listing "Unauthorized Use of a Motor Vehicle" scribbled on it.

(There's an example of one on page 49.) Not much to go on, but that is sufficient to begin the search. You will first need to locate a fingerprint expert who has access to the DPS CJIS Archive Database. Again, this is the repository for all fingerprint cards taken during arrests in Texas. You can locate a person's SID number by running a criminal history; the SID number will also give you access to each fingerprint card.

Which brings us to the most important step in the identification process. The defendant's prior fingerprint cards filed in the CJIS database are useful only if we can show that they belong to the person standing next to defense counsel in court. This means that before anyone can get on the stand and testify that the judgments belong to the defendant in the courtroom, someone must fingerprint that person, then compare the fresh prints to the archive prints. If they are a match, all of the fingerprint cards become the known fingerprints of the defendant.

Fingerprinting a defendant in court is not a customary part of a DA investigator's job. It should be done only by a certified fingerprint expert, which is why it is beneficial for every prosecutor's office to have at least one investigator qualified as a fingerprint expert. (Larry Melton, one of the authors of this article, is one such expert.)

If you are able to fingerprint the defendant in court, use a full 10-print card, such as the one used at booking (there's an example at the top of the opposite page). Some fingerprint experts print the digits of only the right hand on a plain index card, but using a standard 10-print card allows you to document some of the identifiers in the defendant's own hand. Larry typically highlights the boxes for someone's name, date of birth, and Social Security number, and he has the defendant sign the card. He also signs and dates the card himself, and if there will be a delay before he testifies (such as the next day), he will even note the time.

Why is this useful? If the defense challenges the fingerprint expert by asking, "How do you know my client has this date of birth? Were you there when he was born?"—yes, that has really happened to Larry—you can respond, "Well, counselor, your client wrote in his own handwriting his full name, Social Security number, and date of birth on the card containing his fingerprints. The card is authenticated by his signature as well as mine. I presume that your client was not lying when he did this."

In addition to all of the above resources, we suggest you use a database program such as TLO. TLO is a subscription service that is different from TLETS (Texas Law Enforcement Telecommunication System). TLO does not include comprehensive criminal history information, although you may find limited criminal violations—but this information is not always reliable. What TLO does do is locate current addresses and confirm Social Security numbers and driver's license numbers. However, any reliable database that contains a person's name, Social Security number, driver's license number, current and prior addresses, list of known relatives, and phone numbers associated with a target will help authenticate the defendant's identity. TLO is more useful to confirm your conclusions, as you certainly shouldn't go into court with any doubts of your own.

A fingerprint expert cannot be perceived as favoring the prosecution. His testimony must be credible. Though he may work for the prosecutor's office, the sole reason for the testimony is to identify the defendant and link him to the judgments presented by the prosecutor, using accepted methods that could be repeated by another fingerprint expert. This expert must be neutral and let the evidence speak for itself. However, as an expert, he is entitled to his opinion, providing that opinion is based on a sound or established methodology. Do not stretch beyond your abilities, in other words, as your reputation as a fingerprint expert is far too valuable to tarnish by using fuzzy logic.

Lastly, prosecutors should not stop after admitting a judgment via fingerprint identification. The most powerful way to prove a prior offense is to have the victim or arresting officer testify in punishment. From a juror's perspective, hearing the testimony of a victim who had her car stolen—the one she had nicknamed and bought with her first paycheck out of college—has a vastly greater impact than simply seeing a judgment listing "Unauthorized Use of a Motor Vehicle" scribbled on it. Likewise, if a defendant has a lengthy criminal history, find any officers who have handled this guy multiple times so they can convey to the jury the time and effort that have been repeatedly spent on him.

Without Ţngerprints

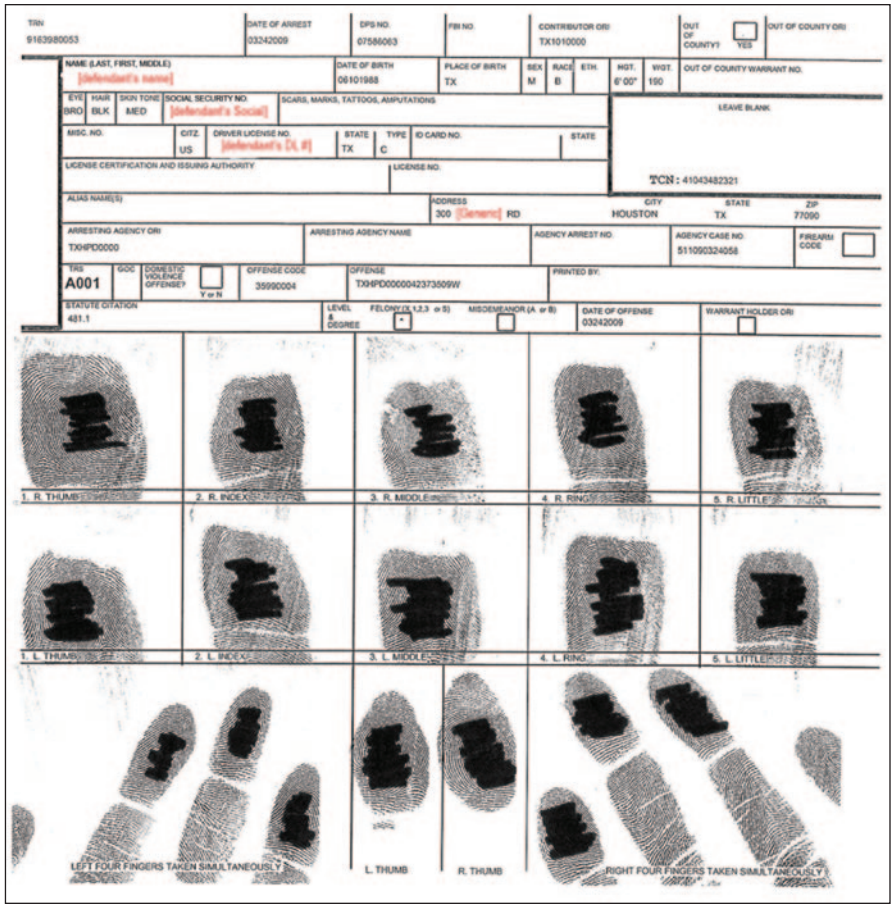
Before we address using alternate ways to prove up judgments without fingerprints, it should be pointed out that perhaps the easiest method is to

ask the defendant to stipulate in writing. But even if the defendant is willing to stipulate, there are times when the prosecutor still wants to read the judgments out loud to the jury to emphasize the numerous chances given him for his past indiscretions.

If a judgment contains only the date of the prior offense, use the booking photo from the prior jail records to show that it belongs to the defendant in court. Also, you may find a credible witness who was in court when the defendant was sentenced. We once proved up a juvenile adjudication based solely on the fact that it listed the defendant's grandmother (who had previously testified, had a very unusual name, and whose address was listed in the judgment) as his guardian. The prosecutor can simply ask any family member who testifies at punishment if she remembers the defendant going to prison back on (the date of the judgment).

Sometimes you might find yourself with fingerprints that are barely legible. Once you realize that you have a bad fingerprint, subpoena (with a business records affidavit) the jail booking information from both the prior offense and the current one. Make sure to include booking photos in the request. You never know how much identifying information might be contained in booking records (in addition to gang affiliations, discipline records, tattoos, etc.). As an example, find a recent 10-print card, which (as has been previously stated) is completed at arrest and contains the inked fingerprints of each of the defendant's digits, as well as an abundance of information about him, including information that can be used to track and identify a defendant through other databases, such as the DPS Driver's License Image file or TLO. The TRN Number will be in the upper left corner of the card.

Information commonly collected at the time of arrest includes the date of arrest, full name, date of birth (DOB), driver's license number, sex, race, ethnicity, height, and weight. You will also find eye color, hair and skin color, and if known, the Social Security number. If the person taking the fingerprints is proficient, the card may even note a defendant's scars, marks, tattoos, and amputations. Many times, the offense will be spelled out, and if not, the offense code will be present so you can match the offense on the judgment. Originating Agency Identification (also called "ORI") numbers can be looked up to verify that the arrest was by a particular



Above, a (redacted) 10-Print Card features a plethora of information about a defendant, whereas at left, the judgment doesn't say much.

Not-so-legal "legal weed"

We detest the term "legal weed" and cringe every time one of our new prosecutors utters it when talking about synthetic cannabinoids ("SynCanns" for short).

By Mandi Say, Edward Wharff, IV, and Virginia Simpson (left to right)
Assistant Criminal District Attorneys in Lubbock County

SynCanns are not legal, and they are not "weed"; they are currently classified as Penalty Group 2-A (PG2A) controlled substances in the State of Texas.[1] However, anyone who is going to prosecute any PG2A cases—including us—had better get used to the term "legal weed" because no one on a jury panel will know what a synthetic cannabinoid is, but they'll all have heard about "legal weed."

Synthetic cannabinoids first hit the market in the early 2000s.[2] They are marketed using flashy packaging with intricate artwork, and they are sold under names such as K2, Spice, Black Mamba, Brain Freeze, Joker, Cheap Trip, Mary Jane, F'd Up, Chilly Willy, and many others. The origin of these compounds is fairly interesting if you enjoy chemistry and pretty mind-numbing if you don't. Basically, chemists around the world were trying to make substances that mimicked the effects of marijuana in the human brain. The goal was to synthesize a substance yielding a marijuana "high" that was legal to sell because it was not the legally prohibited substance tetrahydrocannabinol (THC). The potential financial gain was almost unlimited—and presumably legal—because the chemical compositions of the new substances were not specifically prohibited by statute.

Aside from the questionable legal status, the main problem with these compounds is the adverse side effects on a user's health. In Lubbock County, users have reported nausea, vomiting, seizures, paranoia, confusion—some have even died. A participant in one of our drug courts was at home running a bath, he smoked SynCanns while waiting for the tub to fill, and he passed out and drowned in the bathwater. SynCanns are especially devastating to our city's homeless population. There's a certain park that patrol officers call "Zombieland"; this park is in a part of town that houses a significant portion of Lubbock's homeless people. Officers relate that whenever a homeless person can pull together $10, he or she often goes to a nearby smoke shop, purchases synthetics, and immediately smokes them. The person then walks around in the park in a daze until the drug's effects wear off. There have been so many dazed people stumbling around the park that officers dubbed it Zombieland.

Cracking down on cannabinoids

In 2014, Lubbock experienced an increase in the problems with synthetic cannabinoids. Prior to 2014, synthetics were sold only in the seedier head shops in town. Then legitimate smoke shops began displaying and selling synthetics, adding to the ruse that these products were both legal and safe for consumption.

On June 6 of that year, a letter co-written by the city attorney and criminal district attorney went out to 53 Lubbock smoke shops. The letter outlined that selling synthetics was a violation of both Texas and federal law, and it detailed the effects exhibited by those under the influence of synthetics and warned that continued sales and/or any injuries or deaths because of synthetics sales would prompt prosecution to the fullest extent of both criminal and civil laws. Letters were hand-delivered to suspected stores, including three locations of Tobacco Road, which were owned by Anthony Carter. A few days later, the district attorney and city attorney held a joint press conference warning local businesses about these banned substances and the consequences of their continued possession or

sale.

Four days after delivery of the letter and one day after the press conference, investigators with the Lubbock County Criminal District Attorney's Office made a controlled purchase of suspected synthetics at a Tobacco Road location. The next day, a search warrant was executed at the same store, and 20 packets of F'd Up were seized, totaling approximately 85 grams of synthetics.

In 2014, scientists had identified more than 450 synthetics,[3] but only 162 of them were prohibited by Texas law. Surely the drugs we seized at Tobacco Road would be on the list of the 162, right? Wrong. To our dismay, the criminally motivated, drug-creating mad scientists had once again outpaced our laws. Our lab identified two different synthetics in the F'd Up packets, but they were not listed in the 162. And if they aren't on the list … well, you get the gist.

We could have dropped the case at this point and written it off as anachronistic karma, but we didn't want to send a message to the Anthony Carters of the world that this snag in the law made it acceptable to sell synthetics in Lubbock, Texas. Although we could not prosecute Mr. Carter under the *Health and Safety Code* because his synthetic poison was not on "the list," we *were* able to prosecute him under §32.42 of the *Penal Code* for Deceptive Trade Practices. It turns out that the ingredients in his packages of synthetics were not properly labeled, and that violation was a Class A misdemeanor. Carter pled guilty to that offense in March 2015—a pyrrhic victory at the time, but another step forward and a sound warning to criminals about the seriousness with which Lubbock's law enforcement took this epidemic.

Lucky for us—and prosecutors across the state—the legislature was about to arm law enforcement with a powerful tool against synthetics, and yes, against Anthony Carter too.

Changes to the law

As is often the case, criminals work much more quickly than the wheels of justice. Under the former statute, which took effect on September 1, 2011, Health & Safety Code §481.1031 created Penalty Group 2A. The statute specifically listed 162 illegal synthetics and prohibited "any quantity of a synthetic chemical compound that … mimics the pharmacological effect of naturally occurring cannabinoids. …"[4]

At the local level, we encountered many difficulties. The field test kits law enforcement used were not yet reliable enough with SynCanns to support prosecution. Additionally, our regional DPS lab and the private lab our probation office uses could test for only 25 synthetics at that time. When one SynCann was outlawed, the chemists working for the criminals would change the molecule ever so slightly. The result was that the user would still experience the same high, but it wasn't the result of an illegal compound listed in the statute—this new substance, in other words, was no longer illegal. We quickly learned that we could put our DPS chemist on the stand to testify that the compound in question was a synthetic chemical compound, but we needed a medical doctor or pharmaceutical research doctor to testify whether the compound mimicked the pharmacological effects of naturally occurring cannabinoids. No one was able to take the stand to testify that the substance in question acted like a cannabinoid. We had hit the proverbial brick wall.

But the legislature made more changes. On September 1, 2015, an amended H&SC §481.1031 went into effect, giving prosecutors a powerful tool in the fight against synthetic cannabinoids. While the old version of the law listed 162 banned substances, the new version lists only 23. At first glance, it would appear to be an oversight. However, the statute also omits the language about mimicking the effects of cannabinoids, which was almost impossible to prove. In its place, the statute now addresses "core components," "group A components," and "link components."[5] To further assist prosecutors, the legislature outlined four ways that assembly of these components is illegal. The chemistry begins to get a little difficult here, but the math illustrates the new law perfectly. The old law listed 162 illegal substances, plus anything that mimics cannabinoids. The new law lists 23 illegal substances, plus 5,460 possible combinations of the various components. Currently, if a criminal possesses one of these 5,483 substances, a chemist can testify as to what that substance is and exactly how that substance fits into the code. Ultimately, chemists, lab technicians, doctors, nurses, and law enforcement experts worked with prosecutors and legislators to craft laws that actually allow us to prosecute the sale, distribution, possession, and manufacture

As is often the case, criminals work much more quickly than the wheels of justice.

Officer Chacon was making his way from the bus station towards the Avenue Q smoke shop when he was approached by an actual homeless man. The man simply wanted to tag along with Chacon to Tobacco Road so they could make a purchase and get high on synthetics.

of these synthetic compounds. It's a win for the white-coat-wearing lab peeps, and sorry (not sorry) to the dirty, garage-lab rats.

Anthony Carter, we meet again

Anthony Carter learned during his 2014 prosecution for deceptive trade practices that selling SynCanns was illegal, but he apparently didn't care.

In 2016, the Lubbock Police Department launched a new division, the Homeless Outreach Team, or HOT for short. The primary purpose of this division is to help keep the homeless out of jail and divert them to services or shelters. HOT works to help the homeless become successful by building relationships with them while also identifying physical, mental, educational, and employment needs. While building these relationships, it became apparent that synthetics were the drug of choice among the homeless population. The team personally witnessed the effects of such drugs on these individuals and began collecting information on sources of supply through interviews, recovered packaging and receipts, and surveillance. The Tobacco Road on Avenue Q was the biggest problem and perfect storm because it was conveniently located by a park, the bus station, churches, and soup kitchens, all of which provide services for Lubbock's homeless people. Sergeant Korie Archembault with HOT felt like the people he had taken an oath to protect and serve were valued cizitens and not mere "zombies" left to Carter's control. Something had to be done.

In January 2017, HOT sent Officer Tony Chacon in an undercover capacity, wearing mismatched clothes to play the part of a homeless man, to purchase synthetic from Tobacco Road. Officer Chacon was making his way from the bus station towards the Avenue Q location when he was approached by an actual homeless man. The man simply wanted to tag along with Chacon to Tobacco Road so they could make a purchase and get high on synthetics. When Officer Chacon reached the shop, he walked up to the drive-through, as was customary, purchased two packages of Chilly Willy, and walked away. This buy was used to obtain a search warrant where 683.7 grams of SynCann and $3,081.21 in cash were seized. During the search, Anthony Carter arrived on scene and was told by officers that what he was selling was illegal.

After the HOT warrant, and despite the continued warnings that he was selling illegal drugs, Anthony Carter did not stop dealing. So beginning in February 2017, the narcotics division of the Lubbock Police Department began a more in-depth investigation into Anthony Carter. Instead of just focusing on the Avenue Q shop, they decided to see if undercover officers could make additional purchases from Mr. Carter's other smoke shops. Customers access these shops by pulling up or walking up to a drive-up window and placing an order with the store clerk. Handmade signs with the products available for purchase, along with the pricing, were on display at each drive-through. On February 13, an undercover officer bought Chilly Willy 5g from Mr. Carter's Avenue A store, and on March 29, an undercover officer purchased Chilly Willy, Ripped, and Mary Jane. Additionally, two bags of Ripped were purchased from the Avenue Q shop. On April 3, an undercover officer bought two packages of Ripped from the third of Carter's shops (which had the reputation as "harder to buy from") on Parkway Drive.

During this 2017 investigation, surveillance was conducted on Anthony Carter, his home, and his businesses. Officers saw a pattern of Carter leaving his residence between 8:45 and 10:00 a.m. and going to the Avenue Q, Avenue A, and Parkway shops, and he would either stop at the bank afterward or go straight home. He'd make the same loop between the three stores in the afternoon or evening.

On May 1, LPD officers made another controlled purchase of, you guessed it, Chilly Willy, but this buy was special. Anthony Carter was actually in his store at the time and directed the clerk to wait on the customer (the undercover officer). The DPS lab was great and rush-tested all of the buys so that we would have probable cause for warrants (and later for the criminal case). Based on the buys and the lab results, LPD obtained search warrants for all three Tobacco Road locations, as well as Carter's home, and on May 3, the warrants were simultaneously executed. After the smoke settled, LPD had seized over 15,000 grams of SynCanns, thousands of dollars of U.S. currency, one handgun, one Cadillac Escalade, and two Porsches. Anthony Carter was arrested in one of his vehicles a short distance from his house along with synthetics consistent with the brands sold at his shops.

The DPS lab results from our warrants and buys revealed that our main synthetic was fluoro-ADB. This is not one of the 23 listed substances in the statute, but it was made illegal under the 2015 amendments to H&SC §481.1031. Fortunately, DPS chemists are trained to recognize and test for these substances. Wonderfully, our lab report did not just identify the substance and list the mass in grams like it would with cocaine, but it also identified which core component, group A component, and link component the substance had, and the report even specifically listed which subsection of §481.1031 the drug violated. All the drugs from all the Carter seizures were tested by the same chemist, John Keinath. He was great. Not only did he have to test all of the mounds of stinky—and we mean *stinky*—chemicals, but he also worked with us from the time of indictment to the very last case presented at punishment. He made us charts for visuals and made sure we understood the science behind the drugs so the jury could understand as well. Everyone knows what cocaine and heroin are, but we wanted to make sure we could thoroughly explain fluro-ADB to jurors. We also wanted our indictment to accurately track the statute, and our chemist's understanding of both the statute and the drug proved invaluable to our success.

So we had illegal drugs for which we could prosecute Mr. Carter, but we weren't in the clear by a long shot. We still had to overcome two main obstacles: First, the science aspect of the drugs was confusing, and second, we had to show that just because Carter sold these drugs in the open and from a storefront didn't mean it was legal. We would need to choose our case-in-chief based on these built-in problem areas. The clear choice was Carter's house warrant. The items yielded in this warrant would allow us to connect the dots for the jury: additional surveillance of Carter between his shops and home, text messaging, and financial and business information. Additionally, the house had the largest amount of recovered synthetics including ALL of the brands that Carter sold at his shops. (It was a true "stash house" in every sense of the term.) The main items tested under this warrant were 601 manufacturer-sealed zipper bags of Chilly Willy 2G Chronic Hypnotic containing fluoro-ADB, with a weight of 2.55 kilograms. We indicted Carter for possession with intent to deliver, over 400 grams, resulting in an aggravated first-degree case with a range of punishment of 15 years to life.

The trial

In November 2017, after a motion for speedy trial, Lubbock's first synthetic case was presented to a jury in a week-long trial. During the case-in-chief, Manuel Reyna with the District Attorney's Office and Investigator Matt Barber and others with the Lubbock Police Department Narcotics Division and HOT went through documents and items seized at Anthony Carter's home and businesses, including bank statements and legal documents for Carter and for "JBHAA" and "Bajaha," his incorporated names. Account statements from four different banks all showed large deposits and withdrawals, including cashiers' checks written to "DRL Wholesale," which we believed to be Carter's SynCann supplier.

The jury was presented with a download of Carter's phone, which revealed texts dating back to August 2016 where his source assured Carter that they would be back to "business as usual" as soon as they got the kinks worked out with international shipping. The texts continued, right up until Carter's arrest, showing that he ordered packages of synthetics (thousands at a time) and that he paid his source (also thousands at a time) for the poison. The financials, coupled with the texts with his source, showed the jury Carter's drug operations and his knowledge and intent with the illegal synthetics. Also introduced were messages between Carter and his employees where he would bring them more supply and collect proceeds from sales, showing his control over the day-to-day business of dealing. The jury saw bags of receipts from the shops that documented the illegal sales of synthetics by name. Specifically, in the month leading up to the investigation, the Avenue Q shop *alone* sold a total of $121,134.84 in Chilly Willy, Ripped, and Mary Jane SynCanns. The officers were able to testify that based on the totality of the circumstances, Carter's business was run like any other illegal drug enterprise that they encounter on the streets.

The defense focused its case on Carter's mistake-of-fact claim, that the products he sold were legal. He argued that because he believed his products were legal, he paid sales taxes on them and sold them in the open. They also argued that

In the month leading up to the investigation, the Avenue Q shop alone sold a total of $121,134.84 in Chilly Willy, Ripped, and Mary Jane SynCanns.

In closing, we argued that Carter's was the worst kind of drug dealing because it wasn't confined to a certain area or a specific scary house, but rather his drugs were packaged and advertised ostentatiously as legal and sold openly in public.

Carter had his drugs tested by an independent Drug Enforcement Agency (DEA)-certified laboratory that didn't find illegal chemicals. He argued that he did not intend to break the law and was therefore not guilty.

We countered his arguments through testimony and the evidence as a whole. As for the defense's lab reports, our chemist explained that the DEA-certified lab was not checking for *state*-banned items and did not check specifically for fluoro-ADB. Plus, the lab results were provided by Carter's source, and he requested them *after* a raid to avoid culpability. (You don't have to worry about the science behind the law if you aren't trying to circumvent the law, which is what SynCann producers have been doing all along.) We argued that ignorance of the law was not an excuse and that the text messages between Carter, his suppliers, and his employees showed he knew the products were illegal. In text messages after the January raid, Carter wanted to make sure his customers (who were going through withdrawals) would at least have Bizzaro or Scooby Snax available until he was able to re-up his supply of the good stuff. The most telling testimony to counter his defense came from Sgt. Archembault, who told jurors that Carter's employees refused to sell him products when he approached the stores in full uniform. The undercover buys and the money these shops made speaks for themselves.

On Day Five of trial, and after deliberating for about an hour and 15 minutes, the jury found Mr. Carter guilty as charged in the indictment, and we moved into punishment. Jurors heard evidence of the additional undercover buys from and search warrants for Carter's shops, which yielded hundreds of bags of synthetics and large amounts of cash. The jury was presented with items from Anthony Carter's bedroom, which contained research on the deadly effects of synthetics, some of which were news reports of actual Lubbock events.

The jury also heard testimony from Charlotte Williams, an emergency room nurse at University Medical Center. She testified about the effects she has witnessed of individuals under the influence of synthetics in the hospital. Charlotte is a member of NEIDS (Nurses Educating on Illegal Drugs and Synthetics), and these folks speak all over Texas about the medical consequences of synthetics. She has seen as many as 20 to 30 patients a day in the emergency room because of these drugs, and they range in age from 18 months to 70 years. Some patients experienced hallucinations while others lost the ability to speak. In severe cases, some people suffer cardiac arrest and die. She went on to say that people under the influence are violent to others, law enforcement, and the staff, and often exhibit super-human strength.

In closing, we argued that Carter's was the worst kind of drug dealing because it wasn't confined to a certain area or a specific scary house, but rather his drugs were packaged and advertised ostentatiously as legal and sold openly in public. Time after time, Anthony Carter was warned, yet he continued his drug-dealing business. The jury had before them almost 2,000 packets of his poison. Mr. Carter's bottom line was his greed—it was about him making a profit. We told the jury that Mr. Carter was a businessman, and today was the day for him to count his losses. We asked jurors to send a message to him and anyone like him who might think about setting up a "legal weed" shop in Lubbock.

After half an hour of deliberation, the jury sentenced Anthony Carter to 90 years in prison. And for the businessman Anthony Carter, the jury included a $100,000 fine. His case is currently on appeal.

Slam dunk success

When my boss recommended John Wooden's book, *Wooden on Leadership: How to Create a Winning Organization*, I had no idea who John Wooden was.

By Kailey Gillman
Assistant Criminal District Attorney in Collin County

I was 15 pages into it, still waiting to read about the guy's trial record, when I realized that it was written by a basketball coach.

For those also less than basketball savvy, John Wooden was the head coach at UCLA from 1948 to 1975. During this time, he won 10 NCAA national championships in a 12-year period, including a record seven in a row. To put that in perspective, no other team in history has won more than four in a row in Division I college men's or women's basketball. Needless to say, he was one of the most successful coaches in history.

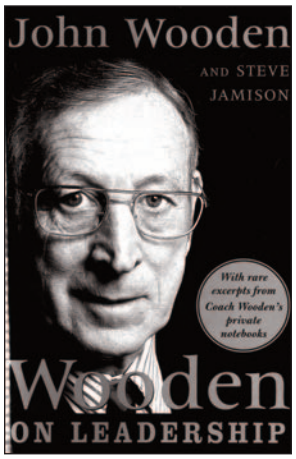
I know nothing about basketball. I played once in third grade and ended up with a bloody nose. But I'm thankful that you don't need to know about basketball to understand Wooden's book and the values that built his team's success. The fundamental principles in making and coaching a successful basketball team are the same in making a successful organization and a successful prosecutor.

One of the core philosophies in Wooden's book (co-written with Steve Jamison) is redefining success. Wooden says the key to his successful team and winning streak was not from concentrating on the outcome, but the effort put forth in getting there. He defines success as "peace of mind which is a direct result of self-satisfaction in knowing you made the effort to become the best of which you are capable." As a leader, Wooden focused on the effort his team put in and whether players came as close as possible to reaching their potential. Winning was just a by-product of that effort.

John Wooden teaches how to achieve this through his pyramid of success. At the apex of his pyramid is success, and each of the 15 "blocks" that build the pyramid represent a quality necessary to reach it. For instance, one of his cornerstones is hard work—the kind of work in which you are fully engaged and focused, as opposed to just going through the motions. Hard work is just a small part of his overall pyramid, though. Another cornerstone is enthusiasm, because without enthusiasm in your work, you cannot perform to the best of your ability. The 15 building blocks are qualities involving attitude, work ethic, personal skills, and relationships with others. Wooden believes that the best way to show leadership and build a good team is through personal example, so he starts by showing how the 15 qualities make an individual successful, and then he broadens the scope to show how a team needs to possess each one of those qualities to be a successful organization.

As prosecutors, so often our view of success almost entirely depends upon whether we win or lose. If we get a guilty verdict, we are successful. If we get a not guilty, we aren't successful. I subscribed to that idea of success for longer than I should have. I love winning and I am very competitive. Most of my family get-togethers include card games that usually end with someone—possibly me—angrily chucking the card deck across the room. So winning at trial was always my favorite part of being a prosecutor. I counted guilty verdicts as a success even if I hadn't put in that much effort at trial. I overvalued advocacy instead of preparation, and I was getting back the verdict I wanted. My view of success was extremely shortsighted, and by worrying about the verdict alone, I was actually reinforcing bad habits and stunting my growth as a prosecutor. It wasn't until I changed how I measure success from the verdict I received to the effort I put out, that I started to really develop skills a good prosecutor needs, such as preparation and planning.

I highly recommend John Wooden's book



Wooden on Leadership: How to Create a Winning Organization
By John Wooden and Steve Jamison
Published in 2005 by McGraw-Hill

Texas District & County Attorneys Association
505 W. 12th St., Ste. 100
Austin, TX 78701

PRSRT STD
US POSTAGE PAID
PERMIT NO. 1718
AUSTIN, TEXAS

RETURN SERVICE REQUESTED

TDCAA's upcoming seminar schedule

Annual Criminal & Civil Law Update, September 19–21, at the Moody Gardens Hotel & Convention Center in Galveston. Because our room block is sold out, we contracted with other hotels for rooms:

Holiday Inn Resort; call 800/465-4329 to make reservations.

Springhill Suites; call 409/740-9443 to make reservations.

Four Points Sheraton; call 866/716-8133 to make reservations.

Key Personnel & Victim Assistance Coordinator Seminar, November 7–9, at Inn of the Hills in Kerrville. Room rates are $119 plus tax and include self-parking and guest-room Internet access. Call 800/292-5690 for reservations, and mention this seminar to get the group rate, which is good until October 16 or the block is sold out, whichever comes first.

Elected Prosecutor Conference, November 28–30, at the Embassy Suites in San Marcos. Room rates are $139 plus tax and include hot breakfast and daily happy hour. Call 800/362-2779 for reservations, and mention TDCAA to get the group rate, which is good until November 6 or the block is sold out, whichever is first.

Jury Selection in Impaired Driving Prosecutions, December 7, in Richmond, Rockwall, and San Antonio. Watch our website, www.tdcaa.com, for exact locations.

Prosecutor Trial Skills Course, January 13–18, 2019, at the Omni Southpark Hotel in Austin.

Investigator School, February 11–14, 2019, at the Omni Colonnade in San Antonio.

Train The Trainer, March 5–8, 2019, at the Inn on Barons Creek in Fredericksburg.

Domestic Violence, April 9–12, 2019, at the Sheraton Hotel in Georgetown.

Civil Law Seminar, May 8–10, 2019, at the Omni Colonnade in San Antonio.

Homicide, June 12–14, 2019, at the Embassy Suites Hotel & Conference Center in San Marcos.

Prosecutor Trial Skills Course, July 14–19, 2019, at the Omni Southpark Hotel in Austin.

Advanced Trial Advocacy Course, July 29–August 2, 2019, at Baylor Law School in Waco.

Annual Criminal & Civil Law Update, September 17–20, 2019, at the American Bank Center in Corpus Christi. Host hotels are the Omni Bayfront, Emerald Beach, and Radisson.

Key Personnel & Victim Assistance Coordinator Seminar, November 6–8, 2019, at the Embassy Suites Hotel & Conference Center in San Marcos.

Elected Prosecutor Conference, December 4–6, 2019, at the Lakeway Resort & Spa in Austin.