The Texas Prosecutor

The official journal of the Texas District and County Attorneys Association

September–October 2021 • Volume 51, 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

Diving into the world of digital evidence

In the 1999 science fiction classic, *The Matrix*, Laurence Fishburne portrays the enigmatic Morpheus, leader of a group trying to free humanity from a virtual prison constructed by a race of intelligent machines.

By Zack Wavrusa
Assistant County & District Attorney in Rusk County

In one of the most iconic monologues in American cinema, Morpheus tells Neo, a denizen of this virtual world played by Keanu Reeves, that something is not right with the world around him. He says that Neo knows something is wrong, even though Neo can't explain what that is. Morpheus then presents Neo with two choices: He can take a blue pill and wake up in his bed the next morning to continue his life ignorant of the world's true nature, or he could swallow the red pill and have the facade pulled away. Neo chooses the red pill, discovers he is "The One," saves his friends, and over two terrible sequels, also rescues all of humanity.

While it's unlikely that the human race exists only in a computer simulation,[1] prosecutors can learn a lot by taking the metaphorical red pill and opening their eyes to the digital world that surrounds us. Our computers, mobile phones, internet activity, smart devices, and more all contain an unbelievable amount of personal information. The depth of that information is equal parts incredible and uncomfortable. Prosecutors who know what information could be out there and where to look for it can dramatically improve the quality of their criminal cases.

Digital evidence isn't just for "computer crimes" either. The GPS metadata behind most every picture taken by a smartphone might lead prosecutors to the bar where a defendant charged with DWI or intoxication manslaughter was drinking before his arrest and to a witness who can report how many drinks the defendant had that night. Cell site location information related to a murder defendant's iPhone can show a jury that the suspect's and victim's phones were both in motion on the night of the crime and were communicating with the same series of cellphone towers.

Computers, mobile devices, the internet, and the law regarding digital searches and seizures are all evolving rapidly. There is always some new piece of computer hardware, software, or social media garbage to upend the rules. Luckily, knowing some of the basics of the current landscape will

Continued on page 12

The Mike Hinton Scholarship Fund

"Machine Gun" Mike Hinton was a beloved prosecutor and defense attorney in Houston, and his passing earlier this year touched a lot of people.

Chuck Rosenthal, a former Harris County DA and Foundation Advisory Board member, led the effort to honor Mike with a scholarship program.

I am pleased to report that the Foundation Board has decided to use contributions made in Mike's name to offer scholarships to TDCAA's Annual Criminal and Civil Law Conference beginning in 2022. We will give you plenty of advance notice about the opportunity to apply next summer, so be on the lookout if you need help to get to the conference.

Texas Prosecutors Society Class of 2021

I am thrilled to announce the 2021 Class of the Texas Prosecutors Society. This by-invitation-only society is unified in its support for the profession of prosecution, and it works to fund an endowment that will one day add significant resources to TDCAA's ongoing training mission. Thanks to these new members (below), who will be honored at a reception in conjunction with the Elected Prosecutor Conference on December 1.

TPS Class of 2021

W. Clay Abbott
Joseph Brown
Katrina Daniels
Roy DeFriend
Rocky Jones
Mia Magness
Dewey Mitchell
Stephanie Stroud
John Wakefield
John Warren
Zack Wavrusa
Andrea Westerfeld

The Escamilla-Wortham Challenge

In the last issue of this journal, I reported that we were just $400 shy of our $15,000 goal, which would match the generous donations of **David Escamilla**, former County Attorney in Travis County, and **Bob Wortham**, Criminal District Attorney in Jefferson County.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

I am thrilled to announce that donors came through to match those funds—and with a little bit to spare! Profuse thanks to David and Bob and to all who gave. We really thought we'd need until the end of the year to earn the match, but all of y'all did it in record time. We are very grateful.

All Donors to the Escamilla–Wortham Challenge

Alva Alvarez
Gordon Armstrong
Diane Beckham
Kathy Braddock
Tom Bridges
Terese Buess
Kriste Burnett
John Dodson
Laurie English
David Finney
Gerald Fohn
Daniel Gonzalez
H.E. Bert Graham
Michael Guarino II
Tom Hanna
Rusty Hardin Jr.
Douglas Howell III
Ed Jones
Kim Judin
Rob Kepple
John Kimbrough
Tom Krampitz
Robert Lassman
Cheryll Mabray
Ken Magidson
Betty Marshall
Rick Miller
Renee Mueller
Lisa Peterson
Joseph Skrivanek III
Beth Toben
Carol Vance
Martha Warner
Roe Wilson

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

2021 TDCAA Legislative Update

By the time you read this edition of the journal, you will probably have viewed our online Legislative Update.

By Rob Kepple
TDCAF & TDCAA Executive Director in Austin

This training was a true labor of love for **Shannon Edmonds**, TDCAA Governmental Affairs Director, who spent the entire legislative session at the capitol, wrote a book on what changed (TDCAA's *Legislative Update*), created the PowerPoint, and did much of the online presentation. Although we missed seeing everyone in person all around the state for the live Legislative Updates, I must tell you candidly that we did not miss the grind of doing 22 presentations in six weeks.

So what about 2023? Will we produce another online version of our very popular Legislative Update? Or will we go back to live sessions? We will be listening to you on whether we should return to our robust road show or whether you actually prefer us to deliver the update in an online version.

As far as content, I think many people were surprised at the number of changes to our codes—folks just figured in the pandemic world not much would get done. But there were many significant changes and a lot for us to tell you about—and caution you about. In my 30 years of spending time at the capitol, this was perhaps the worst session for inconsistencies, conflicts, and downright mistakes in legislation. Forget passing bills that conflict—this session legislators even passed a bill that conflicted with itself! So when you are looking at a change and scratching your head, trying to figure out what they were thinking, read the legislative notes in the new TDCAA code books, or give us a call for the inside scoop.

Texas Board of Legal Specialization (TBLS)

In the January–February 2021 issue of this journal, I asked for those prosecutors who had been denied the opportunity to take the criminal law specialization exam to contact me. The feeling was that prosecutors were being boxed out because they didn't do enough appellate work, even those who are seasoned and skilled trial lawyers. I heard back from some of you confirming that problem. There are many ways to become an expert in criminal law, and many skilled professional prosecutors just don't have the opportunity to do appeals. That shouldn't be an automatic disqualification or excuse to deny them even the opportunity to sit for the exam.

Some good news on that front: **Kenda Culpepper**, Criminal DA in Rockwall County and Chair of the TDCAA Board, is now on the TBLS Criminal Law Advisory Board. Stay tuned, and keep me informed if you are denied your shot to take the test.

Lisa Tanner leaves the AG's Office

I am very happy for our friend **Lisa Tanner**, who has announced her resignation after a storied career as a prosecutor with the Brazos County District Attorney's Office and the Attorney General's Prosecutor Assistance Division. In the last two decades, Lisa has been a tremendous help to the profession, and I know many of you have enjoyed her assistance when you had a conflict and her expertise when you needed legal firepower. I hope this well-deserved respite gives Lisa more time for her passion, scuba diving. And don't throw her phone number away—she is still ready to take your calls and come to the rescue when you need a top hand!

TDCAA Board Service

In conjunction with the Elected Prosecutor Conference in December, our membership will be

electing some people to board positions. Folks serve as at-large or regional directors for two-year terms that begin in January. This December, we will be seeking new board members for the following spots (with the current board member in parentheses): Secretary/Treasurer (**Bill Helwig**), District Attorney at Large (**Julie Renken**), Assistant Prosecutor at Large (**Tiana Sanford**), Region 3 Director (**Ricky Thompson**), Region 5 Director (**Bob Wortham**), Region 6 Director (**Greg Willis**), and Region 7 Director (**Natalie Koehler**). If you have an interest in serving in TDCAA leadership, just give me a call and we will talk it over.

"And Justice for None"

Each year the Texas Bar College Board of Directors honors one writer with the Franklin Jones Best CLE Article Award. Congratulations to **Brandon Draper**, Assistant County Attorney in Harris County, who won the 2021 award with his article, "And Justice for None: How COVID-19 is Crippling the Criminal Jury Right." Brandon's article is an excellent evaluation of the impact of COVID-19 on jury trials, and it details why efforts to conduct trials by Zoom are destined to fail. You can read the article at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3906&context=bclr.

"Roadways to Justice"

There is a new book by a very experienced prosecutor and teacher that might be worth a read. It is titled *Roadways to Justice: Reforming the Criminal Justice System* by Ron Clark. Ron was a longtime prosecutor in King County, Washington, and he served as Senior Training Counsel at the National Advocacy Center. Through discussions of cases and a long career in the pursuit of justice, Ron offers insights into how our system can be improved with practical solutions. You can pick up a copy on Amazon. ❇

Recent gifts to the Foundation*

Richard Alpert
Traci Bennett
Kent Birdsong
Bobby Bland
Murff Bledsoe
Celeste Byrom
James Chapman
Mike Criswell
David Finney *in honor of Scott Durfee*
John Fleming
Jim Hicks
Michael Jarrett
Natalie Koehler
Landon Lambert
Robert Lassmann
Audrey Louis
Lyn McClellan *in memory of Andy Tobias*
Lyn McClellan *in honor of Jo Ann Lee*
Gregory Miller *in memory of Tim Curry*
Amanda Navarette
Kevin Petroff
John Rolater
Hattie Sanderson
Randall Sims
Beth Toben
Steven Wadsworth
John Warren
Andrea Westerfeld
Hardy Wilkerson

Raising bail just because it's insufficient in amount

"Bail reform" has become a major issue in Texas, especially in the big cities.

By Clinton Morgan
Assistant District Attorney in Harris County

Recent elections have brought in judges who are more predisposed to leaving defendants out on bail pending trial.

When prosecutors are unhappy with a defendant's low bail, we have little recourse. We can ask for it to be raised, but we have no appellate remedy if the judge turns us down. But what about a *judge* who thinks a defendant's bail is too low?

Let's say the initial magistrate to hear a case sets bail at a low amount and the defendant bails out, but when the case is assigned to a trial court, that judge believes the bail is too low. Can the trial court judge revoke the current bonds and hold the defendant to a higher bail amount?

In *Ex parte Gomez*,[1] the Court of Criminal Appeals confronted just such a case and upheld the trial court's broad discretion to determine the appropriate bail amount, even if that means sending a bailed defendant back to jail. In doing so, the Court of Criminal Appeals also cleared up one of the longstanding low-level mysteries of Texas law: What's the difference between "bail" and "bond?"

Finding bail "insufficient in amount"

The allegation against Gomez is that he lurked in an ex-girlfriend's closet and, once she was asleep, strangled her until a housemate intervened. Gomez was arrested soon after and charged with burglary and occlusion assault of a family member.

At his initial appearance before a magistrate, the State requested a protective order and asked that bail be set at $100,000 for each charge. The magistrate signed the protective order but set bail at $25,000 for the burglary and $15,000 for the assault charge. Gomez's father got surety bonds for these amounts, and Gomez was released the next morning.

His first trial court appearance was a few hours later, and the trial judge had a different view on what constituted bail in a sufficient amount. After hearing the allegations, she declared the current bonds insufficient and ordered bail be set at $75,000 for each charge—$150,000 total. Gomez's family could not get a bond in this amount, so he went back to jail.

Gomez's attorney quickly filed for habeas relief. His main argument was not about the reasonableness of the amount but about the procedure the trial court used. He alleged Code of Criminal Procedure Art. 17.09, §3 prohibited the trial court from revoking a bailed defendant's bond without "good and sufficient cause." He also alleged the trial court erred by not applying the Rules of Evidence and by appointing Gomez a lawyer although Gomez did not want an appointed lawyer.

At the habeas hearing, the State and trial judge both pointed out that Art. 17.09, §3 allows a trial court to revoke a defendant's bond if it "finds that the bond is defective, excessive, or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause. ..." The trial judge said she had found the original bonds "insufficient in amount" and denied relief.

Was there "good and sufficient cause?"

On appeal, the parties raised the same arguments: Gomez claimed the trial court could not

revoke bail without "good and sufficient cause," and the State[2] replied that under Art. 17.09, a trial court could revoke the bonds based on a bare finding they were "insufficient in amount."

The State pointed to Art. 17.15, which lays out the purpose of bail, requiring that bail be "sufficiently high" to ensure the defendant's presence at trial and that the magistrate considers the safety of the victim and the community. The State argued a trial court could revoke a defendant's bonds any time it found those bonds were insufficient to ensure his appearance or to protect the victim or community.

The First Court of Appeals reversed on a novel argument it came up with on its own.[3] It held that it was "undisputed" that the original bonds were sufficient because the bonds were for $40,000, and the original magistrate had set bail at $40,000.[4] That is, the First Court treated bail and bond as two separate things; so long as a bond was in the amount the magistrate had set bail at, the bonds were necessarily sufficient. The First Court held that because the record did not show any changed circumstances between the initial setting of bail and the trial court's revocation, there was no "good and sufficient cause" for revocation.

Upholding the trial court's discretion

The Court of Criminal Appeals granted petitionary review and reversed.[5] Judge Keel wrote the opinion for a seven-judge majority. Judges Yeary and Slaughter concurred without opinion.

Judge Keel's analysis started off by addressing the First Court's distinction between "bail" and "bond." She noted that Chapter 17 of the Code of Criminal Procedure—which covers most bail procedures—uses the terms "interchangeably."[6] For instance, Art. 17.01 defines "bail" as "the security given by the accused that he will appear ... and includes a bail bond or a personal bond." Thus, bail is bond, and both are the security given. Similarly Arts. 17.02, 17.033, and 17.09 use the terms in a way that "conflates" them. Therefore, the First Court erred to draw a meaningful distinction between "bail" and "bond."

Judge Keel moved on to the main issue; it was not, as it had been addressed in the First Court, whether the trial court abused its discretion in finding the original bonds insufficient. Instead, the issue on a habeas writ was to determine whether, under the criteria in Art. 17.15, the final bond set was excessive. "If the trial court did not set bail in an excessive amount under Art. 17.15, it did not abuse its discretion to find the original bond insufficient under Art. 17.09."[7]

Judge Keel rejected several arguments made by the First Court and Gomez. First, she rejected the First Court's suggestion that the trial court had to justify its ruling with findings. That requirement has no basis in Art. 17.09. Second, she rejected the argument that there had to be a "good and sufficient cause" other than mere insufficiency. The phrasing of Art. 17.09—allowing a bond to be revoked if it is "insufficient in amount ... or for *any other* good and sufficient cause"—showed that insufficiency was itself a "good and sufficient cause."

Third, she rejected the argument that the trial court was bound by the magistrate's original bail determination. The statutes that created hearing officers in Harris and some other counties specifically allow for trial court judges to revisit rulings by the hearing officers.[8]

Finally, she rejected Gomez's argument that because Arts. 16.16 and 23.11[9] allow a judge to raise bail only on affidavit, the trial court had erred to raise bail without proper evidence under Art. 17.03. Without such a requirement, according to Gomez, a trial judge might revoke a defendant's bond on a whim. Judge Keel rejected this argument for two reasons. First, those are different statutes, and their affidavit requirement does not apply to Art. 17.09.[10] Second, bail decisions are still subject to habeas and appellate review; thus, "if the record shows a trial court arbitrarily found 'insufficient bond,' the trial court's actions would be a reversible abuse of discretion."

The opinion concludes by remanding the case to the First Court to consider whether the bail amount was an abuse of discretion and to consider Gomez's procedural issues that were not addressed the first time.

Takeaways

A trial judge's discretion is near its apex when it comes to bail, and *Gomez* emphasizes that. It's frustrating for prosecutors when bail is set too low and it's frustrating for defendants when they have to wait for trial in jail, but someone has to set bail, and our system gives that responsibility to the trial judge.

Gomez should be helpful when a magistrate—whether it's a hearing officer in a big city or a justice of the peace in a smaller county—has set a

The State argued a trial court could revoke a defendant's bonds any time it found those bonds were insufficient to ensure his appearance or to protect the victim or community.

bail the trial judge believes is too low. Not only does *Gomez* let trial judges do the right thing by increasing the bail amount, but it also lets prosecutors remind trial judges it is within their power to do so.

This case may bear watching on remand, where the First Court will address what procedures, if any, a trial court must follow when revoking a defendant's bonds because they are insufficient in amount. ❇

Endnotes

[1] 624 S.W.3d 573 (Tex. Crim. App. 2021).

[2] I represented the State throughout the appeal.

[3] *Ex parte Gomez*, No. 01-20-00004-CR, 2020 WL 4577148 (Tex. App.–Houston [1st Dist.] Aug. 7, 2020) (not designated for publication).

[4] *Id*. at *6.

[5] Because the First Court of Appeals issued its mandate at the same time as its opinion, petitioning for discretionary review was far more complicated than normal. The procedures are laid out in Rule of Appellate Procedure 31.4, and the considerable filings on this subject are available on the First Court's and Court of Criminal Appeals's pages for the case.

[6] *Gomez*, 624 S.W.3d at 577.

[7] *Id*. at 578.

[8] I do not purport to know all the statutes about hearing officers around the state, but Judge Keel cited Government Code §§54.856 (Harris County), 54.882 (Lubbock County), 54.912 (Bexar County), and 54.982 (Travis County).

[9] These articles are interesting but little-used tools. Code of Criminal Procedure Art. 16.16 applies before indictment and Art. 23.11 applies after, but both allow a prosecutor to submit an affidavit to a judge showing a defendant's bond is insufficient in amount. The articles do not require a hearing, and on their bare terms do not even allow one. They give prosecutors a chance to seek increased bail without a hearing, which would likely expose key witnesses to pretrial cross-examination.

[10] *Gomez*, 624 S.W.3d at 579.

Photos from our Investigator Conference

TOP: Several people earned the Professional Criminal Investigator (PCI) certificate, including many who could not attend the conference. All PCI recipients are: John David Aultman, Martin Bautizta, Wendy Bravo, Donaciano Chacon, Luis Cobo, Patrick Custis, Kimberly Ann Franklin, Sandra Hunt, Stacey Lynn Marquez, Nicolette Neeley, Joseph Nichols, Bryan Norris, Reynaldo Pineda, Erin Smith, Swen Spjut, David Stovall, Craig Allen Sweeney, and Matt Turner. MIDDLE: The 2021 Investigator Board. BOTTOM: Robert Warner (center), DA Investigator in the Harris County District Attorney's Office, received the Chuck Dennis Investigator of the Year Award. He is pictured with Gale Echols (at left) and Trina Burkes, both Investigator Board members.

Photos from Train The Trainer

Photos from the Advanced Trial Advocacy Course

Diving into the world of digital evidence (cont'd)

help us get over digital hurdles on the path to justice. It's impossible (for me at least) to explain how to obtain, analyze, and admit all the different digital evidence out there, but here are some common digital evidence issues to start off on the right foot.

Search warrant concerns

All of the search warrant fundamentals that we learned in law school and from living legends Ted Wilson and Tom Bridges apply to search warrants for digital evidence. Those basic yet incredibly critical lessons will not be repeated here.[2] However, digital evidence is complex and ever evolving, and its unique nature means that special considerations are required when deciding whether a warrant is necessary and what information is needed to obtain one.

Particularity. Digital media, such as photos and videos, can be stored in a truly amazing number of devices. Pretty much anything with a hard drive, solid state drive, or flash memory can store photos or video. This includes the usual suspects: computers, mobile devices, and external storage media such as CDs, DVDs, and flash drives. It also includes less obvious devices like game consoles, DVRs, and a multitude of smart home devices.

The Fourth Amendment's search warrant requirements are met when the warrant and supporting affidavit show:

1) that a specific offense has been committed,

2) that the property or items to be searched for or seized constitute or contain evidence of the offense or evidence that a person committed it, and

3) that the evidence sought is located at or within the thing to be searched.[3]

The third element, called the Fourth Amendment's particularity requirement, can be tricky when pursuing digital media evidence.[4] The place to be searched could be a home at 123 Main Street and the thing to be seized could be the defendant's smartphone. It could also be that the place to be searched is the defendant's smartphone and items to be seized are digital images of child pornography. If you get a chance to review a probable cause affidavit prior to its submission to the court, make sure it explains why there is reason to believe that the electronic device is located inside the home AND why there is reason to believe that the electronic device contains evidence of some element of the crime.[5]

To address this concern unique to digital evidence, it has become a common practice among law enforcement officers well-versed in digital evidence to draft warrants that expressly authorize the forensic examination of electronic devices. In the affidavits for these warrants, the affiant will typically explain how the evidence can be or often is stored electronically in devices such as X, Y, and Z. It will further explain that examination of X, Y, and Z requires specialized tools, and the affiant would then request authorization to remove the devices to the cybercrime lab for analysis. The warrant itself would obviously need to follow suit.

In a child pornography investigation, which items should law enforcement seek in its warrant when the photo and video evidence of the crime could be almost anywhere? Will a warrant stand up to constitutional muster if it permits the seizure of every item in a home that could conceivably store electronic data? Maybe.

The Court of Criminal Appeals has explained that the particularity requirement assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his powers to search.[6] The constitutional objectives of requiring a particular description of the place to be searched include:

1) ensuring that the officer searches the right place;

2) confirming that probable cause is, in fact, established for the place described in the warrant;

3) limiting the officer's discretion and narrowing the scope of his search;

4) minimizing the danger of mistakenly searching the person or property of an innocent bystander or property owner; and

5) informing the owner of the officer's authority to search that specific location.[7]

A warrant is sufficiently particular if it enables the officer to locate the property and distinguish it from other places in the community.[8] The degree of specificity required is flexible and will vary according to the crime being investigated, the item being searched, and the types of items being sought.[9] Additionally, "the Fourth Amendment does not require perfection in the warrant's description of the place to be searched."[10] In *Ale-*

man v. State, the defendant was working at a Goodwill when he was caught using a small camera to photograph women in the changing room.[11] The victim got a good look at the camera before the defendant hid it, noting that it was the type of digital camera that saves images to an SD card.[12] Law enforcement was unable to locate the camera and subsequently sought a warrant for the defendant's home. The warrant sought the seizure of electronic media from a bevy of devices ranging from floppy disks (in 2018!) to Nintendo Wiis.[13] Law enforcement recovered a camera, a laptop, several computer hard drives, cell phones, a thumb drive, a media card, a Halo device, and pornographic videotapes and DVDs.[14] A search of these devices uncovered several photographs of women in dressing rooms and videos of two small children performing oral sex on the defendant.[15]

On appeal, the defendant complained that the laundry list of devices the warrant permitted law enforcement to seize violated the Fourth Amendment's particularity requirement. The court of appeals held that the warrant's specification of its list of devices made it facially particular and also advanced the Fourth Amendment's objectives of requiring a particular description of the place to be searched.[16] But don't take this decision to mean that the floodgates are open and that law enforcement can seize any and all digital media storage devices without fear of running afoul of the Fourth Amendment. The 13th Court of Appeals cautioned that the outcome could have been different if the camera did not have transfer capabilities.[17] The Fourth Amendment is never going to permit a person's belongings to be sifted through to look for any evidence of any crime.[18]

At the same time, narrowing the warrant's scope is harder with digital media than with tangible objects. In the physical world, searches are defined by spatial limitations. A warrant to search for a stolen firearm will not permit law enforcement to open the drawers of a jewelry box, nor will a warrant for a stolen RV allow the search of a small lawnmower shed. These same spatial limitations don't make sense when it comes to digital evidence. A file that starts out on one device can easily be stored elsewhere and shared with another. Even within one device, it's easy to move things from one place, say the My Pictures folder, to another more obscure place, say, "C:\Program Files x(86)\OfficeCalendar\DefinitelyNothingIllegalFolder." So officers will often have probable cause to look anywhere on any of the defendant's devices; thus, the scope of the warrant ends up being much more like a general warrant, especially as devices will necessarily have the ability to store many more things than the police have probable cause to believe is there.

As criminal justice stakeholders begin to better understand digital evidence and as technology evolves, the breadth of devices that law enforcement may seize will get smaller and smaller. If you find yourself reviewing a warrant or advising law enforcement prior to one being drafted, promote a tailored listed of devices to be seized. Eventually, an appellate court is going to blow up a warrant for lack of particularity. You don't want it to be your case and you don't want it to be because the warrant authorized seizure of the defendant's smart fridge or a bunch of 3½-inch floppy disks, whose storage capacity is so small that they can't hold a single modern jpeg file.

Intermingled documents. Intermingled documents are of greater concern with the execution of digital search warrants as well. Way back in 1977, the Supreme Court, in *Nixon v. Administrator of General Services*, held that government investigators have broad ability to view documents intermingled with other documents to ascertain their relevancy under a search warrant for documentary evidence.[19] Oftentimes, while investigating one criminal enterprise, forensic computer examiners will discover evidence of another.

It is important to note that the plain-view doctrine is somewhat limited when applied to computer searches. The United States District Court for the Southern District of Texas addressed the issue in *United States v. Kim*. There, investigators were searching Kim's computer for evidence of unauthorized computer access crimes.[20] During their investigation, they discovered computer files with labels that suggested sexually explicit content.[21] The officers in that case said they had never discovered evidence of a lesser crime hidden in files with labels that were suggestive of child pornography.[22] The files were also heavily encrypted.[23] The court in *Kim* subsequently took the position that the images of child pornography were not in plain view and that when the investigators began the process of decrypting and viewing the files, they were conducting a warrantless search for child pornography.[24]

It is important to note that the plain-view doctrine is somewhat limited when applied to computer searches.

Often, the contents of a computer, especially those of less sophisticated users, will be so intermingled that no clear separation of materials exists. Evidence of drug trafficking, child pornography, and the like can be as blended together as different suits in a shuffled deck of cards. An investigator searching for evidence of drug trafficking might not have any indication that the next file she is about to click is evidence of child pornography. When this happens and investigators stumble across materials outside the warrant's scope, and especially if looking further would require them to decrypt anything, advise them to immediately discontinue the search and obtain a subsequent warrant for the new materials.

Cell Site Location Information (CSLI). At this point in the pandemic, we all know at least one person who could be convinced (or is trying to convince others) that the COVID-19 vaccine is a government plot to outfit us all with microscopic GPS trackers. Chances are that person doesn't realize that he has been willingly slipping a sophisticated data collection device into his pocket every day for years.

At this point in the pandemic, we all know at least one person who could be convinced (or is trying to convince others) that the COVID-19 vaccine is a government plot to outfit us all with microscopic GPS trackers. Chances are that person doesn't realize that he has been willingly slipping a sophisticated data collection device into his pocket every day for years.

Our cell phones are a vast source of personal data. Nobody uses a modern smartphone for simply communicating with other people. We use it for banking, shopping, entertainment, and dating. We use it to arrange transportation, pay for goods and services, and monitor home security systems. All the while, the phone is doing something that most people don't think about: It is relaying our every move to America's best in the worldwide cellular communications network.

For a long while, courts took the position that cell phone users had no reasonable expectation of privacy in this data, called Cell Site Location Information (CSLI), because it was surrendered by the phone's user to a third party (the cellular phone service provider). The courts reasoned that users voluntarily disclose the location of their cell phones through cell-site data to a third party when they obtain a cell phone, choose a service provider, and avail themselves of the benefits of the cell provider's network.[25] As a result, this information was regularly obtained from cell service providers with a grand jury subpoena.

In *Carpenter v. United States*, the Supreme Court took up, again, the question of whether law enforcement's acquisition of CSLI was a search for purposes of the Fourth Amendment. The Court held, in a 5–4 opinion drafted by Chief Justice John Roberts, that the government's retrieval of CSLI was indeed a search for purposes of the Fourth Amendment.[26] In its opinion, the Court reasoned that tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring: It is detailed, encyclopedic, and effortlessly compiled. Also, cell phone location information is not truly "shared" as the term is normally understood.[27] First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society.[28] Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up.[29]

The Government argued that collection of CSLI should be permitted without a warrant because it is less precise that GPS data.[30] Rather than exactly pinpointing the defendant's location, CSLI placed him only within a ⅛- to 4-square-mile "wedge" that encompassed the crime scene. The Court rejected this distinction, however. Chief Justice Roberts noted that the accuracy of CSLI is approaching GPS-level precision and, as the number of cell phone towers increases, the geographic area that each tower covers has shrunk. Accordingly, the Court held that individuals had a reasonable expectation of privacy in the whole of their physical movements.[31]

The Texas Court of Criminal Appeals adopted the *Carpenter* position for the Texas Constitution in *Holder v. State*. There, the CCA noted that it "made more sense to adopt the Supreme Court's reasoning in *Carpenter* and to no longer apply the third-party doctrine to CSLI records."[32] Make sure that your local law enforcement agencies are aware of this change in position. For many years, obtaining CSLI by way of a grand jury subpoena was a common practice in many jurisdictions. COVID-19-related interruptions of continuing education means that there is a greater-than-normal chance that investigators are not up-to-date on the state of the law in this regard.

Subscription information. Subscriber information provided to an internet service provider is not protected by the Fourth Amendment.[33] Once people turn over information to a third party, they lose any expectation of the privacy in the in-

formation.[34] The ability to obtain this subscriber information via grand jury subpoena remains alive and well post-*Carpenter*, the major distinction between subscriber information and cell site location information being that all subscriber information is very consciously and obviously handed over to a third party, whereas CSLI is actively catalogued by the cell service provider without any action or input from cellphone users. Subscriber information includes names, addresses, and other personal identifying information given to internet service providers (Suddenlink, AT&T, Spectrum, etc.), social media sites (Facebook, Snapchat, TikTok, etc.), financial institutions (PayPal, Venmo, etc.), and cloud storage applications (iCloud, Google Drive, Dropbox, etc.).

Subscriber information is especially helpful in prosecutions of internet crimes against children. Often, local law enforcement will receive tips from a federal or international law enforcement agency that indicate a local individual is conducting criminal activity online, such as possession of child pornography or online solicitation of a minor. At the time this information is provided, the only information to identify the perpetrator might be a username, phone number, or IP address. Once local law enforcement receives this information, a grand jury subpoena directed to the service provider should reveal sufficient additional info to identify the perpetrator and obtain a search warrant.

Cellphone searches. This isn't exactly breaking news, but it bears repeating: Law enforcement must obtain consent or a search warrant before searching a defendant's phone.[35] Given modern technology and the incredible amount of personal information stored and accessible on a cellphone, defendants have a reasonable expectation of privacy in their cellphones even when the phone is temporarily stored in a jail property room.[36] Police may legitimately "seize" the property and hold it while they seek a search warrant, but they may not embark upon a general, evidence-gathering search of a cell phone, which contains "much more personal information ... than could ever fit in a wallet, address book, briefcase, or other traditional containers."[37]

Circumstances could lead police or prosecutors to believe that exigent circumstances exist to perform a search of the phone. There has not been a lot of appellate litigation of the issue, however, and the cases that are out there are not good for the State. In *Igboji v. State*, the Fourteenth Court of Appeals in Houston found that detectives' beliefs that Snapchat messages would "be deleted after a certain amount of time" and "the user was able to predetermine ... how long the image or video would last" were reasonable, but these beliefs did not amount to exigent circumstances.[38]

The moral of the story is to get a warrant or written consent before every cell phone search. Remember, too, that there are heightened warrant requirements in Tex. Code Crim. Proc. Art. 18.0215 for searches of a person's cell phone conducted pursuant to a lawful arrest of that person.

Obtaining the warrant isn't the only issue. Law enforcement's concern that data on the phone may be remotely wiped is a very real one, especially when dealing with sophisticated defendants. Faraday bags are an effective yet imperfect solution to this problem. Faraday bags are designed to surround the phone and then, once closed, keep it from receiving any cellular or WiFi signal that would instruct it to wipe its data. They aren't a perfect option, however. Cellular data and WiFi signals can still sometimes penetrate a Faraday bag. It is also impossible to charge a device inside a Faraday bag because the portion of the charging cable not in the bag will act is an antenna of sorts for the device in the bag.

Password protection is also an ever-present concern. Both Apple and Samsung are increasing the strength of their products' data encryption. It's harder and harder for computer forensic specialists to bypass these security protocols and access the data on the phones. Sometimes, law enforcement will be fortunate enough to seize a phone while it is still "unlocked" and will want to search the phone. The only real solution to this problem is to prevent the phone from "going to sleep" by having an officer repeatedly tap the screen in such a way as to not activate an app or access any data until a warrant can be obtained by another officer or detective. It feels silly to write this out, but sometimes it's our only option.

Deleted data

Caselaw and statutory requirements aren't the only things prosecutors have to keep up with to maximize our use of digital evidence. You might as well consider computer hardware and soft-

Subscriber information is especially helpful in prosecutions of internet crimes against children. Often, local law enforcement will receive tips from a federal or international law enforcement agency that indicate a local individual is conducting criminal activity online, such as possession of child pornography or online solicitation of a minor. At the time this information is provided, the only information to identify the perpetrator might be a username, phone number, or IP address.

The origin of photographic metadata is as old as chemical photography itself. When archiving their negatives, professional photographers used to note the date, location, which camera they used, and the photograph's subject. As photography advanced into the digital age, software developers incorporated this information into the images themselves.

ware as something in a constant state of flux. New technologies are being developed and incorporated into our favorite devices all of the time.

Data storage is one area that has undergone many changes over the past decade. Our mobile devices (cellphones and tablets) and computers all require data storage devices to function. There are two types: hard disk drives (HDD) and solid state drives (SSD). For the longest time, HDDs were the most common storage device in both desktop and laptop computers, as well as popular mobile devices like the iPod. Over time, advancements in SSD manufacturing led to increases in the volume of data storage and decreases in the cost of manufacture. This development has made SSDs at least as common as HDDs. This is important to prosecutors because the likelihood that deleted data can be recovered greatly depends on which type you're dealing with.

Solid state drives are used in all modern mobile devices and they are becoming much more common in computers, especially high-performance machines. The increasing popularity of SSDs is due to the fact that reading and writing data onto an SSD is much faster than mechanically based HDDs. Internal SSDs will almost certainly utilize a protocol called TRIM. The TRIM protocol automatically erases files designated for deletion and leaves those sectors of the SSD empty. Put another way, the TRIM protocol takes all the ones and zeroes that make up the data and resets them when the user marks files for deletion. This can make recovery of deleted data difficult or, in some instances, impossible.

Hard disk drives (and some external SSDs) store data differently and, as a result, "deleted" data might remain accessible to forensic computer examiners. When a user deletes data on an HDD, the physical part of the HDD where the data is stored does not have its ones and zeros deleted. Instead, the computer removes the data from a registry file that tracks where data is physically stored on the hard drive. Once this location data is removed from the registry, the computer considers that physical location on the hard drive empty and available to store data. Until new data is actually saved in that location, though, the original data remains and can be recovered by someone with the right tools.

Metadata

Metadata is data about ... data. It's usually hidden in the background and not immediately visible to the user of the computer or mobile device. The metadata describes and gives context to the data. It's helpful for organizing, finding, and understanding data, and it can be incredibly helpful to prosecutors, especially when it comes to digital images.

Metadata (also known as Exchangeable Image File Format or EXIF) will include:

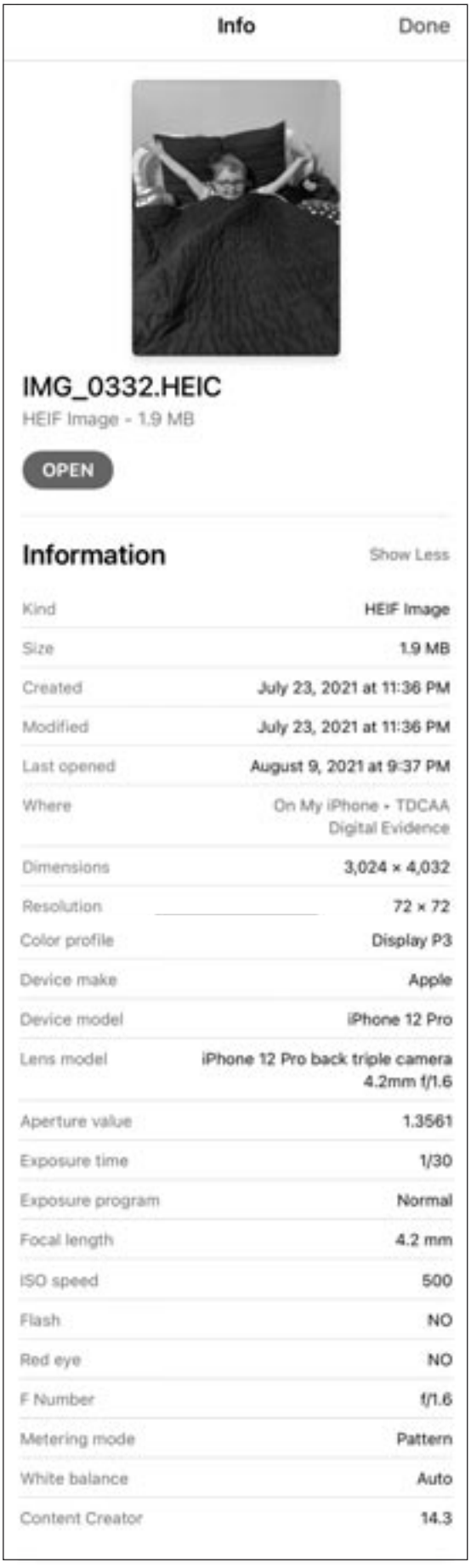
1) the date and time a photo was taken,
2) specific coordinates for the location where the photo was taken,
3) the camera model and manufacturer,
4) camera settings used,
5) file size, and
6) resolution.

The origin of photographic metadata is as old as chemical photography itself. When archiving their negatives, professional photographers used to note the date, location, which camera they used, and the photograph's subject. As photography advanced into the digital age, software developers incorporated this information into the images themselves.

The most complete view of this data comes from a forensic examination of the device where the data is stored. Certain devices, such as the Apple iPhone, make it possible to see some of this data natively within the device's operating system. See the screen capture from my own phone on the opposite page. There are also dedicated EXIF viewers available for purchase and download that will allow you to see metadata.

It doesn't take a whole lot of experience trying cases to see how helpful metadata can be to a criminal prosecution. Does the defendant have photographs on his phone that put him in a place and time that corroborates a child's outcry statement of sexual abuse? How would you like to show a jury that the pictures of stolen property on a defendant's phone were not sent to him by someone he contacted through Craigslist, but were in fact created by his own phone?

Before prosecutors introduce photographic metadata in court, they should prepare for the possibility that the defendant will claim that the metadata has been altered. A number of programs that allow editing of metadata are available for purchase online, and unfortunately, there are no obvious indicators when metadata has been changed. However, don't take that as a sign that we can't rebut this defense if a defendant raises



it. Sit down with your digital forensic examiner and look for inconsistencies in the metadata that indicate it was tampered with. Are there inconsistencies within the metadata, such as a "last edited" date that is before the "created on" date? Are the device model and lens model consistent?

I've been fortunate enough to not have combatted this particular defense. If I (or you) ever have to, we can thankfully breathe a little easier knowing that federal caselaw seems to indicate that allegations of data tampering go to weight, not admissibility. In *United States v. Durham*, the Tenth Circuit court held that the trial court did not abuse its discretion in determining that there was sufficient foundation to support the authenticity of video from a cellphone, despite an allegation from the defense that the data had been altered.[39]

Forensic computer experts

So you've procured some digital evidence. To present it to a jury, you will need a forensic computer expert. Such an expert will be good for a lot more than showing prosecutors data that has been deleted and revealing the metadata hidden behind certain file types. This expert is a key part of the investigation and evidence at trial. The evidence s/he uncovers and his or her testimony will be the focal point of most cybercrime cases and can even be a real turning point in "ordinary" cases where computer use is not normally front and center.

Successfully preparing for and conducting the direct examination of a forensic computer expert are both very similar to and very different from that of other experts. Like someone who has done a DNA comparison or a forensic identification of a controlled substance, forensic computer experts have highly specialized knowledge and tools that allow them to understand the evidence and draw conclusions from it that are impossible for anyone without a similar level of training and technological resources. Such experts are unusual in that many are licensed law enforcement officers. Some will have computer science backgrounds and are hired to fill a role in the cybercrimes division. Others started their careers as patrol officers only to promote into criminal investigations and receive training for forensic computer examinations.

A forensic expert will be good for a lot more than showing prosecutors data that has been deleted and revealing the metadata hidden behind certain file types. This expert is a key part of the investigation and evidence at trial.

When a DNA or drug analysts testify, they are combatting jurors' preconceived notions from movies, television, and books. When forensic computer experts testify, they are battling preconceived notions that the jurors have because jurors have all used a computer before. This distinction is not one that should be taken lightly.

Another important distinction involves the personal experience of jurors. When DNA or drug analysts testify, they are combatting jurors' preconceived notions from movies, television, and books. When forensic computer experts testify, they are battling preconceived notions that the jurors have because jurors have all used a computer before. This distinction is not one that should be taken lightly. Overcoming the preconceived notions of a juror is always a challenge, but it is especially difficult when they are based on personal experience.

Successful testimony from a forensic computer expert requires lots of preparation and planning. Before you sit down for the first pretrial meeting with an expert, especially if it's your first time working with this person, consider using some of the time to discuss the following topics.

Training and experience. Don't brush off preparing on your expert's training and experience. For the jury to give the expert's testimony its proper weight, prosecutors must convince the jury that this person has a level of knowledge with respect to electronic devices and their operation that far exceeds that which the jurors themselves have through their own everyday use of these devices.

There are distinctly different paths to becoming a forensic computer expert in the cybercrimes division, so there isn't a one-size-fits-all approach to discussing it at trial. Step one in deciding a framework for this portion of direct examination is identifying the expert's background. Did he come into law enforcement with a degree in computer science or a background in cybersecurity, or did he work up through the patrol ranks and into the Criminal Investigations Division (CID) to be trained? Treat experts with a background in computers much like any other expert.

For those patrol officers turned cybercrime investigators, spend a lot of time discussing the training they have received. Much cybercrime and digital investigation training is very intense and includes a "lab" component where trainees put the information they learn into action. The National Computer Forensics Institute (NCFI) is one of the leading providers of digital investigation training; it utilizes experienced investigators from the Secret Service and private industry. It can take weeks to complete all the training NCFI offers. Whether your expert attended NCFI courses or received some other training, get a firm grip on the contents of his curriculum vitae and go through it in fine detail with the jury. Don't let the jury get the impression that the training is just some extension of the police academy or that it's taught by anybody but the most capable instructors.

Tools and equipment. Forensic examination of a computer or mobile device isn't done by poking around on an unlocked smartphone or File Explorer on Windows 10. Modern forensic computer examiners use both hardware and software to bypass the phone's encryption and create a forensic copy of the device to conduct their analysis on.

Cellebrite is the most common manufacturer of this type of equipment and software. It is the industry leader; if your computer forensics expert happens to work for the FBI or Secret Service, he is most certainly using Cellebrite equipment to perform the examination. There are other less widely used alternatives, but they all follow a similar process.

The first step is to make a forensic copy of the data or device. Making a copy is important because every time data is accessed or a device is used, a change occurs within the data or device and metadata is updated to reflect that a file was accessed. Logs within the operating system show that it booted up, connected to the internet, fetched information, etc. Despite a forensic examiner's ability to explain why and how these changes to the data are made, such changes can affect the weight and credibility of the data in the jurors' minds. The creation of a forensic copy allows the forensic examiner to look at the data without changing the original.

Once the forensic copy is complete, the examiner will use software to review data and prepare a report. What he finds depends on the device he's analyzing. For a mobile device, you can reasonably expect to see sent and received text messages, call logs, photographs, and internet and search history. For computers, you can expect access to pretty much the entire contents of the computer's storage device plus website history and search history. If the computer has a hard

disk drive, you might recover a certain amount of data that was deleted by the computer's users.

Examiner's report. A really good forensic computer examiner will do more than a simple "dump" of the device and hand over the forensic copy for you to poke through yourself. A good forensic examiner will understand the crime for which the defendant is under investigation and will work through the available data for evidence relevant to the allegation. In a child pornography case, the report will categorize and organize the data so that all images of child pornography are grouped together even if they are saved in a variety of locations on the computer. In a murder investigation, the communications between the defendant and the victim will be collected along with any of the defendant's search history that may shed light on the motive, manner, and means of death. There is so much that our computers and mobile devices are capable of doing and saving that the possibilities in terms of relevant evidence are truly limitless.

I want to warn readers that this report is unlikely to come to you in a paper format and will likely include special software to view in its entirety. There might be an additional paper report that accompanies the forensic report, but the forensic report itself will resemble an e-book with navigable links and search functions. The first time you get one of these, have the forensic examiner walk you through it. These reports contain an incredible amount of information, and if you open the report prepared to see a nice little narrative or a suggested viewing order, you might find yourself overwhelmed. The reports are not intuitive to everyone, and you would hate to miss evidence crucial to the case because of unfamiliarity with the report format.

Conclusion

It is no secret that we are living in the Digital Age. To remain effective as prosecutors, we have to stay up-to-date with the technological advances occurring around us every day. We do not have the option of taking the metaphorical blue pill. It's time to take the red pill and dive headfirst into the digital worlds around us for the benefit of our victims and the communities we serve. ❇

Endnotes

[1] www.popularmechanics.com/science/a34362527/are-we-living-in-a-simulation.

[2] Because you can read all about them in TDCAA's *Warrants Manual*, available for sale at www.tdcaa.com/product/warrants-manual-2018.

[3] *Sims v. State*, 526 S.W.3d 638, 645 (Tex. App.–Texarkana 2017).

[4] U.S. Const. Amend IV; Tex. Const. art. I, §9.

[5] See *Walker v. State*, 494 S.W.3d 905, 908-909 (Tex. App. – Houston [14th Dist.] 2016, pet. ref'd)

[6] *Bonds v. State*, 403 S.W.3d 867, 874-75 (Tex. Crim. App. 2003).

[7] *Id*.

[8] *Id*. at 875.

[9] *United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2011).

[10] *Bonds* at 875.

[11] *Aleman v. State*, No. 13-16-00509-CR, 2018 Tex. App. LEXIS 6716, at *3 (Tex. App.–Corpus Christi Aug. 23, 2018, no pet.)(not designated for publication and so not precedential).

[12] *Id*.

[13] *Id*. at *5-6

[14] *Id*. at 6.

[15] *Id*.

[16] *Id*. at *10.

[17] *Id*. at *11.

[18] *United States v. Layne*, 43 F.3d 127, 132 (5th Cir. 1995).

[19] *Nixon v. Administrator of General Services*, 433 U.S. 427 (1977).

[20] *United States v. Kim*, 677 F. Supp. 2d 930, 948 (S.D. Tex. 2009)

[21] *Id*.

[22] *Id*.

A good forensic examiner will understand the crime for which the defendant is under investigation and will work through the available data for evidence relevant to the allegation.

[23] *Id*.

[24] *Id*.

[25] *Ford v. State*, 477 S.W.3d 321, 328 (Tex. Crim. App. 2015).

[26] *Carpenter v. United States*, 138 S. Ct. 2206, 2209 (2018).

[27] *Id*. at 2210.

[28] *Riley v. California*, 573 U.S. 373, 385, 134 S. Ct. 2473, 2484 (2014) ("modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy").

[29] *Carpenter* at 2210.

[30] *Carpenter* at 2218.

[31] *Id*. Note that extremely short-term CSLI data can still be accessed without a warrant. *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019).

[32] *Holder v. State*, 595 S.W.3d 691, 701 (Tex. Crim. App. 2020).

[33] See *United States v. Trader*, 981 F.3d 961, 968 (11th Cir. 2020) ("every [federal] circuit to consider the question after *Carpenter* [*v. United States*]" has decided "that subscriber information disclosed during ordinary use of the internet, including internet protocol addresses and email addresses, falls within the third-party doctrine"). See also *Ex parte Jones*, 473 S.W.3d 850, 855 (Tex. App. –Houston [14th Dist.] 2015, pet. ref'd).

[34] *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582 (1979).

[35] See *State v. Granville*, 423 S.W.3d 399 (Tex. Crim. App. 2014).

[36] *Id*. at 409.

[37] *Id*. at 412.

[38] *Igboji v. State*, 607 S.W.3d 157, 170 (Tex. App.–Houston [14th Dist.] 2020, pet. granted in Cause PD-0936-20). The Court of Criminal Appeals granted review of the Fourteenth Court of Appeals's decision in *Igboji*, but at the time of writing, it had not yet been decided. Oral argument, conducted April 14, 2021, is available online at www.youtube.com/watch?v=5NKpD63c6YU. See also *Oliver v. State*, No. 14-13-00957-CR, 2015 Tex. App. LEXIS 4350, (Tex. App.–Houston [14th Dist.] Jan. 22, 2015 pet. ref'd).

[39] *United States v. Durham*, 902 F.3d 1180, 1232 (10th Cir. 2018), cert. denied, 139 S. Ct. 849 (2019).

Shepherding a victim's family through a difficult trial

If you are like me, as a victim assistance coordinator (VAC) in a prosecutor's office, your favorite part of the job is being in the courtroom with the victims and their families.

By Amber Dunn
Victim Assistance Coordinator in the Denton County Criminal District Attorney's Office

I could not wait to be back in court after having no jury trials for the last 16 months due to the pandemic.

It would have been nice to have a simple case to get my bearings, but no chance. Instead, my first jury trial back was a capital murder that had been set to go to trial for some time. In this case, the defendant had been robbing people to sell the items and get cash. The victim in our case, an older gentleman, did not show for work one day, which caused his co-workers concern. They contacted his family, and his mother and daughter headed to his house to check on him. The front door was locked, so his daughter went around back. She found her father on the living room floor stabbed to death.

We worked with the victim's family, which consisted of his mother, his adult daughter (the one who found him), and his adult son. Our victim was an only child, and he was a very loving son. He would take his mother out every Sunday for dinner. His mother had even moved closer to him at his request so that he could look after her. We never know when something bad might happen but there was never a thought that he would go before her. On the 911 call, which the victim's mother made, you can hear her say that she did not know how she could live—meaning, of course, without her son. It was a very emotional 911 call to say the least. Mother and son shared a close relationship, one that will never be the same because of this defendant.

Pre-trial conversations

This family came to the office several years ago for our first meeting, attended by the victim's mom, daughter, and son, plus two prosecutors, the investigator, and me. We did not get very far into the meeting before the daughter stormed out of the room with much emotion—having found her dad's body, you can only imagine the sight she saw. I, of course, went after her. I talked her down, and we rejoined the meeting. Our hearts went out to her.

During the pandemic, many cases were resolved by plea agreements, but this case was not one. It was actually set for a jury trial before the pandemic even started. It was reset for a date during the pandemic, too, and then it was reset yet again, this time because the prosecutors just did not want to try the case with masks in the courtroom. I remember calling the mother to tell her that it was reset again. When calling families to tell them something like this, it is often hard for them to understand. We have never gone through a pandemic before, and we did not know what the courtroom would look like. Facial expressions are a huge part of communication, and we did not want to lose that—we wanted the jury to get the full picture of someone answering questions from the stand, including any of their facial expressions. A person's testimony is very important, and we needed the communication to be clear in every way possible. I was glad when the mother agreed completely with our decision.

It was nice to call a victim for once and have her understand and agree with why we asked for a reset.

We finally went to trial this year when courtrooms started reopening.

The trial itself

There was no real social distancing during this trial. It looked like the normal old courtroom I am used to except for the air purifier sitting right outside the jury box, next to the State's table. It gave me some peace that the air we were breathing was being purified. I felt safe around the mother as we had both been vaccinated. It is a new world we are living in, and we all need to do our best to keep each other safe.

I thought everyone was following me as I headed to the door, but when I looked back, I realized the victim's daughter was not in the crowd leaving.

During trials, there are times I know who's about to take the stand thanks to the good communication I have with my investigator. If I know a witness is going to show crime scene pictures or when the medical examiner (ME) testifies, I always warn the family members that they will not want to be in the courtroom during this testimony. During this trial, when the ME was about to testify, I let the family know it was time to leave. This family had many other loved ones and friends who came to support them; they took up three full rows in the gallery. I thought everyone was following me as I headed to the door, but when I looked back, I realized the victim's daughter was not in the crowd leaving.

I stepped aside, went back to the first row, sat down by her, and said, "You do not want to be in here for this." She replied, "Yes, I do." I repeated, "No, you do not. Please come with me." I could tell she was not moving, so I said, "Let's go talk about it outside," and she reluctantly followed me.

We left the courtroom and I explained to her (and everyone else) that as soon as the witness was off the stand, I would take them all back in, but that I needed to go back in to be with the family and friends who had stayed in the courtroom. The mother of the deceased understood so I went back into court. On my way, I asked my investigator, Mike Sparby, to reiterate what I had just explained, and he of course always has my back, so I knew I was leaving the family in good hands.

It was only a short while before my investigator came back into the courtroom requesting my help in the hallway. The daughter was not backing down and wanted in the courtroom. I spoke with both her and her grandmother, who was already crying, and tried to talk the daughter into staying out in the hallway with her grandma. I explained to the daughter that we had only two witnesses after the ME, and we could not risk her having an outburst because of graphic photos—it could be a huge distraction and cause a possible mistrial, and we would have to start all over again with the trial. We had come too far for that.

The daughter told me that seeing those photos would bring her closure. If you have ever seen some of the pictures I have, you know that no family member is going to get any closure out of those horrific images. I think once the daughter realized I was not going to give in, she got mad and said she was going to take a smoke break. Grandmother did not want her to, but I encouraged her to go. She needed this time.

At this point, the rest of the family had sat outside the courtroom doors to wait. The daughter stopped in the middle of the hallway and turned around. I was still watching her, and something in me told me that if I turned my back or went back into the courtroom to be with the other family and friends, she would bolt for the courtroom doors. Having that feeling, I just stood by the doors watching her, and she finally figured out that I was not leaving. She turned around and headed to the elevators. I could see she wasn't happy. This is the first time as a VAC I have felt like I needed to guard the courtroom doors.

I should note that the autopsy photos were so graphic that a juror passed out! When he recovered, he told everyone that he was not going to look at any more pictures. We were thankful we had been able to show the pictures we needed to before that happened.

About this time, one of the prosecutors came into the hallway to let me decide if I wanted to let the family back in. He said he was going to show only the diagram with the rods depicting the stab wounds and let the medical examiner describe everything. That was still not a visual any family needs to see of their loved one. I told him we would just wait until the next witness got on the stand, and he said that was fine, that it was my call. I had already seen the daughter storm out of the courtroom earlier in the week because of a witness who made her so emotional that she just could not control herself. This was just how this daughter is—very emotional. There is a time and place for all feelings, but when there is a jury in

the courtroom trying to pay attention to someone's testimony, family members have to control themselves. I know it is hard and I always have Kleenex ready, but when the judge had already warned the gallery, that was my cue to go above and beyond to make sure they didn't draw his or the jury's attention.

I am sure some of you who are reading this article are saying that the courtroom is open to the public, and you're right, it is. Having said that, I will also say that if I can shield the victim's family from more pain and heartache, then I will. We have to help a family go through one of the hardest things they will ever do in their lives, and if we can make it just a little bit less awful, we should do everything we can to help that family, even if they fight us. I would not be doing my job if I did not try to protect them from everything I could. Sure, we might get the cold shoulder for a little bit after such a situation, but when it is all over, that family will give you a hug afterwards and you know for sure that you did your job.

Words from the judge

By the end of Friday, we were still in the middle of the defense's case so we had to break for the weekend. I went into the courtroom to make sure everyone was gone, and the bailiff told me that the judge had remarked how well I was doing my job. The bailiff had been watching the camera outside the courtroom and saw that the daughter tried to come back in during the autopsy pictures. I smiled and said she sure wanted to, that I felt like I had to guard the doors.

As the bailiff was talking to me, the judge stepped back in, saw me, and told me himself, "You are doing a good job." That really meant more to me than the judge could ever know. I knew this case had been long and hard, but to know that the judge appreciated what I was doing just made my day. I had never thought about anyone watching us through the cameras in the hallway, but it just goes to show that a person should do her job with everything in her no matter if someone is looking or not.

After the defendant was sentenced to life in prison, the family gave two victim allocution statements. I always read the statements before they are given in court, just to be prepared; because of the emotion the daughter had been displaying, I felt like I really needed to read her statement. I approved each one as written; now once they get up there and start their statement, if they go off-script, then that is on them. I had already explained the guidelines to the statement—keeping it short for the court's time, not asking questions because the defendant cannot answer them, and no profanity in the courtroom. The allocution went well.

Conclusion

Though not all cases turn out the way we would like them to, if we have done our jobs, no matter how difficult they might be, crime victims and families will respect what we have done. I will never forget certain cases, not because of what the defendant did, but because of the amazing family I got to work with. Being a VAC is not a job everyone can do, but if you have compassion and empathy for someone during one of the hardest times in their lives, then you will be able to do the job and show that you care about them and what they have to go through. I am truly blessed to get to work with such talented people who do what it takes to see justice done for victims of violent crimes. The trial team on this capital murder case did an outstanding job, and I am just proud to have been a part of the team. ❇

I should note that the autopsy photos were so graphic that a juror passed out! When he recovered, he told everyone that he was not going to look at any more pictures. We were thankful we had been able to show the pictures we needed to before that happened.

Prosecutors out for blood (destruction)

Have you ever read Texas Code of Criminal Procedure Art. 38.50?

By Traci Bennett (at left)
Assistant District Attorney in Fort Bend County, and
Cynthia Garza
Assistant Criminal District Attorney in Dallas County

If you do not handle intoxication offenses or deal with evidence dispositions, there is a good chance you have not availed yourself of its content since the TDCAA Legislative Update in 2015 when the statute was added to the code.

I, Traci Bennett, one of this article's co-authors, must confess that I was not familiar with 38.50 until two years ago when my boss, Fort Bend County District Attorney Brian Middleton, asked me to assist our local Department of Public Safety office in the disposition of hundreds of blood tubes housed at the DPS Crime Lab, the remnants of old DWI investigations. And by hundreds, I mean more than 600. A lot. Disposing of these tubes seemed like it should be fairly simple—simple in that it should require a few hundred destruction orders be prepared and signed by our local county court judges. Uh, no.

I have practiced long enough to know that there's good stuff in the annotated TDCAA code book, so I reviewed it for the law applicable to destruction of the blood tubes. Enter 38.50. It is the statute that provides for the retention and preservation of toxicological evidence, which is defined as blood or urine collected in the course of a Chapter 49 investigation. Such investigations would thus include driving while intoxicated, intoxication assault, and intoxication manslaughter. The law sets out three applicable retention periods depending on the status of the investigation or case.

1) For investigations that result in no charges filed or for offenses for which the statute of limitations has run, the retention period for toxicological evidence is the greater of two years or the length of the statute of limitations for the applicable offense.[1]

2) If a defendant is convicted, the evidence must be retained for the duration of the defendant's sentence or community supervision. If a juvenile respondent is adjudicated delinquent, the evidence must be retained for the length of the juvenile's commitment or term of supervision period.

3) If a defendant is acquitted, the case is dismissed with prejudice, or a court finds that a juvenile is not engaged in delinquent conduct, then retention is no longer required.

As originally enacted, the article tasks the courts with providing notice of the retention period to defendants, parents of juvenile respondents, and the entity assigned to the evidence. The law then allows the storing entity to destroy the evidence upon expiration of the retention period provided by the court.

What seemed simple suddenly became a challenge because courts in Fort Bend County had not been notifying defendants and the parents of juvenile respondents of the applicable retention periods. To complicate matters, the 2015 bill creating Art. 38.50 made the law retroactive. It is impossible for the courts to have notified the relevant parties in many of the older cases. The law was not in effect until the cases had long been disposed and the defendants'/respondents' contact with the court had ceased. Unfortunately, arrangements for the disposition of the pre-2015 evidence had not been obtained prior to the passage of the law, so the evidence was now subject to the notification requirements of Art. 38.50. So much for an easy solution to the blood tube storage problem.

I met with our judges, who expressed understandable concerns about attempting to notify former defendants and respondents of the retention periods, especially those that were several years old. The most pragmatic solution was for DPS to send out notification letters to the last

known addresses of the defendants and wait an appropriate period before seeking judicial approval for destruction. After all, DPS has one of the largest address databases in the state (i.e., driver's license and state identification records). Local troopers were on board with this idea, but the train came to a screeching halt when DPS's legal department insisted it was the job of the courts. And so those tubes still sat on their shelves.

Meanwhile, in Dallas County

Further north, prosecutors in Dallas County were simultaneously dealing with the same issue. The creation of Art. 38.50 and the statutory notification requirements went undetected in Dallas until a local law enforcement agency inquired about the retention period for toxicological evidence, which was backlogged to the level of several thousand units for that agency alone. This backlog created a budget and storage issue that would be extremely costly to address.

Like Traci in Fort Bend County, I, Cynthia Garza, the other co-author of this article, began researching retention statutes and discovered Art. 38.50. Much to our surprise, despite the existence of this statute, the courts had not issued the required notices in cases for post-2015 Chapter 49 cases. To stop the backlog from compounding any further and to address the already backlogged cases, we began conversations with the judiciary, local police departments, district and county clerks' offices, and our local laboratory. Budget concerns were at the top of everyone's list for how we would tackle the issue. Ultimately, Criminal District Attorney John Cruezot decided that our office would take the initiative and create an Art. 38.50 notice that would be part of our plea paperwork packet, allowing us to stop the backlog pipeline. Prosecutors were instructed how to complete the forms, and the courts were to provide a copy of the notification to the defendant upon the plea.

For cases in which notification was not provided, our office worked with local law enforcement agencies, judges, and clerks' offices to develop a process to comply with the statute's notification requirements. This process was new for all parties, so we first tested it with agencies that had the greatest backlog. Doing so allowed us to discover and address logistical issues involved in the process's implementation while decreasing the number of cases waiting to be reviewed. It goes like this: Each law enforcement agency identifies cases eligible for destruction, fills out the Art. 38.50 notice for backlogged cases, and presents it to the court for signature. The clerk's office then mails the completed notice to the defendant's last known address.

As we worked through the issues, it was evident that when the law passed in 2015, no one contemplated the process of retroactive notification and therefore no guidance was provided to that effect. Given that we were several years behind on notifications and that our largest law enforcement agency averages about 1,000 blood draws per year (not to mention all of the other law enforcement agencies that file cases in Dallas County), we were clearly in a bind. The task of identifying cases eligible for destruction and creating individual notifications for backlogged cases, including presentation of each of those notices to the court, proved to be an overwhelming and incredibly time-consuming process. Law enforcement agencies have been working hard to eliminate the compounded backlog, but it was evident that the law needed to change for several reasons, among them:

1) not all courts were willing to change their written plea admonishments to include the statutorily mandated notification (or to include a separate Art. 38.50 notice),

2) occasionally prosecutors and courts forgot to include the Art. 38.50 notice in the plea paperwork or the paperwork was incorrectly filled out,

3) the backlog of toxicological evidence created a budgetary strain on local law enforcement agencies, and

4) mechanisms for notification and/or retention periods for certain types of cases were not provided for in Art. 38.50.

It seemed like there had to be a better way.

The OG 38.50

You may be asking yourself why in the world legislators in 2015 would make Art. 38.50 retroactive and place the duty of notification with the courts, especially regarding cases that were never filed (so suspects never appeared before a court). Before you throw stones (as, admittedly, we mentally did), it is helpful to look at the author's statement of intent for the original bill that birthed Art. 38.50 into the world (HB 1264, 85th Regular

To stop the backlog from compounding any further and to address the already backlogged cases, we began conversations with the judiciary, local police departments, district and county clerk's offices, and our local laboratory. Budget concerns were at the top of everyone's list for how we would tackle the issue.

Session[2]). The bill was sponsored by State Representative Gene Wu (D-Houston) and State Senator Joan Huffman (R-Houston) at the request of the Houston Police Department. The statement points out that the law in effect in 2015 provided rules for the retention and storage of biological material but did not differentiate toxicological evidence collected purely for intoxication investigations. Because toxicological evidence is not used for identification purposes in the same manner as biological evidence, it rarely retains evidentiary value following disposition of a case. However, there was no separate code provision for blood and urine evidence in these types of offenses. The statement noted that the Houston Police Department was at 97 percent storage capacity because it had been storing toxicological evidence since 1988 and it was running out of room. HB 1264 addressed this issue, and it was an important step in keeping toxicological evidence separate from biological evidence, which commands a much longer retention period.

As finally passed, SB 335 does not change the retention periods for toxicological evidence, but the responsibility for notice has shifted. No longer do the courts alone bear the burden of notifying defendants and juvenile respondents of the applicable retention periods.

Having put Art. 38.50 into use, we could clearly see it needed to be tweaked to provide for more direct notification to those whose blood or urine was collected as part of an intoxication investigation.

The fix is in

In Fort Bend County, I (Traci) reached out to Senator Huffman and Representative Wu as the original authors. Both readily agreed to file a bill addressing these concerns. Unbeknownst to me at the time, Dallas County prosecutors were also working with their own delegation to address the issue. In January, State Representative Jessica González (D-Dallas) filed HB 660 and State Senator Nathan Johnson (D-Dallas) filed SB 335. By the end of the filing period, there were four bills in the mix focused on correcting the problem. The bills were different in some ways based on the need of the jurisdiction that sought their filing.

A match was made in heaven when Senator Huffman's office asked Fort Bend and Dallas Counties to work together on a bill to end all other bills. Dallas County prosecutors Paige Williams and Doug Gladden and the co-authors of this article collaborated on the final product, and Senator Huffman filed it as SB 529. Ultimately, the language of SB 529 was adopted into Senator Johnson's SB 335 through a committee substitution, and we went forward with Senator Huffman as co-sponsor of SB 335. The bill moved quickly through the Senate Jurisprudence Committee of which Senator Huffman is chair and Senator Johnson is a member. It passed the full Senate on April 19. Representative Wu picked up SB 335 as the sponsor in the House, and the bill was reported favorably out of the House Criminal Jurisprudence committee on April 29.

Plenty of time, right? Stress-free session, at least in regard to SB 335, right? Wrong! As the end-of-session volume of bills coming out of committees began to take its toll, the bill proceeded at a crawl through the arcane House Calendars Committee process. Paige was working the entire session on behalf of Dallas County and patiently answered our daily frantic texts about the bill's status. With the help of some great folks behind the scenes, we were able to get the bill out of Calendars with a couple of days to spare. Whew! The bill passed the House on May 25, six days before *sine die*. It was signed by the governor June 16 and took effect on September 1.

What does it do?

As finally passed, SB 335[3] does not change the retention periods for toxicological evidence, but the responsibility for notice has shifted. No longer do the courts alone bear the burden of notifying defendants and juvenile respondents of the applicable retention periods. The new and improved Art. 38.50 states that agencies that collect toxicological evidence are required to notify the suspect of the retention periods at the time of collection. The bill also amends §724.015 of the Transportation Code, which in practical application has resulted in a new DIC-24 that includes notice. New English and Spanish versions of this form are now available from the Department of Public Safety; take steps to ensure every law enforcement agency uses them. (Why give the defense another ground to object to the State's evidence?)

The courts are responsible for notifying defendants and respondents of the retention periods only if the collecting agency fails to do so, and they are allowed multiple methods by which to provide the retention periods to defendants and respondents, including email. If notification has been made in accordance with the statute, the evidence can be destroyed by the retaining entity

upon expiration of the retention period. If a case is never filed or a filed case is dismissed without prejudice and the statute of limitations has run, notification is no longer a prerequisite to destruction of the evidence.

What about the backlog? The amendment will not make the backlog of blood tubes go away immediately but does make some provision for them. For evidence associated with unfiled cases or those where the statute has run, including cases dismissed without prejudice, notification to those from whom evidence was taken is not required. (Every little bit helps.) For evidence associated with filed cases regardless of their disposition, the updated Art. 38.50 explicitly requires the courts to notify defendants and juvenile respondents of the required retention periods by September 1, 2022.

Bonus round

In addition to revising the retention period notice provisions of Art. 38.50, SB 355 added a little lagniappe to the law books that will be helpful to prosecutors. First, Art. 38.50 now allows a prosecutor's office to require the entity or individual responsible for storing toxicological evidence to obtain the office's permission before destroying the evidence. This will give prosecutors more control if they feel local labs or property rooms may be too cavalier in clearing out evidence. The most efficient way to signify such consent would be through a prosecutor's signature on the destruction orders that are routinely presented to the courts.

More significantly, SB 355 amended §724.015 of the Transportation Code to mandate that officers require a suspect from whom they are requesting a blood or urine specimen to sign a statement acknowledging that the officer requested them to provide a specimen, that they were informed of the consequences of not providing a specimen, and that they voluntarily gave consent for taking the specimen. Currently, the DIC-24 provides a space for a suspect's signature only if the suspect refuses to consent to taking a specimen. The new law provides unequivocal proof of a defendant's knowing and voluntary consent to the taking of a sample of blood or urine.

Going forward

The old evidence still must be addressed, and many counties may be unaware of just how extensive their blood tube backlogs might be. Dallas County identified the problem and took early steps to address the issues in the manner described above. In Fort Bend County, we have been communicating with law enforcement agencies about what is required to destroy this evidence so that they are aware of the notice requirement. At least one agency has been sending out notices to former defendants and waiting 90 days before asking us to submit motions and orders for destruction. The 90-day period is outside the statute but signifies a good faith effort to comply with an imperfect law. We will be contacting the agencies to obtain lists of the evidence that is subject to the September 1, 2022, deadline. We are also reaching out to the courts to see how we can assist them in completing the notification process.

In regard to evidence collected on September 1, 2021, and beyond, the law will help tremendously but is not foolproof. There could be a delay in the rollout of an updated DIC-24 or other form prepared by DPS that meets the requirements of the new Art. 38.50. Some agencies may be slow to substitute the old forms with the new ones. For the time being, it may be the best practice to provide the notification wherever possible within the movement of a case through the system. Fort Bend County does a fair number of DWI pretrial interventions (PTIs) and we also have an active DWI Court that utilizes a diversion contract. We have added the retention language of Art. 38.50 to these contracts so that all participants receive notification and the evidence in those cases can be disposed of without further action once the PTI is completed and the case dismissed.

Many counties have standard orders or notices that are included with the plea papers addressing the destruction of evidence for their cases. Based on the wording of Art. 38.50, it would be best to specifically state the retention periods set out in Art. 38.50 and not use a sweeping order or notice of evidence destruction that applies to all evidence in a case. At the very least, it should be noted that toxicological evidence will be retained as set out in Art. 38.50. Be sure the notice is on a form that will be seen by the defendant or be copied to him or her. At least one county we know of has placed a statement on its judgments that evidence retention will be controlled by Art.

What about the backlog? The amendment will not make the backlog of blood tubes go away immediately but does make some provision for them.

38.50, which may be of limited use if the defendant never lays eyes on the judgment. The goal is for the offenders to know what will happen to the blood or urine collected from them, and there is certainly more than one way to address this issue. The most important objective is to be aware of the law and put procedures in place that work best for your county.

Prosecutor power

When this journey started, we were drafting our own bills totally unaware that there was another office out there with the same problem. Fortunately, someone recognized the mutual goal and asked us to work together. Once we harnessed our prosecutor power, we were able to make these important changes. Yes, it sounds completely hokey, but it's true. TDCAA does not pass laws and does not lobby for prosecutors—we are the lobbyists for what we do and the best ones to explain it to our elected officials. If you see a problem affecting your work that needs to be addressed with legislation, reach out to other offices and see if you can do the same. You'll improve the criminal justice system and make some new friends along with it. ❇

Endnotes

[1] Note that under the old law there was no applicable retention period for a case that was filed but dismissed without prejudice.

[2] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=HB1264.

[3] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB335.

TDCAA launches diversity video

Creating prosecutor offices that reflect the makeup of the communities they serve is vital in creating an equitable criminal justice system, but prosecutor offices often lack the resources to recruit diverse staff members.

By Diane Beckham
TDCAA Senior Staff Counsel in Austin

With that in mind, TDCAA's Diversity, Recruitment, and Retention (DRR) Committee created a 12-minute video called "Prosecutors: Journeys to Justice" to persuade high school, college, and law school students to consider a career in prosecution. (Watch the video at www.tdcaa.com/diversity) The video was funded in part through a grant from the Texas Bar Foundation, and we are very grateful for that support.

Members of the committee recorded segments discussing what brought them to a career in prosecution, why diversity is so important to the profession, and what a difference prosecutors can make in the lives of victims, defendants, and members of the community.

Six members of the DRR committee (Chair Jerry Varney and Alex Guio from Dallas County, Sunni Mitchell and Jamie Reyne from Fort Bend County, Kenisha Day from Harris County, and Jeremy Sylestine from Travis County) open the video by telling their stories of what motivated them to choose prosecution. Other members of the committee (Tiana Sanford from Montgomery County, Jarvis Parsons from Brazos County, David Alex from Tarrant County, and Denise Hernandez from Travis County) offered encouragement to viewers to join the profession, along with TDCAA Board Chair Kenda Culpepper (Criminal District Attorney in Rockwall County) and TDCAA Executive Director Rob Kepple. Tiana also provided the voiceover talent for the video narration.

The video is available for anyone to view, and we encourage members to use it in their recruiting efforts. The new diversity page on the TDCAA website will include other resources as well, including notice of upcoming events. At the Annual Conference in Galveston this September, the committee will again host a diversity breakfast at 8 o'clock Friday morning. For more information about the conference, see the TDCAA website at www.tdcaa.com/training/annual-criminal-civil-law-conference-2021. ❇

BELOW LEFT: Tiana Sanford, ADA in Montgomery County, recording the video's voiceover. BELOW RIGHT (from left to right): David Alex, ACDA in Tarrant County; Alex Guio, former ACDA in Dallas County; Kenisha Day, ADA in Harris County; Andie Peters, TDCAA Assistant Meeting Planner; and Brian Klas, TDCAA Training Director, in the studio during filming.

Protective order registry

It is often said that a protective order is just a "piece of paper."

By Kim Piechowiak
Domestic Violence Training Attorney, Texas Office of Court Administration in Austin

However, detailed information that such a document even exists is the key that starts the engine of enforcement, protection, safety, and accountability.

Unfortunately, it came too late for at least one Texas woman. In 2015, Monica Deming of Odessa was murdered by her ex-boyfriend. The young mother had no idea that the perpetrator had been the subject of two prior protective orders, only that his violent behavior toward her and her son was escalating. By the time she had begun taking steps to protect herself, it was too late.

As a result, "Monica's Law" was passed during the 86th Legislative Session in 2019 to enable the Office of Court Administration (OCA) to provide justice system stakeholders with online access to valuable information regarding both applications for and issued protective orders, along with very limited public access with the explicit consent of the protected parties.

In September 2020, OCA launched the Protective Order Registry, with mandatory entry of applications, protective orders, and magistrate's orders of emergency protection by the courts beginning on October 15. Courts are required to enter the information into the registry within 24 hours of issuance. As of the date of this writing, more than 40,000 entries are in the system.[1]

PROTECT website

The dedicated website for law enforcement and prosecution personnel to view both applications and orders is called the Protective Order Registry of Texas (PROTECT) and is located at https://protect.txcourts.gov. This portal launched in February 2021. For the first time, PROTECT allows Texas criminal justice personnel to view more comprehensive protective order information online, including images of applications and signed orders, to improve enforcement, investigation, and safety planning for victims of family violence and other violent crimes.

Most elected district attorneys, criminal district attorneys, county attorneys, city attorneys, and heads of law enforcement agencies have already been added to the registry as Restricted Users. "Restricted user" access enables someone to view all applications and protective orders that have been entered into the registry since its inception. For other personnel within these agencies, including victim assistance coordinators (VACs) in prosecutor offices, to also view these records, agency leaders are required to enter them into the registry as Restricted Users. Please go to https://protect.txcourts.gov for all the information on how to get started.

TOPIC website

Another facet of the registry allows the protected party in a final protective order to give consent for limited information about the respondent and the order to be viewed by the public. Once written consent is forwarded to OCA by the clerk's office containing the record, OCA reviews to confirm that the order's information is eligible for publication on the Texas Online Public Information—Courts (TOPICs) website, which is https://topics.txcourts.gov. If published, only the following information is viewable:

- Issuing court
- Case number
- Date issued
- Date served
- Date of expiration
- Date vacated, if any
- Respondent's information
  - Full name
  - County of residence
  - Birth year
  - Race or ethnicity

Members of the public will not be granted access to view information regarding Temporary Ex Parte Protective Orders, Magistrates Orders of Emergency Protection, or any information about the applicant/protected party in any type of order. In addition, images of applications, orders, or other documents will not be accessible to the public through the registry. A protected party seeking to grant public access is required to a complete the form, Consent to Publish or Remove Information from Protective Order Registry Public View, which is found at www.txcourts.gov/media/1451032/form.pdf. Once completed, the form must be submitted to the clerk's office that handles the records for the issuing court. At the time of this writing, only 33 protected parties have elected to grant public access to their protective order information.

Please send any questions to OCA-LegalSupport@txcourts.gov. To inquire about training for you or your staff, please contact me at kim.piechowiak@txcourts.gov. We at OCA are excited to offer this new tool to assist in enforcement and investigation of violent crimes in Texas. Thank you for all that you do! ❇

Endnote

[1] See www.txcourts.gov/judicial-data/protective-order-registry/ for more information.

Building relationships with victims and witnesses

Early one morning, a man drove his elderly mother to an appointment.

By Christy Harris
Assistant Criminal District Attorney in Dallas County

As their small SUV entered an intersection on a green light, a pickup truck hurtled down the service road, blew through a red light, and slammed into the small SUV, instantly killing the man and his mother. The pickup driver was charged with manslaughter, and within days multiple family members of the two deceased victims began contacting our office looking for information. I quickly realized that the next of kin from multiple sides of the family would be very involved, and many of them would need early and frequent individual contact.

The role of contacting victims

Just thinking about picking up the phone to call next of kin (or a complainant or witness) can be exhausting because you don't know what you're getting into. Will they answer the phone? What questions will they ask? Will you be able to communicate effectively? Will they be on board—or too on board? The many unknowns when we enter these conversations can intimidate even experienced prosecutors who have made hundreds of such calls. The truth is, sometimes these interactions go smoothly and sometimes they are difficult, but forming these relationships early is one of the best things prosecutors can do to aid the families and the overall prosecution of a case.

As misdemeanor attorneys, we learn the basic importance of witness contacts, using them to gather information about the facts of the case, restitution, and more. Once promoted into felony, we make similar contacts on more serious cases, but the advice generally remains the same: Find out what actually happened during the offense. This approach, while valid, undervalues the potential relationship we can establish with next of kin, complainants, and witnesses. Contact with witnesses provides an early opportunity to build trust and rapport as well as manage their expectations. If prosecutors build that foundation early and maintain it throughout, it pays dividends when it comes time to resolve the case.

In Dallas, we are fortunate to have many wonderful victim assistants and victim advocates on staff. Assistants connect families with a variety of resources, from crime victims' compensation to crime scene cleanup, and advocates make early contact on violent offenses and are trained in counseling. These valuable team members frequently speak with next of kin or complainants before a prosecutor does, which makes it tempting to rely on the information they gather rather than reaching out ourselves. This is a mistake. Remember: A victim assistant or advocate serves a different purpose from that of a prosecutor or investigator! Victim assistants and victim advocates reach out to come up with safety plans, suggest options for grief counseling, and the like; they are not calling to find out if a witness can prove up the indictment, nor should they. Their role is to support the victims and families through the criminal justice process. It's the prosecutor's job to determine whether we can prove the case—*we* are the ones who need to make the hard calls, both literally and figuratively.

A mental plan of action

With any witness contact my motto is, "It's not the what, it's the how." In other words, the means

we use to communicate matters just as much as the content we deliver. The foundation of any effective witness contact is getting comfortable calling people. If you sound uncomfortable on the phone, you won't sound trustworthy.

In college, I spent summers making calls for my dad's office. I was uncomfortable calling people I didn't know, with names I sometimes couldn't pronounce, not knowing if they'd answer, be nice to me, or even speak the same language. As uncomfortable as that was, the experience turned out to be invaluable to me as a prosecutor. The more calls I made, the more I adjusted to making conversation with strangers. Over time I realized people on the other end of the call could be just as uncomfortable answering the call as I was initiating it, leading me to better understand potential reactions I might encounter in the witness contacts I make as a prosecutor.

Having gained that baseline comfort level, my next priority is to prepare myself. I familiarize myself with the facts, check court settings, and run criminal history for the defendant and complainant. I think about the person I'm calling and his or her relationship to the case. I think about how I will introduce myself and the reason for my call. I consider the person's possible reactions to my call and how to handle any expectations s/he may have, especially if he or she has already interacted with a different prosecutor. I prepare to explain the offense, range of punishment, and any offers made, and to set appropriate boundaries and expectations.

Once I have a mental plan of action, I dial. During that initial conversation, I ascertain the best contact moving forward. Ideally, I'll establish a single contact for regular communication. However, that's not always possible, as in the aforementioned manslaughter case where I kept in touch with two relatives. It was double the work, but doing so made everyone feel heard, providing for a smooth disposition of the case.

Show compassion and understanding throughout the communications. Remember, you won't know their circumstances when you call—maybe this person is at work, just waking up, sick, out of a job, or dealing with a multitude of stressors affecting his response to you. Keep this first call relatively brief. Use it primarily to introduce yourself and set up a face-to-face meeting. While a phone call is a great and necessary starting point, face-to-face contact provides natural human cues such as eye contact, facial expressions, and demeanor that help establish a foundation of trust and authenticity in the relationship.

Meeting in person

When scheduling the face-to-face meeting, include an investigator, victim advocate, and possibly your trial partner. For prosecutors who haven't been practicing long, you would be well-advised to have an experienced senior prosecutor in the meeting. It is up to you to set the tone for the meeting and to bring it back in line if necessary. Be frank but kind. You cannot guarantee an outcome for the case, but you can promise to be honest and forthright. I frequently acknowledge to families that I am deliberately blunt because I believe total honesty is best. Explain the charge, range of punishment, and court process, including a rough timeline. Ask them for patience throughout a potentially long process.

For prosecutors who haven't been practicing long, you would be well-advised to have an experienced senior prosecutor in the meeting. It is up to you to set the tone for the meeting and to bring it back in line if necessary. Be frank but kind.

Tell them from the beginning that you care about their opinions and their input matters, but they will not be making the final decisions. This case is not Civilian v. Civilian—it's State of Texas v. Defendant. Justice requires evaluation of the case without personal ties. We as prosecutors have education, experience, and ethical considerations to guide our decisions and determine a just resolution.

Be a good listener. Don't be in a hurry. When you talk about the offense, be careful to not presume anything based on an offense report or witness statement in the file. Ask follow-up questions without feeding them information. Have them provide a few photos of their loved one (in cases with deceased victims) so you can select the best one for trial. Be up front about any expected challenges at trial such as witness issues, self-defense, a youthful offender, or even an unlikeable complainant. Being forthright early and throughout the case will serve you well later in the process.

Before I end the meeting, I make sure they know how to reach me, encouraging them to check in monthly by phone, text, or email. Doing so empowers them to know they have the freedom to reach out to me, and it creates a process for regular communication.

Emotions run high in these conversations, so prosecutors must keep their composure. Breathe and be calm. If you find yourself unable to give a

calm and rational response, find a way to quickly step away or end the meeting, and follow up later after you've had a chance to calm down. Remember it's OK to say, "I don't know," "I'll get back to you," or even "I won't be able to share that information to protect the integrity of the prosecution of the case." These statements increase the prosecutor's credibility because they illustrate your forthrightness.

Another important point: Caring about the case and the victims doesn't mean carrying it for them. This took me years to figure out. I once had a case where a young couple was robbed at gunpoint while walking their dog. They felt enormous fear and anger about what happened and wanted everyone working the case to be as upset as them. As a young felony prosecutor, this couple's burden became my burden. I listened to the families and let their emotions fill me up like a vessel, to the point that I carried their concerns as if they were my own. It affected my sleep, my work, and my life, which is neither sustainable nor necessary. I had to learn that I could effectively prosecute a case without also physically and emotionally carrying others' burdens. Now, I can listen without making their burden my own, and by doing so I let families feel heard and give them an outlet for their pain while building a foundation of trust between us. I developed this visual: Instead of a vessel filled to the brim, I became a rubber dart board—I feel the pain, but I don't let it sting or cling.

Another important point: Caring about the case and the victims doesn't mean carrying it for them. This took me years to figure out.

Following up

As the case progresses, prosecutors should have periodic brief conversations with the family to keep them reasonably informed about case settings and meaningful progress. Reach out if custody status changes or a plea offer is made or altered. If they contact you, return their call the same day whenever possible. These brief conversations continue the rapport you built in the beginning and maintain a successful relationship.

Notify the family when a trial date is set. Explain where final plea negotiations ended and whether they should brace themselves for trial to be reset once or several times. Remind them that trial doesn't guarantee conviction. Normalize their feelings as much as possible and equip them with solutions to handle unexpected emotions during trial, such as turning to a victim advocate for assistance. Prepare them for the jury to hear negative facts about their loved one, such as criminal history, actions during the offense, social media posts, photos, or gang involvement. Explain how much (if any) they will be permitted in the courtroom. There may be portions of trial they cannot—or should not—watch. Be as firm as needed.

I tried a case in which a woman jumped onto a car that was then driven onto a highway, where she was flung into the roadway and killed. The crime scene photos were horrific. However, the family kept insisting they needed to see video and photos to truly understand what happened to their loved one. I was clear from our first conversation that they would never see the video or photos. No good would come from them seeing the victim that way. They begged, so I brought one of our office's victim advocates into the conversation to help me effectively communicate how being in the courtroom would only cause them further emotional trauma and would not bring them the closure they so desperately wanted. They finally understood and agreed to remain out of the courtroom during the most graphic parts of the trial.

Communication during trial

During trial, the victim advocate, investigator, and co-counsel are our best allies. Utilize them—there is a trial team for a reason!

When the family arrives, greet them and make them comfortable. Be compassionate and confident (but not cocky). They need to trust the prosecutors. With the victim advocate's help, remind them about unpredictable emotional reactions and how to handle them. Keep your own emotions in check—remember, the family is looking to you to set the tone. Breathe and appear calm, no matter how fast your pulse might be racing.

Sometimes, we don't get the desired outcome from the judge or jury. Lay the groundwork from the beginning that trials are unpredictable and outcomes are not guaranteed. In the event of a guilty verdict on a lesser included or even a not guilty verdict, rely upon that foundation to guide them through an upsetting result. Acknowledge their disappointment and do your best to diffuse the situation if it becomes emotional.

Other times, we might decide on a plea offer that upsets the family. When delivering the news, be kind, forthright, and firm. Acknowledge their feelings. Show sympathy and compassion. Re-

member that our job is to see justice done, not merely seek convictions. The family might never be OK with the outcome, but we make evaluations based on the law and evidence and must follow through and do the right thing for the case. It is understandable for families to get emotional, and it will be up to the prosecutors to remain calm and rational. Delivering bad news is one of the least fun parts of our job, but when the time comes, the groundwork we laid early in the case and the way we deliver the news can make all the difference. It is essential to set expectations from the beginning. Bring along a victim advocate when delivering potentially upsetting news. Victim advocates respond to victims' needs and concerns differently, thus providing a well-rounded approach to a difficult conversation.

Case outcome

Regarding my manslaughter case, I maintained regular communication with both sides of the family as it progressed. Although their opinions about desired case resolution started far apart, these conversations brought their desires more in line with each other, helped them have trust in the system, and enabled us to move toward a solid resolution: a plea agreement.

We arranged for various members of the family to give victim impact statements at the plea hearing. While we waited for court to start, my investigator took them to our secure witness waiting room to meet with victim services, which provided support on an emotional day and connected the family with parole board information to empower them moving forward. By utilizing a team approach, we helped this family feel seen and heard through a tragedy and close one chapter in their long grieving process.

Conclusion

As prosecutors, we must learn how to listen, understand, acknowledge, and care. Our work unfolds in ways that are neither predictable nor guaranteed, but preparing ourselves to communicate compassionately and professionally with witnesses, complainants, and next of kin provides us with the most promising pathway in our quest for justice. ❇

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